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### Law, Religion, and the Covid Crisis

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STATE OF THE FIELD ESSAY

LAW, RELIGION, AND THE COVID CRISIS

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*A Revealing Episode*

For well over a year, now, a big story in law and religion, in the United States and throughout the world, has been the Covid crisis. No one anticipated this. In the United States at the start of 2020, lawyers and scholars were preoccupied with other issues, such as whether local governments could exclude religious schools from public scholarship programs,<sup>1</sup> and whether religious believers could claim exemptions from public accommodations laws that prohibit discrimination based on sexual orientation and gender identity.<sup>2</sup> In Europe, jurists disputed whether states could legally restrict ritual animal slaughter by observant Jews and Muslims.<sup>3</sup> Those debates have not ended. But a central issue on the law-and-religion agenda, one that has drawn academic, judicial, and popular attention, has turned out to be something completely different: whether, and to what extent, government can legally restrict collective worship during a public health emergency.

It might seem premature to draw lessons from a crisis still underway. At this writing, in late summer 2021, it remains unclear how the pandemic will continue to unfold. Governments have rescinded most of the restrictions they placed on collective worship during the pandemic's first year and the "flurry" of judicial decisions has ceased, at least for now.<sup>4</sup> Perhaps Covid will ultimately fade from memory, much like the 1918 flu epidemic, and leave little trace on the law of church and state.<sup>5</sup> But the rise of the Delta variant suggests Covid will be with us for some time. Moreover, enough case law exists to merit some early observations. Although crises can distort legal doctrine, they can also clarify, and that is the case here.<sup>6</sup> As in other contexts, in law, the Covid pandemic has revealed dynamics that already existed and trends that were already underway.<sup>7</sup>

In this essay, I draw two early lessons from the Covid crisis, one comparative and one relating specifically to United States law.<sup>8</sup> A comparative approach is appropriate in this context. Sometimes,

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<sup>1</sup> *E.g.*, *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020).

<sup>2</sup> *E.g.*, *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021); *Masterpiece Cakeshop v. Colorado Civil Rts. Comm'n*, 138 S.Ct. 1719 (2018); *cf.* *Bostock v. Clayton County*, 140 S.Ct. 1731, 1753-54 (2020).

<sup>3</sup> *E.g.*, Judgment of 17 Dec. 2020, *Centraal Israëlitisch Consistorie van België et al.*, C-336/19, ECLI:EU:C:2020:1031, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=235717&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=16882268>.

<sup>4</sup> Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 16) (manuscript on file with author).

<sup>5</sup> See ALFRED W. CROSBY, *AMERICA'S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918* p. 305 (2d ed. 2003).

<sup>6</sup> *Cf.* David A. Skeel, Jr., *Institutional Choice in an Economic Crisis*, 2013 WIS. L. REV. 629, 645 (suggesting that "legally problematic responses to a crisis" can "cause lasting distortions to the law").

<sup>7</sup> See Note, *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1785 (2021) [hereinafter *Constitutional Constraints*].

<sup>8</sup> In the interests of space, I focus on cases from the United States and Europe, but "a steady stream of cases from around the world" have considered these issues as well. Mark Hill, *Coronavirus and the Curtailment of Religious Liberty*, 9 LAWS 1, 4 (2020). For more on the situation in Africa, see *id.* at 5, 6. For a discussion of government

legal problems differ in ways that make comparisons tricky; determining whether the problems sufficiently resemble one another can be vexing.<sup>9</sup> In this crisis, however, courts faced the same problem: how to reduce the spread of the novel coronavirus without infringing the right to corporate worship. They did so, moreover, in an emergency setting where conclusive evidence was unavailable and the consequences, quite literally, a matter of life and death.<sup>10</sup> If any legal problems merit comparative analysis, this would seem to be one.

A comparative analysis of courts' response to restrictions on worship during Covid offers something of a surprise. With respect to restrictions on religious freedom, scholars often highlight the differences between the proportionality test that courts outside the United States favor and the U.S. approach under *Employment Division v. Smith*, a 1990 Supreme Court decision on the scope of the First Amendment's Free Exercise Clause.<sup>11</sup> Proportionality analysis expressly calls for judges to weigh the relative costs and benefits of a restriction,<sup>12</sup> while *Smith* rejects judicial balancing in favor of legislative supremacy and predictable results.<sup>13</sup> During the pandemic, however, whatever formal test they have applied, courts have approached the problem in essentially the same way, through intuition and balancing. *Smith* has failed to prevent judicial assessments of pros and cons, as critics long predicted it would.<sup>14</sup>

Across the globe, the legality of Covid restrictions has depended ultimately on judges' weighing of the competing interests at stake.<sup>15</sup> This necessarily has entailed "value judgments" about the

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responses in Asia and Oceania, see generally Xioming Guo, *An Academic Summary of the International Conference Series on "The Role of the Proportionality Principle in the Pandemic Prevention and Control"*, 29 J. HUM. RTS. 535 (2020). For a discussion of some Covid restrictions in Latin America, see Javier Martínez-Torrón, *COVID-19 and Religious Freedom: Some Comparative Perspectives*, 10 LAWS 39, at 6 (Brazil), at 12 (Chile) (2021).

<sup>9</sup> See, e.g., Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 BROOK. J. INT'L L. 405, 418 (2007).

<sup>10</sup> See *Cassell v. Snyders*, 990 F.3d 539, 549 (7<sup>th</sup> Cir. 2021) (noting that governments have "been forced to act with imperfect knowledge" when devising strategy during the Covid pandemic). Cf. Adelaide Madera, *Some preliminary remarks on the impact of COVID-19 on the exercise of religious freedom in the United States and Italy*, STATO, CHIESE E PLURALISMO CONFESIONALE, No. 16, pp. 70, 77 (2020) (observing that the Covid crisis required the Italian government "to undertake . . . a complex balancing of many fundamental freedoms with the urgent need to protect public health and safety and to do so very quickly").

<sup>11</sup> 494 U.S. 872 (1990). For contrasts between the two approaches, see, for example, Justin Collings and Stephanie Hall Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, \_\_\_ B.C. L. REV. (forthcoming 2021) (manuscript at 6) (on file with author) (suggesting that the two approaches are not "interchangeable when it comes to protecting religious exercise"). See also Jamal Greene, *Foreword: Rights as Trumps*, 132 HARV. L. REV. 28, 34-35 (2018) (distinguishing proportionality analysis from U.S. "categoricalism").

<sup>12</sup> See, e.g., PAUL YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN 16 (2018) (describing the proportionality test). For more on the proportionality test, see *infra* text accompanying notes 26-33.

<sup>13</sup> Collings and Barclay, *supra* note 11 (manuscript at 13) (arguing that *Smith* "openly and energetically eschewed any meaningful form of interest-balancing"). In *Smith*, the U.S. Supreme Court held that a religiously neutral and generally applicable law could permissibly restrict the exercise of religion, so long as the law had a rational basis. *Smith*, 494 U.S. at 881-82. For more on the *Smith* approach, see *infra* text accompanying notes 72-76.

<sup>14</sup> See, e.g., MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 150, 160-65 (2013) (arguing that *Smith* does not provide the predictability proponents claim).

