# FREE EXERCISE (DIS)HONESTY

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For over half a century, the Supreme Court's free exercise jurisprudence has been characterized by a less-than-forthright treatment of precedent. The pattern began in the 1960s, when Justice Brennan led the Court to recognize a right to religious exemptions while ignoring language from past cases that had rejected such a right. The trend continued in the 1990s, when Justice Scalia led the Court to disavow the pro-exemption view while ignoring language in cases that had embraced it. Today, the Court appears poised to shift its position on religious exemptions yet again, and leading scholars are suggesting it do so by creatively rewriting precedent.

This Article urges the Justices to decline that invitation and make clear they are no longer willing to read free exercise precedents saying "up" to mean "mostly down." Part I tells the full story of foundational prevarications and subsidiary inconsistencies that have accompanied the Court's past shifts on exemption rights. Part II details the greatest danger of dishonesty going forward—a danger that was lurking in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Part III calls on the Court to develop an honest free exercise jurisprudence and offers suggestions for what that jurisprudence might look like. Specifically, because the Court has at times incorrectly assumed that recognizing exemption rights will either risk anarchy or require treacherous balancing of religious interests against state interests, this Article offers a concrete proposal for vindicating a limited right to religious exemptions without engaging in case-by-case balancing of such interests. But regardless of whether the Court embraces that proposal, it should at long last engage in a thorough reexamination of its sharply conflicting precedents and seriously consider the nuances and middle-ground arguments those precedents have steadfastly ignored. By finally turning to that task, the Court could deliver what has been missing from its free exercise jurisprudence for so long: honesty.



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## INTRODUCTION

For over half a century, the Supreme Court's free exercise jurisprudence has been characterized by a less-than-forthright treatment of precedent. One chapter in this tale of doctrinal dissembling—Justice Antonin Scalia's 1990 opinion for the Court in *Employment Division v. Smith*[1]—is well known. In rejecting the notion that the Constitution provides a right to religious exemptions from generally applicable laws, the *Smith* Court offered an account of its past cases that commentators widely viewed as "transparently dishonest."[2]

Notwithstanding its notoriety, *Smith* does not represent the original sin of jurisprudential mendacity in modern free exercise opinions. That came three decades earlier in *Braunfeld v. Brown*,[3] when Justice William Brennan penned a fateful dissent in which he misappropriated the Court's canonical decision in *West Virginia Board of Education v. Barnette*[4] to argue *for* exemption rights.[5] Two years later, in *Sherbert v. Verner*,[6] Brennan convinced a majority of the Court to adopt his view that the Free Exercise Clause not only safeguards against religious targeting, but also provides robust protection against incidental burdens that flow from generally applicable laws.[7] The Court had twice before rejected that interpretation (as it would again in *Smith*), but Brennan's

1. 494 U.S. 872 (1990).

2. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2–3; *see* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 187–88 (2002) (stating that the *Smith* Court "fooled no one" in attempting to recharacterize its past precedent); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 90 n.104 (1996) (endorsing Professor Laycock's "devastating critique" of "*Smith*'s mistreatment of . . . judicial precedents"); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending the result in *Smith*, but stating that its "use of precedent borders on fiction"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1129 (1990) (describing *Smith*'s precedential argument as "hopelessly contrived").

3. 366 U.S. 599 (1961).

4. 319 U.S. 624 (1943).

5. *See Braunfeld*, 366 U.S. at 611–12 (Brennan, J., dissenting) (quoting *Barnette*, 319 U.S. at 639); *infra* Part I.A. (discussing Brennan's misuse of *Barnette*).

6. 374 U.S. 398 (1963).

7. *Id.* at 403, 407 (requiring that "any incidental burden on the free exercise of appellant's religion . . . be justified by a 'compelling state interest'" that "no alternative forms of regulation" could serve) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

majority opinion in *Sherbert* distinguished away one case and simply ignored the other.[8] And the *Sherbert* Court conspicuously declined to overrule *Braunfeld*, even though the two cases are "as irreconcilable as two cases not involving the same parties can be."[9]

In addition to the foundational prevarications that marked the Court's major shifts from rejecting exemption rights to approving them and then back again, subsidiary inconsistencies and uncertainties have plagued the Court's free exercise jurisprudence for decades. In the *Sherbert* era, one leading decision seemed to indicate that the Court would have to carefully examine the religious pedigree of conduct giving rise to exemption claims,[10] while another taught that such examinations would be wholly inappropriate.[11] And although some exemption decisions subjected the government to the truly strict scrutiny *Sherbert* prescribed,[12] others treated the test as "strict in theory, but ever-so-gentle in fact."[13]

Much like it struggled to explain and consistently apply the strong pro-exemption presumption ostensibly adopted in *Sherbert*, the Court has since run into difficulties with the no-exemptions-required rule seemingly prescribed by *Smith*. For example, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[14] the Court held that unlike the individual religious practitioners in *Smith*, who could claim no immunity from a controlled-substances law for their sacramental use of peyote, religious institutions can claim immunity from employment discrimination laws for their decisions about hiring and firing ministerial employees.[15] Although commentators have offered principled grounds

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8. *Id*. at 403 (distinguishing *Reynolds v. United States*, 98 U.S. 145 (1878), and failing to address *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

9. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 (1970); *see infra* Part I.B. (discussing *Sherbert*'s treatment of *Braunfeld*).

10. *See infra* text at notes 177–81 (discussing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

11. *See infra* text at notes 174–76 (discussing *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981)).

12. *See, e.g.*, *Yoder*, 406 U.S. at 215 (requiring a religious exemption and explaining that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"). For the *Sherbert* Court's original articulation of strict scrutiny, see *supra* note 7.

13. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992).

14. 565 U.S. 171 (2012).

15. *Id.* at 189–90. *See* Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 931 (2018) (describing *Hosanna-Tabor* as the "doctrinal high-water mark" of the "new religious institutionalism [that] places institutions—not individuals—at the core of religious liberty and grants them a special status in the social order").

for the distinction,[16] the one actually offered by the Court has been described as "impossible to credit."[17] And the author of the *Hosanna-Tabor* opinion, Chief Justice John Roberts, has more recently and broadly written about religious liberty in a way that "assumes an understanding of the Free Exercise Clause that the Court previously rejected in . . . *Smith*."[18]

If the Court were to shift back to recognizing an individual right to religious accommodation—and there is reason to suspect it might[19]—it will have executed a remarkable triple-flip on the core meaning of a First Amendment freedom. But even more notable than the prospect of another dramatic change in direction is the fact that leading scholars are urging the Court to accomplish it by creatively rewriting precedent.[20] In other words, they are suggesting that the Court repeat the very mistake that left *Sherbert* and *Smith* on such shaky grounds.

The justices should decline this invitation.

Instead, the Court should engage in a thorough and candid reexamination of its free exercise case law. It should begin by acknowledging that "*Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared,"[21] and further acknowledging that *Sherbert* did the same thing to the opposite effect 27 years earlier.[22] Having squarely confronted the "intolerable tension" in "extant case law,"[23] the Court

16. *See infra* text accompanying notes 204–09 (discussing such grounds).

17. Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1276 (2017); *see* Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 114 & n.38 (2016) (noting that the Court's distinction has "come in for some heated criticism" and collecting examples).

18. 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, 1324–25 (2017) (discussing the Chief Justice's dissent in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

19. *See id.* at 1354 ("Between the implicit questioning of *Smith* in Chief Justice Roberts's *Obergefell* dissent, and prior criticisms of *Smith* from moderate and liberal members of the Court, . . . [this] is a moment that could hold promise for a serious reengagement of the Free Exercise Clause by an ideologically diverse group of justices who may all have doubts about *Smith*."); *see also Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., joined by Alito, J., concurring) ("*Smith* remains controversial in many quarters."); Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 201 (noting that "four Justices recently invited" arguments for reconsidering *Smith*).

20. *See infra* Part II.

21. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 573 (1993) (Souter, J., concurring).

22. *See infra* text accompanying notes 41–47 (quoting prior inconsistent precedent that the *Sherbert* Court ignored).

23. *Lukumi*, 508 U.S. at 574 (Souter, J., concurring).

should then chart an honest path forward, whether it is one that does or does not recognize individual exemption rights.

Part I of this Article details the past dishonesties in the Court's free exercise cases. It begins with the misuse of Justice Robert Jackson's *Barnette* opinion to justify a rule of free exercise exceptionalism with which Jackson vehemently disagreed, and it ends with Chief Justice Roberts's recent reliance on such exceptionalism while wholly ignoring *Smith*.[24] Part II then discusses the greatest risk of free exercise dishonesty going forward. That risk concerns one of the so-called "exceptions" to *Smith*'s general rule that the government is not required to grant religious exemptions.[25] Under this exception, "the Free Exercise Clause may still require religious exemptions from a law when the government selectively makes available other exemptions from that law."[26] The narrow version of this "selective exemption rule," and the one most consistent with *Smith*'s "'equal protection' interpretation of the Free Exercise Clause,"[27] is only implicated in circumstances where the

24. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting).

25. *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1210 n.153 (1996) ("In an effort to reconcile its holding with prior precedent, the *Smith* Court recognized two exceptions to its blanket principle."). The two exceptions *Smith* explicitly contemplated were for cases involving either (1) a "hybrid situation" involving multiple constitutional claims, or (2) a law containing a "mechanism for individualized exemptions." *Emp't Div. v. Smith*, 494 U.S. 872, 881–82, 884 (1990). Subsequent to *Smith*, the Court also recognized the "ministerial exception." *See supra* text accompanying notes 14–15.

26. James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 295 (2013) (addressing the debate over this "selective-exemption rule" at length); *Lukumi*, 508 U.S. at 537 (1993) ("[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'") (quoting *Smith*, 494 U.S. at 884).

27. Oleske, *supra* note 26, at 335–36. The *Smith* Court's "equal protection" approach has been thoroughly discussed in the literature. *See*, *e.g.*, Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 941 (2018) ("[J]ust as *Washington v. Davis* held that 'race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause,' so too [*Smith* explained] religiously neutral laws should not be subject to heightened scrutiny merely because they substantially burdened religious practices.") (quoting *Smith*, 494 U.S. at 886 n.3); Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 560–61 (1994) ("A law is not unconstitutional [under *Smith*] merely because it burdens religion, but it is unconstitutional if it represents the persecution of religion. The critical question is what the law was intended to do or, in other words, what its objective or purpose was.").

denial of a religious exemption "suggests discriminatory intent."[28] A broader proposed version of the rule, however, would require religious exemptions from laws containing routine secular exemptions even where there is no suspicion of anti-religious animus.[29] Given that "virtually all laws . . . contain many secular exceptions,"[30] this interpretation of the selective-exemption rule would effectively overrule *Smith* in a great number of situations,[31] requiring religious exemptions from laws "without regard to whether they had the object of stifling or punishing free exercise."[32] In the recent case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[33] two prominent church-state scholars who have long opposed *Smith* urged the Court to adopt the broad version of the selective-exemption rule.[34] The majority opinion in *Masterpiece* did not address the issue, instead resolving the case based on a finding of "clear and impermissible hostility" toward religion.[35] But three concurring justices did indicate an openness to expanding the se-

28. *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality) (concluding that the state's denial of a religious exemption in *Sherbert* could be viewed as involving such circumstances because the state had used a "good cause" standard to create "a mechanism for individualized exemptions"); *see Smith*, 494 U.S. at 884 (relying upon the reasoning of the *Roy* plurality and distinguishing *Sherbert* as a case that involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct"); Hills, *supra* note 27, at 942 ("*Smith* distinguished *Sherbert* by suggesting that courts could presume an excessive risk of discrimination against religion from a law's system of individualized exemptions."); *cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (finding that a police department's categorical "decision to provide medical exemptions while refusing religious exemptions" from its no-beard rule was "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny").

29. *See infra* notes 238–90 and accompanying text (laying out the argument as described by its proponents and engaging it at length).

30. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999); *see also* Thomas C. Berg, *Can Religious Liberty Be Protected As Equality?*, 85 TEX. L. REV. 1185, 1192–93 (2007) (reviewing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007)) ("Many laws contain exceptions for medical or family needs; antidiscrimination and other employment laws commonly exempt small businesses."); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 772 (1998) ("Federal, state, and local laws are full of exceptions for influential secular interests.").

31. *See* Layock, *supra* note 19, at 173 ("If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are.").

32. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (explaining that such a requirement is not consistent with *Smith*).

33. 138 S. Ct. 1719 (2018).

34. *See infra* Part II (discussing the argument made by Professors Thomas Berg and Douglas Laycock in their amicus brief in *Masterpiece Cakeshop*).

35. *Masterpiece*, 138 S. Ct. at 1729.

lective-exemption rule,[36] a fourth justice was receptive to it in another recent case,[37] and efforts to use the rule to achieve a backdoor reversal of *Smith* will no doubt continue.[38]

Part III of this Article calls on the Court to head off such efforts by at long last committing to an honest free exercise jurisprudence instead of one that continues to perpetuate the pattern of reading precedents that say "up" to actually mean "mostly down." It also offers suggestions for what that honest free exercise jurisprudence might look like. Specifically, because the *Smith* Court incorrectly assumed that recognizing exemption rights will either risk anarchy or require treacherous balancing of religious interests against state interests,[39] this Article offers a concrete proposal for vindicating a limited right to religious exemptions without engaging in case-by-case balancing of such interests. Finally, it notes with some alarm that the Court's recent free speech opinion in *Janus v. AFSCME*,[40] while more forthright in some ways than the Brennan opinions that set in motion the last five decades of free exercise dishonesty, shares one key deficiency with those opinions—failure to acknowledge the doctrinal import of government targeting of protected freedoms as opposed to incidental burdening of such freedoms.

## I. PAST DISHONESTY

The long-disputed question about the Free Exercise Clause of the First Amendment is whether, in addition to protecting against government targeting of religion, it provides any level of protection against neutral laws that incidentally burden religious practices. If the constitutional protection of free exercise extends to incidental burdens, the government will sometimes be required to make religious exemptions from generally applicable laws.

