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CONSTITUTIONAL LAW—ANSWERING JUSTICE BARRETT'S *FULTON* PROMPT: THE CASE FOR A NARROW RECONSIDERATION OF FREE EXERCISE

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INTRODUCTION

In *Fulton v. City of Philadelphia*, the Supreme Court, for the second time in three years,[1] considered a case involving the conflict between First Amendment religious, speech, and associational freedoms and the civil rights of the LGBTQ community.[2] And, for the second time, the Court arrived at an apparent compromise, issuing a narrow, factual ruling in favor of the party seeking an exception from antidiscrimination law while avoiding any firm precedent that might create a broader exception.[3]

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1. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018). In *Masterpiece Cakeshop, Ltd.*, the Court was asked whether a baker could refuse to make a wedding cake for a same-sex wedding when the baker objected to same-sex marriage on religious grounds, a question it did not answer, finding instead that comments made by members of the Civil Rights Commission showed that they treated the baker's religious claims with hostility, thereby violating his rights. *Id.* at 1731–32.

2. Fulton v. City of Philadelphia*,* 141 S. Ct. 1868 (2021). This case arose from a Catholic foster care agency's refusal to certify same-sex couples as foster parents, which Philadelphia claimed violated the nondiscrimination requirement in its foster care contract. *Id.* at 1874. The Court held that because the contract allowed for discretionary exemptions from the nondiscrimination requirement, the requirement was not generally applicable, and under the circumstances, where every other foster care agency in the city was willing to certify same-sex couples, and no same-sex couple had ever even approached the petitioner's agency, the City could not deny an exemption. *Id.* at 1878, 1881–82.

3. *See id.* at 1882. For analysis of the Court's evasive decision in *Masterpiece Cakeshop, Ltd.* see, for example, Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 297–301 (2020); Ira C. Lupu & Robert W. Tuttle, *Masterpiece Cakeshop—A Troublesome Application of Free Exercise Principles By a Court*

In addition to this substantive dodge, the Court also "sidestep[ped]"[4] the question on which certiorari had been granted: whether to overrule *Employment Division, Department of Human Resources of Oregon v. Smith*.[5] In *Smith*, the Court ruled, in upholding the denial of unemployment benefits to the respondents on the basis of their religiously motivated peyote usage, that a "generally applicable and otherwise valid" law does not offend the Free Exercise Clause of the First Amendment when the law incidentally burdens religious activity.[6]

Despite granting certiorari, months of briefing, and oral argument on the question of whether to overturn *Smith*, the Court ultimately avoided the question altogether. The Court found that a single provision in the city's contract—which gave the Commissioner of the Department of Human Services discretion to make exceptions from its nondiscrimination provisions—meant the legal scheme was not neutral or generally applicable, and was thus outside the scope of *Smith*.[7] Thus, the decision avoided two thorny questions in a single swoop: whether to overrule *Smith*, and where to draw the line between religious liberty interests and LGBTQ nondiscrimination interests.[8] As Justice Gorsuch observed in concurrence, *Fulton*, like *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, failed to even provide decisive guidance within the litigation itself, as the government actors in both cases could simply close the "non-neutral" loopholes that had removed their action from *Smith*'s protections—putting the litigants right back where they had started.[9]

Perhaps the most intriguing aspect of *Fulton* was Justice Barrett's

Determined to Avoid Hard Questions, TAKE CARE (June 7, 2018), https://takecareblog.com/blog/masterpiece-cakeshop-a-troublesome-application-of-free-exercise-principles-by-a-court-determined-to-avoid-hard-questions [https://perma.cc/32JY-J7J4]. For analysis of *Fulton*, see *infra* Part IV.

4. *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring).

5. *See id.* (citing Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990)).

6. *Smith*, 494 U.S. at 878.

7. *Fulton*, 141 S. Ct. at 1878.

8. *See id.* at 1931 (Gorsuch, J., concurring) ("Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid 'picking a side.'").

9. *Id.* at 1929–31; *see also id.* at 1887 (Alito, J., concurring). While Justice Gorsuch accurately described litigation that followed the narrow ruling in *Masterpiece Cakeshop, Ltd.*, his warnings about the future of the *Fulton* litigation proved unfounded, with the city recently reaching an agreement to pay Catholic Social Services' legal bills and to exempt the agency from its nondiscrimination requirements. Julia Terruso, *Philadelphia Reaches $2 Million Settlement with Catholic Foster-Care Agency, Aiming to Prevent Future Challenges to LGBTQ Rights*, PHILA. INQUIRER (Nov. 22, 2021), https://www.inquirer.com/news/foster-care-philadelphia-catholic-church-lgbtq-settlement-supreme-court-20211122.html [https://perma.cc/5H75-4LJK]. However, he was correct that the dodge in *Fulton* could only delay a decision on resolving the critical substantive questions avoided by the majority, a delay that is not particularly beneficial to parties on either side of the dispute.

concurrence, joined by Justice Kavanaugh in full and Justice Breyer except for a single paragraph.[10] In the opinion, the newest Justice agreed that *Smith*'s neutrality rule was problematic, but mused that proposed alternatives did not satisfactorily capture the nuance of free exercise claims involving neutral and generally applicable laws.[11] Justice Barrett also noted questions that might arise if *Smith* were overturned before concluding that the case did not require resolving those questions because the discretionary exception provision rendered the city's actions non-neutral.[12]

Justices Alito and Gorsuch also wrote concurrences, joined by Justice Thomas,[13] in which they admonished the majority for its failure to overrule *Smith*,[14] and Justice Barrett for her professed hesitation in deciding how to replace *Smith*.[15]

It is tempting to speculate, as Justice Gorsuch did, as to the motivations of both the majority and the three "middle" Justices in *Fulton*.[16] Justice Breyer, for instance, first called for the Court to reconsider *Smith* in 1997,[17] and there is no shortage of suggestions for replacing *Smith* in the scholarly literature.[18]

But at the same time, the Court's equivocation in both *Masterpiece Cakeshop, Ltd.* and *Fulton*, along with Justice Barrett's concurrence, suggest that there is a decisive bloc of Justices on the Court who at least wish to appear genuinely concerned with finding the right balance between the religious liberty and antidiscrimination interests at stake in such cases. Because we can neither read the minds of the Justices nor tap into their private conversations, it seems most prudent to assume that those Justices are genuinely looking for an answer to the question: "what should replace *Smith*?"[19]

This Article assumes that *Smith*'s time as good law is limited, and

10. *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring).

