Answers to *Fulton*'s Questions

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ABSTRACT: Free exercise now finds itself at a crossroads. In 1990, in Employment Division v. Smith*, the Supreme Court dramatically narrowed the Free Exercise Clause, holding that religious believers generally had no constitutional rights to religious exemptions from neutral and generally applicable laws.* Smith *was always controversial. Yet with each passing year, it seemed more and more like* Smith *had become a fixed part of the jurisprudential landscape.*

But this turns out not to have been the case. Smith *now finds itself on the ropes. Two terms ago, in* Fulton v. Philadelphia*, several Justices called for* Smith *to be overruled. And a bipartisan coalition of three other Justices—Justice Breyer, Justice Kavanaugh, and Justice Barrett—wrote a striking concurrence, essentially asking for help. That concurrence seemed to reject* Smith*'s foundations, but it also asked hard questions about the viability of any other approach.*

This short symposium piece considers the questions posed by Justice Barrett's concurrence in Fulton*. If the Court decides to go back on Smith, it faces an array of complicated choices about how to structure free exercise doctrine. This piece offers some thoughts about how the Court should think about these choices.*

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INTRODUCTION

Free exercise finds itself at a crossroads. Thirty years ago, in *Employment Division v. Smith*, the Supreme Court dramatically scaled back the protections of the Free Exercise Clause.[1] *Smith* was controversial then, and it is controversial now—although who finds it controversial and why has changed an awful lot.

Two years ago, in *Fulton v. Philadelphia*, the Supreme Court granted certiorari on the question of whether *Smith* should be revisited.[2] The Court ultimately left that question unresolved, but more than half the Court staked out positions on the issue. Three Justices—Justices Thomas, Alito, and Gorsuch—called for *Smith* to be overruled.[3] Meanwhile, three other Justices—a bipartisan coalition of Justices Breyer, Kavanaugh, and Barrett—asked hard questions about *Smith* but simultaneously questioned the vitality of any other approach.[4]

This latter concurrence was cautious and inquisitive, and it openly sought help from the outside. While there were "serious arguments that *Smith* ought to be overruled," Justice Barrett wrote, "[t]here would be a number of issues to work through."[5] This symposium piece offers some thoughts on how those issues might be worked through.

I. RELIGION AND SPEECH

> *I am 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.*[6]

Justice Barrett's opinion asks several questions. But before those, she asks another in the form of this statement. Laws restricting speech, she points out, do not always trigger strict scrutiny. Laws restricting speech get strict scrutiny

1. *See generally* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990) (holding that, generally speaking, religious claimants have no constitutional entitlement for exemptions from neutral and generally applicable laws).

2. Fulton v. City of Philadelphia, 140 S. Ct. 1104, 1104 (2020); Petition for Writ of Certiorari at i, *Fulton*, 140 S. Ct. 1104 (No. 19-123), 2019 WL 3380520, at *i (granting certiorari on three questions, the second being "[w]hether *Employment Division v. Smith* should be revisited?").

3. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).

4. *See id.* at 1882–83 (Barrett, J., concurring).

5. *See id.*

6. *Id.* at 1883.

when they discriminate on the basis of viewpoint[7] and also when they discriminate merely on the basis of content.[8]

But when it comes to generally applicable laws that burden freedom of speech, the Court has been all over the place. *United States v. O'Brien*, the old draft-card burning case, famously adopted a deferential version of intermediate scrutiny for such cases.[9] But *O'Brien* is just one of many cases here. Take *Boy Scouts v. Dale*,[10] or *Janus v. AFSCME*,[11] or *Snyder v. Phelps*.[12] All of them involved generally applicable rules that also burdened speech, and none of them applied intermediate scrutiny or treated *O'Brien* as governing. Nevertheless, Justice Barrett's point remains: Why should generally applicable regulations affecting religion categorically get strict scrutiny when many generally applicable regulations affecting speech do not?

This is a hard question. If there is an answer, it likely lies in a phenomenological difference between religion and speech.[13] Religious exercise is frequently fixed and indefeasible. When the law requires you to do something

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7. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 242 (2012) ("There is a great deal of agreement that viewpoint discrimination is at the core of what the First Amendment forbids.").

8. This issue is more controversial, and it divided the Court in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). There the majority held that content-based restrictions on speech categorically trigger strict scrutiny. *See id.* at 171 (concluding that "[b]ecause the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny . . ."). But several Justices would have treated content discrimination only as an indication that strict scrutiny might be appropriate. *Id.* at 175–76 (Breyer, J., concurring) ("In my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic 'strict scrutiny' trigger . . . .").

9. "In [*O'Brien*], the Court rejected a First Amendment challenge to a conviction under a generally applicable prohibition on destroying draft cards, even though O'Brien had burned his card in protest against the draft." Holder v. Humanitarian L. Project, 561 U.S. 1, 26 (2010) (citing United States v. O'Brien, 391 U.S. 367, 370, 376, 382 (1968)). *O'Brien*'s conception of intermediate scrutiny comes in a four-part test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

10. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 641–42 (2000).

11. *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463–65 (2018).

12. Snyder v. Phelps, 562 U.S. 443, 453–58 (2011).

13. Doug Laycock and Thomas Berg developed a quite similar answer to Justice Barrett in a recent piece. Their whole piece deserves close study, but they too emphasized how "burdens on religious practice often leave no adequate alternatives. Most obviously, believers 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." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020 CATO SUP. CT. REV. 33, 48.

your religion forbids, or when the law forbids you from doing something your religion requires, the conflict is often unavoidable. This is not true—or at least not as true, or not as true as much of the time—with speech. Because speakers frequently have alternative means of communication, laws burdening speech can end up channeling speech rather than forbidding it. Now this is an overgeneralization—sometimes speakers will not have ways to get around the government's restrictions, as in the compelled-speech cases.[14] Yet when one goes deep on this point, another thing becomes striking: It is precisely in places where speakers lack other options that the Court has rejected *O'Brien* and gone with more rigorous doctrinal tests. So put in proper context, the speech analogy seems to push toward, rather than away from, strict scrutiny for free exercise.

