

RELIGIOUS EXEMPTIONS AS RATIONAL SOCIAL POLICY

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ABSTRACT

In its 1963 decision Sherbert v. Verner, the Supreme Court interpreted the Free Exercise Clause to permit religious exemptions from general laws that incidentally burdened religious practice. Sherbert, in theory, provided stringent protections for religious freedom. But those protections came at a price. Religious adherents could secure exemptions even if they had no evidence the laws they challenged unfairly targeted their religious conduct. And they could thereby undermine the policy objectives those laws sought to achieve. Because of such policy concerns, the Court progressively restricted the availability of religious exemptions. In its 1990 decision Employment Division v. Smith, the Court then abandoned the Sherbert regime altogether. Incidental burdens would no longer suffice for Free Exercise exemptions. Instead, Smith predicated future exemptions on litigants' showing that laws unfairly targeted religious practice or granted exemptions to secular entities that were arbitrarily withheld from religious comparators. Smith's revision, this Article contends, subtly but profoundly changed how public policy interacts with the Free Exercise Clause. Smith created a world in which religious exemptions often promote, rather than impede, rational policy. Smith's framework helps detect laws that are rooted in animus, rather than reason, or that impede their own efficacy with gratuitous secular exemptions. Applying that insight to recent religious liberty litigation contesting coronavirus lockdowns, this Article contends that many of those suits made state responses

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to COVID-19 more rational. Despite the scholarly criticism religious litigants endured, their suits exposed both irrational over-enforcement of lockdown measures against religious entities and irrational under-enforcement of those measures against their secular counterparts.

INTRODUCTION

COVID-19, the deadly respiratory illness now present worldwide, has brought the American debate over religious liberty to a fever pitch.¹ In response to the novel coronavirus's virulence and ease of transmission, all fifty states issued declarations of emergency for the first time in the nation's history.² To arrest the virus's spread, state and local governments imposed various social distancing guidelines and "stay-at-home" orders, permitting only certain businesses considered "essential" to continue operations.³ Some states permitted churches to operate subject to safety precautions, while others shuttered places of worship by deeming them "non-essential."⁴

A wave of religious liberty litigation ensued.⁵ Churches asserted several theories as to why these regulations were invalid.⁶ In jurisdictions with state religious freedom acts, litigants argued that

1. Compare Nelson Tebbe, Micah Schwartzman & Rich Schragger, *Churches Have Been Hypocritical During the Pandemic*, WASH. POST (May 13, 2020, 10:32 AM), <https://www.washingtonpost.com/outlook/2020/05/13/churches-have-been-astonishingly-hypocritical-during-pandemic> [<https://perma.cc/K24W-WVBS>] and Katherine Stewart, *The Religious Right's Hostility to Science Is Crippling Our Coronavirus Response*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/opinion/coronavirus-trump-evangelicals.html> [<https://perma.cc/TQ5D-VTVB>], with Kurt T. Lash, *A Time to Disobey*, LAW & LIBERTY (May 22, 2020), https://lawliberty.org/time-to-disobey-religious-liberty/?fbclid=IwAR0PwKrNIy3dIrVcffqEoebbHj9-NZmLEOeso-O5HtxgZtKmN_1Spw76VCU [<https://perma.cc/UA3Y-SBWP>] (urging civil disobedience of stay-at-home orders confining religious activities).

2. Justine Coleman, *All 50 States Under Disaster Declaration for First Time in US History*, THE HILL (Apr. 12, 2020, 4:31 PM), <https://thehill.com/policy/healthcare/global-health/492433-all-50-states-under-disaster-declaration-for-first> [<https://perma.cc/JY5F-DLS9>].

3. Hristina Byrnes, *Here Are Every State's Rules for Staying at Home and Social Distancing*, USA TODAY (May 4, 2020), <https://www.usatoday.com/story/money/2020/05/04/every-states-rules-for-staying-at-home-and-social-distancing/111645138> [<https://perma.cc/T7PM-H5LW>].

4. *Id.*; Elana Schor, *Are Church Services Considered 'Essential'? Depends Where You Live*, CHRISTIANITY TODAY (March 24, 2020, 4:11 PM), <https://www.christianitytoday.com/news/2020/march/state-exemptions-church-covid-19-essential-services.html> [<https://perma.cc/G73K-8N4R>].

5. See *infra* Part III.

6. The Free Exercise Clause obviously applies to all manner of religious faiths and

the orders imposed substantial burdens on their religious practice and lacked the narrow tailoring required to survive heightened scrutiny. Other litigants, relying on the federal Free Exercise Clause, contended that the orders were neither neutral nor generally applicable, but singled out religious adherents for disparate treatment. Dramatic scenes unfolded on all sides. Police broke up religious gatherings and informed participants that their “rights were suspended.”⁷ Pastors who resisted social distancing orders and decried the pandemic as “hysteria” later died from COVID-19.⁸ Suspected arsonists torched a Mississippi church that refused to comply with stay-at-home orders.⁹ All the while, the number of religious liberty suits against states mounted.

Though clipped from the headlines, such litigation intersects with long-running debates about the nature and scope of religious liberty and, in particular, of religious exemptions from general laws. Despite the often-strong protection American jurisprudence affords religious liberty,¹⁰ there is an abiding intuition that religious exemptions impede rational social policy.¹¹ Even among

institutions. This Article frequently uses the term “church” as shorthand for the religious entities it discusses because Evangelical churches brought the overwhelming majority of suits against COVID-19 lockdowns.

7. David Epps, *An Incident in Greenville, Mississippi*, THE CITIZEN (May 6, 2020), <https://thecitizen.com/2020/05/06/an-incident-in-greenville-mississippi> [https://perma.cc/3CP2-FLP5]; Plaintiff’s Original Complaint at 3, *King James Bible Church v. Simmons*, No. 4:20-cv-00065-MPM-JMV (N.D. Miss. Apr. 15, 2020).

8. Aleem Maqbool, *Coronavirus Pastor Who Decried ‘Hysteria’ Dies After Attending Mardi Gras*, BBC NEWS (Apr. 6, 2020), <https://www.bbc.com/news/world-us-canada-52157824> [https://perma.cc/2BGA-QXPJ]; see also Neil Vigdor, *Pastor Who Defied Social Distancing Dies After Contracting Covid-19, Church Says*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/14/us/bishop-gerald-glenn-coronavirus.html> [https://perma.cc/B4ED-LESJ].

9. Nicholas Bogel-Burroughs, *Church That Defied Coronavirus Restrictions Is Burned to Ground*, N.Y. TIMES (May 22, 2020; 1:31 PM), https://www.nytimes.com/2020/05/22/us/mississippi-church-arson-coronavirus.html?smid=fb-nytimes&smtyp=csecur&fbclid=IwAR3AXIKecM3LtbOHajBwdd0yQ3RTu2xhNAFbHHKOYH0h58NOplx3_7e1w [https://perma.cc/4C74-Z8YY].

10. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1738 (2018) (“The Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.”) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 189 (2012) (“[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.”).

11. Justice Scalia’s jurisprudence provides a noteworthy example. Scalia was often thought of as an ally of broad religious liberties. See, e.g., David F. Forte, *Religious Liberty after Scalia*, THE FEDERALIST SOCIETY (May 6, 2016), <https://fedsoc.org/commentary/fedsoc-blog/religious-liberty-after-scalia> [https://perma.cc/93HQ-MUZX] (“Without Justice Scalia, religious liberty is in peril.”). Yet he was also the author of *Employment Division v. Smith*, which restricted religious exemptions to combat the “anarchy” they allegedly fostered by undermining important “social welfare legislation.” *Emp’t Div., Dep’t of Human Res. of Or.*

those who support a broad view of religious liberty, many see exemptions as undermining socially important, generally applicable laws.¹² On their view, religious exemptions tend to decrease the net rationality of regulatory schemes.¹³ Exemptions might still be justified, but only by countervailing considerations like freedom of conscience.¹⁴ Skeptics of capacious religious liberty, in turn, entertain the same intuition about exemptions' entropic effect on rational policy.¹⁵ They would simply tolerate less disruption of important policy goals before finding exemptions impermissible.¹⁶

Some religious liberty scholars reacting to lockdown challenges strongly endorsed the latter view—that churches' requests for exemptions were ill-reasoned threats to rational policy.¹⁷ Churches, they thought, were “hypocritical” for demanding “special exemptions” from “neutral stay-at-home orders” while taking federal support from the Paycheck Protection Program.¹⁸ Churches' arguments were “unpersuasive” on the law.¹⁹ When alerted to unequal treatment of religious entities, states were said to “act properly by removing the disparity.”²⁰ Those were perhaps indulgent concessions, in these scholars' view, to churches' “pleas for special consideration.”²¹ During a “time of national crisis” in which churches had served as “vectors of infection,” such litigation was, at root, a “political mobilization[]” driven by “conservative legal politics.”²² Religious adherents' “denial of science and critical thinking,” another commentator opined, “haunts the American response to the coronavirus crisis.”²³ On this received wisdom, churches' pursuit of legal exemptions represented the apex of the traditional tension between religious liberty and rational policy.

v. Smith, 494 U.S. 872, 888–89 (1990).

12. *Smith*, 494 U.S. at 888–89.

13. *Id.*

14. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531 (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”) (internal citation omitted).

15. See, e.g., BRIAN LEITER, WHY TOLERATE RELIGION? 60, 63–64, 76–77, 84–85, 90, 100–08 (2013) (sharply criticizing religion as “irrational” and unjustified but concluding minimal religious exemptions sometimes may be necessary to combat outright discrimination).

16. *Id.*

17. Tebbe et al., *supra* note 1.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Stewart, *supra* note 1.

Some churches undoubtedly displayed an irresponsible aversion to hygiene guidelines and stay-at-home orders, thus endangering nearby communities.²⁴ That point is true, and this Article does not defend them. Yet much the same could be said about the willfully ignorant spring breakers, bar-goers, and protestors crowding into streets and shops despite extensive warnings.²⁵ Where churches—like those groups—have refused to abide by safety guidelines, their suits have justifiably failed.²⁶

Rather than belabor that point, this Article documents the surprising but increasingly well-evidenced reality that religious litigation *enhanced* the rationality of some state and local responses to COVID-19. In the haste to fashion regulations in response to the pandemic, some states classified “essential” operations in a dramatically over- and under-inclusive manner. In North Carolina, for example, a church hosting a “religious worship service” could have “no more than 10 people” in attendance.²⁷ Yet up to *fifty* people could congregate in the same church to attend a funeral.²⁸ In Kansas, even churches that pledged to “follow rigorous social-distancing and safety protocols” were prohibited from holding in-person services.²⁹ Bars and restaurants, oddly, were exempted from those restrictions.³⁰ In Mississippi, as retail stores bustled,³¹ “nearly the entire” police force of a small city broke up a drive-in church service in which congregants remained in their cars, windows up, listening

24. See, e.g., *Louisiana Pastor Again Holds Church Services, Defying House Arrest Orders*, CBS NEWS (Apr. 27, 2020; 3:40 PM), <https://www.cbsnews.com/news/tony-spell-louisiana-pastor-house-arrest-church-services-coronavirus-lockdown> [https://perma.cc/7JYL-LXWG].

