RELIGIOUS MINORITIES IN THE FREE EXERCISE REVOLUTION

By Christopher C. Lund

Traditional religious minorities find themselves in a strange place in the modern debate over the free exercise of religion. Highly salient culture-war cases have polarized the field, with religious exemptions now finding support from conservative religious believers but suspicion from almost everyone else. Needing religious exemptions, but distanced from conservative politics, traditional religious minorities (like Jews, Muslims, Sikhs and others) have a unique perspective on these issues that is easily overlooked.

Thirty years ago, in Employment Division v. Smith, the Supreme Court narrowed the Free Exercise Clause to protect only against religious discrimination, holding that religious believers cannot go to courts to get religious exemptions from neutral and generally applicable laws. Though hard on all religious believers, Smith has always had the harshest impact on religious minorities.

Things began to look up for religious minorities with the arrival of new conservative Justices, who have passionately revived the free exercise clause. But rather than overruling Smith, the Court has instead worked within it—stretching Smith just enough to give exemptions in the Court's most recent, high-profile cases.

One would naturally think these changes would save, or at least greatly help, traditional religious minorities. But this turns out not to the be case. For the new Free Exercise Clause has grown out of culture-war cases, and it bears the marks of those origins. As this piece will explain, various structural features of the Court's new approach basically guarantee that while the new Free Exercise Clause may help conservative religious believers, it probably will not do much for traditional religious minorities. Free exercise has come surging back in the Roberts Court. But it has come surging back only for some.

The Court should reconsider Smith. It should not do so for the sake of guaranteeing results for conservative Christians in the culture-war cases—something the Court will be prone to do regardless. Instead, the Court should reconsider Smith for the sake of the religious minorities who have always been at the heart of the Religion Clauses.

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INTRODUCTION

Free exercise is in the middle of a revolution. Long neglected, the free exercise of religion has quickly become the favorite child of the Roberts Court. Last year, for example, the Court ruled that Philadelphia could not terminate its partnership with Catholic Social Services for refusing to work with gay couples seeking to adopt,[1] and issued a raft of orders giving churches special rights to open despite pandemic-related quarantine orders.[2] Earlier years saw the Court protect a religious baker who refused to do a cake for a gay wedding,[3] immunize religious schools from employment claims brought by their teachers,[4] and exempt religious corporations from having to provide contraceptive coverage to their employees.[5] Religious claimants bringing free exercise claims have won many remarkable victories. Even more tellingly, since Chief Justice Roberts took over, free exercise has not lost even once.[6]

Yet strikingly, the Roberts Court has managed to reach these very protective results, despite having inherited some very unprotective Free Exercise doctrine. Since the 1990 decision in *Smith*, the Supreme Court's official position has been that the Free Exercise Clause only forbids religious discrimination, and so it is up to legislatures, not courts, to give religious exemptions from neutral and generally applicable laws.[7] Some Supreme Court Justices have grumbled about *Smith*, and some exceptions

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[1] *See* Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868 (2021).

[2] *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021) (exempting in-home religious gatherings from California's prohibition on having more than three families in a home); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (exempting religious organizations from California's rules limiting indoor capacity); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (exempting religious organizations from New York's rules limiting indoor capacity).

[3] *See* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).

[4] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[5] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[6] If one looks at the cases the Supreme Court has decided on their merits (ignoring the so-called "shadow docket" rulings, like its orders list), religious claimants have not lost an exemption case since 1997. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating part of the Religious Freedom Restoration Act). This includes not only claims under the Free Exercise Clause, but also claims under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Although one should also note a partial exception, *Sossamon v. Texas*, 563 U.S. 277 (2011), which limited prisoners' claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) to injunctive relief rather than monetary damages.

[7] *See* Employment Division v. Smith, 494 U.S. 872, 879 (1990) (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability").

have been carved from it.[8] Even so, *Smith* remains the lodestar of free exercise jurisprudence.

So despite having an official rule against religious exemptions, the Roberts Court has somehow managed to keep giving religious exemptions in case after case. The Court has been able to this by developing a powerful and conceptually elaborate set of new rules about what counts as discrimination. Through these new rules, the Court has found ways to give exemptions in a set of cases, ranging all the way from Christian bakers, to Christian schools, to Christian-led for-profit corporations, and to Christian churches.[9]

Reactions to this new Free Exercise have been split. On the left side of the political spectrum, most have attacked these changes. Some have worried that religious exemptions might have deleterious real-world effects on sexual minorities, the right to contraceptive coverage, and other important civil rights.[10] Others have pressed an older argument—that the whole project of religious exemptions is misguided, as religious exemptions unfairly privilege religious belief over nonreligious forms of commitment.[11] Of course, some (typically on the political right) have defended these

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[8] The grumbling was most recently seen in a concurrence where three Justices said they would overrule *Smith*. See Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring). The exceptions have been both legislative and judicial. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb); Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (confirming the existence of the ministerial exception, and distinguishing *Smith* as being inapplicable to "internal church decision that affects the faith and mission of the church itself").

[9] *See supra* notes 1-5 (providing citations to those cases). This critique is not completely fair. In one of the seven cases mentioned here, Christian groups were joined by Jewish groups as plaintiffs. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

[10] The citations alone here could fill several pages. But any list of the best works would include the following. *See* Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959 (2020); Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257 (2018); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177 (2015).

[11] *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); Anthony Ellis, *What is Special About Religion?*, 25 LAW & PHIL. 219 (2006). Others have taken different views of the matter. *See* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017); Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

changes.[12] But those defenses have been relatively few and far between. Many have seen free exercise's revival as an exercise of brute conservative power. Some have been gentle about it, like Steve Vladeck's claim that the Court has been giving "unique treatment [to] religious liberty" that is "normatively indefensible."[13] Others have been more forceful, like Laurence Tribe and Michael Dorf arguing that the Court now looks like "the highest judicial authority of a place called Gilead—the theocratic and misogynist country of Margaret Atwood's dystopian 'The Handmaid's Tale.'"[14]

This Article critically examines the Supreme Court's modern free exercise jurisprudence, but it does so from a different vantage point—it considers how religious minorities (like Jews, Muslims, Sikhs and other faiths) are likely to fare under the new Free Exercise Clause.

Ever since *Smith*, religious minorities have been in a difficult situation. *Smith* rejects religious exemptions as a matter of constitutional right, requiring religious groups to get exemptions from legislatures rather than courts. This narrowing of free exercise impacts religious minorities the most, because they are the ones who have the most difficulty getting religious exemptions through the legislative process.[15]

Understandably then, one might think that the Supreme Court's modern revival of the Free Exercise Clause might greatly help traditional religious minorities. Even for those who worry the Supreme Court has

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[12] *See, e.g.*, Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, 2021 CATO SUP. CT. REV. 34; Branton J. Nestor, *Revisiting Smith: Stare Decisis and Free Exercise Doctrine*, 44 HARV. J.L. & PUB. POL'Y 403 (2021); Bradley J. Lingo & Michael G. Schietzelt, *Fulton and the Future of Free Exercise*, 33 REGENT U. L. REV. 5, 6 (2021); Stephanie H. Barclay, *First Amendment "Harms*", 95 IND. L.J. 331 (2020).

[13] *See* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, __ NYU J. L. & LIBERTY __ (forthcoming 2022), at 43, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3987461.

[14] Laurence H. Tribe & Michael C. Dorf, *To This Supreme Court, Religious Freedom Trumps Public Health – Even Amid COVID-19 Plague*, U.S.A. Today, Nov. 29, 2020, *available at* https://www.usatoday.com/story/opinion/2020/11/29/religious-rights-trump-covid-illness-deaths-supreme-court-column/6436196002/. Others have had similar reactions. *See* Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Radically Redefine Religious Liberty*, Apr. 12, 2021, *available at* https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html; Erwin Chemerinsky, *In its COVID Ruling, Trump's Activist Supreme Court Gives Us a Preview of What's to Come,* L.A. Times, Nov. 27, 2020, *available at* https://www.latimes.com/opinion/story/2020-11-27/op-ed-in-its-covid-ruling-trumps-activist-supreme-court-gave-us-a-preview-of-whats-to-come;

[15] At some level, this is probably obvious, but Thomas Berg puts it well: "A minority-protection approach provides a strong case for constitutionally mandated exemptions declared by courts," because "[g]eneral laws enacted by democratic bodies will, almost by definition, reflect the values of the majority or at least the politically powerful," and thus "conflict with the values and practices of minority or outsider religions." Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 964 (2004).

taken free exercise too far, one silver lining might be that religious minorities have an easier time practicing their faiths.

But unfortunately, as this Article explains, this is not so. The modern resurgence of the Free Exercise Clause will not help religious minorities all that much. In various ways this Article will unpack, the design, operation, and basic structure of the new Free Exercise all combine to create a constitutional regime precisely tailored to the needs of conservative Christians, with everyone else essentially left out in the cold.

For one thing, the Supreme Court seems most passionate about the cause of conservative religious believers, going out of its way to intercede for them (when it might not for others). But more fundamentally, the *doctrines* that the Court has created are twisted in ways that essentially stack the deck against religious minorities. Under *Smith*, religious exemptions are supposed to be exceptional. Courts can only give religious exemptions from a law when the government has earlier made "secular exceptions" (exceptions for various kinds of nonreligious conduct) that undermine the purpose of the law to the same extent as a religious exemption would—only then does the denial of a religious exemption become cognizable as discrimination.

This framework essentially means that religious claimants need two things to win. First, they need a certain amount of luck. For whether secular exceptions happen to exist with respect to any given law depends on somewhat arbitrary factors—making it somewhat a matter of luck whether any given free exercise case can win. But second, they also need a certain amount of help. For the various concepts now associated with free exercise—what counts as the "rule" and its "purpose," what counts as a "secular exception," and so on—are all fairly manipulable. For religious claimants to win, they need judges willing to manipulate these concepts in their favor.

But this creates a problem for religious minorities. First, they are unlikely to be "lucky," in this sense. For a variety of reasons, religious minorities are more likely than other groups to be religiously burdened by laws without secular exceptions (i.e., laws that are uniform). And second, they are unlikely to get much "help." For while some courts have shown a willingness to manipulate free exercise concepts to secure conservative victories in culture-war disputes, there is little reason to think that willingness will extend beyond that context.

This Article unpacks all these things. But it goes further, explaining how all these problems have been compounded by the Supreme Court's recent free exercise decisions. All of those decisions have been essentially one-off holdings involving a recurring set of particular circumstances—well-funded and well-represented parties fighting pitched culture-war battles involving formal, written policies with well-established enforcement histories. In important ways, the Court's holdings limit themselves to cases with these same circumstances, meaning that the

Court's new free exercise doctrines will mean little for the kinds of cases religious minorities typically bring. To put it another way, the Court has stretched *Smith* just far enough to give exemptions to the conservative Christians in culture-war cases. But *Smith* has not been stretched, and probably cannot be stretched, far enough to protect minority observance.

A focus on the needs of traditional religious minorities suggests a simple conclusion—that *Smith* itself should be overruled. The Court should not overrule *Smith* for the sake of guaranteeing results for conservative Christians in the culture-war cases—something the Court will do regardless. Instead, the Court should reconsider *Smith* for the sake of the religious minorities who have always been at the heart of the Religion Clauses.

This Article proceeds in four Parts. Part I sets the stage by explaining both the distant history of the Free Exercise Clause, as well as the Supreme Court's most recent decisions in the area. Part II then critically examines these recent decisions, explaining why they are unlikely to mean much for traditional religious minorities. Part III and Part IV discusses overruling *Smith* as a way of protecting religious minorities. Part III discusses its potential, while Part IV examines various objections.