A. WHERE RELIGION AND SPEECH ARE DIFFERENT

O'Brien may be the best place to begin. There the Supreme Court upheld David Paul O'Brien's conviction for burning his draft card in protest of the Vietnam War.[15] O'Brien's claim may have deserved more sympathy than it got from the Court. But even so, we all know a simple truth—O'Brien did not actually need to burn his draft card to register his protest of the Vietnam War.[16] He had countless other ways of sending that message. He could have joined an antiwar group, put up a yard sign, or marched on Washington.[17] Picketing, leafletting, vigils, parades, lobbying—all those familiar avenues of protest remained open to him.[18] Now, of course, O'Brien naturally wanted as much attention as he could get.[19] But O'Brien still had plenty of ways to make a dramatic

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14. *See infra* notes 40–42 and accompanying text.

15. United States v. O'Brien, 391 U.S. 367, 386 (1968).

16. This obvious truth became the heart of Justice Harlan's concurrence: "O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card." *Id.* at 388–89 (Harlan, J., concurring) (arguing that *O'Brien*'s holding should "not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate").

17. O'Brien had been involved with the Committee for Non-Violent Action. *See* Brief for David Paul O'Brien at 9, *O'Brien*, 391 U.S. 367 (Nos. 232 & 233), 1968 WL 129291, at *9.

18. As the government's brief in *O'Brien* put it:

> Indeed, the daily headlines show that there are all sorts of legitimate ways of vigorously expressing dissent—whether through the use of mass communication media, the public meeting hall, the peaceable demonstration or the distribution of literature. Burning draft cards may add a theatrical aura to a protest. But one does not have a constitutional right to perform acts otherwise subject to restraint simply because they are dramatic.

Brief for United States at 18, *O'Brien*, 391 U.S. 367 (Nos. 232 & 233), 1967 WL 113811, at *18 (footnotes omitted).

19. As O'Brien put it:

> I later began to feel that there is necessity, not only to personally not kill, but to try

impression yet stay within the law—most obviously, he could have simply made a fake draft card (or photocopied the real one) and burned that instead.

This illustrates an important difference between speech and religion. Although speakers will always want to maximize the effectiveness of their speech, they will not always feel obligations to speak in any particular time, place, or manner.[20] The First Amendment can therefore maintain a "debate on public issues" that is "uninhibited, robust, and wide-open," while still limiting the avenues for that debate.[21] Take the various speech rules that relate to abortion protesting. The Free Speech Clause may not give you the right to protest abortion in front of the abortion clinic[22] or in front of the doctor's house.[23] You do not have a right to blast loudspeakers at women seeking abortions[24] or block their entry into clinics.[25] But even so, there are still innumerable ways for you to go out and protest abortion—it happens all the time.[26]

Yet here, speech and religion may differ, at least in terms of degree. While speakers can often conform their speech to fit the channels the government permits, religious people cannot change their religious commitments so easily. A man who wants to drive with a Confederate flag does not actually need a specialty license plate from the state of Texas—if he really wants it, he

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> to urge others to take this action, to urge other people to refuse to cooperate with murder.
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> So I decided to publicly burn my draft card, hopefully so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.

Brief for David Paul O'Brien, *supra* note 17, at 6.

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

21. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

22. The Court's cases are nuanced here, but the Court has left room for such regulations. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 707, 714 (2000) (upholding a Colorado statute making it unlawful to come within eight feet of someone, without their consent, to try and engage in protest, education, or counseling with that person, when within one hundred feet of a health care facility); McCullen v. Coakley, 573 U.S. 464, 469–70, 497 (2014) (striking down a similar law passed by Massachusetts, without overruling *Hill*).

23. *See* Frisby v. Schultz, 487 U.S. 474, 476, 488 (1988) (upholding a city ordinance forbidding residential picketing against two individuals who sought to "picket[] on a public street outside the . . . residence of a doctor who apparently performs abortions at two clinics in neighboring towns").

24. *See* Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (upholding a city ordinance forbidding amplified loudspeakers).

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

26. For this point put slightly differently, see Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 521–22 (2017).

can get it as a bumper sticker and put it up himself.[27] But a woman who wants to drive and will not remove her hijab for a license photo is stuck—she has no way of getting a license while staying religiously observant.[28] Talk of "alternative channels" makes a kind of sense in the speech context that does not carry over well into the religion context. Say a warden tells a prisoner that he does not need books in his cell because he can read them in the prison library. That is a harsh position to take, but it is not illogical. But now say a warden tells a Jewish inmate that he does not need a Kosher meal because he can wear a yarmulke. That does not even make sense.[29]

Free exercise is about whether people can live their lives in conformity with their religious faiths.[30] Free exercise is not about whether people have sufficient outlets to express their religious views. This is a mistake people sometimes make when they think of religion in speech terms.[31] But it threatens

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27. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219–29 (2015) (rejecting the First Amendment claim of the Sons of Confederate Veterans to get a specialty license plate with a Confederate flag); Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 291 n.79 ("[I]t is clear that posting even offensive political messages [directly] on one's vehicle is protected by the First Amendment." (citing Baker v. Glover, 776 F. Supp. 1511, 1517–18 (M.D. Ala. 1991) (upholding a bumper sticker reading, "Eat Shit"))).