25. See, e.g., Christopher Brito, *Spring Breakers Say Coronavirus Pandemic Won't Stop Them from Partying*, CBS NEWS (Mar. 25, 2020), <https://www.cbsnews.com/news/spring-break-party-coronavirus-pandemic-miami-beaches/> [https://perma.cc/J3X-UGXS]; Katy Reckdahl, Campbell Robertson & Richard Fausset, *New Orleans Faces a Virus Nightmare, and Mardi Gras May Be Why*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/03/26/us/coronavirus-louisiana-new-orleans.html> [https://perma.cc/8G24-C4MT].

26. See, e.g., *Spell v. Edwards*, NO: 20-00282-BAJ-EWD, 2020 U.S. Dist. LEXIS 85909, at *6 (M.D. La. May 15, 2020) (denying injunction to church that eschewed safety protocols); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, No. 3:20CV119 M-p, 2020 U.S. Dist. LEXIS 72533, at *11 (N.D. Miss. Apr. 24, 2020) (same).

27. *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 U.S. Dist. LEXIS 86310, at *1 (E.D.N.C. May 16, 2020).

28. *Id.* at 11.

29. *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 U.S. Dist. LEXIS 68267, at *6 (D. Kan. Apr. 18, 2020).

30. *Id.* at 5–6.

31. Plaintiff's Original Complaint at 3, *King James Bible Baptist Church v. Simmons*, No. 4:20cv65-MPM-JMV (N.D. Miss. Apr. 15, 2020).

to a sermon on the radio.³² These disparities impeded the response to COVID-19 and triggered wasteful over-deterrence against churches that sought to gather in strict conformity with approved measures.

In light of meritorious suits alleging these regimes were no longer generally applicable—but, instead, unfairly burdened religious practice—states had two options to restore equal treatment in compliance with the Free Exercise Clause.³³ First, some “leveled down” by closing loopholes for secular operations like bars that posed an equal if not greater risk of spreading the virus.³⁴ Second, some “leveled up” by permitting churches to resume operations—like their secular counterparts—so long as they adhered to safety guidelines.³⁵ Either result was more rational than the status quo. Some suits dissolved arbitrary restraints on church operations and ceased the need for states’ over-deterrence. Others enhanced the efficacy of states’ responses by closing inexplicable loopholes for comparable secular gatherings. Contrary to the pervasive intuition that religious exemptions impede rational policy, such litigation actually, if counter-intuitively, promoted it.

In presenting the case for the rationality of church litigation during COVID-19, this Article proceeds in three Parts. Part I outlines relevant religious liberty doctrine. In particular, it describes how *Employment Division v. Smith*’s³⁶ requirement that laws burdening religion must do so in a neutral and generally applicable manner—lest they be subject to heightened scrutiny³⁷—created the doctrinal hook for the current litigation. Part I also catalogues how the assumption that religious exemptions impede rational policy has shaped the formation of modern doctrine, and how that assumption continues to hold sway in the minds of many scholars.

Part II provides a brief overview of COVID-19 and the government measures taken in response. Because of the health emergency, some suggested that courts should suspend their ordinary

32. *Id.*; see also Epps, *supra* note 7.

33. See *Comptroller of Treasury of Maryland v. Wynn*, 135 S. Ct. 1787, 1806 (2015) (“Whenever government impermissibly treats like cases differently, it can cure the violation by either ‘leveling up’ or ‘leveling down.’”); see also Michael C. Dorf, *Discrimination and the “Leveling Down” Puzzle*, VERDICT (Feb. 3, 2020), <https://verdict.justia.com/2020/02/03/discrimination-and-the-leveling-down-puzzle> [<https://perma.cc/L99E-J9SX>].

34. See *infra* Part III.

35. *Id.*

36. 494 U.S. 872 (1990).

37. *Id.* at 884–85; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

scrutiny of state burdens on religious free exercise. Part II illustrates that such a “pandemic exception” is both legally unfounded and normatively undesirable. Crises heighten, rather than diminish, the need for an impartial judiciary to assess state burdens upon constitutional rights. Particularly considering the discrimination detailed below, it is incumbent upon the judiciary to police arbitrary and unfair treatment of religious adherents.

Part III, in turn, presents four case studies—from North Carolina, Kentucky, Kansas, and Mississippi—that highlight the irrationality of some states’ initial stay-at-home orders. Each state’s response contained over- or under-inclusive provisions that not only burdened religious practice, but impeded efforts to contain the virus. Church litigation helped to rectify those loopholes. States were forced to cease wasteful over-deterrence against religion or to remove arbitrary exemptions for secular business. Far from “hypocritical . . . pleas for special consideration,”³⁸ these churches’ requests for equal treatment promoted a more rational approach to COVID-19.

I. THE PUTATIVE TENSION OF RELIGIOUS LIBERTY AND RATIONAL SOCIAL POLICY

Grasping the putative tension between rational policy and religious free exercise requires an understanding of the Supreme Court’s troubled interpretation of the latter guarantee. Litigation over the Free Exercise Clause did not begin in earnest until relatively late in the Republic’s history—1940—when the Court “incorporated” the Clause against the states.³⁹ Even then, the scope of that guarantee proved mercurial. In its *Gobitis* decision, the Court held that free exercise was not offended even when the government directly compelled speech—in that case, the Pledge of Allegiance—antithetical to sincere religious belief.⁴⁰ Frankly motivated by concerns for “national security” as fascism spread in Europe,⁴¹ the

38. Tebbe et al., *supra* note 1.

39. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV 1, 53 (2004) (“[I]n *Cantwell*’s wake, First Amendment free exercise claims against state governments began to flood the federal courts.”).

40. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940).

41. *Id.* at 595.

Court opined that religious freedom should not frustrate patriotism and “national cohesion.”⁴² Regretful over the religious persecution *Gobitis* appeared to license,⁴³ however, the Court overturned its holding on free speech grounds three years later.⁴⁴

In the context of indirect burdens on religion, the Court’s early doctrinal forays exhibited instability as well. In *Braunfeld v. Brown*,⁴⁵ the Court rejected a Jewish shopkeeper’s request for a religious exemption from Pennsylvania’s Sunday closing laws.⁴⁶ He contended that the laws unfairly, if incidentally, burdened his religious practice.⁴⁷ Barred from work by his faith on Saturdays and by law on Sundays, he was effectively compelled to forgo an extra day’s wages.⁴⁸ But the Court concluded that “to strike down . . . legislation which imposes only an indirect burden on the exercise of religion” would illegitimately “restrict the operating latitude of the legislature.”⁴⁹ Justice Brennan, in dissent, considered the law an impermissible tax on the Jewish faith and contrary to “the preservation of personal liberty.”⁵⁰

Two years later, Justice Brennan vindicated those instincts by reversing *Braunfeld* with his landmark opinion in *Sherbert v. Verner*.⁵¹ Adele Sherbert, a Seventh-Day Adventist and South Carolina mill worker, was fired after refusing to work on Saturdays.⁵² When she applied for unemployment benefits, the state concluded that her religious excuse was not “good cause” to miss work, rendering her ineligible for compensation.⁵³ Overturning *Braunfeld*, however, Justice Brennan’s majority opinion subjected the state’s denial of benefits to strict scrutiny, despite the burden on her religious practice being merely incidental.⁵⁴ In so doing, the majority set out a two-step framework that appeared favorable to religious

42. *Id.* at 598, 596.

43. SHAWN FRANCIS PETERS, JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 8, 251 (2000).

44. *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

45. 366 U.S. 599 (1961).

46. *Id.* at 609.

47. *Id.* at 601–02.

48. *Id.*

49. *Id.* at 606.

50. *Id.* at 610 (Brennan, J., dissenting).

51. 374 U.S. 398, 403, 407 (1963).

52. *Id.* at 400–01.

53. *Id.*

54. *Id.* at 403.

claimants. If plaintiffs could show at Step 1 that they were (a) asserting a religious belief, (b) that the belief was sincere, and (c) that the government had imposed a “substantial burden” on their religious exercise, they could force the state to justify that burden under strict scrutiny.⁵⁵ At Step 2, the state would have to show that both a “compelling interest” justified the burden and that the means chosen to achieve that interest were the least restrictive on religious practice.⁵⁶

Though some have expressed nostalgia for *Sherbert* and the exemption era it opened,⁵⁷ its framework engendered criticism from its very inception.⁵⁸ In his *Sherbert* dissent, Justice Harlan, joined by Justice White, labeled the decision “disturbing” both for its casual bulldozing of *Braunfeld* and its “future . . . implications” for state regulators.⁵⁹ South Carolina, in their view, had been consistent about the purpose of its unemployment system: “to tide people over” in economic recessions “when work was unavailable.”⁶⁰ The state had never intended to support those who refused to work “for purely personal reasons.”⁶¹ Though South Carolina denied benefits to able-bodied but secular objectors, the Court effectively instructed the state to subsidize their religious counterparts.⁶² Such “direct financial assistance to religion” sat uneasily with the dissenting Justices.⁶³

Perhaps to Justice Harlan’s pleasant surprise, courts applying the *Sherbert* framework from its announcement in 1963 to its overruling in 1990 did not freely dispense religious exemptions.⁶⁴ *Sherbert*’s majority may have also failed to anticipate that result.

55. William D. Lay, *Free Exercise and the Resurgence of the Religious Freedom Restoration Act*, SAGE OPEN 1, 4 (2016), <https://journals.sagepub.com/doi/full/10.1177/2158244015625446> [<https://perma.cc/EU5M-A3W2>].

56. *Sherbert*, 374 U.S. at 403, 407.

