A SECOND-CLASS FIRST AMENDMENT RIGHT? TEXT, STRUCTURE, HISTORY, AND FREE EXERCISE AFTER *FULTON*

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When the Supreme Court granted certiorari in Fulton v. City of Philadelphia[1] *in February 2020, many hoped the Court would overrule* Employment Division v. Smith[2] *and restore strict scrutiny for free exercise claims. Although* Fulton *stopped short of overruling* Smith, *it indicates that* Smith*'s days are numbered. The question is no longer whether* Smith *will go. It is, instead: What should replace* Smith*? This Article addresses that question, picking up where* Fulton *leaves off.*

This Article proceeds in four parts. Part I describes Smith*, analyzing Justice Scalia's concern with judicial discretion and the reasons he was reluctant to embrace the* Sherbert v. Verner[3] *regime. It also examines the Court's application of* Smith *and connects those cases to the era of strict scrutiny that preceded* Smith.

Part II examines the current state of free exercise jurisprudence, with a particular focus on the meaning of Fulton *and the broader context of the pandemic-related cases decided around the same time. Although* Fulton *stopped short of overruling* Smith*, the combined effect of* Fulton *and the pandemic-closure cases diminished* Smith, *making it less of a shield for lawmakers and more of a sword for religious Americans.* Fulton *expanded* Smith *to compel strict scrutiny whenever there is a "formal mechanism for granting*

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1. 141 S. Ct. 1868 (2021).
2. 494 U.S. 872 (1990).
3. 374 U.S. 398 (1963).

exceptions."[4] *But why stop with formal mechanisms when informal mechanisms are ubiquitous?*

Fulton *confirms that at least five Justices stand ready to overrule* Smith. *But two of those five will not overrule* Smith *until they better understand what should replace it. Those Justices (Barrett and Kavanaugh) are skeptical about "swapping"* Smith*'s rule for* Sherbert*'s "equally categorical strict scrutiny regime."*[5] *They suggest that the historical record is "more silent than supportive" on whether* Smith *should be overruled and that the "textual and structural arguments against* Smith *are more compelling."*[6] *But the concurrence of those Justices is short and doesn't fully explain their thinking, leaving many questions unanswered.*

*Part III examines the text and structure of the First Amendment to develop insights regarding a post-*Smith *understanding of the Free Exercise Clause. Three elements of the amendment's text—its common subject (Congress); an understanding of its participles (respecting, prohibiting, abridging) informed by history; and the use of "free" and "freedom" to describe press, speech, and religious exercise—suggest robust and equivalent protection.*[7] *The amendment's structure, "guarding, in the same sentence, and under the same words, the freedom of religion, of speech, and of the press," bolsters the argument for parity.*[8] *So too does the interconnectedness of the rights the First Amendment protects.*

*And finally, in Part IV, we build on the textual and structural analysis, guided by the pragmatic concerns of Justices Scalia, Barrett, Kavanaugh, and others to offer suggestions for approaching free exercise claims in a post-*Smith *era. Free religious exercise is a fundamental right, and encroachments on fundamental rights should trigger strict scrutiny. The challenge lies in defining both the scope of the religious conduct protected by the First Amendment and the burden necessary to trigger strict scrutiny.*

Smith*'s newfound appeal to religious liberty advocates may prompt them to reconsider their position that* Smith *should be overruled. But that doesn't change our view. The "new"* Smith *still doesn't fit comfortably with other First*

4. 141 S. Ct. at 1879.

5. *Id.* at 1883.

6. *Id.* at 1882.

7. U.S. CONST. amend. I.

8. Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 131, 132 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

Amendment rights. And it doesn't address the elephant in the room: How should courts deal with neutral and generally applicable laws that burden religious exercise? While Smith *focuses on the nature of the challenged law, we argue that* Smith*'s replacement should focus on the conduct at issue and be informed by the history and tradition of regulating that conduct. Assessing free exercise claims through the lens of history and tradition would create greater consistency with how state action is assessed under the Establishment Clause.*

To avoid the fate of Sherbert*, courts also must find ways to assess the claim and the relationship between the challenged law and the burden on religious practice. We suggest that pleading standards that emerged two decades after* Smith *might help cull implausible claims before the application of strict scrutiny.*

The emotionally, culturally, and politically fraught context in which many of today's headline-making religious liberty disputes arise will place immense pressure on whatever free-exercise doctrine comes next. A durable doctrine must be grounded in text and structure to withstand modern pressures. And it should place free exercise on par with the rest of the First Amendment so that it's no longer a second-class First Amendment right.

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INTRODUCTION

Scholars have called on the Court to reconsider *Employment Division v. Smith*'s[9] interpretation of the Free Exercise Clause for more than thirty years.[10] When the Supreme Court granted certiorari in *Fulton v. City of Philadelphia*,[11] academics, advocates, and organizations filed dozens of amicus briefs[12] asking the Court to overturn *Smith* and restore the compelling governmental interest test articulated in *Sherbert v. Verner*[13] and applied in *Wisconsin v. Yoder*.[14]

But when the Court issued its opinion in *Fulton*, the votes weren't there to overrule and replace *Smith*—at least not yet. Three Justices

9. 494 U.S. 872 (1990).

10. *See generally* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) (explaining that "the Supreme Court abandoned the compelling interest test" and substituted a much weaker standard based around neutrality and general applicability); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIG. 99, 102 (1990) (arguing that *Smith* "strip[ped] the free exercise clause of independent meaning").

11. Petition for Writ of Certiorari, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

12. The authors of this article co-authored an amicus brief in *Fulton* with Hon. Kenneth Starr and Hon. Mark Martin. That brief urged the Court to revisit *Smith*. Brief of Amicus Curiae the Robertson Center for Constitutional Law in Support of Petitioners at 9, *Fulton*, 141 S. Ct. 1868 (No. 19-123). *See also* Brief of Amicus Curiae Jewish Coalition for Religious Liberty in Support of Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief of Amici Curiae the Institute for Faith and Family and the International Conference of Evangelical Chaplain Endorsers in Support of Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief of the National Association of Evangelicals as Amicus Curiae in Support of Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief of Amicus Curiae Foundation for Moral Law in Support of Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

13. 374 U.S. 398 (1963).

14. 406 U.S. 205 (1972).

were willing to overrule *Smith* and restore the *Sherbert* regime.[15] Justices Barrett and Kavanaugh appeared willing to reconsider *Smith* but were reluctant to overrule *Smith* without knowing what should replace it.[16] They expressed "skeptic[ism] about swapping *Smith*'s" rule for *Sherbert*'s "equally categorical strict scrutiny regime."[17]

Although Justice Barrett's concurrence characterized *Smith* and *Sherbert* as "equally categorical,"[18] it has been difficult to take at face value what the Court has said about its free-exercise doctrine.[19] One can read the Court's free exercise jurisprudence as lurching between the *Smith* and *Sherbert* poles.[20] But the *Sherbert* test was more protective of religious exercise on paper than in practice.[21] And courts increasingly decline to apply *Smith*'s unprotective rule in cases where a religious litigant might be left vulnerable.[22] In both the *Sherbert* and *Smith* eras, the dissonance between what the Court said and did bred instability that undermined the doctrine.[23] Nevertheless, after *Fulton*, the big question is no longer whether *Smith* will go. Instead, it is: What comes next?

In the thirty years after *Smith*, scholars mined the historical record.[24] But that history has proven difficult to decipher—or at least not convincing to the swing Justices in *Fulton*.[25] Originalist scholars

15. *Fulton*, 141 S. Ct. at 1883 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment).

16. *Id.* at 1882–83 (Barrett, J., joined by Kavanaugh, J., concurring).

17. *Id.* Justice Breyer—who had recently announced his intent to retire from the Court at the end of the October 2021 term—joined the statements quoted above but did not join the first paragraph of Justice Barrett's opinion, which expressed her willingness to revisit *Smith*. *See id.* at 1882.

18. *Id.* at 1883.

19. *See generally* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689 (highlighting the Court's "less-than-forthright treatment of [free-exercise] precedent" and urging the Court to engage honestly with the free-exercise case law).

20. *See Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring). *Compare* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding that the Free Exercise Clause provides no grounds to accommodate religious objections to a compelled flag salute), *with* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (overruling *Gobitis* on general First Amendment grounds). *Compare* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (announcing a "compelling state interest test" for "incidental burden[s] on" an individual's free exercise rights), *with* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (readopting the *Gobitis* standard as the general approach to free exercise claims).

21. *See infra* Subpart I.A.

22. *See infra* Subpart I.B.

23. Oleske, *supra* note 19, at 706–26.

24. *See, e.g.*, *id.*

25. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

have reached conflicting conclusions about what that history means.[26] Of the five Justices who agree that *Smith* was wrong, only three think the historical record yields determinate answers on what should replace it.[27] The votes of Justices Barrett and Kavanaugh will be critical to forming a majority on the question of what replaces *Smith*. In Justice Barrett's concurrence in *Fulton*, she provides a roadmap to those interested in persuading her and Justice Kavanaugh: arguments from "text[] and structur[e]"[28] likely offer the keys to unlocking a new free exercise doctrine. But that concurrence is short and leaves many questions unanswered.

This Article picks up where Justice Barrett leaves off. That is, it examines the text and structure of the First Amendment to develop insights regarding a post-*Smith* understanding of the Free Exercise Clause. The Article proceeds in four parts. Part I describes *Smith*, analyzing Justice Scalia's concern with judicial discretion and reasons he was reluctant to embrace the *Sherbert* regime. It also examines the Court's application of *Smith* and relates those cases to the era of strict scrutiny that preceded *Smith*. Part II examines the current state of free exercise jurisprudence, with a particular focus on the meaning of *Fulton* and the broader context of the pandemic-related cases decided around the same time.

Part III turns to the text and structure of the First Amendment. Placing both the text and structure of the First Amendment within their historical context, we identify principles to guide the discussion of what should replace *Smith*. And finally, in Part IV, we build on the textual and structural analysis, guided by the pragmatic concerns of Justices Scalia, Barrett, and Kavanaugh to offer suggestions for approaching free exercise claims in a post-*Smith* era. Free religious exercise is a fundamental right, and encroachments on fundamental rights should trigger strict scrutiny. The challenge lies in defining both the scope of the religious conduct protected by the First Amendment and the burden necessary to trigger judicial scrutiny. We consider these challenges, informed by history and tradition, in Part IV.

26. *Compare* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

27. *Compare Fulton*, 141 S. Ct. at 1898–1912 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment) (explaining the historical arguments), *with id.* at 1882–83 (Barrett, J., joined by Kavanaugh, J., concurring) (concluding that the historical record is "more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws").

28. *Id.* at 1883.

I. SHERBERT, SMITH, AND THE EFFORTS TO SIDESTEP SMITH

A. Smith *and the Free Exercise Dilemma*

Employment Division v. Smith[29] divided free exercise claims into two categories. The first category consists of claims arising from a "neutral law of general applicability."[30] According to *Smith*, a law is not neutral if it "infringe[s] upon or restrict[s] practices because of their religious motivation."[31] And a law is not generally applicable if it adopts "a system of individual exemptions" yet "refuse[s] to extend that system to cases of 'religious hardship.'"[32]

If the law is neutral and generally applicable, a free exercise challenge triggers only rational basis review.[33] Professors Douglas Laycock and Thomas Berg characterize this as *Smith*'s "unprotective rule."[34] If a law is neutral and generally applicable, one might expect it to almost always survive a free exercise challenge—even when the burden on religious exercise is severe[35] and even when the purported harm caused by the religious behavior would be minimal.[36]

But *Smith* also has a "protective rule."[37] Strict scrutiny applies if a challenger can establish that the law is not neutral and generally applicable.[38] And in those cases, one might expect the religious challenger to prevail.

Scholarly reaction to *Smith* was mixed. Many scholars criticized *Smith*.[39] For example, Professor Michael McConnell noted *Smith*'s "strange and unconvincing" handling of the constitutional text.[40] McConnell described *Smith*'s treatment of precedent as "troubling, bordering on the shocking."[41] Professor Douglas Laycock lamented

29. 494 U.S. 872 (1990).

30. *Id.* at 879.

31. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

32. *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

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

34. Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 20 CATO SUP. CT. REV. 33, 34 (2021).

35. *Id.*

36. *See, e.g.*, *Smith*, 494 U.S. at 874 (explaining that Alfred Smith and Galen Black had lost their jobs and been denied unemployment benefits for ingesting sacramental peyote and identifying no harm caused by their behavior).

37. Laycock & Berg, *supra* note 34, at 34.

38. *Id.*

39. *See* McConnell, *supra* note 10, at 1136 n.118.

40. *Id.* at 1115.

41. *Id.* at 1120.

that a narrow construction of *Smith*'s protective rule would "strip[] the free exercise clause of independent meaning."[42]

Meanwhile, Professor Philip Hamburger and others concluded that history *refutes* the idea of constitutionally required religious accommodations.[43] Professor Eugene Volokh characterized the historical debate over accommodation as "close to a tie."[44] Professor Kurt Lash offered yet another view: While the First Amendment, as ratified in 1791, would not require accommodation, the original meaning of the Fourteenth Amendment requires religious accommodation through the Privileges or Immunities Clause.[45]

Smith didn't arise in a vacuum. It was a response to a decaying and unstable doctrine that some viewed as impractical and overprotective.[46] In *Sherbert v. Verner*, the Supreme Court embraced strict scrutiny for free exercise claims—any "incidental burden" on religious exercise must "be justified by a compelling state interest."[47] After applying *Sherbert* to exempt Amish schoolchildren from compulsory school attendance laws in *Wisconsin v. Yoder*,[48] the Court faced a string of cases that tested its commitment to that standard. In the decade leading up to *Smith*, litigants asked the Court for exemptions from Social Security taxes[49] and welfare application requirements.[50] A small university challenged the revocation of its tax-exempt status due to its prohibition on interracial dating.[51] And a Native American group challenged the federal government's construction of a road and harvesting of timber on a sacred site, which the federal government happened to own.[52]

42. Laycock, *supra* note 10, at 102.

43. Hamburger, *supra* note 26, at 918–19.

44. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1531 (1999); *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring).

45. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1109 (1994).

46. *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 603 (1990) ("Religion-based exemptions . . . encourage false and deceptive claims, many of which are granted.").

47. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

48. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

49. *See* United States v. Lee, 455 U.S. 252, 254 (1982).

50. *See* Bowen v. Roy, 476 U.S. 693, 695 (1986).

51. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580–81 (1983).

52. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988).

Each of these claims failed.[53] While free exercise challenges to the denial of unemployment benefits repeatedly won at the Supreme Court,[54] other cases drew little benefit from the supposedly stringent strict scrutiny test.[55] Though some paint the *Sherbert* test as a "categorical" approach,[56] in truth, it devolved quickly into a "Potemkin doctrine."[57] *Smith* responded to this doctrinal entropy.

Justice Scalia, who wrote the majority opinion in *Smith*, understood the dilemma faced by the Court. If the Court applied robust strict scrutiny to free exercise claims, then litigants would continue to challenge all manner of laws no matter how important the law or how minor the law's incursion on religious exercise.[58] If the Court were *not* serious about applying strict scrutiny to these claims, the Court would face the delicate and subjective task of balancing the relative importance of a religious claim against the government's interest.[59]

Both of those approaches had hazards. Application of robust strict scrutiny might result in a slew of religious exemption claims to unpopular laws.[60] This, in turn, threatened to "court[] anarchy,"[61] rendering each conscience "a law unto [it]self."[62] But if the Court allowed further erosion of an already not-so-strict scrutiny test, it risked "subvert[ing]" strict scrutiny's "rigor in the other fields where [that test] is applied."[63] That is, the instability found in free exercise jurisprudence might spread.

Scholars often note the late Justice Scalia's affinity for bright-line rules.[64] His preference for rules was downstream from his belief that the judiciary should "ground its decisions in some source of

53. *See Lee*, 455 U.S. at 261; *Bowen*, 476 U.S. at 712; *Bob Jones Univ.*, 461 U.S. at 605; *Lyng*, 485 U.S. at 458.

54. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 720 (1981); and Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 139–40 (1987).

55. *See supra* notes 49–53 and accompanying text.

56. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

57. *See* McConnell, *supra* note 10, at 1110.

58. Emp. Div. v. Smith, 494 U.S. 872, 888 (1990).

59. *See id.* at 882–90 (discussing the challenges of applying strict scrutiny or other balancing tests to the types of claims that arise under the Free Exercise Clause).

60. *Id.* at 916.

61. *Id.* at 888.

62. *Id.* at 890.

63. *Id.* at 888.