28. For a sampling of hijab cases in different contexts, see generally Clark v. City of New York, 560 F. Supp. 3d 732 (S.D.N.Y. 2021); Chaaban v. City of Detroit, No. 20-cv-12709, 2021 WL 4060986 (E.D. Mich. Sept. 7, 2021); Taylor v. Nelson, No. 19-ca-467, 2020 WL 7048605 (W.D. Tex. Dec. 1, 2020); Al-Kadi v. Ramsey County, No. 16-2642, 2019 WL 2448648 (D. Minn. June 12, 2019); Carter v. Myers, No. 15-2583, 2017 WL 8897155 (D.S.C. July 5, 2017); J.H. v. Bratton, 248 F. Supp. 3d 401 (E.D.N.Y. 2017); Council on Am.-Islamic Rels., Mich. v. Callahan, No. 09-13372, 2010 WL 1754780 (E.D. Mich. Apr. 29, 2010); Forde v. Zickefoose, 612 F. Supp. 2d 171 (D. Conn. 2009).

29. For this point put slightly differently, see Lund, *supra* note 26, at 523.

30. As Madison put it:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . [For] [i]t is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.

8 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rultand, William M. E. Rachal, Barbara D. Ripel & Fredrika J. Teute eds., 1973).

31. As an example of that mistake, take these remarks about *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), from Kermit Lipez, a First Circuit judge. Note how Judge Lipez starts off, recognizing the religious obligation of the baker not to provide a wedding cake. But then, for some reason, he sees the baker's problem as being somehow solved by all the ways the baker has of speaking out against same-sex marriage:

> If, like the baker [in *Masterpiece Cakeshop*], you believed that same-sex marriage was religiously offensive and any degree of participation in same-sex marriage was wrong, what freedom would you have to express or practice that belief? Obviously, you could express that belief at home to anyone within earshot. You could stand in your town square and loudly proclaim your hostility to same-sex marriage. You could pray openly against same-sex marriage in a place of worship or anywhere you pray, and exercise your

the very core of religious exercise. The government should not force the Catholic Church to make women priests on the ground that it could still publish *Ordinatio Sacerdotalis*.[32]

The Supreme Court itself has said exactly this. *Holt v. Hobbs* was a Religious Land Use and Institutionalized Persons Act ("RLUIPA") case involving a Muslim prisoner who sought to wear a half-inch beard for religious reasons.[33] Rejecting his claim, the district judge reasoned that his religious exercise had not been "substantially burden[ed] . . . because 'he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.'"[34] But the Supreme Court unanimously rejected this logic as "improperly import[ing] a strand of reasoning from" prison free speech cases—whether the Muslim prisoner should be allowed to wear a beard, the Court said, should not depend on "whether [he] is able to engage in other forms of religious exercise."[35]

B. WHERE RELIGION AND SPEECH ARE SIMILAR

Now having said this, we must qualify it a bit. The above section saw speech as differing from religion, conceptualizing religion as a right of conscience and speech as something else. But those who know the Free Speech Clause will instinctively think of the slew of cases where the Free Speech Clause has come to protect conscience (and here "conscience" should be taken in secular terms) in ways akin to how the Free Exercise Clause protects religious conscience. Yet here too there is something striking. For it is precisely in these contexts that courts have rejected *O'Brien* as a doctrinal framework and have gone with strict scrutiny (or something like it) instead.

Students see the linkage between speech and conscience most clearly in *West Virginia v. Barnette*, where the Court interpreted the Free Speech Clause to protect a Jehovah's Witness who refused on grounds of religious conscience to say the Pledge of Allegiance.[36] *Barnette* is the progenitor of all the compelled-

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> belief by attending a house of worship where such ceremonies are prohibited. In short, in our free society, with its robust protections for freedom of worship and freedom of speech, you have many opportunities to express your objections to same-sex marriage and practice your belief.

Kermit V. Lipez, *Reflections on the Church/State Puzzle*, 72 ME. L. REV. 325, 333 (2020).

32. Ordinatio sacerdotalis was an apostolic letter issued by the Pope in 1994, reaffirming the Catholic Church's position "that the Church has no authority whatsoever to confer priestly ordination on women." Letter from Pope John Paul II to the Bishops of the Catholic Church (May 22, 1994), https://www.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html [https://perma.cc/ZFN6-5MKQ].

33. Holt v. Hobbs, 574 U.S. 352, 355–56 (2015).

34. *Id.* at 361 (quoting Holt v. Hobbs, No. 11-cv-0064, 2012 WL 994481, at *7 (E.D. Ark. Jan. 27, 2012)).

35. *Id.* at 361–62.

36. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

speech cases (including the compelled-subsidy and compelled-association cases). Two points are worth making here. First, in these compelled-speech cases, speakers have no alternatives. They are being *compelled*; the label alone suggests the lack of alternatives. In that way, these speech cases resemble classic free exercise cases. And second, in these compelled-speech cases, the Court has been drawn toward stronger, categorical tests and away from weaker, *O'Brien*-style balancing tests.

Boy Scouts v. Dale is a good example. In holding the Boy Scouts did not have to admit a gay scoutmaster because of their free-speech rights against compelled association, the Court rejected *O'Brien* as inapplicable and applied strict scrutiny instead.[37] The law in *O'Brien*, the Court reasoned, "ha[d] only an incidental effect on protected speech," while the law in *Dale* "directly and immediately affects associational rights."[38] While the Court was being a bit cryptic here, the Court's language makes sense when one thinks in terms of alternatives—O'Brien had a bunch of ways around the government's regulation, but the Boy Scouts simply did not.[39] And in truth, *O'Brien* is not the rule in *any* of the compulsion cases. It is not the rule in the compelled-speech cases,[40] or the compelled-subsidy cases,[41] or the compelled-association cases.[42] All those cases either formally apply strict scrutiny or leave the question open but apply a kind of scrutiny that seems awfully strict.

