NOTES

SMITH TO SMITHEREENS? IF SO, WHAT'S NEXT?

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INTRODUCTION

In *Fulton v. City of Philadelphia*,[1] Justice Barrett, in her concurrence, referred to the possibility that the Court would overturn *Employment Division v. Smith*,[2] which established that "a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise."[3] Justice Barrett noted that "[t]here would be a number of issues to work through if *Smith* were overruled"[4] and asked a series of questions that would become relevant if the Court did cast away *Smith*. This paper will walk through how pre-*Smith* history culminated in Justice Barrett's questions and examine alternatives to the current *Smith* regime of neutrality and general applicability.[5]

I. PRE-*SMITH* WORLD

Prior to engaging in an analysis of what could potentially replace *Smith* or the case's current legal implications, understanding where Free Exercise jurisprudence prior to that case stood is useful.

A. Sherbert v. Verner

The landmark case that established the strict scrutiny standard for accommodation of religious belief was *Sherbert v. Verner*.[6] In *Sherbert*, a member of the Seventh Day Adventist Church was fired for refusing to work on Saturday, or the day her faith ascribed "the Sabbath."[7] As a result, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.[8] Under this law, a claimant must both (1) be able to work and (2) be available for work to be eligible.[9] Further, a claimant must not have failed to accept "suitable work" without good cause.[10] Prior to

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1. 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring).
2. 494 U.S. 872 (1990).
3. *Fulton*, 141 S. Ct. at 1881–83 (Barrett, J., concurring) (citing *Smith*, 494 U.S. at 872).
4. *Id.*
5. *Id.*
6. 374 U.S. 398 (1963).
7. *See id.* at 399.
8. *See id.* at 399–400.
9. *See id.* (internal quotations omitted).
10. *See id.*

the Court's ruling in this case, Adell Sherbert was declared ineligible for benefits for failing to accept suitable work.

In conducting its analysis, the Court established that for the law to be upheld,

> it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of [her] religion may be justified by a '*compelling state interest* in the regulation of a subject within the State's constitutional power to regulate . . . .[11]

The Court first determined that the disqualification for benefits *did* impose a burden on Sherbert's free exercise of religion because "[Sherbert's] declared ineligibility for benefits derive[d] solely from the practice of her religion, [and] the pressure upon her to forego that practice [was] unmistakable."[12] Furthermore, because the "ruling force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand[,]" the burden upon her free exercise was essentially the same as if she would have been fined for her Saturday worship.[13]

After concluding that the law imposed a burden on Sherbert's free exercise, the Court turned to the question of "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifie[d] the substantial infringement of [her] First Amendment right."[14] Without doing so by name, the Court effectively introduced a standard of "strict scrutiny" in the presence of a substantial burden on an individual's free exercise of religion. In fleshing out this standard, the Court reasoned that "no showing merely of a rational relationship to some colorable state interest would suffice; [rather] in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation[.]'"[15] Ultimately, the Court did not find the state's interest compelling because it suggested "no more than a *possibility* that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might . . . dilute the unemployment compensation fund . . . [and] hinder the scheduling by employers of necessary Saturday work."[16]

The Court differentiated the state interests in *Sherbert* from those in *Braunfeld v. Brown*,[17] which featured a "less direct burden upon religious practices."[18] There, although the Sunday closing law at issue made "the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive," it

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11. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963) (emphasis added)).
12. Sherbert v. Verner, 374 U.S. 398, 403–04 (1963).
13. *Id.* at 404.
14. *Id.* at 406.
15. *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
16. *Id.* at 407 (emphasis added).
17. 366 U.S. 599 (1961).
18. *Sherbert*, 374 U.S. at 408.

was "saved by . . . a strong state interest in providing one uniform day of rest for all workers."[19] In that instance, the "secular objective could be achieved . . . only by declaring Sunday to be that day of rest"; and "[r]equiring exemptions for Sabbatarians . . . appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable."[20]

In holding that the South Carolina Unemployment Compensation Act did not overcome the threshold of strict scrutiny, the Court emphasized it was not "fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina."[21] Rather, it determined that "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions" that the Establishment Clause precludes.[22]

B. Wisconsin v. Yoder

Another case integral to the early onset of Free Exercise jurisprudence in the context of the strict scrutiny standard was *Wisconsin v. Yoder*.[23] Here, "[r]espondents . . . Yoder and . . . Miller [were] members of the Old Amish Religion, and respondent . . . Yutzy [was] a member of the Conservative Amish Mennonite Church."[24] All resided in Wisconsin, where a "compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16."[25] However, they "declined to send their children, ages 14 and 15, to public school after they completed the eighth grade" and "were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law."[26] The three individuals believed enrolling their children in the required schooling was antithetical "to the Amish religion and way of life."[27] Doing so, they thought, "would . . . expose themselves to the danger of the censure of the church community [and] . . . also endanger their own salvation and that of their children."[28] Among the fundamental beliefs of the Amish faithful is that "salvation requires life in a church community separate and apart from the world and worldly influence."[29]

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19. *Id.* (internal quotations omitted).
20. *Id.* at 408–09.
21. *Id.* at 409.
22. *Id.*
23. Wisconsin v. Yoder, 406 U.S. 205 (1972).
24. *Id.* at 207.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Wisconsin v. Yoder, 406 U.S. at 209.

Here, the Court acknowledged Wisconsin's ability to "impose reasonable regulations for the control and duration of basic education."[30] However, in re-introducing the *Sherbert* strict scrutiny test, the Court declared that "a State's interest in universal education, however highly we rank it, is *not* totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[31] Before diving into its analysis, the Court makes the following clear statement of an application of strict scrutiny:

> [F]or Wisconsin to compel school attendance beyond the eighth grade against a claim that [it] interferes with the practice of a legitimate religious belief, [the State must neither] deny the free exercise of [religion] by its requirement, or [it must have a sufficient interest] to override the interest claiming protection under the Free Exercise Clause.[32]

The Court reiterates the principle that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[33]

In its analysis, the Court reasoned that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion [was] . . . severe [and] inescapable [because it] affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[34] Moreover, it carried with it the "objective danger" of the "real threat of undermining the Amish community and religious practice as they exist today"—they must choose between abandoning their deeply held belief "or be forced to migrate to some other and more tolerant region."[35]

II. *SMITH* LAND

The Court significantly departed from its strict scrutiny standard, as established in *Sherbert* and *Yoder* and elected a new standard regarding burdens on religion in the landmark *Employment Div. v. Smith*.[36] The statute at issue in *Smith* was an Oregon law that "prohibit[ed] the knowing or intentional possession of a 'controlled substance' unless the substance ha[d] been prescribed by a medical practitioner."[37] Violators of this provision would be "guilty of a Class B felony" if they possessed a substance listed on Schedule I, which happened to include "peyote, a hallucinogen derived from the plant *Lophophora williamsii Lemaire*."[38]

30. *Id.* at 213.
31. *Id.* at 214 (emphasis added).
32. *Id.*
33. *Id.* at 215.
34. *Id.* at 218.
35. *Yoder*, 406 U.S. at 218.
36. 494 U.S. 872 (1990).
37. *Id.* at 874; OR. REV. STAT. § 475.992(4) (1987).
38. OR. REV. STAT. § 475.992(4)(a); OR. ADMIN. R. 855-80-021(3)(s) (1988).

