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# The Case for the Current Free Exercise Regime

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*ABSTRACT: How the Supreme Court ought to implement the Free Exercise Clause has been one of the most controversial issues in U.S. rights discourse of the past fifty years. In* Fulton v. City of Philadelphia, *a majority of the justices expressed dissatisfaction with the standard articulated in* Employment Division v. Smith, *but they could not agree on what ought to replace it. This Essay argues that focusing on whether to overrule* Smith *is a distraction from the sensitive task of implementing the Free Exercise Clause. This is not because* Smith *was "right," but because (1) the history and tradition are both indeterminate about accommodations from generally applicable laws, giving judges a measure of discretion about how to implement the Clause; (2)* Smith *has always been only one component of a much larger American legal regime with extraordinarily robust free exercise rights; and (3) subsequent cases have rendered the* Smith *doctrine so malleable that it is now arguably more protective of religious exercise than the pre-*Smith *regime had ever been.*

*So the question is not whether to keep* Smith *but how the Court ought to implement the Clause, consistent with the original understanding, tradition, precedent, and the broader legal protections for religious exercise. This Essay argues that the Court should announce constitutionally mandated accommodations when there is reason to suspect that the political process that would ordinarily have yielded a religious accommodation failed to do so because of a political blind spot or bias. Applied delicately, with an eye toward promoting the American tradition of political, rather than judicial, accommodations, the "most-favored-right" doctrine, for all its conceptual faults, can serve that purpose, especially when coupled with robust, context-specific protections for discrete categories of religious exercise like speech, assembly, association, and ministerial employment.*



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## INTRODUCTION

For more than thirty years, "the central issue of interpretation of the Free Exercise Clause"[1] has been whether the Clause requires an exemption from "a . . . 'neutral law of general applicability'" that incidentally burdens religious

1. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) [hereinafter McConnell, *Revisionism*].

exercise.[2] In *Employment Division v. Smith*, the Supreme Court said no.[3] Congress and many states disagreed, enacting generous religious accommodation statutes.[4]

2. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

3. *Id.* at 879–84.

4. *See generally* Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488 (codified as amended at 42 U.S.C. § 2000bb (2018)) (heightening the standard of review for religious freedom cases), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997); Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 2000 U.S.C.C.A.N. (114 Stat.) 803 (codified as amended at 42 U.S.C. § 2000cc) (providing a narrower version of RFRA for state zoning actions after *Boerne*); THOMAS JIPPING & SARAH PARSHALL PERRY, THE HERITAGE FOUND., THE RELIGIOUS FREEDOM RESTORATION ACT: HISTORY, STATUS, AND THREATS 19 & n.137 (2021), https://www.heritage.org/sites/default/files/2021-05/LM284.pdf [https://perma.cc/RU7E-W6G2] ("[Twenty-one] states have added constitutional or statutory provisions similar to the RFRA . . . .") (citing *State Religious Freedom Acts*, NAT'L CONF. STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx). For an overview of the political history of RFRA, see generally MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008) (describing the political history of the Act).

Most scholars disagree, too.[5] In *Fulton v. City of Philadelphia*,[6] the Court granted certiorari to consider whether to overturn *Smith*[7] but left the issue unresolved.[8] In separate concurring opinions, Justice Alito launched a full-scale assault on

5. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409–10 (1992) (noting that, as of 1992, "[o]f the sixteen law review articles and notes written on the case, all but one condemned the result"); *see, e.g.*, Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 846–47 (2022); Justin Collings & Stephanie Hall Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453, 511–12 (2022); Mark L. Rienzi, *Religious Liberty and Judicial Deference*, 98 NOTRE DAME L. REV. 337, 372–98 (2022); Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 268–71 (2021); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020 CATO SUP. CT. REV. 33, 38–40; David Beck, Casenote, Fulton v. City of Philadelphia*: Religious Objectors, Historically Marginalized Communities, and a Missed Opportunity*, 68 LOY. L. REV. 95, 116–21 (2021); 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, 1355–58 (2017); Daniel J. Hay, Note, *Baptizing* O'Brien*: Towards Intermediate Protection of Religiously Motivated Expressive Conduct*, 68 VAND. L. REV. 177, 209–11 (2015); Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 161–63 (2015); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1193 (2013); Jesse H. Choper, *In Favor of Restoring the* Sherbert *Rule—With Qualifications*, 44 TEX. TECH L. REV. 221, 222–27 (2011); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1190–99 (2008); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1176–77 (2007); Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RSRV. L. REV. 55, 55–57 (2006); McConnell, *Revisionism*, *supra* note 1, at 1114–28. *But see, e.g.*, Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 2021 AM. CONST. SOC'Y SUP. CT. REV. 221, 233–44 (considering Justice Alito's critique of *Smith* as flawed); Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 469 (2015) ("This Essay thus rests on the normative view that *Smith* was correctly decided . . . ."); Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1816–23 (2011) ("I should really hate this [*Smith*] case. And yet, I do not."); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1101–02 (noting a history of typically requiring adherence to laws unless they are hostile to religion); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1505 (1999) ("*Smith* rightly rejected the constitutional exemption model and . . . the common-law model is the best solution, not just a fourth-best alternative to federal constitutional exemptions, state constitutional exemptions[,] . . . and a broad federal 'son-of-RFRA' . . . ."); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 572–74 (1998) [hereinafter Gedicks, *An Unfirm Foundation*] ("There has been virtually no effort at developing an intermediate position between the emphatically rejected exemption doctrine and the rubber-stamp rational basis review which this rejection seems to have left in its place."); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309–17 (1991) ("My task is then to defend *Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself.").

6. *See generally* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) ("Our task is to decide whether the burden the City has placed on . . . religious exercise . . . is constitutionally permissible.").

7. *Id.* at 1876; *see also* Petition for a Writ of Certiorari at i, *Fulton*, 140 S. Ct. 1104 (No. 19-123), 2019 WL 3380520, at *i (considering the choice to revisit *Smith* as one of the questions presented).

8. *Fulton*, 141 S. Ct. at 1881 ("Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.").

*Smith*,[9] but Justice Barrett was wary of overturning the decision without a clear grasp of "what should replace it."[10]

Both justices were right in some ways, but wrong in others. They were right to conclude that the Free Exercise Clause protects substantive religious liberty.[11] And they were right to conclude that the ordinary forms of constitutional reasoning—including text, history, and structure—do not forbid religious exemptions.[12] But Justice Alito was wrong to conclude that the textual and historical "case against *Smith* is very convincing."[13] The ordinary forms of constitutional interpretive reasoning do not settle the exemption question, leaving the Court with tremendous discretion about how to implement the Free Exercise Clause's commitment to substantive liberty.[14] And the Court as a whole—along with myriad scholars and religious liberty advocates—has been wrong to continue to fixate on *Smith*.[15]

This Essay argues that the American tradition of religious free exercise has always been a dialogue between legislatures and courts and that the current regime enables each institution to play to its strengths. Legislatures have democratic legitimacy and epistemic authority to identify and weigh private rights of religious exercise against public interests. They have frequently provided religious accommodations, even for small religious minorities, in response to a decision by the Supreme Court to not announce a constitutional exemption. Yet the lawmaking process has blind spots and is sometimes affected by religious bias. For the past eighty years, courts have served as the last line of defense, robustly protecting key forms of religious exercise—religious expression and communal self-governance—and, increasingly, policing laws for blind spots and bias. The result is the most robust religious liberty regime the world has ever known. Focusing on *Smith* misses the forest for a single tree.

This Essay enters the debate over the exemption question to make four interrelated points. First, any feature of free exercise law, including the proper scope of judicial exemptions from generally applicable laws, should be evaluated in light of all of the doctrinal mechanisms that protect free exercise of religion, including, importantly, legislative accommodations. Second, courts have great discretion about whether and how to implement a right of exemption under the Free Exercise Clause because the traditional forms of constitutional interpretive reasoning are indeterminate. Third, courts should often, but not always, defer to legislative decisions to accommodate and not to accommodate

9. *Id.* at 1894–924 (Alito, J., concurring).

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

11. *See id.*; *id.* at 1883–84 (Alito, J., concurring).

12. *Id.* at 1882–83 (Barrett, J., concurring); *id.* at 1883–84 (Alito, J., concurring).

13. *Id.* at 1912. Justice Barrett "f[ou]nd the historical record more silent than supportive" but "the textual and structural arguments against *Smith* . . . more compelling." *Id.* at 1882 (Barrett, J., concurring).

14. *See infra* Part II.

15. *See supra* notes 4–13 and accompanying text.

religious exercise. Fourth, the current regime reasonably balances the American tradition of legislative accommodation with robust protection for core forms of religious exercise and searching review when there is evidence that the legislature declined to provide an accommodation because of a blind spot or religious bias.

The current free exercise regime is imperfect—no doctrinal regime could be—but it is more consistent with history, tradition, and precedent than an across-the-board standard of heightened scrutiny would be. Considered altogether, the regime provides more context-sensitive guidance for officials and lower courts and more robust protection for free exercise than did the pre-*Smith* regime of so-called strict scrutiny.

Part I sketches the contours of the free exercise regime. Part II argues, contrary to Justice Alito and many scholars, that the ordinary forms of constitutional reasoning do not settle the exemptions question one way or the other, leaving courts with ample discretion to implement the Free Exercise Clause according to their view of the proper allocation of authority between legislatures and courts. Part III considers the institutional arguments for and against judicially announced exemptions. Part IV makes the case for the current regime.

## I. THE AMERICAN LEGAL REGIME OF RELIGIOUS EXERCISE

The exemption question—what, if anything, should replace *Smith*—should be evaluated in light of the entire free exercise regime. American law protects religious exercise through a variety of interrelated and overlapping legal mechanisms and judicial doctrines, ranging from legislative accommodations to categorical bans on government interference with some forms of religious exercise.[16] Importantly, even *Smith* is not *Smith* anymore—as Justice Alito noted in *Fulton*, subsequent decisions have weakened *Smith*'s influence.[17] He thought that was an argument for overruling the decision,[18] but perhaps it demonstrates its irrelevance. This Part briefly sketches the contours of the entire free exercise regime to facilitate the Essay's later analysis.

### *A. LEGISLATIVE ACCOMMODATIONS*

Scholarly focus on the exemption question—and the Free Exercise Clause in general—overlooks the central role American legislatures have always played in protecting religious exercise.[19] As government regulation of

16. *See* THE PEW F. ON RELIGION & PUB. LIFE, A DELICATE BALANCE: THE FREE EXERCISE CLAUSE AND THE SUPREME COURT 10–12 (2007), https://www.pewresearch.org/religion/2007/10/24/a-delicate-balance8 [https://perma.cc/66D2-2SNX].

17. *See Fulton*, 141 S. Ct. at 1915–16 (Alito, J., concurring).