All this tends to show that, when the differences between speech and religion are taken seriously, the speech doctrines resemble *Sherbert/ Yoder*[43] more than *Smith*. In the speech context, the Court has adopted strict scrutiny not only for cases of viewpoint and content discrimination, but also for other cases where speakers have no adequate alternatives—which seems like the

37. Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

38. *Id.*; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559 (1995) (holding that "private citizens who organize a parade" have a constitutional right to exclude "a group imparting a message the organizers do not wish to convey").

39. Douglas Laycock and Thomas Berg make this point too: "The difference between *Dale* and *O'Brien* appears to be that a prohibition on symbolic conduct leaves open many other ways to express the same views." Laycock & Berg, *supra* note 13, at 47.

40. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371–72 (2018) (treating compelled speech as a content-based restriction on speech generally resulting in strict scrutiny, although acknowledging "[t]his Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain [professional] contexts").

41. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018) ("[W]e again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive ['exacting scrutiny'] standard applied in *Knox* and *Harris*.").

42. *See, e.g.*, *Dale*, 530 U.S. at 659 (rejecting *O'Brien* as inapplicable and applying a compelling-interest test); *cf.* Roberts v. U.S. Jaycees, 468 U.S. 609, 623–24 (1984) (applying a compelling-interest test but finding it satisfied).

43. For the uninitiated, the *Sherbert/Yoder* test, was the strict scrutiny test for free exercise that existed from 1963 to 1990, when the Court decided *Smith*. For citations, see *infra* note 52 and accompanying text.

best analog for free exercise cases. Sophisticated understandings of free speech thus seem to push toward, not away from, the use of strict scrutiny in free exercise cases.[44]

II. INSTITUTIONS AND INDIVIDUALS

> *Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf.* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 . . . (2012).*[45]

We now turn to Justice Barrett's first formal question, which points to tensions arising from a case decided by the Court about a decade ago. In *Hosanna-Tabor*, the Court finally had to tackle *Smith*'s most far-reaching consequence—the fact that, without the Free Exercise Clause, religious organizations would have no special immunity from employment-discrimination laws. Ministers could sue their churches, mosques, or synagogues for sex discrimination—or even religious discrimination.[46] *Hosanna-Tabor* unanimously rejected that premise.[47] But in doing so, it had to carve out an exception to *Smith*.[48]

Justice Barrett wants to know what will happen to *Hosanna-Tabor* if *Smith* is overruled. The answer is nothing. If *Smith* is overruled, free exercise claims will be handled under whatever new test replaces *Smith*—maybe strict scrutiny, maybe something else. Free exercise cases outside *Hosanna-Tabor*'s sphere will be governed by that new test. And free exercise cases inside *Hosanna-Tabor*'s sphere (call them "church autonomy" cases, for short)[49] will be handled with the same flat categorical rules we have now.

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44. One other point: The speech analogy might also suggest a path forward for thinking about when religious burdens should be cognizable in free exercise cases (which is Justice Barrett's second question). The speech cases suggest a novel way forward—perhaps different levels of scrutiny (strict v. intermediate) should attach to different kinds of burdens (burdens where there are alternatives v. burdens where there are not). For more on that, see *infra* Part III.

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

46. Religious organizations have statutory immunity from religious discrimination claims under federal employment law. But that immunity does not extend to state law, and some states apply their religious discrimination laws to religious organizations just as they would apply to nonreligious organizations. *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 27 (2011) ("Under the laws as written in all of these jurisdictions, religious groups cannot hire (or even prefer) members of their own faith. Catholic schools must give equal consideration to atheistic teachers, and Jewish temples must give equal consideration to Presbyterian cantors.").

47. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195–96 (2012).

48. *See id.* at 190 (distinguishing *Smith* on grounds that it did not involve "government interference with an internal church decision that affects the faith and mission of the church itself").

49. *Hosanna-Tabor* did not use the phrase "church autonomy," but *Our Lady of Guadalupe School v. Morrissey-Berru* did. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020) ("The constitutional foundation for our holding was the general principle of *church autonomy* to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government." (emphasis added)). The phrase comes from

This bifurcated approach is not new; it is the way it has been for a long time. Free exercise has operated with two separate tracks—one for church autonomy cases, one for other kinds of exemption cases—for 150 years. Take two of the Supreme Court's earliest religion cases, both decided in the 1870s. In 1871, the Court decided *Watson v. Jones*, a church-autonomy case where two factions of a Presbyterian church fought over which faction owned the church building.[50] In 1878, the Court decided *Reynolds v. United States*, an exemption case where Mormons sought constitutional protection from the polygamy laws.[51] Here is a striking thing: *Reynolds* did not even mention *Watson*, let alone treat it as governing precedent.

And this two-track approach continued from the nineteenth century all the way up to *Smith*. *Sherbert v. Verner* and *Wisconsin v. Yoder* were the leading pre-*Smith* cases about religious exemptions. Neither of them cited any of the then-governing church autonomy cases.[52] And the church autonomy cases of this later era, like *Jones v. Wolf*, did not cite *Sherbert* or *Yoder* either.[53] So, Justice Barrett's question has an easy answer: nothing. Nothing will happen to *Hosanna-Tabor* if *Smith* goes, and nothing will happen to *Hosanna-Tabor* if *Smith* stays.[54]

But having answered Justice Barrett's question, we must now quibble with it. The way Justice Barrett frames the question, *Smith* establishes one set of rules for religious individuals, while *Hosanna-Tabor* establishes a different set of rules for religious institutions.[55] But this is not quite right. *Hosanna-Tabor*'s line is not a line between individuals and institutions. Indeed, *Fulton* itself

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Douglas Laycock's foundational article, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981).

50. Watson v. Jones, 80 U.S. 679, 684–86 (1871).

51. Reynolds v. United States, 98 U.S. 145, 145 (1878).

52. *See generally* Sherbert v. Verner, 374 U.S. 398 (1963) (discussing exemption without citing then-governing church autonomy cases); Wisconsin v. Yoder, 406 U.S. 205 (1972) (discussing autonomy without citing then-governing church autonomy cases).

