Religious exemptions may spark a revolution

Overview

Religious exemptions to mandatory vaccination programs may spark a revolution in religion jurisprudence. Existing U.S. Supreme Court religion doctrine should disfavor religious exemptions: under *Employment Division v. Smith*, a religious belief does not excuse compliance with neutral laws of general application.[1] And some state constitutions (like California's) arguably bar giving religious individuals or organizations a benefit (like vaccination exemption) that is unavailable to others. But three factors may force an evolution here: federal law will not permit inquiry into sincerity; several high court justices seem ready to overturn *Smith*; and after *Espinoza v. Montana* state constitutions now arguably can't provide greater establishment clause protection.[2] We suspect that when a believer challenges state and federal vaccination mandates on federal free exercise grounds, the federal government's reliance on *Smith* will fail and the precedent will be abrogated because it excessively burdens free exercise. A state like California will rely on its state constitutional provision, which will be invalidated under *Espinoza*. The upshot: religious exemptions potentially will revolutionize federal free exercise doctrine and frustrate an ongoing public health program.

Analysis

Existing doctrine favors neutral laws over religious exemptions

Current federal religion doctrine should disfavor religious exemptions based on the neutrality principle from *Smith*. True neutrality conflicts with religious exemptions, but federal establishment clause doctrine permits such exemptions to avoid excessively burdening free exercise.[3] The idea that the free exercise clause requires, and the establishment clause permits, exemptions to otherwise neutral laws necessarily conflicts with the *Smith* principle that the faithful must comply with neutral laws of general application. Scholars have speculated that the high court will

overturn *Smith* given its recent trend of broadly applying religious liberty against seemingly neutral government acts. Coronavirus vaccination mandates may compel that collision and present an opportunity to overturn or limit *Smith*.

Abrogating *Smith* would reset federal religion doctrine to 1963, when in *Sherbert v. Verner* the U.S. Supreme Court held that strict scrutiny applies to any government law that substantially burdens religious beliefs; such laws must therefore serve a compelling government interest with no alternative regulation that would serve that interest.[4] On that standard, in *Sherbert* the Court held that denying unemployment benefits because the applicant refused to work on Saturdays based on her religious beliefs violated the free exercise clause.

That is not the rule today. In 1990 the high court's decision in *Smith* limited *Sherbert* to the unemployment compensation context, and for every other free exercise challenge the Court established a new test: "the 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)."[5] Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[6] Since then, *Smith* has provided the test for free exercise challenges — but only to state acts. Congress prevented *Smith* from applying to the federal government by enacting The Religious Freedom Restoration Act, which applies *Sherbert*-style strict scrutiny to the federal government (but not to the states).[7]

The high court's reactions to government acts during the pandemic — particularly those related to churches — are a red flag for *Smith*'s continued vitality.

For example, the Court granted an emergency application for injunctive relief barring the governor of New York from enforcing an executive order restricting capacity at religious services.[8] That ruling came on the so-called shadow docket, where the Court rules without full merits briefing or argument.[9] Such injunctions are an "extraordinary remedy" in which the Court "directs the conduct of a party."[10]

The Court concluded that the applicant church and synagogue had "clearly established their entitlement to relief pending appellate review," showing a likelihood of prevailing on the merits of their claims, irreparable injury absent an injunction, and no harm to the public interest.[11]

The Court ostensibly did not overturn *Smith*, concluding instead that the regulations at issue "single[d] out houses of worship for especially harsh treatment."[12] Thus, the executive order's restrictions were neither neutral nor generally applicable, and strict scrutiny applied.[13] The Court did acknowledge that "COVID-19 is unquestionably a compelling interest," but it concluded that the regulations were not "narrowly tailored" to survive strict scrutiny.[14]

And in *Tandon v. Newsom*, the Court built on *Roman Catholic Diocese* in a *per curiam* opinion enjoining California's restrictions on at-home religious gatherings. The Court emphasized that "whenever [government regulations] treat *any* comparable secular activity more favorably than religious exercise" such regulations are subject to strict scrutiny under the Free Exercise clause.[15] The Court endorsed this portion of Justice Kavanaugh's separate concurrence: "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly or even less favorably than the religious exercise at issue."[16] *Smith* did not apply because the government acts discriminated against religion, requiring the acts to satisfy strict scrutiny.