<sup>15</sup> Cf. YOWELL, *supra* note 12, at 9 (noting how constitutional-rights adjudication in U.S. courts typically attempts to "strike the right balance between collective and individual interests"); *First Amendment—Free Exercise Clause—Government Aid to Religious Schools—Espinoza v. Montana Department of Revenue*, 134 HARV. L. REV. 470, 477

importance of religious exercise, compared to things like grocery shopping and dining out, and the need to accommodate some religious believers.<sup>16</sup> Judges have weighed things differently; some have upheld restrictions and others have not. The important comparative point, though, is that doctrinal nuances in U.S. and foreign law have made little apparent difference.<sup>17</sup> The pandemic thus reveals affinities between proportionality analysis and the U.S. approach, at least in times of crisis.

With respect to the United States, specifically, the crisis suggests a further lesson, not about affinities but about divisions. Scholars debate the extent to which ideological and political commitments affect judging generally.<sup>18</sup> In the Covid crisis, however, judicial disagreements have closely tracked judges' partisan identities.<sup>19</sup> At the Supreme Court, Democratic-appointed justices consistently have ruled against religious plaintiffs in Covid cases. Republican-appointed justices, with one exception, consistently have ruled for religious plaintiffs, and the appointment of Justice Barrett to replace the late Justice Ginsburg during the pandemic decisively shifted the Court in their favor.<sup>20</sup> As Zalman Rothschild writes, when the Court's "political make-up shifted, so did its stance on COVID-19 restrictions on religious institutions."<sup>21</sup>

These partisan divisions should come as no surprise. No completely neutral basis exists for deciding whether a government has restricted religious exercise more than necessary to achieve public health goals. At some point, "the relatively pure science runs out," and decisions require "normatively contested moral and political judgments."<sup>22</sup> Judges, like the rest of us, naturally strike the balance based on "'priors'"—commitments and intuitions about the comparative virtues and importance of religious exercise, for believers and for society.<sup>23</sup> Those priors deeply divide Americans, and our divisions increasingly express themselves in partisan terms.<sup>24</sup> In this environment, judges appointed by Republican presidents naturally tend to favor the claims of religious plaintiffs, while judges appointed by Democratic presidents naturally tend to disfavor them.

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(2020) (noting that many of the Supreme Court's religion clause cases "boil down to raw interest-balancing exercises").

<sup>16</sup> Note, *Constitutional Constraints*, supra note 7, at 1790. See also Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 686 (2021).

<sup>17</sup> See Collings and Barclay, supra note 11 (manuscript at 3-4) ("religious liberty depends less on *which* framework is adopted than on *how* that framework is employed") (emphasis in original).

<sup>18</sup> Compare Dan M. Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349, 354-55 (2016) (arguing that professional training and experience help judges overcome "political predispositions") and Gregory C. Sisk and Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1204 (2012) (arguing that judges' politics and ideology play a major role in Establishment Clause cases). For more on the topic, see generally Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1643-44 (2018).

<sup>19</sup> See Rothschild, supra note 4 (manuscript at 3).

<sup>20</sup> See Blackman, supra note 16, at 638.

<sup>21</sup> Rothschild, supra note 4 (manuscript at 44).

<sup>22</sup> R. George Wright, *Free Exercise and the Public Interest After Tandon v. Newsom*, 2021 U. ILL. L. REV. ONLINE 189, 194.

<sup>23</sup> Howard Kislowicz, *Judging Religion and Judges' Religions*, 33 J. L. & RELIGION 42, 47 (2018) (citation omitted).

<sup>24</sup> See LILLIANA MASON, UNCIVIL AGREEMENT 14 (2018).

The “pandemic,” in journalist Lawrence Wright’s words, has “exposed many different fractures” in U.S. society, not only concerning religion.<sup>25</sup> Deep divisions exist about the good faith of elites, the competence and benevolence of government, the credibility of scientific opinion, and many other factors. All these divisions have influenced the ways in which citizens—and judges—have evaluated restrictions on communal worship. But varying opinions on the value of religion and religious freedom have had a central role in the Covid cases. In the United States, the Covid crisis has revealed a cultural and political rift that makes consensual resolution of conflicts over religious freedom problematic, and sometimes impossible, even during a once-in-a-lifetime pandemic.<sup>26</sup>

### *Outside the United States: The Proportionality Test*

Outside the United States, courts have decided Covid cases under the so-called proportionality test,<sup>27</sup> “the common method worldwide for adjudicating constitutional rights.”<sup>28</sup> Proportionality analysis involves “a limitation phase and a justification phase.”<sup>29</sup> In the limitation phase, the court asks whether the law in question “infringes or interferes with a right.”<sup>30</sup> If the answer is yes, the court moves to the justification phase, which asks whether “the interference is justified in virtue of being proportionate to the aim or value of the law.”<sup>31</sup> To decide whether a measure is justified, the court employs a three- or four-part test that asks, in one form or another, whether the law in question “(1) pursues a legitimate purpose, (2) actually advances that purpose, (3) restricts the right no more than is necessary to achieve the purpose, and (4) restricts the right in a proportionate way.”<sup>32</sup> In practice, these requirements overlap, and the last two are the most significant, especially the necessity requirement, which in formal terms resembles the least-restrictive-means requirement in U.S. law.<sup>33</sup> Indeed, according to Justin Collings and Stephanie Barclay, “many proportionality courts frequently end their analysis at the necessity step.”<sup>34</sup>

Courts in many countries have applied proportionality analysis to Covid restrictions, including Canada, France, Germany, Greece, and Scotland, with mixed results.<sup>35</sup> Some courts have found

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<sup>25</sup> LAWRENCE WRIGHT, *THE PLAGUE YEAR: AMERICA IN THE TIME OF COVID* 85 (2021).

<sup>26</sup> Cf. Wright, *supra* note 21, at 194 (noting that “normative judgments” about Covid restrictions “must be made in the context of a culture that has been increasingly fracturing, if not fragmenting, on relevant moral and political issues, for decades”).

<sup>27</sup> See Hill, *supra* note 8, at 3. For more on proportionality analysis and the Covid epidemic worldwide, see generally Guo, *supra* note 8.

<sup>28</sup> YOWELL, *supra* note 12, at 9. See also *id.* at 16; Greene, *supra* note 11, at 58.

<sup>29</sup> Collings and Barclay, *supra* note 11 (manuscript at 17).

<sup>30</sup> YOWELL, *supra* note 12, at 15.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> Collings and Barclay, *supra* note 11 (manuscript at 17). See also Greene, *supra* note 11, at 59 (observing that “[t]ypical proportionality formulations comprise either three or four ordered steps in the analysis”).

<sup>33</sup> Paul Yowell observes that “[i]n strict scrutiny, courts ask whether there are less restrictive alternatives in determining whether the government measure is ‘narrowly tailored’—similarly to the necessity component of the European proportionality inquiry, which is sometimes phrased in terms of ‘minimal impairment’.” YOWELL, *supra* note 12, at 23.

<sup>34</sup> Collings and Barclay, *supra* note 11 (manuscript at 21).