18. *Id.*

19. *See, e.g.*, JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 153 (5th ed. 2022) (explaining that religious

private conduct has expanded, and as the nation has become more pluralistic, American legislatures, state and federal, have provided thousands of religious accommodations.[20] Many were enacted in response to Supreme Court decisions declining to announce an exemption under the Free Exercise Clause.[21]

Legislative accommodations come in two varieties. Specific accommodations, like the exemption from the military draft for conscientious objectors,[22] lift one law's burden on religiously motivated conduct. General accommodations apply to a wider array of laws. The Religious Freedom Restoration Act ("RFRA"), for example, applies strict scrutiny to any federal law that substantially burdens religious exercise.[23]

The Constitution places few limits on legislative accommodations. The Supreme Court has rarely invalidated an accommodation[24] and has frequently

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accommodations for conscientious objectors to war have always been a matter of "legislative prerogative, not a judicial decision"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466–73 (1990) [hereinafter McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*] (discussing early statutory accommodations); *id.* at 1500–03 (discussing the Militia Exemption Clause in what became the Second Amendment); Letter from George Washington to the Society of Quakers (Oct. 13, 1789) ("[I]t is my wish and desire that the Laws may always be as extensively accommodated to [the conscientious scruples of all people] as a due regard to the Protection and essential Interests of the Nation may Justify, and permit.").

20. *See* Ryan, *supra* note 5, at 1445–50.

21. For instance, in response to *Smith*, Congress enacted RFRA and RLUIPA and amended the Native American Religious Freedom Act, and Oregon enacted a law permitting the use of peyote in Native American Church ceremonies. *See generally* Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488 (codified as amended at 42 U.S.C. § 2000bb) (responding to *Smith*), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997); Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 2000 U.S.C.C.A.N. (114 Stat.) 803 (codified as amended at 42 U.S.C. § 2000cc) (responding to *Boerne*); American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 1994 U.S.C.C.A.N. (108 Stat.) 3125 (codified at 42 U.S.C. § 1996); *Oregon Peyote Law Leaves 1983 Defendant Unvindicated*, N.Y. TIMES (July 9, 1991), https://www.nytimes.com/1991/07/09/us/oregon-peyote-law-leaves-1983-defendant-unvindicated.html [https://perma.cc/4MAS-UA66]. In response to *Goldman v. Weinberger*, Congress amended the federal law to allow members of the military to wear religious garb along with a military uniform. *See* Dwight H. Sullivan, *The Congressional Response to* Goldman v. Weinberger, 121 MIL. L. REV. 125, 140–43 (1988) (citing generally Goldman v. Weinberger, 475 U.S. 503 (1986)). In response to *Lyng*, Congress reserved the sacred land for use by the claimants by designating it as a wilderness under the Wilderness Act. Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, *in* INDIAN LAW STORIES 489, 527 (Carole E. Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011) (citing generally Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)).

22. *See* Military Selective Service Act, 50 U.S.C. § 3806(j).

23. RFRA § 3(a), 107 Stat. at 1488–89.

24. *See, e.g.*, Taylor G. Stout, Note, *The Costs of Religious Accommodation in Prisons*, 96 VA. L. REV. 1201, 1201 (2010) (noting how the Court approved of certain religious accommodations in a prison context). *But see* Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985) (invalidating a Connecticut law that required employers to give their employees the sabbath off); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989) (invalidating a Texas law that exempted only religious

upheld them.[25] Most recently, the Court has said that the Establishment Clause permits an accommodation that alleviates significant burdens on religious exercise, does not discriminate on the basis of religion, and does not impose too high a burden on third parties.[26] These standards are fuzzy, but in light of the many accommodations the Court has enforced, Congress and the states are best understood to have broad authority to provide religious accommodations.

The current American regime of legislative accommodations manages to be both robust and to fairly reflect the American constitutional tradition of federalism. While the Supreme Court has (perhaps overly) policed Congress's authority to provide accommodations from state laws,[27] it has left in place the application of RFRA, mentioned above, to all federal laws that Congress does not expressly place beyond its reach.[28] The result is that virtually any religious accommodation claim against the federal government is subject to the highest level of scrutiny known to constitutional law. The states, for their part, have provided robust religious accommodations from a range of state regulations.[29] State courts are free to interpret state constitutional free exercise provisions to provide more protection than the federal provision, and many have done so.[30]

Even the most generous religious accommodation provisions, however, do not amount to a free pass for all religious accommodation claims. Government agencies and courts adjudicating such claims must ensure that they are based on religion (or conscience, for claims based on accommodations extending to nonreligious conscience) and that the claimant's beliefs are sincere.[31] In some cases, the claimant must demonstrate that the government has placed a nontrivial burden on her religious exercise—such as a "substantial burden"—and the government may always overcome a religious accommodation with

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publications from sales tax); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (invalidating RFRA as applied to states); Bd. of Educ. v. Grumet, 512 U.S. 687, 691–94, 709–10 (1994) (invalidating a New York law authorizing a town that was effectively co-terminus with a religious group to run its own publicly funded schools).

25. *See generally, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (upholding RFRA as applied to the federal government); Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding RLUIPA); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding exemption of religious employer from federal law prohibiting religious discrimination); Arver v. United States (upholding Selective Draft Law Cases), 245 U.S. 366 (1918) (upholding military conscientious objector accommodation).

26. *See Cutter*, 544 U.S. at 720.

27. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating RFRA as applied to the states).

28. *See Gonzales*, 546 U.S. at 439.

29. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 634–36 (2016).

30. *See, e.g.*, *id.* at 645 n.58.

31. *See, e.g.*, Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1241–45 (2017).

sufficient need (although strict scrutiny is very demanding).[32] These "nuts-and-bolts" doctrinal features, many of which apply equally to constitutional accommodation claims, reduce the scope of accommodations and moor them to the rule of law.

### *B. THE RULE AGAINST RELIGIOUS DISCRIMINATION*

The Supreme Court has said that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[33] Inversely, the Court has held that the Free Exercise Clause requires strict scrutiny of a law that "disfavor[s] [a] religion because of the religious ceremonies it commands."[34] A law or executive decision that facially or plainly (based on the legislative context) discriminates on the basis of religion is subject to strict scrutiny,[35] that is, the government must "demonstrat[e] its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."[36] Most recently, the Court extended the principle against religious discrimination to prohibit religious bias by an adjudicator.[37] That prohibition appears to be categorical; it cannot be justified by any government interest.[38]

### *C. THE* SMITH *EXEMPTIONS REGIME*

Before *Smith*, the Court purported to apply strict scrutiny to any law that sufficiently burdened religious exercise, whether the law discriminated on the basis of religion or not.[39] *Smith* changed the baseline rule for exemptions: Under *Smith*, "a . . . 'neutral law of general applicability'"[40] does not trigger any further analysis under the Free Exercise Clause.[41] A law that is *not* neutral and generally applicable, however, triggers "the most rigorous of scrutiny."[42]

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32. *See id.* at 1245–53.

33. Larson v. Valente, 456 U.S. 228, 244 (1982). *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2408, 2416 (2018) (distinguishing presidential decisions about immigrant entry).

34. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421–22 (2022) (discussing a similar principle); McDaniel v. Paty, 435 U.S. 618, 626–29 (1978) (discussing same).

35. *See Lukumi*, 508 U.S. at 546.

36. *Kennedy*, 142 S. Ct. at 2422 (citing *Lukumi*, 508 U.S. at 546).

37. *See* Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018); *see also id.* at 1734 (Gorsuch, J., concurring) ("[W]hen the government fails to act neutrally toward the free exercise of religion, it . . . . can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. . . . Today's decision respects these principles." (citation omitted)).

38. *See Masterpiece Cakeshop*, 138 S. Ct. at 1732 (majority opinion).

39. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 882–83 (1990) (discussing the application of "the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 . . . (1963)").

40. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

41. *See id.* at 885.

42. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

The threshold question, then, is what counts as a neutral and generally applicable law. The *Smith* Court seemed to define both neutrality and general applicability rather narrowly. By a "neutral" law, *Smith* seemed to refer to one that did not single out conduct because it was religiously motivated.[43] By a "generally applicable law," it seemed to refer to one that did not involve "a system of individual exemptions[] [that] it . . . refuse[d] to extend . . . to cases of 'religious hardship' without compelling reason."[44] The underlying concern appeared to be that an insufficiently general law authorizes bureaucratic decisions that may be tainted by undetectable religious discrimination. This is the "*Smith*" rule that leading scholars considered at the time to be "a sweeping disaster for religious liberty"[45] and prompted many others to argue for a return to an across-the-board rule that protects substantive religious liberty, whether "rationality with bite"[46] or some form of "intermediate scrutiny"[47] or "strict scrutiny."[48]

But *Smith*'s version of what counts as neutral and generally applicable is no longer the current doctrine. Not long after *Smith*, in fact, the Court made it clear that it would apply underinclusivity[49] and overbreadth[50] analysis to determine whether a law was neutral and generally applicable.[51] Laws that fail that analysis are subject to strict scrutiny.[52] The Court has recently expanded this approach: A law is not neutral and generally applicable, and therefore is subject to strict scrutiny, if it "treat[s] *any* comparable secular activity more favorably than religious exercise."[53] The question is whether the government has exempted nonreligiously motivated conduct that poses the same threat to the government's interests as the religious claimant's conduct.[54] This is underinclusivity with teeth.

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43. *See Smith*, 494 U.S. at 877–78 ("It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." (alteration in original)).

44. *Id.* at 884. *But see Lukumi*, 508 U.S. at 537–38 (saying this is a failure of neutrality).

45. Edward McGlynn Gaffney, Douglas Laycock & Michael W. McConnell, *An Open Letter to the Religious Community*, FIRST THINGS (Mar. 1991), https://www.firstthings.com/article/1991/03/an-open-letter-to-the-religious-community [https://perma.cc/S3LC-2YVB].

46. Krotoszynski, *supra* note 5, at 1197.

47. Hay, *supra* note 5, at 215; Oleske, *supra* note 5, at 1361–63.

48. *See, e.g.*, Lund, *supra* note 5, at 862; Tebbe, *supra* note 5, at 278; Laycock & Berg, *supra* note 5, at 44.

49. *See Lukumi*, 508 U.S. at 536 ("The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice . . . .").

50. *Id.* at 539–40.

51. *Id.* at 538–40 (using both analyses to determine whether the laws were neutral); *id.* at 543 (deploying underinclusivity analysis to determine whether the laws were generally applicable).

52. *Id.* at 546.

53. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)).

54. *Tandon*, 141 S. Ct. at 1296; *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67–68.