11. *Id.* at 1883.

12. *Id.*

13. *See id.* at 1926 (Alito, J., concurring); *id.* at 1926–31 (Gorsuch, J., concurring).

14. *Id.* at 1883–1926 (Alito, J., concurring); *id.* at 1931 (Gorsuch, J., concurring).

15. *See id.* at 1931 (Gorsuch, J., concurring) ("We hardly need to 'wrestle' today with every conceivable question that might follow from recognizing *Smith* was wrong." (quoting *id.* at 1883 (Barrett, J., concurring))).

16. *Id.* at 1931 (Gorsuch, J., concurring) ("Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid 'picking a side.'").

17. *See* City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, 2000cc-1 to cc-5.

18. *See, e.g.*, *Fulton*, 141 S. Ct. at 1899, 1899 n.34; Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 269, 269 n.16 (2021).

19. *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

that Justice Barrett's question is all that remains. Given that, this Article will advance the argument that if *Smith* is to be overruled, the Court should not look to replace it with any sort of "'grand unified theory' of the Free Exercise Clause."[20] Rather, it should overrule it narrowly by simply stating that the decision was wrong—that a law that burdens religious conduct is not automatically constitutional because it is a neutral law of general applicability, and otherwise leave its free exercise jurisprudence undisturbed. In other words, the answer to the question, "what should replace *Smith*?,"[21] is . . . nothing.

There are some obvious counters to this argument. Justice Gorsuch advanced a similar argument in his *Fulton* concurrence,[22] although he also joined Justice Alito's call for replacing *Smith* with strict scrutiny.[23] Thus, this path was available to Justice Barrett and her colleagues, and they chose not to take it. However, that they declined this option in *Fulton* does not mean that they will reject it in perpetuity; and this Article seeks to flesh out the case for a "skinny repeal" of *Smith* in a much more detailed manner than Justice Gorsuch did. Furthermore, there are three other Justices—Chief Justice Roberts, and Justices Kagan and Sotomayor—who offered no opinion on the fate of *Smith*, but who could affect the outcome in a future case challenging it.[24]

This Article will argue from a legalistic standpoint that overturning *Smith* does not require addressing any of the questions that Justice Barrett posed. Some of the issues raised would not be affected one way or the other, while others may even be brought into greater clarity if *Smith*—which is incongruous with much other First Amendment law—were cast aside. In fact, almost all the questions would be answered by other case law that would no longer need to be read for consistency with *Smith*.

Additionally, there are strong prudential reasons to favor a narrow decision overturning *Smith*. Free exercise jurisprudence is riddled with

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

21. *Id.* at 1882 (Barrett, J., concurring).

22. *See id.* at 1931 (Gorsuch, J., concurring).

23. *See id.* at 1924 (Alito, J., concurring).

24. Additionally, before *Smith* is again reconsidered, Justice Breyer will likely be succeeded by Ketanji Brown Jackson, who has followed the now-familiar tradition of Supreme Court nominees refraining from "comment on the Supreme Court's precedents." *Nomination of Ketanji Brown Jackson to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. On the Judiciary*, 117th Cong. (2022) https://s3.documentcloud.org/documents/21566443/judge-ketanji-brown-jackson-responses-to-written-questions-from-the-senate-judiciary-committee.pdf [https://perma.cc/6TB2-25YB] (questioning by Senator Chuck Grassley) (statements of Ketanji Brown Jackson citing Brown v. Bd. Of Educ., 347 U.S. 485 (1954), Loving v. Virginia, 388 U.S. 1 (1967), and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) as the only prior Supreme Court cases she could affirmatively state were correctly decided and "beyond dispute").

inconsistencies, vague reasoning, and apparent motivated reasoning.[25] *Smith* may well have been doctrinal error, and it certainly has its share of critics from across the political spectrum.[26] But it is hard to ignore the consistency with which the Court's free exercise outcomes have varied based on the favorability of the Court's majority toward the particular claimant.[27] The history of free exercise shows that one decade's exemption seeker is the next decade's denier. Narrowly overhauling *Smith* could correct a doctrinal error, while avoiding setting the Court in an aggressive new direction that it may later wish to backtrack.

This Article consists of five Parts. Part I will summarize key free exercise concepts and briefly sketch the history of free exercise jurisprudence prior to *Smith*. Part II will examine the Court's pivotal decision in *Smith*. Part III will examine the political, judicial, and scholarly backlash to *Smith*. Part IV will discuss *Smith*'s narrow survival in *Fulton*, and the state of free exercise jurisprudence at the close of the 2020–21 Supreme Court Term. Finally, Part V will argue that if the Court overrules *Smith*, it should do so in a narrow manner that leaves its other free exercise precedents in place to guide lower courts while it decides new free exercise issues as they arise.

I. FROM COMPLETE DEFERENCE TO STRICT SCRUTINY: FREE EXERCISE PRE-*SMITH*

The Free Exercise Clause of the U.S. Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[28] The Supreme Court has recognized that the "exercise" of religion includes both beliefs, which the law cannot touch in any way, and physical acts, which may yield to the law under certain circumstances.[29] Drawing the line where religious acts must yield to government action has been a highly contentious issue. Particularly troublesome has been the issue of when a law that is neutral in its terms (for example, a prohibition on wearing hats in court), and general in its applicability (because all who come to the court are bound by the law), incidentally conflicts with a religious practice (for example, a Jewish person's wearing of a yarmulke).

25. *See infra* Part I.

26. *See* Tebbe, *supra* note 18, at 269 n.16 (citing scholarly critiques and defenses of *Smith* from both liberal and conservative thinkers).

27. *See infra* Section V.B.

28. U.S. CONST. amend. I.

29. *See, e.g.*, Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 877 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb, bb-1 to bb-4, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997); *see also* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963), *abrogation recognized by* Holt v. Hobbs, 574 U.S. 352 (2015); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643–44 (1943) (Black, J., and Douglas, J., concurring).

The question of when the First Amendment requires exemptions in such circumstances has long bedeviled judges.