<sup>35</sup> See, e.g., George Androutsopoulos, *The Right of Religious Freedom in Light of the Coronavirus Pandemic: The Greek Case*, 10 LAWS 1 (2021) (Greece); Collings and Barclay, *supra* note 11 (manuscript at 34-38) (Canada); *id.* at 39-40 (Germany); Anne Fornerod, *Freedom of Worship during a Public Health State of Emergency in France*, 10 LAWS 1 (2021) (France); Martínez-Torrón, *supra* note 8, at 12 (2021) (Scotland).

restrictions justified; others have not.<sup>36</sup> Sometimes the same court has found restrictions justified at one stage of the pandemic but not at later stages, as more information about Covid-19 has become available.<sup>37</sup> The French Council of State and German Federal Constitutional Court are good examples of this phenomenon.<sup>38</sup> The details of specific restrictions presumably made some difference to the outcomes in these cases, as did the fact that various national legal systems, each with its own understanding of proportionality and its own rules “for the exercise of emergency powers,” were involved.<sup>39</sup> But the main reason for the different results was surely the proportionality test itself, which relies so prominently on judicial line-drawing and balancing.<sup>40</sup> Judges applying the proportionality test naturally weighed risks and benefits differently.

A good example comes from Scotland. In *Reverend Dr William J U Philip and Others*,<sup>41</sup> the Outer House of the Court of Session ruled that a ban on public worship violated the proportionality test under constitutional principles and under Article 9 of the European Convention on Human Rights, which confers a right to manifest one’s religion in public, including through worship.<sup>42</sup> In January 2021, during an outbreak of a virus variant, Scottish officials ordered places of worship in the country to close temporarily, except for a few limited purposes, including funerals, marriage ceremonies (comprising no more than 5-6 people), and “essential voluntary services” like “food banks,” “blood donation sessions,” and “vaccination centers.”<sup>43</sup> The order effectively prevented “any form of communal worship” in Scotland, either “indoors or outdoors.”<sup>44</sup> The closure also extended to movie theaters, sports stadiums, and conference centers, again with a few exceptions, and to most retail establishments, though not to “essential” businesses like “food retailers, pharmacies, funeral directors,” and “bicycle shops.”<sup>45</sup>

The Scottish authorities and the claimants agreed that the ban on public worship interfered with the claimants’ right to manifest their religion.<sup>46</sup> The proportionality analysis thus moved to the justification phase, which Lord Braid described as follows:

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<sup>36</sup> See, e.g. Collings and Barclay, *supra* note 11 (manuscript at 25) (noting French Council of State’s “rulings in favor of religious claimants); *id.* at 39 (discussing a ruling by the German Federal Constitutional Court that certain Covid restrictions were not disproportionate).

<sup>37</sup> Cf. Martínez-Torrón, *supra* note 8, at 11 (noting that “within the same country, the courts’ approach has sometimes changed depending on the moment that the claim was decided”).

<sup>38</sup> On the French Council of State, see, for example, Fornerod, *supra* note 34, at 3. On the German Federal Constitutional Court, see Collings and Barclay, *supra* note 11 (manuscript, at 39-40).

<sup>39</sup> Hill, *supra* note 8, at 4. Courts applying the proportionality test under the case law of the European Court of Human Rights would also need to consider the margin of appreciation doctrine. For more on that doctrine, see, for example, JIM MURDOCH, PROTECTING THE RIGHT TO FREEDOM OF CONSCIENCE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 41-43 (2012), available at [https://www.echr.coe.int/LibraryDocs/Murdoch2012\\_EN.pdf](https://www.echr.coe.int/LibraryDocs/Murdoch2012_EN.pdf).

<sup>40</sup> A debate exists on how much role balancing as such should have in proportionality analysis, see Greene, *supra* note 11, at 58, and as I explain in the text, courts frequently skip the final step of the analysis. But balancing is formally a fundamental part of the test, and even the “necessity” step can involve balancing, as courts try to determine whether the marginal benefit of a restriction, in terms of the legislature’s stated aim, outweighs the damage to a claimant’s rights. See Collings and Barclay, *supra* note 11 (manuscript at 21).

<sup>41</sup> [2021] CSOH 32.

<sup>42</sup> *Id.* ¶ 127; see also *id.* ¶ 90 (quoting Article 9).

<sup>43</sup> *Id.* ¶¶ 16-17.

<sup>44</sup> *Id.* ¶ 17.

<sup>45</sup> *Id.* ¶ 19.

<sup>46</sup> *Id.* ¶ 96.

(i) whether the objective being pursued is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effect on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.<sup>47</sup>

No debate existed on the first two questions. The parties agreed that the government's objective, "reduction in risk for the protection of health and preservation of life," was legitimate and sufficiently important in principle to justify limiting the right to worship.<sup>48</sup> Moreover, a rational connection existed between that objective and the government's decision to ban many public gatherings. "It is not irrational to conclude," Lord Braid wrote, "that the more people stay at home, the less the virus will be passed on."<sup>49</sup>

Lord Braid concluded, however, that the total ban on communal worship was not necessary to achieve the government's aim. Several factors influenced his decision, including the authorities' apparent concession that the risk of transmission in public worship was relatively small and their failure even to consider less restrictive measures, such as keeping the density of occupants low and providing good ventilation.<sup>50</sup> The most important consideration, he suggested, was the fact that the authorities had allowed some exceptions to the ban on public gatherings, thus acknowledging, at least implicitly, that meetings could "be safe if suitable mitigation measures [were] adopted."<sup>51</sup> If it was not too risky, for example, to open movie theaters as jury centers as long as people observed mitigation requirements, why was it too risky to open places of worship?<sup>52</sup> The existence of exceptions showed that the government could equally achieve its aims through a measure less intrusive than an outright ban.<sup>53</sup>

Lord Braid dismissed deferring to public health authorities because "a scientific judgment [was] involved"<sup>54</sup> and the authorities possessed "expertise and experience" he lacked.<sup>55</sup> The "science" was "not in dispute."<sup>56</sup> Everyone agreed that Covid was "an extremely serious and highly transmissible disease which can result in serious illness and death," and that mitigation measures like "social distancing, face masks, hand washing and good ventilation" could "reduce the risk of transmission."<sup>57</sup> The ban on communal worship failed the necessity test, not because anyone questioned the science, but because the authorities had not explained why, given the scientific consensus, some public gatherings could proceed safely with mitigation measures but communal worship could not. This inconsistency undercut whatever deference the court might have given to the authorities' expertise and experience.

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<sup>47</sup> *Id.* ¶ 100.

<sup>48</sup> *Id.* ¶ 101.

<sup>49</sup> *Id.* ¶ 102.

<sup>50</sup> *Id.* ¶ 112.

<sup>51</sup> *Id.* ¶ 114.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.* ¶ 115.

<sup>54</sup> *Id.* ¶ 106.