In this case, "[r]espondents . . . Smith and . . . Black . . . were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members."[39] When they applied for unemployment compensation at Employment Division, they were "ineligible for benefits because they had been discharged for work-related 'misconduct.'"[40]

The Court, while not explicitly acknowledging its eschewing of strict scrutiny in favor of a new standard, reasoned that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[41] It invoked its ruling in *Reynolds v. United States*,[42] in which it "rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice."[43] Thus, the Court concluded in that case, "[t]o permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[44] Further, the Court looked to *United States v. Lee*,[45] where it held that "the right of free exercise does not relieve an individual of the obligation to comply with a '*valid and neutral law of general applicability*' on the ground that the law proscribes . . . conduct that his religion . . . prescribes."[46] At issue in that case was an Amish employer who, "on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs."[47] Because the regulation there was a "neutral, generally applicable law to religiously motivated action[,]" the Court found no problem with the regulation.[48] To bolster its reasoning, it observed "[t]here would be no way . . .to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes."[49]

In applying the standard of neutrality and general applicability, the Court acknowledges that the "only decisions in which [it] ha[s] held that the First Amendment bars [such laws]" occurred when dealing with not only Free Exercise Clause concerns, but Free Exercise Clause "in conjunction with other constitutional protections, such as freedom of speech and of the press."[50]

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39. *Id.* at 874.
40. *Id.*
41. *Id.* at 878–79.
42. 98 U.S. 145 (1879).
43. Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).
44. *Id.* (quoting Reynold*s* v. United States, 98 U.S. 145, 166–67 (1879)).
45. 455 U.S. 252 (1982).
46. *Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263, n.3) (emphasis added).
47. *Id.* at 880.
48. *Id.* at 881.
49. *Id.* at 880.
50. *Id.* at 881.

Because *Smith* did "not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right," the Court was comfortable in applying "the rule to which [it] ha[s] adhered ever since *Reynolds*."[51] For the Court to have more seriously considered the *Sherbert* approach, Mr. Smith would have at least needed a "contention that Oregon's drug law represent[ed] an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs."[52] Writing for the majority, Justice Scalia asserts that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[53] Further, he notes that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense."[54]

Moreover, Justice Scalia asserts that the *Sherbert* "compelling government interest" test is inapplicable because, unlike in the case at hand, what it produces in the fields of race and speech—"equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly."[55] In response to push back from Justice O'Connor suggesting that "[t]here is nothing talismanic about neutral laws of general applicability," Justice Scalia contends that the Court has "held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause;"[56] similarly, in the realm of speech, the Court has "held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment."[57]

In further advancing his reasoning as to not applying *Sherbert*, Justice Scalia claims it is not "possible to limit the impact of respondents' proposal by requiring a 'compelling state interest' only when the conduct prohibited is 'central' to the individual's religion."[58] He opines that "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be

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51. *Id*. at 882.

52. *Smith*, 494 U.S. at 882.

53. *Id.* at 885 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

54. *Smith*, 494 U.S. at 885 (quoting Reynold*s* v. United States, 98 U.S. 145, 167 (1879)).

55. *Smith*, 494 U.S. at 886.

56. *Id. See* Washington v. Davis, 426 U.S. 229 (1976) (police employment examination).

57. *Smith*, 494 U.S. at 886; *see* Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969) (antitrust laws).

58. *Smith*, 494 U.S. at 886; *cf. Lyng*, 485 U.S. at 474–76 (Brennan, J., dissenting).

for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."[59] Moreover, "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"[60] The judiciary is not equipped "to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[61]

Yet another reason for Justice Scalia's distaste for the application of *Sherbert* to *Smith* is that "[i]f the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded."[62] However, the issue, in his view, is that "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test."[63] If we adopt this standard, he posits, it would be akin to "courting anarchy, [noting] that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[64] The standard is impracticable because the country is "made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, 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."[65] Justice Scalia foresees that applying *Sherbert* here would open the prospect of the following:

> Constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.[66]

In Justice Scalia's view, the "First Amendment's protection of religious liberty does not require" such exemptions.[67]

Justice Scalia concluded his argument by noting the importance of the political process in crafting laws and distinguishing ones that are "permitted, or

59. *Smith*, 494 U.S. at 886–87.

60. *Id.* at 887 (quoting *Lee*, 455 U.S. at 263, n.2) (Stevens, J., concurring).

61. *Id.* (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)).

62. *Id.* at 888.

63. *Id.*

64. *Id.*

65. *Smith*, 494 U.S. at 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)) (emphasis added).

66 *Id.* at 888–89 (1990) (internal citations omitted).

67. *Id.*

even . . . desirable" from ones that are "constitutionally *required*."[68] He concedes that although "those religious practices that are not widely engaged in" may be placed at "relative disadvantage," that outcome is an "unavoidable consequence of democratic government" and is preferable "to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of religious beliefs."[69]

Thus, in a case "most considered relatively insignificant," the Court demolished the free-exercise standard "it had clearly and repeatedly upheld since 1963."[70]

III. How Did Other Justices Address *Smith* in *Fulton*?

In *Fulton v. City of Philadelphia*,[71] the government of the city of Philadelphia "stopped referring children to [Catholic Social Services] upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage."[72] The city claimed it would renew its contract with the agency under one condition: that it agree to certify same-sex couples.[73] Aside from the key question in this case of "whether the actions of Philadelphia violate[d] the First Amendment," the Court was also called to reconsider the precedential value of *Employment Division v. Smith*.[74]

A. Chief Justice Roberts' Approach

In a case that many were anticipating would either directly overrule or affirm the Court's controversial *Smith* decision, Chief Justice Roberts, issuing the Court's majority opinion, subscribed to the view that *Fulton* "[fell] outside *Smith*."[75] The facts of this case, in the eyes of the majority, did not meet the threshold of *Smith*'s test of neutrality and general applicability.[76] Justice Roberts' argument hinged on the assertion that "[a] law is not generally applicable if it 'invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions.'"[77] Furthermore, a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[78]

68. *Id.* at 890 (emphasis added).