57. See, e.g., Lash, *supra* note 1 (criticizing *Smith* and calling for a return to conception of the Free Exercise Clause as a substantive liberty interest); Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39, 50 (2020) (same); James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409–10 (1992) (cataloging various scholars’ and pundits’ negative reactions in the wake of *Smith*).

58. *Sherbert*, 374 U.S. at 418 (Harlan, J., dissenting).

59. *Id.* at 419, 421, 418 (Harlan, J., dissenting).

60. *Id.* at 419.

61. *Id.*

62. *Id.* at 422.

63. *Id.* at 423.

64. Ryan, *supra* note 57, at 1412 (noting that even in the *Sherbert* era, “the free exercise claimant, both in the Supreme Court and the courts of appeals, rarely succeeded under the compelling interest test, despite some powerful claims.”).

Step 1's threshold inquiries represented a notoriously low barrier for plaintiffs seeking strict scrutiny. By 1970, the Supreme Court had defined "religious" beliefs so broadly that almost any sincerely held creed—even those based on secular philosophy—appeared to suffice.⁶⁵ And in terms of claimants' sincerity in those beliefs, doctrine was similarly lax. Since its 1944 decision in *United States v. Ballard*,⁶⁶ the Court had barred inquiry into whether claimants' beliefs were rational or true.⁶⁷ Instead, courts could ask only whether litigants *believed* those claims, even if reasonable observers would find them fanciful.⁶⁸ *Ballard* itself illustrates the looseness of that inquiry. The case concerned the prosecution of followers of Guy Ballard, an occultist who claimed to be Jesus, George Washington, and a "divine messenger."⁶⁹ Charged with mail fraud after distributing Ballard's literature, his followers argued (perhaps improbably) that their sincere belief in Ballard's divinity negated their mens rea.⁷⁰ In dissent, Justice Jackson argued that the majority's rule erroneously excluded the best evidence of sincere belief—whether the proposition was itself believable.⁷¹ Yet Justice Douglas persuaded his colleagues that sincerity could and should remain separate from questions of truth-in-fact.⁷²

Given the permissive standards under *Sherbert's* "sincere" and "religious belief" prongs, courts often required a strong showing of "burden"—and only a weak showing of "compelling" interests—to deny religious exemptions.⁷³ Against an Amish employer's claim

65. See, e.g., *Welsh v. United States*, 398 U.S. 333, 368 (1970) (White, J., dissenting) (criticizing the majority's grant of a "religious" exemption to a conscientious objector whose views represented "a purely personal code arising not from religious training and belief . . . but from readings in philosophy, history, and sociology."). *Welsh*, though a statutory interpretation case, remains an important precedent for Free Exercise jurisprudence. It represents one of the Court's few attempts to define "religious" belief. Some have argued that the Court walked back its indulgent conception of "religion" in *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), decided two years later. Courtney Miller, Note, "*Spiritual But Not Religious*": Rethinking the Legal Definition of Religion, 102 VA. L. REV. 833, 847 (2016). The Court there indicated that it chose to grant the Amish respondents a religious exemption because their views were "religious" and not "based on purely secular considerations." *Id.* Though *Yoder* is the "Court's last word on defining religion," it failed to clarify religion's legal definition. *Id.* Scholars are unsure how *Yoder* interacts with *Welsh*, and *Yoder* simply tells us there is some line between religious and secular views, but not how to find it. *Id.*

66. 322 U.S. 78 (1944).

67. *Id.* at 86–88.

68. *Id.*

69. *Id.* at 79.

70. *Id.* at 79, 81.

71. *Id.* at 92 (Jackson, J., dissenting).

72. *Id.* at 86–88.

73. Ryan, *supra* note 57, at 1414–20 ("In rejecting the majority of the free exercise claims it heard, the Court found either that the government had a compelling interest or

that participation in the social security system would violate his convictions, the Court found a compelling interest in nationally uniform payments.⁷⁴ Against a Native American couples' claim that assignment of a social security number to their daughter would "rob her . . . spirit," the Court disclaimed that assignment of the number burdened their religious practice.⁷⁵ And against indigenous tribes' claim that construction of a logging road near their sacred site would amount to a desecration, the Court held the road insufficiently "coercive" upon their beliefs to warrant strict scrutiny.⁷⁶

Omnipresent in these cases was the intuition that religious exemptions would impede rational social policy. As those opinions reveal, certain Justices feared that exemptions threatened economic development,⁷⁷ the uniformity of government operations,⁷⁸ the distortion of unemployment compensation regimes,⁷⁹ the frustration of state police powers,⁸⁰ and even patriotism and "national security."⁸¹ In some cases, those concerns proved dispositive. In others, exemptions won the day. But lurking behind each was concern for exemptions' entropic effect on the relevant state policies.

Nowhere, however, were these concerns more sharply juxtaposed than in the case in which the Court discarded *Sherbert* altogether: *Employment Division v. Smith*. In an opinion by Justice Scalia, the Court held that neutral and generally applicable laws incidentally burdening religious practice receive only rational basis review.⁸² Decided in 1990 and still good law today, *Smith* has proven an enduring source of intrigue. Despite *Sherbert's* failure to generate broad exemptions, early critics described *Smith* in apocalyptic terms: one labeled it the "virtual remov[al of] religious

that the free exercise right had not been burdened.").

74. *United States v. Lee*, 455 U.S. 252, 259–61 (1982).

75. *Bowen v. Roy*, 476 U.S. 693, 697 n.3, 703, 707 (1986).

76. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

77. *Id.* at 441–42.

78. *Bowen*, 476 U.S. at 703; *Lee*, 455 U.S. at 261.

79. *Sherbert v. Verner*, 374 U.S. 398, 418 (Harlan, J., dissenting).

80. *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961).

81. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595 (1940).

82. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884–85 (1990); see also Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1184 (2015) (noting that post-*Smith* incidental burden claims were subject merely to rational basis review).

freedom from the Bill of Rights,” while another castigated the decision as the Court’s worst since *Dred Scott*.⁸³ Justice Scalia’s authorship of the majority opinion has also surprised and confused many. Throughout his tenure on the Court, Scalia distinguished himself as a stalwart advocate for religious liberty.⁸⁴ As a result, his landmark rejection of *Sherbert* has struck some as a “disastrous” aberration.⁸⁵

Yet strong as his commitment might have been to religious liberty, Justice Scalia’s commitment to what he perceived as the rule of law was apparently stronger. *Smith* itself concerned the firing and subsequent denial of unemployment benefits to employees of a rehab clinic after they ingested peyote in a religious ceremony.⁸⁶ They claimed the penalty imposed an impermissible burden on their religious free exercise.⁸⁷ But that penalty was also “merely the incidental effect of a generally applicable and otherwise valid [law]”—Oregon’s controlled substances act.⁸⁸ The employees marshaled no evidence that the law targeted their religious practice, either on its face or through the state’s application of its text to their conduct.⁸⁹ In a clear doctrinal shift, the Court declared that the Free Exercise Clause provided them no refuge.⁹⁰ In Justice Scalia’s view, the Court had “never held that an individual’s religious beliefs excuse him from compliance” with “valid and neutral law[s] of general applicability.”⁹¹ Unlike Adele Sherbert’s abstention from Saturday toil, the respondents’ ingestion of peyote was illegal—the violation of “an across-the-board criminal prohibition on a particular form of conduct.”⁹² Their alleged “private right to

83. 60 U.S. 383 (1857); Ryan, *supra* note 57, at 1410.

84. See, e.g., *Locke v. Davey*, 540 U.S. 712, 726–34 (2004) (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting); *Edwards v. Aguillard*, 482 U.S. 578, 610–40 (Scalia, J., dissenting).

85. Charles C. Haynes, *Justice Scalia’s Disastrous Decision on Religious Freedom*, RELIGIOUS FREEDOM CENTER (Feb. 18, 2016), <https://www.religiousfreedomcenter.org/justice-scalias-disastrous-decision-on-religious-freedom> [<https://perma.cc/K9TR-SJAU>].

86. *Smith*, 494 U.S. at 874.

87. *Id.* at 875.

88. *Id.* at 878, 874.

89. *Id.* at 878.

90. *Id.* at 890; *id.* at 908 (Blackmun, J., dissenting) (describing the majority opinion as “a wholesale overturning of settled law concerning the Religion Clauses of our Constitution.”).

91. *Id.* at 878–79.

92. *Id.* at 884.

ignore [such] generally applicable” statutes would, of necessity, erode Oregon’s scheme to deter the use of illegal drugs.⁹³

For the majority’s five Justices, however, *Smith*’s stakes were higher than mere enforcement of Oregon’s drug law. In their view, *Sherbert* itself merely “seem[ed] benign.”⁹⁴ But if the Court were to embrace its holding, rather than tacitly relax its test in practical applications, *Sherbert* “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”⁹⁵ The faithful could plausibly object to everything from compulsory vaccination to the minimum wage; from taxes to health regulations; from environmental protections to laws forbidding racial discrimination.⁹⁶ Capacious exemptions to these hard-won policies would permit every citizen “to become a law unto himself”—a situation “courting anarchy.”⁹⁷

In response to those fears of disorder, long reflected by some Justices even during *Sherbert*’s nominal reign,⁹⁸ *Smith* “effectively overruled” *Sherbert*’s central holding.⁹⁹ Incidental religious burdens stemming from neutral and generally applicable laws were no longer said to merit heightened scrutiny.¹⁰⁰ Breaking from *Sherbert*’s conception of religious free exercise as a substantive liberty interest, *Smith* re-envisioned it as a right against discrimination.¹⁰¹ So long as religious institutions were treated no worse than their comparators, their complaints to the judiciary were directed to the wrong branch. Unless legislatures could be motivated through “the political process” to grant exemptions by statute, judges were no longer to impose them for merely incidental burdens.¹⁰²

As aforementioned, the reaction to *Smith* was swift and fierce. Commentators criticized the Court’s opinion in the press, while a bipartisan coalition sought to overturn its holding through federal

93. *Id.* at 886.

94. *Id.* at 885. (emphasis added).

95. *Id.* at 888–89.

96. *Id.* at 889.

97. *Id.* at 885, 888.

98. See *supra* notes 59–63, 73–81 and accompanying text.

99. DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE 394 n.107 (vol. 2, 2011).

100. Rummage, *supra* note 82, at 1410.

101. Nicholas J. Nelson, Note, *A Textual Approach to Harmonizing Sherbert and Smith on Free Exercise Accommodations*, 83 NOTRE DAME L. REV. 801, 802 (2008).