I. THE NEW FREE EXERCISE CLAUSE

The Free Exercise Clause is undergoing a remarkable transformation. In case after case, the Roberts Court has been giving religious exemptions to conservative religious believers, despite a set of doctrines nominally forbidding religious exemptions. While each of the Court's decisions make some sense on its own terms, when examined together—and especially when looked at critically—it becomes clear how problematic the new Free Exercise has become.

A. The Ancient History: *Smith* and *Lukumi*

The history of the Free Exercise Clause centers around a single case—the Supreme Court's 1990 decision in *Employment Division v. Smith*.[16] *Smith* asked whether members of the Native American Church had a constitutional right to use peyote in their religious rituals, despite an Oregon law generally forbidding peyote use. For decades before *Smith*, the Court had operated under a strict-scrutiny test relatively conducive to religious exemptions.[17] Under this test, substantial burdens on free

[16] 494 U.S. 872 (1990). For an in-depth look at *Smith*, see Garrett Epps, *The Story of Al Smith: The First Amendment Meets Grandfather Peyote*, in CONSTITUTIONAL LAW STORIES 455-82 (Michael Dorf ed., 2004).

[17] The test was sometimes referred to as the *Sherbert/Yoder* test, because those were the core cases. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (giving the Amish an exemption from the truancy laws so they could withdraw their children from public school after eighth grade); Sherbert v. Verner, 374 U.S. 398 (1963) (giving a Seventh-day Adventist employment

exercise had to be justified by compelling governmental interests.[18] More demanding on paper than in practice, this compelling-interest test nevertheless led to religious exemptions in a set of sympathetic cases.[19]

But *Smith* changed everything. For one thing, *Smith* rejected the Native American Church's claim for an exemption. More importantly, *Smith* rejected religious exemptions as a general matter.[20] Religious claimants could ask legislatures for exemptions, the Court said, but they had no constitutional right to them. Now in subsequent years, exceptions have been made to *Smith*, both by legislatures[21] and by the Supreme Court.[22] But *Smith*'s general rule—that courts should not give exemptions

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benefits, despite her refusal to take alternative work on a Saturday, which was required by state employment law).

[18] To be sure, there were three elements in this test—substantial burdens, compelling state interests, and least restrictive means. For a representative explanation of the test, see Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

[19] Apart from *Sherbert* and *Yoder*, *see supra* note 17, the Court also gave exemptions in three other cases. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981). Despite that, everyone agrees the strict-scrutiny test sounded more powerful than it actually was in practice. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857-58 (2006) (noting that "the religious liberty category had the highest survival rate of any area of law in which strict scrutiny applies").

[20] More precisely, *Smith* held that burdens on religious exercise required no justification as long as the laws in question were "neutral" and "generally applicable." *See Smith*, 494 U.S. at 879 ("Subsequent decisions have consistently held that 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).") (citations and quotations omitted). The Court did make some exceptions here, for individualized exemptions and hybrid rights. But those exceptions were small ones and did not threaten the rule—at least, until recently. For a fuller explanation of these mechanics, see James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 725-26.

[21] In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which restores religious exemptions at the federal level. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb). In 2000, Congress passed RLUIPA, which restores religious exemptions from state and local law in the special contexts of land use and prisons. *See* Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc (2000)). And on top of that, a number of states have restored exemptions through state statutes or interpretation of their state constitutions. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

[22] The key decision here is the Court's decision confirming the existence of the "ministerial exception"—a constitutional doctrine immunizing churches from employment suits brought by their clergy. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (holding that *Smith* does not apply to "internal church decision that affects the faith and mission of the church itself"); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (expanding the breadth of the ministerial exception).

from laws that are "neutral and generally applicable"—still dominates the jurisprudential landscape. If there is one rule to know, *Smith* is it.

Three years later, the Supreme Court returned to the Free Exercise Clause in *Lukumi*—a case about the rights of a Santeria congregation seeking to sacrifice animals in their time-honored religious rituals.[23] Acting in emergency session to respond to community outrage about the Santeria, the city of Hialeah enacted a set of ordinances prohibiting animal sacrifice.[24]

Despite *Smith*, the Supreme Court in *Lukumi* unanimously ruled for the Santeria, concluding that Hialeah's ordinances were neither neutral nor generally applicable. First, they were not neutral because they had been passed to burden Santeria religious practice.[25] And second, they were not generally applicable because Hialeah made exceptions to those ordinances for other kinds of killings. Crucially, while Hialeah prohibited killing animals in Santeria rituals, it allowed killing animals in a variety of other contexts—for food, clothing, pest control, fishing, hunting, pet euthanasia, and so on. These nonreligious killings threatened the city's stated interests as much as Santeria's killings would.[26] As a result, this was unequal treatment, the Court explained, and "[t]he Free Exercise Clause protects religious observers against unequal treatment."[27]

In a sense, *Smith* and *Lukumi* are polar opposites. The law in *Smith* was neutral and generally applicable; the law in *Lukumi* was anything but. Left to draw the line between them, courts have naturally turned to *Lukumi*'s discussion of general applicability, which centers around notions of secular exceptions and underinclusiveness.[28] Basically,

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[23] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[24] One such ordinance, for example, required people not to "unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id*. at 527.

[25] *Id*. at 540 ("[T]he ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice."). The Court drew this conception of neutrality out of its Equal Protection cases, citing *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977) and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

[26] *Id*. at 544 ("The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it."); *see also* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 207–08 (2004) ("The ordinances' lack of general applicability was shown by their collective failure to prohibit secular killings of animals—analogous secular conduct outside the scope of the ordinances—and also by their failure to prohibit other secular conduct, not analogous as conduct, that caused analogous harmful consequences.")

[27] *Lukumi*, 508 U.S. at 542.

[28] To be sure, some courts initially took a narrower approach, conceiving of *Smith/Lukumi* as a simple ban on intentional discrimination. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702 (9th Cir. 1999) (asking whether the lawmakers in question "were impelled by a desire to target or suppress religious exercise"). This was probably not a

if a law makes no exemptions for other kinds of conduct (call it, "secular conduct"), then it is generally applicable and no claim for a religious exemption is possible. But if a law makes exceptions for secular kinds of conduct, and if those secular exceptions threaten the government's interest as much as a religious exception would, that essentially amounts to discrimination, justifying a religious exemption.[29]

This conception of discrimination has intuitive appeal. It does indeed look like discrimination when the government prohibits religious activities but permits secular equivalents—a school discriminates, in every real sense, if it allows students to wear baseball caps but not hijabs.[30] And, in a deep sense, the doctrine *must* be this way—there is no other way an anti-discrimination right *could* go beyond religious status to protect religious conduct. Moreover, this approach has practical virtues—it gives religious minorities a kind of vicarious protection in the legislative process. Religious minorities can piggyback on battles fought by secular interest groups in the political branches. If those secular groups get an exemption, religious minorities do too.[31]

Despite downsides that will be explored later, one can see the power and attractiveness of this "most favored nation" theory of free exercise in *Fraternal Order of Police v. Newark*, an influential Third Circuit opinion written by then-Judge Alito.[32] There two Muslim policemen challenged a

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persuasive reading of *Lukumi*. *See* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 28 (2000) ("Whatever else it may be, *Lukumi* is not a motive case. The lead opinion explicitly relies on the city's motive to exclude a particular religious group—and that part of the opinion has only two votes. So whatever the holding is, it is not a holding about motive."). But, in any event, it has been superseded by the Supreme Court's most recent cases. *See supra* subpart I(B).

[29] *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 637 (2003) (noting that "[a]s long as a law remains exceptionless, then it is considered generally applicable, and religious claimants cannot claim a right to be exempt from it," but when "a law has secular exceptions, however, a challenge by a religious claimant becomes possible"). As Nelson Tebbe rightly notes, this understanding of *Smith/Lukumi* found support from a surprisingly diverse coalition. *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2405 & nn. 38-39 (2021) (making this point and providing citations).

[30] Of course, the crucial thing will be deciding which secular activities count as equivalents. As Justice Kagan will eventually put it, "the law does not require that the State equally treat apples and watermelons." Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting).

[31] As Doug Laycock and Steve Collis put it, "Small religious minorities will rarely have the political clout to defeat a burdensome law or regulation. But if that regulation also burdens other, more powerful interests, there will be stronger opposition and the regulation is less likely to be enacted." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 25 (2016).

[32] *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999). The phrase "most favored nation status" was first coined in Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49-50.

department policy requiring them to shave, on grounds that they had a religious obligation to grow beards. Their claim succeeded, because of a different exception made by the police department. Although the police department refused to allow the Muslim officers to wear beards, it had earlier allowed officers to wear beards when they had a particular medical condition making it painful to shave.[33] Treating this as the kind of discrimination barred by *Lukumi*, *Newark* gave the Muslim officers their requested exemption.[34]

B. The Modern History: *Masterpiece Cakeshop*, *Tandon*, and *Fulton*

For more than twenty years, nothing changed about this basic picture. The Supreme Court decided various cognate issues.[35] Yet for a generation, the Court left the Free Exercise Clause largely untouched. But in the past five years, this has changed dramatically. The Court has returned to the Free Exercise Clause as if hungry for it. Later we consider the cumulative effect of the Court's decisions in a critical light. But before that, we address them individually.

1. *Masterpiece Cakeshop*—"Exceptions," "Rules," and the Level of Generality.

In retrospect, the first signal that everything was going to change came in 2018, when the Supreme Court decided *Masterpiece Cakeshop*.[36] There a couple seeking a cake for their wedding was turned away by the cakeshop owner, Jack Phillips, who objected on religious grounds to helping with a gay wedding. The couple sued Phillips for unlawful discrimination. But in a 7-2 decision, the Supreme Court said it was Philips himself who been discriminated against in violation of the Free

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[33] *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (noting this medical exception was made principally for officers with "a skin condition called pseudo folliculitis barbae").

[34] As the Court put it, "the Department has provided no legitimate explanation as to why the presence of officers who wear beards for medical reasons does not have this effect [of undermining the government's interest] but the presence of officers who wear beards for religious reasons would." *Id*. at 366.

[35] The Court had several cases about religious exemptions under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act. *See* Holt v. Hobbs, 574 U.S. 352 (2015) (RLUIPA); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (RFRA); Sossamon v. Texas, 563 U.S. 277 (2011) (RLUIPA); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006) (RFRA); Cutter v. Wilkinson, 544 U.S. 709 (2005) (RLUIPA). It also had cases about the scope of ERISA's religious exemption for church plans. *See* Advoc. Health Care Network v. Stapleton, 137 S. Ct. 1652, (2017). And it had several cases about the existence and scope of the ministerial exception. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012).

[36] *See* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).

Exercise Clause.[37] The Court based its conclusion partly on negative comments made about Phillips by the Colorado Civil Rights Commission, who first adjudicated the case.[38]

But the Court simultaneously floated a wider theory of discrimination—a theory that significantly expanded upon *Smith* and *Lukumi*. The Court turned its focus to a set of *other* cases earlier decided by the Colorado courts.[39] In those other cases, a conservative Christian named William Jack had unsuccessfully sued a set of bakeries for refusing to make cakes with religious messages condemning homosexuality written on top.[40] The Supreme Court found inconsistencies in how the Colorado courts recognized the gay couple's claim of discrimination against Jack Phillips in *Masterpiece*, but rejected William Jack's claims of discrimination.[41] The Court took this as evidence of discrimination against Jack Phillips. And, in a separate concurrence, Justice Gorsuch and Justice Alito took it further, arguing that it was not just *evidence* of discrimination. It was discrimination itself, discrimination *simpliciter*, they claimed, for

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[37] "Phillips' religious objection [to serving the gay couple]," the Court concluded, "was not considered with the neutrality that the Free Exercise Clause requires." *Id*. at 1731; *see also* Pamela S. Karlan, *Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights*, 2018 SUP. CT. REV. 145, 147 (2018) (arguing that, "in the end, the case fizzled out," as the Court's decision "rested entirely on the proposition that Colorado's administrative proceedings had been tainted by antireligious bias [and] left articulation of any general rule to 'further elaboration'").