64. John F. Manning, *Classic Revisited: Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749 n.15 (2017) (collecting examples). Indeed, Justice Scalia himself "expressed a strong preference for rule-like judicial decisions." *Id.* at 749.

authority *external* to the judge's will—in text, original meaning, longstanding legal tradition, or widespread social practice."[65]

Smith's objective was to reduce judicial discretion in refereeing free exercise claims.[66] And it might have been *Smith*'s greatest virtue. By confining strict scrutiny to laws that were not neutral and generally applicable, *Smith* limited discretionary judgments while staving off further degradation of the strict scrutiny test. But *Smith* overcorrected. It sought an approach that protects religion without encouraging frivolous claims or unduly constraining government. But in opting for a "categorical antidiscrimination approach" to the Free Exercise Clause, *Smith* transformed free exercise into a second-class First Amendment right.[67]

B. Thirty Years of Sidestepping Smith*'s Unprotective Rule*

In the years after *Smith*, the Court rarely applied its unprotective rule.[68] Some free exercise challenges fell squarely within *Smith*'s protective rule—particularly where the record contained evidence of animus toward religion or a clear intention to target religious practices. For example, the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[69] unanimously invalidated a law that targeted religious animal sacrifice.[70] More recently, the Court applied the protective rule to invalidate an administrative order in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[71] There, members of the Colorado Commission had made disparaging remarks about religious practices,[72] and the Court had little difficulty concluding that religious animus tainted the commission's order.[73]

Other cases sidestepped *Smith*.[74] Sometimes, litigants challenged laws based on the free speech doctrine rather than free exercise. For example, in *Rosenberger v. Rector and Visitors of University of Virginia*,[75] the petitioners alleged free exercise and free speech violations arising from the university's refusal to reimburse

65. *Id.*

66. *Smith*, 494 U.S. at 873.

67. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

68. Bradley J. Lingo & Michael G. Schietzelt, *Fulton and the Future of Free Exercise*, 33 REGENT U. L. REV. 5, 15 (2020) (alteration in original) (applying the *Smith* test would "court[] anarchy").

69. 508 U.S. 520 (1993).

70. *Id.* at 547.

71. 138 S. Ct. 1719, 1727 (2018).

72. *Id.* at 1729.

73. *Id.*

74. Lingo & Schietzelt, *supra* note 68, at 17 (courts wanted to avoid *Smith* because "the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced").

75. 515 U.S. 819 (1995).

printing costs for their religious organization's newspaper.[76] At the Supreme Court, the petitioners did not press their free exercise claim, successfully arguing that the university policy of denying funding for religious publications amounted to viewpoint discrimination.[77] The same was true in *Lamb's Chapel v. Center Moriches Union Free School District*.[78] The petitioners in that case raised both free speech and free exercise claims in their complaint.[79] But at the Supreme Court, the petitioners pushed only their viewpoint discrimination theory.[80]

Even when the Court has considered free exercise challenges to presumptively neutral and generally applicable laws, it has avoided applying *Smith*. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[81] the Court concluded "that the [Americans with Disabilities Act]'s prohibition on retaliation . . . is a valid and neutral law of general applicability."[82] Rather than apply *Smith*'s unprotective rule, however, the Court applied a "ministerial exception rooted in the Religion Clauses."[83] Eight years later, the Court applied the ministerial exception to the employment discrimination claims of two teachers at Catholic elementary schools.[84]

The Court's propensity for avoiding *Smith*'s unprotective rule has transformed *Smith* into a *Lemon*-esque precedent.[85] Like it did with the infamous *Lemon* test, the Supreme Court "conspicuously avoid[s]" applying *Smith*'s unprotective rule.[86] Indeed, like *Lemon*, criticisms of *Smith* fill scores of pages in the U.S. Reports.[87] Much of what

76. *Id.* at 827.

77. *See id.* at 831; *see generally* Brief for the Petitioners at 22–24, *Rosenberger*, 515 U.S. 819 (No. 94-329) (raising the Free Exercise Clause only to show the constitutional conflict created by the respondents' Establishment Clause claim).

78. 508 U.S. 384, 392–94 (1993).

79. *Id.* at 389.

80. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (statement of Alito, J.) ("Petitioner's decision to rely primarily on his free speech claims as opposed to [the Free Exercise Clause and Title VII] may be due to certain decisions of this Court."); *see also* Brief for Petitioners at 33 n.13, *Lamb's Chapel*, 508 U.S. 384 (No. 91-2024) (mentioning the Free Exercise Clause only for the same reason as the petitioners in *Rosenberger*).

81. 565 U.S. 171 (2012).

82. *Id.* at 190.

83. *Id.*

84. Our Lady of Guadalupe v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020).

85. *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

86. *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

87. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., joined by Kavanaugh J., concurring); *id.* at 1883–1926 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment); *id.* at 1926–31 (Gorsuch, J., joined by Thomas and Alito, JJ., concurring in the judgment); Kennedy v.

members of the Court have said about *Lemon* could also be said about *Smith*. As was the case with *Lemon*, the Court's "expectation has not been met" as, "[i]n many cases, [the] Court has either expressly declined to apply the test or has simply ignored it."[88] Still, the Court has "declined . . . invitation[s] to repudiate" *Smith*.[89] The Court's refusal to take that step has allowed *Smith* to "stalk[]" the Supreme Court's free exercise jurisprudence[90] and to leave the lower courts guessing on the contours of neutrality and general applicability.[91]

Accordingly, *Smith*'s unprotective rule has had less impact than one might have expected. In fact, the Supreme Court seems to have applied *Smith*'s unprotective rule only once after *Smith*.[92] In *Christian Legal Society v. Martinez*,[93] the Court summarily rejected a free exercise challenge in a case addressing the right of a student organization to require its leaders to affirm the organization's statement of faith.[94] *Martinez* stands apart from other First Amendment cases in several respects, including the petitioner's stipulation to a neutral and generally applicable policy[95] and the

Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (explaining that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause"); City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided."); *id.* at 544–45, 565 (O'Connor, J., joined by Breyer, J., dissenting) ("[I]t is essential for the Court to reconsider its holding in *Smith*."); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring) ("[I]n a case presenting the issue, the Court should re-examine the rule *Smith* declared."); *see also* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial in many quarters.").

88. *Cf.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019).

89. *Compare Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment), *with Fulton*, 141 S. Ct. at 1881 (majority opinion) (explaining why the Court refused to revisit *Smith*).

90. *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

91. *Compare* Ward v. Polite, 667 F.3d 727, 739 (6th Cir. 2012) (holding that a policy is not neutral and generally applicable because it "permit[ted] secular exemptions but not religious ones"), *with* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076–77 (9th Cir. 2015) (comparing religious objections only against secular objections that were not already accommodated by an exemption).

92. This tally does not include applications for emergency relief, which exploded during the COVID-19 pandemic and are discussed in Subpart II.A, *infra*.

93. 561 U.S. 661 (2010).

94. *Id.* at 697 n.27.

95. *Id.* at 674; Christian Legal Soc'y v. Kane, 319 Fed. Appx. 645, 645–46 (9th Cir. 2009); *see also* Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 286 (2012) ("[*Martinez*]

Court's decision to merge freedom of association and free speech claims.[96] And the Court's application of *Smith*'s unprotective rule—which occupies only a footnote in the opinion—is easy to miss.[97]

Martinez notwithstanding, the Court's treatment of free exercise challenges since *Smith* suggests that perhaps *Smith* wasn't the harbinger of dystopia that many feared. As the Court in *Smith* predicted, legislatures were "solicitous" of religious liberty—at least initially.[98] Federal and state alternatives to *Smith*—now available in at least thirty-four states[99]—may have mitigated *Smith*'s impact. And as *Fulton* suggests, the protective rule has not received the narrow construction that Professor Laycock and others feared in the immediate aftermath of *Smith*.[100] Perhaps, as Professor Laycock later suggested, religious liberty advocates were more influenced by *Smith*'s tone than its actual holding.[101]

Then again, perhaps not. Reliance on state legislative accommodations works only if the people themselves are open to accommodating religion. As the relatively recent Religious Freedom Restoration Act ("RFRA") battles in Indiana, Arkansas, and Georgia indicate, there's not a lot of appetite for accommodation these days—particularly of religious beliefs of others.[102] Hostile state and local

is, in terms, peculiarly limited by its somewhat odd, almost hypothetical, and decidedly unreal, stipulated facts.").

96. In *Martinez*, the petitioners raised speech, association, and free exercise challenges to a campus policy that required student groups to accept anyone who wished to join. 561 U.S. at 668. The Christian Legal Society argued that the Court should "engage" the speech and association arguments "separately." *Id.* at 680. Instead, the Court "merge[d]" these two claims, reasoning that "[*w*]*ho* speaks on [a group's] behalf . . . colors *what* concept is conveyed." *Id.* It further worried that engaging these arguments independently risked "invalidat[ing] a defining characteristic of limited public forums," the ability of the government to set them aside for certain purposes. *Id.* at 681.

97. *Id.* at 694 n.24.

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

99. This number includes states that have imposed a compelling interest test either legislatively or through judicial interpretation of a state constitution. Lingo & Schietzelt, *supra* note 68, at 19 (noting that "thirty-two states have rejected the baseline required by *Smith*"). Since 2020, two additional states—Montana and South Dakota—have rejected *Smith*'s baseline. MONT. CODE. ANN. § 27-33-105 (2021); S.D. CODIFIED LAWS § 1-1A-4 (2021).

100. Laycock, *supra* note 10, at 102; *see* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1915–16 (2021) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment) (discussing several cases following *Smith* in which a facially neutral and generally applicable law was nonetheless held to violate the Free Exercise Clause as applied to the challenger).

101. *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 843 (2014).

102. Lingo & Schietzelt, *supra* note 68, at 32–34.

officials ban travel to jurisdictions considering RFRAs.[103] Corporations threaten to pack up and take jobs and tax revenue elsewhere.[104]

Meanwhile, adherents of minority religious traditions find themselves caught in the crossfire of the culture-war disputes that make some reluctant to overrule *Smith*.[105] *Smith* has justified denying Jewish police officers' requests to wear yarmulkes.[106] It has justified denying a Jewish woman with developmental disabilities access to a habilitation program that would permit her to observe the Sabbath.[107] And it cost Jehovah's Witness Mary Stinemetz her life as she fought to obtain a liver transplant without a blood transfusion.[108] In all except the last of these examples,[109] the laws giving rise to these conflicts were deemed neutral and generally appliable and received only rational basis review, regardless of the harm to the plaintiff.[110]

103. *Id.* at 34.

104. *Id.*

105. One amicus brief in *Fulton* raised the example of a federal appellate judge who posed a hypothetical in oral argument about a "law requiring Americans to turn 'on a light switch every day,'" suggesting such a law would be "a prime example of a rule unlikely to substantially burden anyone's religious liberty." Brief of Amicus Curiae Jewish Coalition for Religious Liberty in Support of Petitioners at 10, *Fulton*, 141 S. Ct. 1868 (No. 19-123) (quoting Oral Argument at 1:00:00, E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015)). As that brief notes, such a law would pose a severe burden to many Orthodox Jews who believe turning a light on or off would violate the Sabbath. *Id.*; *see also* OU Staff, *The 39 Categories of Sabbath Work Prohibited by Law*, ORTHODOX UNION (July 17, 2006), https://www.ou.org/holidays/shabbat/the_thirty_nine_categories_of_sabbath_work_prohibited_by_law/.

106. Riback v. Las Vegas Metro. Police Dep't, No. 2:07-cv-1152-RLH-LRL, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008).

107. Shagalow v. Minn. Dep't of Hum. Servs., 725 N.W.2d 380, 389 (Minn. Ct. App. 2006).

108. Laycock & Berg, *supra* note 34, at 40; Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 166–67 (2016). Ms. Stinemetz sought an exemption to travel beyond the boundaries established by state Medicaid reimbursement laws for a bloodless transplant. Laycock & Berg, *supra* note 34, at 40. For two years, the state argued that its policy was neutral and generally applicable. *See id.* By the time she won her case, Ms. Stinemetz's condition had deteriorated to the point where she was no longer eligible for a liver transplant. *Id.*

109. In Ms. Stinemetz's case, the lower court inexplicably declined to analyze the law's neutrality and general applicability, characterizing Ms. Stinemetz's claim as "almost entirely ecclesiastical in nature." Stinemetz v. Kan. Health Pol'y Auth., 252 P.3d 141, 146 (Kan. Ct. App. 2011).

110. *See, e.g.*, *Riback*, 2008 WL 3211279, at *6; *Shagalow*, 725 N.W.2d at 389.

II. COVID-19 AND THE MARCH TOWARD *FULTON V. CITY OF PHILADELPHIA*

A. Pandemic Restrictions Place General Applicability on the Shadow Docket

The Supreme Court granted certiorari in *Fulton* on February 24, 2020.[111] The world was about to change. But few foresaw just how much COVID-19 would upend American life.

As COVID-19 spread across the country throughout the spring and summer of 2020, state governments took swift—and often unprecedented—actions.[112] Businesses were shut down.[113] State and local authorities prevented people from gathering at churches, schools, sporting events, and even in their own homes.[114] Governments required individuals to don facemasks to venture out of the house.[115] As vaccines became widely available the following year, some governments mandated vaccination for certain adults.[116]

As weeks under lockdown turned into months, houses of worship challenged states' pandemic restrictions. These cases provide critical context for *Fulton*—and clues about what might come after *Smith*. Churches and pastors challenged restrictions on gathering that made exceptions for secular organizations but not religious ones.[117] Individuals challenged mask requirements[118] and, later, the vaccine mandates.[119] Many of these cases progressed quickly through the federal courts, arriving at the Supreme Court as emergency applications for equitable relief.[120]

In the early days of the pandemic, restrictions on congregating in groups in California and Nevada drew free exercise challenges from

111. 140 S. Ct. 1104 (2020).

112. *See generally* Phil Kerpen et al., *A Final Report Card on the States' Response to COVID-19* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29928, 2022), https://www.nber.org/papers/w29928.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603–04 (2020) (Alito, J., dissenting).

118. *See, e.g.*, Resurrection Sch. v. Hertel, 11 F.4th 437, 455–60 (6th Cir. 2021), *reh'g en banc granted*, 16 F.4th 1215 (6th Cir. 2021).

119. *See, e.g.*, Kane v. De Blasio, 19 F.4th 152, 164–69 (2d Cir. 2021); Does 1–6 v. Mills, 16 F.4th 20, 29–35 (1st Cir. 2021), *app. for injunctive relief denied sub nom.* Does 1–3 v. Mills, 142 S. Ct. 17 (2021).

120. For a comprehensive accounting of pandemic legal challenges and the development of the free exercise doctrine during the COVID-19 pandemic, see Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637 (2021).

churches. In California, Governor Newsom adopted a tiered system to relax "stay-at-home" orders.[121] Stage 2 of this system allowed certain nonessential operations to resume across the state, with offices, schools, and retail stores allowed to open in counties that met "certain statistical benchmarks."[122] Churches were not allowed to reopen until Stage 3—"along with movie theaters and hair and nail salons."[123]

In Nevada, Governor Sisolak announced the first wave of re-openings toward the end of May 2020.[124] The governor's emergency directive allowed certain "categories of business and social activity to resume, subject to different restrictions."[125] Many of these activities, including church worship services, were limited to fifty attendees.[126] This limit applied regardless of venue capacity and included outdoor gatherings.[127] But the fifty-person limit did *not* apply to casinos, which were allowed to open at half-capacity.[128]

Churches challenged these restrictions and sought emergency relief from the Supreme Court.[129] The Court denied both emergency applications, each by a 5-4 vote.[130] The Chief Justice avoided citing *Smith* in his *South Bay* concurrence, reasoning that the policy was generally applicable because Governor Newsom's plan treated "comparable secular gatherings" similarly.[131] "[O]nly dissimilar activities . . . in which people neither congregate in large groups nor remain in close proximity for extended periods" received "more lenient[]" treatment.[132] Four dissenters disagreed with the Chief Justice's characterization.[133]

The dissenting Justices' objections intensified three months later when the Court denied Calvary Chapel's application for injunctive

121. Emergency Application for Writ of Injunction at 6, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (No. 19A1044).

122. *Id.* at 6–7.

123. *Id.* at 7.

124. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020).

125. Emergency Application for an Injunction Pending Appellate Review, Appendix A at 2, *Calvary Chapel*, 140 S. Ct. 2603 (No. 19A1070).

126. *Id.*

127. *Id.*

128. *Id.*

129. *See generally Calvary Chapel*, 140 S. Ct. at 2603; S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020).

130. *See* sources cited *supra* note 129.

131. *See S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

132. *Id.*

133. *Id.* at 1614 (Kavanaugh, J., joined by Thomas and Gorsuch, JJ., dissenting); *see also id.* at 1613 (noting that Justice Alito would have joined the other three dissenters in granting the application). No opinion in *South Bay* cited *Smith*.

relief from Nevada's reopening plan.[134] Though some Justices had sharp words for Governor Sisolak and the majority,[135] Justice Kavanaugh took a more measured approach.[136] In his solo dissent, Justice Kavanaugh relied on language in *Smith* and the work of Professor Laycock to put forward a "most-favored nation" approach to general applicability.[137] That is, when a law creates favored and disfavored categories of behavior, the Free Exercise Clause requires the government to "place religious organizations in the favored . . . category."[138]

The dynamic in the COVID-closure cases shifted by November. With the addition of Justice Amy Coney Barrett to the Court, churches and religious organizations started to prevail. For example, the Court enjoined New York's "troubling" gathering restrictions in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[139] In October 2020, Governor Andrew Cuomo issued an executive order identifying areas with COVID-19 outbreaks and assigning them a color—red, orange, or yellow—based on the outbreak's severity.[140] Some businesses could operate without capacity restrictions in red and orange areas.[141] But not houses of worship. They were "single[d] out . . . for especially harsh treatment."[142] In red zones, houses of worship could admit no more than ten people under any circumstances.[143] In orange zones, the governor raised that limit to no more than twenty-five.[144]

In another 5-4 decision, the Court struck down this arrangement.[145] The restrictions failed *Smith*'s neutrality and general applicability benchmarks and could not survive strict scrutiny.[146] Again writing only for himself—but this time in a solo

134. *See Calvary Chapel*, 140 S. Ct. at 2603.