In addition, courts evaluate a law that is not neutral and generally applicable with a version of strict scrutiny that is very strict indeed. As Richard Fallon has noted, the pre-*Smith* version of strict scrutiny worked more like a balancing test, with courts giving various weights to the claimant's religious exercise and the government's countervailing interests.[55] Since *Smith*, however, the Court has applied a version of strict scrutiny that amounts to what Fallon calls a "near-categorical prohibition"[56] to any law that is insufficiently neutral and generally applicable.[57] The government will almost always lose, for the same features of a law that render it insufficiently neutral and generally applicable—overbreadth and underinclusivity—likewise suggest that the government's interest is not "compelling," and that, in any case, it could achieve its interest without burdening the claimant's religious exercise.[58] Many laws have exceptions for nonreligious conduct and, under the Court's most recent decisions, that conduct will be difficult to distinguish from the claimant's religious exercise. Decades ago, James Ryan argued that few of the U.S. Courts of Appeals decisions under the pre-*Smith* standard of strict scrutiny would have come out differently under the *Smith* decision.[59] The current "*Smith* regime" is far more protective of religious exercise than a plain reading of *Smith* would have been—and, by operation of logic, than the pre-*Smith* "strict scrutiny" regime actually was.

### *D. CATEGORICAL PROTECTIONS*

Since *Smith*, the Supreme Court has identified one aspect of religious exercise that is categorically protected from governmental interference, even from a neutral and generally applicable law. Religious groups have a categorical right to select their "ministers," chosen to represent, teach, and inculcate the faith.[60] The "ministerial exception" arises from both the Free Exercise and the Establishment Clauses—it protects the free exercise of religious groups by

55. RICHARD H. FALLON, JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 46 (2019).

56. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1303 (2007).

57. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296–97 ("[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest . . . ."); *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."). The standard mirrors the Court's interpretation of RFRA. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 705 (2014); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006).

58. *See Tandon*, 141 S. Ct. at 1296–97; *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67–68; *Lukumi*, 508 U.S. at 546. For a thorough (and critical) analysis of the *Smith-Lukumi-Tandon* line of cases, see generally Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023).

59. *See* Ryan, *supra* note 5, at 1416–37.

60. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012).

preventing governmental interference with the appointment of clergy,[61] one of the central features of the English religious establishment.[62]

The exemption is categorical. Once the claimant has shown the government has interfered with the selection of a minister, the inquiry is over—the government's interest, motive, or method are irrelevant.[63] So far, the Court has applied the doctrine to exempt churches and religious schools from employment discrimination laws that would otherwise require them to employ a minister against their will.[64] Where it applies, the protection is absolute—the employer's motive is irrelevant; the only question is whether the employee is a "minister," a question that turns on the employee's status and duties.[65]

### *E. PROTECTION FOR RELIGIOUS EXPRESSION*

Some of the most common forms of religious exercise are also forms of expression: speech, the publication of ideas, or the association or congregation with other members of the faith. Religious expression, as expression, is protected to the same degree, and by the same doctrinal standard, as any analogous form of nonreligious expression.[66] Some First Amendment doctrines protect expression under the Speech, Press, or Assembly Clause—religious or not—more than the *Smith* regime protects religious exercise.[67] As a result, claimants who seek an accommodation for religious expression, including "expressive association," which protects a wide range of membership groups from being forced to include those who do not share their values,[68] may have more success under the free speech doctrine than they would under the *Smith* regime.[69]

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61. *Id.* ("We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.").

62. *Id.* at 181–84.

63. *Id.* at 193–94.

64. *See id.* at 194–96; *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020) (applying the ministerial exception to a religious school).

65. *See Morrissey-Berru*, 140 S. Ct. at 2064 ("What matters, at bottom, is what an employee does.").

66. *See* WITTE ET AL., *supra* note 19, at 154–61.

67. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 173 (2015); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 168 (2002); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–96 (1993); *see also* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 659 n.3 (1981) (Brennan, J., concurring in part) ("I read the Court as . . . merely holding that even if Sankirtan is 'conduct protected by the Free Exercise Clause,' it is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent by Rule 6.05.").

68. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647, 656 (2000).

69. For instance, most religious objectors to participating in a same-sex wedding who seek an exemption from a civil rights antidiscrimination statute rely mainly on free speech requirements of content neutrality rather than the *Smith* regime. *See, e.g.*, Brief for the Petitioners at i, 303 Creative LLC v. Elenis, No. 21-476 (May 26, 2022), 2022 WL 1786990, at *i; Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013); *cf.* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 673–75 (2010) (addressing the claims by a religious student group relating to a nondiscrimination policy).

Religious expression is effectively a favored form of religious exercise that receives robust protection, even from laws that are neutral and generally applicable.

## II. THE FREE EXERCISE CLAUSE'S INDETERMINACY

The fact that American law protects religious exercise through many overlapping mechanisms does not answer the question whether the Free Exercise Clause (at least sometimes) requires exemptions from neutral and generally applicable laws. It does, however, show that for many forms of religious exercise, *Smith* or a universal standard are not the only ways to protect religious exercise. Seeing the big picture is especially important because the ordinary tools of constitutional interpretation do not settle the exemption question. In *Fulton*, Justice Alito argued that the textual and historical "case against *Smith* is very convincing."[70] I agree that the text and history support the view that the Clause protects substantive religious liberty (not only nondiscrimination), but that does not settle the exemption question, let alone justify the application of heightened scrutiny to every law that burdens religious exercise. Jurists reasonably disagree about how to interpret the Clause, and none of the ordinary interpretive tools—text, history, ethics, and precedent[71]—settle the exemptions question. The question demands the exercise of discretion.[72]

### A. *INTERPRETIVE METHODOLOGY*

Jurists divide into two broad camps on constitutional interpretation: originalists and everyone else. Within each camp there is great diversity. Originalists disagree about whether the proper object of inquiry is the original intent,[73] the original public meaning,[74] or the original legal meaning;[75] about

70. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1912 (2021) (Alito, J., concurring). Justice Barrett found "the historical record more silent than supportive" but "the textual and structural arguments against *Smith* . . . more compelling." *Id.* at 1882 (Barrett, J., concurring).

71. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982).

72. *See, e.g.*, H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 658 (2013) ("It seems to me then that discretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious."); *see also id.* at 664 (discussing what makes "decisions involving discretion . . . rational"); FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 190–94 (2009) (describing "the use of directives . . . as a device for constraining or withdrawing discretion").

73. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 976 (2004).

74. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 380 (2013) ("Originalist theory has now largely coalesced around original public meaning as the proper object of interpretive inquiry.").

75. *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 99 (2016); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838–39 (2015) [hereinafter Sachs, *Originalism as a Theory of Legal Change*].

whether there is a difference between interpretation and construction;[76] about which norms should guide the construction of underdeterminate provisions;[77] and about whether and when contrary precedent should outweigh the original meaning.[78]

Nonoriginalists, for their part, disagree about how much relative weight to give to various forms of constitutional argumentation.[79] When in doubt,

76. *Compare, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999) (arguing for a distinction between interpretation and construction), *with* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13–15 (2012) (rejecting that distinction), *and* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 91–97 (2007) (questioning the distinction). For more discussion on this topic, see generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (arguing that the difference between interpretation and construction "is both real and fundamental"); Amy Barrett, *Symposium Introduction*, 27 CONST. COMMENT. 1 (2010) (defining and separating the two terms as they relate to originalism).

77. *Compare, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 32 n.159 (2018) (arguing for construction based on "original functions" (emphasis omitted)), *with* JACK M. BALKIN, LIVING ORIGINALISM 5–6 (2011) (arguing for construction based on evolving understandings of constitutional standards). An "underdeterminate" case is one in which the legal materials guide and restrict the range of legal conclusions but do not determine one single conclusion. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

78. *Compare, e.g.*, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) ("Stare decisis is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!"), *and* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3–4 (2007) (arguing that the Court should "mostly never . . . rely on past decisions in preference to direct, unmediated examination of the Constitution"), *and* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 262–63 (2005) ("An originalist simply could not accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist."), *with* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 169 (2013) (arguing that a weak form of precedent is consistent with the original understanding), *and* Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 108 (2015) (arguing that where the text and history are inconclusive "originalists may consider stare decisis as a fallback rule"), *and* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8–10 (2001) (suggesting that reasonable precedent is entitled to respect); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 272–74 (2005) (arguing that there must be a special reason to overrule a prior decision). For a brief overview, see generally James Cleith Phillips, *Is Stare Decisis Inconsistent with the Original Meaning of the Constitution?: Exploring the Theoretical and Empirical Possibilities*, 91 NOTRE DAME L. REV. ONLINE 115 (2016) ("This Essay explains the range of theoretical possibilities for this seemingly incompatible duo, as put forth by originalism's leading scholars . . . .").

79. For one list of "modalities" of constitutional argumentation, see generally BOBBITT, *supra* note 71 (discussing how different scholars might approach constitutional questions).

should courts turn to tradition?[80] To norms of contemporary political morality?[81] Nonoriginalists disagree about which moral principles would make a provision "the best it can be":[82] Should the Constitution be interpreted to give effect to liberal egalitarian principles?[83] Or to the common good?[84] Regardless of their preferred methods of interpretation, originalists and nonoriginalists alike rely on various conventional modalities of interpretation from time to time, and often in the same case. A constitutional decision-maker must therefore elect from this menu of modalities before even beginning to tackle the exemption question.

### *B. CONSTITUTIONAL TEXT*

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[85] From the text alone, it is unclear whether the Clause forbids only laws that "prohibit" the exercise of religion *as such*, meaning, because of the conduct's religious motivation, or whether it also forbids the application of general laws to religiously motivated conduct. On what does the Clause focus? The nature of the government's act, in which case it forbids the express or deliberate prohibition of religious exercise? Or the nature of a claimant's conduct, in which case it forbids any government action that has *the effect of* prohibiting someone's religious exercise? The Clause may be read either way.

Justice Alito disagrees. In *Fulton*, he argued that "the 'normal and ordinary' meaning" behind "'prohibiting the free exercise [of religion]' . . . is[] forbidding or hindering unrestrained religious practices or worship."[86] He constructed this meaning by cobbling together selected dictionary definitions of words in the Clause.[87] The result, he argues, requires exemptions.[88] But that is not the case—his paraphrase raises the same ambiguity as the Clause's text. Which matters, the nature of the government's action, or the nature of the claimant's conduct?

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80. *See generally* Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (considering traditionalism as "the present reality of much of constitutional law"); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020) [hereinafter DeGirolami, *The Traditions of American Constitutional Law*] ("[T]raditionalist interpretation is pervasive, consistent, and recurrent across the Court's constitutional doctrine.").

81. JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 60–61 (2015).

82. *Id.*

83. NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 25 (2017) (adopting a Dworkinian approach that emphasizes egalitarianism).

84. *See* Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/RJH8-CXQ6] (adopting a Dworkinian approach that emphasizes the "common good").

85. U.S. CONST. amend. I.

86. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1895–96 (2021) (Alito, J., concurring) (first alteration in original) (first quoting District of Columbia v. Heller, 554 U.S. 570, 576 (2008); then quoting U.S. CONST. amend. I).

87. *See id.*

88. *Id.* at 1897.