[38] *See Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("The official expressions of hostility to religion in some of the commissioners' comments . . . were inconsistent with what the Free Exercise Clause requires."). The Court's conclusion here can be criticized. While some of the statements made by the Commissioners were troubling, others clearly were not. *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 143 (2018) (reviewing the evidence and concluding that "a fair reading of the entire record in *Masterpiece* shows that the Commission met its adjudicative obligations to Phillips by taking seriously his religious claims, reasoning publicly and extensively about them, and generally according them respect").

[39] *See Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same [kind of discriminatory animus]." For a strong formulation of the point, see Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. REV. 167, 183-84, 187-88 (2019).

[40] *See Masterpiece Cakeshop*, 138 S. Ct. at 1728 (citing Jack v. Gateaux, Ltd., Charge No. P20140071X (Mar. 24, 2015), Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Mar. 24, 2015), and Jack v. Azucar Bakery, Charge No. P20140069X (Mar. 24, 2015)).

[41] To give one example, in *Masterpiece*, the Commission saw the cake's message as the couple's rather than the baker's. Yet in the *Jack* cases, the Commission saw the cake's message as the baker's rather than the couple's. *See Masterpiece Cakeshop*, 138 S. Ct. at 1730 ("[T]he Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism."); *see also* Laycock, *supra* note 39, at 183–84 (pointing to other inconsistencies as well).

Colorado to find Jack Phillips liable for discrimination but to dismiss William Jack's equally valid claims.[42]

This theory—adopted by the Court and vigorously defended by two Justices—reveals some disturbing things about the new Free Exercise Clause. The Court faulted the Colorado courts for treating the legal claims against Jack Phillips better than those brought by William Jack. But the truth is that there is no *necessary* inconsistency in how the Colorado courts acted. Discrimination law could plausibly draw the line in any number of places, including the line between cakes with visibly written messages (William Jack's requested cakes) and those without them (the gay couple's requested cake in *Masterpiece*). After all, visibly written messages require someone to write them out, thus requiring a special imposition on objecting bakers. Now maybe such a line would be a bad one. But that does not make it incoherent, and even that would not make it religiously discriminatory. Justice Gorsuch is confident that the Colorado Civil Rights Commission was attracted to this line because it harbored religious prejudice against Jack Phillips.[43] But that turns *Masterpiece* back into a case about bad motives, and tacitly abandons the position that the line drawn by Colorado was *inherently* discriminatory.[44]

But there is an even deeper problem with the Court's theory of discrimination in *Masterpiece*—something that has flown under everyone's radar. The Court starts from the implicit premise that William Jack's claims and the gay couple's claims in *Masterpiece* have to be treated the same way—that Colorado has a constitutional obligation to interpret its ban on religious discrimination and its ban on sexual-orientation discrimination coextensively. In fact, all nine Justices on the Court assume this, even the dissenters. But this assumption is false. Discrimination

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[42] *See Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring) (noting that some Justices "have written separately to suggest that the Commission acted neutrally toward [Jack Phillips] when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment," but then concluding, "I do not see how we might rescue the Commission from its error.").

[43] *See, e.g.*, *id*. at 1739 (2018) (Gorsuch, J., concurring) (arguing that Colorado drew the line it did "[o]nly by adjusting the dials just right," so as to "engineer the Commission's outcome," and concluding that "[s]uch results-driven reasoning is improper").

[44] In a different way, one sees that same tacit abandonment in Justice Gorsuch's repeated insistence that Phillips had religious reasons for seeing his cake as carrying his own message. *See id*. at 1739 ("To some, all wedding cakes may appear indistinguishable. But to Mr. Phillips that is not the case—his faith teaches him otherwise."); *id*. at 1739–40 ("It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is just bread or a kippah is just a cap.").

The easy response to Justice Gorsuch's is that Phillip's religious reasons do nothing to undermine the legitimacy of Colorado's reasons for drawing the line where it did. Justice Gorsuch's argument becomes an argument for religious exemptions and against *Smith*, rather than an argument about religious discrimination *simpliciter*.

against religious-discrimination claims is not a form or species of religious discrimination. This is just a conceptual mistake.

To see the mistake most clearly, imagine Colorado had a law forbidding sexual-orientation discrimination in public accommodations but no law forbidding religious discrimination in public accommodations. Under the Court's theory in *Masterpiece*, that is clearly unconstitutional. After all, in that world, the gay couple in *Masterpiece* would still have a winning claim and now William Jack would not have a chance. Yet such a conclusion would be breathtaking—it would imply that every state must have statutory protections (co-extensively interpreted) for every kind of constitutionally protected behavior or characteristic. That would have drastic implications.[45] To take just one of them, consider 42 U.S.C. § 1981, which forbids racial discrimination (but not religious discrimination) in contracting.[46] An interracial couple denied a cake by someone like Jack Phillips could successfully sue him for racial discrimination under Section 1981, but someone like William Jack would not be able to use Section 1981 to sue bakeries for religious discrimination when those bakeries refuse to put derogatory messages about interracial couples on wedding cakes. The Court's logic implies there is something unconstitutional about Section 1981. That simply cannot be.

But all this does not just go to the logic of one narrow Supreme Court case. For although no one on the Court ever puts it in these terms, *Masterpiece Cakeshop* really highlights a conceptual problem with the *Smith/Lukumi* notion of general applicability.[47] The Court's true objection

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[45] Just to give one example, consider how some states forbid discrimination in public accommodations on the basis of religion but not sexual orientation. *See* Paul Vincent Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. PA. L. REV. 1497, 1500–01 (2015) ("Although forty-five states have enacted public accommodations statutes, the statutes of only twenty-one states and the District of Columbia explicitly prohibit sexual orientation discrimination.").

If the Court is right that it amounts to religious discrimination to protect gay and lesbians from discrimination but not religious folks, then it must also amount to sexual-orientation discrimination to protect religious folks but not gays and lesbians. That means all the states above are acting unconstitutionally. Of course, this assumes that the Constitution protects gays and lesbians from discrimination by the state. But that assumption seems almost unassailable now. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

[46] 42 U.S.C. § 1981 says that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ."; *see also* Runyon v. McCrary, 427 U.S. 160, 168 (1976) ("It is now well established that Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, prohibits racial discrimination in the making and enforcement of private contracts.").

[47] Douglas Laycock defends Justice Gorsuch's view without talking about general applicability. But one nevertheless sees traces of the concept throughout, particularly in this statement: "The state's conclusion that the law did not apply to the William Jack bakers *undermined its interest* in ending discrimination to the same extent as a conclusion that Masterpiece Cakeshop was entitled to exemption from the law on grounds of religious liberty." Laycock, *supra* note 39, at 189.

to Colorado's discrimination law, in essence, is that it is not generally applicable—or at least not generally applicable *enough*. Colorado made an exception to its discrimination laws when it dismissed William Jack's claims. Now having made that exception, general applicability requires that the claims against Jack Phillips also be dismissed.

But this framing enables us to see just how manipulable the idea of general applicability has become. General applicability has courts give religious exemptions only when governments have already made other "exceptions" to the "rule" in question. But what counts as the "rule," and what counts as the "exception," tacitly depend on the level of generality in how things are framed. In *Masterpiece*, if one frames the rule at a low level of generality (if the rule is "the specific Colorado law forbidding religious discrimination"), then Colorado has made no exceptions to it, and so Jack Phillip's claim for a religious exemption should lose. But if one frames the rule at a higher level of generality (if the rule is "all of Colorado's laws forbidding discrimination"), then Colorado made an exception in the William Jack cases, and so Jack Phillip's claim for a religious exemption should win. But this manipulation problem extends far beyond *Masterpiece Cakeshop*; it raises doubts about the viability of general applicability as a concept. We can always get the religious claim to win if we raise the level of generality sufficiently. (Considered as a whole, American law is not generally applicable.) And we can always get the religious claim to lose by lowering the level of generality. (Every law applies to all the things to which it applies.) Moreover, because the level-of-generality question is always antecedent and never capable of objective resolution, general applicability becomes a protean concept—perpetually contestable and extremely manipulable. In a single stroke, *Masterpiece Cakeshop* turned the Free Exercise Clause into an exercise in gamesmanship, where religious claimants can win only if they find judges sympathetic enough to their claims to manipulate the level of generality in their favor. As will be discussed later, there is every reason to expect this will be hardest on religious minorities.

2. *Tandon*—"Most Favored Nation" Status

The Supreme Court's next dealings with the Free Exercise Clause came in a cluster of recent cases arising from the COVID pandemic. Wanting to minimize transmission risk, states and local governments implemented quarantine orders typically banning gatherings (including religious ones) of more than 10 people, with limited exceptions.

Religious organizations challenged those orders, but the Supreme Court initially those challenges away.[48] In *South Bay v. Newsom*,[49] for example, the Supreme Court upheld California's decision to keep on limiting attendance at churches, even though California had completely re-opened manufacturing facilities, warehouses, and offices—and, in some places, schools and in-restaurant dining.[50] Religious organizations argued those "secular exceptions" rendered California's rules not generally applicable: These nonreligious gatherings posed the same risk of COVID transmission as religious services, they argued, so it was discrimination for California to allow them without allowing religious services. But the Court rejected this argument.[51]

Yet things changed overnight when Justice Barrett replaced Justice Ginsburg on the Supreme Court. In a flash, the 5-4 decisions against churches became 5-4 decisions in their favor, and the same arguments that failed before now succeeded. In *Roman Catholic Diocese v. Cuomo*, the Court invalidated New York's rules limiting religious gatherings to 10 people, because of the exceptions made for various businesses deemed essential and allowed to open.[52]

But the rules both crystalized and formalized in *Tandon v. Newsom*.[53] California had a rule limiting religious gatherings in homes to three families. Now this rule was nondiscriminatory in the most basic sense. It applied to both religious gatherings and nonreligious ones—you

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[48] These cases, it should be noted, were "shadow docket" cases, which involved requests for emergency relief and which were heard on an expedited basis. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & LIBERTY 1 (2015). For criticism of the Roberts Court's use of the shadow docket, see Steve Vladeck, *Shadow Dockets Are Normal, the Way SCOTUS is Using Them is the Problem*, SLATE, Apr. 12, 2021, *available at* https://slate.com/news-and-politics/2021/04/scotus-shadow-docket-use-problem.html.

[49] 140 S. Ct. 1613 (2020).

[50] *See* Michael Helfand, *Religious Liberty and Religious Discrimination: Where Is the Supreme Court Headed?*, 2021 U. ILL. L. REV. ONLINE 98, 101-03 (2021) (providing an overview of *South Bay* and the other cases); *see also* Dorit Rubinstein Reiss & Madeline Thomas, *More Than a Mask: Stay-at-Home Orders and Religious Freedom*, 57 SAN DIEGO L. REV. 947 (2020) (similar).