135. *See id.* at 2603–04 (Alito, J., joined by Thomas and Kavanaugh, JJ., dissenting) ("The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities."); *id.* at 2609 (Gorsuch, J., dissenting) ("[T]here is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.").

136. *See generally id.* (Kavanaugh, J., dissenting).

137. *Id.* at 2612 (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

138. *Id.* (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50).

139. 141 S. Ct. 63, 66 (2020) (per curiam).

140. N.Y. Exec. Order No. 202.68 (Nov. 4, 2020).

141. *Cuomo*, 141 S. Ct. at 66.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See generally id.*

146. *Id.* at 66–67.

concurrence—Justice Kavanaugh leaned into the most-favored-nation approach to general applicability:

> [U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, some secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class.[147]

The Court adopted the most-favored-nation approach to general applicability only four and a half months later.[148] In April 2021, the Court considered another set of challenges—including a free exercise challenge—to California's restrictions on in-home gatherings.[149] Again, the Court held in favor of religious exercise.[150] And this time, the Court fully embraced the most-favored-nation theory.[151] "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[152] To assess comparability, the Court looked to "the asserted government interest that justifies the regulation at issue."[153] The Court did not compare in-home religious gatherings only to in-home secular gatherings (which were similarly restricted).[154] Instead, the Court looked at the favorable treatment given to retail establishments, restaurants, and others to conclude that religious in-home gatherings must be given similar treatment.[155]

Thus, over one year of the pandemic, the Court's approach to general applicability shifted significantly. The Chief Justice's *South Bay* concurrence turned on comparability—a law is generally applicable for purposes of the Free Exercise Clause if it treats *comparable* activity the same way.[156] But the Chief Justice's concurrence offered no guidance on what makes an activity "comparable."[157] Lower courts differed on what activities provide the

147. *Id.* at 73 (Kavanaugh, J., concurring).
148. *See generally* Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).
149. *Id.*
150. *Id.* at 1297.
151. *Id.* at 1296.
152. *Id.* (emphasis in original).
153. *Id.*
154. *See id.* at 1298 (Kagan, J., dissenting).
155. *Id.* at 1297 (majority opinion).
156. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).
157. *See id.* at 1613–14.

appropriate comparison for worship services when assessing pandemic regulations.[158]

By adopting the most-favored-nation approach in *Tandon*, the Court adopted a more bright-line approach to resolving questions of general applicability. That is, if the law in question creates *any* favored class of comparable activity, that law must include religious activity in this favored class.[159] This approach, which further narrows the circumstances in which *Smith*'s unprotective rule will apply, was just the latest example to demonstrate: (1) how reluctant the Court is to apply *Smith*'s unprotective rule and (2) the Court's preference for bright-line rules in this area.[160]

When the Court granted certiorari in *Fulton*, no one saw any of these cases coming. Indeed, as an alternative to overruling *Smith*, the *Fulton* petitioners also asked the Court to resolve a circuit split over *Smith*'s meaning:[161] Does a challenger have to show hostility toward religion to receive the benefit of *Smith*'s protective rule?[162] Or is it enough to "show[] that the government permits the exact same

158. *Compare* Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346–47 (7th Cir. 2020), *with* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614 (6th Cir. 2020).

159. Two weeks after deciding *Fulton*, the Court granted certiorari in *Mast v. Fillmore County*, vacated the judgment, and remanded the case for further consideration in light of *Fulton*. 141 S. Ct. 2430 (2021). In a concurrence, Justice Gorsuch elaborated on three points regarding *Fulton* and the most-favored-nation approach. *Id.* First, he reiterated *Fulton*'s command that the governmental interest at stake is not the general interests advanced by the policy, but the specific interest in denying an exemption to that particular group. *Id.* at 2432 (Gorsuch, J., concurring) (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021)). Second, Justice Gorsuch explained that when other exemptions have been granted, the government "must offer a compelling explanation why the same flexibility extended to others cannot be extended to the [plaintiff]." *Id.* According to Justice Gorsuch, this includes exemptions granted *in other jurisdictions*. *Id.* at 2433. Third, the government must prove the narrow tailoring prong "with evidence." *Id.* ("[S]trict scrutiny demands more than supposition."). Professor Josh Blackman has discussed this and other post-*Fulton* elaborations by Justice Gorsuch in more depth. *E.g.*, Josh Blackman, *Justice Gorsuch Illustrates How* Smith-*Post*-Fulton *Should Be Applied*, VOLOKH CONSPIRACY (Oct. 30, 2021, 3:18 PM), https://reason.com/volokh/2021/10/30/justice-gorsuch-illustrates-how-smith-post-fulton-should-be-applied/ (examining Justice Gorsuch's dissent in Does 1-3 v. Mills, 142 S. Ct. 17 (2021)); Josh Blackman, *Justice Gorsuch Sketches the Post-*Fulton *Roadmap in Amish Septic System GVR*, VOLOKH CONSPIRACY (July 3, 2021, 1:27 AM), https://reason.com/volokh/2021/07/03/justice-gorsuch-sketches-the-post-fulton-roadmap-in-amish-septic-system-gvr/.

160. *See supra* notes 85–92 and accompanying text.

161. Petition for Writ of Certiorari at 19–31, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

162. *See id.* at 20–22.

conduct by" secular actors?[163] The Court effectively resolved this circuit split in *Tandon* by adopting the most-favored-nation approach.[164] If the law in question exempts any comparable secular conduct, it must also offer an exemption to religious conduct or satisfy strict scrutiny.[165] With that issue resolved, the most important remaining question in *Fulton* was whether the Court would abandon *Smith* altogether.

B. Fulton *Expands* Smith*'s Protective Rule*

The Court decided *Fulton* in June of 2021, expressly declining to revisit *Smith*.[166] But what the Court did in *Fulton* is subject to debate.

Catholic Social Services ("CSS") is a foster care agency with a long record of service in Philadelphia.[167] In 2018, a dispute arose between CSS and Philadelphia over the agency's views on same-sex marriage.[168] No same-sex couple had ever sought certification through CSS; Philadelphia learned of CSS's policy from a newspaper article.[169]

The City prohibited foster agencies it contracted with from "reject[ing] a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon" certain protected categories, including "sexual orientation."[170] But this prohibition was not absolute—agencies could seek an exemption from "the Commissioner or the Commissioner's designee," granted "in his/her sole discretion."[171]

The Court held that this "sole discretion" was problematic: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . . because it 'invite[s]' the government to decide which reasons for not complying with the policy

163. *See id.* at 22.

164. Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/ ("[B]y adopting the most-favored-nation theory, the *Tandon* court resolved one of the major issues that had been presented for possible resolution in *Fulton*.").

165. Tandon v. Newsom, 141 S. Ct 1294, 1298 (2021) (per curiam).

166. *Fulton*, 141 S. Ct. at 1877 (majority opinion).

167. *Id.* at 1874.

168. *Id.* at 1875. Specifically, CSS objected to certifying cohabitating unmarried couples. *Id.* And though CSS held no objection to certifying same-sex attracted individuals as foster parents, they did not recognize same-sex marriage as "marriage" within their faith tradition. *See id.* Accordingly, CSS had a policy against certifying same-sex couples, which it viewed as cohabitating. *Id.*

169. *Id.*

170. *Id.* at 1878 (alterations in original).

171. *Id.*

are worthy of solicitude."[172] It didn't matter that the commissioner had never granted an exemption.[173] The mere existence of the formal mechanism for granting exemptions triggered the protective rule.[174]

Joined by Justices Thomas and Gorsuch, Justice Alito criticized what he saw as a narrow holding.[175] He wrote, "[t]his decision might as well be written on the dissolving paper sold in magic shops."[176] In Justice Alito's estimation, the City needed only to "eliminate the never-used exemption power" to reset the dispute back at its starting point.[177] By stopping short of eliminating *Smith*, Justice Alito concluded, "the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state."[178]

But then again, maybe not. Rather than being interpreted narrowly, as some feared in 1990,[179] *Smith*'s protective rule appears surprisingly robust in the wake of *Tandon* and *Fulton*. Religious organizations and individuals now start from a position of considerable strength unless the law grants no exemptions and provides no authority for an administrator to grant an exemption. Today, one can argue that *Smith* has become a powerful sword for the religious claimant—but not much of a shield for policymakers.

Consider how the Court has expanded the general applicability rule from *South Bay* to *Fulton*. It was "big news" when the Court adopted the most-favored-nation approach to general applicability in *Tandon*.[180] *Fulton*, however, seems to take *Tandon* a step further. Because Philadelphia had granted no exemptions, there was no "favored or exempt category" in which to place a religious agency.[181] No "comparable secular activity" was treated "more favorably than religious exercise."[182] (Maybe this explains why the Court's opinion in *Fulton* never cites *Tandon*.)[183] The general-applicability problem

172. *Id.* at 1879.
173. *Id.*
174. *Id.*
175. *Id.* at 1887 (Alito, J., concurring in the judgment).
176. *Id.*
177. *Id.*
178. *Id.* at 1926.
179. *See supra* notes 90–93 and accompanying text.
180. *See* Oleske, *supra* note 164 ("Either overruling *Smith* or adopting the most-favored-nation theory in *Fulton* would have been big news.").
181. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609–13 (2020) (Kavanaugh, J., dissenting).
182. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).
183. Without citing *Tandon*, Justice Alito's concurrence casts doubt on the most-favored-nation approach's workability, particularly the difficulty of "[i]dentifying appropriate comparators" for the conduct at issue. *Fulton*, 141 S. Ct. at 1921–22 (Alito, J., concurring in the judgment). Justice Gorsuch, the only Justice to rely explicitly on *Tandon*, seemed less troubled by this issue, *id.* at 1929 (Gorsuch, J., concurring in the judgment) (citing *Tandon*, 141 S. Ct. at

in *Fulton* instead arose from the mere existence of "a formal mechanism for granting exceptions . . . *regardless whether any exceptions have been given*."[184]

This formulation expands *Smith*'s protective rule. Under *Tandon*, if the law grants *any* exemptions to comparable secular conduct, it must also grant exemptions to religious activity absent a compelling reason for not doing so.[185] "If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are."[186] And under *Fulton*, if the law instead affords an administrator discretion to grant exemptions, she must grant religious exemptions unless she has a compelling reason to deny one.[187]

Moreover, there are at least five Justices prepared to abandon *Smith*'s unprotective rule in a case squarely presenting a genuinely neutral and generally applicable law. Justices Thomas, Alito, and Gorsuch were willing to revisit *Smith* in *Fulton*.[188] Justice Kavanaugh previously joined those three Justices to express a willingness to revisit *Smith*.[189] And Justice Kavanaugh joined all of Justice Barrett's concurrence in *Fulton*, criticizing *Smith* but finding no reason to overrule it in that particular case.[190]

So, if a governmental entity like Philadelphia were to adopt a policy with any secular exemptions (or even a mechanism for exemptions), the courts will require a religious exemption, too. If it were to strip all possibility of exemptions from the law (as Justice Alito's concurrence suggests), it seems doubtful that *Smith* will offer much refuge.[191] After all, a majority of the Court agrees that *Smith* should be overturned.[192]

And if there were any doubt about that, look at how things played out between the parties in *Fulton*. Five months after its loss at the Supreme Court in *Fulton*, Philadelphia settled its dispute with

1874–75) ("Exceptions for one means strict scrutiny for all."), and acknowledged that *Tandon* "resolve[s] at least some of the confusion surrounding *Smith*'s application." *Id.* at 1930–31. Still, "*Tandon* treated [*Smith*'s] symptoms, not the underlying ailment." *Id.* at 1931.

184. *Id.* at 1879 (majority opinion) (emphasis added).

185. *Tandon*, 141 S. Ct. at 1296.

186. Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 173.

187. *See generally Fulton*, 141 S. Ct. 1868.

188. *Id.* at 1888 (Alito, J., concurring).

189. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (statement of Alito, J.).

190. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) ("We need not wrestle with these questions in this case, though, because the same standard applies whether *Smith* stays or goes.").

191. *Id.* at 1921 (Alito, J., concurring).

192. *Id.* at 1883, 1888 (Alito & Barrett, JJ., concurring); *Kennedy*, 139 S. Ct. at 637 (statement of Alito, J.).

CSS.[193] The City paid CSS $2 million to cover CSS's legal fees.[194] It eliminated the provision in city contracts that allowed the Commissioner of the Department of Human Services to grant discretionary exemptions from the City's nondiscrimination policy.[195] And it exempted CSS from the City's nondiscrimination ordinance.[196]

Why would the City take that last step? One city official explained, "[I]t was clear if we took this [litigation] further down the road, we could actually open it up for radically changing other existing constitutional law."[197] She continued, "We could have taken the bait and fought this further and actually put other things in jeopardy and I actually think we made the right decision in this moment."[198] Perhaps the City settled because it didn't want to deal the final blow to *Smith*.

C. Fulton *Doubles-Down on One of* Smith*'s Flaws*

Fulton's rationale exacerbates inconsistencies in *Smith*'s logic. Like *Smith*, *Fulton* compels strict scrutiny when there is a "formal mechanism for individualized exemptions."[199] Why? As *Fulton* explains, such a mechanism "'invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude."[200] "[T]he government" seemingly refers to administrators with discretion to grant exemptions.[201]

But this focus on formal administrative mechanisms raises at least three questions: *First*, why stop with *formal* mechanisms when *informal* mechanisms may accomplish the same purpose? The potential for individualized, discretionary assessment lurks beneath every generally applicable law. Administrators and prosecutors have

193. Julia Terruso, *Philadelphia Reaches $2 Million Settlement with Catholic Foster-Care Agency, Aiming to Prevent Future Challenges to LGBTQ Rights*, PHILA. INQUIRER (Nov. 22, 2021), https://www.inquirer.com/news/foster-care-philadelphia-catholic-church-lgbtq-settlement-supreme-court-20211122.html.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*; *see also* Brittany Bernstein, *Michigan Pays $800,000 in Settlements to Catholic Charities over LGBT Foster, Adoption Order*, NAT'L REV. (Mar. 23, 2022, 4:58 PM), https://www.nationalreview.com/news/michigan-pays-800000-in-settlements-to-catholic-charities-over-lgbt-foster-adoption-order (describing a settlement between Michigan and two Catholic foster-care agencies that lost contracts with the state over the agencies' views on marriage).

199. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

200. *Id.* at 1879 (quoting *Smith*, 494 U.S. at 884).

201. *E.g.*, *id.* at 1878; *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)) (distinguishing the unemployment compensation cases from the criminal statute supposedly at issue).

discretion about which cases to bring and how rigorously to enforce a law. While *Smith* excepted from its unprotective rule "individualized governmental assessment[s] of the reasons for the relevant conduct,"[202] the potential for an individualized assessment exists in almost any agency enforcement or criminal prosecution.[203] Discretion is ubiquitous. Local prosecutors, for example, increasingly refuse to enforce certain drug laws—the very neutral and generally applicable prohibition at the heart of *Smith*.[204] With these informal mechanisms for granting individualized exemptions, a law that is generally applicable on paper may *not* be generally applicable in practice. And if that's the case for drug laws, why *shouldn't* members of the Native American Church receive an exemption for sacramental peyote use?

Second, why doesn't *Fulton*'s description of "formal mechanisms" apply to the legislative process itself? The process of conducting hearings, drafting legislation, considering amendments, and voting on a final product also "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude."[205] All legislative bodies have the inherent ability to consider the reasons for the relevant conduct, tailor the law, and "consider the particular

202. 494 U.S. at 884.

203. *See* McConnell, *supra* note 10, at 1124 ("If *Smith* is viewed as an unemployment compensation case, the distinction [between *Smith* and the previous unemployment compensation cases] is obviously spurious. If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial."); David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 215 (1997) ("Almost every rule of law creates individualized exemptions at some level of abstraction. For example, the prohibition against murder seems to be a law of general application, but the general prohibition against taking another's life doesn't apply to self-defense, military necessity, or even to accidents not amounting to criminal negligence.").

204. *See, e.g.*, Sonia Moghe, *Manhattan District Attorney Announces He Won't Prosecute Certain Crimes*, CNN (Jan. 6, 2022, 3:55 AM), https://www.cnn.com/2022/01/06/us/alvin-bragg-manhattan-district-attorney-crimes-prosecution/index.html (noting that the district attorney intends not to prosecute "marijuana misdemeanors, including selling more than three ounces; not paying public transportation fare; trespassing except a fourth degree stalking charge, resisting arrest, obstructing governmental administration in certain cases, and prostitution"); Juliana Battaglia, *Baltimore Will No Longer Prosecute Drug Possession, Prostitution and Other Low-Level Offenses*, CNN (Mar. 27, 2021, 3:42 PM), https://www.cnn.com/2021/03/27/us/baltimore-prosecute-prostitution-drug-possession/index.html; *see also* Jonathan Mattise, *District Attorneys Refuse to Prosecute Some GOP-Led Laws*, ASSOCIATED PRESS (Oct. 19, 2021), https://apnews.com/article/crime-tampa-tennessee-nashville-787cae9774f5fa36797ce89bb25932a7 (referring to this prosecutorial discretion as a "workaround").

205. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879 (2021).

reasons for"[206] nonconforming conduct when passing a statute or an ordinance. Sometimes, the legislative body grants this sort of power to administrators.[207] But even when it does not—that decision reflects a discretionary judgment within lawmakers' power.