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36. *See id.* at 1734 (Gorsuch, J., concurring, joined by Alito, J., concurring); *id.* at 1740 (Thomas, J., concurring) (indicating agreement with Gorsuch's analysis).

37. *See Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2439–40 (2016) (Alito, J., dissenting from the denial of certiorari, joined by Roberts, C.J., and Thomas, J.).

38. For another recent example of a Supreme Court brief pressing the broad version of the selective-exemption rule, see Brief of Religious Liberty Scholars as Amicus Curiae in Support of Petitioners at 19, *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016) (No. 15-862), 2016 WL 520087 ("A single secular exception triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct.").

39. *See Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990) ("Any society adopting such a system would be courting anarchy . . ."); *id.* at 889 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

40. 138 S. Ct. 2448 (2018).

In its first two cases addressing this issue, the Court squarely rejected a doctrine of constitutionally compelled exemptions. In 1878, it offered the following explanation:

> Can a man excuse his practices to the contrary [of the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[41]

In 1940, the Court adhered to the same position, insisting 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."[42]

But then, without so much as acknowledging either of the above passages, the Court reversed course in the 1963 case of *Sherbert v. Verner*.[43] The Court held that "any incidental burden on the free exercise" of religion must be "justified by a 'compelling state interest'"[44] and further held that it is "incumbent upon the [state] to demonstrate that no alternative forms of regulation" exist to advance that interest.[45] In other words, *Sherbert* dictated that a state "is constitutionally compelled to carve out an exception" for those whose failure to comply

41. *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

42. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940). The result in *Gobitis* was overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), but on free speech grounds, not free exercise grounds. *See infra* text accompanying note 62 (quoting *Barnette*, 319 U.S. at 634–35).

43. 374 U.S. 398 (1963); *see generally* Alfred G. Killilea, *Privileging Conscientious Dissent: Another Look at* Sherbert v. Verner, 16 J. CHURCH & ST. 197, 198–200 (1974) ("The importance of *Sherbert* lay in its ruling for the first time that the free exercise of religion can be breached not only by discriminatory legislation but also by purely secular laws which impose unintended burdens upon conscience. . . . Before *Sherbert*, American constitutional law generally saw the threat to conscience as a peculiarly sectarian ambition. Freedom of conscience in American law came to mean that a person was free from having another's convictions imposed upon him, not that he was ever free to act according to his own convictions when they were restricted for any secular reason by the state.").

44. *Sherbert*, 374 U.S. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The *Sherbert* Court implied that the compelling-interest test could explain its rejection of an exemption in *Reynolds*, distinguishing that case as one involving a "substantial threat to public safety, peace or order." *Id.*

45. *Id.* at 407.

with the law "is due to their religious convictions,"[46] unless the state can satisfy strict scrutiny.[47]

Nine years later, the Court confirmed its embrace of a free-exercise-exemption right backed by strict scrutiny, proclaiming in *Wisconsin v. Yoder*[48] that (1) "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*,"[49] and (2) "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[50]

In 1989, Justice Scalia described *Sherbert* and *Yoder*, along with two subsequent decisions from 1981 and 1987, as precedents in which the Court "held the Free Exercise Clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws."[51] Although this exemption doctrine had its critics,[52] and although some commentators thought it was too often honored in the breach,[53] nobody at the time could have seriously challenged Scalia's claim that such a doctrine existed.

But that is precisely what Justice Scalia himself did just one year later. Writing for the Court in *Employment Division v. Smith*,[54] and conveniently ignoring both his own prior words and those of the *Yoder* Court, Scalia claimed that the Court had "*never held* that an individu-

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46. *Id.* at 420 (Harlan, J., dissenting) (describing the Court's holding); *see* Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J. L. & GENDER 1, 5 (2015) (noting that "the law of constitutionally mandatory accommodations . . . began with *Sherbert v. Verner*").

47. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 296–97 ("*Sherbert* revolutionized the federal interpretation of the Free Exercise Clause of the First Amendment by requiring a strict scrutiny standard of review for general laws that burden religious exercise."); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 379–80 (2006) ("*Sherbert* was the first clear, succinct, and complete statement of what constitutional lawyers have come to mean by the phrase 'strict scrutiny.'").

48. 406 U.S. 205 (1972).

49. *Id.* at 220 (emphasis added).

50. *Id.* at 215.

51. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting).

52. *See, e.g.*, Ely, *supra* note 9, at 1322 ("*Sherbert* was an aberration when it was decided . . . . It should not be followed.").

53. *See, e.g.*, McConnell, *supra* note 2, at 1109–10 ("[T]he free exercise doctrine was more talk than substance. In its language, it was highly protective of religious liberty. . . . In practice, however, the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims.").

54. 494 U.S. 872 (1990).

al's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[55] In short, what Brennan did in 1963 with the key pre-*Sherbert* passages about exemption rights—ignoring them rather than squarely confronting them—Scalia did in 1990 with the key *Sherbert*-era passages on exemption rights. And then he completed the ironic twist by resurrecting and relying upon the very pre-*Sherbert* passages Brennan had failed to explicitly repudiate.[56]

Many commentators have called out the striking audacity of Scalia's move in *Smith*,[57] and several have criticized Brennan's two-step in *Sherbert*,[58] but few have done both. More critically, none have thoroughly explored the origins of this embarrassing pattern of evasion, which pre-dates even *Sherbert*. It is those origins to which this Article now turns.

### *A. Justice Brennan's Misuse of* Barnette *as the Cornerstone of the Religious-Exemption Doctrine*

In *West Virginia Board of Education v. Barnette*,[59] the Supreme Court famously held that the government cannot compel school children to salute the flag.[60] In reaching that conclusion, Justice Jackson's opin-

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55. *Id.* at 878–79 (emphasis added).

56. *See id.* at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940) and *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)); *see also id.* at 880 (relying on *Braunfeld v. Brown*, 366 U.S. 599 (1961)); J. Brett Pritchard, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in* Lyng v. Northwest Indian Cemetery Protective Association, 76 CORNELL L. REV. 268, 281–82 (1990) ("*Sherbert*'s failure to overrule *Braunfeld* left open the possibility that the Court could return to the *Braunfeld* rational basis standard without formally overruling *Sherbert*.").

57. *See, e.g.*, Laycock, *supra* note 2, at 3 (juxtaposing Justice Scalia's irreconcilable statements from 1989 and 1990); McConnell, *supra* note 2, at 1120–21 (noting that Justice Scalia was joined by two other justices in signing on to these irreconcilable statements). Even the attorney representing the prevailing state in *Smith* expressed amazement that the Court "decided the case on the basis of an argument that was never briefed, never argued, never made, and frankly, never fully imagined by the parties. We all assumed that *Sherbert* would be the controlling doctrine." David B. Frohnmayer, Employment Division v. Smith*: "The Sky That Didn't Fall,"* 32 CARDOZO L. REV. 1655, 1665 (2011).

58. *See, e.g.*, Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 501 (2009) (noting that "[w]ithout formally overruling *Reynolds*, the *Sherbert* Court effectively repudiated its basic approach"); Frohnmayer, *supra* note 57, at 1661 (maintaining that "Justice Brennan had largely made up the *Sherbert* test," which "deserved neither the reverence of antiquity nor the force of compelling logic that later commentators would attach to it").