69. *Id.*

70. Michael P. Farris and Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 65 (1995).

71. 141 S. Ct. at 1868.

72. *Id.* at 1874.

73. *See id.*

74. *Id.*

75. *Id.* at 1877.

76. *See id.*

77. *Id.* (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693 (1986)).

78. *Id. See* 723 F. Supp. at 542–46.

Applying these principles to *Fulton*, Chief Justice Roberts noted that section 321 of Philadelphia's standard foster care contract is not "generally applicable." Section 321 specifies that a "provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for services based upon . . . their *sexual orientation* . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."[79] As stated in the policy section, a system of individual exemptions is available here at the "sole discretion" of the Commissioner, and the "City has made clear that the Commissioner 'has no intention of granting an exception' to CSS."[80] Per *Smith*, however, the city "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason."[81] Standing alone, "[t]he creation of a formal mechanism for granting exceptions renders a policy *not generally applicable*, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude—here, at the Commissioner's 'sole discretion.'"[82]

Chief Justice Roberts' opinion demonstrates that he placed more emphasis on reviewing "whether Philadelphia's actions were permissible" than on deciding whether to overrule *Smith*.[83] In defense of his position, he claims that "because the City [had] burdened the religious exercise of CSS through policies that [did] not meet the requirement of being neutral and generally applicable[,]" the agency demonstrated "that the City's actions [were] subject to 'the most rigorous of scrutiny'" and that, as a result, "regardless of *Smith*," the Court had to examine the City's actions under the strictest scrutiny.[84]

B. Justice Alito's Approach

Joined by Justices Thomas and Gorsuch, Justice Alito criticized the Court's decision in *Smith*, asserting that it abruptly pushed aside nearly thirty years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice."[85] Justice Alito countered Chief Justice Roberts' majority opinion by asserting that *Smith* "[was] ripe for reexamination."[86]

Justice Alito begins his argument by presenting multiple hypotheticals demonstrating the dangers posed by *Smith*. Among possibilities that *Smith* would permit include prevention of the celebration of Catholic masses, the

79. 141 S. Ct. at 1878 (quoting Supp. App. To Brief for city Respondents 16–17) (emphasis added).

80. *Id.* (quoting CSS. App. to Pet. for Cert. 168a).

81. *Id.* (internal quotation marks omitted) (quoting *Roy*, 476 U.S. at 708).

82. *Fulton*, 141 S. Ct. at 1879 (quoting *Smith*, 494 U.S. at 884) (emphasis added).

83. *Fulton*, 141 S. Ct. at 1881.

84. *Id. see* 723 F. Supp. at 546.

85. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring).

86. *Id.*

outlawing of kosher and halal slaughter, a categorical ban of the circumcision of infants, and a prohibition of any form of head covering in court.[87] He proceeds to note that the issue in *Fulton* is almost equally as outlandish: "an ultimatum [by the city] to an arm of the Catholic Church: Either engage in conduct [contrary to Church teaching] or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children."[88]

Reintroducing the notion that "[o]ne of the questions [the Court] accepted for review [was] '[w]hether . . . *Smith* should be revisited[,]" Justice Alito posits that the Court should, contrary to Chief Justice Roberts' view, "confront that question."[89] Further distinguishing his concurrence from the majority opinion, Justice Alito asserts that "*Smith*'s holding about categorical rules does not apply if a rule permits individualized exemptions."[90] Despite "the majority['s] seiz[ing] on the presence in the City's standard contract of language giving a City official the power to grant exemptions[,] . . . [it] . . . has never granted such an exemption and has no intention of handing one to CSS[.]"[91] Justice Alito criticizes the majority for "revers[ing] the decision . . . because the contract supposedly confers [the] never-used power" of granting exemptions.[92] He points out that "if the City wants to get around [the Court's] decision, it can simply eliminate the never-used exemption power" and "the parties will be back where they started."[93]

Justice Alito continues by referencing the inability of *Smith*'s interpretation to "be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption."[94] He appeals to *Smith*'s unpopularity "[w]hen [it] reinterpreted the Free Exercise Clause, [and] four justices . . . registered strong disagreement . . . [and five sitting Justices] called for [it] to be reexamined."[95] Moreover, "[o]n two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation [was] contrary to our society's deep-rooted commitment to religious liberty."[96] In fact, "[i]n enacting the Religious Freedom Restoration Act of 1993[97] . . . and the Religious Land Use and Institutionalized Persons Act of

87. *Id.*

88. *Id.* at 1884.

89. *Id.* at 1887.

90. *Id. See* Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).

91. *Fulton*, 141 S. Ct. at 1887 (quoting Brief for City Respondents 36; App. to Pet. for Cert. 168a).

92. *Fulton*, 141 S. Ct. at 1887.

93. *Id.*

94. *Id.* at 1888.

95. *Id.* at 1889; *see* Kennedy v. Bremerton School Dist., 139 S. Ct. 634, 636–37 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari); City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

96. *Fulton*, 141 S. Ct. at 1889.

97. 42 U.S.C. § 2000bb *et seq.*

2000,[98] . . . Congress tried to restore the constitutional rule in place before *Smith*."[99] Unfortunately to Justice Alito, however, those laws "do not apply to most state action[] and . . . leave huge gaps."[100]

After exposing the issues apparent with the Court's ruling in *Smith*, Justice Alito examines the pre-*Smith* world of *Sherbert* and suggests we should return to that precedent.[101] He observes that the "test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for 27 years."[102] For instance, in *Wisconsin v. Yoder*[103] "in holding that the Amish were entitled to a special exemption, the Court expressly rejected the interpretation of the Free Exercise Clause that was later embraced in *Smith*."[104] Demonstrating this claim, Justice Alito demonstrates the *Yoder* court held the following:

"[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability"; "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality* if it unduly burdens the free exercise of religion"; insisting that the Amish children abide by the compulsory attendance requirement was unconstitutional *even though it "applie[d] uniformly to all citizens of the State* and d[id] not, on its face, discriminate against religions of a particular religion, [and was] motivated by legitimate secular concerns."[105]

The Court continued to apply this anti-neutrality principle in *Thomas v. Review Bd. Of Ind. Employment Security Div.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, and *Frazee v. Illinois Dept. of Employment Security*.[106]

Even the cases which "applied *Sherbert* but found no violation" did not question "the validity of *Sherbert*'s interpretation of the free-exercise right."[107]

To further demonstrate why he believes *Smith* was incorrectly decided, Justice Alito then demonstrates the similarities between *Smith* and *Sherbert* in that "[j]ust as Adell Sherbert had been denied unemployment benefits due to conduct mandated by her religion (refraining from work on Saturday), Alfred

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98. 42 U.S.C. § 2000cc *et seq.*

99. *Fulton*, 141 S. Ct. at 1889.