Third, and relatedly, how does one square *Fulton*'s focus on formal administrative discretion as a trigger for strict scrutiny with the text of the First Amendment? *Smith* allows legislatures to pass neutral and generally applicable laws without exemptions,[208] and it insulates those laws from strict scrutiny.[209] But *Fulton* says legislatures cannot delegate that same power to administrators.[210] Recall, Philadelphia had not granted an exemption to the nondiscrimination policy—the mere authority to grant such an exemption was the issue.[211] The problem, then, must not be in the exercise of power to deny exemptions per se. Instead, it's the act of *delegation* that's problematic. Like the unemployment compensation programs that *Smith* distinguished,[212] Philadelphia's policy must run afoul of the Free Exercise Clause because a legislature delegated the power to grant exemptions to an administrative body.

But the First Amendment is not a nondelegation provision. It's an affirmative prohibition on certain *legislative* acts. By its very terms, the First Amendment was meant to apply to *legislative* power: "*Congress* shall make no law . . . prohibiting the free exercise" of religion.[213] Of course, the courts do not confine the First Amendment's application to the legislative power.[214] But there is no textual basis for enforcing the First Amendment's dictates less vigorously against a legislature than other government actors. If anything, the text suggests the opposite. And there's no textual reason in the First Amendment to bristle at administrative discretion to grant exemptions any more than at legislative discretion to do the same.

206. *Id.* at 1877.

207. *See, e.g.*, *id.* at 1877–79 (discussing Philadelphia law at issue which granted discretion to grant exemptions).

208. Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).

209. *Id.* at 886 n.3.

210. *See* 141 S. Ct. at 1879 ("The *creation* of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given.") (emphasis added).

211. *Id.*

212. *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)) (distinguishing the unemployment compensation cases from the criminal statute supposedly at issue).

213. U.S. CONST. amend. I.

214. *E.g.*, N.Y. Times v. United States, 403 U.S. 713, 714 (1971) (per curiam); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

III. LOOKING FOR CLUES IN THE TEXT AND STRUCTURE OF THE FIRST AMENDMENT

Three Justices stand ready to overrule *Smith*.[215] At least two others are willing, conditioned upon the articulation of a durable approach informed by the text and structure of the First Amendment.[216] The historical record doesn't yield answers that will persuade a majority of the Court.[217] We may not uncover the precise metes and bounds of each right by studying only the text and structure of the First Amendment. But the text and structure, colored by historical context, provide clues that should guide our interpretation. Those clues tend to confirm that the Free Exercise Clause has wrongfully been assigned a second-class status among First Amendment rights.

We begin with some observations regarding why it might be that Justice Barrett observed that the historical record is "more silent than supportive" of constitutionally mandated religious accommodation.[218] In short, the Framers' concept of free exercise was still developing at the Founding due to the right's relative novelty and place within the vertical separation of powers.

Next, we examine the text itself.[219] We focus on three elements of the text: its subject, the participles that begin each clause, and the characterization of certain rights as "free" or "freedoms." Viewed in their historical context, these elements of the First Amendment's text suggest that its rights should be protected strongly and in roughly equal measure.

Finally, we examine the structure of the First Amendment, which tends to confirm these conclusions. The observations from structure find support in the Court's recognition that the First Amendment's rights are interconnected and foundational to American society. When courts fail to recognize the interconnectedness of the First Amendment rights, it leads to absurd results.

A. Why Might History Be "More Silent than Supportive" on Robust Protections for Free Exercise?

The First Amendment does not codify or enshrine English tradition in American law. It is a reaction to the perceived

215. *See Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring).

216. *Id.* at 1882–83 (Barrett, J., concurring).

217. *Id.* at 1882.

218. *Id.*

219. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

inadequacies of the English common law.[220] This premise helps explain why "[d]iscerning the original meaning of the First Amendment is a frustrating exercise."[221] Unlike other rights codified in the first ten amendments—such as the right to a jury trial[222]—the freedoms of worship, speech, press, and assembly do not find nearly identical counterparts in centuries of English practice.[223] Indeed, as early Americans attempted to liquidate and ascertain the scope of these rights, their views tended to evolve long after ratification.[224] Moreover, "the framers did not always act as they spoke," a fact that further complicates the historical record.[225]

To be sure, the English common law provided a floor for some of the rights enshrined in the First Amendment. For example, though "unguarded in the British Constitution,"[226] press and speech enjoyed protection against prior restraints under English law.[227] Presumably, the First Amendment's guarantee that Congress would "make no law . . . abridging the freedom of speech, or of the press" ensured that Congress could not impose prior restraints.[228]

But the Framers were not simply codifying English common law rights. There was little precedent for the First Amendment's prohibition of laws "respecting an establishment of religion." Indeed,

220. 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 1:8 (3d ed. 1996).

221. *Id.* § 1:2.

222. U.S. CONST. amend. VI; *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (relying on the English common law tradition to define the scope of the Sixth Amendment). *But see* Williams v. Florida, 399 U.S. 78, 99 (rejecting that *all* elements of the common law right were incorporated into the Sixth Amendment).

223. *See generally* 1 SMOLLA, *supra* note 220, § 1:8; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2112–13 (2003).

224. 1 SMOLLA, *supra* note 220, § 1:2.

225. *Id.*

226. James Madison, Speech Introducing Proposed Constitutional Amendments (June 8, 1789), *in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 332, 340 (Bruce Frohnen ed., 2002).

227. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *151 ("[W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, . . . the *liberty of the press,* properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.").

228. *See* U.S. CONST. amend. I.

establishing religion was a practice with a lengthy pedigree under the English tradition.[229]

Nor was there freedom to assemble under the English tradition. Professor John Inazu highlights a debate in the First Congress over the proposed amendments that illustrates the point.[230] Theodore Sedgwick of Massachusetts proposed striking the right of assembly from the amendment, arguing that the right was "a self-evident, unalienable right which people possess; . . . a thing that never would be called in question."[231] John Page of Virginia responded by alluding to the infamous arrest of William Penn and William Mead for unlawful assembly.[232]

In 1670, Penn, Mead, and a Quaker congregation "attempted to gather for worship at their meeting-house on Gracechurch Street in London."[233] Because Quakers were religious "Nonconformists" under English law, the gathering was illegal, and English soldiers barred them from entering their meeting house.[234] Penn and Mead were arrested and tried for unlawful assembly.[235] More than a century later, Americans—and especially Quakers—still knew this story well.[236] When Page concluded his rejoinder, Sedgwick's motion failed "by a considerable majority."[237]

Even where the common law provided some floor for these rights, it does not tell us how far those rights were to extend. For example, when Congress passed the Alien and Sedition Acts in the late 1790s, some justified the Sedition Act's limitation on the press by arguing that the scope of the "'freedom of the press' is to be determined by the meaning of these terms in the common law."[238] In their view, because

229. *See generally* McConnell, *supra* note 223, at 2111 ("No single law created the established church. Rather, it was constituted by a web of legislation, common law, and longstanding practice.").

230. JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 24 (2012).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 24–25 n.9 (Penn and Mead were ultimately acquitted by the jury, leading to the jurors' arrest).

236. *Id.* at 24–25.

237. *Id.* (quotation omitted).

238. *E.g.*, John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 8, at 136, 138 ("In fact the liberty of the press is a term which has a definite and appropriate signification, completely understood. It signifies a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community.").

the common law "freedom of the press" referred to no more than protections against prior restraints and permitted prosecution for seditious libel,[239] a law criminalizing seditious libel was consistent with the First Amendment.

But James Madison and others rejected that theory:

> If it be admitted that the extent of the freedom of the press secured by the amendment is to be measured by the common law on this subject, the same authority may be resorted to for the standard which is to fix the extent of the "free exercise of religion." It cannot be necessary to say what this standard would be; whether the common law be taken solely as the unwritten, or as varied by the written law of England.[240]

Similarly, the General Assembly of Virginia, in its resolution (authored primarily by Madison) protesting the Alien and Sedition Acts, concluded that basing the scope of press freedoms on the English law would likely prove "fatal" to the free exercise of religion, a freedom denied to many English subjects in the centuries before the American Revolution. [241]

Perhaps Madison, like Representative Page, thought of William Penn's arrest when he wrote that it "cannot be necessary to say" how restricted free exercise might be if defined by the common law.[242] After all, Penn's arrest stemmed from an assembly banned *because of* its religious nature.[243] More likely, Madison thought of the constant struggle for religious liberty in England—a struggle that drove countless religious minorities to immigrate to colonial America.[244] Regardless, Madison's point is that English common law is a poor proxy for the scope of the American rights of conscience. That is particularly true of free exercise.

239. 4 WILLIAM BLACKSTONE, COMMENTARIES *151.

240. James Madison, Report on the Virginia Resolutions (Jan. 1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 8, at 141, 146.

241. James Madison, Virginia Resolutions (Dec. 21, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 8, at 135, 136. Today, it is widely assumed that the Sedition Act would be considered unconstitutional. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (explaining that while the Supreme Court never affirmed or invalidated the Sedition Act, "the attack upon its validity has carried the day in the court of history," including pardons for those prosecuted under the act, repayment of "fines levied in its prosecution," and a subsequent rejection by Justices of the Supreme Court).

242. Madison, *supra* note 240, at 146.

243. INAZU, *supra* note 230, at 24.

244. *See generally* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1055–66 (1996) (describing the religious turmoil in England from the early sixteenth century until the eighteenth century).

Further complicating matters, for the first three-quarters of a century following its ratification, the First Amendment applied only against the federal government.[245] And the federal government has no general police power.[246] By the time the Fourteenth Amendment incorporated the First Amendment against the states' general police power, the Framers were long dead.[247] Their eighteenth century writings were largely silent on the twentieth and twenty-first century challenges of incorporation and rapidly expanding federal authority. Though preeminent scholars such as Professors McConnell and Hamburger have sought answers from state analogues, their conclusions point in opposite directions.[248]

This disconnect is exacerbated by the understanding of the relationship between religion and government that predominated among the Founders. Professor Kurt Lash emphasizes that Founders like Thomas Jefferson and James Madison believed that religion and government occupied "separate spheres."[249] Though Madison thought that strict separation of these two spheres "was not possible," he believed that their overlap could be restricted to "unessential points."[250] These "assumptions regarding the proper roles of religion and government . . . made the need for religious exemptions [via the First Amendment] highly unlikely."[251] If the Framers didn't fully appreciate the potential for conflict between federal laws and the First Amendment—much less anticipate the types and extent of the conflicts in modern American society—they would have had less reason to explain (or even consider) whether the Free Exercise Clause would require accommodation in the event of such a conflict.

So, while the historical record provides evidence to guide and shape our understanding, we should not expect it to hold all the answers. Justice Barrett, a former law professor and a student of religious liberty,[252] is undoubtedly familiar with much of this history and the conflicting scholarship analyzing it. Thus, it shouldn't be surprising that she stated in *Fulton* that she "find[s] the historical record more silent than supportive on the question" of

245. *See generally* Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause against the states).

246. *See* U.S. CONST. amend. X.

247. *See Cantwell*, 310 U.S. at 303.

248. *See supra* note 26 and accompanying text.

249. Lash, *supra* note 45, at 1114.

250. *Id.* at 1116 (quoting a Madison letter from 1832).

251. *Id.*

252. John Nagy, *The Education of Amy Coney Barrett*, NOTRE DAME MAG. (Winter 2020–2021), https://magazine.nd.edu/stories/the-education-of-amy-coney-barrett/.

constitutionally mandated accommodation.[253] It's the "textual and structural arguments against *Smith*" that she finds "more compelling."[254]

B. The First Amendment's Text Does Not Suggest Free Exercise Should Receive Second-Class Treatment Among First Amendment Rights

On its face, the First Amendment provides *some* protection for religion, speech, press, and assembly.[255] But should these freedoms receive roughly equal protection? Are some of these protections more absolute than others? Does the text suggest that free exercise should be treated differently than other First Amendment rights?

This section turns to these questions, focusing on three features of the First Amendment's text: (1) the opening five-word phrase; (2) the participles that divide the First Amendment into its various clauses; and (3) the text of the Free Exercise Clause specifically.

1. "Congress shall make no law . . . "

The first five words of the First Amendment—"Congress shall make no law"—seem simple enough.[256] Taken literally, the First Amendment withholds from Congress the power to pass any laws that fall within the participial phrases that follow.[257] Congress has no

253. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., joined by Kavanaugh, J., concurring).

254. *Id.*

255. U.S. CONST. amend. I.

256. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1254 (2010) (remarking on the clarity of the phrase "Congress shall make no law"); Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) (explaining that the phrase "is composed of plain words, easily understood").

257. Professor Nicholas Quinn Rosenkranz argues that, when considering who has allegedly violated the First Amendment, "there is only one possible answer: 'Congress.'" Rosenkranz, *supra* note 256, at 1253. And because Congress has no enforcement authority, the constitutional violation can occur only at "the moment Congress makes the law." *Id.* at 1255. "Such a constitutional violation has nothing to do with the application of the law to any particular person." *Id.* Thus, Rosenkranz argues that the text permits only facial challenges. Any "alleged [First Amendment] violation must be visible on the face of the statute." *Id.*; *see generally* John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J.L. & PUB. POL'Y 169, 170 (1992) (explaining that the First Amendment "is a rule for legislatures"). This argument is thought provoking but would call for a more fundamental rethinking of First Amendment jurisprudence than any justice appears willing to consider. As-applied challenges are a central feature of free speech and free association doctrines. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (sustaining an as-applied challenge against an anti-discrimination law as violating the Boy Scouts' right to expressive association);

authority to pass laws "respecting an establishment of religion," "prohibiting the free exercise" of religion, or "abridging" the freedoms of speech, press, assembly, or petition.[258] Even absent the Bill of Rights, the Constitution implicitly withholds from Congress any authority to regulate the First Amendment's freedoms.[259] The text of the First Amendment protects affirmatively against encroachments of these freedoms, denying Congress authority over these subjects.

Each of the First Amendment's freedoms—separated by semicolons rather than periods—share a common textual denominator: "Congress shall make no law."[260] Courts have largely ignored that phrase.[261] And scholars disagree on what one should make of it.[262] But the very existence of a common denominator suggests a parity among the First Amendment's rights. Laws infringing on these rights should be analyzed under a framework that reflects this textual commonality.

2. Do the participles suggest a hierarchy of rights?

But the participles that begin each phrase—"respecting," "prohibiting," and "abridging"—can be read to suggest that the First Amendment differentiates or establishes a hierarchy among the rights it protects.[263] A textualist might conclude that the text of the First Amendment is *most* protective against religious establishments; no law even "respecting a religious establishment" should survive.[264]

United States v. O'Brien, 391 U.S. 367, 372 (1968) (sustaining a law prohibiting destroying draft cards against an as-applied challenge without suggesting that such a challenge was improper).

258. U.S. CONST. amend. I.

259. *See* Madison, *supra* note 240, at 146.

260. U.S. CONST. amend. I.

261. *See* David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 35 (2015).

262. *Compare* Rosenkranz, *supra* note 256, at 1255 (arguing that the phrase forecloses as-applied challenges), *with* Strauss, *supra* note 261, at 30–34 (emphasizing "nontextual constitutional principles" liquidated by "judicial and nonjudicial precedents" to argue that the First Amendment must restrict the executive and judicial branches).

263. *E.g.*, Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 713 (2002).

264. U.S. CONST. amend. I; Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Alternatively, they might conclude that "Congress could neither establish religion nor *disestablish* religion." Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 FEDERALIST SOC'Y REV. 26, 31 (2021); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.").

It's somewhat less protective, in this formulation, of speech, press, assembly, and petition; laws run afoul of the First Amendment only if they "abridge" those rights, though presumably, some scope of regulation is permissible.[265] On this reading, it follows that the First Amendment is *least* protective of religious exercise; laws may regulate religious exercise so long as they do not "prohibit" it.[266]

Madison, the First Amendment's primary architect,[267] rejected this argument in his influential 1800 Report on the Virginia Resolutions.[268] Despite his commitment to a textualist interpretation of the Constitution,[269] Madison cautioned against such strict formalism. "[T]he words and phrases in the amendment," including these participles, should not be "considered as chosen with a studied discrimination."[270] Congress may not "*regulate* the freedom of the press, provided they do not *abridge* it."[271] Nor may Congress "*regulate* and even *abridge* the free exercise of religion, provided they do not *prohibit* it."[272]

St. George Tucker—an influential judge and professor of law at the College of William and Mary[273]—elaborated on Madison's reasoning. As a law professor, Tucker used Blackstone's *Commentaries* as a pedagogical text, though he found it inadequate for the task of teaching American law students.[274] Blackstone's

265. U.S. CONST. amend. I.

266. *Id.*

267. 1 SMOLLA, *supra* note 220, § 1.8.

268. *See generally* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 695 (1994) ("Within a few years of the election of 1800 the language and the concepts of the Resolutions and the Report were a sort of constitutional *lingua franca*, as likely to be used by northern Federalists as by southern Republicans."). Madison drafted the 1800 Report in response to criticism of the Virginia Resolutions of 1798. *See id.* at 705 n.54 ("Madison . . . wrote the Virginia Report of 1800 as chair of the committee appointed to study the responses to Virginia's 1798 action.").