102. *Smith*, 494 U.S. at 890.

legislation.¹⁰³ Yet against this backdrop of “condemnation and despair,”¹⁰⁴ cooler heads pointed out that the decision might come as a sheep in wolf’s clothing. Most obviously, *Sherbert*-era courts had often declined to grant exemptions anyway, manipulating an already pliable doctrine to preserve government functions.¹⁰⁵ *Smith*’s formal renunciation of the old regime seemed to entail no seismic practical consequence.

More subtly, some scholars noted that important “caveats” accompanied *Smith*’s declaration of a new regime.¹⁰⁶ First was *Smith*’s emphasis that relaxed standards of review apply only when the relevant laws are genuinely neutral toward religion.¹⁰⁷ The Court soon confirmed in *Church of the Lukumi Babalu Aye* that a law’s *non*-neutrality provides a powerful reason for heightened scrutiny.¹⁰⁸ That is, legislators may not intentionally target a disfavored sect for unequal treatment.¹⁰⁹ The Court further indicated that to detect such bias, it would plumb virtually all relevant evidence: a statute’s text, practical effects, legislative history, and even suspicious circumstances surrounding its passage.¹¹⁰ The Free Exercise Clause, in the *Lukumi* Court’s view, bars even “*subtle* departures from neutrality.”¹¹¹

Second and concomitantly was *Smith*’s holding that if laws are to receive rational basis review, they must also be “generally applicable.”¹¹² In essence, without strong justification, the state may not deny exemptions from general laws to religious practitioners as it simultaneously grants them to secular (or religious) comparators.¹¹³ Generally phrased laws—for instance, “no animal sacrifice”—lose their pretense of general applicability if they exempt all forms of sacrifice other than those practiced by a disfavored sect.¹¹⁴

103. Ryan, *supra* note 57, at 1409–11.

104. *Id.* at 1409.

105. *Id.* at 1412, 1414–20.

106. *Id.* at 1412.

107. *Smith*, 494 U.S. at 879–81.

108. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

109. *Id.* at 542.

110. *Id.* at 526, 533–36. For instance, shortly after practitioners of the Santeria religion arrived in Hialeah, its city council held an “emergency public session” to pass various resolutions expressing concern over animal sacrifice. *Id.* at 526.

111. *Id.* at 534 (emphasis added).

112. *Smith*, 494 U.S. at 878, 880–882, 884–86.

113. *Church of the Lukumi Babalu Aye*, 508 U.S. at 535–36.

114. *Id.*

Such a “gerrymander” can reveal a legislature’s underlying hostility to religion.¹¹⁵ But even laws untainted by animus that disproportionately burden religion with inexplicable secular exemptions may forfeit claims to general applicability.¹¹⁶ In those instances, the state must justify the disparity under heightened review.¹¹⁷ As Justice Scalia clarified in his *Lukumi* concurrence, incompetent legislators intending to benefit religion, who, through sloppy drafting, unfairly burden it, violate the Free Exercise Clause all the same.¹¹⁸

Properly understood, then, *Smith* did not vanquish *Sherbert’s* heavenly city so much as it rebuilt it with different materials—in some cases, perhaps, to be even stronger than the original edifice. *Sherbert’s* “vague” test¹¹⁹ had cultivated “unfettered judicial discretion”¹²⁰ and mere “half-hearted enforcement” of its nominal guarantees.¹²¹ It initially permitted a huge proportion of claimants to attain strict scrutiny.¹²² Without a gatekeeping device, judges resorted to watering down the compelling interest test, lest government operations be shot through with exemptions.¹²³ The result was pervasive doctrinal distortion and a plethora of failed claims.¹²⁴ *Smith*, by contrast, cabined such discretion by clarifying

115. *Id.* at 535, 531. Indeed, “neutrality and general applicability are interrelated.” *Id.* at 531. That a law is not generally applicable on its face or in its effect is probative that religion was targeted. *Id.*

116. *Id.* at 542 (“The Free Exercise Clause protects religious observers against unequal treatment[.]”); see also *id.* at 558–59 (Scalia, J., concurring in part) (“Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens.”).

117. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32.

118. *Id.* at 558–59 (Scalia, J., concurring in part).

119. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1494 (1999).

120. Nelson, *supra* note 101, at 808.

121. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 173 (1992).

122. As discussed *supra* at page 10, of *Sherbert’s* three threshold inquiries, only the “burden” prong had analytical bite. Much of that force came quite late in the *Sherbert* experiment, with the Court’s 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Association*. 485 U.S. 439 (1988). That case is widely understood to have heightened the threshold showing required for application of strict scrutiny, essentially requiring litigants to demonstrate direct governmental coercion on religious beliefs. The novel requirement was one “that few free exercise claimants could overcome” and one that created “a Catch-22”: if government spent the time and resources required to directly coerce believers, for instance, through criminal prosecutions, then it almost always had a compelling interest in doing so. Ryan, *supra* note 57, at 1416.

123. Ryan, *supra* note 57, at 1415.

124. *Id.* at 1414–17.

the scope of meritorious challenges. It called not for an impressionistic assessment of “burden” or the centrality of some belief to a religious system, but for the correction of governments’ discriminatory treatment—whether intentional or *de facto*—of religious adherents.

In that sense, *Smith* struck a bargain. As it narrowed the universe of claims, it strengthened what remained. Its general applicability prong made identification of secular comparators enjoying disparate exemptions a prerequisite for heightened review. Strict scrutiny gained a legitimate gatekeeper grounded in a more objective assessment of the surrounding landscape. And aside from this gatekeeping function, the grant of an arbitrary exemption to a secular comparator is often powerful evidence the state should lose on the merits. If a state’s purported interest really is “compelling,” or its chosen means narrowly tailored to achieving those ends, it ought not to grant a secular comparator an exemption it withholds from a religious claimant.¹²⁵ Such secular exemptions may reveal the state does not have as compelling an interest in achieving its policy as it might allege, or that it could achieve those ends all the same if it granted an analogous religious exemption.¹²⁶

On the question of remedy, too, *Smith* likely strengthened qualifying suits. *Sherbert*-era claimants often failed to present comparable, extant exemptions as evidence of further exemptions’ feasibility.¹²⁷ Courts, pushed to “the edge of or even beyond their institutional competence,” were then left to weigh difficult questions of policy against the backdrop of unknown facts.¹²⁸ For in-

125. Such “underinclusion” is relevant to both prongs of the strict scrutiny test. Underinclusivity can indicate that a law is not tailored to achieve its “proffered objectives,” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), or that the state’s purported interest in its policy is not all that compelling. *Id.* at 547.

126. *Id.*; see also *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) (holding that a religious exemption for beards could not seriously undermine a police department’s desire to cultivate “uniformity” and “esprit de corps” when it already permitted beards for medical reasons).

127. Often because they simply lacked comparators. This is why *Sherbert*’s conception of religious freedom as a substantive liberty interest rather than an antidiscrimination right remains attractive to some. Judges applying *Sherbert* could weigh the equities and grant religious claimants ad hoc exemptions, even if no analogous secular exemption existed. By contrast, *Smith* often makes religious liberty claims hinge on the (sometimes arbitrary) existence of comparators. Compare CÉCILE LABORDE, *LIBERALISM’S RELIGION* 55–57 (2017) (criticizing *Smith* on these grounds), with CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 102–08 (2010) (defending *Smith*’s equality approach).

128. Nelson, *supra* note 101, at 808 n.27.

stance, would permitting Muslim police officers to wear beards impermissibly undermine their department's desire to cultivate "uniformity" and "esprit de corps"?¹²⁹ *Sherbert* might have invited all manner of judicial theorizing on that question. But *Smith* mitigates uncertainty by making identification of a comparator the logical antecedent of a general applicability challenge. In that very case, the department had earlier exempted from the regulation officers with a medical condition preventing a close shave.¹³⁰ That precedent revealed that the handful of their Muslim comrades requesting an analogous exemption was unlikely to frustrate the department's goals.¹³¹ So as such claimants rebut general applicability by identifying comparators, they simultaneously present courts with models for further exemption.

Unsurprisingly, given the restrictions imposed upon religious practice in the wake of COVID-19, these same debates—about exemptions and comparators; state interests and rational policy—have recently unfolded in federal courts nationwide. Yet unlike many of their forebears, modern claimants have not enjoyed the luxury of litigating in a time of domestic tranquility. Instead, the pandemic's mounting death fostered intense scrutiny of religious gatherings.¹³² The crisis has led some to wonder whether courts should even apply their ordinary scrutiny to government burdens upon constitutional rights.¹³³ Part II repudiates that suggestion. It highlights not only the defects in a purported 'pandemic exception,' but also the need for even greater vigilance against such violations in "times of commotion."¹³⁴ Precisely because "dangerous times [create] dangerous precedents," it remains incumbent upon "the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude."¹³⁵

129. *Fraternal Order of Police*, 170 F.3d at 366.

130. *Id.* at 360.

131. *Id.* at 366.

132. *See, e.g.*, *Tebbe et al.*, *supra* note 1.

133. *See, e.g.*, *Jackson*, *supra* note 57, at 39 (noting that "erroneous readings of early Supreme Court cases have led at least one circuit court" to significantly relax the scrutiny applied to constitutional infringements under an emergency powers theory).

134. *United States v. Bollman*, 24 F.Cas. 1189, 1192 (C.C.D.C. 1807) (Cranch, J.).

135. *Id.*

II. LOCKING DOWN FREE EXERCISE? RELIGIOUS LIBERTY DURING COVID-19

Detected in humans for the first time in December 2019,¹³⁶ the novel coronavirus and the illness it causes have changed the world as we know it.¹³⁷ COVID-19 has killed hundreds of thousands of people in the United States alone.¹³⁸ Troublingly, there remains “no known cure.”¹³⁹ As a result, and in a development without historical precedent, all fifty states at some point in 2020 issued declarations of emergency.¹⁴⁰

As part of that response, many states initially imposed stringent measures to contain the virus’s spread. These included limitations on the size of public gatherings, the shutdown of “nonessential” businesses, social distancing requirements, and stay-at-home orders.¹⁴¹ Such regulations no doubt were motivated by the benign intention to “slow the rate of new infections.”¹⁴² Yet they also posed vast implications for the continued exercise of civil liberties; not least among them religious free exercise. As one commentator put it, states “imposed aggressive measures almost never utilized outside wartime.”¹⁴³

No one doubts that state governments retain a police power to combat contagious disease.¹⁴⁴ Chief Justice Marshall himself ex-

136. Ruthann Robson, *Pandemics and the Constitution: Positive Constitutionalism in a Pandemic: Demanding Responsibility from the Trump Administration*, 12 CONLAWNOW 15, 19 (2020).

