Loyola University Chicago Law Journal

Volume 54
Issue 2 *Winter 2022*

Article 13

2023

Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context

Alan E. Brownstein
UC Davis School of Law

Vikram David Amar
University of Illinois College of Law

Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context

Alan E. Brownstein[*] *and Vikram David Amar*[†]

This Article examines the theoretical and doctrinal origins and consequences of a potentially game-changing approach to processing claims brought under the Free Exercise Clause of the First Amendment. Since 1990, and the decision in Employment Division v. Smith*, the Court has read that Clause not to require accommodation of religious activity via exemptions from religion-neutral and generally applicable laws and regulations. What the Free Exercise Clause does prohibit, according to* Smith*, is government action targeting or discriminating against religion. But the Court's decision a year ago in* Tandon v. Newsom *provides some powerful evidence about how this doctrine has been transformed in the eyes of the new Court majority.*

In Tandon*, religious individuals challenged California's COVID-inspired rule that limits all social gatherings—including religious gatherings—in homes to no more than three households. Because more than three households were allowed to come together indoors in stores, movie theaters, private suites at sporting events and concerts, and indoor restaurants, plaintiffs argued in-home religious gatherings were being treated in an inferior and discriminatory manner. Accordingly, California's rule could survive only if the inferior treatment of in-home religious gatherings were narrowly tailored to further a compelling government interest. In validating this challenge, a five-person majority on the Court ruled that "government regulations are not neutral and*

---

* Professor Emeritus, UC Davis School of Law.

† Dean and Iwan Foundation Professor of Law, University of Illinois College of Law.

Parts of this article are grounded in prior blog columns by the authors. *See* Vikram David Amar & Alan Brownstein, *Exploring the Meaning of and Problems with the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty under the Free Exercise Clause: Part One in a Series*, JUSTIA (Apr. 30, 2021), https://verdict.justia.com/2021/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c [https://perma.cc/VUX9-BZ99]; Vikram David Amar & Alan Brownstein, *"Most Favored-Nation" ("MFN") Style Reasoning in Free Exercise Viewed through the Lens of Constitutional Equality*, JUSTIA (May 21, 2021), https://verdict.justia.com/2021/05/21/most-favored-nation-mfn-style-reasoning-in-free-exercise-viewed-through-the-lens-of-constitutional-equality [https://perma.cc/CLV9-8VTF].

generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." The majority rejected the notion that since many (indeed most) secular activities were treated no more favorably than religion, that religious activity was not being targeted or discriminated against: "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."

This new approach, if pursued by the Court in future cases, creates serious conceptual and practical difficulties and raises important questions as to how and why religious activity ought to be privileged over other, including other constitutionally protected and encouraged, activities.

INTRODUCTION 778
I. MFN INTRODUCED 779
II. *TANDON*'S ILL FIT WITH THE WAY THE COURT GENERALLY ERECTS DOCTRINE TO PROTECT LIBERTY RIGHTS 783
A. The Problem of Effect 786
B. The Problem of Purpose 789
C. The Problem of Precedent 793
D. The Problem with Privileging Religion by Protecting It against Being Devalued 795
E. The Problematic Inconsistency between MFN and the Generally Accepted Nature of Religious Liberty 799
F. The Problem of MFN's Inconsistency with Free Exercise Doctrine 804
III. *TANDON*'S UNEASY COEXISTENCE WITH GENERAL CONSTITUTIONAL EQUALITY PRINCIPLES 809
CONCLUSION 819

INTRODUCTION

In the 2021–22 Term in a per curiam opinion in a case that was not fully briefed and argued at the Supreme Court, a majority of justices (Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) announced a potentially game-changing approach to processing claims brought under the Free Exercise Clause of the First Amendment. Since 1990, and the decision in *Employment Division v. Smith*,[1] the Court has read the Free Exercise Clause as not requiring accommodation of religious activity via

1. Emp. Div. v. Smith, 494 U.S. 872 (1990).

exemptions from religion-neutral and generally applicable laws and regulations. What the Free Exercise Clause does prohibit, according to *Smith*, is the government *targeting or discriminating against* religion.[2] Yet the Court's 2021 decision in *Tandon v. Newsom* provides some powerful evidence about how this doctrine is in the process of being transformed in the hands of the new Court majority.[3]

I. MFN INTRODUCED

In *Tandon*, religious individuals challenged California's COVID-inspired rule that limited all in-home social gatherings—including religious gatherings—to persons from no more than three households.[4] Because California law allowed people from more than three households to come together indoors in stores, movie theaters, private suites at sporting events and concerts, and indoor restaurants, plaintiffs argued in-home religious gatherings were being treated in an inferior and discriminatory manner.[5] Accordingly, they contended, California's rule could survive only if the inferior treatment of in-home religious gatherings were narrowly tailored to further a compelling government interest.[6] In validating this challenge and embracing the plaintiffs' reasoning, a five-person majority on the Court ruled that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[7] To the majority, a religious activity could still be targeted or subject to discrimination even though many (indeed most) secular activities were treated no more favorably than religion. To the Court, "It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[8]

In assessing (the obviously important question of) comparability, the Court said that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. . . . Comparability is

2. *Id.* at 877–78; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (citations omitted) ("Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.").

3. Tandon v. Newsom, 141 S. Ct. 1294 (2021).

4. *Id.* at 1297.

5. *Id.* at 1298 (Kagan, J., dissenting).

6. *Id.*

7. *Id.* at 1296 (citing Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020)).

8. *Id.* (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66–67 (Kavanaugh, J., concurring)).

concerned with the risks various activities pose, not the reasons why people gather."[9] We take that to mean that MFN applies and controls review when the secular and religious activities being compared are similarly underinclusive. A secular activity is comparable to religious exercise (and can be treated no better than religious activity) if the secular activity risks creating the same harm or costs that justifies regulation of the religious activity, regardless of whether the secular activity might also confer secular benefits that religious activities do not, benefits that might otherwise be considered in a rational regulatory balance.[10]

For purposes of our analysis, we describe these two major innovations by the Court in *Tandon*—the principle that no secular activity can be treated more favorably than religion, no matter what benefits the secular activity may confer and the focus on underinclusivity to determine comparability—as "Most Favored Nation" (MFN) reasoning. The "Most Favored Nation" phrase is drawn from international trade lingo, in which some nations are entitled to be treated at least as well as any other nation is being treated and borrows from the work of other scholars who have suggested this language and advocated for an MFN approach in free exercise cases.[11]

As Justice Kagan's dissent in *Tandon* powerfully pointed out, an MFN-style analysis always requires deciding what the relevant "comparators" are—just as in traditional MFN arenas where the treatment of other nations is analyzed for trade treaty purposes.[12] For Justice Kagan, the argument for upholding California's rule was strong

---

9. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67 (Gorsuch, J., concurring)).

10. *See infra* notes 25–27 and accompanying text (describing *Fraternal Ord. of Police* as the forerunner of the Court's comparability and underinclusivity analysis in *Tandon*).

11. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49 (suggesting religion receive most-favored nation status). Justice Kavanaugh quoted this language with approval in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting). For a much more in-depth discussion of MFN, see generally Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016); Thomas C. Berg & Douglas Laycock, Masterpiece Cakeshop *and Reading* Smith *Carefully: A Reply to Jim Oleske*, TAKE CARE (Oct. 30, 2017), https://takecareblog.com/blog/masterpiece-cakeshop-and-reading-smith-carefully-a-reply-to-jim-oleske [https://perma.cc/JE8G-TM4C]; Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 35 (2000). In addition to scholarship, many briefs support the MFN approach as well. For recent examples filed in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), see, e.g., Brief for the United States as Amici Curiae Supporting Petitioners, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123); Brief for the Nat'l Jewish Comm'n on L. & Pub. Pol'y et al. as Amici Curiae Supporting Petitioners, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123); Brief for the Rutherford Inst. as Amicus Curiae Supporting Petitioners, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123).

12. *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting). Justice Kagan dissented for herself and Justices Breyer and Sotomayor. Chief Justice Roberts dissented without opinion.

and clear:

> California limits religious gatherings in homes to three households [but if] the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike. California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here.[13]

Justice Kagan went on to point out (as the lower courts in the case had concluded) that commercial gatherings are qualitatively different from in-home gatherings in several respects, including the length of time people sit or stand near each other talking, the size and ventilation of the buildings, and the ease of enforcing social-distancing and mask requirements.[14]

At a minimum, the problem Justice Kagan identifies above in determining whether a secular activity is a fair comparator to a religious activity in an MFN analysis is challenging—something we take up at various points in this Article.[15] Indeed, given the practical and doctrinal difficulty courts will encounter in implementing an MFN approach, an obvious initial question is where in prior cases this MFN notion might have emerged from and what is behind it.

One possible explanation suggests that the emergence of MFN reasoning may be a plausible extension and extrapolation of Justice Scalia's majority opinion in *Employment Division v. Smith*,[16] in which the Court first held that under the Free Exercise Clause, government is generally not required to grant religious exemptions to neutral laws of general applicability.[17] In *Smith*, the Court permitted Oregon to enforce its prohibition on the controlled substance of peyote even as applied to Native Americans who used the hallucinogen as a sincere component of religious ritual. In doing so, a majority of the Court signaled a disinclination to decide on a case-by-case basis whether the conferral of a complete or even partial accommodation to religious adherents to exempt them from generally applicable (and otherwise unobjectionable) regulations would in and of itself frustrate the state's accomplishment of

---

13. *Id.*

14. *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting).

15. *See infra* notes 32–34, 59–71 and accompanying text.

16. Emp. Div. v. Smith, 494 U.S. 872 (1990).

17. *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982))).

a compelling interest.[18]

The primary rationale the *Smith* majority offered to support its holding (a holding that itself marked a substantial change in free exercise doctrine)[19] was that alternative approaches to free exercise were, as a practical and doctrinal matter, untenable. If courts applied strict scrutiny with full rigor to all laws that substantially burdened religious exercise and conferred accommodations whenever judges honestly concluded this rigorous test was not satisfied, society would devolve into anarchy as religious individuals could avoid complying with any law that allegedly interfered with their beliefs or practices.[20] And if strict scrutiny were applied more leniently, judges would have to engage in a subjective, indeterminate balancing of interests; a task for which the judiciary is ill-suited (and which lies outside its proper institutional role) and which, accordingly, is better assigned to the political branches of government.[21]

But, as we explain in more detail below,[22] an MFN approach creates—indeed exacerbates—the very problems that Scalia and the four other justices joining his opinion in *Smith* were trying to avoid. Interpreted and applied broadly, MFN reasoning requires rigorous strict scrutiny review of any law that includes at least one secular exemption. Under this analysis, the scope of rigorous review required by an MFN test is at least as broad as existed in the pre-*Smith* free exercise doctrine—the very difficulty the Court was trying to remedy in making the major doctrinal shift it did in *Smith*.[23] And if an MFN approach is applied narrowly by aggressively limiting the scope of relevant secular comparators, courts will be engaged in the kind of subjective indeterminate quagmire Scalia considered to be so problematic.[24]

Perhaps a more likely doctrinal predecessor of *Tandon* is not found within Supreme Court case law, but instead in a Third Circuit opinion authored by Justice Alito prior to his appointment to the Supreme Court. In *Fraternal Order of Police v. City of Newark*, then-judge Alito wrote for a Third Circuit panel applying heightened scrutiny and requiring the Newark Police Department to grant an accommodation from its no-facial-

18. *Id.* at 889–90 n.5.

19. *See, e.g.*, *id.* at 891–93 (O'Connor, J., concurring) (explaining that the reasoning of *Smith* was a dramatic change in free exercise jurisprudence); *see generally* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

20. *Smith*, 494 U.S. at 888.

21. *Id.* at 890.

22. *See infra* notes 29–35, 71–82 and accompanying text.

23. *.Smith*, 494 U.S. at 885–89 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'").

24. *Id.* at 889 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

hair grooming policy for police officers to individual officers who wanted to maintain their beards for religious purposes.[25] The fact that the department granted exemptions to officers for whom facial hair was medically beneficial (i.e., for whom regularly shaving created skin or other health problems) meant, to the Third Circuit, that religious requests for exemptions also had to be granted.[26] Previewing the reasoning of *Tandon*, the court held that religious claims for exemption could not be treated less favorably than secular claims for exemption, when both claims similarly interfered with the purposes and goals of the department's grooming standards—in this case uniformity of appearance—unless the department could satisfy a heightened-scrutiny standard of review.[27]

But identifying *Tandon*'s decisional wellspring is one thing; grounding *Tandon*'s approach and instincts within the larger constitutional foundation and framework is another (and much more important) matter altogether. In the two Parts that follow—the first that juxtaposes *Tandon* against the Constitution's more general doctrinal, practical, and theoretical treatment of liberty and autonomy rights,[28] and the second that compares *Tandon* to the Constitution's prior and general approach to equality—we seek to demonstrate that *Tandon*'s prescription simply doesn't comport with the way rights are treated under the rest of the Constitution.[29] Accordingly, *Tandon*'s approach should not be extended for widespread use by the Court, or at a minimum, the Court needs to address why *Tandon*'s exceptional treatment of one (religious) right in particular can be defended under the Constitution.[30]

II. *TANDON*'S ILL FIT WITH THE WAY THE COURT GENERALLY ERECTS

25. Fraternal Ord. of Police v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

26. *Id.* at 360, 364–65

27. *Id.* at 366.