That posture required the government to demonstrate that less restrictive measures "could not address its interest in reducing the spread of COVID," and that the religious exercise was more dangerous than the other activities, even though the same precautions applied to both.[17] As with New York's restrictions, California arguably did not regulate religious worship evenhandedly: the Court identified several categories of activities California permitted without imposing a similar limit (including hair salons, retail stores, movie theaters, and indoor restaurants).[18] The Court emphasized that "[t]he State cannot 'assume the worst when people go to worship but assume the best when people go to work.'"[19]

Whatever the wisdom of the Court's decisions in *Roman Catholic Diocese* and *Tandon*, the fact that it resolved both cases with emergency relief shows that a majority of the Court is willing to reach free exercise questions even where a compelling government interest exists — such as fighting a global pandemic. And even though *Smith* survived by not applying in those cases, avoiding a direct confrontation with *Smith* in the context of a religious challenge to a universal vaccination mandate seems implausible. In the next section we analyze how that is likely to play out.

Abrogating *Smith* will return religion doctrine to *Sherbert* and strict scrutiny

In the test case we suspect is coming, the high court could require religious exemptions to vaccination mandates without directly abrogating *Smith* by limiting that decision to its context. *Smith I* only held that free exercise "does not extend to conduct that a State has validly proscribed."[20] The distinction could be that a vaccination mandate is a requirement, not a proscription: in *Smith* the individual demanded a religious exemption to a criminal statute that banned consuming peyote. A vaccination mandate is the reverse situation, where the individual will claim that the government requires doing an act that the individual's faith proscribes. *Smith II* noted that it rested on a line of cases upholding criminal laws against religious claims.[21] But it also noted another line of "hybrid" cases where religious liberty combined with another constitutional protection.[22] Religious liberty combined with physical autonomy privacy could be such a hybrid case of dual constitutional protections. That is a path to requiring religious exemptions to vaccination mandates, while seemingly preserving *Smith*. But so limiting or distinguishing *Smith* opens wide the door to requiring religious exemptions to a wide array of otherwise neutral laws.

Other scholars reach similar conclusions. For example, Professor Aziz Huq considered this issue in *Fulton v. Philadelphia*, which concerned a religious entity's demand to receive government grants without complying with non-discrimination laws. In *Fulton* the high court held that the religious entity's free exercise right was burdened by the city's law against discriminating against protected groups in

administering city grant funds — the court distinguished *Smith* because it found that the city's law was not neutral and generally applicable.[23]

Professor Huq notes that in *Fulton* three justices (Alito, Gorsuch, and Thomas) argued for overturning *Smith* in concurring opinions. He concludes:

> *The Smith regime collapses under repeated challenges. At that point, the court would hold that the Constitution is violated anytime religion isn't accommodated unless the state can make a showing of compelling necessity. The court has already rejected the idea that avoiding harm to third parties — including disfavored minority groups — counts as a necessary state interest. Hence, religious organizations will have the constitutional right to act on beliefs when doing so causes predictable, grave harm to others, including employees, patients and others.*

The end result of this conflict between neutral government laws and religious liberty likely will be that *Smith* is abrogated (either directly or with a thousand cuts), *Sherbert* is reinstated (or a similar test adopted), and even facially neutral laws or government programs must pass strict scrutiny if they impede religious liberty. That would apply the federal RFRA strict scrutiny standard to the states. Ordinarily we would then pivot to the California constitution, but in this instance the state constitution's religion clauses may not be much help.

California's religion clauses arguably provide greater free exercise protections

Some state constitutions (like California's) have religious freedom clauses that have been interpreted to better guard that liberty by more aggressively enforcing their establishment clauses. The idea is that the less government can regulate religion, the greater the liberty interest. That idea could apply here to prevent the government from creating exemptions for religious belief in its vaccination program — making it apply regardless of belief or absence thereof. That arguably is consistent with *Smith*'s neutral laws principle.

California constitution article XVI, section 5 provides that government entities may

not “make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose,” may not “help to support or sustain” schools, hospitals, or other institutions “controlled by any religious creed, church, or sectarian denomination whatever,” and may not grant or donate personal property or real estate “for any religious creed, church, or sectarian purpose whatever.”[24] The California Supreme Court has read that provision to mean that a government act violates the California constitution if the act confers a “direct, immediate, and substantial” benefit to religion.[25] The court held that article XVI, section 5 forbids all forms of governmental aid to religion, whether tangible or intangible preferences.