To overcome this ambiguity, Alito offers a translation of the Free Exercise Clause, asserting that it provides "the right to [exercise religion] without hindrance."[89] This reformulates the Clause's negative ("Congress shall make *no* law . . .") as an affirmative right and cleverly puts the emphasis on the private party, not the government.[90] But for this reason, his translation goes well beyond the Clause's "normal and ordinary meaning." The Clause says nothing about a right,[91] much less about what Justice Alito calls the right of "a specific group of people (those who wish to engage in the 'exercise of religion')."[92] Rather, it forbids the enactment of a certain kind of *law*, one that "prohibits the free exercise [of religion]"—but the question is what sort of law it forbids.[93]

Contemporaneous evidence from the amendment's drafting history doesn't help illuminate the text either. As Professors John Witte, Jr., Joel A. Nichols, and Richard W. Garnett argue, that history may bear either a "thinner reading" that amounts to "Congress may not proscribe religion"[94] or a "thicker reading" that would require accommodations from general laws,[95] both of which are "plausible readings of the place of the freedom of conscience in the First Amendment."[96] The amendment's text plainly contemplates the protection of "religious exercise" from a government prohibition, but it does not specify how.

### *C. THE ORIGINAL MEANING*

Justice Alito's argument against *Smith* relies heavily on evidence of the original understanding of free exercise, and a majority of the justices on the Court are open to originalist claims, so this subsection gives special attention to the historical evidence of the original meaning of the Free Exercise Clause.

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89. *Id.*

90. *See id.*; U.S. CONST. amend. I.

91. *Compare, e.g.*, U.S. CONST. amend. I ("[T]he right of the people peaceably to assemble, and to petition the Government for a redress of grievances."), *and* U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed."), *and* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."), *and* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial . . . ."), *and* U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved . . . ."), *with* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

92. *Fulton*, 141 S. Ct. at 1897 (Alito, J., concurring).

93. *Id.* at 1895–96 (quoting U.S. CONST. amend. I). I grant that a limit on government power for the sake of freedom ("the free exercise [of religion]") may fairly be called a "right" against the government, but reformulating the Clause to protect a "right" does nothing to specify its contours. *See* U.S. CONST. amend. I. Under the plain meaning of the text, the right the Clause protects is a right to not have the government enact certain sorts of laws.

94. WITTE ET AL., *supra* note 19, at 109–11. For one such reading, see generally STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM (2014) (expounding on religious freedom in America from the colonial to modern eras).

95. WITTE ET AL., *supra* note 19, at 111.

96. *Id.* at 124.

That evidence strongly suggests that the founding generation believed at least some forms of religious exercise were beyond the government's reach.[97] What it does not resolve, however, is whether, and when, the Clause itself requires judicially announced exemptions. It permits them; in this way, it can fairly be said to support them. But it does not require them; in this way, it can fairly be said to support the rule in *Smith*.[98] Whether and how to implement the substantive right protected by the Free Exercise Clause calls for the exercise of judicial discretion.

Most scholars agree that the Free Exercise Clause and its state analogues at least declared, if they did not also guarantee, a pre-existing substantive right to the free exercise of religion.[99] Americans widely agreed, for various but overlapping reasons,[100] that all people have a natural right to religious liberty.[101] This was the right declared in state and federal free exercise clauses.[102] Where the historical evidence is less clear, however, is the scope of the natural right

97. On the original legal meaning, see, for example, Sachs, *Originalism as a Theory of Legal Change*, *supra* note 75, at 838–39.

98. To be sure, many scholars have argued that the history requires, supports, or does not support religious exemptions. *See supra* note 5. The sheer fact of disagreement is not alone evidence that the question is in equipoise; sometimes people disagree because one of them is right and the other is wrong. In this case, the disagreement seems to me to reflect the difficulty of handling the historical materials carefully and the ambiguity of those materials. *See generally* Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause*, 23 U. PA. J. CONST. L. 1 (2021) (arguing against exemptions); Paulsen, *supra* note 5 (arguing in favor of almost categorical exemption right for good-faith religious exercise); Hay, *supra* note 5 (arguing that the history supports strict scrutiny).

99. An exception is Frederick Mark Gedicks. *See* Gedicks, *An Unfirm Foundation*, *supra* note 5, at 560 (arguing that the Free Exercise Clause was meant to "protect[] religion from discrimination; it does not compel discrimination in favor of religion" (quoting Marshall, *supra* note 5, at 325)). For persuasive evidence against this view, see Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 271–76 (1991) (showing that courts did not enforce an antidiscrimination norm); and Wesley J. Campbell, *Religious Neutrality in the Early Republic*, 24 REGENT U. L. REV. 311, 316 (2012) ("[J]udicial enforcement of facially discriminatory laws actually *supports* the historical argument for religious exemptions.").

100. *See* VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 68–87 (2022); *see also* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 377–88 (1996) (describing influential views on religious liberty and freedom in the United States during the late eighteenth century).

101. MUÑOZ, *supra* note 100, at 29–40 (considering religious liberty as a natural right held equally by all individuals); *id.* at 55 ("What is inalienable is the right to worship God according to conscience."); McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, *supra* note 19, at 1456 (noting that the right "was universally said to be an unalienable right"); Campbell, *supra* note 99, at 316 ("The Free Exercise Clause guaranteed a natural, unalienable right of religious freedom—not a right to government neutrality.").

102. MUÑOZ, *supra* note 100, at 211 ("From the repeated and various ways in which the words 'free exercise' were employed in Founding-era charters, it appears that they were used to communicate the principle that individuals possessed a right of religious freedom, often in the context of discussion of natural rights."); *see* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 69–70 (Murray Dry ed., 1981).

and the extent to which courts were authorized—even obligated—to enforce it. The evidence raises at least four ambiguities.

### 1. What Was the Scope of the Right?

The first is the scope of the natural right. One question is the extent to which founding-era Americans really understood it to be inalienable. Scholars seem to agree that all natural rights, whether alienable or inalienable, were limited by the natural rights of others; one could not intrude on another's rights in the name of exercising a natural right.[103] At least some alienable natural rights could be further limited by society, but "only to promote the public good and only with the consent of the people."[104] Many scholars argue, however, that free exercise rights were a special class—they were *inalienable*, so the government could not restrict them for any reason.[105] As Thomas Jefferson put it, "we never submitted, we could not submit [them to the government]. We are answerable for them to our God."[106]

Yet many of the early state constitutional free exercise provisions expressly limited the free exercise right in the name of public "peace and safety."[107] For example, the Georgia Constitution of 1777 simply said that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."[108] Perhaps those provisions simply restated the norm that every natural right is limited by the natural rights of others. But they don't say that: They specify another limit, the peace and safety of the public, which is not a natural right. So, was the natural right of religious liberty unalienable or not? Is it possible there were two natural rights to religious exercise—an alienable one that could be subjected to public peace and safety, and an unalienable one that ever remained beyond the government's reach?

Another question about the scope of the natural right of free exercise is whether it extended to all religiously motivated conduct, or only to a subset,

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103. *See* MUÑOZ, *supra* note 100, at 61–63. Some have argued "that the [natural] right to religious liberty does not take precedence over the civil rights of other people." Heyman, *supra* note 98, at 10.

104. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 265–66 (2017) [hereinafter Campbell, *First Amendment*].

105. MUÑOZ, *supra* note 100, at 55–56.

106. Thomas Jefferson, Notes on the State of Virginia: Query 17, *reprinted in* TEACHING AM. HIST., https://teachingamericanhistory.org/document/notes-on-the-state-of-virginia [https://perma.cc/A4VG-V2A3]; *see also* James Madison, Memorial and Remonstrance Against Religious Assessments, *reprinted in* U.S. NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163 [https://perma.cc/BNC5-K2S3]. ("It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator.").

107. For an overview of the relevance of early state constitutions for interpreting the U.S. Constitution, see Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 816–18 (2020).

108. GA. CONST. of 1777, art. LVI. For a chart of provisions, see MUÑOZ, *supra* note 100, at 65–66.

such as "acts of religious worship."[109] If so, perhaps, the Free Exercise Clause prohibits the government "from exercising jurisdiction over religious worship as such, not from burdening religious believers or institutions through the promulgation of otherwise valid legislation."[110] Assuming that the natural right extended only to acts of worship, that conception is too vague to resolve the exemptions question. What counts as an act of worship? Who decides? Suppose there is a dispute about whether someone's conduct is truly an act of worship or merely one of religiously motivated morality—how could the government refuse the right without favoring one contested view of religion over another, raising questions under the Establishment Clause?[111]

### 2. Positivism and Judicial Review

Several other ambiguities arise from the fact that Americans in the late eighteenth century were experimenting with a new form of constitutionalism that raised questions about the object of constitutional inquiry and the role of courts. The combination of two features made the American constitutions a novelty in Anglophone constitutionalism: the creation of a government by contemporaneous agreement (as opposed to a hypothetical ahistorical agreement) and the memorialization of that agreement in writing (as opposed to a combination of traditions and written laws).

Writing down the terms of the constitutional agreement implied that the written constitution should be the focal point of constitutional analysis. As Professor Jonathan Gienapp has argued, many Americans initially conceived of the constitution as inaugurating "a dynamic system that seamlessly blended text and surrounding practice" that "was very much a work in progress."[112] Under this view, an inquiry into the little-c constitution's requirements focused on the agreed-to *system of government*, not necessarily its written text. As Americans debated the meaning of the constitution over the course of the ensuing decade, however, they gradually coalesced around the text as the object of inquiry into the constitution's meaning.[113]

The drafting, ratification, and early application of the Free Exercise Clause occurred as American constitutionalism was undergoing these changes,

109. MUÑOZ, *supra* note 100, at 55–56, 226; *see also, e.g.*, Northwest Ordinance of 1789, 1 Stat. 52 (reaffirming Art. I of Northwest Ordinance of 1787) ("No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory."); Lupu & Tuttle, *supra* note 5, at 236 (arguing that the original public meaning of "exercise" was an "[a]ct of divine worship" (citation omitted)). The worship-morality distinction tracks John Locke's. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 33, 48–49 (Goldie ed., 2010) (1689).

110. MUÑOZ, *supra* note 100, at 256.

111. *See* WITTE ET AL., *supra* note 19, at 372–75.

112. JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 10 (2018).

113. *See id.* at 9–12 (discussing the early development of the Constitution, accompanying debate, and shifting perceptions as to the written documents significance in political discourse).

complicating the task of making sense of founding-era statements about the scope of the Clause and its requirements. The ambiguity arising from this constitutional innovation helps to explain two enduring questions about the historical materials.