The early historical record is sparse as to the meaning of free exercise in the context of neutral, generally applicable laws. In his *Fulton* concurrence, Justice Alito relied heavily on the work of Michael W. McConnell, a legal historian, to argue that *Smith*'s non-exemption rule was inconsistent with the original meaning of the Constitution.[30] However, McConnell himself "was willing to venture no more than that 'constitutionally compelled exemptions from generally applicable laws regulating conduct were *within the contemplation* of the framers and ratifiers as a *possible interpretation* of the free exercise clause,'"[31] and other scholars have observed that even many of the cases cited by McConnell from the early Republic disallowed religious exemptions.[32]

The Supreme Court did not consider such a case for the first century after the Revolution. That changed in 1878 when George Reynolds challenged his conviction for bigamy on the basis that it was his "duty" as a "male member[] of [the Church of Jesus Christ of Latter-Day Saints] . . . to practise [sic] polygamy."[33] In strained, possibly results-motivated reasoning, the Court referenced statements from Thomas Jefferson on the separation of church and state, and concluded that while the First Amendment deprived Congress "of all legislative power over mere opinion, [it] was left free to reach actions which were in violation of social duties or subversive of good order."[34]

This non-exemption rule persisted through the early twentieth century. In 1940, the case of *Minersville School District v. Gobitis* reaffirmed the principal when it upheld the expulsion of two Jehovah's Witness children from a Pennsylvania public school "for refusing to salute the national flag as part of a daily school exercise."[35] In language that

30. *See Fulton*, 141 S. Ct. at 1900–07. Justice Alito relies primarily on McConnell's *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), and historical sources cited therein.

31. *Flores*, 521 U.S. at 537–38 (Scalia, J., concurring) (quoting McConnell, *supra* note 30, at 1415), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, 2000cc-1 to cc-5.

32. *See* Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 124–26 (1993).

33. Reynolds v. United States, 98 U.S. 145, 161 (1878).

34. *Id.* at 164. The quoted statement by Jefferson referred only to the Establishment Clause and is ambiguous at best on whether the Constitution compels religious exemptions from neutral laws. Other language the Court used, such as referring to polygamy as "odious among the northern and western nations of Europe," and "almost exclusively a feature of the life of Asiatic and of African people," further indicates the sentiments that may have motivated the result. *Id.*

35. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

would be revived in *Smith*, the majority stated that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[36]

However, in 1943, the Court did an abrupt about-face in *West Virginia State Board of Education v. Barnette*, overturning *Gobitis* and holding that the First Amendment protected the rights of Jehovah's Witnesses to refuse to salute the flag in public schools.[37] The *Barnette* opinion does not meticulously separate out the First Amendment rights at issue, and it reads more as a rejection of compelling displays of patriotism than as an endorsement of religious exemptions.[38] However, it is a noteworthy example of a case where religiously motivated conduct was judicially exempted from a neutral law of general applicability. Additionally, Justices Black and Douglas—who changed their positions from *Gobitis* to *Barnette*—concurred with language suggesting that neutral and generally applicable laws might be held to a higher standard when in conflict with religious conduct, stating that religion must only yield "to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."[39]

This concurrence may have foreshadowed what was to come. In 1963, the Court considered the case of *Sherbert v. Verner*.[40] In that case, a member of the Seventh Day Adventist Church was denied unemployment compensation because of her refusal to accept work that would require her to work on Saturday, her Sabbath.[41] Although the unemployment law requiring "availab[ility] for work" was "uniformly applied,"[42] the majority found that the state lacked any "compelling state interest" to justify the substantial infringement on religious liberty.[43]

36. *Id.* at 594.

37. *Barnette*, 319 U.S. at 642.

38. *See id.* at 641–42:

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of [American] institutions to free minds . . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

39. *Id.* at 643–44 (Black, J., and Douglas, J., concurring).

40. Sherbert v. Verner, 374 U.S. 398 (1963), *abrogation recognized by* Holt v. Hobbs, 574 U.S. 352 (2015).

41. *Id.* at 399–400.

42. *Id.* at 419 (Harlan, J., dissenting).

43. *See id.* at 406–09.

Thus, with *Sherbert*, the non-exemption principle was demolished. After *Sherbert*, incidental effects of neutral, generally applicable laws on religion would need to survive strict constitutional scrutiny.[44] This was emphasized a decade later in *Wisconsin v. Yoder*, where the Court found that Wisconsin could not constitutionally compel Amish children to attend public school beyond the eighth grade over the religious objections of their parents.[45] The Court expressly rejected the notion that neutrality and uniformity saved the law from judicial review, stating that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[46]

Thus, in the span of some three decades from 1940 to the early 1970s, the Court moved from complete deference to neutral laws of general applicability to a regime of holding such laws to strict constitutional scrutiny when they infringed religiously motivated conduct.

II. *SMITH* TURNS BACK THE CLOCK

The timeline from *Gobitis* to *Yoder* shows that a lot can change in a few decades, and that was to prove true again. Less than thirty years after *Sherbert* subjected neutral laws of general applicability to strict scrutiny, the Court did another about-face in *Smith*.[47]

The case arose out of the denial of unemployment benefits to two members of the Native American Church, on the basis that their religiously inspired ingestion of peyote violated the State of Oregon's criminal prohibition of controlled substances.[48] The Supreme Court concluded that the denial of benefits did not violate the Free Exercise Clause on the basis that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[49]

Strangely, given that *Gobitis* was overruled by *Barnette* within three years, the *Smith* Court defended its ruling by quoting *Gobitis*.[50] More strangely, the Court, rather than explicitly overruling *Sherbert*, sought to

44. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1890–91 (2021) (Alito, J., concurring).

45. Wisconsin v. Yoder, 406 U.S. 219–20 (1972).

46. *Id.* at 220.

47. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb, bb-1 to bb-4, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

48. *Id.* at 874.