59. 319 U.S. 624 (1943).

60. *Id.* at 642 ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades

ion for the Court made clear that—as John Hart Ely would later put it—"the presence or absence of religious objections on the part of the complainants was entirely beside the point."[61] The Court explained:

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.[62]

In other words, "[w]hat *Barnette* holds is that the state simply cannot compel an affirmation of patriotic loyalty,"[63] regardless of whether the individual objecting to the compulsion does so for religious or nonreligious reasons.[64]

Notwithstanding *Barnette*'s explicit avoidance of the religious-exemption issue,[65] the decision "is occasionally said to stand for the proposition that the state is sometimes obligated to carve religious exemptions out of valid across-the-board requirements."[66] And this mistaken portrayal lies at the heart of Justice Brennan's dissent in *Braunfeld v. Brown*.[67]

*Braunfeld* involved the claims of Orthodox Jewish merchants that a Sunday closing law unconstitutionally burdened the free exercise of their religion.[68] The merchants argued that, because their religion already required them to close their businesses to observe the Sabbath on

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the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

61. Ely, *supra* note 9, at 1322 n.363.

62. *Barnette*, 319 U.S. at 634–35.

63. Ely, *supra* note 9, at 1322 n.363.

64. *See* Jeffrey S. Sutton, Barnette*, Frankfurter, and Judicial Review*, 96 MARQ. L. REV. 133, 144 (2012) ("[T]o Jackson, *Barnette* was a case about compelled speech. He could not understand why anyone should be required to salute the flag, whether over faith-based objections or something else.").

65. *See Barnette*, 319 U.S. at 635 ("It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty."); *id.* at 642 (holding that the local authorities' imposition of the duty "transcends constitutional limitations on their power").

66. Ely, *supra* note 9, at 1322 n.363; *see, e.g.*, Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 759 (1996) (describing *Barnette* as "holding that the Free Exercise Clause required exempting" the objecting students); *cf.* Gerard V. Bradley, *Today's Challenges to Religious Liberty in Historical Perspective*, 21 TEX. REV. L. & POL. 341, 363 (2017) (portraying the Court as having "invigorated the Religion Clauses starting in *West Virginia State Board of Education v. Barnette*").

67. 366 U.S. 599 (1961).

68. *Id.* at 601–02.

Saturdays, the state's requirement that they also close on Sunday would cause them "substantial economic loss, to the benefit of their non-Sabbatarian competitors."[69] That result, the merchants contended, "will either compel [them] to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put [them] at a serious economic disadvantage"[70] and impair their ability to "earn a livelihood."[71] Indeed, they alleged, one of the merchants would be "unable to continue his business, thereby losing his capital investment."[72]

As an initial matter, it must be asked why the Court did not treat *Braunfeld* as a case of unconstitutional favoritism of one religious practice (Sunday Sabbath observance) over another (Saturday Sabbath observance). The answer to that question was delivered in a companion case, *McGowan v. Maryland*,[73] where the Court concluded that "despite the strongly religious origin" of Sunday closing laws,[74] they had since evolved—"wholly apart from their original purposes or connotations"—to serve the secular purpose of advancing the "health" and "general well-being of our citizens" by providing "a uniform day of rest."[75] Consistent with that understanding, the Court treated *Braunfeld* not as a case about intentional religious discrimination but, rather, the incidental burdening of religion by a "secular" requirement—to close one's business on a uniform day of rest.[76]

Dissenting from the Court's ruling that the Jewish merchants were not entitled to an exemption from that requirement, Justice Brennan framed the question as being "whether a State may put an individual to a choice between his business and his religion."[77] Under *Reynolds*, the answer to this question would seem to be a clear "yes." For in that case, the government was permitted to put an individual to a choice between *freedom from prison* and his religion,[78] and the Court rejected the

69. *Id.* at 602.

70. *Id.*

71. *Id.* at 601.

72. *Id.*

73. 366 U.S. 420 (1961).

74. *Id.* at 433.

75. *Id.* at 444–45.

76. *Braunfeld*, 366 U.S. at 605 (plurality) (stating that "the Sunday law simply regulates a secular activity"); *see id.* at 602 (referencing *McGowan*'s discussion "of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community and tranquility, respite and recreation"); *id.* at 610 (Brennan, J., dissenting) (acknowledging "the public need for a weekly surcease from worldly labor").

77. *Id.* at 611.

78. *See Reynolds v. United States*, 98 U.S. 145, 150–51, 161–68 (1878) (affirming bigamy conviction that resulted in a two-year prison term for a member of the Church of Jesus Christ of Latter Day Saints at a time when "it was an accepted doctrine

claimed right to a religious exemption on the ground that it would "permit every citizen to become a law unto himself."[79] The plurality in *Braunfeld* echoed that theme in ruling against the Jewish merchants, emphasizing Thomas Jefferson's view that man "has no natural right in opposition to his social duties."[80] But Justice Brennan simply assumed without discussion that the Free Exercise Clause *does* protect such a right, and jumped right to the question of "the appropriate standard of constitutional adjudication in cases in which a statute" implicates a First Amendment right.[81]

It is on that question that Brennan invoked the "canon of adjudication clearly stated by Mr. Justice Jackson, speaking for the Court" in *Barnette*: that First Amendment freedoms "may not be infringed on such slender grounds" as the state having a "rational basis" for its action, and "are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[82] According to Brennan, this "exacting standard,"[83] which he described as requiring a "compelling state interest,"[84] should have been applied in *Braunfeld* to the state's decision not to "follow the alternative route of granting an exemption" to the Jewish merchants.[85]

The flaw in Brennan's analysis should be obvious: he assumed as a threshold matter, contrary to the Court's teaching in *Reynolds*, that religious exemptions from generally applicable laws are a First Amendment freedom subject to the protective *Barnette* standard. But *Barnette* vindicated a qualitatively different type of claim: freedom from a law *targeted* at expressive content,[86] and the Court nowhere addressed whether a content-neutral (or religion-neutral) law *incidentally impacting* speech (or religious practices) would similarly implicate the First

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of that church 'that it was the duty of male members of said church, circumstances permitting, to practise polygamy'").

79. *Id.* at 166–67.

80. *Braunfeld*, 366 U.S. at 604.

81. *Id.* at 611.

82. *Id.* at 611–12 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

83. *Id.* at 612.

84. *Id.* at 613.

85. *Id.* at 614.

86. *See* Stephen Clark, *Judicially Straight?* Boy Scouts v. Dale *and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521, 580 (2003) (noting that *Barnette* "involved targeted compulsion of both actual speech and expressive conduct"—the Pledge of Allegiance and the flag salute—and recognizing that the challenged law did not merely "compel activity that sometimes happens to have expressive aspects; it compelled activity in a desire to force teachers and students to express a state-approved message"); *id.* at 581 (making a similar observation about the law challenged in *Wooley v. Maynard*, 430 U.S. 705 (1977), which "singled out speech or expressive conduct for special compulsion precisely because of its communicative aspects").