<sup>55</sup> *Id.* ¶ 111.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Lord Braid’s decision that the ban was not necessary could have ended the proportionality analysis—as we have seen, courts frequently stop at this point—but he continued to step four, the balancing stage, “for completeness and in case I am wrong.”<sup>58</sup> Regarding the risk avoided, only a relatively small number of persons with Covid-19 infections apparently had attended religious services, “in comparison with other activities.”<sup>59</sup> A total ban on communal worship, therefore, would not likely contribute “to a material reduction” in the risk of Covid transmission.<sup>60</sup> Moreover, the existence of exceptions in other circumstances undercut the benefit of a “bright-line” rule respecting religious gatherings.<sup>61</sup> By contrast, the authorities had underestimated the importance of the right to manifest one’s religion, especially compared with other activities they had determined to be “essential” and allowed to continue.<sup>62</sup> True, the ban was only temporary (though it had stretched on for months) and believers could participate in online worship.<sup>63</sup> Some believers evidently found this arrangement unobjectionable.<sup>64</sup> But online worship was at best “an alternative to, not a substitute for,” communal in-person worship—“worship-lite,” Lord Braid called it—and, as a result of the ban, some important ceremonies could not occur at all, including communion, baptism, and confession.<sup>65</sup> Even though the question was “finely balanced,” the burdens of a total ban on communal worship outweighed the benefits.<sup>66</sup>

As this summary shows, intuitive judgments had a central role in *Philip*. Consider the necessity determination. Whether a public-health measure goes too far is not a question with a categorical answer. It is a judgment call depending on many factors, including the nature of the risk, the relative importance of the activities restricted, and, crucially, the credibility of public-health officials who might, because of their professional commitments, dismiss religious viewpoints.<sup>67</sup> For Lord Braid, the temporary ban on communal worship was excessive, given the risks involved, and in the circumstances, he felt he could evaluate the evidence himself and need not give public-health officials the benefit of the doubt. The point is not that he was wrong. The point is a judge with contrary views could just as plausibly have drawn the lines differently. “Narrower tailoring,” as Cass Sunstein observes, “is almost always imaginable.”<sup>68</sup>

Intuitive judgments also figured centrally in step four, which expressly required Lord Braid to weigh competing benefits and burdens. His conclusion in this respect depended on intuitive and

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<sup>58</sup> *Id.* ¶ 118.

<sup>59</sup> *Id.* ¶ 119.

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* ¶ 125.

<sup>62</sup> *Id.* Debates about which activities were “essential” also took place in other countries applying the proportionality test. Martínez-Torrón, *supra* note 8, at 6 (Spain and Brazil).

<sup>63</sup> *See Philip et al.*, [2021] CSOH 32 ¶ 121.

<sup>64</sup> *See id.* ¶ 123.

<sup>65</sup> *Id.* ¶ 121; *id.* ¶ 62 (“worship-lite”).

<sup>66</sup> *Id.* ¶ 126.

<sup>67</sup> For an interesting discussion of why the public-health professionals might systematically undervalue religious viewpoints when making decisions, see Donald L. Drakeman, Book Review, *Some Second Thoughts about the Humanities*, 56 ZYGON 732, 736-39 (2021), at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/zygo.12730>. “At present,” Drakeman observes, “many of the most influential public health professionals are consciously ignoring religiously based input.” *Id.* at 739.

<sup>68</sup> Cass R. Sunstein, *Our Anti-Korematsu*, Harvard Public Law Working Paper No. 21-21 (manuscript at 5) (2020), at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3756853](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756853).



contested assumptions, for example, that in-person, communal worship is equally important during a pandemic as obtaining food and that temporarily requiring believers to avail themselves of online services imposed an unacceptable cost (“worship lite”). Even many believers did not share those assumptions. In Scotland, as in many other places, many religious communities supported temporary restrictions on gathering.<sup>69</sup> Again, Lord Braid’s conclusion was certainly plausible. But a judge with different assumptions, applying the same proportionality analysis, could just as plausibly have reached the opposite conclusion—as some UK judges did, with respect to other Covid restrictions.<sup>70</sup>

*The U.S. Cases: General Applicability under Smith*

The U.S. Covid cases likewise have turned on judicial line drawing and balancing. This might come as a surprise, since, as a formal matter, U.S. law does not rely on the proportionality test. In practice, though, during the Covid crisis, U.S. courts have acted very much like their foreign counterparts. Under the pressure of the pandemic, as Collings and Barclay observe, the legal “framework” has not mattered much.<sup>71</sup> The “priors” of individual judges—their normative commitments and intuitions about the comparative virtues and importance of religious exercise—have mattered more.<sup>72</sup> And those, quite evidently, have differed greatly.

More than thirty years ago, the Supreme Court announced a test that was supposed to preclude judicial balancing in religious freedom cases. Under *Employment Division v. Smith*, a neutral, generally applicable law that only incidentally burdens religious exercise is presumptively constitutional.<sup>73</sup> Such a law receives only minimal, “rational basis” review, which is virtually impossible to fail.<sup>74</sup> Only where a law is *not* neutral and generally applicable—that is, where the law substantially burdens religious conduct more than analogous non-religious conduct—does “strict scrutiny” apply.<sup>75</sup> In those circumstances, the state must show that the law serves a compelling governmental interest and does so only as far as necessary.<sup>76</sup> The state must show that it could not equally achieve its interest in a way that burdens religious exercise to a lesser degree.<sup>77</sup>

The *Smith* Court evidently believed that the neutral-and-generally-applicable test would limit occasions for judicial balancing and promote predictability.<sup>78</sup> During the Covid crisis, the opposite has occurred. The neutrality requirement has not posed much problem.<sup>79</sup> With a couple of possible

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<sup>69</sup> *Philip et al.*, [2021] CSOH 32 ¶ 123. Martínez-Torrón observes that religious communities were especially deferential to government restrictions early in the crisis, but less so as time passed. Martínez-Torrón, *supra* note 8, at 9-11.

<sup>70</sup> See, e.g., Collings and Barclay, *supra* note 11 (manuscript at 28-29).

<sup>71</sup> See *id.* (manuscript at 3-4).

<sup>72</sup> Kislowicz, *supra* note 22, at 47 (citation omitted).

<sup>73</sup> 494 U.S. 872, 879-82 (1990).

<sup>74</sup> See KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION 31 (2006).

<sup>75</sup> See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (2007).

<sup>76</sup> See MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 115 (4<sup>th</sup> ed. 2016).

<sup>77</sup> See *id.*

<sup>78</sup> See Collings and Barclay, *supra* note 11 (manuscript at 14) (arguing that *Smith* “openly and energetically eschewed any meaningful form of interest-balancing”); see also MCCONNELL ET AL., *supra* note xx, at 146; Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 152-53 (2004).

<sup>79</sup> See Jiwoon Kong, Note, *Safeguarding the Free Exercise of Religion during the Covid-19 Pandemic*, 89 FORDHAM L. REV. 1589, 1609 (2021). For an argument that the Court should have resolved the Covid cases under the neutrality

exceptions, U.S. authorities have not targeted religion during the pandemic, though some have acted with comparative “indifference,”<sup>80</sup> as in New York City, where Mayor de Blasio downplayed the importance of worship in comparison with political protests.<sup>81</sup> General applicability has proved troublesome, however.<sup>82</sup> The requirement has puzzled scholars for decades and the pandemic has intensified the tensions.<sup>83</sup> Whether public-health measures like Covid restrictions are generally applicable is not an objective matter, but a question of judgment that turns on implicit balancing—an assessment of the “comparative risks and importance of certain activities.”<sup>84</sup> In the Covid crisis, with so many unknowns and so much at stake, judges have found it impossible to reach consensus.