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

50. *Id.* (quoting the passage referenced at *supra* note 38 and accompanying text).

distinguish every case that had ever applied a higher standard of scrutiny to a neutral, generally applicable law, in strained, possibly result-oriented reasoning reminiscent of the *Reynolds* case. First, it held that *Sherbert*'s strict scrutiny standard was limited to an unemployment context where individualized exemptions were permitted[51]—a bizarre distinction given that *Smith* itself was an unemployment case where individualized exemptions were permitted. Second, it held that other cases, such as *Yoder*, which had applied strict scrutiny, did so only because the case involved so-called "hybrid claims," where the government action violated *both* the free exercise of religion *and* some other constitutional right.[52] This reasoning has been strongly criticized, as it effectively moots the Free Exercise Clause, and has never been mentioned in any other constitutional context prior to or since *Smith*.[53]

Four Justices expressed strong disagreement with the majority's holding in *Smith*. Justice O'Connor wrote that the majority's ruling "dramatically depart[ed] from well-settled First Amendment jurisprudence, appear[ed] unnecessary to resolve the question presented, and [was] incompatible with our Nation's fundamental commitment to individual liberty."[54] While she was highly critical of the Court's abandonment of *Sherbert*'s strict scrutiny standard, she ultimately concurred in the judgment as she felt that Oregon had a sufficiently compelling interest in maintaining uniform enforcement of its controlled substance laws to justify the infringement on religious liberty.[55] Meanwhile Justice Blackmun dissented, joined by Justices Brennan and Marshall, arguing that the law should fail strict scrutiny under *Sherbert* because the State failed to show that granting an exemption to the Native American Church would significantly affect its efforts in combating illegal drug trafficking.[56]

III. REACTION TO *SMITH*

Smith was deeply unpopular when it was decided, and has remained so, although it also has its defenders.[57] It was so unpopular that it led Congress to attempt to "restore" the strict scrutiny standard for judicial

51. *Id.* at 883–84; *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1892–93 (2021) (Alito, J., concurring).

52. *Smith*, 494 U.S. at 881.

53. *See Fulton*, 141 S. Ct. at 1915 (Alito, J., concurring) ("To dispose of [*Wisconsin v. Yoder*, 406 U.S. 205 (1972)], *Smith* was forced to invent yet another special category of cases, those involving 'hybrid-rights' claims." (quoting *Smith*, 494 U.S. at 881)).

54. *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

55. *See id.* at 906–07.

56. *Id.* at 916–18 (Blackmun, J., dissenting).

57. *See* Tebbe, *supra* note 18, at 269, 269 nn.15–16 (citing criticisms and defenses of *Smith* from both ends of the political spectrum).

review through legislation. In 1993, a near unanimous Congress enacted the Religious Freedom Restoration Act ("RFRA," commonly pronounced, "rifra"),[58] which sought to correct *Smith* by providing that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the burden is imposed "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[59]

RFRA's effect was swiftly limited in *City of Boerne v. Flores*,[60] in which a Catholic Church raised a challenge under RFRA to the denial of a construction permit under a local zoning ordinance affecting historic landmarks.[61] The Court held that RFRA could not be enforced against state and local governments, as it exceeded Congress's power to enforce the protections of the Fourteenth Amendment—and thus the First—because that power only allows Congress to enforce such rights *to the extent they are defined by the Supreme Court*.[62] The definition of free exercise put forward by RFRA was inconsistent with that given by the Supreme Court, and thus it exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment and was unconstitutional as applied to state and local governments.[63] Thus, RFRA is only a constraint on the conduct of the federal government.[64] While twenty-one states have now joined the federal government in passing "State RFRAs,"[65] in the majority of the country, state and local governments can enact policies that infringe religious conduct so long as the policies are neutral and uniformly applied.

IV. *SMITH* SURVIVES BY A THREAD

This past Term, the Supreme Court granted certiorari in *Fulton* on the question, among others, of whether *Smith* should be overruled.[66] The case

58. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb, bb-1 to bb-4), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

59. § 2000bb-1, *held unconstitutional by Flores*, 521 U.S. at 507.

60. *See generally Flores*, 521 U.S. at 507, *superseded by statute*, Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, 2000cc-1 to cc-5.

61. *Id.* at 512.

62. *See id.* at 519.

63. *See id.*

64. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (applying RFRA to the federal government's denial of an exemption from its prohibition on a hallucinogen contained in a sacramental tea consumed for religious purposes and holding that the government failed its burden under RFRA).

65. *State Religious Freedom Restoration Acts*, NCSL (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/LSG7-QA2F].

66. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021), *cert. granted*, 141 S. Ct. 1868

appeared properly poised for a determination on *Smith*'s continued vitality: Philadelphia had a neutral policy of refusing to certify foster care agencies that discriminated against same-sex couples as foster parents, and was applied uniformly to all agencies.[67] If *Smith* was upheld, the petitioner Catholic Social Services (CSS) would be denied an exemption, while overturning *Smith* would open the door to a higher level of judicial scrutiny that might recognize an exemption. Thus, resolution of the case appeared to require a determination on this issue. Furthermore, the Court had recently issued a decision on COVID-19 related restrictions on religious gatherings that was criticized as incompatible with *Smith*'s neutrality principle.[68]

The majority, however, had other things in mind. In an opinion by Chief Justice Roberts, it held that a single provision in Philadelphia's contract with CSS, which granted the Commissioner of the Department of Human Services "sole discretion" to grant individualized exemptions from its nondiscrimination policies, meant that the policy was *not* one of general applicability, and was thus outside the scope of *Smith*.[69] This reasoning is dubious—the Commissioner had never granted such an exemption, and the notion that a system of individualized exemptions rendered a law nonneutral was itself a creation of *Smith*, put forward in an effort to distinguish *Sherbert*, and never mentioned again until *Fulton*.[70]

Regardless of the dodge in *Fulton*, it is probably safe to say that *Smith*'s expiration date is nearing. Three Justices were ready to overrule it in *Fulton*, another three expressed significant skepticism toward it, and not a single Justice defended the decision.[71] The key question is no longer whether *Smith* should be overruled, but "what should replace *Smith*?"[72]

V. REPLACING *SMITH*

In questioning how the Court should replace *Smith*, Justice Barrett raised several concerns: whether replacing *Smith*'s "categorical" neutrality approach with "an equally categorical strict scrutiny regime" would capture the "nuance" of free exercise claims; whether entities

(2020); *id.* at 1931 (Gorsuch, J., concurring).

67. *See id.* at 1874–76.

68. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (Kagan, J., dissenting) (arguing that California acted neutrally by "adopt[ing] a blanket restriction on at-home gatherings of all kinds, religious and secular alike"); Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Radically Redefine Religious Liberty*, SLATE (Apr. 12, 2021, 2:51 PM) https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html [https://perma.cc/QVZ4-YQ8W].

69. *Fulton*, 141 S. Ct. at 1878.