100. *Id.*

101. *See id.*

102. *Id.*

103. 406 U.S. at 234.

104. *Fulton,* 141 S. Ct. at 1890.

105. *Id.* (quoting 406 U.S. at 220) (emphasis added).

106. *Fulton,* 141 S. Ct. at 1891 (internal citations omitted).

107. *Id.* Such cases include United States v. Lee, 455 U.S. 252, 258 (1982), Gillette v. United States, 401 U.S. 437, 462 (1971), Bowen v. Roy, 476 U.S. 693, 700 (1986), Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987), Goldman v. Weinberger, 475 U.S. 503, 506 (1986).

Smith and Galen Black were denied unemployment benefits because of a religious practice (ingesting peyote as part of a worship service of the Native American Church)."[108] Even the State "defended the denial of benefits under the *Sherbert* framework" and "never suggested . . . *Sherbert* should be overruled."[109] Rather, "the crux of its disagreement with Smith and Black and the [Oregon] Supreme Court was whether its interest in preventing drug use could be served by a more narrowly tailored rule that made an exception for religious use by members of the Native American Church."[110] Even more fascinating perhaps, "the *Smith* majority wanted no part of that question[;] [i]nstead, without briefing or argument on whether *Sherbert* should be cast aside, the Court adopted what it seems to have thought was a clear-cut test that would be easy to apply[.]"[111] Further criticizing the majority's approach in *Smith*, Justice Alito buttresses his argument by asserting that the Court "was satisfied that its interpretation represented a 'permissible' reading of the text . . . and [] did not . . . stop to explain why."[112]

Justice Alito proceeds in his concurrence by demonstrating the bipartisan nature of the vociferous response to *Smith*, emphasizing that Senator Schumer's Religious Freedom Restoration Act was "passed in the House without dissent, was approved in the Senate by a vote of 97 to 3, and was enthusiastically signed into law by President Clinton."[113] Despite the Court's finding in *City of Boerne*[114] "that Congress lacked the power under the 14th Amendment to impose [RFRA] on the States, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA)" to serve as at least some sort of counterweight to the unpopular *Smith* regime.[115] RLUIPA served this end in the context of land use and prison regulations, passing both Houses of Congress "without a single negative vote and, like RFRA, was signed by President Clinton."[116] Although RFRA and RLUIPA "have restored part of the protection that *Smith* withdrew, . . . they are both limited in scope and can be weakened or repealed by Congress at any time."[117] Thus, in Justice Alito's view, they are "no substitute for a proper interpretation of the Free Exercise Clause."[118]

108. *Id.* at 1891.

109. *Id.*

110. *Id.* at 1891–92.

111. *Id.* at 1892.

112. *Id.* (quoting *Smith,* 494 U.S. at 878).

113. *Id.* at 1893–4 (citing 139 CONG. REC. 27239–27341, 26416; Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. OF PRES. DOC. 2377 (1993)).

114. City of Boerne v. Flores, 521 U.S. 507 (1997).

115. *Fulton*, 141 S. Ct. at 1894; *see* Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000bb-2000bb-4).

116. *Id. See* S. 2869, 106th Cong. (2000); 42 U.S.C. §§ 2000cc-2000cc-5; 146 CONG. REC. 16698, 16703, 16623 (2000); Presidential Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 WEEKLY COMP. OF PRES. DOC. 2168 (2000).

117. 141 S. Ct. at 1894.

118. *Id.*

Justice Alito's vision for Free Exercise jurisprudence prioritizes beginning "with the constitutional text."[119] Ultimately, his criticism of *Smith* turns on the Court's "shockingly little attention [paid] to the text of the Free Exercise Clause."[120] He opts for interpreting "what readers would have understood [the words of the Free Exercise Clause to have meant] when adopted" over asking "whether it was 'permissible' to read the text" to have a particular meaning.[121] Using Justice Scalia's opinion in *District of Columbia v. Heller*[122] as a guidepost, Justice Alito's technical analysis of the definitions of the words comprising the Free Exercise clause at the time of its enactment leads him to conclude that "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) *forbidding or hindering unrestrained religious practices or worship*."[123] In his view, this interpretation in no way comports with *Smith*'s "distinction between laws that are generally applicable and laws that are targeted."[124] The so-called "equal treatment interpretation" is neither rooted in the Free Exercise Clause's ordinary meaning, nor does it purport to attempt to—in Justice Alito's view.[125] In fact, he believes that this interpretation misses the point of the Free Exercise Clause entirely. "[T]hose who wish to engage in the 'exercise of religion' [are supposed to have] the right to do so without hindrance"; the clause does not address "persons not in this group."[126]

Extending the logic of *Smith* to applications in other amendments, Justice Alito hypothesizes "[if] Congress or a state legislature adopted a law banning counsel in *all litigation*, civil and criminal[,] [w]ould anyone doubt that this law would violate the Sixth Amendment rights of criminal defendants [to assistance of counsel]?"[127] Additionally, "[w]ould there be any question that a law abolishing juries in *all* civil cases would violate the rights of parties in cases that fall within the [scope of] the Seventh Amendment[,]" which grants the right of trial by jury to parties in civil suits at common law?[128] In engaging in the thought exercise of displaying the absurdity of the results of his hypothetical,

119. *Id.* (citing Martin v. Hunter's Lessee, 1 Wheat. 304, 338-39 (1816); Chiafalo v. Washington, 140 S. Ct. 2316, 2323-26 (2020) (starting with the text of Art. II, § 1, before considering historical practice); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2169-70 (2019) (beginning analysis with the text of the Takings Clause); Gamble v. United States, 139 S. Ct. 1960, 1964-65 (2019) (starting with the text of the Fifth Amendment before turning to history and precedent); *City of Boerne*, 521 U.S. at 519 ("In assessing the breadth of § 5's enforcement power, we begin with its text.")).