Consider the shifting decisions of the Supreme Court. Early in the pandemic, in *South Bay United Pentecostal Church v. Newsom* (*South Bay I*), by a vote of 5-4, the Court refused to enjoin a California measure limiting “attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.”<sup>85</sup> Like the Court’s other Covid cases, *South Bay I* was part of the Court’s “shadow docket”—an emergency application for injunctive relief—and the Court did not issue an opinion.<sup>86</sup> Nonetheless, it is clear that the general applicability requirement divided the justices.<sup>87</sup> For example, Chief Justice Roberts, who voted with the majority, noted that California had imposed similar or stricter restrictions on “comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods.”<sup>88</sup> Consequently, the California measure merited only minimal review, especially during a public health emergency that counseled deference to expert opinion.<sup>89</sup> By contrast, Justice Kavanaugh’s dissent argued that the measure was not generally applicable, since “comparable secular businesses [were] not subject to” the cap, “including factories, offices, supermarkets, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.”<sup>90</sup> Two months later, in *Calvary Chapel v. Sisolak*,<sup>91</sup> the Court again divided 5-4 in refusing to enjoin a Nevada restriction on

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requirement rather than the general applicability requirement, see Mark Storslee, *COVID-19, Neutrality, and the Free Exercise of Religion*, 37 J.L. & RELIGION (forthcoming 2022).

<sup>80</sup> See Sunstein, *supra* note 67, at 5-6 (“selective sympathy and indifference”) (citation omitted). On one possible example of hostility, see *Agudath Israel of America v. Cuomo*, 980 F.3d 222, 229 (2<sup>nd</sup> Cir. 2020) (Park, J., dissenting) (discussing New York Governor Andrew Cuomo’s remarks about ultra-Orthodox Jews).

<sup>81</sup> See *Soos v. Cuomo*, 470 F.Supp.3d 268, 276 (N.D.N.Y. 2020).

<sup>82</sup> See Note, *Constitutional Constraints*, *supra* note 7, at 1788.

<sup>83</sup> See *id.* at 1785. Cf. James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 691 (noting that “inconsistencies and uncertainties have plagued the Court’s free exercise jurisprudence for decades”).

<sup>84</sup> Blackman, *supra* note 16, at 686.

<sup>85</sup> 140 S.Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

<sup>86</sup> See Blackman, *supra* note 16, at 681-82; see also Jim Oleske, *Tandon steals Fulton’s thunder: The most important free exercise decision since 1990*, <https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/> (discussing the Court’s disposition of emergency “challenges to Covid limits”). On the shadow docket generally, “a range of orders and summary decisions that defy [the Court’s] normal procedural regularity,” see William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 1 (2015).

<sup>87</sup> Zalman Rothschild, *Free Exercise’s Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 289-90 (2020). This is so even though the justices “did not directly engage” with *Smith*. *Id.* at 289.

<sup>88</sup> *South Bay I*, 140 S.Ct. at 1613 (Roberts, C.J.).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

<sup>91</sup> 140 S.Ct. 2603 (2020).

places of worship, with the dissenters again protesting that the restriction did not apply to comparable “activities that involve extended, indoor gatherings of large groups of people,” including casinos.<sup>92</sup>

A few months after that, though, in *Roman Catholic Diocese of Brooklyn v. Cuomo*,<sup>93</sup> the Court, by a vote of 5-4, enjoined a New York measure that looked very much like the ones it had permitted in *South Bay I* and *Calvary Chapel*. The measure divided the state into color-coded zones. In “red” zones, where the danger of contagion was high, the state restricted attendance at places of worship to 10 persons; in “orange” zones, where the risk of contagion was somewhat less, to 25.<sup>94</sup> Once again, the Justices disagreed about general applicability. For the members of the majority, New York had imposed stricter limits on places of worship than comparable, non-religious gatherings. For example, Justice Gorsuch noted that the state allowed people to gather for long periods in laundromats and hardware stores, among other places.<sup>95</sup> By contrast, the dissenters argued that the proper comparator for religious services was the set of activities involving “large groups of people gathering, speaking, and singing in close proximity indoors for extended periods”— theaters and concert halls, for example.<sup>96</sup> By that measure, New York had treated religious and non-religious activities alike. Indeed, New York had treated religious activities better than it had their secular counterparts.<sup>97</sup>

The debate continued in two subsequent cases. In *South Bay Pentecostal Church v. Newsom* (*South Bay II*), a divided Court enjoined California’s ban on indoor worship services.<sup>98</sup> Justice Gorsuch argued in a concurrence that the prohibition was not generally applicable, since most retail stores continued to operate at 25% capacity.<sup>99</sup> By contrast, Justice Kagan’s dissent argued that the proper comparator was the set of secular gatherings California had banned along with religious services— political meetings, for example—and criticized the majority for “displac[ing] the judgments of experts about how to respond to a raging pandemic.”<sup>100</sup> Finally, in *Tandon v. Newsom*, the Court enjoined, 5-4, California’s ban on at-home religious gatherings of more than three households.<sup>101</sup> The majority maintained that California had treated “comparable secular activities” better than at-home religious gatherings, since it had allowed retail stores, movie theaters, and restaurants, among other locations, to admit more than three households at a time.<sup>102</sup> In dissent, Justice Kagan again disagreed, arguing that the “obvious comparator” was not retail operations, but at-home, non-religious gatherings, which California had also limited to no more than three households.<sup>103</sup> Viewed in that light, the restriction applied generally to religious and secular activities.

The Court has thus found it impossible to stick to a consistent position regarding the general applicability requirement and Covid restrictions on places of worship. This is not surprising. Whatever

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<sup>92</sup> *Id.* at 2605 (Alito, J., dissenting from denial of application for injunctive relief).

<sup>93</sup> 141 S.Ct. 63 (2020) (per curiam).

<sup>94</sup> *Id.* at 66.

<sup>95</sup> *Id.* at 69 (Gorsuch, J., concurring).

<sup>96</sup> *Id.* at 79 (Sotomayor, J., dissenting).

<sup>97</sup> *Id.* at 80.

<sup>98</sup> 141 S.Ct. 716 (2021). The majority declined to enjoin other restrictions, in part because the record was not sufficiently clear. *See id.* at 717 (Barrett, J., concurring in the partial grant of application for injunctive relief).

<sup>99</sup> *Id.* at 717 (Statement of Gorsuch, J.).

<sup>100</sup> *Id.* at 720 (Kagan, J., dissenting).

<sup>101</sup> 141 S.Ct. 1294 (2021) (per curiam).

<sup>102</sup> *Id.* at 1297.

<sup>103</sup> *Id.* at 1298 (Kagan, J., dissenting).

the *Smith* Court hoped, general applicability has always depended on judicial line drawing, and “in a pandemic, the line-drawing problems are challenging.”<sup>104</sup> Notwithstanding scoffing by some on both sides, finding the right comparator for religious services in these cases was “not straightforward.”<sup>105</sup> In terms of risk of contagion, places of worship are not entirely like factories, restaurants, shopping malls, and casinos, but not entirely unlike them, either.<sup>106</sup> Whether worship services were “close enough” to activities the state had permitted was a question without a categorical answer. Deference to public health authorities could not resolve things, because it, too, depended on judicial line drawing.<sup>107</sup> All agreed the Court should defer to the experts to some extent. But how far?