Amendment.[87] Indeed, not only did Justice Jackson's opinion on behalf of the Court in *Barnette* disclaim any reliance on claimed exemption rights,[88] Jackson made crystal clear elsewhere his view that an individual's participation in various activities "may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose."[89] As one commentator puts it:

> According to Jackson, the First Amendment . . . applied principally when governments attempted to regulate religion qua religion or speech qua speech, but not religion or speech qua something else. Jackson joined the Court to strike down rules that actually regulated speech or religion. He questioned a Court that would hold attempts to regulate commercial activity that incidentally affected speech or religion unconstitutional—activity that could be either religiously or secularly motivated. This gave Jackson a rough rule of decision: Closely examine statutes that really were about religion or speech, but leave in place those that were about something else—noise, doorbell-ringing, licenses to sell merchandise, and taxes. . . .
>
> Jackson was willing to give the First Amendment its due—*Barnette* serves as ample evidence of this—but he was deeply concerned that the First Amendment was becoming a sword in

87. *Id.* ("The activities [in *Barnette*] were not compelled for some reason unrelated to the message expressed by the activity.").

88. *See supra* note 65; *see also* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1385–86 (2000) ("In *Barnette*, . . . the Court did not reject the analytical approach taken to the free exercise claim in *Gobitis*. To the contrary, the Court was careful to point out that it was not suggesting that religiously devout students had a free exercise right to be *exempt* from compulsory flag salutes. Rather, the Court in *Barnette* concluded that legislatures could not compel *any* students to salute the flag or recite the pledge of allegiance. Thus the holding in *Barnette* . . . left undisturbed the conclusion that the Free Exercise Clause did not grant religious adherents (including students) a constitutional right to be exempt from laws of general applicability.").

89. *Prince v. Massachusetts*, 321 U.S. 158, 178 (1944) (Jackson, J.); *see Douglas v. City of Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring) ("Civil government cannot let any group ride rough-shod over others simply because their 'consciences' tell them to do so."); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1964 (2016) (noting that on the question of "whether private economic actors engaged in expressive conduct should be exempted from nondiscriminatory health, safety, and commercial regulations on civil libertarian grounds," "Justices Frankfurter and Jackson, the opposing authors of *Gobitis* and *Barnette*, were in total agreement that the answer . . . had to be 'no'").

> the hands of a small group of citizens unwilling to yield to the larger will of the community.[90]

Jackson did acknowledge that if the Court refused to recognize a constitutional right to religious exemptions, "[i]t may be asked why then does the First Amendment separately mention free exercise of religion?"[91] His response to that question was straightforward:

> The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy, because he failed to conform in mere belief, or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.[92]

Jackson's arguments against requiring exemptions from generally applicable laws sometimes fell on deaf ears in cases involving free speech and free press claims that were joined with free exercise claims,[93] but never in his time on the Court did the justices require an exemption on free exercise grounds alone.[94] And unlike Justice Brennan's dissent in *Braunfeld*, Chief Justice Earl Warren's opinion for the plurality in that case largely struck the same chord as Jackson:

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90. Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 290–91 (2000).

91. *City of Jeannette*, 319 U.S. at 179 (Jackson, J., concurring).

92. *Id.*

93. *See Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jones v. City of Opelika*, 319 U.S. 103 (1943); James R. Mason, III, Comment, Smith*'s Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 231 (1995) ("None of these cases turned upon granting exemption from the ordinance *only* to religiously motivated colporteurs, but to anyone distributing pamphlets to disseminate ideas or beliefs. Nor did they extend protection to *all* religiously motivated door-to-door peddlers, but *only* to those disseminating ideas. The constitutional protection afforded these 'hybrid situations' derived vitality from the non-free-exercise element.").

94. *See* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 576 (1983) (noting that while the "argument for free exercise supremacy was first presented in the Jehovah's Witnesses cases of the 1930's and 1940's," in "no case . . . did the Court vindicate a free exercise right while simultaneously denying a free speech claim"); Daniel J. Hay, Note, *Baptizing* O'Brien*: Towards Intermediate Protection of Religiously Motivated Expressive Conduct*, 68 VAND. L. REV. 177, 184 (2015) ("[P]rior to 1963, religious adherents were unsuccessful when their claims rested solely on the Free Exercise Clause.").

> Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.[95]

This passage, like the plurality's aforementioned reliance on Jefferson's teaching that "man has no natural right in opposition to his social duties,"[96] reads like a straightforward rejection of exemption rights. Yet, a subsequent passage in the plurality opinion sends a more muddled message about what should happen in cases where a law has the unintended effect of burdening a religious practice:

> If the purpose *or effect* of a law *is to impede* the observance of one or all religions or is to discriminate invidiously between religions, that law is *constitutionally invalid* even though the burden may be characterized as being only indirect. *But* if the State regulates conduct by enacting a general law within its power, the purpose *and effect* of which is *to advance the State's secular goals*, the statute is *valid* despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden*.[97]

Read literally and in isolation, the first sentence in this passage appears to espouse a rule that would lead to the invalidation of laws like those in *Reynolds* and *Braunfeld* based on their effect alone. But that cannot be what the *Braunfeld* plurality intended given that it (1) cited *Reynolds* approvingly,[98] and (2) ruled *against* the *Braunfeld* plaintiffs despite acknowledging that they "will be burdened economically by the State's day of rest mandate."[99] Moreover, the "effect/impede/invalid" language in the first sentence does not stand alone; it is immediately followed by the "effect/advance/valid" language in the second sentence. Most exemption cases will involve laws with effects that *both* impede a religious practice *and* advance valid state interests, and the question is what to do in those situations. The remainder of the plurality's analysis,

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95. *Braunfeld*, 366 U.S. at 606.
96. *See supra* note 80 and accompanying text.
97. *Braunfeld*, 366 U.S. at 607 (emphasis added).
98. *Id.* at 603–05.
99. *Id.* at 603.

and the result in the case, indicates that the presumption of validity in the second sentence governs such cases. But the language in the first sentence did leave an opening for supporters of strong exemption rights to seize upon, as the Court itself would soon do.[100] And although the *Braunfeld* plurality nowhere purported to apply the compelling-interest standard Justice Brennan championed in dissent, the "unless" caveat at the end of the passage above did call for an alternative-means analysis, albeit one the plurality applied deferentially to the government.[101] Thus, even though the exemption claim lost in *Braunfeld*, and even though there is language elsewhere in the plurality opinion casting doubt on the very idea of exemption rights,[102] the passage above could be viewed as a step towards embracing a right to religious exemptions.[103] Unfortunately, like Justice Brennan's more definitive embrace of such a right in dissent, the plurality's gesture was unaccompanied by any discussion of whether and how the law should distinguish between targeted burdens and incidental burdens.[104]

In any event, one thing is clear: Justice Brennan's misappropriation of *Barnette* to call for *strict scrutiny* of incidental burdens on religion failed to carry the day in *Braunfeld*.[105] But just two years later, in a stunning reversal that the Court pretended was not a reversal, Bren-

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100. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (relying on the "effect/impede/invalid" line from *Braunfeld* without acknowledging the "effect/advance/valid" line).