120. 141 S. Ct. at 1894.

121. *Id.* at 1895.

122. District of Columbia v. Heller, 554 U.S. 570 (2008).

123. *Fulton*, 141 S. Ct. at 1896 (emphasis added).

124. *Id.*

125. *Id.* at 1898.

126. *Id.* at 1897 (parentheses removed).

127. *Id.*

128. *Id.*

Justice Alito attempts to show that "*Smith*'s interpretation conflicts with the ordinary meaning of the First Amendment's terms."[129]

In further criticizing the "equal treatment" interpretation of the Free Exercise Clause, Justice Alito posits that Congress would have at least alluded to equal treatment in the text of the clause if that were *the* objective.[130] Moreover, "it would have been simple to cast the Free Exercise Clause in equal-treatment terms, [so] why would the state legislators who voted for ratification have read the Clause that way?"[131] As evidence that the equal treatment interpretation was *not* the interpretation of the framers, Justice Alito cites Art. I, § 9, cl. 6; Art. IV, § 2, cl. 1; Art. V; and the religious liberty provisions of colonial charters and state constitutions as constitutional provisions that adopted language akin to what one would expect in such a regime.[132] To him, "[t]he contrast between these readily available anti-discrimination models and the language in the First Amendment speaks volumes."[133]

Yet another of Justice Alito's anti-*Smith* arguments includes an allusion to the development of the country's historical record since the time of the *Smith* ruling. "When *Smith* was decided," he argues, "scholars had not devoted much attention to the original meaning of the Free Exercise Clause, and the parties' briefs ignored this issue, as did the opinion of the Court."[134] However, much more scholarly work on the historical basis for the Free Exercise Clause has come to light since then, and, in his view, "we are now in a [better] position to examine how [it] was understood when the First Amendment was adopted."[135] By the time various states signed early colonial charters and agreements in 1789, "freedom of religion enjoyed broad protection, and the right was 'universally said to be an unalienable right.'"[136] In analyzing constitutional provisions at the founding, the predominant model among different states "extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger 'the public peace' or 'safety.'"[137] This model, per Justice Alito, is "antithetical" to *Smith* because "[i]f . . . the free-exercise right does not require any religious exemptions from generally applicable laws, . . . a public-peace-or-safety carveout would [hardly] be necessary."[138] Hypothetically, if generally applicable "laws are thought to

129. *Id.*

130. *Id.* at 1898.

131. *Id.*

132. *Id.* For example, Art. I § 9, cl. 6 provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the ports of one State over those of another." Under Art. IV, § 2, cl. 1, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

133. *Fulton*, 141 S. Ct. at 1898.

134. *Id.* at 1899.

135. *Id.*

136. *Id.* at 1900 (quoting Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990)).

137. *Id.* at 1901.

138. *Id.* at 1903.

be sufficient to address a particular type of conduct engaged in for a secular purpose, why wouldn't they also be sufficient to address the same type of conduct when carried out for a *religious* reason?"[139]

To justify an answer to this question, *Smith* proponents must stretch the "ordinary meaning of offenses that threaten public peace or safety . . . beyond the breaking point to encompass *all* violations of *any* law."[140]

Last of Justice Alito's primary arguments is that "*Smith*'s treatment of the free-exercise right is fundamentally at odds with how we usually think about liberties guaranteed by the bill of rights."[141] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . ."[142] However, *Smith* determined that the political process is a better vehicle for protection of freedom of religion than the courts; thus, "the free exercise of religion does not receive the judicial protection afforded to other, favored rights."[143]

Upon his definitive conclusion that *Smith* should be overruled, Justice Alito posits that the Court should replace it with "the standard that *Smith* replaced"—that of *Sherbert v. Verner*.[144] Although he seems open to rephrasing or supplementing such a rule, he feels that *Fulton* was not the occasion to do so "because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can be properly protected[,] . . . [since] CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future."[145]

C. Justice Gorsuch's Approach

In an analysis focused on justiciability issues in *Smith*, Justice Gorsuch points to the endless litigation resulting from the Court's "indecision" on *Smith* in *Fulton*.[146] For instance, in the case of Jack Phillips,[147] "[a]fter being forced to litigate all the way to the Supreme Court, . . . all that victory assured [him] was a new round of litigation—with officials now presumably more careful about admitting their motives."[148] Outside the context of potential "targeting"

139. *Id.* (emphasis added).

140. *Id.* at 1905.

141. *Id.* at 1917.

142. W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

143. *Fulton*, 141 S. Ct. at 1917.

144. *Id.* at 1924.

145. *Id.*

146. *Id.* at 1930.

147. Mr. Phillips is the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings in Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).

148. *Fulton*, 141 S. Ct. at 1930. The Court, per Justice Gorsuch, ruled for him on narrow grounds because "certain government officials responsible for deciding [his] compliance with a local public accommodations law uttered statements exhibiting hostility to his religion[.]"

cases, in COVID-19 litigation in the nine months prior to *Fulton*, the Supreme Court "had to intervene at least half a dozen times to clarify how *Smith* works."[149]

Justice Gorsuch reiterates Justice Alito's assertion that "[n]o fewer than ten Justices—including six sitting justices—have questioned [*Smith*'s] fidelity to the Constitution.[150] Despite the uncertainty with what would follow post-*Smith*, he remains unconcerned, claiming that "the Court should overrule it *now*, set [the Court] back on the correct course, and address each case as it comes."[151]

IV. WHAT DID JUSTICE BARRETT ASK IN *FULTON*, AND WHY?

Unlike Justice Gorsuch, Justice Barrett seems reluctant to overturn *Smith* without a sufficient replacement for it.[152] Unlike Justice Alito, she "find[s] the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances"; rather she favors the textual and structural arguments because she finds it "difficult to see why the Free Exercise Clause—long among the First Amendment freedoms—offers nothing more than protection from discrimination."[153] Ultimately, Justice Barrett felt that because "the government contract at issue [in *Fulton*] provide[d] for individualized exemptions from its nondiscrimination rule," strict scrutiny was triggered, and the City could not meet the threshold.[154] Thus, she did not address *Smith*, save for posing a few questions in a future case in which it could, hypothetically, be implicated.