70. *See* Tebbe, *supra* note 18, at 298–300.

71. *See Fulton*, 141 S. Ct. at 1931 (Gorsuch, J., concurring).

72. *Id.* at 1882 (Barrett, J., concurring).

should be treated the same as individuals; whether the Court should distinguish between indirect and direct burdens; what forms of scrutiny to apply; and how cases should be decided under the standard selected.[73]

This section argues that the best answer to Justice Barrett's question might well be "nothing." That is, that the Court should simply overrule *Smith*, leave the rest of free exercise jurisprudence intact, and answer the questions that arise when they are properly presented to the Court in future litigation. While this argument was available to the Court in *Fulton*, and advanced by Justice Gorsuch,[74] this Article will suggest some additional reasons why this may be the best course.

This option may not be favored by Justices Barrett, Kavanaugh, and Breyer, but it was endorsed by Justice Gorsuch, and joined by Justices Alito and Thomas, while the Chief Justice and Justices Sotomayor and Kagan were silent on the issue. As Justice Gorsuch argued, "[r]ather than adhere to *Smith* until we settle on some 'grand unified theory' of the Free Exercise Clause for all future cases until the end of time . . . the Court should overrule it now, set us back on the correct course, and address each case as it comes."[75]

Justice Gorsuch also, however, joined Justice Alito's concurrence, which argued that *Smith*'s neutrality rule should be replaced with the rule that "[a] law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest,"[76] i.e., that *Smith*'s rule should be replaced with a categorical strict scrutiny regime.

The argument this Article advances is slightly different. Instead of replacing *Smith* with a strict scrutiny regime, the Court could simply issue an opinion that concludes, hypothetically: "*Smith* was wrongly decided. Neutral laws of general applicability are not automatically shielded from scrutiny under the Free Exercise Clause. *Smith*, and any language in prior or subsequent cases to the contrary, is hereby overruled. All other free exercise cases that have not been explicitly overruled remain effective to the extent they are consistent with this order."

A. *Answering Justice Barrett*

This proposal seems like an unusual suggestion because it apparently answers none of Justice Barrett's concerns. However, the answers to many of the "issues to work through if *Smith* were overruled"[77] would in fact be answered simply by removing *Smith* and requiring litigants and

73. *Id.* at 1883.

74. *See id.* at 1931 (Gorsuch, J., concurring).

75. *Id.* (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2086–87 (2019)).

76. *Id.* at 1924 (Alito, J., concurring).

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

courts to turn to other sources of law in resolving free exercise claims. Consider the "issues" highlighted:

1. "Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals?"[78]

It is difficult to see how removing *Smith* affects this analysis. That entities like CSS, which are organized for an explicit religious purpose, are entitled to at least some of the protection of the Free Exercise Clause seems uncontroversial—and none of the Justices doubted that CSS was entitled to its protection.[79] The Court has already held that religious institutions are completely exempt from nondiscrimination laws in the employment relationship with their "ministers," a fact Justice Barrett was surely aware of as she cited a case involving the doctrine in her concurrence.[80] This holding is unlikely to be affected by overturning *Smith*. While the Court has not explicitly assessed the free exercise rights of corporations,[81] it is not clear that the question is affected at all by overturning *Smith*.

2. "Should there be a distinction between indirect and direct burdens on religious exercise?"[82]

This question is more directly relevant as *Smith* itself drew a hard line between indirect burdens, which it held fully constitutional so long as the law is neutral and generally applicable, and direct burdens, which are generally unconstitutional.[83] However, the answer to this question can also be found in existing precedent. Here Justice Barrett cites *Braunfeld v. Brown*, which upheld a Sunday closing law against a group of Jewish merchants' free exercise challenge.[84] The merchants argued that, because

78. *Id.*

79. *See, e.g.*, *id.* at 1883 (describing CSS's religious mission).

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

81. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), held that the statutory language in RFRA extended to a closely held corporation under a very narrowly defined set of facts, and it is unclear whether its reasoning would extend to the Free Exercise Clause—and overturning *Smith* would not disturb *Hobby Lobby* as RFRA would remain on the books. On the other hand, decisions such as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), which assessed the right of a bakery to refuse service on religious grounds, suggest that the Court will be hospitable to for-profit businesses seeking religious exemption.

82. *Fulton*, 366 U.S. at 1883 (Barrett, J., concurring).

83. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) for a case decided under *Smith* that found government conduct directly targeted religion when a law banned only those animal slaughter practices consistent with rituals of the Santeria faith, and there was evidence that the law was motivated by hostility to the Santeria.

84. Braunfeld v. Brown, 366 U.S. 599, 602–03 (1961).

their faith compelled them to close on Saturday, the Jewish Sabbath, requiring them to also close on Sundays put them "at a serious economic disadvantage."[85] The Court termed this an indirect burden, and found that such a burden was insufficient to overcome the State's interest in a uniform day of rest.[86]

While some of the language in *Braunfeld* is consistent with *Smith*'s neutrality approach,[87] the decision also acknowledged that an incidental burden could violate the Free Exercise Clause when "the State may accomplish its purpose by means which do not impose such a burden."[88] This is consistent with the Court's decision in *Sherbert*, which required a compelling state interest to justify an incidental burden on religious exercise.[89] Thus, if the Court were to overrule *Smith* using language such as that suggested above, lower courts and other decision makers would know to disregard the neutrality language in *Braunfeld*—and between *Braunfeld* and *Sherbert*, would be able to find that laws that incidentally burden religious conduct require compelling state interests that cannot be achieved by other means, i.e., that such laws must withstand strict scrutiny. While the cases had different outcomes, there are distinguishing factors. The burden in *Sherbert* was arguably more direct, as the government there sought to compel labor on the Seventh Day Adventist Sabbath,[90] while the government in *Braunfeld* prohibited labor on a day that had no meaning to the Jewish merchants and did not require them to work on their own Sabbath.[91] Furthermore, the Court in *Braunfeld* placed great weight on the state interest in a "weekly respite from all labor,"[92] while the *Sherbert* Court was unconvinced by South Carolina's speculation that allowing the religious exemption might lead to a wave of fraudulent claims that would dilute the unemployment compensation fund and threaten the availability of labor for "necessary Saturday work."[93]

In short, the answer to Justice Barrett's second question is that, in the event *Smith* was narrowly overruled, lower courts would simply apply other Free Exercise precedents when assessing indirect and direct burdens on religious exercise, and decide cases based on comparison to those precedents.