[51] The Court offered no explanation for this, simply denying injunctive relief without an opinion, which is typical for cases in this posture. In a concurrence explaining his own views, Chief Justice Roberts stressed that several of the permitted secular gatherings still had attendance limits, that courts should defer to politically accountable officials in a pandemic, and that the legal standard for obtaining an injunction pending appeal was high indeed. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

[52] The Court held that New York's rule was not generally applicable, focusing on the long list of businesses that New York had deemed essential. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) ("[T]he list of 'essential' businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.").

[53] 141 S. Ct. 1294 (2021).

simply could not have three non-related families in the same home. But even so, the Supreme Court rinvalidated it, because of how California treated businesses:

> California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time [and these activities had not been shown] to pose a lesser risk of transmission than applicants' proposed religious exercise.[54]

Tandon can be criticized from many directions; maybe the best criticism is that the Court was simply wrong on the facts. There was, in fact, genuine reason to believe that the businesses in question posed significantly less transmission risk than gatherings of three families in the same house.[55]

But, for our purposes, *Tandon*'s real legacy is how it makes explicit something that had been only implicit in *Roman Catholic Diocese v. Cuomo*. In *Tandon*, the Court formally adopted the *Newark*-style "most-favored-nations" approach to the concept of general applicability. "[G]overnment regulations are not neutral and generally applicable," *Tandon* said, "whenever they treat *any* comparable secular activity more favorably than religious exercise."[56] Even a *single* secular exception requires a religious exemption under the Free Exercise Clause, the Court said, as long as that secular exception undermines the rule to the same extent as a religious exemption would.

3. *Fulton*—Hypothetical Exemptions

We turn now to the final case in the Supreme Court's recent triumvirate—last term's decision in *Fulton v. City of Philadelphia*.[57] *Fulton* repeats many of the same issues, themes, and political dynamics as

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[54] *Id*. at 1297.

[55] In dissent, Justice Kagan emphasized that this was the factual conclusion of the district court: "No doubt this evidence is inconvenient for the per curiam's preferred result. But the Court has no warrant to ignore the record in a case that (on its own view, turns on risk assessments." Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting). For criticism of *Tandon* for making significant changes through the shadow docket, see Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, __ NYU J. L. & LIBERTY __ (forthcoming 2022), at 30-34, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3987461.

[56] *Tandon*, 141 S. Ct. at 1296 (adding, moreover, that "[i]t is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue").

[57] 141 S. Ct. 1868 (2021). For an in-depth look at *Fulton*, see Laycock & Berg, *supra* note 12, at 34-38.

Masterpiece Cakeshop.[58] At stake in *Fulton* are the rights of three different groups: Catholic Social Services (CSS), gay couples seeking to adopt, and the city of Philadelphia. After a newspaper story about how CSS would not certify gay couples as prospective foster parents, Philadelphia's Department of Human Services ended up cancelling the city's contract with CSS. Ultimately, *Fulton* ends like *Masterpiece*—the Court rules for the religious claimants, but on a strikingly narrow ground.

Like *Tandon*, *Fulton* is a case about general applicability. CSS's contract with Philadelphia had a provision forbidding CSS from rejecting any adoptive family. But at the same time, the contract gave Philadelphia's Department of Human Services Commissioner the power to make exceptions to that provisions—exceptions that would allow partner agencies to reject adoptive families.[59] In *Fulton*, everyone agreed on one thing. If the Commissioner had *actually given* an exception to someone else, then CSS would have had a strong claim to a religious exemption. But, it turns out, the Commissioner never actually made an exception for anyone else. Yet despite that, the Supreme Court in *Fulton* ruled for CSS anyway, holding that the *mere ability* of the Commissioner to make exceptions entitles CSS to an exemption, regardless of whether the Commissioner ever had used that ability.[60]

Perhaps *Fulton* can be defended. Several cases, for example, establish a parallel principle with regard to Free Speech—the government cannot have unbridled discretion to choose among speakers, because it

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[58] *See* Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 160 (2014) (discussing how "much of the reason for the shift in views on accommodation involves another contested field in the American culture wars: the status of gay rights and same-sex marriage").

[59] Section 3.21 of the contract had the following provision: "Provider shall not reject a child or family including, but not limited to . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . *unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion*." *Fulton*, 141 S. Ct. at 1878 (emphasis added).

[60] *Fulton* has other parts as well. Apart from the contract between CSS and Philadelphia, there is also Philadelphia's anti-discrimination law. The Court dealt with that by concluding that CSS was not a place of public accommodation for purposes of city law, even though no state court had ever said that. In reality, the Court was applying a doctrine of constitutional avoidance. But the Court was understandably hesitant to state that explicitly, because it (1) backhandledly implies *Smith* is defective, and (2) ignores the fact that the doctrine of constitutional avoidance has not applied to matters of state and local law. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1904 (2011) ("[F]ederal courts . . . often refuse, for example, to apply widely accepted statutory interpretation doctrines—most conspicuously, the canon of constitutional avoidance—to state-law questions...").

might exercise that discretion in discriminatory ways.[61] *Fulton*, some have said, is this same principle translated into the context of free exercise.[62]

Like *Masterpiece* and *Tandon*, *Fulton* does not overrule *Smith*. Instead, *Fulton* conceives of itself as a discrimination case, implicitly presuming that if Philadelphia's rule was truly generally applicable—that is, if the rules applied to everyone and there was no possibility of exemptions—then CSS would really have to serve gay couples.

Of course, if push came to shove, it is hard to believe the Court would let that happen. But if Philadelphia's rules were truly neutral and generally applicability, protecting CSS would probably require the Court to overrule *Smith*. Six Justices raised that possibility, in two different concurrences.[63] But while *Fulton* may be a harbinger for *Smith*'s eventual overruling, right now it stands only as just another case adopting a broad understanding of *Smith*.[64]

II. RELIGIOUS MINORITIES AMIDST THE FREE EXERCISE REVOLUTION

Reactions to the Court's new Free Exercise Clause tend to divide along predictable lines. Those on the right have praised and welcomed these changes, while those on the left have criticized and feared them.[65] But everyone understands their significance—anyone who reads the cases, or even just the newspapers, knows how the Roberts Court has reinvigorated the Free Exercise Clause in a series of cases protecting the religious liberty of conservative Christians.

But here is something people has missed. There are important, but unseen, problems with how the Supreme Court has revitalized the Free Exercise Clause. The protections of the new Free Exercise Clause, in fact,

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[61] *See* City of Lakewood v. Plain Dealer Publishing, 486 U.S. 750 (1988) (invalidating a city ordinance that gave the mayor discretion over which newspapers would be sold in public news racks, based on whatever he thought would be "necessary and reasonable"); see also Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (striking down a county ordinance for giving discretion to an administrator in setting fees for parade permits).

[62] As Nelson Tebbe puts it: "It is true that there are freedom of speech precedents in which the Court has invalidated licensing regimes that give too much discretion to local officials. On an analogy to them, the mere availability of an exemption would be enough to arouse a suspicion of impermissible burdening. That seems to have been the justification in *Fulton*, and it makes some sense on its face." Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 302 (2021).

[63] In one concurrence, three Justices (Alito, Thomas, and Gorsuch) argued straightforwardly that *Smith* should be overruled. In another concurrence, three other Justices (Barrett, Kavanaugh, and Breyer) raised questions about *Smith*, but stopped short of advocating for it to be overruled. *See Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

[64] Nelson Tebbe has a point when he says that "it is far from inevitable that *Smith* will be formally overruled or explicitly abandoned," as "[t]he Roberts Court may prefer to cut a series of fine distinctions without reformulating any landmark precedents." Tebbe, *supra* note 52, at 268.

[65] *See supra* notes 10-14 (providing citations).

are spotty, unpredictable, and subject to manipulation. In a way, the present Free Exercise Clause is marked by the incredible degree of discretion judges have over free exercise adjudication. That might be acceptable for some—conservative Christian believers can perhaps be confident the Supreme Court will step in for them if lower courts do not. But for others, like traditional religious minorities, the situation is not nearly so rosy.

A. Religious Minorities and Constitutional Luck

The Supreme Court's recent decisions tend to downplay an important fact. Despite all that has happened, *Smith* still dominates the jurisprudential landscape. Free exercise is still an anti-discrimination right, not a substantive right (like freedom of speech). To get a religious exemption, religious claimants must show they have been discriminated against—under *Smith*, religious claimants must show a "secular exception" that has already undermined the law in question as much as a religious exemption would.[66] The Court has interpreted *Smith* almost as expansively as can be imagined, but its very nature imposes a fundamental limit on how far the Court can go. That limit is simply stated: Unless there is some existing secular exception to a rule, religious claims for exemptions from the rule must fail.

This limitation destabilizes the entire regime of free exercise, rendering it a matter of luck. Return to *Newark* again—the Third Circuit case involving the Muslim police officers who won the right to wear a beard as required by their faith.[67] Recall that they won their case solely because the Police Department had earlier permitted other officers not to shave—namely officers with a rare skin condition, *pseudo folliculitis barbae*.

But this prompts some interesting questions. What if the officers with that skin condition had not needed a medical exemption, perhaps because there were other treatments for it? Or what if the skin condition had simply never existed? Then the Muslim officers would have lost. This is a core problem with *Smith* and *Lukumi*. No matter how broadly they are interpreted, they can only generate religious exemptions when the needs of religious believers just happen to overlap with other peoples' non-religious needs. In practice, that means that free exercise exemptions will end up turning on idiosyncrasies. Muslim officers will have the rights to follow the Qur'an only if enough other people have uncurable skin conditions (*Newark*). Santeria congregations will be able to practice their religion only if other people kill animals in secular contexts sufficiently analogous to Santeria sacrifice (*Lukumi*). Religious exemptions now turn

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[66] *See supra* subpart I(A).

[67] *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999); *see also supra* notes 32-34 and accompanying text (discussing *Newark*); *see also* Lund, *supra* note 29, at 647-52 (making some of these points).

on essentially random factors, unrelated to the religious claimant's interest in getting an exemption or the government's interest in denying one. This is the problem of constitutional luck.

Moreover, this problem—the problem of constitutional luck—will have its harshest impact on traditional religious minorities. Religious minorities naturally tend to have religious practices that the dominant culture sees as idiosyncratic—or as strange or threatening. In a way, this is what *makes* a group a religious minority. But this becomes a problem under *Smith*, even under its most protective versions. For seeking to do things few other people want to do, religious minorities will naturally be burdened by laws that simply will not burden other people. As a result, statutes burdening the religious exercise of religious minorities will tend disproportionately to be uniform (that is, exceptionless). As a result, of all the religious groups out there, we can expect religious minorities to get the *least* out of general applicability.

Just consider, for example, a small religious group seeking to use an unknown drug in their religious exercise.[68] These very things (the smallness of the group, the unfamiliarity of the drug) make it less likely that anyone will want to use this drug for nonreligious reasons. As a result, secular exceptions to this rule are unlikely to develop, defeating any possible claim to a religious exemption. But this is also true more generally. Religious minorities often want things that no one else has reasons to want—there are few secular analogues, for example, to the religious prohibitions against photographs, automobiles, or blood transfusions.[69] Perhaps this point should not be pushed too far. To be sure, sometimes nonconventional religious practices will just happen to have conventional secular analogues.[70] But because of the close relationship between religion and culture, we can expect viable secular analogues to arise most often for culturally dominant religious practices.

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[68] *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006) (involving a small Brazilian group, the UDV, who sought to use a relatively unknown drug, hoasca, in their religious rituals). For more on *Gonzales*, see Joshua D. Dunlap & Richard W. Garnett, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2006 CATO. SUP. CT. REV. 257.