101. *See* DAVID R. MANWARING, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 246 (1962) ("Warren's single qualification was largely vitiated by the very great benefit of the doubt he gave the state in determining that other forms of sabbath regulation—e.g., a prohibition exempting those observing some other day of the week—'might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity.'") (quoting *Braunfeld*, 366 U.S. at 608); Killilea, *supra* note 43, at 202–03 ("Warren's actual test presumed the validity of the law and merely invited the appellant to show that alternative means of regulation existed, with the appellant assuming the burden of evidence.").

102. *See supra* text accompanying notes 95–96.

103. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 940 (1989) (making the case that *Braunfeld* "significantly widened" the Free Exercise Clause's "potential scope" beyond what had been recognized in *Reynolds*).

104. *See supra* text accompanying notes 86–87 (discussing Justice Brennan's conflation of the two types of burdens in his *Braunfeld* dissent); *infra* text accompanying notes 117–22 (discussing the same conflation in Justice Brennan's majority opinion in *Sherbert*).

105. *See* Frederick Mark Gedicks, *RFRA and the Possibility of Justice*, 56 MONT. L. REV. 95, 110 (1995) (noting that "the Court had refused in *Braunfeld* to apply anything like the compelling interest standard to burdens on the free exercise of religion"); Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 645 (2016) ("[T]he *Braunfeld* Court used a test far more deferential than the compelling interest test used in *Sherbert*.").

nan's revisionist account garnered support from a majority of the Court.

### *B. Dishonesty Begets Dishonesty: The Path from* Sherbert *to* Smith

> Smith *only brought to the surface a gap that had plagued the Court's religion-exemption cases from their start in* Sherbert. *For those cases never admitted, let alone tried to make sense of, the constitutionally "anomalous" character of the free exercise doctrine they were propounding. And while it would be ascribing too much force to mere argument to suggest that* Smith *would have come out the other way had those earlier cases been more forthright, coherent, and convincing, Scalia and the rest of his majority would at least have had a harder time tearing down the edifice. . . .*
> *Brennan's . . . masterful rereading of precedent [in* Sherbert*] was not as outrageous as Scalia's in* Smith*, though an observer could be forgiven for thinking that they deserved each other.*
>
> – Professor Perry Dane[106]

The era of constitutionally compelled religious exemptions (1963–1990) began with *Sherbert*,[107] a case involving a Seventh-day Adventist who lost her job because she "would not work on Saturday, the Sabbath Day of her faith."[108] After the state of South Carolina denied unemployment compensation benefits to Ms. Sherbert pursuant to a law requiring applicants to be "available for work,"[109] she appealed the denial on the ground that it unconstitutionally burdened her observance of the Sabbath.[110] In a decision written by Justice Brennan that sidestepped the same fundamental question as did his dissent in *Braunfeld*, the Supreme Court agreed.

Brennan's opinion emphasized that South Carolina's rule forced Ms. Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[111] Of course, this is the same type of dilemma Brennan had highlighted in his *Braunfeld* dissent, where he argued that the government should not

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106. Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 SAN DIEGO L. REV. 53, 87–88 (2016) (paragraph break added).

107. 374 U.S. 398 (1963).

108. *Id.* at 399.

109. *Id.* at 400.

110. *Id.* at 403.

111. *Id.* at 404.

be permitted to "put an individual to a choice between his business and his religion"[112] and complained that the Court had allowed the government to do so in the interest of "mere convenience."[113] Although it seems clear that "*Sherbert* made Brennan's *Braunfeld* dissent the law of the land,"[114] *Sherbert* did not overrule *Braunfeld* and instead attempted to distinguish it. That effort, which saw Brennan describe the burden in *Braunfeld* as "less direct" and justified by a "strong state interest,"[115] has been the subject of widespread and justifiable criticism.[116] But the core problem with *Sherbert* runs deeper than its unconvincing comparison of the respective burdens and state interests in the two cases.

The critical flaw in Justice Brennan's analysis for the Court in *Sherbert* is the same as it was in his *Braunfeld* dissent: he skips over the threshold question of what *type* of government action implicates the Free Exercise Clause, simply assuming that it makes no constitutional difference whether a burden flows from an intentionally discriminatory law or a neutral one. After observing that South Carolina's general requirement that beneficiaries be available for work had the effect of forcing Ms. Sherbert to choose between adhering to her Sabbath practices and qualifying for unemployment benefits, the Court asserted that "imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[117] If the word "kind" in this sentence were replaced with "degree," the sentence would be far more defensible. But it would be far less helpful to the *Sherbert* majority, because regardless of degree, constitutional law routinely treats incidentally imposed burdens as

112. *Braunfeld v. Brown*, 366 U.S. 599, 611 (Brennan, J., dissenting).

113. *Id.* at 614.

114. Siegel, *supra* note 47, at 379.

115. *Sherbert*, 374 U.S. at 408.

116. *See, e.g.*, *id.* at 417–18 (Stewart, J., concurring) ("The *Braunfeld* case involved a state *criminal* statute. The undisputed effect of that statute . . . was that 'Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment.' . . . The impact upon the appellant's religious freedom in the present case is considerably less onerous. . . . I agree with the Court that the [impact here] is enough to infringe upon the appellant's constitutional right to the free exercise of her religion. But it is clear to me that in order to reach this conclusion the court must explicitly reject the reasoning of *Braunfeld v. Brown*."); *id.* at 421 (Harlan, J., dissenting) ("[D]espite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*."); Killilea, *supra* note 43, at 207 ("While Brennan made a game try in overcoming the objections raised in his opinion in *Braunfeld*, one was left with the feeling that a finding of 'wholly dissimilar' state interests in the two cases was hyperbolic indeed."); J. Brett Pritchard, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in* Lyng v. Northwest Indian Cemetery Protective Association, 76 CORNELL L. REV. 268, 281–82 (1990) ("If anything, the impact of the law challenged in *Sherbert* was less onerous than the law challenged in *Braunfeld*.").

117. *Sherbert*, 374 U.S. at 404.

being different in kind and less inherently suspect than targeted burdens.[118] Justice Brennan's fine-imposed-for-worship sentence in *Sherbert* completely elides this distinction,[119] permitting the Court to invoke the type of strict scrutiny customarily used to protect against intentional discrimination for the very different purpose of creating a new presumptive right to religious exemptions.[120] By expanding the protection of the Free Exercise Clause without acknowledging that it was doing so, the *Sherbert* Court violated Justice Jackson's admonition that "[f]orthright observance of rights presupposes their forthright definition"[121] and left an unexplained "anomaly" that Justice Scalia would be able to attack in *Smith*.[122]

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118. *See* Dorf, *supra* note 25, at 1176–79, 1183–84 (discussing this dynamic in doctrines governing the rights to free speech, free exercise, privacy, and equal protection); *see also Emp't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("[W]e subject to the most exacting scrutiny laws that make classifications based on race . . . [b]ut we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause; and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment.") (citations omitted).

119. Elsewhere, Justice Brennan himself emphasized the distinction when writing for the Court on free speech, treating "content and viewpoint neutral" laws as less suspect than those that raise "the specter of content and viewpoint censorship," even where laws in the former category "completely prohibit[] a particular manner of expression." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763–64 (1988).