28. See *infra* Part II.

29. *Id.*

30. It is of course possible that *Tandon*'s approach is if not a one-off of sorts, not something that will ripen into a full-fledged approach to Free Exercise cases, but we see reasons for taking the Court seriously here—notwithstanding that *Tandon* was a so-called "Shadow-Docket" case. First, prominent scholars seem taken by the MFN approach *See, e.g.*, Berg & Laycock, *supra* note 11. Second, *Tandon*'s formulation finds echoes in subsequent cases. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1926, 1929 (2021) (Gorsuch, J., joined by Thomas, J., and Alito, J., concurring); Does 1–3 v. Mills, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., joined by Thomas, J., and Alito, J., dissenting from denial of application for injunctive relief) ("This Court has explained that a law is not natural and generally applicable if it treats '*any* comparable secular activity more favorably than religious exercise.'") (quoting Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021))). And third, it seems clear that dissatisfaction with the way *Smith*'s neutrality and general-applicability tests have played out is causing the conservative Court majority to seek ways of modifying or replacing the *Smith* yardstick with another test that at least appears easy to understand and apply. Thus, people who care about getting religious freedoms under the Constitution right ignore or downplay *Tandon* at their peril.

DOCTRINE TO PROTECT LIBERTY RIGHTS

Let us begin by observing that the disagreement among the justices in *Tandon* illustrates one aspect of the inherent subjectivity of the MFN approach to free exercise jurisprudence. While the focus of that disagreement was directed at the facts and resolution of the case before the Court, the underlying indeterminacy, problematic scope, and unpersuasive justifications of MFN exist much more pervasively and were never remotely addressed by the justices.[31]

If we are to take seriously the majority's statements in *Tandon* and at least some of the scholarly support for an MFN interpretation of the Free Exercise Clause, strict scrutiny must be applied whenever a claim to a religious exemption to a law is denied while "any" secular exemption to the law is granted.[32] Thus, the bare predicate for rigorous review of the denial of a religious liberty exemption claim is the existence of a secular exemption to the scope of a law. The problem with this approach, as Eugene Volokh argued, (we think persuasively) years ago in a related context, is the extraordinary reach of its application.[33] Few laws are without limits. Indeed, the nature of law in a complex society of pluralistic stakeholders is that exceptions to, and limits on, the scope of laws are almost unavoidable.[34]

Moreover, it is not even clear that the formal recognition of a secular exemption is essential to an MFN analysis. A law on its face may distinguish between certain persons and activities, treating some differently than others.[35] There may be sufficient common denominators among the potential persons and activities to which the law might apply so that it is easy to conceptualize a law extending to all such actions and actors while exempting a few applications from its reach. A more narrowly drawn law, however, would have the same effect and it is difficult to understand why the lack of a formal exemption should be controlling for MFN purposes. If the narrowly drawn law does not

---

31. *See generally Tandon*, 141 S. Ct. 1294.

32. *See generally id.*; Fraternal Ord. of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999); *see also supra* notes 4–11 and accompanying text (discussing *Tandon* and its implications).

33. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1539–42 (1999).

34. *Id*. Volokh provides numerous examples.

> Trespass law is full of exceptions—consider adverse possession, necessity, law enforcement, and so on. The duty to testify when subpoenaed is subject to many exceptions in the form of testimonial privileges. Statutory-rape laws often except acts committed by someone who is close enough in age to the minor, or acts committed by the minor's spouse. Breach of contract law has exceptions galore. The Copyright Act contains one operative section followed by fifteen sections of exceptions.

Id. at 1540 (footnotes omitted).

35. The police department grooming regulation with medical exemptions described in *Fraternal Ord. of Police* is an example of such a law. *See supra* notes 25–27 and accompanying text.

restrict certain secular activity but applies to what the court considers to be comparable religious activity, it would seem that the predicate for a court applying strict scrutiny under MFN would be established.

For example, a state law might require all persons to vote in person on Election Day if they want to exercise the franchise. An exemption is provided, however, which allows persons who have legitimate reasons to be traveling out-of-state on Election Day to vote by absentee ballot. In theory, pursuant to MFN analysis, individuals who cannot vote in person on Election Day for religious reasons should be permitted to vote by absentee ballot as well unless the state can justify denying them the opportunity to do so under strict scrutiny review. But, surely, the form of this distinction should not be controlling. A law that states on its face that all persons present in the state on Election Day must vote in person to exercise the franchise should be equally susceptible to an MFN challenge brought by individuals who cannot vote in person for religious reasons. Their core contention is that they are entitled to the same favorable treatment as voters who chose to travel out-of-state on Election Day and are permitted to exercise the franchise through absentee ballots. Thus, if a person traveling out-of-state for secular reasons is permitted to vote by absentee ballots, a religious claimant in state who cannot vote in person for religious reasons would insist under MFN that their religious reasons for not voting in person requires that they be allowed to use an absentee ballot as well.

Finally, it is very important to recognize that MFN analysis is grounded on a difference in treatment without regard to the effect of a law on religious beliefs and practices. Pre-*Smith* doctrine and case law limited free exercise claims to state action that substantially burdened the exercise of religion.[36] This substantial burden threshold, at least in theory, operated as a filter to constrain the scope of free exercise challenges based on the effect of the challenged law.[37] There is nothing in the description of MFN analysis that limits its scope by effect. Even insubstantial burdens on religious liberty would seem to require justification under strict scrutiny review if any comparable secular

36. *See, e.g.*, Hernandez v. Comm'r., 490 U.S. 680, 699 (1989); IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT RELIGIOUS PEOPLE 191–92 (2014) (describing how rigorous review in *Sherbert v. Verner*, 374 U.S. 398 (1963) depended on a finding that the state's action imposed a substantial burden on religious belief or practice).

37. *See, e.g.*, Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. ILL. L. REV. ONLINE 53, 56–57 (explaining that pre-*Smith*, courts used the substantial burden test to limit the scope of free exercise claims and Congress deliberately included a substantial burden test in RFRA to reduce litigation brought under the statute); Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA*, 85 GEO. WASH. L. REV. 94, 143 (2017).

activities receive more favorable treatment.[38]

Given these observations, the scope of MFN seems extraordinarily broad. Taken literally, a commitment to MFN would require strict scrutiny review of virtually all rejections of religious liberty claims.

A. The Problem of Effect

One possible response to this contention recognizes the breadth of the MFN approach but suggests that the failure to take effect into consideration precedes the shift toward MFN and does not extend the scope of free exercise doctrine, even if *Smith* is overruled. From this perspective, the Court's opinion in *Hobby Lobby* suggests an interpretation of the substantial burden requirement that renders it all but useless as a constraint on free exercise claims.[39] Pursuant to this argument, a substantial burden would be pretty much be whatever a religious claimant sincerely asserted in litigating their claim. We certainly agree that a sincerity test alone would essentially nullify the substantial burden requirement and that Justice Alito's highly deferential reasoning in *Hobby Lobby* supports this concern.[40] However, we suggest that neither *Hobby Lobby* nor *Zubik* exhaust the filtering role of the substantial burden standard in religious liberty litigation.

Laws typically burden religious practice or belief in one of two ways. Either they require the religious individual or entity to engage in some conduct that their religion prohibits, or they penalize or interfere with the religious individual or entity engaging in some conduct mandated by their faith. *Hobby Lobby* involved the former kind of a burden.[41] The plaintiffs, an employer, argued that by providing medical contraceptive insurance coverage to their employees mandated by Affordable Care Act, they would be complicit with sin in violation of the tenets of their faith.[42]

---

38. *See* Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 284 n.13 (2020).

39. *Hobby Lobby* and *Zubik* are RFRA cases, but the analysis at issue is relevant to Free Exercise jurisprudence. *See* Burwell v. Hobby Lobby, 573 U.S. 682, 723–26 (2014) ; Zubik v. Burwell, 578 U.S. 403, 408 (2016).

40. *See, e.g.*, Caroline Mala Corbin, *Deference to Claims of Substantial Religious Burden*, 2016 U. ILL. L. REV. ONLINE 10, 13 ("To simply assume a substantial burden whenever a sincere religious objector claims one exists essentially reads the substantial burden requirement out of RFRA."); Sepper, *supra* note 37, at 54 (describing how *Hobby Lobby* "opened the door" for the Court's "deferential approach" in which the Court would have to accept "say-so" claims that their religious exercise is substantially burdened); Cath. Health Care Sys. v. Burwell, 796 F.3d 207, 218 (2d Cir. 2015) ("[T]he fact that a RFRA plaintiff *considers* a regulatory burden substantial does not make it a substantial burden. Were it otherwise, no burden would be insubstantial."); *Hobby Lobby*, 573 U.S. at 690, 700, 717–19 (emphasizing the sincerity of the plaintiffs' beliefs).

41. *Hobby Lobby*, 573 U.S. at 691, 701–04, 720.

42. *Id.* at 692, 703.

Thus, the regulations substantially burdened their ability to comply with the requirements of their religion.[43]

The Court's acceptance of this complicity argument in *Hobby Lobby* recognized that neither the state, nor courts, had any basis for challenging plaintiffs' asserted beliefs about complicity outside of conventional concerns about the sincerity of their claims.[44] Religious beliefs about complicity are no different than other religious beliefs. They are beyond the scope of judicial review. Courts cannot evaluate the theological reasoning or logic of religious beliefs.[45]

We think the Court's conclusion here is largely correct. But if, as critics argued, complicity is in the eye of the religious beholder, then any regulation that requires religious adherents to perform acts which they believe make them complicit with sin are almost by definition substantially burdensome to religious exercise.[46] Pursuant to that understanding, the substantial burden standard of infringement imposes no judicially enforceable check on the scope of religious liberty claims.[47]

The critics of this analysis are correct about the impact of the *Hobby Lobby* analysis on the review of alleged substantial burdens in religious liberty claims grounded in complicity. But these are only one kind of free exercise claim, the kind in which the state requires religious adherents to engage in conduct that their religion prohibits. The other kind of religious liberty claim involving laws that penalize or interfere with religious practice typically has nothing to do with complicity. And the Court's analysis of what constitutes a substantial burden in *Hobby Lobby* does nothing to undermine the utility of the substantial burden standard to limit the scope of this kind of religious liberty claim.[48]

Many religious liberty claims are of this latter sort.[49] For example, the core issue in the *Smith* case involved a prohibition against possession of peyote, a substance used in the religious rituals of certain Native

---

43. *Id.* at 723–26.

44. *Id.* at 724–26.

45. *Id. See also* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981) (finding that an individual's struggle to "articulate" their religious beliefs is not grounds to disregard them); United States v. Ballard, 322 U.S. 78, 81 (1944) ("[I]t is immaterial what these defendants preached or wrote or taught in their classes. . . .[T]he religious beliefs of these defendants cannot be an issue in this court.").

46. *See* Corbin, *supra* note 40, at 10; Sepper, *supra* note 37, at 61

47. *See supra* notes 37–40 and accompanying text .

48. Burwell v. Hobby Lobby, 573 U.S. 682, 723–26 (2014).

49. The cases adjudicating restrictions on religious services during the COVID-19 pandemic are examples of this kind of religious liberty claim. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) . Cases involving claims by Native American faiths are often also good examples. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)

American faiths.[50] Complicity was irrelevant to this religious liberty claim. Nor was there any doubt that peyote was being used for religious purposes.[51] Because state law imposed criminal penalties on the possession and use of peyote, a person arrested for doing so would have little difficulty establishing a substantial burden in such a case.[52]

Suppose, however, peyote were legalized, but a state water rationing regulation applicable to the farming of peyote as well as other crops incidentally and slightly increased the cost of purchasing peyote by ten cents per pound. Would that constitute a substantial burden on its use for religious purposes? Or suppose the government regulated the locations where peyote and other drugs could be sold so that some individuals had to travel an extra distance, perhaps several blocks, to purchase the drug. Again, would that extra travel time constitute a substantial burden? For these kinds of laws which penalize or interfere with religious practice, a substantial burden analysis would require some evaluation of the magnitude of the burden and a proximate cause kind of analysis to determine whether the burden was too attenuated to support a viable claim.[53] And nothing in *Hobby Lobby*'s complicity analysis precludes this evaluation as a predicate for determining whether rigorous review should be applied to the state's action.[54]

Under an MFN approach, however, the substantial burden test would have no bearing on the level of review to be applied. If the manufacturer of drugs used for the treatment of cancer were exempt from government regulations which modestly burdened the production of hallucinogenic

---

50. Emp. Div. v. Smith, 494 U.S. 872, 874–76 (1990).

51. *Id.* at 874–78.