85. *Id.* at 602.

86. *Id.* at 606–07.

87. *See id.* at 605–06 (stating that a person "*has no natural right in opposition to his social duties*" (emphasis added) (quoting 8 Works of Thomas Jefferson 113)).

88. *Id.* at 607.

89. Sherbert v. Verner, 374 U.S. 398, 403 (1963), *abrogation recognized by* Holt v. Hobbs, 574 U.S. 352 (2015).

90. *Id.* at 398.

91. *Bruanfeld*, 366 U.S. at 601.

92. *Id.* at 607.

93. *Sherbert,* 374 U.S. at 407.

3. "What forms of scrutiny should apply?"[94]

Of the questions Justice Barrett posed, this is the one that would probably be the most useful for the Court to explicitly answer in any decision overruling *Smith*. But, again, it is not clear that existing law could not supply an answer to this question were the Court to simply overrule *Smith*. Prior to *Smith*, it was apparently well-accepted that strict scrutiny under *Sherbert* applied to laws that burdened religious conduct—whether or not the laws were neutral.

Thus, even in the *Smith* litigation itself, the Oregon Supreme Court cited *Sherbert* for the proposition that a constraint on religious activity must be "the least restrictive means of achieving a 'compelling' state interest."[95] When the U.S. Supreme Court overruled that decision, the concurring and dissenting Justices made it clear that they viewed the majority's decision as a significant departure from a clearly established rule.[96] Less than a decade before *Smith*, the Court itself had cited *Sherbert* for the statement that laws infringing on religious liberty must be "the least restrictive means of achieving some compelling state interest."[97] *Smith* did not explicitly overrule *Sherbert* or *Thomas*, instead pigeonholing both as limited to "the unemployment compensation field."[98] This distinction was dubious—as Justice Alito observed in *Fulton*, neither *Sherbert* nor *Thomas* placed any emphasis on the unemployment context, and *Smith* itself arose in the unemployment context.[99] If *Smith* were narrowly overruled in the manner suggested, lower courts could simply return to those cases, read them for what they actually say, and apply them accordingly to new fact scenarios as they arise.

Justice Barrett cites *Gillette v. United States* as having applied a "substantial" rather than "compelling" interest test.[100] But the *Gillette* decision, which rejected a religious exemption from military conscription that was based on "conscientious objection to a particular war, rather than objection to war as such,"[101] does not actually state a specific standard of review. It cites *Sherbert* for the statement that even neutral laws may

94. *Fulton*, 366 U.S. at 1883 (Barrett, J., concurring).

95. Smith v. Emp. Div., Dep't of Hum. Res., 721 P.2d 445, 449 (Or. 1986) (citing *Sherbert*, 374 U.S. at 403), *vacated*, 485 U.S. 660 (1988).

96. *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990) (O'Connor, J., concurring), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb, bb-1 to bb-4*, invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997); *id.* at 907–08 (Blackmun, J., dissenting).

97. Thomas v. Rev. Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).

98. *Smith*, 494 U.S. at 884.

99. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1893 (2021) (Alito, J., concurring).

100. *Id.* at 1883 (Barrett, J., concurring) (citing Gillette v. United States, 401 U.S. 437, 462 (1971)).

101. *Gillette*, 401 U.S. at 439.

violate the Free Exercise Clause "when the burden on First Amendment values is not justifiable in terms of the Government's valid aims."[102] Then, in explaining why the law was justified, the Court stated that "[t]he incidental burdens felt by persons in petitioners' position are strictly justified by substantial government interests that relate directly to the very impacts questioned."[103] This line does not purport to announce any rule, and the Court at the time was not always rigorous in defining and citing levels of scrutiny. The citation to *Sherbert* in *Gillette*, together with the affirmation of strict scrutiny the following decade in *Thomas*, are sufficient to guide lower courts in the event *Smith* is overturned without the Court declaring a new standard.

This conclusion may not fully satisfy Justice Barrett's concern that "resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced" than a categorical strict scrutiny regime.[104] It seems likely that she was referring to the Court's jurisprudence involving general laws that burden expressive, but nonverbal, conduct under the Free Speech Clause, and the Court's cases concerning time, place, and manner restrictions on public expression.[105]

For example, in *United States v. O'Brien*, the Court upheld a criminal defendant's conviction for burning a Selective Service Certificate on the basis that the prohibition on burning the certificate served "a legitimate and substantial purpose" in the administration of the military.[106] The Court applied what some have termed a "weak"[107] or "unserious"[108] version of intermediate scrutiny, which provided that a government regulation survived Free Speech review "if it furthers an important or substantial government interest; if [it] is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[109]

The language "unrelated to the suppression of free expression" is arguably analogous to *Smith*'s "neutral laws of general applicability." And while *O'Brien* did not go so far as *Smith*, both decisions are consistent with a view that such laws are less constitutionally suspect than those that directly target speech or religion.

102. *Id.* at 462 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

103. *Id.*

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

105. *See* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2021 CATO SUP. CT. REV. 33, 46–47 (2021).

106. United States v. O'Brien, 391 U.S. 367, 375, 378 (1968).

107. Laycock & Berg, *supra* note 105, at 46 n.75.

108. Tebbe, *supra* note 18, at 282 n.77.

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

While *O'Brien*'s reasoning might have been strained with respect to the application of the standard to the facts,[110] the adoption of something akin to the *O'Brien* standard to govern free exercise challenges to neutral laws of general applicability would not be unreasonable.[111] An intermediate standard would recognize the basic idea that laws that apply equally to everyone are fairer than those that intentionally target people or groups, an idea present in other areas of law like race discrimination.[112] It would also make the swing from *Smith*'s non-exemption rule less disruptive and would force lower courts to engage more seriously with the interests pursued by laws—such as those prohibiting LGBTQ discrimination—as opposed to granting exemptions as a matter of course under strict scrutiny.