53. *See generally* Jones v. Wolf, 443 U.S. 595 (1979) (citing neither *Sherbert* nor *Yoder*).

54. To be sure, if the Court overrules *Smith* and goes back to strict scrutiny, it could get rid of the two tracks. It would only require the church-autonomy cases to be reframed as compelling-interest cases—the government has a compelling interest in protecting nonministers from discrimination, the Court could say, but no such interest for ministers. This would not even be a big stretch—*Hosanna-Tabor* already reads this way a bit. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1189 (2014) ("This is another way in which *Hosanna-Tabor* aligns better with *Sherbert* and *Yoder* than with *Smith*: it smacks of the old compelling interest test when the Court says that the employment laws are 'undoubtedly important' but still insufficient to outweigh the religious interest." (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012)).

55. Smart people sometimes say things like this; perhaps they just mean it as a convenient shorthand. *See, e.g.*, Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 835–36 (2012) ("*Hosanna-Tabor* suggest[s] a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions."); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 1016 (2013) ("Individual religious believers are subject to the rule of *Smith*, while institutions are not.").

demonstrates that conclusively. The plaintiff in *Fulton* was a religious institution (Catholic Social Services), but no one thought *Fulton* was on the *Hosanna-Tabor* side of the *Hosanna-Tabor/Smith* line. Ten years ago, I described the line in these terms:

> Individuals have no right to use peyote under *Smith*, but neither does the Catholic Church. The Catholic Church can fire ministers for any reason under *Hosanna-Tabor*, but any individual who hires a minister would have exactly the same right. Religious institutions will benefit from *Hosanna-Tabor*. But the case is more about the nature of religious association than the power of religious institutions.[56]

Why would *Hosanna-Tabor* create a special rule about religious association? The deep answer lies in the idea of religious voluntarism. A core principle of the Religion Clauses is that no one can use the power of the government to force their religion on other people. These days, we associate this principle most with the Establishment Clause, which may be why church autonomy rings true both as a disestablishment principle as well as a free-exercise one.[57] We take it as given that individuals have an absolute right to choose what to believe or reject, whether to practice or not, what church to join or leave, and so on. Even *Smith* did not take this away.[58]

But while religious voluntarism works pretty smoothly when it comes to individuals, it is harder to implement in the group context. And that's what church autonomy really is—it is the phrase we attach to the protection of religious voluntarism in the group context. The lesson of the Court's church-autonomy cases, all taken together, is that church dissenters cannot be allowed to go to court to force the group to change its religious beliefs, practices, or governance.[59] The ministerial exception is an application of that principle: In every ministerial-exception case, the fired minister has lost their church, cannot get the church back voluntarily, and goes to court to force the church back against the church's will. The resulting legal claim—"I have the right to practice religion with them, no matter what they want"—is simply one the law cannot recognize without intruding too far on the religious rights of the other members of the church. I do not get to control the religious choices of the other people in my church, just as I do not get to control the religious choices of my next-door neighbor or my adult children. They must be free, as free as I am, to decide

56. Lund, *supra* note 54, at 1193 (footnote omitted).

57. "Government 'may not coerce anyone to attend church,' nor may it force citizens to engage in 'a formal religious exercise.' No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) (first quoting Zorach v. Clauson, 343 U.S. 306, 314(1952); then quoting Lee v. Weisman, 505 U.S. 577, 589 (1992)).

58. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").

59. These points are elaborated in more detail in Lund, *supra* note 54, at 1196–201.

on their own religious paths. This both justifies the distinctive treatment of the church-autonomy cases and explains why the Court so long ago separated them from the exemption cases.

III. THE BURDEN QUESTION IN FREE EXERCISE

> *Should there be a distinction between indirect and direct burdens on religious exercise? Cf.* Braunfeld v. Brown, *366 U.S. 599, 606–07 . . . (1961) (plurality opinion).*[60]

Justice Barrett's next question gets at something important. Any sensible regime of religious exemptions will end up treating some burdens on religious exercise as cognizable and others as non-cognizable. If *any* burden on religious exercise triggers heightened scrutiny—if, say, the government must show a compelling interest anytime it wants to tow the car of someone who parked illegally to attend a religious service—it would tear at the fabric of free exercise doctrine. Either we would have unjustified exemptions all over the place, or every government interest would suddenly become compelling. Any sensible regime of religious exemptions must find a way of recognizing some burdens on religious exercise as cognizable while dismissing others.[61]

The Court has never explicitly developed any formal theory about burdens, but the beginnings of such a theory can be found in the Court's early cases.[62] During the *Sherbert/Yoder* era, the Court dismissed three cases on burden grounds.[63] The first was *Braunfeld*, where Orthodox Jewish merchants challenged Pennsylvania's law requiring businesses to close on Sunday. The Orthodox Jewish merchants alleged their business could not survive closing for the entire weekend (given that Orthodox Jews are religiously committed to closing their businesses on Saturday), but the Court nevertheless dismissed their claims on burden grounds—reasoning that the Sunday-closing law "imposes only an indirect burden on the exercise of religion" as the "legislation . . . does not make unlawful the religious practice itself."[64]

In the decade before *Smith*, the Court decided two other cases on similar grounds. In *Bowen v. Roy*, a Native American religiously objected to

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

61. This is Justice Scalia's point, back in *Smith*, about how it would make no sense if a religious practice of throwing rice at a church wedding were given the same protection as the religious practice of getting married in a church. *See Smith*, 494 U.S. at 887 n.4.

62. In the Court's absence, scholars have been working toward a theory. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 96–99 (2017); Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1774–75; Chad Flanders, *Substantial Confusion About "Substantial Burdens,"* 2016 U. ILL. L. REV. ONLINE 27, 29–30. For a classic earlier piece, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 961–66 (1989).

63. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988); Bowen v. Roy, 476 U.S. 693, 702–03, 706–09 (1986); Braunfeld v. Brown, 366 U.S. 599, 606–09 (1961).

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

the government giving his daughter a Social Security number.[65] In *Lyng v. Northwest Indian Cemetery Protective Ass'n,* Native Americans religiously objected to the government building a road on government property they believed sacred.[66] The Court dismissed both claims, on grounds that the Free Exercise Clause does not give people rights over how the government conducts its internal affairs—for you to have a claim under the Free Exercise Clause, the Court said, the government must actually *do* something to *you*.[67]

In recent years, scholars have offered various theories of burdens. One approach would make the burden question depend on the amount of the legal penalty—only when a penalty is sufficiently grave should the protections of the Free Exercise Clause come into play.[68] But this will not work. It would be impossible to say how much of a fine or penalty is too much, and it might even descend into messy contextual judgments about a particular religious claimant's ability to pay.[69] It also squarely contradicts the Court's precedents—in *Yoder*, the old case about whether the Amish could be exempted from the requirement that their children attend public school, the Court held the burden was cognizable, even though the only penalty the parents faced was a five-dollar fine.[70]

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65. *Bowen*, 476 U.S. at 695.

66. *Lyng*, 485 U.S. at 441–42.

67. *See Bowen*, 476 U.S. at 699–700 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . '[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.'" (second alteration in original) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963))); *Lyng*, 485 U.S. at 449 ("The building of a road . . . on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in [*Bowen*] . . . . In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.").

68. *See* Helfand, *supra* note 62, at 1793 (arguing that courts ought to focus on the "substantiality of the civil penalty").

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

70. *See* Wisconsin v. Yoder, 406 U.S. 205, 208 (1972) (noting that "respondents were charged, tried, and convicted of violating the compulsory-attendance law . . . and were fined the sum of $5 each"). Michael Helfand says that *Yoder* merely *assumed* there was a cognizable burden. *See* Helfand, *supra* note 62, at 1795 ("The Court did not, however, evaluate whether the $5 fine for failing to abide by the state's compulsory education law constituted a substantial burden.") But the Court's conclusion that five dollars was a cognizable burden was part of the compelling-interest test that the Court applied; only because the Court thought five dollars was a cognizable burden did the Court reach the other issues in the case. *See Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

Another approach to the burden issue would have it turn on the religious consequences that would result without an exemption. This would be even worse. Courts would have an impossible job deciding what kinds of religious consequences are serious enough. And such an inquiry would, almost inevitably, contradict some very basic notions of religious equality. Free exercise is not just for religious traditions that believe in hell (or even in God).[71] But that is where such a test would lead, if one had to allege fears of divine punishment to establish a cognizable burden on religious exercise.

This Essay advocates a different approach to burdens, one consistent with the Court's decided cases. This is a two-track approach that sorts burden cases into two categories—what this Essay will label "easy cases" and "hard cases."[72]

In the easy cases, religious commitment and legal obligation diametrically conflict. This situation is the classic Catch-22, where a religious believer cannot practice their religion without violating the law (or vice versa). To put it more formally, easy cases are when the government either (1) penalizes you for some part of your religious beliefs or practice or (2) requires you to do something forbidden by your religious beliefs or practice.[73] This fits the Court's precedents—never has the Court dismissed such a claim on burden grounds.[74] Easy cases merit a flat categorical rule—the burdens in such cases should always be sufficient.[75]

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

72. In an excellent article-length piece on burdens, Sherif Girgis argues that the burden issue in free exercise should turn on whether there are adequate alternatives for religious practice. *See* Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1762–63 (2022). This is roughly consistent with the position sketched out here. For my category of easy cases, there simply are no adequate alternatives and thus the burden element should always be deemed satisfied. For my category of hard cases, the question of adequate alternatives is less certain and will require a case-by-case inquiry.

73. "Penalty" here should be considered broadly, not just in terms of criminal punishments or civil fines but also in terms of governmental benefits taken away. This is hardly new. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

74. None of the three cases dismissed on burden grounds during the *Sherbert/Yoder* era are easy cases. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442–45 (1988); Bowen v. Roy, 476 U.S. 693, 695–98 (1986); Braunfeld v. Brown, 366 U.S. 599, 600–01 (1961).

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

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

Holt v. Hobbs, 574 U.S. 352, 361 (2015) (second alteration in original) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014)).

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

One can think of this distinction between easy and hard cases in terms of a distinction drawn in preemption law. Both free exercise and preemption are fundamentally concerned with the priority of conflicting obligations. Free exercise deals with conflicts between a person's obligations to the government and to their religious faith; preemption deals with conflicts between a person's obligations to the federal government and to the states. Both bodies of law must have rules about which obligations take precedence and when. But more crucially here, both bodies of law must have antecedent rules about *when* obligations are thought to conflict with each other—for that question is not always as easy as it appears. In free exercise, this antecedent issue is the substantial-burden inquiry; in preemption, this antecedent issue is the question of which preemption category we are in.

Easy cases in my typology analogize to cases of impossibility preemption, when federal law preempts state law because it is just impossible for someone to comply with both.[76] In such cases, preemption happens categorically and automatically. By contrast, hard cases in my typology analogize to cases of obstacle preemption, where federal law preempts state law because state law has made it just too difficult to follow federal law.[77] In those cases, preemption happens neither categorically nor automatically—it depends on a judicial judgment about how difficult it will really be to follow both state and federal law.[78]

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

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

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

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

Table 1: Burdens Within Free Exercise

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

This standard may be somewhat imprecise, but such imprecision is unavoidable—it is the only way of crafting a uniform legal standard applicable to such a wide variety of cases. Besides, courts have essentially been using this standard in categories of free exercise cases for many years without any problem. To illustrate how the standard works, consider cases of religious exercise by prison inmates. These are often hard cases in my typology, for prisons frequently restrict religious exercise (it is prison, after all) without formally preventing it—and it is only when those restrictions become overly severe that courts treat burdens on religious exercise as cognizable.