### *i. A Natural Right, a Positive Right, or Both?*

The first is that some Americans talked about constitutional free exercise provisions as though they merely declared or stated the preexisting natural right of religious liberty. Under this view, the Free Exercise Clause did nothing to alter that underlying right. For them, the proper object of constitutional inquiry was the meaning and scope of the natural right, not the meaning of a particular free exercise provision written into a state or federal constitution.[114]

Others, however, seemed to believe that the specific wording of the text mattered. For instance, when James Madison and Thomas Jefferson corresponded about a potential Bill of Rights, they both emphasized the importance of getting the language right.[115] Under this view, the scope of the natural right may be relevant to interpreting the constitutional text, but it is the text that expresses the community's political will and understanding of the scope of the law, and is therefore the proper object of interpretation. This may explain why each state constitution deployed a different formulation to implement the free exercise right.[116]

### *ii. Judicial Review?*

A related question raised by the new constitution, especially the declaration of the Constitution as "the supreme [l]aw of the [l]and,"[117] set apart from ordinary lawmaking, was which institution had the principal, or perhaps the exclusive, authority to implement the Free Exercise Clause. Under the English constitutional model, Parliament had the final say.[118] By analogy, Congress or a state legislature may have had a duty to enforce the free exercise right, but the legislature would determine the scope of that right in the ordinary course of legislation, by deciding whether an accommodation

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114. Muñoz more or less adopts this position: He puts his reasoning in positivistic terms by saying that he is offering a "construction" of the Free Exercise Clause that implements the founders' understanding of the natural right of religious liberty. *See* MUÑOZ, *supra* note 100, at 250.

115. This is, I think, the only way to make sense of the ratification-era correspondence between James Madison and Thomas Jefferson. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* U.S. NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-11-02-0218 [https://perma.cc/3A6S-GDX2]; *see also* 1 ANNALS OF CONG. 456 (1789) (Joseph Gales ed., 1834) (responding to criticism about the Bill of Rights).

116. *See* MUÑOZ, *supra* note 100, at 65–66.

117. U.S. CONST. art. VI.

118. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1693 (2012); *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *90–92.

from a general law would be consistent with the public safety and peace.[119] Judges, for their part, would enforce the right by enforcing the judgment of the peoples' representatives in the legislature and on the jury.[120] During the late eighteenth century, jurists, officials, and popular authors debated which institution had the ultimate authority and duty to interpret "the Constitution."[121]

From the beginning, however, many jurists argued that courts have a duty to enforce the written terms of the Constitution, whatever they are, for they are the supreme law of the land.[122] This view was mainstream by the time the Supreme Court decided *Marbury v. Madison*,[123] but the exact interpretive relationship between the courts and the other branches remained contested for decades.[124] With respect to the Free Exercise Clause, then, the duty of judicial review entails a duty to determine what the Clause requires and to enforce it, whether or not that includes an exemption from a general law.

The ambiguity of judicial duty may have contributed to the diversity of results in the early exemption cases decided by state courts.[125] Indeed, it seems to account for Justice Gibson's reluctance to announce a constitutional

119. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 96–97 (2017); Campbell, *First Amendment*, *supra* note 104, at 290–94 (discussing the natural rights of free speech and press).

120. Perhaps criminal juries would have been understood to have the power and right to acquit against a statute that interfered with the natural right of religious liberty, as they were understood to have that right with respect to the liberty of the press. *See* Campbell, *First Amendment*, *supra* note 104, at 253.

121. *See generally, e.g.*, PAUL YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN (2018) (explaining how the court system interacts with other branches in the American model); *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 24 (2004) (explaining that constitutional law also governed areas of law typically reserved for the political domain); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 51 (1990) (explaining how the judiciary and legislature clashed over uncertain powers).

122. *See, e.g.*, PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 104 (2008); William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 457–58 (2005) (arguing that judicial review before *Marbury* "was dramatically better established . . . than previously recognized").

123. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (referring to U.S. CONST. art. VI); *see, e.g.*, 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *447–49 (John M. Gould ed., 1896) (emphasizing how "an act of Parliament . . . cannot be questioned, or its authority controlled, in any court of justice" because it is an "exercise of the highest authority that the kingdom acknowledges upon earth" (citation omitted in original)).

124. *See* Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 754–59 (2018) (discussing the rarity of judges reviewing a statute for constitutionality in the early nineteenth century).

125. *See* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 103 (2020) [hereinafter Barclay, *The Historical Origins of Judicial Religious Exemptions*] (arguing that the early practice of "equitable interpretation of statutes" on the basis of fundamental law—including constitutional law—was a precursor of free exercise exemptions).

exemption;[126] doing so was contrary to his general view of the proper allocation of constitutional enforcement authority between the legislature and the courts.[127]

The ambiguity of judicial review also makes it difficult to ascertain the implications of the "peace and safety" exceptions to free exercise in many state constitutional provisions.[128] Philip Hamburger has argued that the "peace and safety" exceptions meant that the free exercise right did not entail a right to violate a law of any kind,[129] while Michael McConnell has argued that those exceptions implied that the right included a right to an accommodation from any law except those necessary to secure the state's "peace and safety."[130] Assuming McConnell has the better of the argument does not resolve the question whether *courts* were understood to have the authority to announce exemptions from generally applicable laws. It is plain that some, though by no means all,[131] serious jurists believed that the responsibility to determine the requirements of the "peace and safety" of the community lay with the legislature, not with the courts.[132]

There is a related implication for ascertaining the original scope of the free exercise right. To the extent Americans believed legislatures were authorized, perhaps uniquely so, to define and enforce the constitutional right of free exercise, then early legislative religious accommodations are not only evidence of the scope of that right, but powerful evidence *for* a constitutional right of exemption.[133]

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126. *See* Philips v. Gratz, 2 Pen. & W. 412, 416–17 (Pa. 1831); Commonwealth v. Lesher, 17 Serg. & Rawle 155, 160–63 (Pa. 1828) (Gibson, C.J., dissenting).

127. *See* Eakin v. Raub, 12 Serg. & Rawle 330, 354–56 (Pa. 1825) (Gibson, J., dissenting). Stephanie Barclay has argued that the judge prioritized deferring to the legislature. Barclay, *The Historical Origins of Judicial Religious Exemptions*, *supra* note 125, at 95–96.

128. *See, e.g.*, MUÑOZ, *supra* note 100, at 65–66 (collecting provisions).

129. *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 918–21 (1992); *see also* City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring in part) (adopting this view). *But see* Bradley, *supra* note 99, at 247–48 (arguing that the conduct exemption is a bad construction).

130. *See* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 835–37 (1998); *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1903–04 (2021) (Alito, J., concurring) (adopting this view).

131. *See, e.g.*, People v. Philips (Gen. Sess., N.Y. 1813) (slip op.), *reported in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA: WHETHER A ROMAN CATHOLIC CLERGYMAN CAN BE IN ANY CASE COMPELLABLE TO DISCLOSE THE SECRETS OF AURICULAR CONFESSION 5, 113–14 (1813); Farnandis v. Henderson (Union Dist. S.C. 1827), *reported in* 1 Carolina L.J. 202, 211–14 (1831); Commonwealth v. Cronin, 2 Va. (1 Gratt.) 488, 498, 500, 505 (Va. Cir. Ct. 1855). For an argument that the history of equity jurisdiction supports judicially announced exemptions, see Barclay, *The Historical Origins of Judicial Religious Exemptions*, *supra* note 125, at 124.

132. *See* Philips v. Gratz, 2 Pen. & W. 412, 412–13 (Pa. 1831); State v. Willson, 13 S.C.L. (2 McCord) 393, 394–97 (S.C. 1823); Stansbury v. Marks, 2 Dall. 213, 213 (Pa. 1793).

133. *Cf.* Campbell, *First Amendment*, *supra* note 104, at 312 (making this point with respect to the Speech and Press Clauses). For more discussion on free exercise, see generally McConnell, *supra* note 19, at 1466–73 (giving historical account of Free Exercise controversies).

What are the implications of the interpretive ambiguities flowing from the early evolution of constitutional positivism and judicial review?

First, founding-era claims about the meaning and scope of the free exercise right likely reflect a spectrum of assumptions about the centrality of constitutional text and the proper role of courts. One can imagine a two-by-three matrix, with "Legislative Supremacy" and "Judicial Duty to Enforce the Constitution" on the left side and "Natural Right," "Inalienable Natural Right," and "Positive Right" at the top, yielding six boxes. Any statement about free exercise made during this period could have derived from assumptions that corresponded with any of those boxes or, perhaps more likely, from an inchoate combination of more than one of them.

Second, none of this accounts for constitutional "liquidation,"[134] "historical gloss,"[135] or "tradition."[136] Constitutional positivism and judicial review have interrelated and complicated histories, but both understandings seem to have been fairly settled by the early decades of the nineteenth century.[137] Perhaps that settlement is all that ought to matter. If so, however, more historical work must be done to ascertain the effects of that settlement on the understanding of the Free Exercise Clause in particular.

Third, and relatedly, much work must be done to investigate the mid- to late-nineteenth century understanding of the right of free exercise and its relationship to the Fourteenth Amendment. One thing virtually all scholars agree upon is that the First Amendment was not originally understood to apply to the states.[138] The Supreme Court has applied the free exercise right to the states via the Fourteenth Amendment[139] but has given precious little historical justification for doing so.[140]

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134. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13 (2019) (arguing that, for James Madison, liquidation "centered around three things: an indeterminacy, a course of deliberate practice, and settlement"); Nelson, *supra* note 78, at 10–21 (discussing James Madison's views on liquidation).

135. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012).

136. *See generally* DeGirolami, *The Traditions of American Constitutional Law*, *supra* note 80, at 1123 (identifying the use of tradition as a method of constitutional interpretation).

137. *See supra* notes 112–33 and accompanying text.

138. *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1145–56 (1994); *cf.* Richard A. Posner, *Pragmatism versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 737–38, 737 n.5 (2002) (noting that the First Amendment, now viewed through subsequent doctrines, looks quite different from how it did at the time of its drafting).

139. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

140. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1910–11 (2021) (Alito, J., concurring) (arguing, in total, that "[o]ne of the objectives of the Fourteenth Amendment, it has been argued, was to protect the religious liberty of African-Americans in the South, where a combination of laws that did not facially target religious practice had been used to suppress religious exercise by slaves"); *see also* Lash, *supra* note 138, at 1145–56 (discussing the historical background of the Free Exercise Clause).

This brief survey of the problems raised by the historical evidence for and against religious exemptions under the Free Exercise Clause is meant to illustrate the difficulties of the task, not to resolve them—and certainly not to suggest that they are irresolvable. In my view, the evidence tilts in favor of modest exemptions, but it does not plainly settle the issue.

### *D. CONSTITUTIONAL ETHICS OR MORALITY*

Many jurists—including some originalists[141]—would also consider arguments from constitutional "ethics"[142] or political morality.[143] These restrain judicial discretion even less than the forgoing modalities of argumentation. To begin with, one must select which principle of ethics or morality ought to apply to the case. Consider the array of ethical concerns that have purchase in constitutional text, structure, history, and precedent that may bear on the implementation of the Free Exercise Clause: (1) federalism; (2) republicanism; (3) democracy; (4) fundamental or natural rights of religious liberty; (5) equality rights of religious minority groups; and (6) the equality rights of other individuals and groups.