52. *Id.* at 893–94 (O'Connor, J., concurring).

53. Elizabeth Sepper notes that

> courts have evaluated burdens along a scale between directness and attenuation. As in tort and criminal cases, courts consider the proximity and necessity of objectors to the purported wrongdoing and the existence of independent intervening acts (or actors) that dilute the connection between the objector and what the objector sees as wrongdoing.

Sepper, *supra* note 37, at 58 (footnote omitted). Abner Greene writes that a substantial burden analysis can "track ordinary ways of thinking about responsibility, from tort and criminal law's use of proximate cause analysis, to common moral understandings of responsibility to those with whom we have direct, chosen connections as stronger than to those with whom we have indirect, often unchosen connections." Abner S. Greene, *A Secular Test for a Secular Statute*, 2016 U. ILL. L. REV. ONLINE 34, 38. Sepper and Greene, however, contend that courts can apply this kind of a substantial burden analysis to both complicity claims and those involving the penalizing of or interference with religious practice. *See id*; Sepper, *supra* note 36, at 58–59. We are unpersuaded by this latter argument. While Chad Flanders worries that a substantial burden test could improperly involve courts in determining and evaluating theological tenets, he concedes that the government's actions must coerce or pressure religious adherents. Attenuated increases in the cost of religious practice or in the difficulty of carrying out religious mandates resulting from general laws should not be held to constitute substantial burdens. Chad Flanders, *Substantial Confusion about Substantial Burdens*, 2016 U. ILL. L. REV. ONLINE 27, 27–28.

54. Burwell v. Hobby Lobby, 573 U.S. 682, 723–26 (2014).

substances, but the government denied comparable exemptions to farmers who grew peyote to be sold to adherents who used it for religious purposes, an MFN analysis would seem to require strict scrutiny review of the denial of the exemption. The difference in treatment between medical and religious exemptions favoring the former would be decisive. The arguably minor increase in cost and the attenuated nature of the burden at issue would seem to be irrelevant to the level of review to be applied.

B. The Problem of Purpose

The more common and forceful response offered by proponents of MFN to the criticism that MFN extends too broadly is that MFN has a limiting principle. It only applies if there is a secular exemption to a law which renders the law underinclusive as to its purpose to the same extent that the denied religious exemption would interfere with the ability of government to effectively further the law's purpose.[55] Thus, strict scrutiny review would only be required in situations when a granted secular exemption and rejected religious liberty exemption claim reflected parallel underinclusivity.[56]

This focus on underinclusivity has some validity. Certainly, not all exemptions to laws are inconsistent with a law's purpose such that granting the exemption would render the law underinclusive as to its objective. The early and classic example of an exemption that does not render a law underinclusive as to its purpose is the exemption from the police department's grooming standards for undercover police officers in *Fraternal Order of Police*.[57] Obviously, the department's purpose in imposing grooming standards to facilitate the identification of police officers was never intended to apply to undercover officers whose duties required them to conceal their identity.[58]

The fact that some such non-underinclusive exemptions exist, however, should not be taken to suggest that the requirement of parallel underinclusivity provides an effective or predictable limiting principle for the application and scope of MFN. The underinclusivity foundation

---

55. *See* Fraternal Ord. of Police v. City of Newark, 170 F.3d 359, 364, 366 (3d Cir. 1999); *supra* notes 25–27 and accompanying text.

56. *See, e.g.*, Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 867 (2001) ("A law that is underinclusive in the sense of failing to restrict certain 'nonreligious conduct that endangers' state interests, 'in a similar or greater degree' than the restricted religious conduct is not generally applicable, at least when the 'underinclusion is substantial, not inconsequential.'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993))); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 196–99 (2002) [hereinafter Brownstein, *False Messiahs*].

57. *Fraternal Ord. of Police*, 170 F.3d at 365–66.

58. *Id.* at 360.

of MFN depends on a determination of the law's purpose. Accordingly, how courts determine the state's purpose becomes a critical factor in understanding the utility of this limiting principle.[59]

In conventional cases, courts defer to the government's assertion of the state's interest under rational basis review.[60] Courts will not independently evaluate, and sometimes reject, the government's assertion of its purpose unless and until they first determine that there is some basis for rigorously reviewing a challenged state action.[61] If that conventional approach of judicial deference applies to MFN, states attempting to avoid strict scrutiny review of their denial of religious liberty exemption claims will be incentivized to explain a law's purpose in a way that negates the argument that secular exemptions render the law underinclusive as to its purpose.[62]

Under rational basis deference, the manipulation of the state's asserted purpose to avoid a finding of underinclusivity may not be that difficult to accomplish. In a case like *Fraternal Order of Police*, for example, a police department might justify grooming standards as promoting the health of officers and their availability for duty. Under that statement of the department's purpose, which is not constitutionally irrational, the medical exemption for some officers from the grooming requirement would be consistent with the department's "health of its officers" purpose.[63] If courts extend this conventional level of deference to the government's statement of its purpose, the lack of underinclusivity will serve as a limiting principle and the scope of MFN will be substantially reduced. The discussion of the state's purpose would arguably become as empty of content and open to manipulation as the analysis of the state's purpose in so many rational basis cases. MFN will primarily provide increased free exercise protection in those (presumably few) cases where

59. Brownstein, *False Messiahs*, *supra* note 56, at 199–202.

60. *See generally* Fed. Commc'n Comm'n v. Beach, 508 U.S. 307 (1993). The Court in *Beach* could not have been more explicit. It explained that further inquiry into the legislature's actual purpose is foreclosed because "a statutory classification that neither proceeds along suspect lines nor infringes fundamental rights must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313–14. The Court added, "On rational basis review, a classification . . . bear[s] a strong presumption of validity. . . . [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 314–15.

61. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) ("[Under the heightened review applied to gender classifications,] [t]he justification [for a law] must be genuine, not hypothesized or invented *post ho* in response to litigation.").

62. *See* Brownstein, *False Messiahs*, *supra* note 56, at 199–202 ("[T]he only way to prevent . . . [a manipulation of purpose] from creating a doctrinal escape hatch a truck could drive through is to apply some rigorous standard of review to whatever purposes the state asserts are being furthered by the challenged law. . . . Otherwise the state will always be able to come up with some rational purpose that is allegedly furthered by the law that is not underinclusive.").

63. *Id.*

the state's attorneys lack the imagination to manipulate the purpose of the government's actions to its advantage.

If MFN is intended to operate as a serious framework for extending the scope of free exercise protection, however—which the language in *Tandon* certainly suggests—complete judicial deference to the government's statement of its purpose would be rejected.[64] Instead, courts would review the state's alleged purpose in adopting a law as to its accuracy and legitimacy under some level of rigorous review, perhaps something akin to the analysis of government purpose under intermediate level scrutiny in gender discrimination cases.[65]

When courts aggressively engage in an independent determination of the state's purpose in adopting laws, there will be an increased likelihood that secular exemptions will be found to be underinclusive, and, accordingly, that the denial of similarly underinclusive religious exemptions will be subject to strict scrutiny review.[66] The impact of MFN in mandating religious exemptions will be magnified. It should also be clear, however, that pursuant to this understanding of MFN, the focus on underinclusivity does not operate as a limiting principle restricting the rigorous review of religious liberty claims for exemptions.[67] Instead, one might argue that the opposite principle applies. MFN requires a showing of underinclusivity; a conclusion of underinclusivity requires a determination of the state's purpose; and an independent, serious evaluation of the state's purpose requires the application of some form of rigorous review. Accordingly, all claims grounded on MFN and the existence of an allegedly underinclusive secular exemption will be subject to rigorous review.[68] It is certainly counterintuitive, but the emphasis on underinclusivity, asserted at least in part to serve as a limiting principle to restrict the scope of rigorous review, may result in an expansive application of rigorous review to all claims grounded in an MFN analysis.

---

64. *See* Tandon v. Newsom, 141 S. Ct. 1296, 1296–98 (2021) ; *supra* notes 4–9 and accompanying text.

65. *See Beach*, 508 U.S. at 313–14 n.6 (leaving open an analysis of government purpose under intermediate level scrutiny in gender discrimination cases).

66. *Id.*

67. *Id.*

68. *Id.* Although he is not as critical of an MFN approach as we are, Nelson Tebbe recognizes the force of this concern. In discussing this issue, he writes,

> In order to determine whether a law is driven by a purpose that applies in the same way to regulated actors and unregulated actors, a court will have to apply heightened scrutiny or something similar. There simply is no alternative—to apply rational basis review to the question of comparability would be to accept the government's assertion that the classes are distinct with respect to its interests.

Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2450–51 (2021) (footnote omitted).

MFN's underinclusivity focus is unconventional in other ways as well. Typically, rigorous review is the culmination of judicial analysis of the constitutionality of state law. Here, one form of rigorous review is the foundation for courts applying an even more rigorous form of scrutiny. The rigorous review of the state's asserted purpose to determine underinclusivity is the predicate for the application of strict scrutiny.[69]

Finally—and this point cannot be overemphasized—an independent judicial analysis of the state's purpose, which may conflict with the government's statement of its asserted goals, will be intrinsically subjective and indeterminate. There are no clear doctrinal rules to guide a court's evaluation of purpose. Much may depend on idiosyncratic conclusions based on the generality of the analysis and judicial predilections as to the legitimacy of state goals.

Thus, for example, consider a state that provides a medical exemption from a mandatory COVID-19 vaccine requirement for adults. Under an MFN analysis, would the refusal to grant a religious exemption be subject to strict scrutiny review? Religious claimants may argue that because the purpose of the vaccine requirement is to further the public health purpose of preventing contagion, the medical exemption to the vaccination mandate would seem to be underinclusive. The state may respond by asserting that its purpose is protecting health at a higher level of generality which would include protecting the health of the vaccinated individual as well as the health of the community. At that level of generality, the medical exemption is not underinclusive because it furthers the health of the exempt individual; one of the same purposes the state is attempting to further with the vaccine mandate. The religious claimant may respond that the state does not typically mandate vaccination to protect the health of adults (where there is no public health concern) out of respect for the autonomy and dignitary rights of adult individuals to determine the medical treatment they receive. Accordingly, the higher generality purpose asserted by the state should not be accepted. The only state purpose deserving judicial respect is the public health goal and as to that purpose, the medical exemption is underinclusive. We offer no opinion as to how this dispute should be resolved. We do think it provides an example of a situation where conclusions as to purpose under an MFN analysis will be subjective and indeterminate.

For the purposes of this Article, we are assuming that courts will take MFN seriously and will independently evaluate the state's purpose to implement an MFN analysis. Given the breadth, complexity,

---

69. Fed. Commc'n Comm'n v. Beach, 508 U.S. 307, 314 (1993). *See* Brownstein, *False Messiahs*, *supra* note 56, at 201 (describing MFN as requiring "a double standard of review").

indeterminacy, and practical difficulties intrinsic to this approach, one would think that there are powerful justifications for courts adopting it. In this Article, we try to evaluate and critique support for an MFN analysis.

C. The Problem of Precedent

One possible justification for MFN is that it is at least grounded in precedent, even if not dictated by it. MFN is, the suggestion would run, a permissible elaboration of the framework sketched out by the Court in *Smith* and fleshed out in *Church of Lukumi Babalu Aye v. Hialeah*.[70] Even if MFN could be defended as a permissible doctrinal development based on the Court's analysis in *Smith*, and we are not persuaded that it is, one would be hard-pressed to insist that it is a required development. Thus, the need for further justification for MFN would continue. In point of fact, however, the attempt to link MFN to the Court's reasoning in *Smith* is entirely unpersuasive.

In making this argument, we do not intend to suggest that the Court's analysis in *Smith* is meritorious.[71] But if MFN is to be defended as a doctrine that is faithful to *Smith* as precedent, it can hardly reject the core reasoning of the *Smith* analysis. Taking MFN seriously, however, repudiates the primary concerns Justice Scalia identified in *Smith* as the basis for the Court's unexpected and controversial decision in that case.[72]

From Justice Scalia's perspective, the contention that laws that substantially burdened the exercise of religion should receive strict

---

70. Emp. Div. v. Smith, 494 U.S. 872, 884–85 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–40, 543–46 (1993). In *Lukumi*, the Court arguably opened the door to an MFN analysis because it examined the treatment of comparable secular activities in determining that the challenged law banning animal sacrifices was neither neutral nor generally applicable. The Court's analysis and holding focused on "religious gerrymandering," however, it did not extend to the MFN situation in which both religious and secular exemptions were denied, but one secular exemption was granted.