It seems apparent that the justices drew the lines in these cases, based not so much on the similarity or dissimilarity between places of worship and other locations, but on whether the authorities had fairly excluded worship services from the set of activities they had permitted.<sup>108</sup> This necessarily entailed implicit balancing and “value judgments” about the importance of religious exercise, compared to things like grocery shopping and dining out, and the need to accommodate some religious believers.<sup>109</sup> These matters greatly divide conservative and progressive Americans, including conservative and progressive justices. Notably, the Court switched its position, from acquiescing in the restrictions in *South Bay I* and *Calvary Chapel* to forbidding them in *Roman Catholic Diocese, South Bay II*, and *Tandon*, after Justice Barrett, a conservative, replaced Justice Ginsburg, a progressive, thus altering the philosophical balance on the Court. I have more to say about this below.

#### *Strict Scrutiny and Proportionality: Intuition and Balancing*

The decisions in *Roman Catholic Diocese, South Bay II*, and *Tandon* made clear that the Court would subject Covid restrictions to strict scrutiny. As a formal matter, strict scrutiny differs from proportionality analysis, for example, with respect to the “framing” of the right in question.<sup>110</sup> Strict scrutiny applies only to “fundamental” rights, while the proportionality test applies to rights more generally.<sup>111</sup> Moreover, strict scrutiny requires that the state have a “compelling” interest to justify its measure, not merely a “legitimate” one.<sup>112</sup> Finally, strict scrutiny does not formally call for judicial balancing.<sup>113</sup> The proportionality test, by contrast, expressly requires a court to weigh the relative costs

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<sup>104</sup> Sunstein, *supra* note 67, at 14.

<sup>105</sup> *Id.* at 3; *see also id.* at 14. Questions about whether permitted non-religious gatherings were comparable to prohibited religious gatherings occupied courts outside the United States as well. *See Collings and Barclay, supra* note 11 (manuscript at 25-27).

<sup>106</sup> *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7<sup>th</sup> Cir. 2020) (“[i]t would be foolish to pretend that worship services are exactly like any of the possible comparisons”); *see also Rothschild, supra* note 4 (manuscript at 45 & n.222).

<sup>107</sup> Questions about how much deference to give public health authorities occupied courts outside the United States as well. *See Collings and Barclay, supra* note 11 (manuscript at 34-40).

<sup>108</sup> *Cf. Rothschild, supra* note 4 (manuscript at 47) (arguing that “the real constitutional question” that divided the justices in *South Bay I* “was whether it could be said that California was discriminating against religion by having different standards for church gatherings and certain secular gatherings”).

<sup>109</sup> Note, *Constitutional Constraints*, *supra* note 7, at 1790; *see also Blackman, supra* note 16, at 686.

<sup>110</sup> Greene, *supra* note 11, at 57.

<sup>111</sup> *Id.*

<sup>112</sup> Compare *McCONNELL ET AL.*, *supra* note 75, at 115 (strict scrutiny), with *YOWELL, supra* note 12, at 16 (proportionality).

<sup>113</sup> *See Oleske, supra* note 82, at 740-41.

and benefits of a measure (though “many” courts “frequently” skip this step in practice and may “smuggl[e]” balancing into the necessity requirement).<sup>114</sup>

Nonetheless, one should not overstate the dissimilarities, and, in the Covid crisis, at least, the two tests have worked out essentially the same.<sup>115</sup> The framing of the right has not made a difference in this context, since all concede the fundamental character of the right to worship. Similarly, no one doubts the state has a compelling interest in reducing the spread of Covid. Proportionality’s necessity requirement outside the United States has performed a similar function as strict scrutiny’s least-restrictive means test inside the United States.<sup>116</sup> In *Philip*, recall, Lord Braid described the necessity requirement in words an U.S. judge could have used to describe U.S. law. The question, he wrote, was “whether a less intrusive measure could have been used without unacceptably compromising the achievement of the [state’s] objective.”<sup>117</sup>

Finally, whatever the formalities, in practice strict scrutiny often operates as a balancing test, requiring courts to make “all-things-considered” judgments about the relative weight of competing social goods, especially where a measure would “reduce risks of harm rather than eliminate them.”<sup>118</sup> That is what has happened in the Covid context. Judges applying strict scrutiny have weighed whether a limitation on collective worship is “justifiable in light of the benefits likely to be achieved and the available alternatives.”<sup>119</sup> And they have done so based on “priors” — intuitions about things like the importance of collective worship, the need to “follow the science,” and the competence and goodwill of regulatory authorities.

Consider *South Bay II*.<sup>120</sup> The Court did not address strict scrutiny in its per curiam opinion, but, writing separately, Justice Gorsuch did, and a majority agreed with the heart of his analysis.<sup>121</sup> Gorsuch characterized strict scrutiny as a balancing test opposing the interests of religious believers to those of the public more generally. In such cases, he wrote, “courts nearly always face an individual’s claim of constitutional right pitted against the government’s claim of special expertise in a matter of high importance involving public health and safety.”<sup>122</sup> Here, California had a compelling interest in stopping the spread of Covid, but religious believers had a right to worship, and California had not sufficiently explained why it could not honor that right and still achieve its stated objectives.<sup>123</sup> For example, the state could have required places of worship to adopt the social distancing measures it had mandated for

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<sup>114</sup> Collings and Barclay, *supra* note 11 (manuscript at 21).

<sup>115</sup> On the similarity between the two tests generally, see YOWELL, *supra* note 12, at 20-21.

<sup>116</sup> *Cf. id.* at 23 (arguing generally for the similarity of the least-restrictive means and necessity requirements).

<sup>117</sup> Reverend Dr William J U Philip and Others, [2021] CSOH 32, ¶100.

<sup>118</sup> Fallon, *supra* note 74, at 1272; *see also see also* Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 581 (2015); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897, 1907 (2015).

<sup>119</sup> Fallon, *supra* note 74, at 1272.

<sup>120</sup> 141 S.Ct. 716 (2021).

<sup>121</sup> *Id.* at 717 (Statement of Gorsuch, J.). Justices Thomas and Alito joined Gorsuch’s statement in full. Justices Barrett and Kavanaugh agreed with Gorsuch’s analysis of the ban on indoor worship but disagreed with his conclusion that California’s ban on singing during indoor services also violated the First Amendment, because, in their view, the record on that question was unclear. *Id.* (Barrett, J., concurring in the partial grant of application for injunctive relief).

<sup>122</sup> *Id.* at 718 (Statement of Gorsuch, J.).

<sup>123</sup> *See id.*

“many secular settings.”<sup>124</sup> It could have restricted occupancy, imposed reasonable time limits, or given places of worship the option of offering regular Covid testing.<sup>125</sup> Any of these alternatives would have constrained believers’ free exercise rights less than a total ban and still allowed California to reach its stated public health goals.