Some of these point in opposite directions, and deciding which ought to trump the others is a matter of personal judgment. Those who favor republicanism or democracy would probably defer to the judgment of legislatures more often than those who favor natural or fundamental rights.[144] Those who favor liberal egalitarianism may tolerate some exemptions, at least as long as they do not interfere with egalitarian concerns,[145] or they may reject them altogether.[146] Arguments from ethics or morality may provide valuable context for deciding constitutional issues, but because they are abstract, vague, and often incommensurable, they normally increase, rather than reduce, the range of judicial discretion.

### *E. PRECEDENT*

Precedent may seem to be the traditional form of constitutional reasoning most clearly in favor of the ruling in *Smith*. "Does *Smith* support

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141. *See generally* BALKIN, *supra* note 77 (arguing that originalism and a living constitutional interpretation are compatible).

142. *See* BOBBITT, *supra* note 71, at 93–95.

143. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7–11 (1996).

144. *See, e.g.*, Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."); Garnett, *supra* note 5, at 1816–17.

145. *See, e.g.*, Tebbe, *supra* note 5, at 270–74 (arguing for presumption of religious exemption rebuttable by showing an important state interest such as women's reproductive health and recognizing same-sex relationships); Beck, *supra* note 5, at 96–98.

146. *See, e.g.*, Case, *supra* note 5, at 469 (arguing against strict scrutiny for exemptions, even under RFRA).

*Smith*?" is a question that seems to answer itself.[147] Yet this depends on what *Smith* requires and, separately, on the requirements of *stare decisis*.

*Smith* holds that the Free Exercise Clause does not provide a religious exemption from "a 'valid and neutral law of general applicability.'"[148] As thus stated, *Smith* seems to generate a relatively broad rule. The vast majority of laws are religiously neutral in the sense that they neither expressly refer to nor apparently target religion, religious practice, or religious motives.[149] What counts as "generally applicable" is less clear, but *Smith* helpfully contrasted a generally applicable law with a regime of "individualized governmental assessment[s]."[150] Since *Smith*, however, the Court has expanded the breadth of both *non*-neutral laws and *non*-generally applicable laws,[151] thereby reducing the reach of the no-exemption rule.[152] The more often the Court expands the exceptions to that rule, the more often judges could reasonably disagree about whether and when the exceptions apply, and therefore when the no-exemption rule applies.[153] *Smith* is still good law, but the scope and application of the no-exemptions rule is increasingly a matter of discretion.[154]

But, of course, it always was. *Smith* evoked an extraordinary political response, but the decision was always just one among many Supreme Court free exercise decisions. It did not even *purport* to overturn any prior decisions; it merely purported to reinterpret their rationales in order to justify a baseline rule of no-exemptions.[155] Under the doctrine of *stare decisis*, though, later courts are required to give no more deference to *Smith*'s reinterpretation of prior decisions than they are required to give to those decisions' original justifications. A court could easily treat *Smith*'s reasoning, and thus its scope, with as little deference as *Smith* treated the reasoning in prior cases, greatly narrowing its reach to, say, criminal laws. Since at least 1940, the Supreme Court's exemption decisions have been unpredictable and unstable—no

147. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) ("If precedent matters, a prior decision now believed erroneous still affects the current decision simply because it is prior.").

148. *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

149. *See id.* at 879–80.

150. *Id.* at 884.

151. *See infra* Part III.

152. *See* Schauer, *supra* note 147, at 591 ("[I]f the conclusions of one case apply to a sweepingly broad set of analogies . . . then the constraints of precedent are likely to be substantial."); *see also id.* at 595 (discussing the imperfections of legal "system[s] in which precedent operates as a comparatively strong constraint").

153. Hart, *supra* note 72, at 656 ("[D]isputable questions of what a precedent 'amounts to' and whether or not a given case falls within the ambit of a precedent . . . calls for the exercise of discretion.").

154. *See* Koppelman, *supra* note 58, at 2298.

155. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879–84 (1990).

matter which test the Court purported to apply.[156] Some of those decisions ought to be followed on their own terms, some on the terms offered by subsequent decisions (such as *Smith*), some as precedent, and some not at all. The diversity of the holdings in those cases, including *Smith*, dilutes the force of any one of them.

Defining *Smith*'s reach is only the beginning of the range of judicial discretion associated with precedent. At least some on the Court are far more concerned with whether *Smith* should be overruled rather than narrowed. But the demands of *stare decisis* is a model of legal indeterminacy. Suppose jurists agree about the applicable factors.[157] Each of them is a standard that calls for a degree of discretion. Take the "reliance" factor: What sort of "interest" is relevant for assessing reliance on *Smith*?[158] Does a *state*'s reliance on *Smith* count?[159] Now suppose jurists agree about the *scope* of the *stare decisis* factors. They might still disagree about how those factors apply to *Smith*.[160] None of the ordinary tools of constitutional interpretation, including precedent, settle the exemption question.

## III. JUDICIAL REVIEW AND DEFERENCE

The Supreme Court has discretion at each stage of implementing the Free Exercise Clause: the scope of the right, what standard to apply to exemption claims, and how to apply it.[161] The decision at each stage will have different downstream effects on officials, courts, and litigants. Given the indeterminacy of the ordinary legal materials, perhaps the most important consideration for each stage of implementation will be how best to distribute responsibility for weighing religious exercise against other important government

156. *See* Lupu & Tuttle, *supra* note 5, at 233–38; James M. Oleske, Jr., *Free Exercise Dis(Honesty)*, 2019 WIS. L. REV. 689, 690–98. For pre-1940 examples of exemption decisions within post-1940 cases, see generally *Girouard v. United States*, 328 U.S. 61 (1946) (finding Free Exercise Clause and Article VI prohibit government from denying citizenship to religiously motivated conscientious objector to war); *Largent v. Texas*, 318 U.S. 418 (1943) (finding city ordinance that requires permit to solicit orders for books but reserves to city official discretion to deny permits is unconstitutional as applied to religious publications); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying the Free Exercise Clause to the states).

157. *See* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 109–21 (2017) (describing the factors as "procedural workability," "factual accuracy," "jurisprudential coherence," "reliance and disruption," and, for some, "flawed reasoning and flagrancy of error").

158. *Id.* at 116–18.

159. *See id.*

160. *Compare, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992) (upholding "the essential holding of *Roe v. Wade*," 410 U.S. 113, 164–65 (1973)), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–85 (2022) (overruling *Roe*).

161. *See, e.g.*, Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 142 (1997); FALLON, *supra* note 55, at 48 (distinguishing between "triggering rights," "scrutiny rights," and "ultimate rights"). For other accounts of the judicial process of turning the constitutional text into an applicable rule, see generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (expounding on the modern "metadoctrinal" approach to constitutional law).

interests between lawmakers and courts. At each stage, the Court should keep in mind the whole panoply of legal mechanisms for protecting religious exercise.[162] Given the judicial branch's incompetence to ascertain and balance competing private and public interests, as well as the risk of legislative blind spots or bias against unpopular or esoteric religious views, the ideal regime would balance legislative initiative in protecting religious exercise with measured but robust judicial review as a backstop.

### *A. THE INEVITABILITY AND INCOMMENSURABILITY OF VALUE JUDGMENTS*

The Constitution elevates the free exercise right above other governmental interests but does not specify how to implement that right.[163] Implementing the right necessarily entails value judgments, for it requires weighing the interests of the private parties seeking an accommodation—and society's interest in protecting religious liberty generally—against society's interests in applying the law without an exemption.[164] Often those interests seem to be incommensurable: comparing the relative value of a party's religious exercise against society's interest in, say, the more efficient use of public lands is like asking whether a song is more melodic than a breeze is refreshing. Any judgment requires converting the relevant interests into quantifiable units that can be weighed against one another. Something important about religious exercise and religious liberty are lost in such a calculus, even when the government's interests are readily quantifiable—and of course, some government interests, such as protecting the dignity of other citizens, are not. Yet some such conversion is necessary for determining when a religious exemption is appropriate.[165] Since the traditional methods of constitutional reasoning do not resolve the issue, the question is which institution ought to be responsible for doing so?

### *B. ARGUMENTS FOR JUDICIAL REVIEW*

The classic case for judicial review of rights, including free exercise, is that the legislature will undervalue the rights of those without sufficient political clout to protect them through the ordinary political process (I will use "ordinary political process" as a shorthand for the law- and policymaking process of the legislature, the executive, and administrative agencies).[166] Large religious groups may be able to secure their right to engage in conduct that many of their members believe to be obligatory (like using wine for

162. *See supra* Part I.

163. U.S. CONST. amend. I.

164. *See* FALLON, *supra* note 55, at 40.

165. *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1626 (1993).

166. *See* Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 LAW & PHIL. 247, 247–48 (2003).

Christian communion),[167] while smaller groups are unable to protect their practices (like using peyote in a Native American Church ceremony).[168] In fact, the power holders may be biased against smaller, more esoteric groups, doubling their inability to protect themselves in the ordinary political process.[169] In either case, the courts are the only governmental backstop for fundamental rights. As critics of *Smith* have pointed out, courts do not generally defer to the legislatures' judgments about other fundamental rights, so why should they defer in free exercise cases?[170]

Some scholars suggest that judicial review is especially important now because popular support for religious liberty is "waning."[171] Indeed, some religious liberty advocates argue that "religious freedom is increasingly threatened."[172] Their evidence seems to be that many Americans oppose exceptions for religious exercise from laws that protect reproductive and LGBT rights.[173] But the conflict between religious liberty and other civil rights reflects a dispute about the proper scope of religious liberty, not necessarily a dispute about the importance of religious liberty itself.[174] Few think religious liberty ought to trump every other consideration. The question is what sorts of public or private interests ought to override it. The conflicts between religious liberty and other civil rights generate more exemption claims, but they do not, without evidence of a general decline in support for religious

167. *See* National Prohibition (Volstead) Act, Pub. L. No. 66-66, § 6, 41 Stat. 305, 311 (1919) (repealed 1935).

168. *See* Claire McCusker, Note, *When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith *World*, 25 YALE L. & POL'Y REV. 391, 395–96 (2007) (describing how minority religions may have their practices prohibited more often by laws of general applicability because of the tendency for legislation to be drafted with dominant religions in mind).

169. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–42 (1993).

170. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 891–907 (1990) (O'Connor, J., concurring); Rienzi, *supra* note 5, at 357–58.

171. *See* Bradley J. Lingo & Michael G. Schietzelt, Fulton *and the Future of Free Exercise*, 33 REGENT U. L. REV. 5, 5–6, 35–36 (2020) (arguing that, in light of religious liberty's politicization and mischaracterization, "[t]he path forward will require a more robust judicial role in" monitoring free exercise claims); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 412–19 (2011) (describing the concern for LGBT civil rights that doomed the Religious Liberty Protection Act).

172. *See, e.g.*, *Our First Freedom*, ALLIANCE DEFENDING FREEDOM, http://adflegal.org/issues/religious-freedom [https://perma.cc/679L-F256].

173. *See id.* (highlighting issues involving reproductive and LGBT rights).