71. One of us, at least, has been harshly critical of Justice Scalia's arguments in *Smith* and the *Smith* holding for the last thirty years. *See, e.g.*, Brownstein, *False Messiahs*, *supra* note 56, at 213 (concluding a long article, much of which is critical of *Smith*, with the words "*Smith repudiendus est*."). As a footnote explains, this is intended to mean "*Smith* must be overruled." *Id.* at 213 n.310. *See* ADRIAN GOLDSWORTHY, THE PUNIC WARS 333 (2000) (quoting Marcus Porcius Cato) ("'Carthage must be destroyed' [Carthago delenda est]"). "*Smith* improdandus est" or "*Smith* rejectiendus est" probably conveys the same idea. This language is anachronistic and out of context, according to Latin experts, but it provides an aesthetic parallel to Cato's Carthage quote. A more authentic expression that a medieval clerk might use to convey the idea is '*Smith irretetur et pro nollo habeatu*,' but it lacks the symmetry of the shorter statements." Brownstein, *False Messiahs*, *supra* note 56, at 213 n.310.

72. *See* David B. Frohnmayer, Employment Division v. Smith*: The Sky That Didn't Fall*, 32 CARDOZO L. REV. 1655, 1665 (2011) ("We quickly discovered that the five-person majority had decided the case on the basis of an argument that was never briefed, never argued, never made, and frankly, never fully imagined by the parties. We all assumed that *Sherbert* would be the controlling doctrine.").

scrutiny review was flawed in two related respects.[73] On the one hand, if we took the standard seriously, and applied strict scrutiny with absolute rigor, it provided far too much protection to individuals who objected to complying with laws that ostensibly conflicted with the obligations of their faith.[74] The scope of the doctrine was untenable.[75] It courted anarchy and provided anyone who asserted a sincere challenge to a law a get-out-of-jail-free card.[76] On the other hand, if strict scrutiny were reduced in rigor, judges would be required to balance the individual's right to exercise their faith free from state interference against the conflicting state interests supporting the law under review.[77] To Justice Scalia, this balancing analysis was hopelessly subjective and indeterminate.[78] It was much more properly the prerogative of the legislature than the judiciary, much more a matter of political decision-making rather than constitutional adjudication.[79]

Accordingly, any doctrinal development reflecting the core reasoning of the *Smith* decision would operate within these two constraints. It would accept the need to limit the scope of constitutionally mandated free exercise exemptions and it would reject an approach requiring judges to engage in subjective and indeterminate decision-making. MFN fails to respect either constraint.[80] Put simply, it is a repudiation of *Smith* rather than an extension of it.[81]

If MFN is not faithful to, much less dictated by, *Smith* (and we think it clearly is not), it can arguably be defended as an attempt to circumvent the unreasonably truncated understanding of free exercise rights set out in *Smith*. This is a perfectly understandable position to be taken by lawyers working to protect the religious liberty interests of their clients against ostensibly neutral laws of general applicability. If the Court remained committed to the *Smith* holding, attorneys had little choice but to find some way to argue that *Smith* did not apply. But this explanation of advocacy for MFN can hardly justify its adoption by the Supreme Court itself.

---

73. *See Smith*, 494 U.S. at 888–89.

74. *See id*. at 888 ("The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . .").

75. *Id.*

76. *Id.* at 888–89 (noting a rigorously applied strict scrutiny regime could conceivably require religious exemptions from civic obligations like payment of taxes, compulsory vaccination laws, traffic laws, child labor laws, animal cruelty laws, and more).

77. *Id.*

78. *Id.* at 889 n.5.

79. Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

80. *See supra* notes 73–80 and accompanying text.

81. *See, e.g.*, James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 730 (explaining that MFN "would largely eviscerate" *Smith*'s rule against constitutionally mandated religious exemptions); Brownstein, *False Messiahs*, *supra* note 56, at 195–96.

D. The Problem with Privileging Religion by Protecting It against Being Devalued

Moving beyond the case law, what theoretical justification might support an MFN analysis? The substantive justification offered by some proponents of MFN is that the analysis is grounded on a core foundational idea: government cannot devalue religion by treating any secular interest, including public health and access to medical care, more favorably than any comparable religious belief or practice without satisfying strict scrutiny review.[82] Exactly how are we to evaluate this contention that government can never treat any secular interest more favorably than any religious belief or practice unless it can justify doing so under strict scrutiny review?

As a matter of plain meaning and commonsense intuition, the contention seems divorced from our general understanding of the way that constitutional liberty rights are recognized and protected. We do not typically insist that the exercise of a right can never be devalued in the sense that some other activity is assigned a relatively greater value than the fundamental right in particular contexts.

For example, assume a city ordinance for obvious safety reasons requires all private parties, including organized parades, traveling through public streets to obey relevant traffic rules and stop at traffic lights and stop signs. However, there is an exception. Private ambulances driving patients to the hospital are exempt from these requirements. Courts uphold the ordinance against a free speech challenge. There is no recognized right for a caravan of car protestors to receive the same exemption from traffic laws afforded to ambulances on the grounds that the failure to do so treats speech less favorably than public health and safety.

Under an MFN analysis, however, if a parade of vehicles were engaged in a religious practice, perhaps to celebrate a religious holiday, should it be permitted to ignore red lights and stop signs while traveling through city streets? Is treating religious activity differently than hospital-bound ambulances constitutionally problematic because it is impermissibly disrespectful and demeaning to the exercise of religion to provide relatively more favorable exemptions for emergency medical vehicles than religious holiday celebrations? Can the state justify the denial of the religious exemption under strict scrutiny review by asserting the importance of ambulances reaching hospitals as quickly as possible? Or

82. *See, e.g.*, Berg & Laycock, *supra* note 11 ("This 'devaluing' can happen even when only a small number of other interests are left unregulated. When the government deems some private interests and activities sufficiently important to protect and others insufficiently important, religious exercise should be treated like the important interests, not the unimportant ones. Religious exercise is an interest deemed important by the constitutional text.").

would courts have to evaluate whether less restrictive alternatives exist for promoting traffic safety, such as hiring overtime police to shepherd the religious parade through intersections, rather than insisting that conventional traffic regulations must be obeyed?

While the protection of free exercise rights may arguably extend beyond conventional intuitions, a deeper analysis of the MFN concern about devaluing religion is necessary to support such an approach. Constitutional requirements relating to religion are particularly complicated because church-state relationships implicate multiple constitutionally salient values. Constraints on the freedom to practice one's faith raises liberty interests.[83] Discrimination against individuals who hold or reject particular religious beliefs is inconsistent with equality commitments.[84] State action favoring or disfavoring expressive religious practices or activities brings freedom of speech concerns into play.[85] Because of religion's distinctive, multi-dimensional nature in the constitutional scheme of things, religion clause doctrine may not track precisely the jurisprudence of other more unidimensional fundamental rights. Still, looking at free exercise rights in terms of the theoretical foundation and doctrinal protection of other liberty and equality rights should provide a valuable basis for evaluating the justification for MFN.

The idea that government cannot "devalue" the exercise of a right by treating some secular interest more favorably than the protection afforded the right is not lodged comfortably in the jurisprudence of fundamental liberty rights.[86] There is not much of any formal pedigree for applying this approach to other liberty rights.[87] Courts typically determine whether to review laws alleged to abridge liberty rights under rigorous

---

83. *See, e.g.*, DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 42 (2016) ("[R]eligious 'liberty' means religious voluntarism, that is the freedom to make religious choices for oneself, free from governmental compulsion or improper influence"); Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95–102 (1990) [hereinafter Brownstein, *Harmonizing the Heavenly*] ("[F]ree exercise of religion is . . . part of that basic autonomy of identity and self-creation which we preserve from state manipulation . . . .").

84. CONKLE, *supra* note 83, at 43–44 (noting the importance of religious equality in Religion Clause jurisprudence); Brownstein, *Harmonizing the Heavenly*, *supra* note 83, at 102–12 (discussing the overlap between Religion Clause and Equal Protection Clause principles in protecting religious equality).

85. *See generally* Brownstein, *Harmonizing the Heavenly*, *supra* note 83; Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 268–78 (1999) [hereinafter Brownstein, *Religious Clauses*] (examining religion and speech); Brownstein, *False Messiahs*, *supra* note 56, at 119–80 (providing an in-depth analysis of religion and speech).

86. *See generally* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994) [hereinafter Brownstein, *How Rights Are Infringed*].

87. *See infra* notes 89–91 and accompanying text.

scrutiny by examining the effect of the law, the law's content, or in rarer cases, the legislature's motive in enacting the law.[88] Focusing on whether some secular interest is valued more than the exercise of the right as the predicate for heightened scrutiny would seem to be a constitutional anomaly.

Further, the "avoid devaluing religion" justification for MFN is not only anomalous but would also seem to privilege the protection provided to religious exercise over all other fundamental liberty rights. Fundamental liberty rights are political or social interests and, other than the Free Exercise Clause, are considered to be generically secular in nature. That is, the right to marry, to travel, to vote, to keep and bear arms, to access reproductive medical care, and other rights commonly exercised to serve secular purposes (although they may be exercised in a specific instance for religious reasons), are protected when they further secular goals, and in that sense may be characterized as secular liberty rights. Accordingly, under MFN, if the state provides a discretionary accommodation for the exercise of one of these rights beyond constitutional requirements, it would be obligated to grant comparable accommodations to religious exercise. The failure to do so would impermissibly devalue religion unless it could be justified under strict scrutiny review. Pursuant to MFN, it would seem that religious liberty cannot be placed lower in the hierarchy of fundamental liberty interests than other rights.

But there is no similar obligation that applies to guarantee the relative value of any and all secular rights if a discretionary exemption is granted to religious exercise. One would think that under the logic of MFN, the failure to grant a comparable exemption to other fundamental rights when a free exercise exemption is granted devalues those rights. However, MFN would seem to be a one-way ratchet. Only the devaluing of religion matters. If the devaluing of secular fundamental liberty rights relative to free exercise rights is ignored and has no constitutional significance, however, it is difficult to avoid the conclusion that free exercise rights occupy a more highly valued place on the hierarchy of constitutional rights.

So, for example, assuming that underinclusivity criteria are satisfied, if a reproductive health care clinic is exempt from certain pandemic

88. *See* Brownstein, *How Rights Are Infringed*, *supra* note 86, at 870, 893–94 (identifying a law's effect or purpose in many cases as determinative of judicial inquiry into the appropriate standard of review to apply). Most equal protection cases and most free speech cases reviewing content discriminatory laws focus on the content of the challenged legislation to determine the standard of review. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155 (2015) (holding that a law that discriminates on the content of speech on its face must receive strict scrutiny review); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("[Laws] [c]lassifying persons according to their race [are] . . . . subject to the most exacting scrutiny").

restrictions that would otherwise limit access to the facility, religious institutions must be granted comparable exemptions. But there would be no symmetrical constitutional obligation (even before *Dobbs* repudiated constitutional protection for reproductive autonomy)[89] requiring the state to provide exemptions to reproductive health care clinics comparable to discretionary exemptions from pandemic regulations granted to religious institutions. Similarly, if a state allows parents to travel to visit children in another state during a pandemic (out of respect both for the right to travel and familial rights), under MFN, it may be required to allow people to travel out-of-state for religious purposes, but (again) not vice versa. Importantly, this privileging of religion does not seem to be recognized, much less explained and defended, by the emerging Court majority seemingly attracted to MFN-style reasoning.[90]

Potentially, this privileging of religious exercise rights can be mitigated in some circumstances by courts recognizing that many religious practices and activities are sufficiently expressive in nature to require the review of their accommodation under free speech doctrine.[91] The Court has repeatedly held that discrimination against expressive religious activities constitutes viewpoint discrimination which can only be justified by strict scrutiny review.[92] This prohibition against viewpoint discrimination, of course, should apply with the same force to state action that discriminates in favor of expressive religious activities as it does to government decisions that discriminate against expressive religious activities.[93] A commitment to this doctrinal principle, a long-standing staple of free speech case law, would offset, to some extent, the tendency of MFN to operate asymmetrically. The exemption or accommodation of expressive religious activities would require the state to provide exemptions or accommodations to comparable expressive secular activities. The justification for mandating such even-handed treatment, however, would be grounded in conventional free speech concerns about distorting debate rather than a focus on the devaluing of secular speech. Candor, however, requires the concession that the Court has not addressed the free speech implications of religious exemptions in recent cases, and it is unclear to us whether and how free speech review would be employed to temper an MFN analysis.[94]

---

89. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

90. In *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), for example, the Court seems oblivious to the fact that its ruling will privilege religious gatherings over secular associational gatherings and secular entertainment venues. *See supra* notes 4–10 and accompanying text.