Justice Barrett's first question in *Fulton* was simple: "[W]hat should replace *Smith?*"[155] However, she remains "skeptical about swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[156] Second, if *Smith* were overturned, she continues, "[s]hould entities like Catholic Social Services . . . be treated differently than individuals?"[157] Third, "[s]hould there be a distinction between indirect and direct burdens on religious exercise?"[158] Fourth, "[w]hat forms of

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149. *Id. See*, *e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020).

150. *Id.* at 1931.

151. *Id.* (emphasis added).

152. *See id.* at 1882.

153. *Id.*

154. *Id.* at 1883.

155. *Id.* at 1882.

156. *Id.* at 1883.

157. *Id.* at 1883; *cf.* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012).

158. *Id. Cf.* Braunfeld v. Brown, 366 U.S. 599, 606–07 (1961) (plurality opinion).

scrutiny should apply?"[159] Fifth, "if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?"[160]

V. IN LIGHT OF JUSTICE BARRETT'S QUESTIONS, HOW SHOULD WE APPROACH A POST-*SMITH* REGIME?

Smith's result shocked the consciences of many legal minds, leading some to deem it a "travesty," a "tragedy," an "assault," and a "dastardly and unprovoked attack."[161] The Court's ruling, to those with such a view, signaled a relegation of "our national commitment to the free exercise of religion to the sub-basement of constitutional values."[162] Perhaps making the ruling even more unexpected, "no one involved in the case, party or amicus, urged the Supreme Court to abandon the compelling state interest test for the neutral law of general applicability test."[163] In fact, "[f]ifty-five legal scholars from around the nation petitioned the Court to rehear the case" on account of the lack of briefing and the lack of indication that the Court was even considering what it ultimately decided.[164] Nonetheless, while many are quick to criticize *Smith* and its progeny, critics are not united in their conception of how a post-*Smith* world should look. Assuming that *Smith* is overruled, the following appear to be the most viable options.

A. Return to Sherbert?

The most natural and easily explainable of the options in a post-*Smith* regime is to return to the world that existed before *Smith*: namely, that of *Sherbert* and *Yoder*. This option does not require extensive explanation, as it merely would revitalize the test that "a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest . . . ."[165] Proponents of this model argue that it "properly holds that *only* the prevention of *significant* harm can justify prohibiting religiously motivated

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159. *Id. Compare* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (assessing whether government's interest is "'compelling'"), with Gillette v. United States, 401 U.S. 437 (1971) (assessing whether government's interest is "substantial").

160. *Id. See* Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990).

161. Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1816 (2011) (citing JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 138 (3d ed. 2011); W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions*, 1993 B.Y.U. L. REV. 421, 448 (1993); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 755 (1992); 137 CONG. REC. 17,035–36 (1991) (statement of Rep. Solarz)).

162. Michael P. Farris & Jordan W. Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 66 (1995).

163. *Id.* at 72 n.27 (internal quotations omitted).

164. *Id.* at 75.

165. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1890 (2021).

conduct."[166] Further, they argue, because "the right to practice religion is a fundamental right[, and] [s]ubstantial burdens on fundamental rights generally trigger the compelling-interest test," it is apt.[167]

Analogizing to the context of freedom of speech and association, "as-applied First Amendment challenges . . . [that] seek exemption from facially neutral and generally applicable laws . . . support the idea of exemptions, but more specifically . . . application of the compelling-interest test."[168]

Additionally, proponents posit that the appeal of the compelling-interest test is its workability. Congress, in enacting RFRA, itself found the test useful "for striking sensible balances between religious liberty and competing prior governmental interests."[169] For instance, pre-*Smith*, "the government had proved compelling interests in free-exercise cases involving racial equality in education,[170] tax collection,[171] and the military draft[;][172] [b]ut the Court had *always* affirmed that the government had to show that the conduct 'posed some substantial threat to public safety, peace or order.'"[173] Analytics also favor the compelling-interest test, as fear of "anarchy" should be allayed by the fact that "from 1990 through 2003 . . . free-exercise claims, including RFRA claims, were the least likely to invalidate the government action: the government won 59 percent of the time, 74 percent if the category were limited to challenges to generally applicable laws."[174]

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166. Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 Cato Sup. Ct. Rev. 33, 41 (2021) (emphasis added).

167. *Id.*

168. *Id. See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (requiring an exemption where a law requiring disclosure of political parties' campaign contributions and expenditures, valid on its face, would significantly deter political association); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (exempting the NAACP from an order, entered pursuant to a generally applicable corporation statute, requiring it to disclose its membership lists because those members would face public reprisals, causing the burden on association from disclosure to serve a compelling interest); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (ordering an exemption from a generally applicable nondiscrimination law, holding that the Scouts could not be penalized for dismissing a scoutmaster whose public statements and identity conflicted with the organization's message); Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, 515 U.S. 557 (1995) (holding that parade organizers did not have to admit marchers with a message inconsistent with the organizers' message); NAACP v. Button, 371 U.S. 415 (1963) (invalidating, as applied to the NAACP, a Virginia statute that prohibited any organization from retaining a lawyer in connection with litigation as to which it was not a party and had no pecuniary right or liability).

169. LAYCOCK & BERG, *supra* note 166, at 44 (internal quotations omitted) (quoting 42 U.S.C. § 2000bb(a)(5)).

170. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

171. United States v. Lee, 455 U.S. 252 (1982).

172. Gillette v. United States, 401 U.S. 437 (1971).

173. Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)) (emphasis added) (internal quotations omitted).

174. Laycock & Berg, *supra* note 179 at 45; *see* Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857-58, 861 (2006). By contrast, the government won only 22 percent of free-speech cases. *Id.* at 844.

Critics of returning to *Sherbert* argue that the *Sherbert*-era did not actually see the Court applying strict scrutiny, as it was supposed to. Rather, in reality, it merely performed a "balancing test," considering the burden "in light of government interest and government interest in light of burden . . . ."[175] The issue with the balancing test is not the test itself, but "that the *language* of the test invoked by the Court during the *Sherbert* era . . . does *not* speak of balancing [at all]."[176] In other words, true strict scrutiny was not the reality of the *Sherbert* (and RFRA) era. Thus a return to the compelling-interest test would merely bring about a "squishier" version of strict scrutiny, unless it were "applied faithfully," at which point there would be "far more exemptions than society would be willing to tolerate."[177] Furthermore, from a justiciability and functionality standpoint, *Sherbert* should not be the desired test because "judges working with precedents . . . calling for strict scrutiny in exemptions cases often have an incentive to apply some undefined level of lesser scrutiny while writing decisions in the language of strict scrutiny."[178] The incentive also exists for judges to "avoid the scrutiny issue altogether by finding no cognizable burden on religion as a threshold matter," which certainly discounts the importance of religious practice.[179] Ultimately, *Sherbert* critics feel that "*Sherbert*-era exemption doctrine was grounded in a misrepresentation of past precedent, promised a high level of protection that it often failed to deliver, and gave courts an incentive to make value judgments about different religions."[180] Thus, although a return to *Sherbert* would be more favorable than the current *Smith* regime, another option should replace *Smith*.