120. *See Sherbert*, 374 U.S. at 406–07 (requiring the state to show a "compelling state interest" and to further "demonstrate that no alternative forms of regulation would [serve its interests] without infringing First Amendment rights"); Jesse H. Choper, *In Favor of Restoring the* Sherbert *Rule—with Qualifications*, 44 TEX. TECH L. REV. 221, 221 (2011) ("[I]n *Sherbert v. Verner*, the Supreme Court held that when generally applicable regulations of conduct that have been enacted for secular purposes conflict with the requirements of certain religions, the Free Exercise Clause requires an exemption, unless the law survives 'strict scrutiny.'"); Killilea, *supra* note 43, at 198 (describing *Sherbert* as "scrapping the time-honored 'secular-regulation rule' that considered freedom of religion to be violated only by intentional discrimination"); Siegel, *supra* note 47, at 379 (describing *Sherbert*'s use of strict scrutiny as a "stunning departure" from the approach in *Braunfeld*, where "six Justices held that indirect burdens on religion required only reasonable basis review").

121. *Douglas v. City of Jeannette*, 319 U.S. 157, 182 (1943) (Jackson, J., concurring); *see* Dane, *supra* note 106, at 91 ("[T]he slide from free speech doctrine to a defense of religion-based exemptions was, in fact, misguided. The intellectual foundation established for exemptions doctrine was therefore brittle from the start."); Killilea, *supra* note 43, at 204 ("The difficulty with Brennan's [analysis] was . . . that he made this major change in constitutional interpretation so casually and presumptuously that the state's argument was denied the benefit of a clear and reasoned rejection.").

122. 494 U.S. 886 (1990) ("What the [compelling interest] test produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly."); *see generally* Dane, *supra* note 106, at 69–70 (further discussing how claims for religious exemptions are "consti-

Before Scalia would have that opportunity, however, the Court added several more layers of confusion to its religious-exemption doctrine. The resulting mess continues to have ramifications today for cases decided under the Religious Freedom Restoration Act (RFRA),[123] which was designed to restore *Sherbert*-era exemption rights.[124]

The most infamous aspect of the doctrinal uncertainty that reigned during the *Sherbert*-era was the Court's uneven treatment of the compelling-interest standard. Although the Court invoked the demanding standard on numerous occasions,[125] it ruled only once against the government in an exemption case outside the *Sherbert*-specific context of unemployment compensation benefits.[126] One way in which the Court watered down the scrutiny level was to focus on the government's overall interest in maintaining a legal requirement rather than the government's specific interest in denying the requested religious exemption.[127] In other words, although the Court *said* its test required the government to show that denying an exemption was "essential" to, or "the least restrictive means" of, achieving its interest,[128] the Court did not always operationalize that part of the test.

Another way the Court defanged the test was by lowering the level of scrutiny, either implicitly or explicitly, when the burden imposed by

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tutionally anomalous"). *But see infra* text accompanying notes 186–89 (arguing that a religious-exemption right backed by intermediate scrutiny rather than strict scrutiny would not be an anomaly).

123. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997). Although the Supreme Court has found that RFRA exceeds Congress's powers under Section Five of the Fourteenth Amendment and cannot be applied to the states, it remains in effect against the federal government, *Flores*, 521 U.S. at 536. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (applying RFRA to federal regulations). In addition, twenty-one states have adopted their own RFRAs. *See State Religious Freedom Restoration Acts*, NCSL (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx [https://perma.cc/EL6U-QZA9].

124. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (describing how after the *Smith* Court "rejected the interpretation of the Free Exercise Clause announced in *Sherbert v.Verner* . . . Congress responded by enacting [RFRA], which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*"); Volokh, *supra* note 30, at 1473 (noting that "supporters of the *Sherbert* model persuaded Congress to enact" RFRA, which "was billed as a way to reinstate by statute the old constitutional exemption regime.").

125. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 384–85 (1990); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983); *United States v. Lee*, 455 U.S. 252, 257–58 (1982).

126. *See Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972).

127. *See* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 182–85, 194, 223 (1995) (discussing cases in which the Court applied this approach of evaluating "state interests in gross, rather than at the margin").

128. *See infra* text accompanying notes 154–59.

the law was not a direct prohibition or compulsion of conduct, but instead a denial of benefits. Notwithstanding the fact that the *Sherbert* Court had specifically rejected such a distinction,[129] it resurfaced in exemption decisions outside the unemployment compensation context,[130] one of which drew upon the reasoning of the *Braunfeld* decision that *Sherbert* declined to overrule.[131]

In explaining denials of exemptions in the *Sherbert*-era, the Court also came back to *Braunfeld*'s discussion of how "we are a cosmopolitan nation made up of people of almost every conceivable preference."[132] After quoting that language in *United States v. Lee*, the Court added that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[133] And at the end of its decision, the *Lee* Court reiterated that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."[134] Similarly, the plurality in *Bowen v. Roy* emphasized that "given the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental neutral restraints on the free exercise of religion are inescapable."[135] These arguments for rejecting exemption claims are perfectly

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129. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

130. *See Bowen v. Roy*, 476 U.S. 693, 706 (1986) (plurality) ("We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard."); *Bob Jones*, 461 U.S. at 603–04 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.").

131. *See Roy*, 476 U.S. at 704 n.14 (distinguishing between situations where government regulation may indirectly "result in some financial sacrifice" by religious adherents and those where "legislation attempts to make a religious practice itself unlawful") (quoting *Braunfeld v. Brown,* 366 U.S. 599, 605–06 (1961)).

132. *United States v. Lee*, 455 U.S. 252, 259 (1982) (quoting *Braunfeld*, 366 U.S. at 606).

133. *Id.*

134. *Id.* at 261.

135. 476 U.S. at 712 (1986) (plurality). In a passage previewing the reasoning subsequently adopted by a majority of the Court in *Smith*, the *Roy* plurality wrote:

compatible with the *Braunfeld* Court's teaching that "it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.[136] But the exemption-skeptical passages of *Lee* and *Roy* strike a very different tone than *Sherbert*, which insisted that "any incidental burden on the free exercise of [an individual's] religion" must "be justified by a compelling state interest" that "no alternative forms of regulation" could serve.[137]

The Court's failure to apply truly strict scrutiny consistently in the *Sherbert*-era is widely acknowledged.[138] As Michael McConnell, one of the most prominent champions of religious exemptions in the academy, has written:

> [I]t must be conceded that the Supreme Court before *Smith* did not really apply a genuine "compelling interest" test. Such a test would allow the government to override a religious objection only in the most extraordinary of circumstances. . . . Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases, and they were correct to do so. The "compelling interest" standard is a misnomer.[139]

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> It is readily apparent that virtually every action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. For example, someone might raise a religious objection, based on Norse mythology, to filing a tax return on a Wednesday (Woden's day). Accordingly, if the [*Sherbert*-era] interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a "compelling government interest." While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended.

*Id.* at 707 n.17.

136. *Braunfeld*, 366 U.S. at 606.

137. *Sherbert v. Verner*, 374 U.S. at 403, 407; *see id.* at 406 (stating that "[o]nly the gravest abuses" in exercising First Amendment rights, "endangering paramount interests, give occasion for permissible limitation") (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)) (internal quotation marks omitted); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

138. *See supra* note 13 and *infra* note 139 (collecting authorities).