91. *See* Brownstein, *False Messiahs*, *supra* note 56, at 121–23 .

92. *See generally* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

93. *See* Brownstein, *False Messiahs*, *supra* note 56, at 164–72 .

94. *See generally id.*

E. The Problematic Inconsistency between MFN and the Generally Accepted Nature of Religious Liberty

In addition to the anomalous nature of MFN compared to other liberty rights and the privileging of religion it appears to require, there are serious questions about the basic understanding of religious liberty implicit in this approach. In important ways, one may argue that MFN fundamentally misunderstands and mischaracterizes the very nature of religious liberty for constitutional purposes. What exactly does it mean to suggest that government has a distinctive constitutional responsibility not to devalue religion by recognizing the importance of arguably comparable secular interests? Or, to cast the question in related but somewhat different terms, why should one believe that it is any of the government's business to assign some value to religion, much less that the Constitution requires it to do so?

Clearly, there are some fundamental rights that are protected because we value the social utility of the exercise of the right. Indeed, it is often in the nature of some such rights that the government must play a role in the way the right is exercised. Voting is a classic and obvious example. It is far from clear that the free exercise of religion belongs in this category of socially utilitarian rights that the state is intended to promote or to which the state should assign some special value.[95] Indeed, the existence of the Establishment Clause, the free speech constraints on viewpoint discrimination described above, the regularly repeated acknowledgment in the case law of the constitutional importance of government neutrality toward religion, all ostensibly point in the opposite direction.[96] Government should not be taking sides in religious debates among faiths or between secular and religious belief systems.[97] The free exercise of religion is predominately a dignitary right, rather than a right

95. *Compare* JOHN GARVEY, WHAT ARE FREEDOMS FOR? 49–54 (1996) (surveying a variety of arguments in favor of protecting religious freedom), *with* Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 793–813 (1998) (responding critically to Garvey's arguments aimed at justifying protection of religious exercise).

96. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a religious belief or disbelief in any religion."); Van Orden v. Perry, 545 U.S. 677, 709–11 (2005) (Stevens, J., dissenting) ("The first and most fundamental of these principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality . . . .").

97. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) ("But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."); LUPU & TUTTLE, *supra* note 36, at 6 ("[The disestablishment] principle limits the state's power to privilege religion over analogous nonreligious beliefs and practices. . . . [and] constrains government decisions to exempt religious adherents from general laws that burden their exercise of religion, where the exemptions require government officials to make substantive judgments about the religious meaning or importance of the burdened activity.").

that is protected to further specific instrumental goals.[98]

We do not suggest that religion lacks all instrumental value. Historically, many Americans and the leaders of our country assigned considerable value to religion.[99] George Washington famously exclaimed, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . ."[100] More specifically, religion serves as an independent source of moral values, and as such, it can be employed to monitor government actions and operate as a check on government abuses of power.[101] Most movements for social change throughout American history were substantially influenced by religious ideas and received considerable support from religious individuals and organizations.[102]

However, the picture is hardly, much less entirely, one-sided. Assigning instrumental value to religion did not necessarily correlate with a commitment to religious liberty, or at least not to a commitment to religious liberty as it is currently understood. Some leaders who valued religion were supportive of state establishments of religion.[103] Others were selective in identifying those faiths whose liberty should be protected.[104] Many of the founders, for example, as well as many other

98. *See* Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 207–11 (2013) [hereinafter Brownstein, *Protecting the Religious Liberty*] (explaining why the religious liberty of individuals is "essentially a dignitary right"); Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 91 (2006) [hereinafter Brownstein, *Taking Free Exercise Rights Seriously*] ("The instrumental value of religion is secondary at best."). *See generally* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008). Lupu and Tuttle suggest that a critical justification for protecting religious liberty is that "religion is special because of its constitutive role in human identity and well-being. But religious experience and commitment can be authentic only if they are freely chosen." LUPU & TUTTLE, *supra* note 36, at 22.

99. *See, e.g.*, CONKLE, *supra* note 83, at 11–14, 35 (explaining that the founders grounded their beliefs in religious liberty on theological, not secular, foundations); STEVEN WALDMAN, SACRED LIBERTY: AMERICA'S LONG, BLOODY, AND ONGOING STRUGGLE FOR RELIGIOUS FREEDOM 42 (2019) ("[A]lmost all of the founders believed that religion was important to the health of the Republic."); Brownstein, *Protecting the Religious Liberty*, *supra* note 98, at 208 ("[A]s a historical matter, many American leaders believed that a commitment to religious beliefs by citizens was instrumentally necessary to an orderly, good, and democratic society.").

100. WALDMAN, *supra* note 99, at 41.

101. *See, e.g.*, BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION 162 (1997) ("Religious institutions serve as additional means of checking the power of government."); Corwin Smidt, *Religion, Social Capital, and Democratic Life: Concluding Thoughts*, *in* RELIGION AS SOCIAL CAPITAL: PRODUCING THE COMMON GOOD 211, 221 (Corwin Smidt ed., 2003) ("In its public role, religion may serve as one of the voices to which political power should be responsive in the formulation of public policy.").

102. *See* WALDMAN, *supra* note 99, at 7 (describing the ways in which religious freedom has played a role in creating a "more perfect Union," specifically by fueling significant social movements).

103. *Id.* at 41–42. *See also* Barnes v. First Parish in Falmouth, 6 Mass. 401, 406 (1810) (defending Massachusetts's establishment of religion).

104. *See generally* Brownstein, *Protecting the Religious Liberty*, *supra* note 98.

Americans were overtly anti-Catholic although they couched their animosity in defense of religious liberty.[105] Further, while religion influenced dissenters who challenged government and the established order including the abolitionists, those who worked to help the poor, and contemporary civil rights activists,[106] religion was equally employed by those who defended the state and the existing power structure. Slaveholders, Social Darwinists, and segregationists all found support for their beliefs and actions in scripture.[107]

---

105. *See, e.g.*, *id.* at 223–33 (describing the pervasiveness of anti-Catholic sentiments and the conviction that Catholicism was a threat to the religious liberty of American Protestants); WALDMAN, *supra* note 99, at 65–79 (surveying the anti-Catholic beliefs and actions of the 1830s, 1840s, and 1850s).

106. *See generally* J. Albert Harrill, *The Use of the New Testament in the American Slave Controversy: A Case History in the Hermeneutical Tension Between Biblical Criticism and Christian Moral Debate*, 10 RELIGION & AM. CULTURE: J. INTERPRETATION 149 (2000) (describing religious arguments by both abolitionists and proponents of slavery); Daniel J. McInerney, *"A Faith for Freedom": The Political Gospel of Abolition*, 11 J. EARLY REPUBLIC 371 (describing how abolitionists were guided by, and drew from, their faith and religious convictions); RELIGION AND THE ANTEBELLUM DEBATE OVER SLAVERY (John R. McKivigan & Mitchell Snay eds., 1998) (discussing religious arguments by both abolitionists and proponents of slavery); BERTRAM WYATT-BROWN, LEWIS TAPPAN AND THE EVANGELICAL WAR AGAINST SLAVERY (1997) (describing religious support for the abolitionists); Harry Murray, *Dorothy Day, Welfare Reform, and Personal Responsibility*, 73 ST. JOHN'S L. REV. 789 (describing religious support for adequate social welfare policies that treated the poor with dignity); David O'Brien, *American Catholics and Organized Labor in the 1930's*, 52 CATH. HIST. REV. 323 (1966) (describing religious support for union movement); John T. McGreevy, *Racial Justice and the People of God: The Second Vatican Council, the Civil Rights Movement, and American Catholics*, 4 RELIGION & AM. CULTURE: J. INTERPRETATION 221 (1994) (describing religious support for the civil rights movement); Dennis C. Dickerson, *Religious Intellectuals and the Theological Foundations of the Civil Rights Movement, 1930–55*, 74 AM. SOC'Y CHURCH HIST. 217 (2005) (describing religious support for the civil rights movement); James F. Findlay, *Religion and Politics in the Sixties: The Churches and the Civil Rights Act of 1964*, 77 J. AM. HIST. 66 (1990) (describing religious support for the civil rights movement).

107. *See generally* NOEL RAE, THE GREAT STAIN: WITNESSING AMERICAN SLAVERY (2018); JOHN PATRICK DALY, WHEN SLAVERY WAS CALLED FREEDOM: EVANGELICALISM, PROSLAVERY, AND THE CAUSES OF THE CIVIL WAR (2002); Larry R. Morrison, *The Religious Defense of American Slavery Before 1830*, 37 J. RELIGIOUS THOUGHT 16, 16–29 (1980); STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (2002); Michelle E. Martin, *Philosophical and Religious Influences on Social Welfare Policy in the United States: The Ongoing Effect of Reformed Theology and Social Darwinism on Attitudes Toward the Poor and Social Welfare Policy and Practice*, 12 J. SOC. WORK 51, 51–64 (2010); Tara Isabella Burton, *The Prosperity Gospel Explained: Why Joel Osteen Believes That Prayer Can Make You Richer*, VOX (Sept. 1, 2017; 4:20PM), https://www.vox.com/identities/2017/9/1/15951874/prosperity-gospel-explained-why-joel-osteen-believes-prayer-can-make-youricher-rich-trump [https://perma.cc/B653-76Q8]; SIDNEY FINE, LAISSEZ-FAIRE AND THE GENERAL-WELFARE STATE, 1865-1901 117–25 (1956); HENRY F. MAY, PROTESTANT CHURCHES AND INDUSTRIAL AMERICA (1949); JEMAR TISBY, THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH'S COMPLICITY IN RACISM (2019); ALAN CROSS, WHEN HEAVEN AND EARTH COLLIDE: RACISM, SOUTHERN EVANGELICALS, AND THE BETTER WAY OF JESUS (2014); William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657,

Perhaps most importantly, one may reasonably question whether religious beliefs or institutions are distinctively more valuable as a monitor and check on government wrongdoing than beliefs and institutions grounded on secular foundations. One plausible answer to that question suggested that religion could be especially trusted to be a more reliable check on government than secular ideologies because religion is more independent from the state.[108] This argument was more convincing when the Establishment Clause was interpreted to limit religious institutions from receiving state funds and becoming dependent on the financial support of government.[109] Establishment Clause constraints on state aid to religion precluded faith-based institutions from operating under the admonition that whoever takes "the King's shilling" is the King's man.[110] However, recent dramatic changes in Establishment Clause doctrine, which have all but obliterated constitutional limits on the government funding of religion, have effectively undermined the persuasive force of this argument.[111]

Further, it may be that in the late 1700s, adherence to religious beliefs was overwhelmingly common and considered a predicate to being a moral person.[112] But in 2022 in a society in which 30 percent of the population identifies itself as religiously unaffiliated,[113] the equation of religious belief and public morality seems dubious. One can understand the Court's decision in *Wisconsin v. Yoder* to protect the ability of Amish families to educate their children in their faith-based communities rather

---

659–77 (2011); David L. Chappell, *Religious Ideas of the Segregationists*, 32 J. AM. STUD. 237, 237–62 (1998). Some court cases evidence religious support for segregation. *See e.g.*, Loving v. Virginia, 388 U.S. 1, 3 (1967) (discussing how the trial judge defended the state's anti-miscegenation law by pointing to religious justification for prohibiting inter-racial marriage); Bob Jones Univ. v. United States, 461 U.S. 574, 577 (1983) (adjudicating a claim by a religious college challenging the IRS policy denying tax exemptions to faith-based schools that practice race discrimination).

108. *See, e.g.*, Frederick Mark Gedicks, *Towards a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 161–62.

109. *See, e.g.*, Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1706–08 (2011); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 798–99 (2002).

110. Brownstein, *supra* note 109, at 1706–08; Blasi, *supra* note 109, at 798–99.

111. *See, e.g.*, Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246, 2249 (2020) (holding that application of state no-aid provision discriminated against religious schools and the families whose children attended or hoped to attend them was in violation of the Free Exercise Clause); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (holding that state policy violated the Free Exercise Clause by denying the Church an otherwise available public benefit on account of its religious status).

112. *See supra* notes 100–103 and accompanying text.

113. Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), https://www.pewforum.org/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/ [https://perma.cc/3VTL-3Z69].

than public high schools as a commitment to the dignitary nature of free exercise rights.[114] It is far less persuasive to suggest that the Amish are a more trusted monitor and check on government wrongdoing than the followers of the philosophy of Henry David Thoreau.[115]

To the contrary, one may argue with considerable power that the Constitution does not protect religious exercise because of the special value of religion to society or to the constitutional scheme. The Constitution does not assign some heightened value to religious belief and practices over and above the myriad secular interests the state considers to be worthy of protection.[116] Instead, we protect the free exercise of religion because we do not want the state, and that includes members of the judiciary, to interfere with the personal dignity inherent in religious choice and the voluntary association of religious individuals.[117] Put simply, we do not trust the state to make judgments about religion, one way or the other. And, accordingly, we do not expect the state to exercise its regulatory power in a way that involves the monitoring of its treatment of secular interests to guarantee that no such interest is valued more than some exercise of religion.