Justice Gorsuch appeared unperturbed by the fact that public health experts evidently disagreed that narrower measures would equally reduce the spread of Covid. “Of course we are not scientists,” he conceded, but judges should not defer to experts where constitutional rights were at stake.<sup>126</sup> He did not put it this way, exactly, but he obviously believed that balancing the interests of some religious believers and the public at large was a matter for the courts, not epidemiologists. Besides, public health experts had burned their credibility by “moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner.”<sup>127</sup>

Like Lord Braid in *Philip*, in *South Bay II*, Justice Gorsuch balanced competing social goods and concluded that the costs of the state’s measure, in terms of the restriction on believers’ rights, outweighed the benefits, in terms of reducing the spread of disease. And, like Lord Braid, he did so based on intuitions—“naked judicial instinct,” Justice Kagan complained in dissent—that many would not share.<sup>128</sup> To give just one example, Justice Gorsuch’s opinion turned on the assumption that temporarily banning indoor gathering substantially burdened believers. As in Scotland, however, many congregations in California easily adjusted to restrictions on in-person worship.<sup>129</sup> “Given California’s mild climate,” Justice Kagan protested, forbidding indoor gathering did “not amount to a ban” on worship.<sup>130</sup> Believers could continue to worship outdoors; in fact, “[w]orship services” had “taken place outdoors throughout this winter.”<sup>131</sup>

Justice Kagan also expressed dismay at the Court’s dismissal of experts’ conclusions on the measures necessary to reduce contagion. “[I]t is alarming,” she wrote, “that the Court second-guesses the judgment of expert officials,” since, “[t]o state the obvious, judges do not know what scientists and public health experts do.”<sup>132</sup> The Court had substituted “judicial edict” for “science-based policy.”<sup>133</sup> But whether, and how far, to defer to experts is itself a judgment call that depends on one’s confidence in the experts’ consistency and good faith, as well as one’s assessment of the gravity of the risk and the costs deference imposes on important rights like free exercise.<sup>134</sup> On those matters, Justices Gorsuch and Kagan evidently disagreed. Both made plausible arguments. The point is that judges applying strict

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<sup>124</sup> *Id.* at 718-19.

<sup>125</sup> *Id.* at 719; *id.* at 720.

<sup>126</sup> *Id.* at 718.

<sup>127</sup> *Id.* at 720.

<sup>128</sup> 141 S.Ct. at 723 (Kagan, J., dissenting).

<sup>129</sup> See *supra* text accompanying note 63 (discussing *Philip*), text accompanying note 68 (same).

<sup>130</sup> *South Bay II*, 141 S.Ct. at 721 (Kagan, J., dissenting).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 723.

<sup>133</sup> *Id.*

<sup>134</sup> Cf. Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 DUKE L.J. ONLINE 1, 27 (2020) (noting that a court’s rigorosity in applying strict scrutiny might “depend on its assessment of the gravity of the pandemic”).

scrutiny in the same case easily can reach different conclusions if they start with different priors about fundamental matters.

In short, in the Covid crisis, doctrinal differences have had relatively little significance. Under either the proportionality test outside the United States, or *Employment Division v. Smith* inside the United States, courts have decided cases based mostly on intuition and balancing. Undoubtedly, the pressure of the crisis explains much. In a public-health emergency, where speed is essential and hard information difficult to obtain, intuitive assessments may be the best one can do. But crises often clarify, and the Covid pandemic has done so. Notwithstanding formal differences, in their case-by-case character and reliance on individual judgment, proportionality analysis and strict scrutiny have shown themselves in this episode to be more alike than different.<sup>135</sup> In some circumstances, where debate exists about the importance of the right in question or the strength of the state's interest, proportionality and strict scrutiny may cash out differently. But the Covid crisis has revealed that the two tests share significant affinities.

### *Judicial Partisanship and Cultural Divisions in the United States*

Let me now turn, briefly, to what the pandemic has revealed about U.S. law, specifically. Here, the story is not one of affinity but division. The Court's inconsistent decisions in the Covid cases reflect a cultural and partisan divide respecting religion and religious freedom. True, that is not the only fissure that exists in the United States today. The Covid crisis has revealed other disagreements as well, for example, about the competence of government, the credibility of scientific experts, and other matters. And the pandemic did not create our religious divide, which has been growing for decades, and which has influenced the Court's response to other legal questions as well.<sup>136</sup> But the current public health crisis, affecting hundreds of millions of Americans simultaneously, has intensified our religious divide and made it impossible to ignore.<sup>137</sup> In the crisis, the lack of a "shared baseline" with respect to religious freedom has become quite manifest.<sup>138</sup>

Where cultural consensus exists on an issue, balancing tests like strict scrutiny work reasonably predictably. Results differ in specific cases, but judges tend to weigh rights and interests in foreseeable ways that conform to social expectations.<sup>139</sup> Where consensus does not exist, however, balancing tests become more problematic.<sup>140</sup> In that context, outcomes turn on the personal worldviews of the judges who happen to hear a case—and given the lack of consensus, those worldviews may vary considerably. In the absence of shared cultural understanding, judges inevitably rely on their "own moral

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<sup>135</sup> On similarities between proportionality and strict scrutiny generally, see YOWELL, *supra* note 12, at 9, 20-21.

<sup>136</sup> See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 158-59 (2014) (noting how the cultural consensus in favor of religious accommodations has dissolved and the affect this has had on legal decisions).

<sup>137</sup> See Storslee, *supra* note 78, manuscript at 3 (observing that "the COVID cases further aggravated an already politicized debate about the Free Exercise Clause").

<sup>138</sup> Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 937 (2019).

<sup>139</sup> Cf. Donald Braman & Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, in *HOW LAW KNOWS* 93, 114 (Austin Sarat et al., eds., 2007) (observing that where "values and norms" are "widely shared," most judges "will find no difficulty reaching agreement").

<sup>140</sup> See *id.* at 103 (observing that "in cases that are the focus of competition between cultural groups in society at large . . . the evidence suggests that cultural cognition leads [judges] in different directions").

backgrounds” and commitments and weigh interests differently.<sup>141</sup> As a result, judicial balancing becomes “unpredictable” and legal doctrine “incoherent.”<sup>142</sup> One would especially expect this to be the case in an emergency, where access to reliable information is uncertain and the potential consequences severe, and where the sense of crisis swamps the effect of professional training that might otherwise encourage greater judicial detachment.<sup>143</sup>

The shifting results in the Court’s Covid cases reflect this dynamic. The historical U.S. consensus on the beneficence of religion—the traditional idea that “religion is valuable and . . . legal rules should be crafted for the purpose of protecting that value”<sup>144</sup>—no longer exists. Americans have not become uniformly irreligious; rather, they have become polarized, and the polarization expresses itself, more and more, in partisan terms.<sup>145</sup> Increasingly, Republicans are the party of traditional believers, especially conservative Christians, while Democrats are the party of Nones and secular Americans.<sup>146</sup> Some exceptions exist. Black Christians strongly identify as Democrats, for example, as do the relatively small number of Americans who consider themselves part of the “Religious Left.”<sup>147</sup> Overall, though, the religious/secular divide between the two parties appears consistently in social surveys.