269. *See generally id.* at 707 n.59 (explaining the "significance of Madison's textualism" when juxtaposed against the "English constitutional argument" prevalent in the late eighteenth century). The textualism common to Republicans such as Madison could be strict at times, but it "was not, as its critics asserted, a mechanical literalism. Correct interpretation, the Republican constitutionalists uniformly insisted, required a correct understanding of the general principles of 'free and responsible government' that the Constitution was meant to express." *Id.* at 714.

270. Madison, *supra* note 240, at 146.

271. *Id.* (emphasis added).

272. *Id.* at 147 (emphasis added).

273. *See* CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772–1804, at 118–19 (1987).

274. Paul Finkelman & David Cobin, *An Introduction to St. George Tucker's* Blackstone's Commentaries, *in* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF

treatise, including its passage on freedom of the press, did not account for "colonial statutes and practice," a gap that "became more acute after the Revolution."[275] Tucker's notes and lectures supplementing Blackstone's text attempted to account for the differences between English and American law.[276] In 1803, Tucker succeeded in publishing his American edition of the *Commentaries*, which "quickly—and correctly—became known as the 'American Blackstone.'"[277]

In this American Blackstone, Tucker explained why the differences between the participles in the First Amendment were not significant.[278] To Tucker, there was almost no practical difference between laws that "regulate" and laws that "abridge."[279] "[L]aws to regulate, must, according to the true interpretation of that word, impose rules, or regulations" that didn't previously exist.[280] New regulations tend to create new restraints. And new restraints "must necessarily imply an abridgment of some former existing rights."[281]

It follows, Tucker argued, that the different participles in the First Amendment did not suggest much, if any, difference in their protection.[282] A law "respecting" speech or the press was, in most instances, a law "abridging" the freedom of speech or the press.[283] Thus, a prohibition on "abridging" the freedom of the press was no different than a prohibition on a law "respecting" the freedom of the press, with one caveat: a regulation that "remed[ies]" any "existing restraints upon the freedom of the press" might be permitted because it would enlarge, rather than abridge, the right.[284] Tucker's reasoning supports Madison's conclusion that these freedoms should receive *equal* treatment.[285]

THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, at x (St. George Tucker ed., The Lawbook Exch., Ltd. 1996) (1803).

275. *Id.*

276. *Id.* at x–xi.

277. *Id.* at i. In fact, Tucker's *Commentaries* were "the only treatise on American law available in the nation" until James Kent and Joseph Story published their seminal works decades later. *See id.* at xiii.

278. *See* St. George Tucker, *Appendix* to 2 BLACKSTONE'S COMMENTARIES, *supra* note 274, at 21.

279. *Id.* at 21–22.

280. *Id.* at 21.

281. *Id.*

282. *Id.* at 21–22.

283. *Id.* at 22.

284. *Id.*

285. According to Madison, these rights "rest equally on the original ground of not being delegated by the Constitution." Madison, *supra* note 240, at 146.

3. The "free" exercise of religion

A textual analysis of the Free Exercise Clause should also consider another word it shares with the speech and press clauses—a form of the word "free." The text does not just prohibit Congress from interfering with religious exercise—it prohibits Congress from interfering with "free" religious exercise.[286] And the Amendment frames the rights to speak and publish using a different form of the word free—as the "freedom[s] of speech[] or of the press."[287]

Webster's 1828 dictionary defines "free" as "[u]nconstrained; unrestrained; not under compulsion or control."[288] A man is *free* to pursue his own choice; he enjoys *free* will.[289] By the terms of the First Amendment, Congress was not merely banned from direct prohibitions of religious exercise, but from interfering with the "free" or "unrestrained" exercise of religion.

Justice Alito, relying on Samuel Johnson's 1755 dictionary, arrived at a similar conclusion when interpreting the Free Exercise Clause in his *Fulton* concurrence.[290] "'To prohibit' meant either '[t]o forbid' or 'to hinder.' . . . And 'free,' in the sense relevant here, meant 'unrestrained.'"[291] Accordingly, "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship."[292]

So, too, with the freedoms of speech and press. Webster's 1828 dictionary defines "freedom" as "[a] state of exemption from the power or control of another."[293] If we distinguish between the common law freedoms and the freedoms enumerated in the First Amendment—as we should[294]—then Congress could not "abridge" the "exemption from" government "power or control" of speech or of the press. The protections for religion, speech, and press thus track very closely as a matter of text, one described as "free," and the others labeled as "freedom[s]" rather than "rights" or "privileges."[295]

286. U.S. CONST. amend. I.

287. *Id.* Compare the formulation of these "freedom[s]" to the First Amendment's protections of assembly and petition as "right[s]." Madison, *supra* note 240, at 141 ("Congress shall make no law . . . abridging . . . the *right* of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added); *see also Right*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed., 1828) (defining a "right" in this sense as a "just claim").

288. *Free*, WEBSTER'S AMERICAN DICTIONARY, *supra* note 287.

289. *Id.*

290. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring in the judgment).

291. *Id.*

292. *Id.*

293. *Freedom*, WEBSTER'S AMERICAN DICTIONARY, *supra* note 287.

294. *See supra* Subpart III.A.

295. U.S. CONST. amend. I.

This vindicates St. George Tucker's argument that any regulation of the "freedom of the press" (or of speech) would tend to "abridge" that freedom.[296] If a regulation imposes any restraint on press, the press is no longer "exempt[] from the power or control of another."[297] Similarly, interference with a religious practice would have the effect of "prohibiting the free exercise" of religion.[298] Though Tucker had little to say specifically about the Free Exercise Clause, his reasoning applies with equal force. Any law that imposes restraints on religious exercise "prohibit[s] the free exercise" of religion.[299]

This includes a prohibition on sacramental peyote use, as in *Smith*,[300] and a law that permits administrators to withhold unemployment benefits from a person because of their Sabbath observance, as in *Sherbert*.[301] Both laws burden only one religious practice, presumably leaving open other modes of worship. But once the government erects barriers to individual religious practices, the free exercise of religion is, by definition, no longer "unrestrained"—the "*free* exercise" of religion has been "prohibit[ed]," or "hindered."

Simply put, the First Amendment safeguards more than the "exercise" of religion. It safeguards the "*free* exercise" of religion.[302] It withholds from governments the power to "forbid" or "hinder," not merely the expression of faith, but the "unrestrained" expression of faith. In this way, the adjective "free" provides a textual justification for Madison's cautionary interpretive advice. That is, Congress may not "*regulate* and even *abridge* the free exercise of religion" because, if it did, exercise of religion would no longer be "free."[303]

The words "free" and "freedom" provide a textual basis to conclude, as Madison and Tucker did,[304] that the differences among the participles should not be read to create significant distinctions among the various clauses of the First Amendment (or at least between free exercise and free speech and press). The adjective "free" and the noun "freedom" bolster the protections afforded by the weaker participles that precede them.

296. *See supra* notes 279–85 and accompanying text.
297. *Freedom*, WEBSTER'S AMERICAN DICTIONARY, *supra* note 287.
298. U.S. CONST. amend. I.
299. *Id.*
300. Emp. Div. v. Smith, 494 U.S. 872, 873 (1990).
301. Sherbert v. Verner, 374 U.S. 398, 399 (1963).
302. U.S. CONST. amend. I.
303. *See supra* notes 268–72 and accompanying text.
304. Madison, *supra* note 240, at 141, 146; St. George Tucker, *supra* note 278, at 21–22.

C. Free Exercise and The Structural Logic of the First Amendment

The First Amendment's structure also suggests an equality among its freedoms. In 1798, Thomas Jefferson observed that the First Amendment "guard[s], *in the same sentence, and under the same words*, the freedom of religion, of speech, and of the press."[305] *Smith*'s unprotective rule "offends the deep logic of the First Amendment."[306] Perhaps this explains some of Justice Barrett's unease with *Smith*'s unprotective rule. She asks us to consider why the "Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."[307]

Though Justice Barrett's *Fulton* concurrence notes that she finds the "structural arguments against *Smith* . . . compelling," she does not make clear what she means by the First Amendment's "structure."[308] She doesn't appear to use "structural" in the way scholars typically use that word in constitutional law—to refer to horizontal relationships between the three branches of the federal government and the vertical relationship between the federal and state governments.[309] Instead, it appears Justice Barrett is referring to the interdependence of the First Amendment freedoms.[310]

This interdependence isn't merely theoretical; it has practical implications. A single encroachment on an expressive act often gives rise to multiple causes of action under the various clauses of the First Amendment.[311] An act of worship is an expressive act that may find protection in the Free Exercise Clause or the Free Speech Clause.[312]

305. Jefferson, *supra* note 8, at 132 (emphasis added).

306. McConnell, *supra* note 10, at 1111.

307. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring).

308. *Id.*

309. Josh Blackman, *What Justice Barrett's First Two Concurrences Tell Us About Her Approach to the Free Exercise Clause and Originalism*, VOLOKH CONSPIRACY (June 19, 2021, 1:12 AM), https://reason.com/volokh/2021/06/19/what-justice-barretts-first-two-concurrences-tell-us-about-her-approach-to-the-free-exercise-clause-and-originalism/.

310. *Cf.* St. George Tucker, *supra* note 278, at 4 ("[The] right of personal opinion, comprehends first, liberty of conscience in all maters relative to religion; and, secondly, liberty of speech and of discussion in all speculative matters, whether religious, philosophical, or political.").

311. *See, e.g.*, *Fulton*, 141 S. Ct. at 1890 (holding that many religious claims can be hybrid free-exercise/free-speech claims); *see also* Emp. Div. v. Smith, 494 U.S. 872, 876 (1990) (discussing similar hybrid rights claims).

312. *Fulton*, 141 S. Ct. at 1915 (Alito, J., concurring in the judgment) ("A great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims."); *see also* McConnell, *supra* note 10, at 1122 (explaining how the sacramental "ingestion of peyote communicates, in a rather

In the wake of *Smith*, litigants have recharacterized religious liberty claims as free speech claims on more than one occasion.[313] A religious organization may find refuge from forced inclusion in the Court's free speech or free association doctrines.[314] The concerns that animate the freedom of expressive association "appl[y] with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals."[315]

When courts treat First Amendment rights unequally, they then must make choices about how to assess these rights when they overlap, as they frequently will. Does the claimant receive the benefit of the more stringently protected right? Does the court apply only the lowest level of scrutiny? Should courts apply each standard in turn, beginning with the least stringent and working their way up to the most stringent?

The stronger protections of the Free Speech Clause relative to the Free Exercise Clause are illogical and inappropriate given that these rights are protected "in the same sentence, and under the same words."[316] Perhaps attempting to harmonize this clear tension, *Smith* concluded that the First Amendment "bars application of a neutral and generally applicable law" when it implicates religious exercise "in conjunction with other constitutional provisions."[317] This hybrid-rights theory of strict scrutiny—where the Court applies strict scrutiny when multiple constitutional claims are implicated simultaneously—has been largely ignored by lower courts and criticized as "completely illogical" by at least one circuit court.[318]

But that criticism hasn't deterred the Court from taking an analogous approach in at least one other case. In *Christian Legal Society v. Martinez*, discussed in Subpart II.B, the Court held that the

dramatic way, the participants' faith in the tenets of the Native American Church").

313. *See supra* notes 75–80 and accompanying text.

314. *Compare* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 574–75 (1995) (grounding in the Free Speech Clause the Court's holding that a parade organizer can choose which groups to accept or reject as part of its parade), *with id.* at 580 (remarking that, if the same case were analyzed solely on the doctrine of expressive association, "GLIB would lose").

315. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (Alito, J., joined by Kagan, J., concurring).

316. McConnell, *supra* note 10, at 1114.

317. 494 U.S. 872, 881 (1990).

318. Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) ("We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free Exercise Clause if it did not implicate other constitutional rights."); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part) (explaining that *Smith*'s hybrid rights claim is "ultimately untenable" because it would "be so vast as to swallow the *Smith* rule").

confluence of First Amendment protections justifies a *lesser* standard of scrutiny.[319] This is the *opposite* of what *Smith*'s hybrid-rights approach commands. But it nevertheless illustrates the practical difficulty that arises when First Amendment rights are assigned different levels of scrutiny.

But that's not the only thing that makes *Smith* an outlier. *Smith*'s focus on the law—rather than the conduct—at issue also makes it an outlier among First Amendment rights. Under *Smith*, the characteristics of the *challenged law* drive the analysis regarding whether strict scrutiny or rational basis review will apply.[320] If the law is neutral and generally applicable, then the standard is rational basis review no matter the nature of the religious practice it prohibits.[321] In other First Amendment contexts, the line between strict scrutiny (or some other form of heightened scrutiny) and rational basis review depends primarily upon the *conduct at issue*.[322]

In *Smith*, the Court justified its unconventional rule by pointing to other cases in which the Court also focused on the law rather than the conduct (or the law's effect on conduct) when assessing constitutional rights.[323] But the analogies don't hold.

Smith first mentions *Washington v. Davis*,[324] which concerned the Equal Protection Clause.[325] That *Smith* attempted to draw a connection to an Equal Protection case underscores how much of an outlier it is relative to other First Amendment rights.[326] *Smith* did cite one First Amendment case—*Citizen Publishing Co. v. United*

319. 561 U.S. 661, 680–83 (2010).

320. Emp. Div. v. Smith, 494 U.S. 872, 886 n.3 (1990).

321. *Id.* at 879–80.

322. *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) ("While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that *focuses on the particular issue at hand and looks to history for guidance*.") (emphasis added); United States v. Stevens, 559 U.S. 460, 468–69 (2010) (cataloguing the categories of speech unprotected by the First Amendment); Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (holding that a neutral antidiscrimination statute was unconstitutional as applied to the Boy Scouts). There are times when an inadvertent conflict with expression requires a court to assess features of the law, but the tests that have emerged in those situations tend to focus in part on those features' impact on the expressive behavior being regulated. *E.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). In any event, the courts subject these types of regulations to something more than rational basis review.

323. 494 U.S. at 886 n.3 (1990) (citing Washington v. Davis, 426 U.S. 229 (1976); Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969)).

324. 426 U.S. 229 (1976).

325. *Id.* at 239.

326. *Id.* at 242.

States[327]—to justify its unconventional approach.[328] In that case, the only "two daily newspapers of general circulation" in Tucson, Arizona, combined their operations in an agreement that "foreclosed" all "competing publishing operations."[329] The federal government sought to break up this anticompetitive merger under the Sherman Act.[330] The Court briefly considered and rejected the newspapers' argument that breaking up this merger violated the freedom of the press.[331]

Smith summarily presents *Citizen Publishing* as an example of an "incidental effect of a generally applicable and otherwise valid provision," the type of law that does not "offend[]" the First Amendment.[332] But this characterization belies *Citizen Publishing*'s reasoning, which says nothing about the general applicability of the Sherman Act but echoes St. George Tucker's argument regarding regulations that tend to *enlarge* rather than *restrict* press freedoms:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. . . . Freedom to publish means freedom for all and not some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.[333]

In other words, rather than focus on the neutrality and general applicability of the challenged action, the Court looked at its effect on the asserted right. And it concluded that preventing anticompetitive behavior tends to *enhance* the freedom of the press—not abridge it.[334] In short, this case does little to assuage a concern that *Smith*'s focus on the nature of the challenged law (i.e., whether it is neutral and generally applicable), rather than the conduct affected, sets it apart from the broader pattern of our First Amendment fabric.

Courts have repeatedly recognized that the First Amendment's freedoms are inextricably connected by a common "concern with matters of freedom of conscience."[335] There is a "central liberty that unifies" the various rights of the First Amendment, often formulated

327. 394 U.S. 131 (1969).
328. Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).
329. *Citizen Publ'g Co.*, 394 U.S. at 133–34.
330. *Id.* at 134.
331. *Id.* at 139–40.
332. *Smith*, 494 U.S. at 878.
333. Associated Press v. United States, 326 U.S. 1, 20 (1945).
334. *Citizen Publ'g Co.*, 89 S. Ct. at 931–32.
335. Rosenkranz, *supra* note 256, at 1269.

as "freedom of expression,"[336] "freedom of conscience,"[337] or "individual freedom of mind."[338] Thomas Jefferson explained that an act that violates any one right enshrined in the First Amendment "throws down the sanctuary which covers the others."[339]

Smith isolated free exercise from the other fundamental rights protected by the First Amendment. According to *Smith*, the judiciary was not the appropriate channel for religious exemptions—that responsibility sat with the legislatures.[340] "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[341]

Smith wasn't the first case to do so. Fifty years earlier, the Court adopted similar reasoning in *Minersville School District v. Gobitis*,[342] which upheld the expulsion of students who refused on religious grounds to salute the American flag.[343] Like *Smith*, the *Gobitis* Court insisted that legislatures, not courts, are the proper source of religious exemptions.[344] "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."[345]

Gobitis was rejected in one of the Court's most celebrated decisions, *West Virginia State Board of Education v. Barnette*.[346] While "*Barnette*'s holding is generally regarded as grounded in free speech, the principles and rhetoric framing the decision reached across the First Amendment."[347] The opinion lays out in cogent terms

336. *E.g.*, Reno v. ACLU, 521 U.S. 844, 865 (1997) (quoting Ginsberg v. New York, 390 U.S. 629, 636 (1968)); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

337. Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

338. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637).

339. Jefferson, *supra* note 8, at 132. Madison, too, saw the interdependence between these rights. "[A] man has a property in his opinions and the free communication of them." James Madison, Property (Mar. 29, 1792), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 8, at 598, 598. Included among these opinions are "his religious opinions, and . . . the profession and practice dictated by them." *Id.* According to Madison, any government that "does not protect [its citizens] in the enjoyment and communication of their opinions," whether religious or secular, fails in its most basic duty. *Id.*

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

341. *Id.*

342. 310 U.S. 586 (1940).