This distinction between protecting an interest the state should value and maintaining the private integrity of individual choice with regard to an interest is important for protecting religious liberty. It helps to explain the continuing constitutional commitment by religious majorities to the protection of minority faiths, the beliefs of which are often considered both false and potentially dangerous. In the vastly pluralistic society of the American religious landscape throughout its history, the beliefs and practices of some faiths are considered entirely without merit or value by the adherents of other religions.[118] Yet, for the most part, the perceived lack of value of these faiths does not preclude their eligibility for protection against state interference. What then explains and justifies protecting the religious liberty of individuals whose beliefs are deemed by some to lack merit?

Religious individuals who support religious liberty for adherents of

---

114. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

115. *Id.* at 215–16 (stating that the protection provided to the Amish to be exempt from compulsory education requirements applicable to children over the age of fourteen would not be available to followers of Thoreau's individualistic philosophy).

116. *See, e.g.*, LUPU & TUTTLE, *supra* note 36, at 3–6; Brownstein, *supra* note 95, at 793–805 (; Brownstein, *Harmonizing the Heavenly*, *supra* note 83, at 95–102 (

117. Michael McConnell, *Religious Participation in Public Programs—Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 173, 175 (1992) ("[T]he Free Exercise Clause protects religious 'choice' in the sense that it recognizes the individual believer as the only legitimate judge of the dictates of conscience . . . . [and] protect[s] the freedom to act in accordance with the dictates of religion, as the believer understands them.").

118. *See, e.g.*, Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L. J. 504, 523–27 (2003); WALDMAN, *supra* note 109, at 65–79, 97–117.

faiths they believe to be false do not do so because they believe the faith communities receiving protection are moral or correct. The justification for protecting false faiths do not depend on the accuracy or value of what is believed. At its core, religious liberty recognizes the deeply felt need of individuals to determine religious truth for themselves and the right to live one's life authentically in accordance with one's religious identity.[119]

F. The Problem of MFN's Inconsistency with Free Exercise Doctrine

Further, the struggle American courts have experienced in providing protection to religious exercise reflects the varied interests at issue in church-state disputes. Still, it is difficult to avoid the conclusion that what is of paramount importance is preventing the state from making judgments about religion rather than implementing some constitutional imperative guaranteeing state recognition of the value of religion. The focus of free exercise doctrine has been the dignity of religious choice, not the value of religious beliefs. For example, judicial decisions about the centrality of religious beliefs or practices would almost certainly make it easier for courts to balance free exercise rights against competing state interests.[120] This is no small matter because standards of review involving balancing have been an important vehicle for protecting free exercise rights.[121] Thus, facilitating judicial balancing arguably facilitates the protection courts can provide to religious exercise. Notwithstanding the utility of a centrality analysis, however, such an approach has been rejected, and correctly so, because it would involve courts in valuing the importance of religious beliefs and obligations to a faith community.[122]

Courts are not only unwilling to consider the centrality of religious beliefs to an organized religion,[123] they also do not require free exercise claimants to ground their beliefs in any organized or shared faith.[124] Any sincerely held religious belief, no matter how idiosyncratic or divorced from collective acceptance it may be, is sufficient to warrant

---

119. Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodations of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 407 (2010) .

120. By limiting free exercise protection to beliefs and practices that were central to a claimant's faith, courts would avoid the difficulty of having to balance state interests which interfered in any way with religious exercise. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Assoc., 485 U.S. 439, 449–50 (1988); *id.* at 473–75 (Brennan, J., dissenting); Emp. Div. v. Smith, 494 U.S. 872, 886–87 (1990) .

121. *Smith*, 494 U.S. at 894–95 (O'Connor, J., dissenting).

122. *Id.* at 887 ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of different religious claims.'"); *Lyng*, 485 U.S. at 449–50, 457–58.

123. *Smith*, 494 U.S. at 886–87; *Lyng*, 485 U.S. at 449–50, 457–58.

124. *See, e.g.*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981).

constitutional recognition and protection.[125] It is not difficult to understand why courts protect such isolated believers in the name of personal dignity and authenticity.[126] It is much more difficult to explain why courts, government, or society in general should assign some special value to such isolated beliefs.

Indeed, not only are courts unwilling to evaluate the importance of religious beliefs or commitments to a religion, they also have been unable to provide a working, operational definition of religion.[127] Surely, one would expect that constitutional principles grounded on the value assigned to religion would require some clear understanding of what it is that deserves this special constitutional recognition and protection. It is an odd mandate that prohibits government from devaluing religion while failing to define what constitutes the exercise of the right deserving this kind of relative respect.

The failure to provide a definition of religion for free exercise purposes makes considerable sense if our primary constitutional concern is restricting government and judicial judgments about religion. Courts are justifiably wary that by attempting to identify and distinguish religion from non-religion, judges would inevitably be involving themselves with questions about the nature, value, and meaning of religion—a precarious and constitutionally problematic undertaking.[128] Rather than allowing judges to enter this forbidden territory, courts accept the personal sincerity of the believer as the determining factor to resolve whether beliefs constitute religion for free exercise purposes.[129] While one may question whether reliance on sincerity is an adequate basis for identifying

---

125. *Id.* ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.").

126. As the Court in *Thomas* explained, courts do not second-guess the way that individuals understand their religious beliefs. "Here, the religious claimant 'drew a line' [as to what his religious beliefs permit him to do] and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715.

127. CONKLE, *supra* note 83, at 60 ("[T]he Supreme court has never adopted a constitutional definition [of religion] as such, and, indeed it has offered no more than partial and sometimes conflicting suggestions."); MICHAEL W. MCCONNELL, THOMAS C. BERG, & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION (4th ed. 2016) ("[T]he Supreme Court has never provided an authoritative definition of the constitutional term [religion]."); Brownstein, *Taking Free Exercise Rights Seriously*, *supra* note 98, at 68–70 ("[I]t is fair to say that no attempt to define religion has won sufficiently wide support to be accepted as providing the answer to this problem.").

128. *Thomas*, 450 U.S. at 715–16 ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner . . . more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

129. *See, e.g.*, CONKLE, *supra* note 83, at 69–74 ; JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS LIBERTY 168–69 (1998) ("[For] [t]he majority of judges in *Ballard* . . . [t]he test of belief being religious was the sincerity with which the belief was held."); *see also* United States v. Ballard, 322 U.S. 78, 87 (1944) .

religious exercise for any purpose, judicial commitment to this understanding of religion certainly reinforces the idea that we protect religion by keeping it free from state involvement and judgment, not by assigning value to its purported exercise.

The intrinsically fluid and indeterminate understanding of religion in American jurisprudence, reflected in part by the lack of objective criteria for defining religion, undermines the practicality as well as the conceptual foundation of an MFN approach. Religious exemptions may do more than prevent the state from interfering with the ability of individuals to comply with the dictates of their faith. In some circumstances, they will allow claimants to escape burdens they deem particularly disagreeable for secular reasons, or provide them material secular benefits they would not otherwise be eligible to receive under law. Conscientious objectors who are exempt from conscription and the risks and burdens of military service are an obvious example. Or consider an accommodation which allows religious employees to take a weekend day off from their required work schedule to observe their Sabbath. Weekend days off may be prized by both religious and non-religious employees as opportunities to spend time with one's family or to engage in various valued non-vocational activities that in our society are often scheduled on Saturday or Sunday.[130]

Exemptions which result in positive secular externalities for claimants are problematic for multiple reasons. They privilege the religious claimant as is the case when the exemption for Sabbath observers allows them to displace the weekend days off to which non-religious employees would otherwise be entitled. When constitutionally mandated religious exemptions result in secular benefits being made available to virtually all religious claimants and only a few secular beneficiaries, the criticism of religious privileging would be acute. More problematically from a free exercise perspective, these benefits create incentives that may induce individuals to affiliate with a faith or to engage in religious observance to justify receipt of secular benefits. This distortion of decision-making conflicts with the overriding constitutional principle that religion should be a matter of voluntary choice uninfluenced by state involvement.[131] Finally, religious exemptions providing material secular benefits risk increased assertions of sham claims by individuals who have no actual faith-based foundation for their demand for accommodations.[132]

---

130. Brownstein, *Taking Free Exercise Rights Seriously*, *supra* note 98, at 70–78 (emphasizing both the religious and secular benefits conferred when public employers exempt religious employees from having to work on their Sabbath).

131. *See, e.g.*, CONKLE, *supra* note 83, at 42–43 .

132. Brownstein, *Taking Free Exercise Rights Seriously*, *supra* note 98, at 70–78 (explaining the

The existence of material secular benefits is a problem for any legal framework exempting religious individuals from the burdens of otherwise applicable law. We do not contend that this concern precludes religious exemptions generally and we recognize that it is not unique to MFN. Moreover, in pre-*Smith* cases like *Sherbert v. Verner*, the Court rejected the idea that state speculation about the risk of sham claims would justify a blanket denial of religious exemptions in a system which accepted individualized hardship exceptions.[133]

However, MFN may exacerbate this problem. After all, any secular exemption ostensibly opens the door to a range of alleged religious exemption claims without regard to the secular benefits that may accrue to the claimant. At least it is unclear to us how the possibility of material secular benefits would be taken into account in an MFN analysis. Thus, in a case like *Fraternal Order of Police*,[134] the existence of a medical exemption from departmental grooming standards would allow a claim for exemption by officers who believed they were much better-looking with beards or longer hair and identified a purported religious belief to support their resistance to shaving or haircuts. More seriously, if an employer allowed a worker with cancer a weekend day off from her work schedule to receive chemotherapy, that secular exemption would seem to require providing weekend days off for any employee seeking a weekend day off to observe their Sabbath.

It is not only the potential scope of religious exemptions resulting in material secular benefits for claimants that raises concerns about the operation of MFN. There is the additional question of how courts should evaluate attempts by states to reduce the risk of sham claims or unacceptably expansive exemptions. States may be receptive to claims for medical exemptions not only because of the recognized importance of the health concerns justifying special treatment, but because the validity of the claim can be supported by objectively verifiable evidence. Medical exemptions from vaccine mandates, or shaving requirements, or military conscription can be clinically evaluated. Religious claims for exemption in similar contexts may depend on a subjective determination of the claimant's sincerity, an analysis which is often arbitrary and may

---

importance of carefully evaluating claim for exemptions which provide surplus secular benefits to the religious liberty claimant in order to limit sham claims and mitigate inducements towards adopting religious beliefs and practices).

133. Sherbert v. Verner, 374 U.S. 398, 406–08 (1963) ("For even if the possibility of spurious claims did threaten to dilute the [unemployment compensation] fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.").

134. Fraternal Ord. of Police v. City of Newark, 170 F.2d 359 (3d Cir. 1999).

reflect the bias of the decisionmaker.[135]

The problem becomes even more complex if the state does more than attempt to limit exemptions to sincerely held and limited claims. If the religious exemption provides material secular benefits to the claimant, the state may impose offsetting conditions to limit the secular value of the exemption. Conscientious objector exemptions are the classic example of such an approach. Religious individuals who successfully assert conscientious objector status were relieved of the burdens of military service, but they were obligated to engage in alternative civilian service in its place.[136] This requirement operated as a limited check on sham claims for exemptions and recognized that in all fairness, religious pacifists should bear some civic obligation in lieu of the military burden they avoided.[137]

Conscientious objector status has generally been recognized to be a statutory accommodation.[138] Suppose, however, we evaluate the treatment of religious individuals opposed to military service under MFN. Potential conscripts could receive secular deferments from service on various grounds including medical limitations which would render participation in combat an unacceptable hardship. Pursuant to MFN, would religious individuals whose beliefs render their participation in combat a spiritual hardship be entitled to a conscientious objector exemption, not as a matter of legislative discretion, but rather by free exercise mandate? Both deferments would be comparably underinclusive in that they would limit the military's purpose in conscripting civilians to provide it access to needed personnel.

Assuming that courts recognize such a constitutional mandate, how should they evaluate the requirement of alternative service? Recipients of medical deferments are not required to engage in alternative service or any civic obligation they can perform competently without jeopardizing their health.[139] Does this mean that religious conscientious objectors should be relieved of the duty to perform alternative service as well? If not, then the religious exemption here is of lesser value than the medical deferment. Does that mean that requiring alternative service for

---

135. *See* MCCONNELL, *supra* note 127, at 127–29 (discussing the problems with courts analyzing religious sincerity to determine the legitimacy of free exercise claims).