B. Consider an "Adequate Alternatives" Principle for Religion?

Perhaps one of the reasons for the apparent disconnect between the text of *Sherbert* and its application is the vagueness surrounding what constitutes a "substantial burden." To better understand its meaning—and to "add[] distinctive substantive content" to the doctrine, one can draw from free speech, abortion, travel, and Second Amendment jurisprudence in the form of an

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175. James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WISC. L. REV. 689, 712 (citing KENT GREENAWALT, 1 FAIRNESS AND FREE EXERCISE 202 (2006)); *see also* Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the H. Subcomm. on the Const. of the Comm. on the Judiciary, 105th Cong. 17 (June 16 and July 14, 1998) (statement of Douglas Laycock, Associate Dean for Research, University of Texas Law School) ("In the practical application of the substantial burden and compelling interest tests, it is likely to turn out that 'the less central an observance is to the religion in question the less the officials must do' to avoid burdening it.") (quoting Mack v. O'Leary, 80 F.3d 1175, 1180 (1996), *vacated on other grounds*, 118 S. Ct. 36 (1997)).

176. Oleske, *supra* note 175.

177. *Id.* at 714–15.

178. *Id.* at 715 (internal quotations omitted).

179. *Id.* (quoting James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistanct," Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1324–25 (2017)).

180. *Id.* at 718.

"adequate alternatives" analysis.[181] Applying this framework to the context of religion, "a (non-targeted) . . . burden . . . [is] 'substantial' . . . if it leaves . . . no adequate alternatives. . . [that] let [one] pursue *the interest served by* that liberty (i) to about the same degree, and (2) at not much greater cost, than [otherwise]."[182] This test can supplant the compelling-interest test by determining "when one form of religious exercise is an 'adequate' alternative to another . . . [a]nd . . . whether the one form of exercise achieves *the interests served by* religious conduct to the same degree."[183]

Employing a definition of "religion" that includes (1) harmony with the transcendent, (2) pursuit of ultimate meaning, and (3) fulfilling personal identity, "the criteria for 'adequate' alternatives will be internal to the claimant's own creed or code."[184] What will suffice as "adequate" will be "just as good religiously, in the claimant's view."[185] A more narrowly tailored version of the adequate alternatives principle to religion—in other words, a more robust "substantial burden test"—is as follows:

State action that prevents, prohibits, or raises the cost of religious exercise imposes a "substantial burden" if it does not leave you another way you could realize your religion to *about the same degree* as you could by the now-burdened exercise, and at *not much greater cost* than you could by that means.[186]

In other words, under this approach, the "substantial burdens increase the cost to you of living your faith to about the same degree as you could before."[187]

The main virtues of this test are that: "(1) It yields more-compelling outcomes than the proposals offered to date. (2) It strikes the right balance between blind deference to claimants and violations of the religious questions doctrine. And (3) it resolves several questions that remain open in the case law on substantial burdens."[188]

However, critics of this test note that "[b]y their nature, burdens on religious practice often leave no adequate alternatives."[189] "[B]elievers who are prohibited from acting on their belief cannot simply change their belief: [for example,] if Native Americans are barred from ingesting using peyote in worship, they can't switch to wine."[190] Furthermore, it is not adequate for the

181. *See* Sherif Girgis, *Defining "Substantial Burdens" on Religion and other Liberties*, 108 VA. L. REV. 1759 (2022).

182. *Id.* at 1792. "This is not to be confused with the "least restrictive means" test sometimes invoked by courts at stage two of a civil-liberties analysis, applying heightened scrutiny." *Id.* at 1784. In this analysis, "the question is whether the claimant has other forms of conduct by which to pursue her interests—whereas the 'least restrictive means' test asks if the *government* has other *policies* by which to pursue *its* interests." *Id.* at n.139.

183. *Id.* at 1793.

184. *Id.* at 1794.

185. *Id.*

186. *Id.* at 1795

187. *Id.*

188. *Id.* at 1797

189. Laycock & Berg, *supra* note 179 at 45.

190. *Id.*

government to "say they still have the 'alternative' of following their other beliefs."[191] An example of this is present in *Holt v. Hobbs*,[192] where the Court rejected the argument that a Muslim inmate suffered no substantial burden "because he could still use a prayer rug, receive Islamic literature, correspond with a religious advisor, and observe religious diets and holidays."[193] Rather, the substantial burden inquiry "asks whether the government has substantially burdened religious exercise, . . . not whether the . . . claimant is able to engage in *other* forms of religious exercise."[194] The adequate alternatives test suffers as well when analogizing free exercise to free speech in that "telling the free-exercise claimant to practice its other beliefs instead of this one would be like telling the free-speech claimant to communicate other messages instead of this one"; the issue is that "religious practices are rarely fungible."[195] Nonetheless, Professors Laycock and Berg acknowledge that "[t]here are cases in which courts can assess the adequacy of alternative means of exercising religion" but that alternatives are inadequate in the following contexts: "when a law penalizes a practice stemming from religious tenets . . ., interferes with a religious organization's internal governance, or significantly burdens a religious organization's ability to provide a service."[196] Thus, although the adequate alternatives principle could be more beneficial than a return to *Sherbert*, its problems suggest we should continue to search for a different post-*Smith* approach.

C. Pursue a Heightened Scrutiny Standard

From his opinion in *Smith*, Justice Scalia omitted "the fact that the Court *does* apply an intermediate level scrutiny to . . . [generally applicable] laws [unconcerned with regulating speech that have the effect of interfering with speech] under *United States v. O'Brien*."[197] In the same way that, in the eyes of Justice Scalia, *Sherbert* strict scrutiny was an anomaly, "so too is the complete lack of heightened scrutiny prescribed by *Smith*."[198]

Given that heightened scrutiny should apply in the context of religion, the Court could take the following two-step approach [proposed by Professor Oleske], which does not call for either judicial determinations about the relative

191. *Id.*

192. 574 U.S. 352 (2015).