174. For considerations of the conflict between LGBT rights and religious liberty, see generally ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT (2020); RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) (discussing possibilities to reconcile this conflict).

liberty, justify a special form of judicial review.[175] Whatever one's views about the conflict between religious liberty and civil rights, the question remains how *generally* to balance legislative and judicial responsibility for defining and protecting religious liberty against other interests.

### C. *ARGUMENTS FOR DEFERENCE*

The case for deferring to legislative value judgments relies on arguments about relative institutional competence, democratic accountability, and the ease of error correction.[176] As noted above, evaluating a claim for a religious accommodation almost always requires weighing incommensurable goods.[177] There is no reason to think judges are better at that task than legislatures are.[178] For this reason, perhaps, Justice Scalia asserted in *Smith* that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[179]

When judges announce an exemption, they substitute their judgment for the judgment of an institution that more directly represents, and is more directly accountable to, the views of the public.[180] And when judges decide that the *Constitution* requires an exemption that dramatically departs from the public's judgment, the public's only recourse is to amend the Constitution or, over the longer term, to use the political process to appoint judges who better reflect the public's view.[181] Legislative accommodations that prove unworkable or undesirable, by contrast, may be changed through the ordinary lawmaking process.[182] For these reasons and others, Eugene Volokh has argued that even judicially announced exemptions should be subject to legislative override.[183]

Another argument against judicial exemptions deserves attention. In *Smith*, the Supreme Court worried that judicial exemptions from generally applicable laws undermine the rule of law by allowing "every citizen to become

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175. Indeed, there is evidence that support for religious pluralism and protection for religious minorities is high. *See* BECKET, RELIGIOUS FREEDOM INDEX: AMERICAN PERSPECTIVES ON THE FIRST AMENDMENT 7 (2022) [hereinafter RELIGIOUS FREEDOM INDEX], https://becketnewsite.s3.amazonaws.com/20221207155617/Religious-Freedom-Index-2022.pdf [https://perma.cc/22L7-FAMB].

176. Garnett, *supra* note 5, at 1822–23 (arguing that religious accommodations are best handled politically and not through judicial review); Hamilton, *supra* note 5, at 1215.

177. *See supra* Section III.A.

178. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 3 (1980). Douglas Laycock argues that "broad policy questions are better left to legislators than to courts," but that courts are better at factfinding than legislatures are. *See* Laycock, *supra* note 5, at 1175. Whether to accommodate a religious objector seems to me a policy question, not a question of fact.

179. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 889 n.5 (1990); *see id.* at 890.

180. Volokh, *supra* note 5, at 1483–87.

181. *See id.* at 1469.

182. *See id.* at 1486–87.

183. *See id.* at 1469–70, 1490–92 (supporting a "common-law exemption model" wherein judges make decisions in the first instance and legislators make the final call).

a law unto himself."[184] The problem with this argument ought to be apparent: It begs the question whether the Free Exercise Clause requires the exemption. If so, enforcing the exemption does not make the objector into "a law unto himself" any more than enforcing a legislative accommodation would. The law is shot through with exceptions—they promote the purpose of the lawmaker in the same way the outer bounds of a law's coverage does.[185] The argument that a constitutionally required religious exemption flirts with anarchy eats its own tail.

## IV. IMPLEMENTING THE FREE EXERCISE CLAUSE

### *A. LEGISLATIVE-JUDICIAL DIALOGUE*

The above arguments for and against judicial deference to legislative value judgments pose a false binary. In reality, the American tradition of religious exercise has been the product of a dialogue between legislatures and courts. Legislatures have almost always taken the initiative in determining the proper bounds of a religious accommodation.[186] Courts have enforced those accommodations and, on occasion, served as a backstop to protect religious claimants who had no recourse in the ordinary political process.[187] Sometimes it has worked the other way: The Court has denied a constitutional exemption and the legislature has followed up with a statutory one.[188] The result of this dialogue is the most robust legal regime of free exercise the world has ever seen.

This has two important implications for judicial review. The first is that Americans appear to generally support religious liberty.[189] This is crucial for its longevity. The Supreme Court cannot meaningfully enforce, much less save, a right the public does not support.[190] The flip side is that the Court should consider risk to the long-term support for religious liberty if its constitutional decisions get too far out of step with public sentiment.

Another implication of widespread support for free exercise is that courts can usually trust the ordinary political process to fairly consider and evaluate

184. *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)); *see* Case, *supra* note 5, at 478–87.

185. *See, e.g.*, Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991).

186. *See generally, e.g.*, Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488 (codified as amended at 42 U.S.C. § 2000bb) (defining the scope of religious freedom through legislative action), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

187. *See generally* Lupu & Tuttle, *supra* note 5 (acknowledging how the Court may develop exceptions).

188. *See supra* note 4 and accompanying text.

189. *See* RELIGIOUS FREEDOM INDEX, *supra* note 175, at 16–17 (showing broad support for freedom of religion among the American public). *But see* PEW RSCH. CTR., WHERE THE PUBLIC STANDS ON RELIGIOUS LIBERTY VS. NONDISCRIMINATION 3–11 (2016) (finding the public closely divided over how to balance religious liberty against other interests).

190. *See, e.g.*, Letter from James Madison to Thomas Jefferson, *supra* note 115; *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 420 (2d ed. 2008).

demands for religious accommodation. The baseline assumption should be that American legislatures will provide religious accommodations when consistent with the government's interests. Yet this should be only a baseline. The hard question is when courts should be more or less deferential to legislative decisions *not* to accommodate religious exercise.

When a claimant seeks a constitutional exemption, courts may draw one of three conclusions. The first is that the legislative process was fair: The legislature considered an accommodation, but declined to provide one because it concluded the accommodation would threaten the government's interests. This presents a clear case of the legislature's evaluation of the relative weight of the religious exercise and the government's interest. When courts interfere to announce an exemption, it should be because they are certain that the legislature has failed to give religious exercise its due weight.

The second possible inference from a legislative nonaccommodation is that the lawmaking process was fair but the legislature did not consider an accommodation because the religious exercise fell into a legislative blind spot: The legislature did not know about the religious exercise and the religious claimants did not know about the threat to their exercise or they lacked the wherewithal to lobby for an accommodation.[191] In such cases, the suit's publicity may bring the issue to the legislature's eye. Judicial review functions in the first place as a spotlight, to illuminate the issue for the legislature. Because of the legislative blind spot, however, the court cannot assume the legislature would or would not have provided an accommodation. It is left to decide the issue in the first instance, under whatever standard the Supreme Court chooses, keeping in mind that constitutional errors are harder to fix than legislative ones.

The third inference from a legislative nonaccommodation is that the process was unfair—that the lawmaker labored under a prejudice or bias against the religious exercise, such that its rejection of the accommodation does not reflect an objective evaluation of the religious exercise's threat to the government's interests. Unfortunately, American history furnishes plenty of examples of such bias.[192] In these cases, the courts should be neither deferential nor at equipoise—they are, at least for the time being, the free exercise right's last line of defense. The legislature cannot be trusted to fairly ascertain and determine the scope of the religious exercise right. The Court's standard of

191. *E.g.*, Volokh, *supra* note 5, at 1481 (discussing the political challenges of getting a statutory accommodation).

192. *See, e.g.*, Daniel Wiessner, *SCOTUS Won't Decide If Bias Law's Religious Exemption Applies to Hiring*, REUTERS (Mar. 21, 2022, 11:36 AM), https://www.reuters.com/legal/government/scotus-wont-decide-if-bias-laws-religious-exemption-applies-hiring-2022-03-21 [https://perma.cc/ZPL7-2TQU].

review should be more rigorous, if only as a prophylaxis.[193] The challenge is how to tell when a nonaccommodation is the result of the ordinary legislative process or the result of a blind spot or legislative bias.

### *B. JUDICIAL REVIEW*

Judicial review of free exercise claims requires (at least) three conceptually distinct stages of construction or implementation: defining the scope of the right (for instance, does the right include only divine worship or does it extend to other religiously motivated conduct?); articulating the applicable legal standard (strict scrutiny or something else?); and applying that standard to individual cases.[194] The Supreme Court has discretion at each stage of implementation. My focus here is on the second stage: What legal standard(s) the court should create to apply to the run of cases. I argue that the current free exercise regime—considering all of the legal mechanisms for enforcing the right—does a fairly good job of balancing legislative initiative with judicial protection. *Smith* creates a baseline of deference, some of the most important forms of religious exercise receive special protection, and *Tandon v. Newsom* gives courts the tools they need to investigate nonaccommodations for potential legislative bias.[195]

#### 1. Legislative Initiative

Overall, the regime largely defers to the legislature to define and enforce the free exercise right. Legislatures are usually generous with accommodations and courts generally defer to the legislature's view of those accommodations. All of this is consistent with the original understanding of the Religion Clauses, American constitutional tradition, longstanding judicial precedent, and a commitment to religious liberty. Legislatures have ordinarily taken the lead in providing accommodations. This is desirable because legislatures are more competent than judges at deciding difficult questions of values according to the views of the public. Religious liberty will not last long if the public is not generally behind it.

#### 2. Heightened Scrutiny for Some Forms of Religious Exercise

Courts apply heightened scrutiny, though, to any law that interferes with certain forms of religious exercise. Religious exercise that is expressive is entitled to relatively strict scrutiny under applicable free speech doctrine

193. The discussion of legislative blind spots and bias was inspired by John Hart Ely's argument that judicial review of equal protection claims should be guided by concerns about inefficiencies in the legislative process. *See* ELY, *supra* note 178, at 30–33.

194. *See* FALLON, *supra* note 55, at 48 (distinguishing between "triggering rights," "scrutiny rights," and "ultimate rights").

195. *See generally* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990) (creating the baseline for states); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (providing further tools).

(more scrutiny if the expression is written, verbal, or associational; less if it is expressive conduct). When the exercise is selecting a minister for a religious community, the protection is categorical and absolute. With both of these forms of exercise, *Smith* critics already have what they want: heightened scrutiny. They simply want heightened scrutiny of *every* governmental burden on religiously motivated conduct.

The special protection for religious expression[196] and ministerial selection[197] is defensible. Selecting ministers and religious expression are both core features of many (but not all) religions.[198] They often constitute acts of worship, are inextricably bound up with disputed theological beliefs, and are uniquely responsible for the maintenance and conveyance of the faith. They both have a communal dimension—expression is ordinarily directed at someone else, and often on behalf of a community, and selecting ministers is one of the key features of communal independence. Many religious communities simply could not function without wide latitude for expression and clergy appointment.

This is not to say that expression and ministerial selection are the only forms of religious exercise that serve those functions. And perhaps those other forms of religious exercise should receive more protection than they do. Is across-the-board heightened scrutiny the only way to do so? Not necessarily. Consider, for instance, Justice Alito's "communion hypothetical."[199] Suppose a state prohibits the use of alcohol without exception; it thus has the incidental effect of prohibiting the use of alcohol in Christian communion. The law is neutral and generally applicable; under the *Smith* regime it is not subject to strict scrutiny. Prohibiting conduct that for many constitutes the core of Christian worship seems to conflict with the founders' expectations, longstanding tradition, and almost any sensible theory of religious liberty. Is strict scrutiny the only answer?