The center has argued that the California constitution’s religion clauses limit the state government to giving religious persons or entities nothing more than generally available incidental benefits because the California constitution religion clauses require the state government to involve itself in its citizens’ religions to the least degree possible.[26] California government entities whose vaccination mandates are challenged on free exercise grounds could defend with the state constitution’s “no aid” requirement: exempting the faithful provides them with the intangible benefit of an apparent preference. Under existing California law that should be a complete defense, but in the next section we explain that this theory may now lack vitality.

California’s religion clauses are in jeopardy

The U.S. Supreme Court’s recent decision in *Espinoza v. Montana Department of Revenue* may undercut the “no aid” analysis and cabin California’s constitutional religion clauses.[27] Montana’s constitution has religion provisions similar to California’s, and Montana relied on them to make a no-aid argument similar to ours — but the high court rejected it.

Like California’s no-aid provisions, Montana constitution article X, section 6(1) bars government aid to any school “controlled in whole or in part by any church, sect, or denomination.” Montana relied on that provision to exclude religiously affiliated private schools from a state scholarship program. The high court subjected the Montana no-aid provision to strict scrutiny because it discriminated based on

religious status. Montana claimed an interest in using its no-aid provision to separate church and state more than the federal constitution would require, to foster greater religious liberty by reducing government interference in religion.

The Court held that Montana failed to state a compelling interest, and that barring religious schools from the scholarship program did not promote religious freedom. The Court expressly rejected the argument that a no-aid provision ensures greater religious liberty by requiring even more separation of church and state than the federal constitution would require:

> *In the Department's view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. [¶] Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place.*[28]

If other analogous state constitution provisions — such as California's — are challenged on similar grounds, they likely will suffer the same fate. The result will be that California's constitutional religion clauses will be locked to the minimum requirements of the federal free exercise clause, and that state constitutional attempts to make state governments more neutral in religious matters will be struck down.

How this will play out

A citizen will refuse a federal or state government vaccination mandate, claiming that compliance would violate a tenet of their sincerely held religious beliefs. The

federal government will argue that *Smith* requires upholding the mandate as a neutral law of general application, and that it is neither facially discriminatory against religion, nor intended to burden religious exercise; instead, the law is the least restrictive means to achieve a compelling policy interest (ending a global pandemic). California will argue the same, with the additional argument that its state constitution's religion clauses require including the faithful in the benefits of a generally available government program — excluding them would be religious discrimination, and preferentially exempting them would violate the state constitution's no-aid clause.[29]

In that scenario a federal court likely will reject the governments' arguments and impose a religious exemption. Federal religion doctrine bars considering the sincerity of a claimed faith, so the citizen's refusal on religious grounds must be taken at face value.[30] Only those governmental interests "of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[31] Avoiding harms to third parties in general (all persons potentially exposed to disease from the citizen's refusal to be vaccinated) is not such a compelling interest.[32] And the specific potential for any given person to be injured or killed by the one religious citizen's unvaccinated status is too speculative and tenuous to overcome the free exercise right.[33] There are "areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[34] Following the high court's recent religion decisions, a court likely will hold that compelling a faithful citizen to submit to an invasion of their bodily autonomy that their faith forbids is just such an area of conduct, and the government's interest is insufficiently compelling to overcome the citizen's religious liberty interest in following their faith's command that they refuse vaccination.

Conclusion

To be clear, we do not endorse the projected analysis and likely outcome. They rely on antiquated views of the balance between neutral laws and religious liberty, ignore the reality of harm to third parties, and would compel the result of permitting

a religious minority to grievously harm the public health. Naturally, the test case may depend on its context: for example, neutrality requires that religious objectors be treated on equal footing with any other exemption, so if people with medical exemptions can be accommodated by wearing masks in the office then religious objectors should receive the same accommodation. And there must be a nexus between the government action and the mandate itself, so states cannot overreact with mass quarantine orders to combat isolated local outbreaks. Thus, the test case may not require directly confronting *Smith*.

Still, *Smith* and *Jacobson v. Massachusetts* are clear that a government need not exempt believers from broad vaccination mandates.[35] And a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents as to become an establishment.[36] The worst time to revisit those principles is during a pandemic. Yet the principle that religious beliefs are no excuse for complying with neutral laws of general application inevitably conflicts with the concept of religious exemptions. And the view that providing special benefits to religion is an establishment clause problem is equally opposed to a practice of religious exemptions from generally applicable laws. These opposing values have existed in tension, tenuously balanced for 30 years since *Smith* was decided in 1990. This state of the law may be unsustainable, and we fear for *Smith*'s continued vitality — and for a nation of laws that apply equally to all regardless of faith.

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Senior research fellow Brandon V. Stracener contributed to this article.