137. Grant C. Killoran & Christa D. Wittenberg, *Due Process in the Time of Coronavirus*, 93 WIS. LAW. 18, 19 (2020).

138. Amy Harmon, *The Number of People with the Virus Who Died in the U.S. Passes 300,000*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/us/covid-us-deaths.html> [<https://perma.cc/8JDQ-HB9R>].

139. *Id.* However, various vaccines have recently become available.

140. Coleman, *supra* note 2.

141. *State Data and Policy Actions to Address Coronavirus*, KFF, (May 22, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/> [<https://perma.cc/XX39-UA73>].

142. Kyle J. Connors, *Federalism and Contagion: Reevaluating the Role of the CDC*, 12 CONLAWNOW 75, 79 (2020).

143. Ahilan Arulanantham, *How Much Liberty Must We Give Up? A Constitutional Analysis of the Coronavirus Lockdown Proposals*, IACL-AIDC Blog (Apr. 9, 2020), <https://blog-iacl-aide.org/2020-posts/2020/4/9/how-much-liberty-must-we-give-up-a-constitutional-analysis-of-the-coronavirus-lockdown-proposals> [<https://perma.cc/F2XL-WVPT>].

144. Connors, *supra* note 142, at 85; Henry F. Fradella, *Why the Special Needs Doctrine Is the Most Appropriate Fourth Amendment Theory for Justifying Police Stops to Enforce COVID-19 Stay-at-Home Orders*, 12 CONLAWNOW 1, 3–4 (2020).

publicly recognized states' authority to craft public health ordinances and "quarantine laws."¹⁴⁵ Yet given public health officials' haste to contain the sudden and widespread outbreak of COVID-19, courts have been left to answer the extent to which these measures validly may burden constitutional rights.¹⁴⁶ In particular, to what extent may governments simply suspend constitutional protections for civil liberties like free exercise in times of pandemic?¹⁴⁷

In response to that question, the Fifth Circuit's recent decision *In re Abbott*¹⁴⁸ flirted with a virtual 'pandemic exception' to the U.S. Constitution. *Abbott* grew out of restrictions the Texas government placed on abortion providers in response to COVID-19.¹⁴⁹ Reading those restrictions as an "outright ban" on pre-viability abortions—an alleged violation of *Roe* and its progeny—the district court enjoined those measures' enforcement.¹⁵⁰ But the Fifth Circuit, sharply criticizing the lower court's order, granted a writ of mandamus to rectify its perceived error. That extraordinary writ, in the majority's view, was justified by the district court's "extraordinary failure" to analyze the case under the relevant standard—that purportedly established in the Supreme Court's 1905 decision *Jacobson v. Massachusetts*.¹⁵¹

Dusting off *Jacobson*, the Fifth Circuit's majority reasoned that the case established a remarkably deferential standard of review for alleged violations of *any* constitutional right during times of pandemic. "So long as the measures have at least *some* 'real or substantial relation'" to [a] health crisis and "are not '*beyond all question*, a plain, palpable invasion of rights secured by the fundamental law,'" those measures were said to be constitutionally valid.¹⁵²

145. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 186, 203 (1824).

146. Tom Ginsburg & Mila Versteeg, *States of Emergencies: Part I*, HARV. L. REV. BLOG (Apr. 17, 2020), <https://blog.harvardlawreview.org/states-of-emergencies-part-i/>; Jackson, *supra* note 57, at 39.

147. Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV L. REV. BLOG (Apr. 9, 2020), <https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/> [https://perma.cc/GL5U-QMDD].

148. *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).

149. *Id.* at 777–78.

150. *Id.* at 779. The Eighth Circuit, in its own decision to uphold pandemic-related restrictions on abortion providers, endorsed the Fifth Circuit's analysis. *See In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020).

151. *In re Abbott*, 954 F.3d at 777.

152. *Id.* at 784 (emphasis added).

The dissent, in response, suggested that the majority employed this weak standard not because of abstract principles, but because of the case's controversial subject matter.¹⁵³ Yet the majority countered that *Jacobson* would permit officials to “reasonably restrict[] . . . all constitutional rights.”¹⁵⁴ For instance, “the same analysis,” it said, “would apply . . . to an emergency restriction on gathering in large groups for public worship during an epidemic.”¹⁵⁵ Thus, even textually demonstrable rights such as free exercise apparently may not hide from *Jacobson*'s gaze. In the decision's wake, district courts cited both *Abbott* and *Jacobson* to defeat free exercise objections to stay-at-home orders.¹⁵⁶

The good news is that the Fifth Circuit's majority was clearly wrong.¹⁵⁷ In the later Ninth Circuit case *South Bay United Pentecostal Church v. Newsom*, a California church challenged the state's decision to put houses of worship in “Phase 3” of its re-opening plan, rather than in “Phase 2.”¹⁵⁸ The practical effect of that classification was to delay resumption of in-person worship services, even as restaurants and malls opened for business. In briefs and at the lectern, California pressed *Jacobson*-style arguments it thought precluded application of ordinary free exercise scrutiny.¹⁵⁹ The panel ultimately sided with the state, but not by recognizing a ‘pandemic exception.’ It ignored *Jacobson* and treated free exercise as the key threshold issue, but declared that standard satisfied.¹⁶⁰ In a laconic order, it explained that because California had not selectively burdened religion, it had not offended the First Amendment.¹⁶¹

153. *Id.* at 797.

154. *Id.* at 787.

155. *Id.* at 788 n.1.

156. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, No. 20 C 2782, 2020 U.S. Dist. LEXIS 84348, at *6–8 (N.D. Ill. May 13, 2020) (applying the *Jacobson* framework as restated in *Abbott*); *Cross Culture Christian Center v. Newsom*, No. 2:20-cv-00832-JAM-CKD, 2020 U.S. Dist. LEXIS 79155, at *10–12 (E.D. Cal. May 5, 2020) (stating that when “normalcy is lost” during emergency, constitutional strictures on state action relax under *Jacobson*).

157. *See, e.g.*, Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE (July 2020) (criticizing *Abbott*'s treatment of *Jacobson* as “especially unconvincing” for its conclusion “that states can effectively suspend constitutional rights during a public health emergency.”).

158. *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 940 (9th Cir. 2020).

159. *Id.* at 942 (Collins, J. dissenting). In dissent, Judge Collins also considered free exercise the relevant threshold inquiry, under which he would have granted the injunction.

160. *Id.* at 940.

161. *Id.*

A week later, the Supreme Court considered the church's application for an emergency injunction. In a 5–4 vote, the Court, like the Ninth Circuit below, denied relief.¹⁶² But a majority of the Justices similarly treated free exercise as the threshold inquiry. Four voted to deny the injunction without written opinion, while four others, finding the burden on religion impermissible, would have granted it.¹⁶³ In the deciding opinion, Chief Justice Roberts reasoned that though California's guidelines undoubtedly burdened "places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment."¹⁶⁴ In his view, secular comparators labored under similar burdens. By contrast, businesses that enjoyed lighter restrictions were sufficiently dislike religious gatherings to disprove comparator status. Under the applicable standard of review—rational basis—Chief Justice Roberts unsurprisingly thought those limitations constitutional.¹⁶⁵ Citing *Jacobson* for its true significance, the Chief Justice—*after* concluding no fundamental right was burdened—indicated that the Court would not second-guess public health officials' fact-intensive judgments.¹⁶⁶

In some quarters, the Supreme Court's denial of the injunction in *South Bay United* engendered alternate hand-wringing and adulation. Law professors twittered that the Chief Justice, like a juridical Goldilocks, had gotten "it just right,"¹⁶⁷ while columnists castigated the dissent as "unfounded," "depressing," and "terrifying."¹⁶⁸ The case's actual implications for free exercise jurisprudence, however, are unremarkable. At least five Justices (and perhaps all of them) declined to endorse an *Abbott*-style pandemic

162. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

163. *Id.*

164. *Id.* (Roberts, C.J., concurring).

165. *Id.*

166. *Id.* Later confronted with Nevada's indoor-limitation restrictions that permitted more than fifty persons to gather in casinos while restricting comparable church venues to a chosen few, four justices in *Calvary Chapel Dayton Valley v. Sisolak* would have granted injunctive relief on the grounds that "there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel." 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting). Though the case matters for many reasons, especially the focused identification of secular comparators, the case principally illustrates that at least four justices continue to labor under the belief that the Free Exercise Clause remains the threshold inquiry—not *Jacobson*'s watered-down language.

167. See Marty Lederman (@marty_lederman), TWITTER (May 29, 2020, 9:06 PM), https://twitter.com/marty_lederman/status/1266581633257349124 [<https://perma.cc/ZR66-V5MW>].

168. Linda Greenhouse, *The Supreme Court, Too, Is on the Brink*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/sunday/supreme-court-religion-corona-virus.html> [<https://perma.cc/2NL5-SRZJ>].

exception. That initial step was clearly correct. As Professor Jeffrey Jackson has argued, *Jacobson* did not establish “a special framework for reviewing laws concerning emergency health regulations.”¹⁶⁹ It simply applied a contemporary version of the rational basis test to deflect a novel claim advanced under the rubric of substantive due process.¹⁷⁰ “[N]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards.”¹⁷¹ Rather, it underscores the basic point that even as constitutional standards remain the same, shifting background conditions like a pandemic may make them easier to satisfy. An emergency, in the words of a later Court, “may afford a reason for the exertion of a living power already enjoyed.”¹⁷² But it “may not call into life a power which has never lived.”¹⁷³ As a recent district court opinion appropriately held, there is “no pandemic exception to the Constitution . . . or the Free Exercise Clause of the First Amendment.”¹⁷⁴

The Supreme Court later decisively endorsed that conclusion in the case *Roman Catholic Diocese of Brooklyn v. Cuomo*.¹⁷⁵ There, petitioners challenged the governor of New York’s “severe restrictions on attendance at religious services” in certain “zones” throughout New York City.¹⁷⁶ Rather than water down its review, however, the Court explained that “even in a pandemic, the Constitution cannot be put away and forgotten.”¹⁷⁷ In other words, the First Amendment mandated “a serious examination of the need” for the governor’s “drastic measure[s]”—an examination that proved fatal to those particular restrictions.¹⁷⁸ As Justice Gorsuch emphasized in his concurrence, “[g]overnment is not free to disregard the First Amendment in times of crisis.”¹⁷⁹

169. Jackson, *supra* note 57, at 43.

170. *Id.*; see also *id.* at 42 (“At the time *Jacobson* was decided, “there was no neat distinction between what we now term ‘fundamental’ rights and those that were not fundamental. Instead, the Court applied the same test to all rights, with the test itself adjusting with the nature of the right that was purported to be infringed.”).