This partisan divide affects judicial appointments—and, through them, judicial decisions. As Devins and Baum show in a recent study, “presidents increasingly choose [judicial] nominees who ... adhere strongly to their parties’ dominant ideological tendency,”<sup>148</sup> so that “credible [judicial] candidates from either party are likely to reflect the ideological gap that separates” Democrats from Republicans.<sup>149</sup> In the free exercise context, one would expect Democratic presidents to nominate judges who sympathize with the secularism that increasingly defines that party and Republican presidents to nominate judges who sympathize with the GOP’s pro-religious orientation. Presidents have a handily differentiated set of candidates from which to choose. Legal elites today are as divided as the rest of the country, if not more, and competing progressive and conservative networks exist to help

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<sup>141</sup> Kislowicz, *supra* note 22, at 42.

<sup>142</sup> Alan Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens’s Establishment Clause and Free Exercise Jurisprudence*, 106 NW. U. L. REV. 605, 638 (2012).

<sup>143</sup> On how professional experience and training may diminish the effects of judges’ political and ideological commitments, see Kahan et al., *supra* note 18, at 354-55.

<sup>144</sup> Andrew Koppelman, *Neutrality and the Religion Analogy*, in RELIGIOUS EXEMPTIONS 165, 165 (Kevin Vallier & Michael Weber, eds., 2018).

<sup>145</sup> See, e.g., MASON, *supra* note 23, at 14, 33, 37.

<sup>146</sup> See Mark L. Movsesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 Harv. J.L. & Pub. Pol’y 711, 747-48 (2019); see also Sisk and Heise, *supra* note 18, at 1205, 1233-36.

<sup>147</sup> See, e.g., PEW RESEARCH CENTER, FAITH AMONG BLACK AMERICANS 120 (Feb. 16, 2021) (“Black adults from all religious backgrounds are strongly Democratic.”); Frank Newport, *The Religious Left Has a Numbers Problem*, Gallup’s Polling Matters, at <https://news.gallup.com/opinion/polling-matters/258032/religious-left-numbers-problem.aspx> (noting the comparatively weak “influence of the religious left within the Democratic party”) (emphasis omitted).

<sup>148</sup> NEAL DEVINS AND LAWRENCE BAUM, THE COMPANY THEY KEEP 13 (2019).

<sup>149</sup> *Id.* at 121. *But cf.* Michael A. Perino, *Law, Ideology, and Strategy in Judicial Decision Making: Evidence from Securities Fraud Actions*, 3 J. OF EMPIRICAL LEGAL STUD. 497, 508 (2006) (noting that with respect to lower-court appointments, “Presidents frequently use their nominating powers to push partisan or personal, rather than ideological, agendas”) (citation omitted).



identify the right people to fill vacancies on the bench.<sup>150</sup> Consequently, presidents of both parties can readily select judicial candidates likely to sympathize with their parties' core commitments.

The lack of a cultural baseline thus has made judicial decisions on religious freedom more subjective and dependent on judges' partisan identities. Americans today "lack a common measure for weighing the importance of practicing one's religion against other important concerns,"<sup>151</sup> and, as a result, a balancing test like strict scrutiny, which depends so heavily on judges' priors, leads inevitably to politically polarized results. Exactly that pattern has appeared in the U.S. Covid cases.<sup>152</sup> A study by Zalman Rothschild of more than 100 Covid cases in the federal courts reveals that not a single Democratic-appointed judge has ruled in favor of religious plaintiffs in any of them.<sup>153</sup> By contrast, "66% of Republican-appointed judges" have done so, and "82% of Trump-appointed judges."<sup>154</sup> This partisan breakdown has held true at the Supreme Court as well as in the lower courts.<sup>155</sup> Democratic-appointed justices consistently have ruled against religious plaintiffs in Covid cases. Republican-appointed justices, with one exception, consistently have ruled for religious plaintiffs, and, as we have seen, the appointment of Justice Barrett to replace the late Justice Ginsburg during the pandemic decisively shifted the Court in their favor.<sup>156</sup>

Again, the Covid crisis did not create this situation. The polarization I describe has been growing for decades—an aspect of our ongoing culture wars.<sup>157</sup> The crisis has highlighted those divisions, however. How could it be otherwise? The pandemic has presented difficult questions in a context of great uncertainty and consequence and has required judges to make quick decisions without the benefit of regular briefing or argument. And it has done so in a context of deep social and political dissensus on the value and scope of religious freedom. In this environment, it is not surprising that judges would fall back on their priors and decide cases differently. Indeed, a consensual resolution in this setting hardly seems possible.<sup>158</sup> It is not a wonder that judicial balancing in the Covid cases has been so partisan and controversial. The wonder would be if that were not the case.

### *Conclusion*

In an essay in April 2021, Javier Martínez-Torrón wrote about what legal scholars can learn from the Covid pandemic. The most important lessons, he suggested, do not relate to "concrete"

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<sup>150</sup> See DEVINS AND BAUM, *supra* note 146, at 112 (noting the "more pronounced" divisions among elites than exist "in the general population"); *id.* at 117 (noting "the emergence of distinct career paths for conservatives and liberals" among legal elites).

<sup>151</sup> Storslee, *supra* note 137, at 937.

<sup>152</sup> Cf. Sisk and Heise, *supra* note 18, at 1238 (observing that partisan differences have also begun to "percolat[e]" into the Court's Establishment Clause jurisprudence).

<sup>153</sup> Rothschild, *supra* note 4 (manuscript at 3).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (manuscript at 43-44).

<sup>156</sup> See Blackman, *supra* note 16, at 638.

<sup>157</sup> On the U.S.'s culture wars generally, see JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1992).

<sup>158</sup> See Wright, *supra* note 21, at 194. In the Establishment Clause context, Micah Schwartzman and Nelson Tebbe have identified what they describe as a pattern of "appeasement" by progressive justices, who offer conservative justices "unilateral concessions for the purpose of avoiding further conflict." Micah Schwartzman and Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 272. Whatever the situation in the Establishment Clause context, such a pattern has not appeared so far in the Covid cases.

particulars—the details of specific restrictions and the holdings of specific cases.<sup>159</sup> Like all pandemics, this one will eventually end, and paying too much attention to the finer points of courts’ responses to it would be a mistake. Rather, scholars should concentrate on what the Covid cases reveal about the law more generally, about “already familiar” questions that “manifest with special clarity in moments of crisis.”<sup>160</sup> Most of all, scholars should focus “on what this pandemic teaches us about ourselves, that is, about our societies, our conception of political organization, [and] our understanding ... of fundamental rights, including freedom of religion or belief.”<sup>161</sup>

In this essay, I have drawn two such lessons, one comparative and one relating specifically to U.S. law. As a comparative matter, the crisis suggests significant affinities between the proportionality test courts outside the United States favor and the U.S. approach under *Employment Division v. Smith*. Doctrinal differences have not had much practical significance, at least during the crisis. Both in the United States and abroad, courts ultimately have struck a balance between the competing interests at stake, those of some religious believers and those of the public more generally, and have relied on intuition and normative commitments about the comparative importance of religious exercise. With respect to the United States, specifically, the Covid cases reveal a cultural and political divide that makes consensual resolution of conflicts over religious freedom increasingly problematic, and sometimes impossible, even during a once-in-a-lifetime pandemic.

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<sup>159</sup> Martínez-Torrón, *supra* note 8, at 2.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*