[69] *See* James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 329 (2013) ("The practices of small religious minorities often are not shared by others."); Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 359 (2010) ("Small religious minorities often want idiosyncratic things—they demand rights that no one else wants.").

[70] This was, for example, the case in *Lukumi*, where the Santeria practice of animal killing (prohibited by the city of Hialeah) bore some resemblance to various permitted secular killings—for food, clothing, pest control, fishing, hunting, pet euthanasia, and so on. *See supra* notes 24-27 and accompanying text (discussing *Lukumi*).

B. Religious Minorities and Selective Manipulation

As explored above, winning a case under the new Free Exercise Clause requires luck, and there is every reason to think religious minorities will have less luck than other groups. But just as importantly, winning a case under the new Free Exercise Clause also requires help. As we have seen in earlier sections, so many of the free exercise's pivotal concepts—what counts as the "rule," what counts its "purpose," what counts as a "secular exception"—are highly manipulable. A judge sympathetic to a claimant's religious practices may be able to manipulate those concepts to give an exemption. But an unsympathetic judge will be able to manipulate those concepts to deny an exemption. Given the significant discretion the doctrine now vests in judges in deciding free exercise claims, it seems almost inevitable that mainstream religious practices will be treated better than others. Moreover, all this may be more subconscious than deliberate. Every judge will be quicker to protect religious practices they share (or at least understand). But that does not bode well for religious minorities whose practices will seem (at best) foreign or (at worse) dangerous. Together these two points about "luck" and "help" work to explain why religious minorities have traditionally fared worse in their free exercise challenges than others.[71]

But the Supreme Court's recent decisions compound this problem. The Court's revamp of the Free Exercise Clause arose from the Court's vindication of certain kinds of claims—we might call them "culture-war claims" for short—and the Court's jurisprudence bears the marks of these origins. Religious minorities already faced a stacked deck, but the Court's recent jurisprudence stacks it further.

Consider the three recent Supreme Court decisions: *Tandon, Masterpiece Cakeshop*, and *Fulton*. All of them generously interpret the Free Exercise Clause to maximize religious exemptions within *Smith*'s constraints. But all three are also culture-war cases, with two sides that are highly motivated, well-represented, and well-funded. Moreover, all three involve relatively formal policies established by written documents, with public and documented enforcement histories. These tacit features now explicitly shape the boundaries of the Free Exercise Clause.

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[71] *See, e.g.*, Meredith Abrams, *Empirical Analysis of Religious Freedom Restoration Act Cases in the Federal District Courts Since Hobby Lobby*, 4 COLUM. HUM. RTS. L. REV. ONLINE 1, 72 (2019) ("[T]his study presents evidence that being Christian makes a litigant more likely to win a RFRA case."); Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 375, 400 (2018) (arguing that "courts may be underenforcing RFRA for religious minorities" as most cases are brought "on behalf of non-Christian religious minorities, meeting limited success"); Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1386 (2013) ("[C]laimants from other religious communities were nearly twice as likely to prevail as Muslims.").

Start with *Fulton*, where the Supreme Court exempted Catholic Social Services from Philadelphia's contractual requirement that CSS serve all couples because that requirement gave Philadelphia officials the ability to make exemptions.[72] But what exactly does *Fulton* mean? *Fulton* cannot mean that religious claimants can get exemptions anytime any government official has the power to make an exemption for them. That may be *Fulton*'s most natural meaning, but it would immediately make every religious exemption claim a winner. After all, *some* government official *always* has the power to look the other way and not enforce the rules.

Moreover, *Fulton* carefully avoids any such implication. Note how *Fulton* attributes the problem in *Fulton* to Philadelphia's "creation of a *formal mechanism* for granting exceptions."[73] That "formal mechanism" language is crucial; it suggests the problem lies in how Philadelphia formalized the ability to make exceptions by putting it in *writing*. But that instantly makes *Fulton* of no use in the kind of day-to-day cases that religious minorities often bring. Take a Muslim girl who wants to wear a hijab in gym class, but gets in trouble with her school who insists that she de-veil. The policy she wants to challenge will not be written down—and, even if it was, it would not explicitly mention how officials could make exceptions to it. (To be sure, that discretionary power will exist, it just will not be written down.) This point can be generalized to large classes that religious minorities typically bring—*Fulton* will mean little for religious prisoners or religious employees, for example, because the discretion of prisons and employers tends to be implied rather than explicit, and rarely gets reduced to writing.

Or take *Masterpiece Cakeshop*, which illustrates a pernicious aspect of the most basic feature of the Supreme Court's current regime—the need to find a secular exception that one can use as the basis for claiming a religious exception. When rules are formalized, and exceptions hidden but discoverable, a talented and well-funded litigation team can go hunting for those exceptions and often find them. Recall how the religious claimant in *Masterpiece*, Jack Phillips, won his case because of how the Colorado Civil Rights Commission adjudicated three other cases brought by William

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[72] *See supra* section I(B)(3) (discussing *Fulton*). Again the key provision here was Section 3.21 of the contract, which said providers could not reject prospective parents "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1878 (2021). On the basis of this quoted language, the Court exempted Catholic Social Services from the rule, explaining that "the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable." *Id*. at 1879.

[73] The entire line from the Court is this: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*. at 1879.

Jack.[74] Those other adjudications were unpublished. Even now, they are not on Lexis or Westlaw.[75] Jack Phillips had a talented, well-funded, and highly motivated litigation team that was able to discover those adjudications, recognize their potential as "secular exceptions," and then use them as the basis of Phillip's claims of religious discrimination. But note the implication—without such a team, Jack Philips would have lost. In this way, *Masterpiece Cakeshop* shapes the concept of general applicability around these culture-war cases. Religious claimants who can call upon such resources will sometimes be able to win religious exemptions. But ordinary plaintiffs, like the minorities who are the concern of this piece, will have a much harder time.

Indeed, if one looks closer at *Masterpiece Cakeshop*, one sees something else disturbing. Again, Jack Philip's claim succeeded because of those earlier cases brought by William Jack. But the William Jack cases were not mere happenstances. William Jack brought those cases, on purpose, to help Jack Phillips.[76] Jack Phillips was part of a cause popular in conservative Christian circles; he needed help from his allies to get a religious exemption, and he got that help from William Jack. It is nice to have friends, of course. But constitutional rights should not be determined by how many friends you have. And a constitutional regime that allocates rights this way is incompatible with the most basic notions of religious equality.[77]

Put these principles together, and you see a Free Exercise Clause now geared to best help well-connected and well-funded parties fighting culture war issues. It ends up looking like a lesson about tax avoidance,

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[74] *See supra* section I(B)(1) (discussing *Fulton*). *See* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018) ("The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same [kind of discriminatory animus]."

[75] *See* Jack v. Azucar Bakery, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), available at http://perma.cc/5K6D-VV8U; Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015), available at http://perma.cc/35BW–9C2N; Jack v. Gateaux, Ltd., Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), available at http://perma.cc/JN4U-NE6V.

[76] "[William] Jack explained to CP [the Christian Post] that his ultimate point in requesting the cake and filing the complaint was to point out how anti-discrimination law was being unequally applied to bakers . . . 'This statute is being applied inequitably; it so far is only being applied against Christians, such as Jack Phillips and Masterpiece Bakery.'" Michael Gryboski, *Christian Activist Denies Asking Colorado Bakery to Make 'God Hates Gays' Cake*, THE CHRISTIAN POST, Jan. 31, 2015, *available at* https://www.christianpost.com/news/christian-activist-denies-asking-colorado-bakery-to-make-god-hates-gays-cake-133368/. For a more pointed take, see Stephanie Mencimer, *Did the Supreme Court Fall for a Stunt*?, MOTHER JONES, June 7, 2018, *available at* https://www.motherjones.com/politics/2018/06/did-the-supreme-court-fall-for-a-stunt/.

[77] *See* Larson v. Valente, 456 U.S. 228, 245 (1982) ("Free exercise thus can be guaranteed only when [people] accord to their own religions the very same treatment given to small, new, or unpopular denominations.").

where complicated rules, opaque rules, and rules that require front-end investigation all serve to help the most dominant groups in society. As the Supreme Court has fashioned it, the new Free Exercise Clause increasingly looks like that kind of regime—where the popular and those with resources can find (or create) what they need to get religious exemptions. But unpopular folks, and those without resources, are in an entirely different position.

To be sure, these problems are endemic to law. Some (the rich, the sophisticated, cultural insiders, religious majorities) will always find it easier to enforce their rights than others (the poor, the unsophisticated, cultural outsiders, religious minorities). But in so many ways, modern Free Exercise Clause doctrine is making things worse and not better.

III. RELIGIOUS MINORITIES AND THE CASE FOR OVERRULING *SMITH*

Smith has never been good for religious claimants. The Supreme Court's new revitalization of the Free Exercise Clause has helped some of them—the string of victories in free exercise cases by conservative religious believers has escaped no one's notice. But, as we have unpacked, the revival of free exercise has not been a revival for everyone. For a variety of reasons, the Supreme Court's recent decisions are unlikely to improve the position of religious minorities all that much.

If one wants to help religious minorities, the most obvious solution is to overrule *Smith*. *Smith*, of course, was controversial.[78] When it came down, groups on both the left and right excoriated it, often stressing the burdens the case imposed on religious minorities.[79] Many called for the Court to overrule *Smith*,[80] and go back to the compelling-interest test that *Smith* had rejected.[81]

Returning to that compelling-interest test would aid religious minorities in practicing their religions. This is not speculation. For

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[78] Laycock, *supra* note 32; James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL L. REV. 91 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); *see also* James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992) (compiling, and providing citations to, various scholarly criticisms of *Smith*). For a contrary view, see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

[79] This point was put most strongly, and defended most ably, by Douglas Laycock, who said *Smith* sets out a "legal framework for persecution, and persecutions will result." Douglas Laycock, *supra* note 32, at 4. Three years later, he represented the Santeria in what was, essentially, a case of persecution. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[80] *See supra* notes 78-79.

[81] Under this test, the government had to justify substantial burdens by showing they were "the least restrictive means of achieving some compelling state interest." Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 718 (1981). The test originated from two cases, *Sherbert* and *Yoder*. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

although *Smith* is the constitutional rule, the compelling-interest test has been restored by legislation in several places. At the federal level, there is the Religious Freedom Restoration Act (RFRA),[82] which establishes a compelling-interest test for religious exemptions from federal laws. At the state level, roughly half the states have created a compelling-interest test for religious exemptions, either through state RFRAs (state analogues of the federal RFRA) or through judicial interpretations by state courts of relevant state constitutional provisions.[83]

To be sure, these provisions are not perfect. For one thing, many states do not have them and sometimes they have been watered down.[84] Moreover, there is a persistent fear that religious minorities are still treated worse under RFRA and state RFRAs than mainstream religions.[85] Even so, the federal RFRA and state RFRAs have helped religious minorities in a wide variety of situations.

Religious minorities have won many cases under the compelling-interest test that they would not have won under *Smith*.[86] Muslim firefighters have won the right to wear beards as the Qur'an requires, after demonstrating that any genuine safety concerns could be handled without a shaving requirement.[87] Incarcerated Muslim women have won the right

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[82] *See* Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)). Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (RFRA); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006) (RFRA).