193. Laycock & Berg, *supra* note 179 at 48.

194. *Id.* (emphasis added).

195. *Id.* at 12–13.

196. *Id.* at 13.

197. Oleske Jr., *supra* note 175 at 719; United States v. O'Brien, 391 U.S. 367, 377 (1968).

198. Oleske, *supra* note 175 at 719. *See also* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemption*, 59 B.C. L. REV. 1595, 1621 (2018) ("[T]he *Smith* framework is anomalous in that it fails to *at least* provide intermediate scrutiny for religious exercise.") (emphasis in original); Oleske Jr., *supra* note 175, at n.189.

import of different religious practices or judicial balancing informed by such determinations:

> **Question 1: Would the application of the legal rule at issue impose a *substantial secular burden* on an exemption claimant who engages in certain conduct or refrains from certain conduct for sincere, religiously motivated reasons?** This inquiry should not include any judicial evaluation of the religious significance of the particular behavior at issue, but instead, assess only 'the substantiality of the civil penalties triggered by religious exercise.'[199] If the adverse legal consequences of engaging in the religiously motivated behavior at issue are not trivial, and if the exemption claimant can show a sincere religious belief is motivating the behavior, the claimant should be permitted to move forward.
>
> **Question 2: Does the state have an actual and substantial interest in denying an exemption to the claimant?** This inquiry would put the burden on the state to show that it has more than a *de minimis* interest in denying the claimed exemption. To meet this burden, the state would have to explain why its interest could not easily be served through means other than denying the exemption. If the state cannot meet its burden, the religious claimant is entitled to an exemption.[200]

Despite the reality that "courts would still be doing some *weighing* under this approach," it is not the same as "[b]alancing two interests against each other."[201] Rather, the two interests are *separately* weighed "to determine whether or not they meet a pre-set threshold."[202] In effect, this test posits that "government should not lightly impose burdens on the exercise of anyone's religion, but if [it] . . . has solid and legitimate reasons for declining to exempt religious objectors from complying with a general law, courts should defer to such democratic judgments."[203]

Critics of a heightened scrutiny approach, however, express concern that "intermediate scrutiny often declines into excessive deference" and "[i]f lower courts have underenforced the compelling-interest test, they could just as easily underenforce intermediate scrutiny."[204] Professors Laycock and Berg proceed to suggest that "[i]f the Court wants anything less than strict scrutiny for challenges to generally applicable laws . . . then to prevent underenforcement, it *must* give clear instructions about the demanding nature of the intermediate

199. Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1808 (2016).

200. Oleske, *supra* note 175, at 741 (emphasis added).

201. *Id.*

202. *Id.*

203. *Id.* at 742 (quoting Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be A Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2041–42 (2011)).

204. Laycock & Berg, *supra* note 179, at 50.

review."[205] In the case of Professor Oleske's proposed heightened scrutiny test, clarity should not be an issue. Ultimately, if the Court decides to overrule *Smith*, Professor Oleske's two-step test appears to fit the combination of most straightforward, justiciable, and issue-less of the options.

With widespread criticism of *Smith* and newfound understanding that *Sherbert* was applied differently in practice than in theory, falling somewhere between the two may be the most optimal landing spot for a new, post-*Smith* test.[206] Professor Oleske's test would be more practical in its ability to "actually deliver on what the legal standard promises in terms of protection, a critical virtue for the rule of law," and "avoid engaging in more than a minimal examination of claimed religious burdens, thus reducing the establishment perils that are inherent in the *Sherbert-Yoder* . . . regimes."[207] This test is also comfortably parallel to that in free speech "for incidental restrictions on expressive conduct by requiring the government to show (1) that it has a substantial interest in denying the claimed exemption and (2) that the denial is narrowly tailored to achieving that interest."[208] Although "there will be challenging cases that require courts to build out the new doctrine, . . . nothing . . . indicates that it is a task beyond the institutional competence of the courts."[209] In fact, "[i]t is in the core competencies of judges . . . to articulate the scope and limits of *constitutional* provisions and the balance of their interactions"; this job is precisely what they are called to do.[210] This test would also be no "ad hoc balancing of relative social costs and benefits," as *Sherbert* in some ways effectively was.[211] Ultimately, if the Court reconsiders *Smith*, it should "guarantee a constitutional floor of modest religious exemption rights," interpreting the Free Exercise Clause as "protecting against incidental burdens on religion that the government could easily lift without compromising legitimate state interests."[212] Professor Oleske's two-step heightened scrutiny test best fits this mold and should be the most strongly considered by the Court.

CONCLUSION

"For over five decades, the Supreme Court's free exercise jurisprudence has been a doctrinal disaster area."[213] The country has found itself in the exact position Justice Scalia warned against—a "confusing and rather ragtag body of

205. *Id.* (emphasis added).

206. *See* James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion Over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1358.

207. *Id.* at 1361.

208. *Id.*

209. *Id.* at 1370.

210. Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 359 (2018).

211. *Id.* at 358, n.22.

212. Oleske Jr., *supra* note 207, at 1371.

213. Oleske Jr., *supra* note 175, at 744.

law" on religious exemptions after over a quarter-century of *Smith*.[214] While the call of this analysis was not to directly answer *whether Smith* should be overturned, it is sympathetic to the arguments that it should. Justice Gorsuch's desire to overrule *Smith now*, "set [the Court] back on the correct course, and address each case as it comes" is appealing to an extent.[215] However, Justice Barrett's suggestion that the Court should be aware of the different options available to the Court in such a circumstance—at the very least to ensure that the metaphorical "cure" is no worse than the disease—is reasonable. Regardless of whether the Court *should* overrule *Smith*, the time is ripe for the Court to, at a minimum, revisit it and directly address its place in free exercise jurisprudence. *If* the Court indeed decides overruling *Smith* is the route it wants to take, it has more options than merely returning to *Sherbert* and *Yoder* world. As a matter of preference, Professor Oleske's heightened scrutiny two-step framework seems to offer the most logically coherent and comprehensive framework and can even incorporate some of the ample alternative analysis proffered by Professor Girgis.[216] As for next steps, a more rigorous analysis of Professor Oleske's framework to his five scenarios would be particularly useful.

214. Oleske Jr., *supra* note 207, at 1357 (quoting Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845 (2014)).

215. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1931 (2021).

216. Namely, in defining what constitutes a "*substantial* secular burden."