343. *Id.* at 600.

344. *Id.*

345. *Id.*

346. 319 U.S. 624 (1943).

347. John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 804 (2014).

the philosophy undergirding the First Amendment's freedoms. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy."[348] One of those subjects was the "individual['s] freedom of mind."[349] This "freedom of mind," far from the obstacle to governance that *Gobitis* envisioned, was itself a "means of strength" for our nation.[350] Thus, the rights "to free speech, a free press, freedom of worship and assembly . . . may not be submitted to vote; they depend on the outcome of no elections."[351] In other words, *Barnette* framed these rights as deeply interrelated and counsels that the courts, not the legislatures, are responsible for vindicating them.

Barnette also describes a common approach to protecting these freedoms. It explains that the scope of state power under the Due Process Clause of the Fourteenth Amendment

> may well include . . . power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction *only to prevent grave and immediate danger* to interests which the state may lawfully protect.[352]

This is consistent with Madison's contemporaneous writings on both the nature of conscience and the First Amendment's text.[353]

The following year, in *Prince v. Massachusetts*,[354] Justice Rutledge explained that the First Amendment freedoms

> have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[355]

348. *Barnette*, 319 U.S. at 638.

349. *Id.* at 637.

350. *Compare Gobitis*, 310 U.S. at 596, *with Barnette*, 319 U.S. at 637.

351. *Barnette*, 319 U.S. at 638.

352. *Id.* at 639.

353. *See, e.g.*, James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* THE AMERICAN REPUBLIC, *supra* note 226, at 327–28; *see also* Subart III.B *supra*.

354. 321 U.S. 158 (1944).

355. *Id.* at 164–65.

IV. REPLACING *SMITH* AND REFORMING FREE EXERCISE

This brings us to the concurring Justices' primary question: Replace *Smith* with what? The briefing for petitioners in *Fulton* never supplied a definitive answer.[356] During oral argument, Justice Barrett asked the question point-blank: "What would you replace *Smith* with?"[357] Counsel's response bore strong resemblance to the compelling state interest and least restrictive means test of *Sherbert v. Verner* and *Wisconsin v. Yoder*.[358] Many amicus briefs also called for a revival of *Sherbert*'s compelling state interest test.[359] But because the Court held that the policy in *Fulton* was not generally applicable, the Court didn't need to overrule *Smith* to decide that strict scrutiny should apply.[360] So, the Justices didn't need to reach the question of what might replace *Smith*.

Joined by Justices Breyer and Kavanaugh, Justice Barrett expressed skepticism "about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime."[361] (Although one might argue that the combined effect of *Tandon* and *Fulton* is to put strict scrutiny on a hair trigger, which is not so distant from a "categorical" invocation of strict scrutiny.)

Justice Barrett suggested that, to supplant *Smith*, advocates for religious liberty need to supply a "much more nuanced" solution.[362] Presumably, that nuance would help the Court find a workable solution that falls somewhere between *Sherbert*'s overprotectiveness and *Smith*'s emphasis on administrability. That solution should combine strict scrutiny with bright lines that define the scope of protected conduct and the burdens that trigger review under the Free Exercise Clause. That might allow the courts to find accommodations that avoid transforming religious liberty disputes into zero-sum battles between religious and secular interests.

356. *See generally* Brief for Petitioners at 50–52, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (suggesting only that the free exercise right should be defined consistently with "text, history, and tradition," and that it might be limited by "particularly important government interests").

357. Transcript of Oral Argument at 30, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

358. *Compare id.* at 31 ("I think the question should be pretty simple: Is the . . . free exercise of religion being prohibited and, if so, does the government have a compelling reason for doing so?"), *with* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

359. *E.g.*, Brief of Christian Legal Soc'y et al. as Amici Curiae in Support of Petitioners at 28, *Fulton*, 141 S. Ct. 1868 (No. 19-123); Brief of Amicus Curiae Former Attorney General Edwin Meese III in Support of Petitioners at 15, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

360. *Fulton*, 141 S. Ct. at 1879.

361. *Id.* at 1883 (Barrett, J., concurring).

362. *See id.*

We begin this section by addressing an important threshold question: Does *Smith* still need to be replaced? As interpreted by *Tandon* and *Fulton*, perhaps the old *Smith* has already been jettisoned and replaced with a new *Smith*—one more protective of religious liberty. Even so, the "new" *Smith* still doesn't fit comfortably with other First Amendment rights.[363] And the key question remains: How should courts deal with neutral and generally applicable laws that burden religious exercise?

We don't have all the answers. But we do offer some observations based on text and structure that build on the work of other scholars. And we offer some suggestions that might help avoid the shortcomings of the *Sherbert* regime that provoked *Smith*'s overreaction.

A. Does Smith *need to be replaced?*

Before considering what should replace *Smith*, one must question whether *Smith* still needs to be replaced. If one's only concern is protecting religious liberty, the post-*Tandon*, post-*Fulton* status quo is not so bad. As explained in Part I, the Court has alternately circumvented and strengthened *Smith*'s "neutral and generally applicable" standard.[364] And, as explained in Part II, after *Tandon* and *Fulton*, *Smith* may now be a useful sword for religious-liberty advocates.[365] And government actors shouldn't rely on *Smith* as much of a shield. In fact, the threat that *Smith* might be completely overruled likely restrains government actors (e.g., Philadelphia) considering neutral and generally applicable laws that burden religious liberty.

We doubt that any form of *Smith* can withstand the intense pressure of the culture-war issues that often implicate free exercise. "A profound practical and cultural need exist[s] to accommodate religious belief and practice, lest 'the state and religion [become] aliens to each other—hostile, suspicious, and even unfriendly.'"[366] Religious liberty is no longer valued in all quarters. Some view it as contaminated, or worse, a "code word[]" for bigotry.[367] An interpretation of a constitutional right that is neither responsive to the factors thought most relevant nor firmly grounded in

363. *See supra* Subpart III.C.

364. *See supra* Part I.

365. *See supra* Subpart II.B.

366. KEN STARR, RELIGIOUS LIBERTY IN CRISIS: EXERCISING YOUR FAITH IN AN AGE OF UNCERTAINTY 129 (2021) (second alteration in original) (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)).

367. U.S. COMM'N ON C.R., PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016).

constitutional text and structure will not withstand the forces involved in today's free exercise disputes.[368]

For starters, we must recast *Smith*'s focus on the law—and whether that law is neutral and generally applicable—to focus instead, as is done in other First Amendment contexts, on the conduct of the person vested with the free exercise right.[369] *Smith*'s reliance on general applicability means that the outcome of free exercise disputes depends on whether secular exemptions have been (or may be) granted. Secular exemptions arise when laws create significant *secular* burdens.[370] The existence of secular burdens "are a random product of various factors, which often seem irrelevant to the constitutional question"—whether the free exercise of religion has been prohibited.[371] As Professor Christopher Lund has observed, the *Smith* framework is thus "often completely unresponsive to factors that most may think more relevant to the constitutional inquiry, such as the government's interest in denying an exception and the claimant's interest in receiving one."[372] Justice Alito echoed this point in his *Fulton* concurrence: "Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection."[373]

"If the Free Exercise Clause does not apply to neutral and generally applicable laws, it cannot serve its original purposes."[374] The rights enshrined in the First Amendment arose in response to the inadequate protections afforded by the English common law—shortcomings that included restrictions on disfavored speech, religious practices, and assemblies.[375] By codifying and constitutionalizing these rights, the Framers hoped to alleviate "human suffering, social conflict, and persecution."[376] *Smith*'s standard, in contrast, allows the state to "coerce individuals and cause them to suffer for their faith," so long as it doesn't grant exemptions to those who wish to avoid that same suffering for secular reasons.[377]

368. *See generally* Laycock, *supra* note 101, at 839 (describing the conflict and growing hostility between religious and secular viewpoints over hot-button issues).

369. *See infra* Subparts IV.B, IV.C.1, IV.C.2.

370. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 629 (2003).

371. *Id.* at 653.

372. *Id.*

373. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).

374. *See* Laycock & Berg, *supra* note 34, at 38.

375. *See supra* notes 220–44 and accompanying text.

376. *See* Laycock & Berg, *supra* note 34, at 38.

377. *Id.* at 39.

Moreover, as explained in Subpart IV.C, the lack of parity between the Free Exercise Clause and its fellow First Amendment freedoms ensures that courts (and litigants) will continue to either sidestep free exercise issues to decide them under other doctrines or reach anomalous results. A litigant who presses multiple First Amendment claims might have those claims combine to trigger strict scrutiny, as *Smith* suggests.[378] Or she might see her stronger claim merge into the weaker one, as in *Martinez*.[379]

Furthermore, even with *Tandon*'s most-favored-nation refinements, the general applicability prong will tend to "prolong[] litigation."[380] *Tandon* may have shifted the focus toward finding appropriate comparators. But shifting the argument is not the same as resolving it. "If [government] officials can argue over general applicability, they will."[381]

This ambiguity—combined with a standard oriented toward rational basis review—places a weighty thumb on the scale for well-resourced governmental litigants. Though religious Americans have enjoyed successes in the Supreme Court as it has applied and explained *Smith*'s standard, lower courts and policymakers haven't always been so solicitous of free exercise.[382] Consider the losses the plaintiffs in *Fulton* suffered before prevailing in the Supreme Court. The district court applied rational-basis review and denied relief.[383] The Supreme Court denied an emergency injunction.[384] The Third Circuit asked only whether Catholic Social Services had been "treated differently *because of* its religious beliefs" and denied relief.[385] Finally, after the foster-care agency endured years of litigation waiting for its rights to be vindicated, the Supreme Court *unanimously* applied strict scrutiny and ruled in favor of the agency.[386] *Smith* provides the fig leaf that allow lower courts to justify such rulings.

All of this suggests that even though today's *Smith* may be more protective of religion than *Smith* version 1.0, it doesn't offer an enduring solution. A 2.0 version of "neutral and generally applicable" still lacks root in the text[387] and structure of the First Amendment

378. *See supra* notes 311–15 and accompanying text.
379. *See supra* note 94–96 and accompanying text.
380. Laycock & Berg, *supra* note 34, at 39.
381. *Id.* at 40.
382. Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 680–83 (E.D. Pa. 2018).
383. *Id.* at 682–83.
384. *See generally* Fulton v. City of Philadelphia, 139 S. Ct. 49 (2018) (mem.).
385. Fulton v. City of Philadelphia, 922 F.3d 140, 156 (3d Cir. 2019) (emphasis added).
386. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1871–73 (2021).
387. *Contra* Rosenkranz, *supra* note 256, at 1268.

and isn't responsive to the core question of whether the free exercise of religion has been prohibited. A doctrine built to withstand the pressure of today's free exercise disputes must be so grounded.

B. Two Proposed Alternatives: Speech and Assembly

In her *Fulton* concurrence, Justice Barrett suggests speech and assembly as two First Amendment doctrines that are more nuanced than the blunt tool *Smith* provides.[388] These analogies are helpful for two reasons: (1) they offer a starting point for considering what sorts of mechanisms might create a lasting free exercise doctrine; and (2) they offer some insight into what proposals might persuade the Court.

Five years after *Smith*, Professor Thomas McCoy drew on parallels to free speech to suggest an alternative approach to free exercise.[389] Though *Smith* was protective to the extent laws *intentionally* burdened religious exercise, Professor McCoy noted *Smith*'s weakness against "inadvertent" encroachments.[390] Like Justices Barrett and Kavanaugh, Professor McCoy notes that "the Court has continued to struggle with a choice between two doctrinal extremes."[391]

Professor McCoy finds a potential solution in the free speech doctrine's approach to "interferences with expression that occur in the course of pursuing a regulatory objective other than suppression of expression."[392] According to Professor McCoy, *Clark v. Community for Creative Non-Violence*[393] "authoritatively summarize[s]" that approach.[394] *Clark* held that inadvertent burdens on speech will survive a constitutional challenge if they are (1) content neutral, (2) "narrowly tailored to serve a significant governmental interest," and (3) "leave[] open adequate alternative channels for communication of the message."[395] In other words, inadvertent burdens on speech are treated as time, place, or manner restrictions.[396] "[R]easonable time,

388. *Fulton*, 141 S. Ct. at 1883; *see also* Blackman, *supra* note 309.

389. Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1334, 1353, 1381 (1995).

390. *Id.* at 1364–65.

391. *Id.* at 1364.

392. *See id.* at 1359.

393. 468 U.S. 288 (1984).

394. McCoy, *supra* note 389, at 1359. In *Clark*, the Community for Creative Non-Violence planned a protest in Lafayette Park and the National Mall in Washington, D.C. 468 U.S. at 288–89. "[I]ntended to call attention to the plight of the homeless," the protest involved demonstrators sleeping in tents at both locations. *Id.* at 289. The National Park Service "authorized the erection of two symbolic tent cities," but would not allow protestors to sleep in the tents due to prohibitions on camping. *Id.* at 291–92. The protesters challenged the application of this prohibition to their protest. *Id.*

395. McCoy, *supra* note 389, at 1359 (citing *Clark*, 468 U.S. at 293).

396. *Clark*, 468 U.S. at 293.

place, or manner regulations normally have the purpose and direct effect of limiting expression, but are nevertheless valid."[397]

According to Professor McCoy, this approach generally tracks the Court's handling of inadvertent burdens on religious exercise pre-*Smith*.[398] Specifically, he argues that "the outcome in each case appears to have been dictated by one or more of the *Clark* factors, although identified only obliquely in the Court's opinion and never expressly balanced against the other factors."[399] Professor McCoy thus tailors the three-part *Clark* test to apply to free exercise challenges. In his formulation, courts should ask (1) "whether the regulatory impact on religion" was intentional;[400] (2) whether the law is narrowly tailored to serve an important "nonreligious objective";[401] and (3) whether the government's interest outweighs "the importance to the individual of the restriction on his or her religiously motivated conduct and the availability of alternative courses of conduct that would serve the individual's religious purposes nearly as well as the prohibited conduct."[402]

In response to Justice Barrett's questions in *Fulton*, Professors Laycock and Berg revisited the question of replacing *Smith* and argued that the better analogy might be to expressive association.[403] Their preferred approach "balances the burdens on religion against the government interests, with a heavy thumb on the scale for religious freedom."[404] At its core, this approach would apply the *Sherbert* test to any "generally applicable law [that] substantially burdens religious practice."[405]

Professors Laycock and Berg posit that the "substantiality of the burden . . . should not be an all-or-nothing threshold."[406] Such a rule "greatly magnifies the cost of misjudging the religious interest."[407] Accordingly, they argue that "the importance of the practice should affect the balance: the greater the burden, the greater the justification required."[408]

397. *Id.* at 294.

398. McCoy, *supra* note 389, at 1372 ("[T]he Court's methodology in the free exercise clause cases prior to Smith appears to be a . . . form of the inadvertence jurisprudence that has been much more clearly formulated in the free speech clause cases.").

399. *Id.* at 1369.

400. *Id.* at 1365–66.

401. *Id.* at 1369.

402. *Id.*

403. Laycock & Berg, *supra* note 34, at 43.

404. *Id.* at 45–46.

405. *Id.* at 41.

406. *Id.* at 56.

407. *Id.*

408. *Id.*

By including "importance," or "centrality," in the balance, Professors Laycock and Berg push back on *Smith*'s contention "that courts must not presume to determine" such questions.[409] "[C]laimants who seek an exemption put their sincerity and the significance of their belief or practice at issue. They cannot object to the court inquiring into the belief or practice more than would otherwise be permitted."[410]

As for the government's asserted interest, Laycock and Berg argue that "the court must measure [it] at the margin."[411] This allows for proportionality in the balancing between the government's interest and the effect of granting an exemption, as "a free-exercise claimant seeks . . . an exemption [only] at the margin."[412] Professors Laycock and Berg acknowledge that this "free-form balancing" test "may worry the Court."[413] But they argue that this balancing test will tend to "resolve[]" itself "into categorical rules."[414]

And, as noted above, Professors Laycock and Berg argue that the better analogy is to expressive association. "Substantial burdens on religious practice are usually more like the restrictions in *Boy Scouts v. Dale* than like restrictions on symbolic conduct or on time, place, and manner of expression."[415] Why? Because, like burdens on expressive association, "burdens on religious practice often leave no adequate alternatives."[416]

The analogy to the right of association is apt, if imperfect. Religious organizations and communities, like expressive associations, "play[] a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."[417] They buttress our republic by teaching citizens "to transcend their individual interests and opinions and to develop civic responsibility."[418] And just as an individual's religious, political, and civil identity within a pluralistic society is forged through community, so too is her political and civil identity forged through her faith.[419]

But the analogy to expressive association is also flawed. The right to expressive association is not found in the text of the First

409. Emp. Div. v. Smith, 494 U.S. 872, 887 (1990).
410. Laycock & Berg, *supra* note 34, at 55.
411. *Id.* at 51.
412. *Id.*
413. *Id.* at 56.
414. *Id.*
415. *Id.* at 48.
416. *Id.*
417. Roberts v. U.S. Jaycees, 468 U.S. 609, 618–19 (1984).
418. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 17.
419. *See* ROBERT NISBET, THE QUEST FOR COMMUNITY 49 (1953) (describing "the family and local community and the church" as "the area[s] of association" that generally shape an individual's "concept of the outer world").