171. *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 943 (9th Cir. 2020) (Collins, J., dissenting).

172. *Wilson v. New*, 243 U.S. 332, 348 (1917).

173. *Id.*

174. *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 U.S. Dist. LEXIS 86310, at *3 (E.D.N.C. May 16, 2020).

175. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

176. *Id.* at 65–66.

177. *Id.* at 68.

178. *Id.*; *id.* at 69.

179. *Id.* at 69 (Gorsuch, J., concurring).

Unfortunately, such genuine and unjustified disparity between religious adherents and their secular comparators was not confined to religious adherents' experience in New York. Rather, it was exposed through lawsuits nationwide. Part III, in turn, surveys the recent litigation that shed light upon this arbitrary discrimination. Yet more than just rectifying unequal treatment, those suits enhanced the rationality of states' responses to COVID-19. Part III reveals the manner in which this litigation helped to end both arbitrary under- and over-enforcement of public safety regimes.

III. RELIGIOUS EXEMPTIONS AS RATIONAL SOCIAL POLICY: FOUR CASE STUDIES

Recall how some scholars alleged that churches, relying on incoherent views of the Constitution, sought "special exemptions" to "neutral" stay-at-home orders.¹⁸⁰ Such suits were overreactions given policymakers' willingness to "act properly by removing . . . disparit[ies]" when alerted to their existence.¹⁸¹ Far from requests for "equal treatment," these "pleas for special consideration" made sense only as the litigation arm of "a political program to advance religion."¹⁸² When reading the case studies below, however, think about what these suits actually reflect. Governors and mayors promoted heavy-handed and demonstrably arbitrary regimes that disparately burdened religious practice. They aggressively defended those policies in the press and dispatched their solicitors general to do the same at the lectern. And only after they were hit with federal lawsuits—and, for some officials, only after they lost them—did they attempt to rectify their responses' discriminatory and irrational treatment of religious adherents.

A. *North Carolina*

Like his counterparts across the nation, North Carolina Governor Roy Cooper promulgated a series of executive orders throughout March 2020 in response to COVID-19.¹⁸³ Most significantly, his orders prohibited "mass gatherings," defined as an indoor "event

180. Tebbe et al., *supra* note 1.

181. *Id.*

182. *Id.*

183. *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 U.S. Dist. LEXIS 86310, at *1–2 (E.D.N.C. May 16, 2020).

or convening” of ten or more persons.¹⁸⁴ The orders deemed their violation a Class 2 misdemeanor,¹⁸⁵ the same category of crime in North Carolina as simple assault and resisting arrest.¹⁸⁶ The nominal and admirable goal of these prohibitions was to slow COVID-19’s spread. In the words of the reviewing judge in the church’s subsequent lawsuit, “so far so good.”¹⁸⁷

From there, however, things began to fall apart. The same orders exempted from the ten-person limit the “normal operations” of airports, buses, trains, offices, and restaurants—thus permitting an unlimited number of patrons to crowd into these institutions.¹⁸⁸ But the orders included no analogous exemption for religious gatherings. They permitted indoor worship services with more than ten persons only if hosting those services outside was “impossible.”¹⁸⁹ And they did so despite the Governor’s failure “to cite any peer-reviewed study” showing that “religious interactions . . . accelerate the spread of COVID-19 in any manner distinguishable from non-religious interactions.”¹⁹⁰ Moreover, the apparent criterion for “impossibility” was whether a sincere religious belief dictated the necessity of indoor services.¹⁹¹ When pressed at oral argument about how the state would make that determination, its solicitor general explained, remarkably, that sheriffs’ deputies “would decide” case-by-case “whether the religious entity or individual was correct in deciding it was ‘impossible’ to worship outside.”¹⁹² The orders apparently rejected the longstanding American assumption that it is not for the civil power to police “departure from doctrine.”¹⁹³

184. *Id.* at *4–5.

185. *Id.* at *9.

186. *An Explanation of Misdemeanor Charges in North Carolina*, THE LAW OFFICES OF WILEY NICKEL (Apr. 22, 2014), <https://wileynickel.com/raleigh-defense-lawyer-blog/2014/4/22/an-explanation-of-misdemeanor-charges-in-north-carolina.html> [<https://perma.cc/ES29-RRVE>].

187. *Berean Baptist Church*, 2020 U.S. Dist. LEXIS 86310, at *17.

188. *Id.* at *9.

189. *Id.* at *2.

190. *Id.* at *24.

191. *Id.* at *13.

192. *Id.* at *18.

193. *See, e.g., Presbyterian Church v. Hull Church*, 393 U.S. 440, 450 (1969) (“[D]eparture-from-doctrine . . . requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such role.”).

Even more troubling for the reviewing judge than the potential for arbitrary enforcement were the “glaring inconsistencies” in the treatment of religious practice on the orders’ face.¹⁹⁴ As they restricted indoor worship to ten persons or fewer, they permitted “up to *fifty* (50) people” to attend indoor funerals without a showing of necessity.¹⁹⁵ The practical effect of that loophole was this: Eleven people gathering in a Sunday worship service committed criminal misdemeanors analogous to slapping someone in the face.¹⁹⁶ Yet the Monday after, *fifty* people could freely congregate in the same building for a funeral.¹⁹⁷ The Governor offered no evidence to justify that disparity.¹⁹⁸ “At oral argument,” in fact, the state “conceded that there [was] no public health rationale for allowing 50 people to gather inside at a funeral, but to limit an indoor religious worship service to no more than 10.”¹⁹⁹ The Governor “could not explain why [he] trust[ed] those who run funerals to have 50 people inside to attend the funeral, but only trust[ed] religious entities and individuals to have 10 people inside to worship.”²⁰⁰

Because the orders failed *Smith’s* requirements of neutrality and general applicability, the reviewing court subjected them to strict scrutiny.²⁰¹ Accepting that control of a pandemic is a compelling interest, the court nevertheless found the orders not narrowly tailored to achieving that purpose.²⁰² They imposed disparate and inexplicable burdens on religious practice, even when worshipers “pledged to adhere to ‘all recommended . . . social distancing and personal hygiene safety guidelines.’”²⁰³ Because religious adherents simply wanted “the same treatment” as their secular counterparts, the court enjoined enforcement of the orders against them.²⁰⁴

More than just quashing discrimination, though, the decision enhanced the rationality of North Carolina’s response to COVID-19. Despite the state’s initial effort to defend its orders, it was ul-

194. *Berean Baptist Church*, 2020 U.S. Dist. LEXIS 86310, at *21.

195. *Id.*

196. *See id.* at *20–22.

197. *Id.* at *21.

198. *Id.* at *22–23.

199. *Id.* at *21 (emphasis added).

200. *Id.*

201. *Id.* at *25.

202. *Id.* at *27.

203. *Id.* at *28.

204. *Id.* at *25.

timately forced to concede that it had “no . . . rationale” for arbitrarily restricting religious practice.²⁰⁵ So not only did the state fail to ground its law upon reasons, but it also thereby ensconced pointless over-deterrence against religious adherents who posed no greater risk—and probably less—than their secular counterparts.²⁰⁶ Indeed, the state stood poised to waste police officers’ time and resources. At least before it lost in federal court, it had enlisted officers to interrogate whether worshipers were departing from doctrine by holding in-person services—a task surely outside those officers’ best use.²⁰⁷ Perhaps most unfortunately, however, these themes were not isolated to a single jurisdiction.

B. *Kentucky*

Like Governor Cooper, Kentucky Governor Andy Beshear issued executive orders throughout March 2020 in response to COVID-19.²⁰⁸ Put forth on March 19, his first relevant order prohibited “mass gatherings” and barred worship services by name.²⁰⁹ Prohibited gatherings included, “but [were] not limited to, community, civic, public, leisure, *faith-based*, or sporting events.”²¹⁰ Yet that same order, much like Governor Cooper’s, went on to grant broad secular exemptions. Permitted were “normal operations at airports, bus and train stations,” “shopping malls and centers,” “typical office environments,” “factories,” and “retail or grocery stores.”²¹¹ The March 19 order apparently allowed an unlimited number of persons to crowd into these institutions, so long as they promised to practice social distancing.²¹²

Perhaps realizing the March 19 order resembled the sort of “germy-mander”²¹³ likely to provoke a federal lawsuit, the governor modified Kentucky’s response six days later.²¹⁴ Rather than cast the regime as one of secular *exemptions*, the modified March 25 order

205. *Id.* at *21.

206. *Id.* at *24–25 (noting that the Governor presented no evidence religious interactions posed disparate risk and that religious figures had strong incentives to comply with safety guidelines).

207. *Id.* at *18.

208. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 611 (6th Cir. 2020).

209. *Id.*

210. *Id.* (emphasis added).

211. *Id.*

212. *Id.*

213. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

214. *Maryville Baptist Church*, 957 F.3d at 611.

categorized institutions as either “life sustaining” or “not life sustaining.”²¹⁵ It then characterized many secular businesses—for instance, liquor stores, accounting services, law firms, and gun shops—as “life sustaining,” permitting their continued operation.²¹⁶ By contrast, the order “require[d] organizations that are not ‘life sustaining’ to close.”²¹⁷ Because in-person worship services were not considered “life sustaining,” they were to be discontinued on threat of criminal penalties.²¹⁸

A few weeks later, the “Maryville Baptist Church held a drive-in Easter service.”²¹⁹ Rather than mingling in the nave, “congregants parked their cars in the church’s parking lot and listened to a sermon over a loudspeaker.”²²⁰ Yet soon “Kentucky State Police arrived.”²²¹ They “issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act,” recorded their license plates, and ordered them to disperse and “self-quarantine for 14 days or be subject to further sanction.”²²² In response, the church sought an injunction against the continued enforcement of the March orders.²²³

Defending the Governor’s orders in the Sixth Circuit against the church’s free exercise challenge, the state’s counsel “insist[ed]” the policy contained “no exceptions.”²²⁴ But the panel readily dissected the Governor’s “word play.”²²⁵ Labeling secular services “life sustaining” to permit their continued operation while barring non-“life sustaining” worship services was obviously the functional analogue of granting secular exemptions.²²⁶ Moreover, the Governor failed to offer justification as to why his orders permitted secular business to host unlimited patrons, while religious congregants were barred from even sitting in their cars in a church parking lot.²²⁷ This failure was problematic: “At some point, an exception-ridden policy takes on the appearance and reality of a system of

215. *Id.*

216. *Id.* at 611, 614.