[83] There are about twenty-one states with state RFRAs. *See* ALA. CONST. AMEND No. 622; ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02; ARK. CODE ANN. §§ 16-123-401 *et seq*.; CONN. GEN. STAT. ANN. § 52-571b; FLA. STAT. ANN. §§ 761.01-.05; IDAHO CODE §§ 73-401 to -404; IND. CODE ANN. § 34-13-9-1, et seq.; 775 ILL. COMP. STAT. ANN. 35/1-99; KAN. STAT. ANN. §§ 60-5301 to 60-5305; KY. REV. STAT. § 446.350; LA. REV. STAT. ANN. §§ 13:5231-5242; MO. ANN. STAT. §§ 1.302-.307; N.M. STAT. ANN. §§ 28-22-1 to 28-22-5; MISS. CODE ANN. § 11-61-1; OKLA. STATE ANN. TIT. 51, §§ 251-258; 71 PA. CONS. STAT. ANN. §§ 2401-2407; R.I. GEN LAWS §§ 42-80.1-1 to -4; S.C. CODE ANN. §§ 1-32-10 to -60; TENN. STAT. § 4-1-407; TEX CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012; VA. CODE ANN. §§ 57-1 to -2.02. A less certain number of other states have state constitutional provisions interpreted along *Sherbert/Yoder* lines. *See* Larson v. Cooper, 90 P.3d 125 (Alaska 2004); State v. Adler, 118 P.3d 652 (Hawaii 2005); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208 (Me. 2005); Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); St. John's Lutheran v. State Comp. Ins. Fund, 830 P.2d 1271 (Mont. 1992); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000); Door Baptist Church v. Clark County, 995 P.2d 33 (Wash. 2000); State v. Miller, 549 N.W.2d 235 (Wisc. 1996).

[84] For fuller analysis of these problem, see Lund, *supra* note 21, at 479-96 (discussing these and other limits on state RFRAs, such as notice and exhaustion requirements, jurisdictional problems when state RFRAs are litigated in federal court).

[85] *See supra* note 71 (providing citations to the empirical literature); *see also* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 174-182 (2016) (giving reasons why RFRA and state RFRAs are still better for religious minorities than *Smith*).

[86] A full recounting is not possible here, although many cases are covered in Lund, *supra* note 85, at 165-84 and Lund, *supra* note 29, at 482 & n.98.

[87] *See* Potter v. District of Columbia, 558 F.3d 542 (D.C. Cir. 2009).

to avoid unnecessary cross-gender pat-down searches.[88] Sikhs have been able to keep sheathed kirpans,[89] Amish pretrial detainees have been able to avoid unnecessary photographs,[90] the Santo Daime have been able to drink Daime tea,[91] the Santeria have been able to continue their practices of animal sacrifice,[92] and Native American schoolchildren have been able to keep their hair long.[93] In all of these cases, traditional religious minorities have won cases under RFRA or state RFRAs that they probably would have lost under the Free Exercise Clause alone. Moreover, in many of these cases, the judges in question seemed desperate to give religious exemptions, often making cutting comments asking why the government had denied the religious exemption in the first place.[94]

But even beyond the cases, the compelling-interest test fundamentally changes the kind of bargaining that happens in the shadow of the law. By saying that the government does not need to give exemptions to religious minorities, *Smith* discouraged officials from even listening to them.[95] The compelling-interest test thus would simultaneously give religious minorities back both exemptions from courts, and the leverage to get exemptions from other government officials, that *Smith* took away.

IV. RESPONSES TO OBJECTIONS

[88] *See* Forde v. Baird, 720 F.Supp.2d 170 (D. Conn. 2010). In a related context, female Muslim pretrial detainees have been allowed to pursue a right to only unveil in front of female photographers, although the source of the exemption here is not entirely clear. *See* J.H. v. Bratton, 248 F.Supp.3d 401 (E.D.N.Y. 2017), Soliman v. City of New York, No. 15CV5310PKCRER, 2017 WL 1229730 (E.D.N.Y. Mar. 31, 2017).

[89] *See* Tagore v. United States, 735 F.3d 324 (5th Cir. 2013).

[90] *See* United States v. Girod, 159 F.Supp.3d 773 (E.D. Ky. 2015).

[91] *See* Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210 (D. Or. 2009).

[92] *See* Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009).

[93] *See* A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248 (5th Cir. 2010); Gonzales v. Mathis Indep. Sch. Dist., No. 2:18-CV-43, 2018 WL 6804595 (S.D. Tex. Dec. 27, 2018).

[94] *See Needville*, 611 F.3d at 272 ("[W]hile a school may set grooming standards for its students, when those standards substantially burden the free exercise of religion, they must accomplish *something*.") (emphasis in original); *Merced*, 577 F.3d at 593-94 ("The city has absolutely no evidence that Merced's religious conduct undermined any of its interests . . . Merced has performed these sacrifices for sixteen years without creating health hazards or unduly harming any animals."); *Forde*, 720 F.Supp.2d at 178 ("[The government has] offered no evidence establishing a compelling governmental interest in permitting male correctional officers to pat search Forde" and, in fact, "there may be penological disadvantages to cross-gender pat searches").

[95] *See* Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823, 844 (1999) (statement of Douglas Laycock, then a Professor at the University of Texas School of Law) ("The common understanding of the meaning of *Smith* among government lawyers is: 'We don't have to talk to you anymore.'"); Lund, *supra* note 21, at 480 ("State RFRAs surely increase prospects of favorable settlements for religious claimants, both before and after complaints are filed.").

Yet despite all the arguments for the compelling-interest test, there are nevertheless counterarguments. These counterarguments come from all directions. Some academics, for example, see religious exemptions as unfairly privileging religious belief over nonreligious forms of commitment.[96] Others have argued that religious exemptions should be limited to exemptions that do not significantly harm others.[97] Although these objections are important, they have been addressed elsewhere.

Yet it is particularly vital to respond to a set of objections that arose recently from a peculiar source—from inside the Supreme Court. Last term, the Supreme Court decided *Fulton v. Philadelphia*, which again gave Catholic Social Services the right to refuse to provide certain adoption-related services to gay couples.[98] *Fulton* had actually granted certiorari on the question of whether *Smith* should be overruled.[99] But ultimately, when it was decided, *Fulton* left that question entirely unaddressed.

Even so, more than half the Court took positions on that question, in various concurring opinions. Three Justices—Justices Thomas, Alito, and Gorsuch—said directly they would overrule *Smith*.[100] But three other Justices—a unique bipartisan coalition of Justices Barrett, Breyer, and Kavanaugh—both contemplated overruling *Smith* but also flagged some hesitations about whether it should be overruled.[101] While there were "serious arguments that *Smith* ought to be overruled," Justice Barrett's opinion noted, "[t]here would be a number of issues to work through."[102]

This Article now turns to the concerns raised in Justice Barrett's opinions. This makes sense for two reasons. First, answering them has tremendous practical importance. Three Justices have already said they would overrule *Smith*. If two more Justices are to be found, they will almost surely come from the bipartisan three-Justice coalition that signed on to Justice Barrett's opinion. The future of Free Exercise Clause thus depends on answering the questions they posed. But second, the concerns raised by Justice Barrett raises are the very kinds of objections to the compelling-interest test that this piece should address anyway. Other parts of this Article have demonstrated how the compelling-interest test serves the interests of religious minorities. This part explains why the

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[96] *See supra* note 11 (citing the literature about this objection).

[97] *See supra* note 10 (citing the literature about this objection).

[98] *See supra* subpart I(B(3) (discussing *Fulton*).

[99] Fulton v. City of Philadelphia, Pennsylvania, 140 S. Ct. 1104 (2020) (granting certiorari on three questions, the second one being "[w]hether Employment Division v. Smith should be revisited?").

[100] *See* Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring).

[101] *See id*. at 1882 (Barrett, J., concurring).

[102] *See id*. at 1882-83 (2021) (Barrett, J., concurring).

problems associated with the compelling-interest test are not as severe as some have suspected.

A. Religion and Speech

> *I am skeptical about swamping Smith's categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.*[103]

Justice Barrett opens with a concern about privileging freedom of religion over other constitutional rights, like freedom of speech. After all, laws restricting speech do not always trigger the compelling-interest test associated with strict scrutiny. To be sure, laws that discriminate against speech on the basis of viewpoint trigger strict scrutiny.[104] But when speech is burdened by generally applicable laws, the Court has often adopted more forgiving standards.[105] This is the heart of Justice Barrett's concern: Why should generally applicable regulations affecting religion get strict scrutiny, if generally applicable regulations affecting speech do not?

The answer lies in a crucial difference between speech and religion. People often experience religious commitments as fixed and unalterable. But this is not true, or at least not as true, for speech. Speakers may want to maximize the effectiveness of their speech. But even so, they rarely feel any kind of moral obligation to speak in any particular time, place, or manner.[106] As a result, the First Amendment can maintain a "debate on

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[103] *Id*. at 1883 (Barrett, J., concurring).

[104] *See, e.g*., Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 242 (2012) ("There is a great deal of agreement that viewpoint discrimination is at the core of what the First Amendment forbids.").

[105] For an examination of various difficult issues arising when generally applicable laws burden speech, see Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005).

[106] This is part of why the Court has been so deferential about time, place, and manner restrictions. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("[R]easonable, time, place, or manner restrictions . . . are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

public issues" that is "uninhibited, robust, and wide-open," while still limiting the avenues for that debate.[107]

The simple example of abortion protesting illustrates the point. One may not be able to protest abortion right in front of the abortion clinic,[108] or in front of the doctor's house.[109] One may not be able to blast loudspeakers at women seeking abortions,[110] or block their entry into abortion clinics.[111] But there are still innumerable ways for people to protest abortion.

Yet here religious exercise differs from speech. While speakers can conform their speech to fit the channels the government permits, religious people cannot change their religious commitments in the same way. A man who wants to drive with a Confederate flag does not actually need a specialty license plate from the state of Texas—if he really wants it, he can just get it as a bumper sticker.[112] But a Muslim woman who wants to drive and will not remove her hijab for a license photo is stuck—she simply has no way of getting a license while staying religiously observant.[113] The

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[107] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[108] The Court's cases are nuanced here, but the Court has left room for such regulations. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (upholding a Colorado statute making it unlawful to come within 8 feet of someone, within their consent, to try and engage in protest, education or counseling with that person, when within 100 feet of a health care facility); McCullen v. Coakley, 573 U.S. 464 (2014) (striking down a similar law passed by Massachusetts, without overruling *Hill*).

[109] *See* Frisby v. Schultz, 487 U.S. 474, 476 (1988) (upholding a city ordinance forbidding residential picketing against two individuals who sought to "picket[] on a public street outside the [] residence of a doctor who apparently performs abortions at two clinics in neighboring towns").

[110] *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a city ordinance forbidding amplified loudspeakers).

[111] *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 286 (1993) ("Trespassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises.").

[112] *See* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015) (rejecting the First Amendment claim of the Sons of Confederate Veterans to get a specialty license plate with a Confederate flag); Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 299 (2015) ("[I]t is clear that posting even offensive political messages [directly] on one's vehicle is protected by the First Amendment.") (citing *Baker v Glover*, 776 F. Supp. 1511 (M.D. Ala. 1991) (upholding a bumper sticker reading, "Eat Shit").