Amendment.[420] So, if what replaces *Smith* should come from text and structure, this seems like an odd place to start.

To be sure, expressive association has largely grown out of and supplanted the text-based right of assembly.[421] But, as demonstrated by the Court's merging of association with free speech in *Martinez*,[422] malleable, atextual rights may be converted into mere adjuncts or "appendage[s]" of textual rights.[423]

In any event, it's not clear that either the McCoy test or the Laycock-Berg test alleviates the concerns of the Court in *Smith*. These proposals resemble the balancing approach *Smith* rejected, weighing the government's interest against the importance of the religious practice.[424] Both proposals introduce, as one of the factors to be weighed, an element of pre-*Smith* doctrine that made the Court uncomfortable—"importance" or "centrality."[425] Subjectivity in the free-exercise analysis is unavoidable. But whatever replaces *Smith* should appropriately cabin that subjectivity, lest it suffer the same fate as *Sherbert*.

C. The Future of Free Exercise After Fulton

Small wonder the Court was not ready to decide what should replace *Smith*.[426] No one has all the answers. But we don't think that a pure balancing test—with or without a thumb explicitly on the scale for religious liberty—is the solution. Such a test would likely evolve back toward a categorical rule with a tangled web of exceptions, like the current free speech doctrine.[427] And given the controversy that surrounds many of today's free-exercise disputes,[428] an approach grounded in external sources of law—rather than the judge's sensibilities—is more needed than ever. To our minds, text,

420. U.S. CONST. amend. I.

421. The Becket Fund for Religious Liberty made this point in a recent amicus brief. Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners at 7, Americans for Prosperity v. Bonta, 141 S. Ct. 2373 (2021) (Nos. 19-251 & 19-255).

422. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 680 (2010).

423. Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners, *supra* note 421, at 8.

424. *See supra* note 59 and accompanying text.

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

426. And, perhaps, replacing *Smith* is a task best done slowly, a little at a time, as cases come before the Court.

427. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000) ("The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.").

428 *See supra* notes 366–68 and accompanying text.

structure, and the need for a test grounded in external sources of law suggest more bright lines and less balancing.

Additionally, post-*Smith* experience with federal and state laws protecting religious liberty[429] has shown that rules more permissive of religious exemptions won't court anarchy the way *Smith* feared.[430] History has shown that *Smith*'s concern about administering an accommodation regime—and the potential anarchy it might court[431]—was unfounded. Moreover, we don't foresee a flood of claims by litigants seeking to use their faith as a license to discriminate. For anyone other than true believers, the steep societal and economic costs of discrimination will offset whatever benefit such an exemption might confer.

With these general principles in mind, we offer a few additional observations about the path forward. To us, the task of guarding strict scrutiny seems best accomplished by erecting stronger thresholds. One such threshold can assist courts by defining the scope of the *conduct protected* by the Free Exercise Clause using a common judicial tool—history and tradition. Another threshold, the "substantial burden" element required under RFRA and RLUIPA, can assist by defining the scope of *governmental action prohibited* by the Free Exercise Clause. And pleading standards can be used to cull weak and implausible claims. Only then should plaintiffs' claims trigger strict scrutiny.

1. Defining the scope of the right using history and tradition

If one accepts that strict scrutiny should be a central feature in any free-exercise claim analysis grounded in text and structure, the key question then becomes: How does the religious challenger trigger strict scrutiny? *Smith* posited, "We cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[432]

Though others have proposed a sliding-scale balancing approach to determine the appropriate level of scrutiny,[433] a rule-based threshold might better serve the courts by eliminating early those claims without merit. Such a threshold would separate claims into two categories—a protected category and an unprotected category. This approach should be somewhat familiar from the speech context, where the courts routinely draw lines between protected and

429. *E.g.*, RFRA of 1993, 42 U.S.C. § 2000bb et seq.; Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc et seq.; *see supra* note 102 and accompanying text.

430. *See, e.g.*, *supra* note 98 and accompanying text.

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

432. *Id.*

433. *See supra* Subpart IV.B.

unprotected speech.[434] Under *Smith*, the "neutral and generally applicable" law analysis serves this screening function. But, as noted in Subpart IV.C, that test presently focuses on the characteristics of the *law*, while in the free speech context, the test focuses on the *speech being regulated*.

One way to return the focus to conduct is by looking to history and tradition. Courts often look to history and tradition to determine the scope of rights and powers enshrined in the Constitution.[435] For example, courts look to the "history and tradition" surrounding the *liberty* at stake when assessing substantive due process claims.[436]

But when dealing with an enumerated right like free exercise, the courts should place the burden on the *government* to establish a history and tradition of *regulatory power* over the conduct at issue. Focusing on the government's relationship to the conduct rather than the nature of the regulation might avoid the aspect of the neutral-and-generally-applicable-law test that we've criticized above. This approach shifts the inquiry from whether the *law* possesses the required characteristics to pass constitutional muster to whether the *conduct* has historically been subject to regulation and thus rests outside the scope of the Free Exercise Clause.

Moreover, using history and tradition—omnipresent tools in constitutional interpretation—to draw the line between protected and unprotected conduct might also mitigate a second problem with the neutral-and-generally-applicable-law test: the role of "luck" in

434. *See infra* notes 444–51 and accompanying text.

435. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (assessing the historical significance of jury unanimity to define the scope of the Sixth Amendment jury right); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082–83 (2019) (discussing historical significance of monuments and symbols when applying the Establishment Clause); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–85 (2012) (discussing historical tension between church and state); McDonald v. City of Chicago, 561 U.S. 742, 767–80 (2010) (summarizing *Heller*'s historical discussion and adding further evidence that the right to keep and bear arms was "deeply rooted in this Nation's history and tradition" at the time the Fourteenth Amendment was ratified); California v. Hodari D., 499 U.S. 621, 624–25 (1991) (relying on historical definition of "seizure" in the Fourth Amendment context); Powell v. McCormack, 395 U.S. 486, 522–48 (1969) (relying on history to determine the scope of congressional power under Article I Section 5); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 598–602 (1952) (Frankfurter, J., concurring) (describing the history of congressional authorizations of "executive seizure of production, transportation, communications, or storage facilities" to assess executive power to seize steel mills).

436. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

determining the scope of a constitutional right.[437] Secular interests leading to exemptions—which might defeat general applicability—will differ from year to year and from community to community.[438] As societal mores shift, so, too, does the scope of the Free Exercise Clause under *Smith*'s test.[439] Shifting cultural sensibilities is not merely a temporal issue, but a geographical issue.[440] The desire for secular exemptions to a law may wax or wane *over time*, and it may also vary from *community to community*.[441] Even if courts applied *Smith* consistently, the Free Exercise Clause would contract with each passing decade or expand from one township to the next. History and tradition provide a much more consistent benchmark for defining the outer bounds of a constitutional right.

For those who find the Free Exercise Clause's original public meaning inconclusive, history and tradition provide an additional advantage over a pure balancing approach: they account for the clause's liquidation over time. When the original public meaning proves elusive, "the longstanding 'practice of the government' can inform [the Court's] determination of 'what the law is.'"[442] The First Amendment speaks in absolute terms ("no law"),[443] but an unbroken tradition of regulatory power over certain kinds of conduct provides strong evidence that such regulations fall outside the scope of the amendment's prohibition.

The Court uses this approach to distinguish between protected and unprotected categories of speech. "'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'"[444] Legislatures have long been free to regulate these "well-defined and narrowly limited classes of speech" without "rais[ing] any constitutional problem."[445]

For example, *Brandenburg v. Ohio*[446] excludes from constitutional protection speech that is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce

437. *See supra* notes 364–70 and accompanying text; *see generally* Lund, *supra* note 370, at 649–51 (explaining the role of luck in determining free exercise cases under *Smith*).

438. Lund, *supra* note 370, at 648.

439. *Id.* at 649.

440. *Id.* at 648.

441. *Id.* at 647–48.

442. *See* NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (citations omitted) (first quoting M'Culloch v. Maryland, 17 U.S. 316, 401 (1819); and then quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

443. U.S. CONST. amend. I.

444. United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382–83 (1992)).

445. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

446. 395 U.S. 444 (1969).

such action."[447] *Miller v. California*[448] excludes material that "appeals to the prurient interest," "describes . . . sexual conduct specifically defined by the applicable state law[,] and . . . lacks serious literary, artistic, political, or scientific value."[449] *Virginia v. Black*[450] withholds constitutional protections for "statements where a speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[451]

The Supreme Court recently reiterated that history and tradition provide critical guidance when applying the Establishment Clause.[452] Decades of relying on tests purporting to gauge a law's "endorsement" of or "entanglement" with religion left the Establishment Clause doctrine in a deeply confused state.[453] History and tradition provide a more consistent compass, protecting "practice[s] that w[ere] accepted by the Framers and ha[ve] withstood the critical scrutiny of time and political change."[454]

In *Kennedy*, the Court explained that "[a] natural reading" of the First Amendment text and structure "suggest[s] the [Establishment and Free Exercise] Clauses have 'complementary' purposes, not warring ones."[455] Accordingly, history and tradition should guide courts when assessing claims made under both clauses.

In the Establishment Clause context, this supports allowing state action that accords with history and tradition.[456] In the free-exercise context, we suggest that the constitutional text should lead one to start with a presumption in favor of the free-exercise right. That

447. *Id.* at 447.

448. 413 U.S. 15 (1973).

449. *Id.* at 24.

450. 538 U.S. 343 (2003).

451. *Id.* at 359.

452. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022); *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127–31 (2022) (confirming the use of history and tradition to define the scope of the Second Amendment and noting that such an approach "accords with how [the Court] protect[s] other constitutional rights").

453. *See Kennedy*, 142 S. Ct. at 2427 (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768–69 n.3 (1995) (plurality opinion)) (explaining that the earlier Establishment Clause tests "'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators").

454. *See* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014).

455. *See Kennedy*, 142 S. Ct. at 2426 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)); *see supra* note 308–15 and accompanying text.

456. *See Kennedy*, 142 S. Ct. at 2428 (quoting *Galloway*, 572 U.S. at 577) ("'[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'").

presumption would then be assessed in light of the history and tradition of allowable state action.

Relying on history and tradition to determine the scope of *unprotected* conduct would weed out some of the more problematic cases previously brought by religious adherents. Government litigants would have little trouble establishing, for example, a deeply rooted history and tradition of imposing taxes for the "general Welfare"[457] or the "common Defense."[458] Nor would they have difficulty establishing a right to set and adhere to internal governmental procedures, such as identifying an applicant for government benefits by his social security number.[459]

The government might have more difficulty establishing an unbroken tradition of regulating the use of controlled substances,[460] imposing health insurance coverage requirements,[461] or compelling school attendance.[462] Given that these types of regulations are of more recent vintage, it is less likely that the government could make a convincing case for a deeply rooted history and tradition of regulating these areas.

This predicate determination of protection is unconcerned with the *importance* of the challenged policy. Using history and tradition to exclude categorically some conduct from strict scrutiny limits subjective balancing while promoting stability in the law. If the government has long regulated the conduct in question without granting exemptions or accommodations, then perhaps courts might justifiably defer to that practice.[463]

457. U.S. CONST. art. I § 8; *see also* United States v. Lee 455 U.S. 252, 254–55 (1982) (seeking an exemption from the social security tax on the basis of a religious objection to receiving its benefit).

458. U.S. CONST. art. I § 8; *see also* Adams v. Comm'r, 170 F.3d 173, 181–82 (3d Cir. 1999) (seeking, under RFRA, an exemption from paying taxes to fund the military); Browne v. United States, 176 F.3d 25, 25 (2d Cir. 1999) (same); Packard v. United States, No. 98-6223, 1999 WL 500797, at *1 (2d Cir. 1999) (same).

459. *See generally* Bowen v. Roy, 476 U.S. 693, 699 (1986).

460. *See generally* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006); Emp. Div. v. Smith, 494 U.S. 872, 874 (1990). The earliest attempts to regulate drugs in America appear to have been the federal Drug Importation Act of 1848 and San Francisco's 1875 Anti-Opium Smoking Act. LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 2 nn.8–9 (2014). The former of these two laws was directed at curtailing the importation of poor-quality substances. *See id.* at 2 n.8. Widespread regulation of controlled substances did not occur until the late nineteenth century and early twentieth century. *See generally id.* at 2.

461. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689–90 (2014).

462. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

463. In this way, our suggestion differs from the Court's recent use of history and tradition in *Ramirez v. Collier*, 142 S. Ct. 1264 (2022), in which the Court

2. Triggering strict scrutiny: The claimant's burden

a. The "substantial burden" requirement

The rigors of strict scrutiny should apply only when a law has truly put a religious adherent to the choice of obeying the commands of the law or the commands of his faith. This problem was part of the motivation behind *Smith*'s sudden doctrinal shift.[464] The Court felt uncomfortable applying strict scrutiny to every law challenged on religious grounds because that would render "each conscience . . . a law unto itself."[465]

A workable free exercise doctrine can account for this problem by requiring the challenger to establish that its free exercise of religion has been burdened. Existing statutory protections for religious liberty require such a showing; RFRA[466] and RLUIPA[467] both require a "substantial burden" on religion before inquiring as to whether the law serves a compelling state interest.

Though this standard is familiar, it's been difficult to apply. A substantial burden might refer to "substantial *religious* costs" of complying with the challenged law—i.e., the spiritual costs of complying—or to "substantial *secular* costs" of noncompliance—e.g., fines or criminal convictions.[468] The religious questions doctrine prohibits courts from engaging with the theological issues that form the religious-cost inquiry.[469] And in *Burwell v. Hobby Lobby Stores, Inc.*,[470] the Supreme Court disclaimed any ability to assess the religious costs of compliance, declaring that "the federal courts have no business addressing" questions about theology and the reasonableness of someone's beliefs.[471] The analysis thus becomes one-sided: courts take the challenger's declarations about his faith at face value and ask what secular costs the law imposes.[472]

relied in part on the history of permitting audible prayer during executions to enjoin Texas's categorical ban on audible prayer. *Id.* at 1276–79. In *Ramirez*, history and tradition provided one basis for finding that Texas's policy was not the least restrictive means of accomplishing a compelling state interest. *Id.* Under our suggested approach, the Court could avoid the compelling-state-interest analysis altogether if historical practice establishes that the relevant conduct falls outside the First Amendment's scope.

464. *Smith*, 494 U.S. at 878–79.

465. *Id.* at 890.

466. 42 U.S.C. § 2000bb-1(a).

467. *Id.* § 2000cc-1(a).

468. Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 96 (2017).

469. *Id.* at 106.

470. 573 U.S. 682 (2014).

471. *See id.* at 724.

472. *Id.* at 720.

Some scholars have defended this hands-off approach to analyzing alleged burdens on religious exercise,[473] noting that the test "is wholly consistent with the deference given to plaintiffs in the First Amendment expressive association context."[474] Others argue that the courts' uncritical acceptance of alleged substantial burdens "without the check of meaningful judicial review is bad for both law and religion."[475] According to at least one scholar, though courts must defer to plaintiffs on theological questions, they should "rely[] on relevant doctrines of secular law," namely causation, to determine whether a burden is substantial.[476]

Professor Sherif Girgis, like Professor McCoy,[477] proposes that courts analyze substantial burdens on religious exercise by determining whether the law in question leaves open adequate alternatives.[478] As Professor Girgis explains, incidental burdens on civil liberties (e.g., speech, abortion, and travel) are generally permissible if they leave open adequate alternatives.[479] Applying this to free exercise, Girgis suggests that a law substantially burdens religious exercise if it does not "leave[] you another way that you could [(1)] realize your religion to *about the same degree* as you could by the now-burdened means of exercise, and [(2)] at *not much greater cost* than you could by that means."[480] To avoid conflict with the religious questions doctrine, he limits the courts' inquiry in the first instance to "whether the *plaintiff* thinks one [course of conduct] is religiously as good as another."[481] Then, looking at the practice's alleged "religious significance" in combination with the "material cost" of noncompliance with the law, courts would determine whether the asserted burden is substantial.[482]

473. *E.g.*, Chad Flanders, *Substantial Confusion About "Substantial Burdens,"* 2016 U. ILL. L. REV. 27, 30 ("Absent a finding that the plaintiff is being insincere, the issue of whether the law is affecting a really important part of his or her religion should largely go unchallenged. After all, if it was not important, why sue in the first place?").

474. Scott W. Gaylord, *RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases*, 81 MO. L. REV. 655, 705 (2016); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 650–51 (2000) (accepting with little scrutiny the Boy Scouts' claims about its "professed beliefs").

475. Gedicks, *supra* note 468, at 149.

476. *Id.* at 131.

477. *See supra* notes 389–402 and accompanying text.

478. Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912126.

479. *Id.* at 6.

480. *Id.* at 31.

481. *Id.* at 37 (emphasis added, original emphasis omitted).

482. *Id.* at 38.