However, again, it is not apparent that the Court must decide whether or not to import *O'Brien* to the free exercise context in order to overrule *Smith*. None of the Court's pre-*Smith* decisions foreclose the possibility that similar principles to those set forth in *O'Brien* might also apply in the free exercise context. If *Smith* were overruled, and lower courts found that *Sherbert* meant strict scrutiny applied, it would not foreclose litigants from arguing that *O'Brien* should be used as a model. After all, *Sherbert* would only set forth a general rule of strict scrutiny—just as the general rule is that infringements on free speech must withstand scrutiny—and the *O'Brien* intermediate scrutiny only applies when the expression at issue is "combined" with "'nonspeech' elements"[113] and the government has a neutral interest unrelated to the suppression of expression.[114]

4. "[If] strict scrutiny [applies], would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?"[115]

Justice Barrett's final question is also an intriguing one; however, again, the suggested language for overturning *Smith* would allow surviving case law to stand on its own terms.

110. As Professors Laycock and Berg observe, the administrative convenience relied upon usually fails intermediate scrutiny, and it was a particularly flimsy basis to justify the serious sanction of a criminal conviction. Laycock & Berg, *supra* note 105, at 46.

111. *See* Daniel J. Hay, *Baptizing* O'Brien*: Towards Intermediate Protection of Religiously Motivated Expressive Conduct*, 68 VAND. L. REV. 177 (2015) (arguing that *O'Brien* should be adapted to the free exercise context).

112. *See* Washington v. Davis, 426 U.S. 229 (1976) (requiring a showing of both discriminatory purpose *and* effect for strict scrutiny to apply in an equal protection challenge).

113. *See* Texas v. Johnson, 491 U.S. 397, 407 (1989) (quoting *O'Brien*, 391 U.S. at 376).

114. *See id.* at 409–11 (holding that Texas lacked an interest in prohibiting flag burning that was unrelated to the suppression of expression, and that the Court was accordingly "outside of *O'Brien*'s test altogether").

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

For example, here Justice Barrett cited to a passage in *Smith* that referenced three cases from the late 1980s that apparently did not apply strict scrutiny.[116] Two of these cases, *O'Lone v. Estate of Shabazz* and *Goldman v. Weinberger*, arose in the unique contexts of prisons and the military, where rights are more restricted and the government has a greater interest in uniformity.[117] The final case cited, *Bowen v. Roy*, vacillated between language that forecast *Smith*'s turn and adherence to the *Sherbert* standard.[118] Again, the proposed language for revising *Smith* would have the effect of nullifying those portions of *Bowen* that suggest neutrality alone spares a law from free exercise scrutiny.[119] Courts would then be free to assess whether the remainder of the *Bowen* reasoning survived.

What of pre-*Sherbert* cases that upheld "garden variety" laws under a neutrality standard, such as cases upholding anti-bigamy laws[120] or vaccination mandates?[121] Perhaps overruling *Smith* could precipitate reconsideration of those cases. But again, there is no reason that all this need be determined in one fell swoop.

In the case of *Jacobson v. Massachusetts*, which upheld a state vaccination program, the Court did use some language noting the need for neutrality and for religious individuals in a society to conform their conduct to the requirements of the law,[122] but the decision also focused on the State's interest in protecting the public health and welfare.[123] Lower courts could read a reversal of *Smith* that does not touch *Jacobson* to mean that state vaccination mandates remain constitutional so long as the programs are properly tailored to a public health need using the framework from *Jacobson* and subsequent cases for guidance.

116. *See id.* (citing Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 888–89 (1990)).

117. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–49 (1987); Goldman v. Weinberger, 475 U.S. 503, 504 (1986).

118. Bowen v. Roy, 476 U.S. 693, 704 (1986).

119. *See id.*

120. Reynolds v. United States, 98 U.S. 145, 168 (1878).

121. Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).

122. *See, e.g.*, *id.* at 26 ("[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."); *Reynolds*, 98 U.S. at 164 ("Congress was deprived [by the Free Exercise Clause] of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

123. The Court analyzed the vaccination program at issue, how it delegated authority, its scientific basis, and its impact on the individual, and determined that it did not go "beyond what was reasonably required for the safety of the public." *Jacobson*, 197 U.S. at 28. The case was decided prior to the adoption of tiers of scrutiny, but the Court was nevertheless weighing the strength of the government's need against the burden on the individual in a manner that reflects modern strict scrutiny analysis.

While *Reynolds* relied much more on the dichotomy between beliefs and conduct,[124] it also focused on the perceived social degeneracy caused by polygamy,[125] and permitted a jury instruction on "the evil consequences that were supposed to flow from plural marriages."[126] Thus, overruling *Smith* while leaving *Reynolds* intact would allow courts to infer that the public interest in preventing polygamy outweighs the burden on religion imposed by such bans. On the other hand, if the reasoning in *Reynolds*—much of which is tinged with open racism[127]—does not hold up under closer scrutiny, then it should be reconsidered in its turn. But that is a decision that does not need to come at the same time as one on *Smith*.

This shows that neither *Reynolds* nor *Jacobson* need be revisited as a precedent to revisiting *Smith*, and both older decisions can stand on their own in the absence of *Smith*. Thus, it is possible that those older decisions would still be upheld under a strict scrutiny regime. After all, neither decision was overruled in the wake of *Sherbert*.

This analysis shows that, from a legalistic standpoint, a narrow overruling of *Smith* that does not announce a new rule in its place would not raise significant doctrinal challenges nor require answering a host of questions to guide every free exercise case for all eternity, but would in fact bring greater clarity to free exercise jurisprudence by removing a problematic case from the hornbook.

B. *Prudential Considerations*

There are also strong prudential reasons for the Court to overrule *Smith* narrowly. The Court's inconsistent Free Exercise decisions[128] have created an appearance that such decisions are not the product of cool, dispassionate legal analysis, but are rather driven by the policy preferences of the Court's majority at any given time.[129] Of course, many would argue that this is the way it has always been, in every area of the law, and that there is nothing to be done for it but to work to get Justices

124. *See supra* notes 34–35 and accompanying text.

125. *See Reynolds*, 98 U.S. at 166 ("[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism . . . .").

126. *Id.* at 168.

127. *See supra* note 34 and accompanying text.

128. *See supra* Parts I–II.

129. *See, e.g.*, Tebbe, *supra* note 18, at 269 (accusing the Court of "overwrought reasoning" and "settl[ing] for contrived justifications for its outcomes"); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 135–36 (2018) (accusing the Court of placing "etiquette" over "reason-giving" in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018), only to "abdicate" that demand for "tolerance and respect" when upholding President Trump's travel ban in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)).

who share one's political convictions onto the Court.