136. Military Selective Service Act, 50 U.S.C. § 456(j) (2000) (recognizing conscientious objector alternatives to include "appropriate civilian work contributing to the maintenance of the national health, safety, or interest").

137. Brownstein, *Taking Free Exercise Rights Seriously*, *supra* note 98, at 70–76 .

138. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 187 (1965) (holding that the exception from the military draft applies to conscientious objectors if they have a sincere anti-war belief as provided for in the statute).

139. *See, e.g.*, Amy J. Rutenberg, *What Trump's Draft Deferments Reveal*, ATLANTIC (Jan. 2, 2019), https://www.theatlantic.com/ideas/archive/2019/01/trumps-military-draft-deferment-isnt-unusual/579265/ [https://perma.cc/W65E-JGYL]. *See generally* 50 U.S.C. § 3806.

conscientious objectors but not for individuals receiving medical deferments devalues religion? It may be that this example demonstrates that MFN cannot be taken all that literally and must take into account differences between secular and religious exemptions. Or it may be that the contention on which MFN is grounded—that the granting of any secular exemption while denying a comparable religious exemption devalues religion—is of questionable merit.

III. *TANDON*'S UNEASY COEXISTENCE WITH GENERAL CONSTITUTIONAL EQUALITY PRINCIPLES

Much of the discussion thus far has focused on how MFN does or does not fit into the general framework of fundamental rights seeking to protect liberty and autonomy that the Constitution and Supreme Court doctrine has created over time. But the problems with an MFN-style approach are not limited to its uneasy fit within the liberty/autonomy-protection tradition. In this Part, we analyze how an MFN approach does not easily square with various constitutional equality perspectives either.

To begin, as we explained in the liberty rights section of this Article, an MFN approach seems to treat religious activity as preferred over all other activities, including the exercise of other fundamental rights.[140] Analytically (as the "M" in MFN would suggest) this places free exercise rights at the top of a hierarchy of protected rights; free exercise can never be treated worse, but can be treated better, than other fundamentally protected activities. The special status assigned to free exercise rights has equality as well as liberty implications because, to use the parlance of MFN, rights which non-religious individuals exercise are treated unfavorably in comparison to the fundamental rights available only to religious individuals.

As a general matter, preferential treatment, especially when conferred on a majority (and we should note that a strong majority of Americans associate themselves with a religion and would presumably value the opportunity to engage in religious activity consistent with their beliefs) based on immutable or core facets of personhood is ordinarily the antithesis of equality in American jurisprudence.[141] Certainly, this preferential position assigned to religious activity does not cohere with classic approaches to equality under the constitutional provision most explicitly focused on equal treatment—the Equal Protection Clause of the

140. *See supra* Part II and accompanying text (explaining the privileging of religion inherent in the MFN approach).

141. *See Modeling the Future of Religion in America*, PEW RSCH. CTR. (Sept. 13, 2022), https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/ [https://perma.cc/92VL-TL3X] (estimating that, as of 2020, about 70 percent of Americans were Christians or "adherents" of "other religions").

Fourteenth Amendment (and its counterpart component in the Fifth Amendment's Due Process Clause).[142] In order to see the uncomfortable fit between MFN status and equal protection theory, it is important to appreciate that in the real world, the great majority of requests for secular exemptions from any particular regulatory regime are likely to be denied, either by the legislature or the executive branch.[143] What that means is that a majority of the citizenry (through their representatives) have decided that the costs of a regulatory regime with limited exemptions are worth paying—presumably because of the importance of the state's legitimate regulatory objectives. But when the burdens of a regulatory regime are wide and disperse, and do not fall specifically on some politically disempowered minority, that is precisely the situation when classic constitutional equality theory counsels judicial restraint and deference to the political process.

The key distinction is that while serious equality concerns may sometimes justify judicial intervention, a commitment to democracy precludes rigorous review when the majority's decision to treat some people differently than others is trustworthy rather than invidious. In the famous footnote 4 of *United States v. Carolene Products Co.*,[144] for example, the Court indicated that, generally speaking, the political process is to be trusted to correct its own mistakes, but that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[145] With regard to facially neutral laws that provide for very limited secular exemptions but are as unreceptive to religious exemptions as they are to most secular exemptions, absent extrinsic evidence it would be hard to make out a case of "prejudice against discrete and insular minorities."[146] Claims for (secular) exemptions are routinely rejected,[147] and religious believers themselves, broadly speaking, comprise a majority.[148] Accordingly, in these cases, the majority's democratically determined judgments deserve respect, and judicial repudiation of laws is unjustified. Under a political

142. U.S. CONST. amends. V, XIV, § 1.

143. *See, e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 140 (1969); Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 201 (1990).

144. United States v. Carolene Prods. Co., 304 U.S. 144, 151–54, 154 n.4 (1938).

145. *Id.* at 154 n.4.

146. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022) (explaining the difficulty of establishing that restrictions on abortion reflect invidious intent).

147. *See, e.g.*, *Citizen Publ'g Co.*, 394 U.S. at 140, 144 (explaining that the First Amendment did not exempt news organizations nor universities from antitrust laws).

148. *See Modeling the Future of Religion in America*, *supra* note 141 and accompanying text (explaining how a large majority of religiously unaffiliated Americans believe in some kind of higher power or spiritual force).

process theory of equality rights, what MFN arguably devalues is democracy.

A corollary of this analysis is Justice Jackson's oft-cited concurring opinion in *Railway Express Agency v. New York* in which he made clear that the most effective way to prevent "arbitrary and unreasonable" government action is to require that the burdens imposed on minorities must be imposed on the majority as well.[149] Or, to put it another way, we can trust the majority more when it enacts a law that imposes burdens on itself as opposed to a law that directs its burdens upon minoritarian interests. (This principle is also reflected in other constitutional provisions—for example, when a state's citizens are singled out for unfavorable federal tax treatment, the Court is much more skeptical than when a state's citizens are given more favorable treatment by the federal government. This is because citizens of the other forty-nine states bear the costs of such favoritism and can take care of themselves in the national political process to avoid it.)[150] Thus, when we have a general law as to which most secular exemptions are denied, but a very few may be granted, the *Railway Express Agency* analysis—like that of *Carolene Products*—suggests that the fact that the burden of the law falls on the majority (although some limited facet of the majority may escape its requirements) means we can generally trust the enactment of the law and accept the burdens that it imposes on most of us.[151] The case would be different if so many secular exemptions were granted that one could question whether the majority was in fact burdened by the law. Baselines matter and should be analyzed with care. But such a baseline showing of majoritarian rent-seeking is not required for MFN protections to apply under the Court's recent analysis. Why would the granting of an occasional secular exemption undermine the conclusion that the general law at issue substantially burdens the majority, and accordingly is more deserving of trust than a law which allows the majority to escape the consequences of a law's enactment? Yet MFN would seem to treat these situations as equivalent to each other by requiring strict scrutiny review in both circumstances.

Of course, a majority of the Court in the past few decades does not seem to energetically embrace the *Carolene Products* political process approach to equality.[152] Instead, under current equal protection doctrine, the Court has tended to identify certain classifications (or sorting tools)—

149. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949).

150. *See, e.g.*, United States v. Ptasynski, 462 U.S. 74, 84–87 (1983) (upholding a taxing scheme providing favorable treatment to Alaskan oil as a unique class of oil).

151. *See Ry. Express Agency*, 336 U.S. at 112 (1949) (Jackson, J., concurring); United States v. Carolene Prods. Co., 304 U.S. 144, 151–54, 154 n.4 (1938) .

152. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989).

most emphatically, race—that are invariably (or almost invariably) impermissible for government to use.[153] (This is often referred to as a "colorblind" approach which could be extended to require gender-blindness in most cases as well.)[154] But even if one embraces a "colorblind" or "genderblind" approach to equal protection, that approach in no way supports an MFN-style analysis. A "colorblind" approach (generally) forbids treating people of some races differently from others. It does not prohibit government from treating race differently (or even less favorably) from other factors employed by government in its decision-making.[155] For example, a law that provides an admissions plus for Black applicants to public universities may be viewed skeptically under a colorblind approach (although it would not necessarily be problematic for those who embrace *Carolene Products*'s footnote 4, since the beneficiaries are a minority and the burdens are borne by a majority not lacking in political power), but a law that provides an admissions plus for poor persons but *not* for Black applicants (as a distinct group) would not trigger any meaningful review. There is no constitutional requirement that racial considerations be taken into account simply because other non-racial factors are the basis of government decisions.[156]

Indeed, the Court recently rejected this very notion, notwithstanding some earlier cases—sometimes known as the *Hunter* doctrine—that had flirted with it. The *Hunter* doctrine emerged from a line of cases in which the Court had held unconstitutional certain changes in the structure of a state's or city's political processes—changes that isolate public policy decisions intrinsically important to racial minorities and make it more difficult for these groups to be successful in achieving these goals through conventional legislative politics.

In *Hunter v. Erickson*, the Court first gave "clear[] expression" to the principle that equal protection may be violated by "subtl[e] distort[ions] [in] governmental processes" that operate to "place special burdens on the ability of minority groups to achieve beneficial legislation."[157] In *Hunter*, the people of Akron, responding to a fair housing ordinance enacted by the City Council, amended the city charter to prevent the

153. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that virtually all racial classifications must be analyzed under a strict scrutiny standard of review).

154. *See generally, e.g.*, ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

155. *See, e.g.*, Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 314–15 (2014) (holding that the Equal Protection Clause does not prohibit states from banning affirmative action in public universities).

156. *See, e.g.*, *id.* at 310 (stating race need not be taken into account when non-racial factors are considered by government).

157. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982) (quotations omitted) (citing Hunter v. Erickson, 393 U.S. 385, 387–94 (1969)).

implementation of any fair housing ordinance that had failed to gain the express approval of a majority of Akron voters.[158] The amended charter defined the ordinances that were to be subject to the newly created popular approval requirement as those laws regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry. . . ."[159] The charter amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required approval of the electors before any future [housing discrimination] ordinance could take effect."[160]

By a vote of eight to one, the Court struck down the charter amendment as violative of equal protection.[161] The Court declined to rest its decision on a finding of invidious intent.[162] Instead, the Court subjected the law to strict scrutiny (which it could not survive) because the law effectively drew a "racial classification [which] treat[ed] racial housing matters differently [and less favorably]" than other matters.[163] The Court found it crucial that the law, while neutral on its face in the sense that it drew no distinctions among racial and religious groups, would nonetheless uniquely disadvantage beneficiaries of antidiscrimination laws (i.e., minorities) by forcing such laws to run a legislative gauntlet of popular approval that other laws—and thus other interest groups—were spared.[164]

In *Washington v. Seattle School District No. 1*, the Court applied and extended *Hunter*. In order to cure widespread de facto racial segregation in Seattle area schools, Seattle School District No. 1 adopted a voluntary integration plan that extensively used pupil reassignment and busing to eliminate one-race schools.[165] The Seattle program prompted the people of Washington to enact Initiative 350.[166] On its face, the Initiative provided broadly that "no school board . . . shall directly or indirectly require any student to attend a school other than" the geographically closest school.[167] The Initiative, however, then set out so many exceptions to this prohibition that the effect on local school boards was to bar them from ordering reassignment or busing for the purpose of racial integration, but to permit them to order reassignment or busing for all

158. *Hunter*, 393 U.S. at 387–94.
159. *Id.* at 387 (quotations omitted).
160. *Id.* at 389–90.
161. *Id.* at 392–93.
162. *Id.* at 393.
163. Hunter v. Erickson, 393 U.S. 386, 389 (1969).
164. *Id.* at 390.
165. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 461 (1982).
166. *Id.* at 462.
167. *Id.* (alteration in original) (quotations omitted)

other educationally valid reasons.[168] As the Supreme Court put it:

> [T]he initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students . . . ."[169]

On a five-to-four vote, the Court struck down the plebiscite.[170] As in *Hunter*, the Court declined to rest its holding on a finding of invidious intent.[171] Instead, the Court invalidated Initiative 350 because it specially removed racial busing—a program of particular importance to racial minorities—from the control of local decision-making bodies and shifted it to central management at the statewide level, where minorities were less likely to have the political leverage to enjoy democratic success.[172] This selective and unfavorable treatment of public programs that were beneficial to minorities denied such minorities the equal protection right to "full participation in the political life of the community."[173]

The third case in the *Hunter* trilogy, *Crawford v. Board of Education*, was a companion case to *Seattle*.[174] While the case involved superficially similar facts, the Court voted eight to one to reject the *Hunter*-based challenge to a California initiative.[175] Crawford involved the validity of Proposition I, an amendment to the California Constitution enacted by the electorate in response to state court decisions interpreting the California Constitution to require the state to remedy de facto as well as de jure school segregation.[176] To overrule these judicial decisions, Proposition I provided that

> [N]o court of this state may impose upon the State [or any state entity or official] any obligation or responsibility [in the name of the state constitution] with respect to the use of pupil school assignment or pupil transportation, except to remedy a specific [action by the State that would violate the federal Equal Protection Clause such that a federal court could impose the obligation as a remedy].[177]

In rejecting the *Hunter*-based challenge to Proposition I, the *Crawford* Court found that the "elements underlying the holding in *Hunter* [were] missing."[178] In particular, Proposition I's classification was not "racial"

---

168. *Id.*
169. *Id.* at 463 (alteration in original).
170. *Id.* at 487.
171. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486–87 (1982).
172. *Id.* at 483.
173. *Id.* at 467.
174. Crawford v. Bd. of Educ. of L.A., 458 U.S. 527 (1982).
175. *Id.* at 542.
176. *Id.* at 527.
177. *Id.* at 532.
178. *Id.* at 537 n.14.

in the same way as the charter amendment in *Hunter*. Moreover, the *Crawford* Court reasoned, Proposition I did not disable minorities from enacting racial busing programs legislatively, but rather merely "repealed" the existing state constitutional requirement of these programs that California had no federal obligation to provide.[179] The lack of both a racial character and a political process burden thus served to distinguish and save Proposition I.