217. *Id.* at 611.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 611–12.

223. *Id.* at 611.

224. *Id.* at 614.

225. *Id.*

226. *Id.*

227. *Id.* at 615.

individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.”²²⁸

After further analysis, the Sixth Circuit concluded that the orders’ patchwork nature indeed mandated heightened review.²²⁹ The panel conceded that Governor Beshear had “a compelling interest in preventing the spread of [the] novel” coronavirus.²³⁰ Yet his chosen means to achieve that end were not the least restrictive on religious practice.²³¹ Even concerning worship services *inside* the church, the state simply could have ordered a “limit [on] the number of people who can attend a service at one time,” rather than imposing a total ban.²³² As the church underscored several times, it was willing to comply with all known precautions and guidelines.²³³ Busting up Maryville Baptist’s parking lot sermon was all the more inexplicable. Throughout the litigation, the Governor’s counsel failed to explain why an outdoor gathering *in cars* posed a higher risk of viral transmission than did congregating within planes, trains, and businesses *in person*.²³⁴ That was so because, obviously, it did not.

C. *Kansas*

Like her colleagues in Kentucky and North Carolina, Kansas Governor Laura Kelly issued a series of executive orders in March and April 2020 as part of her state’s response to COVID-19.²³⁵ These included a stay-at-home order and a ban on mass gatherings, defined as those “of more than 10 people.”²³⁶ “Five days before Easter,” an updated order specified that “churches and other religious facilities” were “among the venues to which the prohibition on ‘mass gatherings’ applie[d].”²³⁷ The order permitted more than

228. *Id.* at 614 (quoting *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012)).

229. *Id.*

230. *Id.* at 613.

231. *Id.* at 615.

232. *Id.*

233. *Id.* at 615.

234. *Id.* at 613.

235. *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 U.S. Dist. LEXIS 68267, at *2 (D. Kan. Apr. 18, 2020).

236. *Id.*

237. *Id.* at *2.

ten individuals to *conduct* worship services, so long as they practiced social distancing.²³⁸ Church audiences, however, were capped at ten congregants or fewer.²³⁹ Simultaneously, the order granted broad exemptions for secular activities. It permitted airports, childcare centers, shopping malls, libraries, restaurants, bars, offices, public transportation, and job centers to welcome an unlimited number of patrons, so long as they observed social distancing guidelines.²⁴⁰

In early April, pastors from two Kansas churches wrote to the Governor pointing out the orders' disparate treatment of secular and religious gatherings.²⁴¹ They requested that an "allowance be made for churches to hold in-person worship services[,] provided [that] congregants follow rigorous social-distancing and safety protocols applicable to similar secular facilities."²⁴² Perhaps to some commentators' surprise,²⁴³ the Governor's response was unenthusiastic.²⁴⁴ She first attempted to cure the disparity by leveling down—removing analogous secular exemptions rather than granting the requested religious exemption.²⁴⁵ But this effort was half-hearted. Her April 17 order removed exemptions from peripheral secular functions like libraries and imposed an occupancy cap on bars and restaurants.²⁴⁶ Yet it preserved "more lenient treatment" for "airports, childcare locations, hotels, food pantries and shelters, detoxification centers, retail establishments . . . public transportation, job centers, office spaces used for essential functions," and the catch-all category of "manufacturing, processing, distribution, and production facilities."²⁴⁷ As the reviewing court acknowledged, "the exemption for office spaces" was so broad that it could "include such activities as providing real estate services."²⁴⁸

In response, the churches sued. Properly rejecting *Jacobson*-style arguments to relax the standard of review, the district court

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Tebbe et al., *supra* note 1 ("[T]o the degree that there really does seem to be unfairness . . . policymakers act properly by removing the disparity.").

244. *First Baptist Church*, 2020 U.S. Dist. LEXIS 68267, at *7.

245. *Id.* at *6–7.

246. *Id.*

247. *Id.* at *6.

248. *Id.* at *23.

undertook an analysis of the plaintiffs' free exercise objection.²⁴⁹ Beginning with first principles under *Smith*, the court noted as an initial matter that the churches had indeed labored under disparate treatment. Unlike secular comparators, only churches' "core purpose—association for the purpose of worship—had been basically eliminated."²⁵⁰ Further, it was an "arbitrary distinction . . . imposed without any apparent explanation for the differing treatment of religious gatherings."²⁵¹ The Governor had not even argued "that mass gatherings at churches pose[d] unique health risks that do not arise in mass gatherings at airports, offices, and production facilities."²⁵² In the court's view, "the legitimate health and safety concerns arising from people attending religious services inside a church would logically be present with respect to most if not all [the] other essential activities" enjoying exemptions.²⁵³

This honeycomb of exemptions led the district court to conclude that the governor's orders were neither neutral nor generally applicable. "The most reasonable inference from [churches'] disparate treatment" was that religion had been "targeted for stricter treatment due to the nature of the activity involved," "rather than . . . unique health risks" churches might pose.²⁵⁴ Indeed, the Governor's orders "restrict[ed] religious practice while failing to prohibit secular activity that endanger[ed] the same interests to a similar or greater degree."²⁵⁵ Thus, they were subject to heightened scrutiny.²⁵⁶

On that front as well, the district court found the orders deficient. Their "arbitrary" and patent under-inclusivity refuted the notion that the state had selected the least burdensome means on religious practice to achieve its purported ends.²⁵⁷ The orders were "not narrowly tailored to achieve [their] stated public health goals," instead subjecting "comparable secular gatherings . . . to

249. *Id.* at *10–24.

250. *Id.* at *22.

251. *Id.* at *24.

252. *Id.* at *23.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at *8.

much less restrictive conditions.”²⁵⁸ The district court therefore enjoined their continued enforcement against the plaintiffs.²⁵⁹ In so doing, the court discharged its duty to rectify arbitrary discrimination against religious adherents.

D. *Mississippi*

The same scholars who criticized churches’ alleged “pleas for special consideration” also considered it “especially unpersuasive” that “relatively conservative states such as . . . Mississippi”—the origin of our final case study—were “singling out religious practices for discrimination.”²⁶⁰ In a healthy dose of irony, it was “the heart and soul of the Delta”²⁶¹—Greenville, Mississippi—that witnessed perhaps the most egregious treatment of religious adherents during COVID-19. That controversy grew out of Greenville’s misguided measures to combat the novel coronavirus. It ended with intervention by the Department of Justice, exposure on national news networks,²⁶² and Greenville’s voluntary repeal of its “unreasonable (and likely unconstitutional)” targeting of religious entities.²⁶³

On March 14, 2020, Mississippi Governor Tate Reeves “proclaimed a state of emergency” in Mississippi and issued “a series of executive orders” implementing a shelter-in-place policy.²⁶⁴ Ten days later, he signed a subsequent order that designated religious entities “essential business[es] or operation[s].”²⁶⁵ The practical effect of the March 24 order was to permit worship services to continue, provided that they adhered to both federal and state safety guidelines.²⁶⁶ On March 26, the Governor published a clarification of his March 24 order.²⁶⁷ The “supplement” explained that though

258. *Id.* at *25.

259. *Id.* at *30.

260. Tebbe et al., *supra* note 1.

261. *Visitors*, THE OFFICIAL WEBSITE OF GREENVILLE MISSISSIPPI, <https://www.greenvilleems.org/visitors> [<https://perma.cc/Z5UC-RSQC>].

262. *E.g.*, Brooke Singman & Jake Gibson, *DOJ Intervenes in Mississippi Drive-In Church Case, Says City’s Actions ‘Target Religious Conduct,’* FOX NEWS (Apr. 14, 2020), <https://www.foxnews.com/politics/doj-mississippi-church> [<https://perma.cc/7HLD-NG6G>].

263. *First Pentecostal Church of Holly Springs v. City of Holly Springs*, No. 3:20CV119 M-p, 2020 U.S. Dist. LEXIS 72533, at *2 (N.D. Miss., Apr. 24, 2020).

264. Plaintiff’s Original Complaint at 2, *King James Bible Church v. Simmons*, No. 4:20-cv-00065-MPM-JMV (N.D. Miss. Apr. 15, 2020).

265. *Id.* at 7.

266. *Id.*

267. *Id.* at 8.

cities could adopt more restrictive safety measures than those promulgated by the state, they could not “impose restrictions that prevent[ed] any essential business or operation” from providing “essential services and functions.”²⁶⁸ The Governor thereby instructed that the March 24 order protecting essential services from shutdown—including churches—was to have preemptive effect against contrary local regulations.²⁶⁹

Those provisions notwithstanding, the City of Greenville then published a series of regulations in patent conflict with the Governor’s orders. Singling out religion by name, the City “issued an ‘Executive Order Regarding Church Services’” on April 7, 2020.²⁷⁰ It declared that “all church buildings w[ere] closed for in person *and* drive in church services” for the duration of the pandemic, even though retail establishments remained open.²⁷¹ Pursuant to that order, the city dispatched “eight uniformed police officers” to Temple Baptist Church on April 8.²⁷² When they arrived, officers discovered parishioners seated in their cars listening to a sermon broadcast over the radio.²⁷³ Because the church had no website or streaming ability and many of its congregants lacked Internet access, many had no alternative means to receive the sermon.²⁷⁴ “No one was outside his or her car at any point during the service, including when the City police arrived.”²⁷⁵ All had “their windows rolled up.”²⁷⁶ Yet the police “began knocking on car windows, demanding driver’s licenses,” and issuing \$500 tickets for violating the City order.²⁷⁷

When some objected to the City’s policy of exempting retailers as it dispensed \$500 tickets to parishioners too poor for WiFi, the City did not “act properly by removing the disparity.”²⁷⁸ Instead, it doubled down.²⁷⁹ It flatly claimed in a statement on April 9 that its

268. *Id.*

269. *Id.*

270. *Id.* at 8, 19 (attaching the order as Exhibit A).