Still, it is noteworthy just how jarring the swings in the Court's free exercise jurisprudence have been, particularly with regard to neutral laws of general applicability. When *Reynolds* laid down a strict belief/action dichotomy, it enforced that dichotomy against Mormon challengers who were part of a deeply unfavored religious minority[130] with an abysmal track record at the Supreme Court.[131] The decision revealed little sympathy for the claimants and used racist language to describe the practice of polygamy, such that the outcome appears preordained.[132]

The abrupt reversal from *Gobitis* in 1940 to *Barnette* in 1943 is also intriguing. Is it a coincidence that the Court abruptly changed its opinion on mandatory flag salutes after the country went to war with an authoritarian regime famous for compelling a very similar salute?

The Free Exercise Clause was expanded to its broadest terms under the Warren Court with *Sherbert* in 1963. The Warren Court was of course famous for being perhaps the most liberal era in the Court's history, a time when the Court was more solicitous toward claimants from historically disfavored groups[133] and dramatically expanded the understanding of the rights guaranteed by the Constitution.[134]

By the time of *Smith*, the conservative William Rehnquist was Chief Justice, and the Court's makeup had been altered by conservative Republican presidents in the 1970s and 1980s, including Richard Nixon, who began the so-called War on Drugs,[135] and Ronald Reagan, who

130. In one extreme example, the governor of Missouri in 1838 issued an executive order to treat all Mormons "as enemies [who] must be exterminated or driven from the state if necessary," leading about ninety percent of the state's Mormon population to depart. This order was not rescinded until 1976. *See* Steve Pokin, *Pokin Around: Was There Ever a Time in Missouri when You Could Legally Kill a Mormon?*, SPRINGFIELD NEWS-LEADER (Sept. 1, 2018, 11:31 PM), https://www.news-leader.com/story/news/local/ozarks/2018/09/01/missouri-executive-order-44-mormon-war/1147461002/ [https://perma.cc/VLG8-73QL].

131. Other noteworthy defeats in this era include *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 66 (1890) (affirming the revocation of the church's charter and confiscation of its property) and *Davis v. Beason*, 133 U.S. 333, 348 (1890) (affirming an Idaho law requiring voters to affirm that they are not members of an organization that teaches polygamy).

132. *See supra* note 27.

133. *See* Tebbe, *supra* note 18, at 317 ("During the Warren Court, not a single plaintiff in a free exercise case was a member of a mainstream Christian religion.").

134. *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993) (describing a "constitutional revolution embarked upon by the Warren Court" that involved two major developments: the idea of "a [living] constitution that evolves according to changing values and circumstances," and "the reemergence of the discourse of rights as a dominant constitutional mode").

135. *See* Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons we Should Have Learned from the War on Drugs*, 36 S. ILL. UNIV. L.J. 1, 5 (2011).

significantly expanded it.[136] Was *Smith*'s methodological dissembling of the previous thirty years of free exercise jurisprudence truly an endeavor in cold legal reasoning, or was it a means to the desired end: denying a religious exemption for the use of a criminalized drug?

And now, thirty years after the three most liberal Justices of the time, Blackmun, Brennan, and Marshall, voted to preserve religious exemptions in *Smith*, the situation has apparently reversed. In the COVID-19 cases and in *Fulton*, the more conservative the Justice, the more vehement their attack on *Smith*; the more liberal, the more supportive of neutrality. Is it a coincidence that this reversal has happened at a time when it is religious conservatives, traditionally the dominant group setting the laws, that now finds themselves seeking exemption from neutral laws of general applicability that are supported by political and judicial liberals?

What to make of all of this? Again, many might say that this is an inevitable feature of our judiciary that can only be changed by changing the composition of the Court. However, for the vast majority of us who have little say in the composition of the Court aside from our votes in presidential and senatorial elections, persuasion should not be cast aside as a political tool.

It is not good for the Court or for the American people to have a free exercise jurisprudence that swings in abrupt rounds and turns depending on what political party has appointed more Justices, what type of plaintiff is seeking religious accommodation, or what type of government conduct is at issue. The Justices of the Supreme Court should not consider this acceptable either.

All that said, while the narrow approach to overturning *Smith* will not itself forestall accusations that the Court is a political entity, it would be a more measured step than many the Court has taken in the past. It would allow a reset of free exercise jurisprudence, during which time lower courts could look to a broader range of authorities for answers, consider cases from a variety of angles and based on a variety of factors, and thus spend time carefully weighing the balancing interests, rather than engaging in a single-minded analysis of whether a law meets the standard of "neutral and generally applicable" or not. This would also give the Supreme Court itself more time to grapple with how to engage in the difficult line-drawing exercises such as those required in cases involving religious challenges to LGBTQ antidiscrimination laws.

136. Sawyer Like, *Burning in the Melting Pot: American Policing and the Internal Colonization of African Americans*, 22 RUTGERS & RACE L. REV. 333, 361–63 (2021) (describing various efforts made by Reagan and his allies throughout the 1980s to increase opposition to drug use and to make drug enforcement increasingly punitive).

C. *Summary*

This Part has argued that, in the event *Smith* is overruled, the Court should overrule it narrowly, without attempting to set out an elaborate theory for resolving future free exercise claims. Simply overruling *Smith* will not cause any doctrinal issues and may actually go a long way toward clarifying free exercise jurisprudence. Furthermore, prudence cautions against further action that will inject more inconsistency, confusion, and bitterness into the canon of free exercise case law, to the detriment of litigants, courts, and the American people.

CONCLUSION

Fulton left free exercise jurisprudence on a knife's edge. Only time will tell whether *Smith* will be overruled, although it appears to be in its final days. In three recent orders denying emergency relief from COVID-19 vaccine mandates based on religious exemptions, the same three Justices who argued for overturning *Smith* have dissented from the denial of relief.[137] Thus the *Fulton* majority remains intact for now. This Article seeks to contribute to what will surely be a growing body of scholarship responding to Justice Barrett's prompt. It is my hope that the Justices will take this scholarship seriously and proceed in a manner that will bring greater clarity and stability to free exercise jurisprudence.

137. *See* Does v. Mills, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting); Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021) (Gorsuch, J., dissenting); Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301, 1302 (2022) (Alito, J., dissenting) (mem.).