Often, however, there are no adequate alternatives for religious practices. Sabbath days, sacraments, and other rites "are rarely fungible."[483] "[B]elievers who are prohibited from acting on their belief cannot simply change the belief: if Native Americans are barred from using peyote in worship, they can't switch to wine."[484] A Saturday Sabbatarian can't settle for Sundays.[485] A Sikh cannot replace his *kirpan* with some other article of faith.[486] So, if courts must take claimants at their word on the issue of both theological questions and on the availability and adequacy of alternatives,[487] then we shouldn't expect courts to find copious adequate alternatives.[488]

As noted earlier, Laycock and Berg suggest logic from expressive association cases be used to help guide free exercise jurisprudence.[489] One example they raise, *Boy Scouts of America v. Dale*,[490] though not mentioned by Girgis, might be helpful in thinking about the concept of a substantial burden in ways somewhat along the same lines as Girgis. In that case, the Boy Scouts claimed that forced inclusion of a homosexual assistant scoutmaster would burden its organizational tenets and undercut its ability to instill its values in the next generation of scouts.[491] The Supreme Court accepted the Boy Scouts' claim that elements of the Scout Oath and Law provided the doctrinal basis for its stance against homosexuality.[492] But the Boy Scouts' claim about its organizational beliefs was not dispositive. Instead, it formed the basis of a two-step analysis assessing (1) the belief's sincerity;[493] and (2) whether application of a nondiscrimination law would substantially burden that belief.[494] The Court did not question the *logic* of the Boy Scouts' belief. But it pointed to evidence that the

483. Laycock & Berg, *supra* note 34, at 48.

484. *Id.*

485. *See generally* Braunfeld v. Brown, 366 U.S. 599 (1961).

486. *See, e.g.*, *Feds Say Sikhs Can't Meet Pope due to Weapon*, NBCNEWS (Mar. 6, 2008, 9:08 AM), https://www.nbcnews.com/id/wbna23499948 ("'We have to respect the sanctity of the *kirpan*, especially in such interreligious gatherings,' Anahat Kaur, secretary general of the Sikh Council, said in a statement. 'We cannot undermine the rights and freedoms of religion in the name of security.'").

487. Girgis, *supra* note 478, at 37.

488. A test that looks to adequate alternatives may run afoul of the textual command that religious exercise remain "free." *See supra* Subpart IV.B.3. We assume for the purposes of this Article that the existence of adequate alternatives leaves religious exercise "unrestrained." *See supra* notes 287–304 and accompanying text.

489. Laycock & Berg, *supra* note 34, at 43.

490. 530 U.S. 640 (2000).

491. *Id.* at 650.

492. *Id.* at 650–51.

493. *Id.* at 651.

494. *Id.* at 653.

organization's stance on the issue remained consistent for many years.[495] Nor did the Court question whether application of the law would *burden* the Boy Scouts' expression.[496] Instead, the Court determined whether that burden was "*significant*[]."[497]

The first step of this framework is intuitive: Is there evidence that the plaintiff genuinely holds the asserted belief? The second step is somewhat more fraught. *Should* courts "defer[] to" a plaintiff's "view of what would impair" its asserted belief?[498] Or should courts independently scrutinize that claim of impairment? And if courts may scrutinize alleged impairments, how can they do so without questioning the reasonableness of the plaintiff's beliefs? Or, in the context of free exercise claims, how can courts scrutinize alleged impairments without engaging theological questions? Girgis's test admittedly, and rightly, defers to plaintiffs on their judgment about whether one alternative is "religiously as good as another."[499] But that deference means that plaintiffs unilaterally decide significant questions of fact in free exercise litigation. Courts ought to pair that deference with heightened responsibilities on plaintiffs to establish the precise parameters of the burden on their faith.

b. Plausibly pleading substantial burden

Pleading standards may be useful in this regard. A plaintiff bears the burden of establishing his claim's plausibility in his complaint.[500] The current plausibility standard for pleading emerged nearly two decades after *Smith*.[501] This standard gives courts one additional tool to cull meritless claims before applying strict scrutiny.

Under *Twombly* and *Iqbal*,[502] we should expect plaintiffs to describe their beliefs and express clearly how the challenged law burdens them. *Twombly* and *Iqbal* have been criticized for placing hefty burdens on plaintiffs who may have a meritorious claim but lack either resources or access to develop the factual basis for their claim at the pleading stage.[503] But these informational asymmetries do not generally exist at the pleading stage for free exercise claims. When the operative questions surround the nature of an individual's

495. *Id.* at 651–53.
496. *Id.* at 653.
497. *Id.* at 653–56.
498. *Id.* at 653.
499. Girgis, *supra* note 478, at 37 (original emphasis omitted).
500. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that a complaint must state "plausible grounds" to support the plaintiff's claim).
501. *See generally Twombly*, 550 U.S. 544; *Iqbal*, 556 U.S. 662.
502. *Id.*
503. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 68 (2010).

religious beliefs and how those beliefs are burdened by a law, the informational asymmetries benefit the plaintiff.

Plaintiffs also benefit from the religious questions doctrine, which prevents courts from "second-guessing a plaintiff's own judgments about what is true or valuable in religious matters."[504] Courts may find a plaintiff's claim insincere or the burden insubstantial. But they may not question the reasonableness of the belief.[505] Even so, courts can and should require plaintiffs to show more of their cards at the outset of litigation.

With that information, courts should engage in familiar tasks already required by existing law. That is, they can evaluate whether the plaintiff alleged facts that raise a plausible inference of sincerity and assess whether the claimant plausibly connects the claimed burden with his or her religious beliefs—and do so under the pleading standards already required by *Twombly* and *Iqbal*.[506]

Several circuit courts have already analyzed free exercise claims in this manner.[507] One circuit has held that a claimant must "allege[] enough facts to suggest, raise a reasonable expectation of, and render plausible the fact that he sincerely held [a] religious belief," and that the challenged act burdened that belief.[508] In other words, a claimant must allege enough facts to show (1) sincerity; and (2) causation.

In *GeorgiaCarry.Org, Inc. v. Georgia*,[509] the Eleventh Circuit took this analysis further by demonstrating how specific pleading standards could be drawn from the opening paragraph of *Lukumi*.[510] According to the court, a plaintiff must establish that (1) "what is at issue is religious in nature[;]" (2) "there is a religious belief, not merely a preference at stake[;]" (3) the "religious belief is sincerely held[;]" and (4) the religious belief "is burdened by the governmental regulation."[511] The plaintiffs in *GeorgiaCarry.Org* challenged under

504. Girgis, *supra* note 478, at 11.

505. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724–25 (2014); *cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

506. *Iqbal*, 556 U.S. at 678.

507. *E.g.*, Ghailani v. Sessions, 859 F.3d 1295, 1303–06 (10th Cir. 2017); Williams v. California, 764 F.3d 1002, 1017 (9th Cir. 2014); Cornerstone Christian Schs. v. Univ. Interscholastic League, 563 F.3d 127, 133, 135–38 (5th Cir. 2009).

508. Watts v. Florida Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007) (applying *Twombly*); *see also* GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1258–59 (11th Cir. 2012) (affirming dismissal of a free exercise claim where the claimant failed plausibly to connect the burdened conduct with any religious belief).

509. 687 F.3d 1244 (11th Cir. 2012).

510. *Id.* at 1257 n.25.

511. *Id.*

the Free Exercise Clause a law banning firearms in places of worship.[512] The Eleventh Circuit affirmed that claim's dismissal, explaining that the plaintiffs had alleged no facts "that could possibly be construed" as an encroachment on free exercise.[513] "Plaintiffs allege[d] that they would like to carry a handgun in a place of worship for the protection either of themselves, their family, their flock, or other members of the Tabernacle."[514] But these allegations amounted only to burdens on "personal preference[s], motivated by a secular purpose."[515] Because the plaintiffs failed to satisfy the pleading criteria derived from *Lukumi*, they had failed to allege a violation of the Free Exercise Clause.[516]

And of course, *Twombly* and *Iqbal* describe only the minimum pleading standard under existing law.[517] If this standard proves to be an inadequate gatekeeper—if it allows too many claims to progress to strict scrutiny—Congress could bolster pleading requirements by statute. Congress has already acted twice when it felt that the Court overcorrected in this area. That is, it passed RFRA and RLUIPA to overturn *Smith* by statute.[518] It's possible that Congress would act again—this time to prevent weakly pleaded and implausible free exercise claims from reaching strict scrutiny if that standard is reinstated. And that, in turn, could further mitigate the anarchy *Smith* feared might follow from strict scrutiny.

3. Strict scrutiny

If the government cannot establish a right to regulate through history and tradition and the challenger can plausibly plead (and then establish) that its free exercise of religion has been substantially burdened, then the Court should apply strict scrutiny to the claim. The text and structure of the First Amendment firmly establish that free exercise of religion—like the freedom to speak, to publish, and to gather—is a fundamental right.[519] These rights are deeply intertwined both textually and structurally, and courts should protect them in a way that reflects that.

Strict scrutiny would look much like it does now. As Laycock and Berg suggest, "[A] free-exercise claimant seeks only an exemption at the margin," so the courts should "measure the government's interest at the margin."[520] The Supreme Court has repeatedly stated that

512. *Id.* at 1249.
513. *Id.* at 1258.
514. *Id.*
515. *Id.*
516. *Id.* at 1257–58.
517. Ashcroft v. Iqbal, 556 U.S. 662, 662 (2009).
518. Lingo & Schietzelt, *supra* note 68, at 17–19.
519. *See supra* Subparts III.B, III.C.1.
520. Laycock & Berg, *supra* note 34, at 51.

"courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'"[521]

Generally applicable laws—meaning laws with *no* exceptions—provide evidence of the strength of the government's interest at the margin. It's much easier for the government to claim credibly that it *must* enforce its policy against religious adherents if it does not permit the same conduct for other reasons. But general applicability cannot, on its own, conclusively establish that the government's interest in marginal application of the law is compelling.

It's possible to imagine how these pieces might work together. Consider *Braunfeld v. Brown*,[522] a pre-*Smith* (and pre-*Sherbert*) case Justice Barrett cited to raise the question of how courts should treat "indirect" burdens on religion.[523] Abraham Braunfeld was an Orthodox Jewish merchant in Philadelphia who observed Shabbat each week from Friday evening to Saturday evening.[524] Pennsylvania enacted a criminal statute prohibiting certain businesses from opening on Sundays.[525] That statute meant that, to observe the dictates of their faith and of the law, Braunfeld and other Orthodox Jews had to keep their businesses closed for the entire weekend—they could not open Sundays to recoup the revenue lost due to closing on Saturdays.[526]

Mr. Braunfeld brought a free-exercise challenge to the statute.[527] He alleged that Sunday closures would cause him to go out of business.[528] But the Court rejected his claim.[529] In language that would echo in *Smith*, the Court concluded that permitting such claims risked opening the door to all manner of challenges: "To strike down . . . legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature."[530]

By characterizing the burden as "indirect," the plurality[531] centered its analysis on the "substantial burden" variable of the

521. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006)).

522. 366 U.S. 599 (1961).

523. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

524. *Braunfeld*, 366 U.S. at 601.

525. *Id.* at 600.

526. *Id.* at 601.

527. *Id.* at 600–01.

528. *Id.* at 601.

529. *Id.* at 603.

530. *Id.* at 606.

531. Chief Justice Warren wrote for a four-justice plurality, focusing on the indirect nature of the burden. *Id.* Justices Frankfurter and Harlan concurred, rejecting the free-exercise challenge for different reasons in a separate opinion.

equation, though not necessarily in those terms.[532] Mr. Braunfeld's Sabbath observance had always shortened his working week by one day compared to secular Pennsylvanians.[533] The 1959 statute requiring Sunday closures didn't change that—it merely shortened the working week by one day for everyone.[534] Thus, the statute didn't directly cause Mr. Braunfeld's economic disadvantage.[535] That disadvantage existed even without the Sunday closing law.[536] In other words, the Sunday closing law didn't *cause* Mr. Braunfeld's burden—at least not directly. One can read the majority opinion in *Braunfeld* to employ "relevant doctrines of secular law," such as causation, to determine whether the Sunday closure law created an actionable harm.[537]

Justices Frankfurter and Harlan arrived at the same result by a different path—one guided by history and tradition.[538] They found "[t]he long history of Sunday legislation," marked by "its continuity and fullness," to be "controllingly relevant" to the free exercise issue.[539] Justice Frankfurter's lengthy opinion assesses the history of such legislation across a number of states, with a particular focus on Virginia.[540]

This focus on Virginia is significant for two reasons. First, founding-era attitudes toward religious freedom in Virginia were more permissive and accommodating than perhaps any other state.[541] While other states' statutes and constitutional provisions protecting religious liberty contained "caveats" or "conditions" allowing that liberty to be curtailed, Virginia's Act for Establishing Religious Freedom "condemned [those caveats] as intolerant."[542] Second, the "Court has looked to the [Act for Establishing Religious Freedom],

Justices Brennan, Stewart, and Douglas dissented from the Court's rejection of the free-exercise challenge, each writing a separate dissent.

532. In dissent, Justice Brennan *did* put the analysis in these terms. *Id.* at 614 (Brennan, J., concurring in part and dissenting in part) ("What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom?").

533. *Id.* at 601 (plurality opinion).

534. *Id.* at 603.

535. *Id.* at 605–06.

536. *Id.*

537. Gedicks, *supra* note 468, at 131.

538. McGowan v. Maryland, 366 U.S. 420, 459–60 (1961) (opinion of Frankfurter, J.). This concurrence applied to four cases decided on the same day, including *Braunfeld*.

539. *Id.*

540. *Id.* at 492–95.

541. Hamburger, *supra* note 26, at 923.

542. *Id.* at 924.

and to the Virginia history which surrounded its enactment, as a gloss on the signification of the [First] Amendment."[543]

Justice Frankfurter noted that the Virginia legislature adopted its own act requiring work to cease on Sundays—at the same time it also adopted the Act for Establishing Religious Freedom.[544] That history, combined with the deeply rooted tradition of Sunday closure laws in other states, proved conclusive to Frankfurter: Sunday closure laws did not conflict with the Free Exercise Clause.[545]

Thus, there were at least two possible off-ramps for the Court before it would engage in strict scrutiny: (1) the nature of the burden and (2) history and tradition. If the Court *had* strictly scrutinized Mr. Braunfeld's claim, it's likely that it would have struck down the Pennsylvania law. The statute at issue allowed for certain other retail establishments to remain open on Sundays.[546] And other states allowed exemptions for religious laborers "who, because of religious conviction, observe[d] a day of rest other than Sunday."[547]

Contrast *Braunfeld* with *Sherbert*, where the claimant was denied unemployment benefits because she refused to work on her Sabbath.[548] As a matter of history and tradition, unemployment insurance claims emerged in America for the first time during the Great Depression.[549] And unlike the burden in *Braunfeld*, the burden in *Sherbert* was *caused directly* by the law—Adell Sherbert was denied unemployment benefits *because* she would not violate her Sabbath.[550] Unlike Abraham Braunfeld, Ms. Sherbert's claim satisfies both threshold questions that might then lead to strict scrutiny.

Justice Barrett's concurrence likely directs attention to this case because she shares our sense that if strict scrutiny applied in

543. *McGowan*, 366 U.S. at 493–94; *see also id.* at 493 ("In [the Act for Establishing Religious Freedom] breathed the full amplitude of the spirit which inspired the First Amendment."). This emphasis on Virginia might have been due to Madison and Jefferson's role in crafting the Virginia Act and their later influence on the Bill of Rights. *See id.* at 492 (opinion of Frankfurter, J.).

544. *Id.* at 494.

545. *See id.* at 460.

546. *See* Braunfeld v. Brown, 366 U.S. 599, 600 n.1 (1961) (quoting the statute).

547. *Id.* at 608.

548. Sherbert v. Verner, 374 U.S. 398, 401 (1963).

549. *See generally* Daniel N. Price, *Unemployment Insurance, Then and Now, 1935–85*, SOC. SEC. BULL., Oct. 1985, at 22, 23 (explaining that, early in the twentieth century, "a number of States had considered providing benefits to unemployed workers, but only one—Wisconsin—actually enacted a program, in 1932").

550. *Sherbert*, 374 U.S. at 401.

Braunfeld, the state would have lost.[551] When claims such as the one raised in *Braunfeld* reflexively trigger strict scrutiny, it creates significant practical problems for courts. Appropriately tailored threshold questions may provide the key to a sustainable, workable, and protective free exercise doctrine.

CONCLUSION

Months after the adoption of the First Amendment, James Madison opined on the importance of finding a balance between effective government and individual liberty.[552] "Where an excess of [governmental] power prevails," he wrote, "property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions."[553] But, he continued, "[w]here there is an excess of liberty, the effect is the same, tho' from an opposite cause."[554] One can divide the past six decades of free exercise litigation into two acts of roughly equal length—the first marked by "an excess of liberty" and the second marked by "an excess of power."

Fulton v. City of Philadelphia disappointed those who have been troubled by the excess of power *Smith* provides to neutral and generally applicable laws.[555] The Court avoided the question of whether to overrule *Smith*.[556] But as Justice Gorsuch recognized, "Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer."[557] Advocates now possess a roadmap for how to address this question the next time it arises at the Supreme Court. Avoid the excesses of *Smith* and *Sherbert*. Ground the doctrine in text and structure so that it can withstand modern pressures. Look to history and tradition. And place free exercise on par with the rest of the First Amendment so that it's no longer a second-class First Amendment right.

551. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) (asking whether courts should distinguish "between indirect and direct burdens on religious exercise" and citing *Braunfeld* as an example of that problem arising).

552. Madison, *supra* note 339, at 598.

553. *Id.*

554. *Id.*

555. *See* Laycock & Berg, supra note 34, at 39.

556. *Fulton*, 141 S. Ct. at 1877.

557. *Id.* at 1931 (Gorsuch, J., concurring).