Throughout this trilogy, the Court applied (with varying degrees of clarity) a two-pronged test. First, a challenger must show that the law in question is "racial" or "race-based" in "character," in that it singles out for special treatment issues that are particularly associated with minority interests. Second, the challenger must show that the law imposes an unfair political process burden with regard to these "minority issues" by entrenching their unfavorable resolution. Strict scrutiny is triggered only if the challenger satisfies both parts of the test. A law that imposes special political process burdens on classes not defined by race does not directly implicate the trilogy. Similarly, a law that deals explicitly with "racial" issues but does not impose any entrenching political process burdens is also unproblematic.

The central idea behind this line of cases is relatively straightforward: Just as minorities cannot be singled out for substantively inferior treatment—say, subjected to a unique sales tax—neither can they be singled out and relegated to inferior treatment in the political process—say, subjected to a race-based poll tax. Consider the following (and extreme) hypothetical: A state constitutional provision that requires a 90 percent legislative supermajority vote for any "law that benefits persons of color." That provision is obviously problematic under the trilogy because its text explicitly defines the provision's scope in terms of minority interests, and because the high supermajority requirement obviously imposes a substantial political process burden on minorities.

The *Hunter* line of cases was controversial in large part because the cases do not concern laws whose very scope is explicitly defined in terms of minority interests. The laws in question did not expressly single out minorities at all, but instead singled out issues that the Court deemed to be of particular interest to minorities. The equal protection vice found by the Court in these cases is thus more subtle than that plaguing the hypotheticals in the preceding paragraph.

The *Hunter* doctrine was not invoked in very many cases. When one of us first wrote about it twenty-five years ago, we noted that lower courts must (at that time) fully respect it, even though we doubted whether the

179. *Id.* at 546–47.

Court of the 1990s and since would embrace it.[180] Yet it is more intuitively plausible than MFN in *Tandon* for two reasons. First, as applied in *Seattle School District No. 1*, the *Hunter* doctrine meant only that proponents of race-based affirmative action couldn't be treated worse than proponents of the use of *all* other admission criteria, not simply worse than the proponents of *any* particular admissions criteria. In other words, there was a sense in *Seattle School District No. 1* that the group in question (proponents of desegregative school assignments) were not only denied MFN status; they were relegated to the ranks of LFN (Least Favored Nation) status.

Second, at least the group in question in the *Hunter* doctrine—racial minorities thought to have a special interest in race-based civil rights protections—are a *minority*, bringing the *Hunter* doctrine into the neighborhood of the *Carolene Products* Footnote 4 theory. As noted above, religious practitioners comprise a majority of Americans,[181] placing the MFN approach in Tandon in an entirely different zip code from Footnote 4 in *Carolene Products*.

In any event, the *Hunter* doctrine was rejected in 2014 in *Schuette v. Coalition to Defend Affirmative Action*, where the plaintiffs unsuccessfully argued that removal of race-based affirmative action by the voters of Michigan is constitutionally problematic when other kinds of preferential, affirmative action remain in place.[182] A majority of the Court declined to embrace—indeed distanced itself from—the central part of the *Hunter* doctrine test, that laws dealing with areas of special concern to minorities should be strictly scrutinized based on their subject-matter.[183] After *Schuette*, there is nothing constitutionally problematic about laws that disfavor, relative to other government programs or objectives, affirmative action, or police reform, or community health investment, or any of a number of other policies which racial minorities particularly care about and which may be distinctly beneficial to or protective of their interests. Policies that matter to minorities do not, in other words, have any claim to special, much less MFN, treatment.

Thus, whether viewed from a classic *Carolene Products* political process standpoint, or a more modern classification-blind perspective, MFN reasoning does not easily jibe with equality theory.

Indeed, there is a significant way in which MFN would seem to *violate* long-standing and agreed-upon equality values in the religious

---

180. *See generally* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens and the CCRI,* 23 HASTINGS CONST. L.Q. 1019 (1996).

181. *See Modeling the Future of Religion in America*, *supra* note 141 (discussing statistics regarding the percentage of religious Americans).

182. *See generally* Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291 (2014).

183. *Id.* at 303–04.

realm by effectively conferring differential protection on different religious groups. To the extent that inter-religious equality is a norm that continues to command broad support and respect, we should care about the fact that it can be frustrated, rather than furthered, by MFN reasoning.

In particular, requiring religion to be treated at least as well as any non-religious activity—as MFN reasoning does—makes religious protection turn on what is often a fortuitous secular analog, which can exacerbate inequality among religious groups. Take, for example, the *Fraternal Order of Police* case we discussed earlier.[184] The Third Circuit Court of Appeals held that Muslim officers whose religion prohibits them from shaving were entitled to an exemption from the police department's facial-hair grooming rule requiring daily shaving (to promote uniform appearance) because an exemption was provided to police officers who would suffer medical problems if they shaved on a regular basis.[185] But consider the consequence of this holding for police officers of other faiths. A Native American officer whose religion prohibited cutting his hair in conformity with a police department's uniform hair-length grooming standard (as distinguished from its facial-hair policy) requiring short hair cuts could not get a religious exemption if there was no medical exemption applicable to the short-hair requirement. In this example, Muslim police officers get mandated religious exemptions from grooming standards, but adherents of Native American faiths do not—even though their claims to religious liberty seem so similar and worthy of protection—simply because of the fortuity that shaving policies implicate medical skin conditions but short-hair policies might not.

A related potential problem with an MFN approach to free exercise is that it would end up, again because of fortuitous differences in particular regulatory policies, conferring more religious protection for people in some locations than others. Adjacent cities, for example, might adopt similar restrictions on religious exercise, but include different secular exemptions in their regulatory schemes. Under an MFN approach, one city's restrictions on religious exercise will be subject to strict scrutiny because of the city's underinclusive secular exemptions. If the other city does not grant such secular exemptions, however, its restrictions (assuming *Smith* is still good law) would be upheld under rational basis review. The interference with free exercise activity would be the same in both cities. But that regulatory burden would be struck down in one city and upheld in the neighboring municipality. To go back to our absentee voting example above, one state's accommodation of the right to travel would confer more religious liberty than would be enjoyed by persons in

184. *See supra* notes 25–27 and accompanying text (describing *Fraternal Ord. of Police* as the forerunner of the Court's comparability/underinclusivity analysis in *Tandon*).

185. Fraternal Ord. of Police v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999).

a neighboring state where no provision for absentee voting at all were made.

To be sure, people in America enjoy different rights under their state constitutions depending on where they live. And even federal rights are sometimes (temporarily, at least) construed differently among the federal appellate courts. But it is very odd that a person's free exercise rights would be different in one place compared to another—without any judicial disagreement among circuits as to the meaning of the right—simply because some few secular exemptions exist in the first location but not the other. Certainly, if there were a plausible equality-based reason to think that religion was being disrespected or demeaned in one jurisdiction but not another, that could explain different jurisdictional outcomes. (In that regard, when two jurisdictions pass laws with the same disparate racial impacts, but one jurisdiction spitefully intended those impacts whereas another simply tolerated them unhappily, constitutional doctrine might rightfully differentiate between those two jurisdictions on the ground that communication of a legislature's ill motive itself creates unequal psychological effects for minorities in one place compared to the other.) But as we explained above,[186] not getting preferred treatment is not the same as being disrespected, and MFN does not require a showing of invidious or discriminatory treatment for strict scrutiny to apply. Thus, the geographical inequality virtually guaranteed by an MFN-style approach is much harder to justify. It will be particularly difficult to explain, much less justify, to the religious individuals whose claims for exemptions are denied in their jurisdiction while religious individuals in an adjacent jurisdiction receive constitutionally mandated exemptions from a virtually identical law.

One possible constitutional analogue to MFN in *Tandon* could come from equality not under the Equal Protection Clause, but equality housed within a different provision of the First Amendment, namely, the Free Speech Clause. We have in mind here the Court's super-strong aversion to content-based discrimination in the regulation of speech.[187] Under conventional free speech doctrine, courts strictly review government regulations singling out some limited speech topics for distinctive accommodation (e.g., a statute such as that struck down in *Carey v. Brown* that exempted or accommodated labor picketing when all other picketing was prohibited).[188] In such circumstances, the Court could be said to be conferring MFN status on *all* topics of speech when any one subject is singled out and exempted from a regulation to which all

186. *See* Brownstein, *Religious Clauses*, *supra* note 85 and accompanying text. .

187. *See generally* Reed v. Town of Gilbert, 576 U.S. 155 (2015) (holding that laws targeting speech based on communicative content must meet strict scrutiny to be constitutional).

188. *See generally* Carey v. Brown, 447 U.S. 455 (1980) .

comparable speech is subject.

Yet this analogy doesn't quite work, because in the speech setting, the Court isn't favoring one topic by placing it above all others in the one-way ratchet sense (discussed earlier)[189] that *Tandon* does for religion. Instead, the Court (rightly or wrongly) is conferring equality on all topics (and the people who find those topics worthy of discussion) and prohibiting direct discrimination for or against particular subjects of speech.

But what about those people (and at least one of us, Amar, counts himself among them) who think that not all content-based laws are constitutionally problematic and that the Court has been wrong in prohibiting (virtually) all content-based discrimination?[190] Such folks would permit treating political speech in, say, the regulation of property signage, better than other subjects of speech. MFN supporters might point out that this approach in essence would confer MFN status on political speech relative to all other speech—in that political speech could be regulatorily preferred but not disfavored.

Perhaps it would. And perhaps it should. But that is only because historical and functional justifications for the Free Speech Clauses of the First Amendment place political speech in a special category. Political speech deserves special protection because of its instrumental value—the way in which it facilitates democratic self-governance. As explained earlier, however, religious liberty has generally not been understood to be protected because of instrumental utility.[191] That is why even this analogy, we think, breaks down.[192]

CONCLUSION

The MFN approach to interpreting the Free Exercise Clause of the First Amendment seems to us to have been developed as a response to the unexpected holding of *Employment Division v. Smith* and Justice Scalia's mangling of precedent in an unpersuasive attempt to justify his case analysis. But two wrongs do not make or adequately explain a "right,"

189. *See* Supra notes 89–91 and accompanying text..

190. And at least one of us, Amar, falls in this camp. So does his brother, constitutional scholar Akhil Amar.

191. *See supra* note 98–98 and accompanying text .

192. There is one arguable sense in which religious speech/activity is already given preferred status. If the Court in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) was right in characterizing religious speech as a "viewpoint," then how are religious accommodations of the kind provided in the federal Religious Freedom Restoration Act or the Religious Land Use and Institutional Persons Act (and analogous state laws) consistent with the absolute requirement in free-speech law of viewpoint neutrality? The Court has never begun to recognize, much less resolve, this apparent tension. *See, e.g.*, Vikram David Amar, *Foreword*, 29 U.C. DAVIS. L. REV. 465 (1996) (discussing the Court's opinion in *Rosenberger* and its implications). We wonder if the Court fully understood the implication what it said in cases like *Rosenberger*.

nor do they provide a convincing foundation for free exercise doctrine. MFN isn't really about devaluing religion. It is an attempt to privilege religion by providing it a form of protection unavailable to other liberty or equality rights—and it does that in a way which jeopardizes important secular interests by tying government into a straitjacket of review that ignores the very nature of government decision-making. Protecting religious exercise in a pluralistic society in which government represents myriad stakeholders and competing religious and secular beliefs abound is a complex undertaking. The attempt to resolve the difficult issues raised in undertaking this project through the artificial and simplistic mechanism of MFN should be rejected.