Take an example involving Ramadan meals for Muslim inmates. Say a prison normally serves three daily meals to its inmates for a total of 2,600 calories. But during Ramadan, Muslims fast during the day, eating only one meal at night. How many calories does that one evening meal have to have? If the meal has 2,500 calories, that seems close enough—in such cases, a court should hold there is no substantial burden on religious exercise. But if the meal only had 1,000 calories, the burden on religious exercise would be staggering. In the actual case, the Sixth Circuit looked at the meal (which had 1,300 calories) and rightly decided the burden was serious enough to be cognizable—such meals were practically a starvation diet, which Muslim inmates should not have to endure for the whole month of Ramadan to stay devout.[79] This example illustrates two things at once. First, there can never be a perfectly clear line between cognizable and noncognizable burdens in hard cases. And second, courts will still be able to draw sensible lines.

Another set of hard cases arises from fights between local governments and religious organizations over land-use regulations.[80] Land-use cases also

79. *See* Welch v. Spaulding, 627 F. App'x 479, 484 (6th Cir. 2015). Indeed, not only did the Sixth Circuit hold there was a substantial burden on religious exercise, but it concluded there was a constitutional violation and denied qualified immunity to the relevant government officials. *See id.* at 484.

80. To be clear, the land-use cases that follow are typically brought under the RLUIPA and not just the Free Exercise Clause. *See generally* Douglas Laycock & Luke W. Goodrich, *RLUIPA:*

tend to be hard cases within our typology, as religious organizations almost never have any religious obligation to locate in any particular place. So if burdens only existed in easy cases, local governments could exclude them entirely. "Your religion allows you to locate somewhere else," the argument would go, "so just go and build your mosque in someone else's town."[81] Rightly rejecting this kind of logic, courts have recognized that there can be cognizable burdens on religion even in hard cases. Here too there are line-drawing issues[82]—there is, in fact, a circuit split right now on what kind of burdens are cognizable in the land-use context.[83] But even so, this discussion illustrates the same two things as before. First, no perfectly objective lines are possible here. And second, courts can still draw sensible distinctions in difficult cases.

IV. FREE EXERCISE AND THE TIERS OF SCRUTINY

> *What forms of scrutiny should apply? Compare* Sherbert v. Verner*, 374 U.S. 398, 403 . . . (1963) (assessing whether government's interest is "'compelling'"), with* Gillette v. United States*, 401 U.S. 437, 462 . . . (1971) (assessing whether government's interest is "substantial").*[84]

Justice Barrett's penultimate question asks where free exercise should fit within the tiers-of-scrutiny model that the Court has developed in various areas

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Necessary, Modest, and Under-Enforced, 39 FORDHAM URB. L.J. 1021 (2012) (examining RLUIPA, and defending it as an important protection for religious liberty).

81. One sees this kind of argument frequently. The Connecticut Supreme Court once denied a construction permit to a Buddhist group, on the grounds that the Buddhists' building of a temple could not be religious exercise because no tenet of Buddhism required it. *See* Cambodian Buddhist Soc'y of Conn., Inc. v. Plan. & Zoning Comm'n, 941 A.2d 868, 888 (Conn. 2008) (explaining "that 'building and owning a church is a desirable accessory of worship, not a fundamental tenet of the [c]ongregation's religious beliefs'" (alteration in original) (quoting Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983)).

82. Courts have been frank about this:

> [W]e do not adopt any abstract test, but rather identify some relevant factors and use a functional approach to the facts of a particular case. We recognize different types of burdens and that such burdens may cumulate to become substantial. . . . We do identify some factors that courts have considered relevant when determining whether a particular land use restriction imposes a substantial burden on a particular religious organization, but we do not suggest that this is an exhaustive list.

Roman Cath. Bishop of Springfield v. City of Springfield, 724 F.3d 78, 95–96 (1st Cir. 2013).

83. *Compare* C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (holding that a land-use regulation imposes a substantial burden under RLUIPA only when it "render[s] religious exercise . . . effectively impracticable"), *with* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (rejecting the "effectively impracticable" standard, and holding that "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct"), *and* Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 988 & n.12 (9th Cir. 2006) (rejecting the "effectively impracticable" standard and holding that "a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise") (quoting San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)).

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

of constitutional law. Over the years, law professors have embraced all the possible answers.[85] Justice Barrett here lays two choices on the table—something akin to strict scrutiny ("compelling") or something akin to intermediate scrutiny ("substantial").

From a practical perspective, either one would be a dramatic improvement, and we should be wary of making the perfect the enemy of the good. The difference between strict scrutiny and intermediate scrutiny is small compared to the difference between either of them and *Smith*. Both strict scrutiny and intermediate scrutiny are balancing tests, requiring the government to justify burdens imposed on the free exercise of religion. But *Smith* is not a balancing test. The whole point of *Smith* was to reject balancing—to not require the government to offer justifications, at least most of the time.[86] Recall the case where a claimant asked for a religious accommodation, giving various reasons why the accommodation was entirely reasonable under the circumstances. Recall how the district judge rejected the claim. "For the employment requirement to be neutral and generally applicable," the judge pointed out, "[d]efendants need not make, or even try to make, a reasonable accommodation for [your] religious practice."[87] That is *Smith*, in all its glory.