[113] For a sample of hijab cases, in different contexts, see Clark v. City of New York, No. 18CIV2334ATKHP, 2021 WL 4236700 (S.D.N.Y. Sept. 17, 2021); Chaaban v. City of Detroit, No. 20-CV-12709, 2021 WL 4060986 (E.D. Mich. Sept. 7, 2021); Taylor v. Nelson, No. W-19-CA-467-ADA, 2020 WL 7048605 (W.D. Tex. Dec. 1, 2020); Al-Kadi v. Ramsey Cty., No. CV 16-2642 (JRT/TNL), 2019 WL 2448648 (D. Minn. June 12, 2019); Carter v. Myers, No. CV 0:15-2583-HMH-PJG, 2017 WL 8897155 (D.S.C. July 5, 2017); J.H. v. Bratton, 248 F.Supp.3d 401 (E.D.N.Y. 2017), Council on Am.-Islamic Rels., Mich. v. Callahan, No. 09-13372, 2010 WL 1754780 (E.D. Mich. Apr. 29, 2010); Forde v. Zickefoose, 612 F. Supp. 2d 171 (D. Conn. 2009).

concept of "alternative channels," which makes a lot of sense in many speech contexts, does not make sense in the context of free exercise.[114] Say a warden tells a prisoner that he doesn't need books in his cell because he can read them in the prison library. That warden is harsh, but his position is defensible. But now say a warden tells a Jewish inmate that he doesn't need a Kosher meal because he can wear a yarmulke. That warden has lost her mind.

The point is that while generally applicable laws have the capacity to destroy religious exercise, when they only have the capacity to limit (or channel) freedom of speech. Indeed, this is almost perfectly reflected in the Court's core speech case in this area—*United States v. O'Brien*.[115] *O'Brien* upheld a criminal conviction for draft-card burning, famously adopting a deferential standard for generally applicable laws affecting speech.[116] O'Brien's claim deserves more sympathy than it got from the Court. But even so, everyone knows O'Brien didn't actually need to burn his draft card to protest the Vietnam War.[117] He had innumerable other ways of protesting the War—in fact, nothing stopped him from just making a fake draft card (or photocopying the real one) and burning that instead.[118]

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[114] *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 469 (1998) ("Under existing free-speech doctrine, for instance, whether the government may enforce a time, place, or manner regulation depends in part on whether the government leaves open adequate alternative channels of communication.").

[115] 391 U.S. 367 (1968).

[116] "In [*O'Brien*], the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O'Brien had burned his card in protest against the draft." Holder v. Humanitarian L. Project, 561 U.S. 1, 26 (2010). *O'Brien*'s conception of intermediate scrutiny comes in a four-part test: "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968).

[117] This point became the heart of Justice Harlan's concurrence: "O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card." *O'Brien*, 391 U.S. at 389 (Harlan, J., concurring) (arguing that *O'Brien*'s holding should "not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate").

[118] Picketing, leafletting, vigils, parades, sound trucks, lobbying, boycotts, protest art and music—all the traditional channels of protest remained open to O'Brien. Or, as the government's brief in *O'Brien* put it: "Indeed, the daily headlines show that there are all sorts of legitimate ways of vigorously expressing dissent—whether through the use of mass communication media, the public meeting hall, the peaceable demonstration or the distribution of literature. Burning draft cards may add a theatrical aura to a protest. But one does not have a constitutional right to perform acts otherwise subject to restraint simply because they are dramatic." Brief for the United States at 18, United States v. O'Brien, 391 U.S. 367 (1968) (Nos. 232, 233), *available at* 1967 WL 113811.

Simply put, there are genuine differences here between religion and speech as phenomena that justify the doctrinal differences between them.

B. Institutions and Individuals

> *Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. Hosanna-Tabor Evangelical Church and School v. EEOC, 565 U.S. 171 (2012).*[119]

Justice Barrett's second prompt raises a different issue. About a decade ago, in the *Hosanna-Tabor* case, the Supreme Court adopted the "ministerial exception" that effectively immunized religious organizations from employment claims brought by their ministers. *Hosanna-Tabor* sits uneasily with *Smith*. *Smith* said religious believers could not get exemptions from neutral and generally applicable laws. But *Hosanna-Tabor* gave such an exemption.

Justice Barrett wants to know what will happen to *Hosanna-Tabor* if *Smith* is overruled. The simple answer is nothing—nothing will happen to *Hosanna-Tabor* if *Smith* is overruled. Free exercise will essentially continue along two tracks. Run-of-the-mill free exercise claims will be adjudicated under whatever test replaces *Smith*—presumably the old compelling-interest test. And claims within *Hosanna-Tabor*'s sphere—call them "church autonomy" claims[120]—will be handled by the same flat categorical rule that exists now.[121]

But this two-track approach is nothing new. It has always been this way. In the nineteenth century, the Supreme Court decided its first

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[119] Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

[120] *Hosanna-Tabor* did not use the phrase "church autonomy," but *Our Lady* did. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020) ("The constitutional foundation for our holding was the general principle of *church autonomy* to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government.") (emphasis added). The phrase comes from Doug Laycock's foundational article, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

[121] Justice Barrett's question should be quibbled with in one respect. Justice Barrett makes it seem as if the *Smith*/*Hosanna-Tabor* line is the line between religious organizations and religious individuals. But this is not so. *Fulton*, for example, involves a religious institution. But no one thinks that *Fulton* falls within *Hosanna-Tabor*'s principle. *Smith* held individuals had no right to use peyote. But if the Catholic Church sought to use peyote in its religious rituals, it would be treated the same way. Rather than being about the powers of religious institutions, Hosanna-Tabor is really about about the free nature of religious association. For a fuller defense of this point, see Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1192-96 (2014).

two big religion cases. In 1872, the Court decided *Watson v. Jones*,[122] a church-autonomy case where two factions of a Presbyterian church fought over who would control the property. In 1878, the Court decided *Reynolds v. United States*,[123] an exemption case about whether Mormons should be exempted from the polygamy laws. The Court treated *Reynolds* as an exemption case and *Watson* as a church autonomy case; neither case cited nor spoke of the other.

This two-track approach has continued all the way up to the present. Throughout the Warren Court, *Sherbert* and *Yoder* governed religious exemptions cases, but neither of them cited any of the then-governing church-autonomy cases.[124] And the last church autonomy cases, *Jones v. Wolf*,[125] cited neither *Sherbert* nor *Yoder*. The short answer to Justice Barrett is that free exercise has always had two tracks and it would continue to do so.[126] So nothing here would change if *Smith* were overruled.

C. Burdens on Religion

> *Should there be a distinction between indirect and direct burdens on religious exercise? Cf. Braunfeld v. Brown, 366 U.S. 599, 606–607 (1961) (plurality opinion).*[127]

Here Justice Barrett asks a crucial question. If *any* burden on religious exercise triggers heightened scrutiny—if, say, the government must show a compelling interest anytime it wants to tow the car of someone who parked illegally to attend a religious service—then free exercise doctrine will quickly descend into chaos. Any sensible regime of religious exemptions must find a way of recognizing some burdens on religious exercise as cognizable while dismissing others as noncognizable.[128]

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[122] 80 U.S. 679 (1872).

[123] 98 U.S. 145 (1878).

[124] *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[125] 443 U.S. 595 (1979).

[126] To be sure, if the Court wanted to get rid of the two tracks, it easily could. It would simply reframe the church-autonomy cases as compelling-interest cases. The ministerial exception, for example, could be reconceived as an application of strict scrutiny—the government has a compelling interest in protecting non-ministers from discrimination, but no such interest for ministers. This would not even be a big stretch—*Hosanna-Tabor* already reads this way a little. *See* Lund, *supra* note 123, at 1189 ("This is another way in which *Hosanna-Tabor* aligns better with *Sherbert* and *Yoder* than with *Smith*: it smacks of the old compelling interest test when the Court says that the employment laws are 'undoubtedly important' but still insufficient to outweigh the religious interest.").

[127] Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

[128] This is Justice Scalia's point, back in *Smith*, about how it would make no sense if a religious practice of throwing rice at a church wedding were given the same protection as the

Although the Court has never explicitly developed any formal theory about burdens, it has the beginnings of such a theory.[129] But the Court has the beginnings of such a theory. During the *Sherbert/Yoder* era, the Court dismissed three cases on burden grounds.[130] The first was *Braunfeld v. Brown*, where Orthodox Jewish merchants challenged Pennsylvania's law requiring businesses to close on Sunday. Even though the Orthodox Jewish merchants alleged their business could not survive closing for the entire weekend (as Orthodox Jews are religiously committed to closing their businesses on Saturday), the Court dismissed their claims on burden grounds—reasoning that the Sunday-closing law imposes "only an indirect burden on the exercise of religion" as the "legislation [] does not make unlawful the religious practice itself."[131]

Decades later, the Court decided two other cases similarly. In *Bowen*, a Native American objected on religious grounds to the government giving his daughter a Social Security number. In *Lyng,* Native Americans religiously objected to the government building a road on government property they believed sacred. Dismissing both claims, the Court reasoned that the Free Exercise Clause does not give people rights over how the government conducts its internal affairs—for you to have a claim under the Free Exercise Clause, the government must actually *do* something to *you*.[132]

Scholars have jumped into the fray to offer various theories of burdens. One approach would make the amount of the legal penalty

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religious practice of getting married in a church. *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 887 n.4 (1990).

[129] In the Court's absence, scholars have been working toward a theory. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94 (2017); Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 177; Chad Flanders, *Substantial Confusion about "Substantial Burdens",* 2016 U. ILL. L. REV. ONLINE 27. For a classic earlier piece, see Ira C. Lupu, W*here Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

[130] *See* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Braunfeld v. Brown, 366 U.S. 599 (1961).

[131] Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

[132] *See Bowen*, 476 U.S. at 699–700 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens . . . The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.") (citations and quotations omitted); *Lyng*, 485 U.S. at 449 ("The building of a road . . . on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in [Bowen]. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.").

determinative.[133] But this will not work. It would be impossible to give clear answers about how much of a fine is too much, especially as it would involve messy contextual judgments about a particular religious claimant's ability to pay.[134] It also does not fit the Court's precedents—the Court found a cognizable burden in *Yoder*, for example, even though the fine there was only five dollars.[135]

Others have said the burden issue should turn on the religious consequences that would result without an exemption.[136] But this too raises difficult problems. Courts will have an impossible job deciding what kinds of religious consequences are serious enough. Moreover, such an inquiry would violate basic notions of religious equality. Free exercise is not just for religious traditions that believe in hell (or even in God).[137] But that is how such a test would likely function in practice, if only fears of divine punishment were enough to establish a burden on religious exercise.

This Article advocates a different approach to burdens, a two-track approach reflecting the fact that burden cases tend to come in two kinds—what this Article will call "easy cases" and "hard cases."

In the easy cases, religious commitment and legal obligation diametrically conflict. This is the classic Catch-22 situation, where a religious believer cannot follow their religion without violating the law (or vice versa). To put it more formally, easy cases are when the government

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[133] *See* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771 (arguing that courts ought to focus on the "substantiality of the civil penalty").

[134] Commentators have been drawn to this idea in part because the Supreme Court in the *Hobby Lobby* emphasized the size of the penalty in that case. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) ("[I]f they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies."). But, in context, the amount of the penalty was just a striking background fact, not one necessary to the holding.

[135] *See* Wisconsin v. Yoder, 406 U.S. 205, 208 (1972) (noting that "respondents were charged, tried, and convicted of violating the compulsory-attendance law . . . and were fined the sum of $5 each"). Michael Helfand says that *Yoder* merely *assumed* there was a cognizable burden. *See* Helfand, *supra* note 135, at 1795 ("The Court did not, however, evaluate whether the $5 fine for failing to abide by the state's compulsory education law constituted a substantial burden.") But the Court's conclusion that five dollars was a cognizable burden was part of the compelling-interest test that the Court applied; only because the Court thought $5 was a cognizable burden did the Court reach the other issues in the case. *See Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

[136] Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 149-50 (2017) (arguing that courts should "adjudicate the substantiality of religious burdens," asking which burdens are "theologically significant").