No. In fact, strict scrutiny may not even lead to an exemption. In *Smith*, for instance, Justice O'Connor believed that strict scrutiny did not entitle the plaintiffs to use a controlled substance for what amounts in the Native American Church to a sacrament.[200] When popular sentiment against certain conduct is strong and widespread enough to categorically prohibit its use, some judges will be hard to convince because they are creatures of the same society that prohibited the conduct in the first place.

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196. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022) ("That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("[I]n Anglo-American history . . . government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.").

197. *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020).

198. *See* JULIAN RIVERS, THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM 108 (2010).

199. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring).

200. *Smith*, 494 U.S. at 903–06 (O'Connor, J., concurring).

By contrast, suppose the Court held that the Free Exercise Clause, perhaps alongside the Establishment Clause, requires near-categorical protection for communal acts of worship (with exceptions for those that result in serious and permanent physical harm, so no human sacrifice or mutilation). Such a rule would be grounded in a similar combination of concerns about expression, assembly, communal integrity, and maintaining the faith that animate the ministerial exception. The rule could be applied equally across religions. Judges familiar with the practices of more widely known religions could easily apply the rule by analogy to the practices they know well. For instance, it would almost certainly have led to a different result in *Smith*—without requiring courts to apply a vague one-size-fits-all standard to every religious claim. The rule's coverage would be fairly narrow, but of course there would be boundary cases, and courts would have to be careful to avoid favoring one theological view about what constitutes "communal worship" over others. But it would be at least as judicially manageable as a uniform standard of heightened scrutiny. This is just an example of the sort of doctrinal development available to courts under the current regime.

### 3. Scrutinizing Legislative Blind Spots and Bias

The *Smith* regime's general deference to legislatures when they have not provided an accommodation and have not overtly targeted a religious practice is in keeping with the nation's longstanding tradition of religious liberty and with concerns about relative institutional competence and legitimacy to resolve conflicts among incommensurable interests. Yet in light of the many historical instances of legislative blind spots and religious bias, a strict reading of *Smith* is too deferential.[201] The most-favored-rights interpretation of *Smith* articulated most clearly in *Tandon* has weaknesses, but it has the laudatory effect of smoking out blind spots and bias.[202]

If the legislative nonaccommodation was the result of a blind spot, the fact of litigation alone, and especially the visibility given to the accommodation claim by Supreme Court review, may be enough to incentivize the legislature to provide an accommodation. This may account for many of the cases, mentioned above, in which a legislature provided a legislative accommodation only after the Supreme Court denied a constitutional one based on the Free Exercise Clause. When litigation does not prompt a legislative accommodation, however, applying strict scrutiny does not have the downside of substituting a judicial value judgment for a legislative one because, by definition, a blinkered legislature did not make a value judgment. When the legislature carved out nonreligious exceptions that are akin to the

201. *See* Krotoszynski, *supra* note 5, at 1263 (arguing *Smith* does not do enough to protect against discrimination).

202. Lund, *supra* note 5, at 871–72 (arguing that deferring to legislatures underprotects religious minorities).

claimant's religious conduct, there is little reason to worry that announcing a religious accommodation frustrates the people's will as reflected in the ordinary political process.

If the nonaccommodation was the result of religious bias, however, the rationale for robust judicial review is at its apex. The court is right to apply a relatively strict form of strict scrutiny, for this is where the legislature has not only failed to fairly consider providing an accommodation but has done so out of bias against the religious basis for the religious conduct. It makes sense to use comparable nonreligious exceptions as a basis for suspicion of bias. In some cases, there will be evidence from the legislative history that supports that suspicion.[203]

Using nonreligious exceptions as a condition of heightened scrutiny does nothing to reduce the indeterminacy of that standard of review, whether it calls for intermediate or strict scrutiny. Judges will still reasonably disagree about whether the government's interest is compelling and about whether the nonaccommodation is sufficiently tailored to that interest. What the *Smith-Tandon* regime does is focus that inquiry on the cases that are more likely to have been the product of forces that are inconsistent with the constitutional tradition of legislative accommodation.[204]

This is not to say that the *Tandon* rule and its application in recent pandemic-era cases leave nothing to be desired—most laws have nonreligious exceptions.[205] A great deal turns on the comparison of those exceptions with the religious conduct under review.[206] Absent other evidence of bias, courts should be fairly deferential to the government's justifications; most laws are somewhat overbroad and underinclusive, and such imperfect tailoring is not necessarily a sign of bias. But gaping loopholes for nonreligious conduct that are hard to distinguish from the claimant's conduct are a bad sign. Whether a nonreligious exception is comparable to the exemption the claimant seeks is inevitably a matter of practical judgment, but courts inclined to suspect the legislature of bias should bear in mind the arguments that weigh in favor of generally deferring to the legislature's value judgment.

For instance, at least some of the COVID-era cases challenging restrictions on group gatherings could have gone either way. As Chief Justice Roberts appreciated, courts have often given special deference to

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203. *See, e.g.*, Dr. A. v. Hochul, 142 S. Ct. 2569, 2569–71 (2021) (mem.) (Gorsuch, J., dissenting); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540–42 (1993).

204. *See* Laycock & Berg, *supra* note 5, at 39 (arguing that the generally applicable standard favors the government because it allows the government to change the rule midstream and prolong litigation—but that is only in the case where the government is willing to eliminate nonreligious exceptions, which reduces a concern about unfairness in the legislative process, but of course does not recognize a free exercise right).

205. *See* Schauer, *supra* note 185, at 871–72.

206. *See* Lund, *supra* note 5, at 845 (criticizing the doctrine as too indeterminate).

policymakers' expertise and ability to respond quickly to evolving circumstances during emergencies, but the justification for special deference usually wanes with the acuity of the crisis.[207] The COVID-era religious liberty cases were complicated by partisan polarization about how the government ought to respond to the crisis, with state officials of both parties apparently scoring points as much on the basis of style as substance, especially as the pandemic wore on. To some extent, the polarization followed religious lines. This polarization made it harder, not easier, for courts to assess the relative merits of conflicting policy schemes, giving greater reason for the Court to stay its hand. Yet in some cases, at least, the pattern of exemptions from restrictions on gathering were difficult to explain except as a legislative preference for some interests over religious exercise. The more the government gerrymandered social gatherings by the number of participants, the size of the space, and the purpose of the gathering, the less plausible the government's justifications for failing to give the same context-specific treatment for religious gatherings. If casinos can host gamblers (with masks, social distance, etc.), why not churches, subject to the same strictures?[208] If customers can select a bottle of wine, and patients enjoy an acupuncture treatment, why can't parishioners worship together—subject to whatever regulations apply to pandemically comparable gatherings?[209]

There will be hard cases under any constitutional test, and especially, one might think, during an international crisis. Whatever the circumstance, courts deploying *Tandon* should focus on rooting out prejudice against religious discrimination, rather than substituting their own preference for religious exercise for the government's good faith policy judgment.

### 4. Administrability

No doctrinal regime can be perfect, from any jurisprudential standpoint, even one that generally supports the regime. The current free exercise regime does not eliminate judicial discretion or determine results in hard cases. For instance, under the *Tandon* doctrine, how do we know whether nonreligious conduct is comparable to the religious claimant's conduct—even considering

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207. *See Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 75 (Roberts, C.J., dissenting) ("[I]t is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic."); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' When those officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'"(first quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905); then quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

208. *See generally* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (mem.) (denying church's application for injunctive relief).

209. *See generally Roman Cath. Diocese of Brooklyn*, 141 S. Ct. (granting application for injunctive relief).

the question from the government's standpoint. Under strict scrutiny (whether applied across the board or to laws that are insufficiently neutral and generally applicable), what counts as a compelling interest? How narrowly tailored to achieving that interest ought the law be?

From the standpoint of administrability, one of the least attractive features of the current regime is that it is complicated.[210] It consists of a variety of context-specific rules arising under different constitutional provisions, each with its own genealogy. By contrast, a uniform regime of strict scrutiny would appear to be relatively easy for officials, lower courts, and claimants to understand and apply,[211] and, perhaps, more difficult for courts to manipulate[212]—at least on the surface.

Unfortunately, experience with applying heightened scrutiny to religious exemption claims suggests otherwise. Even *Smith*, which sought to simplify the analysis, admitted that exemption claims fell into multiple categories depending on factual context.[213] Some claims implicated additional constitutional rights. And some claims were entitled to strict scrutiny, for instance if they were the product of a regime of individualized exceptions. In reality, the Court's application of strict scrutiny before *Smith* had generated an array of controversial decisions, each of which served as a basis for analogical reasoning in subsequent cases. Government regulations are diverse and sometimes innovative. Religious practices are too. The myriad and unpredictable ways the government can affect religious exercise guarantees a common law development of constitutional rules, regardless of the doctrinal default rule for religious exemptions.

### 5. Summary

On the whole, the current regime reasonably balances legislative initiative with judicial safeguards. Some of the most important forms of religious liberty receive special protection and all forms of religious liberty are protected from legislative blind spots and bias. The regime promotes the traditional dialogue between legislatures deciding in good faith whether to exempt religious objectors and courts making sure the legislature actually acted in good faith. Doing so has the benefit of allowing the people a say in the meaning of vague constitutional provisions. This in turn incorporates public sentiment into constitutional law, reduces the influence of unelected judges on American politics, and reinforces the legitimacy of federal courts.

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210. Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 192, 200–05, 209–210 (2009) (describing how the *Smith* regime "has created a quagmire of confusion related to religious freedom" that "is not acceptable").

211. Beck, *supra* note 5, at 121–27.

212. Lund, *supra* note 5, at 859–60; Koppelman, *supra* note 58, at 2259, 2291.

213. *See supra* Section I.C.

## CONCLUSION

Whether and when courts should announce an exemption from a "neutral law of general applicability" that burdens religious exercise has bedeviled courts and scholars for decades. They have often framed the question in terms of whether to uphold or overturn *Smith*. But that is the wrong question. *Smith* did not eliminate religious exemptions. Answering "*Smith* or not-*Smith*" will not answer the deeper question raised by every exemption claim: Should the court defer to the lawmaker's value judgment? The answer to that question, this Essay has argued, is sometimes yes, sometimes no. Much turns on the importance of the religious exercise at issue and on the extent to which the legislature can be trusted to have fairly considered providing an accommodation. Applying heightened scrutiny to every exemption claim would simply push this inquiry into the application stage; it would not resolve it, and it would not provide the coherence and predictability religious liberty advocates seek. The current regime sensibly balances competing arguments about institutional responsibility by giving legislatures latitude to generously accommodate religious exercise, offering more judicial protection for especially important forms of religious exercise, and policing legislative decisions not to accommodate religion for blind spots and bias. It continues the American tradition of defining and protecting free exercise rights through legislative initiative and judicial safeguards.