1. *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 879–82 (*Smith II*). That decision affirmed after remand the holding in *Smith I*, *Employment Div., Ore. Dept. of Human Res. v. Smith* (1988) 485 U.S. 660. Where necessary for clarity we refer to these decisions separately; otherwise, we refer to them jointly. ↑

2. *Espinoza v. Mont. Dept. of Revenue* (2020) 140 S.Ct. 2246, 2260–61. ↑

3. *Cutter v. Wilkinson* (2005) 544 U.S. 709, 719. ↑

4. *Sherbert v. Verner* (1963) 374 U.S. 398, 403 (any incidental burden on the free exercise of appellant's religion must be justified by a compelling state interest in the regulation of a subject within the state's constitutional power to regulate). ↑

5. *Smith II* at 879 (quotation omitted). ↑

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

7. Congress responded to *Smith II* by enacting the Religious Freedom Restoration Act of 1993 (107 Stat. 1488, 42 U.S.C. § 2000bb et seq.) which prohibits the government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *Cutter* at 714–15. In *City of Boerne v. Flores* (1997) 521 U.S. 507, 515–16, 536, the court invalidated the RFRA as applied to states and their subdivisions because it exceeded Congress's remedial powers under the Fourteenth Amendment. ↑

8. *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, 66–69. ↑

9. *Id.* at 77 (Breyer, J., dissenting). ↑

10. *Niken v. Holder* (2009) 129 S.Ct. 1749, 1757 (citations omitted); *see Roman Catholic Diocese of Brooklyn* at 75 (Roberts, J., dissenting), 77 (Breyer, J., dissenting). ↑

11. *Roman Catholic Diocese of Brooklyn* at 66. ↑

12. *Ibid.* ↑

13. *Id.* at 67. ↑

14. *Ibid.* ↑

15. *Tandon v. Newsom* (2021) 141 S. Ct. 1294, 1296 (original italics). ↑

16. *Ibid.* ↑

17. *Id.* at 1296–97. ↑

18. *Id.* at 1297. ↑

19. *Ibid.* (citation omitted). ↑

20. *Smith I* at 671. The Court affirmed that holding in *Smith II*: "the 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)." *Smith II* at 879 (quotation omitted). ↑

21. *Smith II* at 879–80. ↑

22. *Id.* at 881. ↑

23. *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868, 1877. ↑

24. Cal. Const., art. XVI, § 5. ↑

25. *Cal. Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 604. ↑

26. Carrillo & Smith, *California Constitutional Law: The Religion Clauses* (2011) 45 U.S.F. L.Rev. 689, 736. ↑

27. *Espinoza* at 2260–61. ↑

28. *Ibid.* ↑

29. States cannot exclude members of any faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. *Everson v. Bd. of Education* (1947) 330 U.S. 1, 16. ↑

30. *U.S. v. Ballard* (1944) 322 U.S. 78, 86 ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (2020) 140 S.Ct. 2367, 2383 ("[W]e made it abundantly clear

that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities. That is, they could not 'tell the plaintiffs that their beliefs are flawed' . . . ."). ↑

31. *Wisconsin v. Yoder* (1972) 406 U.S. 205, 215. We recognize that, on the current state of the law, *Yoder* and other *Sherbert*-era cases arguably are not the best authority. But we cite them here to show how this argument can be built to support a return to this doctrinal period: these cases may not be the law now, but we suspect they soon will be again. ↑

32. *Little Sisters of the Poor Saints Peter and Paul Home* at 2381 (dismissing concerns about potential harms to "interested women," which although the court previously assumed that is a compelling governmental interest, concluded that such policy concerns did not override the statute). Again, this area of the law is unstable. There is precedent that contradicts this argument. *See Prince v. Massachusetts* (1944) 321 U.S. 158, 166–67 ("[A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."). Our point here is that we suspect that cases like *Prince* and *Smith* are at risk of being abrogated or limited. ↑

33. *Sherbert* at 403 ("The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."). ↑

34. *Yoder* at 220. ↑

35. *Jacobson v. Massachusetts* (1905) 197 U.S. 11. *See* Belcher & Belcher, *State-mandated COVID-19 vaccination is constitutional*, SCOCAblog (Aug. 9, 2020); Duvernay, *The University of California can require COVID-19 vaccinations*, SCOCAblog (Apr. 23, 2021). ↑

36. *Bd. of Education of Kiryas Joel Village School Dist. v. Grumet* (1994) 512 U.S. 687, 722 (Kennedy, J., concurring). ↑