[137] This has been the Court's position for more than sixty years. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

either (1) penalizes you for some part of your religious beliefs or practice, or (2) requires you to do something forbidden by your religious beliefs or practice. This fits the Court's precedents—never has the Court dismissed such a claim on burden grounds.[138] Easy cases merit a flat categorical rule—the burdens in such cases should always be sufficient.[139]

Hard cases, by contrast, are those where there is no unavoidable conflict between following the law and following one's religion. As in *Braunfeld*, *Bowen*, and *Lyng*, government has made it somehow *harder* to practice one's religion, but there is no direct conflict between religious practice and legal obligation.

One can think of this distinction between easy and hard cases in terms of a distinction drawn in preemption law. Free exercise and preemption are both fundamentally concerned with conflicting obligations—free exercise deals with conflicts between a person's obligations to the government and to religious faith, preemption deals with conflicts between a person's obligations to the federal government and to the states. Easy cases in this typology are essentially cases of impossibility preemption, when federal law preempts state law because it is just impossible for someone to comply with both.[140] In such cases, preemption happens categorically and automatically. Hard cases, by contrast, are essentially cases of obstacle preemption, where federal law preempts state law because state law has made it just too difficult to follow federal law.[141] In those cases, preemption happens neither categorically nor

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[138] None of the three cases dismissed on burden grounds during the *Sherbert/Yoder* era are easy cases. *See* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Braunfeld v. Brown, 366 U.S. 599 (1961).

[139] Take, for example, the Court's decision in *Holt v. Hobbs*, which quickly found a substantial burden after pointing out the Catch-22 between religious commitment and legal obligation.

> Petitioner easily satisfied that obligation [to show a substantial burden]. The Department's grooming policy requires petitioner to shave his beard and thus to engage in conduct that seriously violates his religious beliefs. If petitioner contravenes that policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise.

Holt v. Hobbs, 574 U.S. 352, 361 (2015).

[140] *See, e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . ."). As Justice Thomas has noted, the Supreme Court has sometimes used quite "different formulations of the standard to be used in deciding whether state and federal law conflict, and thus lead to pre-emption, under the impossibility' doctrine." Wyeth v. Levine, 555 U.S. 555, 589–90 (2009) (Thomas, J., concurring).

[141] *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (understanding obstacle preemption as preemption of state law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

automatically—it depends on a judicial judgment about how difficult it will really be to follow both state and federal law.[142]

Label	Description	Result	Examples	Analogy
Easy Cases	Government Penalizes Religious Practice or Requires Something Religiously Forbidden	Always a Burden	*Holt v. Hobbs*; Many Other Cases	Impossibility Preemption
Hard Cases	Other Situations	A Burden Only When Sufficiently Limiting	*Braunfeld; Bowen; Lyng*	Obstacle Preemption

What, then, should the test for hard cases? Here we can reason from the extremes to two principles. First, if the government makes it sufficiently difficult to practice one's religion, then there is a burden on religious exercise in every practical sense. And second, not every difficulty should count as a burden. Only those difficulties that are sufficiently limiting should trigger protections for the free exercise of religion.

While this standard is somewhat imprecise, the imprecision is unavoidable. Besides, courts have essentially been using this standard in categories of Free Exercise cases for many years without any problem. Take cases of religious exercise by prison inmates, which are often hard cases in this typology. The prison context frequently makes some restriction on religious exercise inevitable (it is prison, after all). When those restrictions become overly severe, courts treat burdens on religious exercise as cognizable.

A representative example involves Ramadan meals for Muslim inmates. Say a prison normally serves three daily meals to its inmates for a total of 2,600 calories. But during Ramadan, Muslims fast during the day, eating only one meal at night. So how many calories does that one evening meal have to have? If the meal has 2,500 calories, that seems close enough—in such cases, a court should hold there is no substantial burden on religious exercise. But if the meal only had 500 calories, the burden on religious exercise would be staggering. In the actual case, the Sixth Circuit looked at the meal (which had 1,300 calories) and rightly decided the burden was serious enough to be cognizable—the amount of calories was practically a starvation diet, which Muslim inmates should not have to endure to stay devout through the month of Ramadan. Finding a

[142] *See* Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 35 (2013) ("Obstacle preemption is generally thought to be the most open-ended form of preemption."); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228–29 (2000) ("[S]o-called 'obstacle preemption' [is so broad because it] potentially covers not only cases in which state and federal law contradict each other, but also all other cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law.").

substantial burden, the Sixth Circuit ruled for the Muslim inmates.[143] This example illustrates two things at once: first, that there can never be a totally clear line between cognizable and noncognizable burdens in hard cases; and second, that courts will still be able to draw sensible lines.

Another set of hard cases arises from fights between local governments and religious organizations over land-use regulations.[144] Land-use cases also tend to be hard cases within our typology, as religious organizations almost never have any religious obligation to locate in any particular place. So if burdens only existed in easy cases, local governments could exclude them entirely. "Your religion allows you to locate somewhere else," the argument would go, "so just go and build your mosque in someone else's town."[145] Rightly rejecting this kind of logic, courts have recognized that there can be cognizable burdens on religion even in hard cases. Here too there are line-drawing issues[146]—there is, in fact, a circuit split right now on what kind of burdens a religious organization has to show in the land-use context.[147] But even so, this discussion illustrate the same two things as before: first, that no perfectly

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[143] Indeed, not only did the Court hold there was a substantial burden, but it concluded ultimately that there was a violation of the Religious Land Use and Institutionalized Persons Act and denied qualified immunity to the relevant government officials. *See* Welch v. Spaulding, 627 F. App'x 479 (6th Cir. 2015).

[144] To be clear, the land-use cases that follow are typically brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and not just the Free Exercise Clause. For more on RLUIPA, see Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021 (2012).

[145] One sees this kind of argument frequently. The Connecticut Supreme Court once denied a construction permit to a Buddhist group, on the grounds that the Buddhists' building of a temple could not be religious exercise because no tenet of Buddhism required it. *See* Cambodian Buddhist Soc'y v. Planning & Zoning Comm'n, 941 A.2d 868, 888 (Conn. 2008) (explaining that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the [c]ongregation's religious beliefs").

[146] Courts have been frank about this: "[W]e do not adopt any abstract test, but rather identify some relevant factors and use a functional approach to the facts of a particular case. We recognize different types of burdens and that such burdens may cumulate to become substantial . . . We do identify some factors that courts have considered relevant when determining whether a particular land use restriction imposes a substantial burden on a particular religious organization, but we do not suggest that this is an exhaustive list." Roman Cath. Bishop of Springfield v. City of Springfield, 724 F.3d 78, 95-96 (1st Cir. 2013).

[147] *Compare* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003 (holding that a land-use regulation imposes a substantial burden under RLUIPA only when it renders "religious exercise . . . effectively impracticable"), *with* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (rejecting the "effectively impracticable" standard, and holding that "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct"), and Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter, 456 F.3d 978, 988 (9th Cir. 2006) (rejecting the "effectively impracticable" standard, and holding that "a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise").

objective lines are possible here; and second, that courts can still draw sensible distinctions in difficult cases.

D. Strict Scrutiny or Something Else

> *What forms of scrutiny should apply? Compare Sherbert v. Verner, 374 U.S. 398, 403 (1963) (assessing whether government's interest is "'compelling'"), with Gillette v. United States, 401 U.S. 437, 462 (1971) (assessing whether government's interest is "substantial").*[148]

Justice Barrett's last question may be the most vexing. Certainly law professors have seen it this way, offering various different suggestions for the general standard by which free exercise claims should be judged.[149] Justice Barrett here puts two choices on the table—something akin to strict scrutiny ("compelling") or something akin to intermediate scrutiny ("substantial"). This is a hard choice. Arguments can be made for both, and arguments can be made that it does not matter.

Take first the idea that it does not matter. The difference between strict scrutiny and intermediate scrutiny is modest, maybe entirely semantic.[150] Both are flexible standards, capable of reaching almost any result in almost any case. It seems doubtful either standard could tie the Court's hands enough to dictate results. And, of course, we have doctrinal areas where intermediate scrutiny seems quite strict, and where strict scrutiny seems not strict at all.[151]

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[148] Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring). Justice Barrett actually asks a final question about whether, if *Smith* is overruled, the Court's pre-*Smith* precedents will still apply. The simple answer is that they should not—the Court could treat its earlier decision as persuasive, but it does not have to do so. Just as the Court is free to adopt some standard other than strict scrutiny (like intermediate scrutiny), it is similarly free to adopt a different version of strict scrutiny.

[149] *See, e.g.*, Laycock & Berg, *supra* note 12 (strict scrutiny); James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317 (2017) (intermediate scrutiny); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189 (2008) (rationality with bite); cf. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999) ("burden is justified").

[150] Strict scrutiny asks whether the law is necessary to achieve some compelling governmental purpose, while intermediate scrutiny asks whether the law is substantially related to some important governmental purpose. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (providing these basic definitions); *see also* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 571 n.6 (1998) ("It is unclear not only whether there is now any real difference between strict and intermediate scrutiny but also whether there ever has been.").

[151] For example, sex-based discrimination triggers a kind of intermediate scrutiny that seems quite strict. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly

It also may not matter in a different sense. For while the difference between strict scrutiny and intermediate scrutiny is modest (maybe evanescent), the difference between either of them and *Smith* is significantly greater. Both strict scrutiny and intermediate scrutiny are balancing tests, requiring the government to justify burdens imposed on the free exercise of religion. But *Smith* is not a balancing test. The whole point of *Smith* was to reject balancing—to not require the government to have offer justifications, at least most of the time.[152] In one case a religious claimant asked for a religious accommodation, arguing that it was entirely reasonable under the circumstances. The district judge explained that she had gotten *Smith* all wrong: "For the employment requirement to be neutral and generally applicable," he said, "Defendants need not make, or even try to make, a reasonable accommodation for [your] religious practice."[153]

Yet a choice must be made, so let us assume the choice matters. Given that, the best alternative, it seems to me, is intermediate scrutiny. For good reason, many now fear that the Free Exercise Clause will undermine all kinds of important social goals.[154] Some of the Court's cases suggest this, and some concurring opinions are even more worrisome. [155] Indeed, a case presently in front of the Court asks whether public school football coaches have free exercise rights to pray at football games, regardless of the coercive pressure students face to join them.[156] The move to intermediate scrutiny may not prevent the Court from reaching these results. Indeed, the Court has been able to reach them without even overruling *Smith*, as we have seen from cases like *Tandon*, *Masterpiece Cakeshop*, and *Fulton*.[157] But even so, intermediate scrutiny is the best way of protecting free exercise in a society that is not only religious pluralistic, but pluralistic along a number of important dimensions.

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persuasive justification' for that action."). While impositions on freedom of association trigger a kind of strict scrutiny that seems not all that strict. *See* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (unanimously upholding an ordinance forbidding the Jaycees from limiting their membership to men, despite the application of strict scrutiny).

[152] *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 889 n.5 (1990) ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

[153] Filinovich v. Claar, No. 04 C 7189, 2006 WL 1994580, at *5 (N.D. Ill. July 14, 2006).

[154] *See supra* note 10 (providing a list of citations).

[155] *See, e.g.*, Dr. A v. Hochul, 142 S. Ct. 552 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief) (arguing that religious health care workers are constitutionally entitled to exemptions from a vaccine mandate).

[156] *See* Kennedy v. Bremerton School District, 4 F.4th 910 (9th Cir.), cert. granted, 142 S. Ct. 857 (2021).

[157] *See supra* Part I.

CONCLUSION

[To be written.]