Now some will say that the choice between intermediate scrutiny and strict scrutiny does not matter. Both are balancing tests, their doctrinal formulations differ only in minor linguistic ways, and neither standard ties the Court's hands all that much.[88] Plus there are doctrinal areas where intermediate scrutiny seems quite strict, and doctrinal areas where strict scrutiny seems not that strict at all.[89]

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85. *See, e.g.*, Laycock & Berg, *supra* note 13, at 44–49 (strict scrutiny); James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion Over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1318, 1355–70 (2017) (intermediate scrutiny); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1197 (2008) ("rationality with bite"); *cf.* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1503 (1999) ("burden is justified").

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

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

88. Strict scrutiny asks whether the law is necessary to achieve some compelling governmental purpose, while intermediate scrutiny asks whether the law is substantially related to some important governmental purpose. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220, 230, 237 (1995) (providing these basic definitions); *see also* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 488 n.6 (1998) ("It is unclear not only whether there is now any real difference between strict and intermediate scrutiny but also whether there ever has been.").

89. For example, sex-based discrimination triggers a kind of intermediate scrutiny that seems quite strict. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Impositions on freedom of association, however, trigger a kind of strict scrutiny that has sometimes been not all that strict. *See generally* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (unanimously upholding an

Surely free exercise advocates would not be disappointed if the Court replaced *Smith* with *United States v. Virginia*'s vigorous version of intermediate scrutiny.

All this is true. Nevertheless, the choice between intermediate scrutiny and strict scrutiny still matters. It may not control much at the level of the Supreme Court, where standards of review could just be epiphenomenal—the Justices that want the most vigorous standard of review will also interpret the standard of review vigorously, whatever it happens to be. But the choice will color how lower courts act. And it will certainly affect the on-the-ground governmental officials making first-line decisions, whether they care primarily about fulfilling their constitutional obligations or just avoiding having to pay attorneys' fees.

Strict scrutiny is the right choice. Strict scrutiny is the test traditionally applicable to core violations of constitutional rights. And this is a core violation of a constitutional right—the constitutional text protects free exercise, and free exercise is not possible without religious exemptions.[90] Moreover, the backstory here matters quite a bit. Strict scrutiny had been the rule for the three decades before *Smith*. If the Court were to reverse *Smith* and adopt anything less than strict scrutiny, it would send a clear signal—that the Court's new regime should be interpreted less vigorously than *Sherbert/Yoder*. Frankly, that is the *only* thing a decision to adopt intermediate scrutiny could mean under the circumstances, and it is certainly how lower courts would take it.

But insiders know that the strict scrutiny of the *Sherbert/Yoder* era was hardly too strict. Even *Smith*, which had nothing good to say about *Sherbert/Yoder*, never made that criticism. *Smith* discusses about a dozen lower-court cases applying strict scrutiny, but all of them ended up denying the religious claims at issue. Justice Scalia was bothered by the idea of courts engaging in this business at all; he was not worried that courts were actually giving inappropriate religious exemptions.[91] We should be clear about what *Smith* did and why: *Smith* threw out strict scrutiny, but *Smith* did not throw out strict scrutiny because it was too strict.

Indeed, when one looks back at the cases decided in the *Sherbert/Yoder* era, one comes away thinking that strict scrutiny was not strict enough. Take *Quaring v. Peterson*, a Supreme Court case from mid-1980s, where a Pentecostal woman from Nebraska sought a driver's license but refused on religious reasons to be photographed.[92] *Quaring* should have been an easy case. Few religious people want this kind of accommodation, basically no one seeks it

ordinance forbidding the Jaycees from limiting their membership to men, despite the application of strict scrutiny).

90. For elaborations on this point, see generally Lund, *supra* note 26.

91. Justice O'Connor saw this at the time. "The Court's parade of horribles . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

92. *See* Quaring v. Peterson, 728 F.2d 1121, 1122–23 (8th Cir. 1984), *aff'd by an equally divided court sub nom.* Jensen v. Quaring, 472 U.S. 478, 478 (1985).

on nonreligious grounds, it does not affect anyone else, and it costs the state basically nothing. But that claim could not even get five votes from the Court in 1984. Adopting intermediate scrutiny would send the message that cases like *Quaring* were rightly decided. It would send the message to lower courts and government officials that the weak version of strict scrutiny adopted in the *Sherbert/Yoder* era was not weak enough.

> *And if the answer is strict scrutiny, would pre-*Smith *cases rejecting free exercise challenges to garden-variety laws come out the same way? See* Smith, *494 U.S. at 888–89.*[93]

This final question has a simple answer—no. If the Court decides to go with strict scrutiny, it will not be bound by the pre-*Smith* cases rejecting free exercise challenges. If it finds its pre-*Smith* cases persuasive, the Court of course could keep them. But the Court could also discard them, if it wants. The same freedom that enables the Court to adopt some standard other than strict scrutiny enables the Court to adopt a different version of strict scrutiny.

But given that the Court has this freedom, how should it be exercised? Should the individual precedents of the *Sherbert/Yoder* era be kept or not? The truth is that it should depend on what precedents we are talking about. Some of the Court's *Sherbert/Yoder*-era cases seem unavoidably right—*Sherbert* and *Yoder* themselves, and *Thomas v. Review Board.*[94] Others seem debatable—I would offer *Quaring* as an example, others will suggest *Lyng*,[95] still others will say *United States v. Lee.*[96] But all this should happen on a case-by-case basis. In any event, the Court can certainly restore the standard without restoring how it was implemented.

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

94. *See generally* Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981) (holding it violated the Free Exercise Clause for a Jehovah's Witness to be denied unemployment compensation for refusing to help make tank turrets).

95. *See* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1321–26 (2021) (offering a sustained critique of *Lyng*).

96. *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 266–67 (1995) (offering a sustained critique of *Lee*).

Conclusion

The future of free exercise is up in the air. If the Court decides to go back on *Smith*, it faces an array of complicated choices about how to structure free exercise doctrine. This short symposium piece has offered some thoughts on how the Court should think about these choices.