271. *Id.* at 19.

272. The United States’ Statement of Interest in Support of Plaintiffs at 3, *Temple Baptist Church v. City of Greenville*, Case No. 4:20-cv-64-DMB-JMV (N.D. Miss. Apr. 14, 2020).

273. *Id.* at 2–3.

274. *Id.* at 2.

275. *Id.* at 3.

276. *Id.*

277. *Id.*

278. Tebbe et al., *supra* note 1.

279. Plaintiff’s Original Complaint at 9, *King James Bible Church v. Simmons*, No. 4:20-cv-00065-MPM-JMV (N.D. Miss. Apr. 15, 2020).

order was “no infringement on the right to religion or right to worship,” and that enforcement of the order would continue.²⁸⁰ As proof of its sincerity, the City dispatched “nearly the entire Greenville Police Department” to a nearby church—King James Bible Baptist—to uphold the prohibition on drive-in church services.²⁸¹

The events that followed would seem fanciful if not for King James’s Pastor, Charles Hamilton Jr., capturing them on video and posting the clip to YouTube.²⁸² Pastor Hamilton’s video opened by panning across the church parking lot where, indeed, a fleet of police cars had assembled to enforce the drive-in worship ban.²⁸³ A police officer approached him to explain that his congregants had a choice—leave or be fined.²⁸⁴ When Hamilton asked how the officers’ behavior accorded with the First Amendment, another explained (incorrectly) that they had “an order from the Governor” under which “your rights are suspended.”²⁸⁵ When Hamilton objected, the officer again informed him that “your rights are suspended by the military.”²⁸⁶ A fellow pastor who saw Hamilton’s video noted that the officer’s bizarre statements to Hamilton, a black man, reminded him “of the bad old days in a segregated South where the civil rights of blacks were ‘suspended’ all the time.”²⁸⁷ Pastor Hamilton, to his credit, simply asked viewers to pray for the officers.²⁸⁸

As the absurdity escalated, Greenville officials again failed to “act properly by removing the disparity.”²⁸⁹ In response to further complaints, Greenville Mayor Errick Simmons tripled down on his policy in an April 13 press conference.²⁹⁰ Mayor Simmons “reiterated that the ban on drive-in church services would remain in place.”²⁹¹ His proffered rationale was that “[d]rive-in services will

280. *Id.*

281. *Id.* at 3.

282. Temple Baptist Michael Johnson, *Police Swarm Independent Baptist Drive-In Church—War on Religious Liberty! 1st Amendment*, YOUTUBE (Apr. 10, 2020), https://www.youtube.com/watch?v=oVt_Ny0Ot_E [<https://perma.cc/N8N4-5855>].

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. Epps, *supra* note 7.

288. Johnson, *supra* note 284.

289. Tebbe et al., *supra* note 1.

290. Plaintiff’s Original Complaint at 10, *King James Bible Church v. Simmons*, No. 4:20-cv-00065-MPM-JMV (N.D. Miss. Apr. 15, 2020).

291. *Id.*

not work because people of faith like to fellowship.”²⁹² The apparent implication of his statement was that religious congregants, trusted to follow safety guidelines when patronizing secular business, could not be trusted to remain in their cars for the duration of a worship service.

By April 15, the City of Greenville was facing multiple federal lawsuits and had attracted intense criticism from national news media.²⁹³ Commentators decried its “blatant,” “patently . . . unequal treatment of the church” as “offend[ing] the Constitution.”²⁹⁴ The City only caved, however, after the Department of Justice filed a Statement of Interest in support of the plaintiff churches.²⁹⁵ Its filing pointed out what had become clear to everyone other than Greenville’s leadership: the City’s policy was neither generally applicable nor neutral toward religion.²⁹⁶ After the state had declared a list of services “essential,” the City went through the list and labeled a single activity—religious worship—non-essential.²⁹⁷ It had transparently “singled out churches for distinctive treatment not imposed on other entities . . . designated as essential.”²⁹⁸ It had also declined to generally apply its ban on drive-in services. For instance, it permitted citizens to eat at drive-in restaurants “with their windows rolled *down*,” but barred them from attendance “at a drive-in church with their windows rolled *up*.”²⁹⁹ Because it had no coherent reason for that disparity, the City’s policy could not have survived heightened review.³⁰⁰ But only under the weight of national criticism and federal lawsuits did the City agree to reverse course and permit drive-in worship.

292. *Id.*

293. *See, e.g.*, Singman & Gibson, *supra* note 264. Both Temple Baptist and King James Baptist filed federal lawsuits against Greenville for deprivation of First Amendment rights.

294. *See, e.g.*, Andrew McCarthy, *Justice Department Achieves a Victory for Religious Liberty*, NATIONAL REVIEW (Apr. 16, 2020, 2:42 PM), <https://www.nationalreview.com/2020/04/the-justice-department-achieves-a-victory-for-religious-liberty> [https://perma.cc/CX58-WLZP].

295. Michael Ruiz & Brooke Singman, *Mississippi Mayor Nixes Ban on Drive-In Services After DOJ Intervention*, FOX NEWS (Apr. 15, 2020), <https://www.foxnews.com/politics/mississippi-mayor-nixes-ban-drive-in-services-doj-intervention> [https://perma.cc/S2D8-GHFB].

296. Plaintiff’s Original Complaint at 8–9, *King James Bible Church v. Simmons*, No. 4:20-cv-00065-MPM-JMV (N.D. Miss. Apr. 15, 2020).

297. *Id.* at 8.

298. *Id.* at 8–9.

299. *Id.* at 9.

300. *Id.*

Like the previous case studies, Greenville's policy was more than deeply unfair. It was also deeply irrational. As Pastor Hamilton insightfully observed on the video of his ordeal, "people are committing crimes, and [the police] are here to mess with a church."³⁰¹ Indeed, the City's decision to enforce its ban on drive-in worship services was more than racially tinged and economically regressive. It was a massive and wasteful diversion of police resources. Granting the church an exemption, in turn, restored a rational approach: It ended the City's over-deterrence against churches that posed demonstrably *less* of a health risk than their bustling secular counterparts.

CONCLUSION

Though the above vignettes might appear at first glance to be isolated disputes, they are part of a broader dialogue about the security and scope of American religious liberty. Just as the nation stands at an inflection point on that topic, so too does the Supreme Court. This term, the Court will examine whether *Employment Division v. Smith* should be overruled and some new theory of Free Exercise expounded in its stead.³⁰² The current Court appears to feature several *Smith* skeptics,³⁰³ and its conservative personnel are undoubtedly aware of the burgeoning critique that their institution has become aloof to religious freedom.³⁰⁴

However tempting it might be to topple *Smith*, that decision's detractors must grapple with the shortcomings of *Smith's* historical alternative: the doctrine of *Sherbert v. Verner*. The regime *Sherbert* established was often fatal in theory but not particularly strict in fact.³⁰⁵ Religious liberty, like beauty, was placed in the eye of the beholder. *Sherbert's* malleable contours only barely disguised the results-oriented reasoning the case facilitated, and judges often applied it in ways averse to the religious claimant.³⁰⁶ To avoid

301. Johnson, *supra* note 284.

302. *Fulton v. City of Philadelphia*, No. 19-123 (cert. granted Feb. 24, 2020) (considering whether *Employment Division v. Smith* should be overruled).

303. See, e.g., *Kennedy v. Bremerton School District*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, J., Gorsuch, J., and Kavanaugh, J.) ("In [*Smith*], the Court drastically cut back on the protection provided by the Free Exercise Clause.")

304. See, e.g., Senator Josh Hawley, *Senator Hawley Speaks on the Supreme Court's Bostock Decision*, YOUTUBE (June 16, 2020), https://www.youtube.com/watch?v=hrKb_OuEy2k [<https://perma.cc/9VGU-5TY2>] (arguing that the Supreme Court has betrayed religious conservatives).

305. See *supra* notes 51–87 and accompanying text.

306. Ryan, *supra* note 57, at 1412.

regression, *Smith* skeptics must present some alternative path that avoids *Sherbert*'s pitfalls.

By contrast, there are those in and out of the academy who would like the Court to stand by *Smith*.³⁰⁷ Just as *Smith*'s detractors should consider the downside of potential alternatives, *Smith*'s supporters should think hard about their reaction to recent religious liberty litigation in the wake of COVID-19. Religious institutions did not request ad hoc, *Sherbert*-style exemptions. Rather, they pointed out the targeted and irrational nature of some states' regulations, under which religion shouldered disparate burdens. In so doing, religious adherents asserted their First Amendment rights as they helped to rectify inexplicable loopholes. Yet they were skewered in the press with allegations of hypocrisy and incompetence.³⁰⁸ The apparent implication is that these churches, stripped of *Sherbert*, should not find refuge even in *Smith*. But that perspective does not represent neutrality or evenhandedness. It is, really, a form of antireligious preferentialism—an apparent endorsement of treating religious institutions worse than secular comparators and then mocking them when they object. It is the sort of reasoning that would deploy health regulations to shutter a chapel as it exempted a secular protest for causes deemed sufficiently worthwhile.³⁰⁹

That perspective both dishonors the typical justification for *Smith*—fairness—and overlooks a subtler justification for its regime advanced throughout this Article—rationality. Basic intuitions tell us it is wrong to discriminate against religion because such treatment fails to comport with norms of equality. But when the state so discriminates without any legitimate reason, its discrimination is also irrational. It represents either a burden arbitrarily imposed and taxingly enforced on religious practitioners, or a boon arbitrarily conferred upon their secular counterparts. Correction of such a confused policy ought to have universal appeal. And that is precisely the relief the litigants detailed herein sought to secure.

307. See, e.g., Tebbe et al., *supra* note 1 (appearing to endorse *Smith*'s “central holding” barring “a special constitutional right to a religious accommodation from neutral stay-at-home orders.”).

308. *Id.*

309. See, e.g., Spell v. Edwards, No. 20-30358, 962 F.3d 175, 181 (5th Cir. 2020) (Ho, J., concurring) (noting the contradiction of “officials . . . exempting protestors” as they “continu[e] to restrict worshippers”).