139. McConnell, *supra* note 2, at 1127. *See also Emp't Div. v. Smith*, 494 U.S. 872, 883 (1990) (noting that while the Court had "sometimes purported to apply" the compelling state interest test in pre-*Smith* cases, outside of limited contexts, it "always found the test satisfied"); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (describing pre-*Smith* scrutiny in exemption cas-

If the Court was not applying strict scrutiny in the *Sherbert*-era, what was it doing? The consensus seems to be that it was applying a "balancing test," which is how the Court itself has repeatedly described *Sherbert*,[140] and how supporters of RFRA subsequently described that law's test.[141] As Professor Kent Greenawalt has explained, "[i]n reality, courts consider burden in light of government interest and government interest in light of burden, striking a kind of balance."[142] Despite this reality, however, it bears emphasizing that the *language* of the test invoked by the Court during the *Sherbert* era and then codified in RFRA does *not* speak of balancing.[143] Rather, it sets out a series of yes/no questions. First, does application of the law substantially burden the exemption claimant's religious practice?[144] If no, the claimant loses, if

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es as "strict in theory but feeble in fact"); William P. Marshall, *Bad Statutes Make Bad Law:* Burwell v. Hobby Lobby, 2014 SUP. CT. REV. 71, 89 (noting that the Court only "nominally adhered to *Sherbert*'s compelling interest test in evaluating free exercise claims" and that the "results in the cases . . . did not reflect the Court's announced standard."). For a pre-*Smith* recognition of this dynamic, see Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373, 379 (1989) ("[P]eople are led to believe that there is a general doctrine of mandatory accommodation, a belief the Court's decisions basically belie. . . . [P]eople present claims for exemption based on the purported 'doctrine' of *Sherbert*, only to find that those claims are routinely denied.").

140. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014); *id.* at 2792 (Ginsburg, J., dissenting); *Smith*, 494 U.S. at 883.

141. *See, e.g.*, Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 169 (1995) ("The courts can balance government interests against religious interests under the compelling interest test."); Testimony of Steven K. Green, Religious Liberty Protection Act: Hearings on H.R. 4019 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 105th Cong. 210–11 (June 16 and July 14, 1998) ("The beauty of the compelling interest standard is that it does not preordain any particular outcome but merely sets up a balancing test of competing interests. . . . The standard weighs and then balances competing interests, first considering the burden on the claimant's religion and then evaluating the importance of the government's activity and the available alternatives for achieving its goals.").

142. KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 202 (2006); *see also* Testimony of Douglas Laycock, 1998 House Hearing, *supra* note 141, at 17 ("In the practical application of the substantial burden and compelling interest tests, it is likely to turn out that 'the less central an observance is to the religion in question the less the officials must do' to avoid burdening it.") (quoting *Mack* v. *O'Leary,* 80 F.3d 1175, 1180 (1996), *vacated on other grounds*, 118 S. Ct. 36 (1997)).

143. *See* GREENAWALT, *supra* note 142, at 202 (noting that "[i]n typical formulations, examination of the burden on religious practice is formally distinct from assessment of government interest"). For a further discussion of the distinction between the process of balancing interests against each other and weighing interests separately, see *infra* text accompanying notes 294–300.

144. *See Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice . . . ."); 42 U.S.C. § 2000bb-1 (2012) ("Government shall not substantially burden a person's exercise of religion even if the burden

yes, the analysis continues. Second, does the law serve a compelling state interest?[145] If no, the claimant wins, if yes, the analysis continues. Third, is applying the law to the claimant essential to, or the least restrictive means of, advancing the state's compelling interest?[146] If no, the claimant wins, if yes, the claimant loses.

So long as the test was only a judicial doctrine, the disconnect between its binary language and its balancing reality was a manageable problem, if a bit of an embarrassment. But now that Congress has codified the test, the disconnect presents a statutory-interpretation dilemma: Congress's manifest purpose in passing RFRA was to restore the Court's pre-*Smith* jurisprudence, as evidenced by the Act's title ("Religious Freedom *Restoration* Act") and its statement of purpose,[147] but the language in RFRA's operative provision is that of strict scrutiny and not balancing.[148] The dilemma was on partial display in *Burwell v. Hobby Lobby Stores, Inc.*,[149] where the analysis was further complicated by sloppy language from a prior case. In *Hobby Lobby*, the Court said that under one "understanding" of its pre-*Smith* cases, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions."[150] The Court's evidence for this understanding, however, was its own earlier misstatement about that line

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results from a rule of general applicability, except as provided in subsection (b) of this section.").

145. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."); 42 U.S.C. § 2000bb-1 ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest . . .").

146. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); 42 U.S.C. § 2000bb-1 ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . (2) is the least restrictive means of furthering that compelling governmental interest.").

147. *See* 42 U.S.C. § 2000bb ("The Congress finds that . . . in Employment Division v. Smith . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests. . . . The purposes of this chapter are . . . to restore the compelling interest test as set forth in Sherbert v. Verner . . . and Wisconsin v. Yoder . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . .").

148. *See supra* notes 145–146 (quoting the operative language).

149. 573 U.S. 682 (2014).

150. *Id.* at 695 n.3. *But see id.* at 706 n.18 (finding it unnecessary to resolve this issue definitively).

of cases in *City of Boerne v. Flores*.[151] The *City of Boerne* Court had asserted that RFRA's "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify."[152] But in fact, the pre-*Smith* cases repeatedly invoked the least-restrictive-means requirement, sometimes using that precise phrasing, and sometimes using equivalent formulations.[153] For example, in *Thomas v. Review Board*,[154] the Court described the test as asking whether the government's action was "the least restrictive means of achieving some compelling state interest";[155] in *Bob Jones University v. United States*,[156] the Court ruled in favor of the government after concluding that there was "no less restrictive means . . . available to achieve" the compelling government interest in that case;[157] in *Lee*, the Court said the test was whether burdening religion was "essential" to achieving the state's interest;[158] and in *Sherbert*, the Court said the question was whether "no alternative form[] of regulation" would serve the state's interest.[159] It is remarkable that the *City of Boerne* Court could have overlooked these passages in the *Sherbert*-era cases. And it is a vivid confirmation of the disconnect between the language of those cases, which is now codified in RFRA, and the judicial understanding of those cases, which informed how they were described to the Congress that thought it was restoring them.[160]

But what explains the disconnect? And why did Professor McConnell write in the passage excerpted above that the Court was "correct" to apply a "far more relaxed standard" than its language indicated?[161] The answer is driven by a very practical concern: true strict scrutiny, if applied faithfully to government denials of religious exemp-

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151. 521 U.S. 507 (1997).

152. *Id.* at 509.

153. As noted above, however, the Court did not consistently give the requirement full effect in the *Sherbert* era. *See supra* text accompanying note 128.

154. 450 U.S. 707 (1981).

155. *Id.* at 718.

156. 461 U.S. 574 (1983).

157. *Id.* at 604 (quoting *Thomas*, 450 U.S. at 718).

158. *United States v. Lee*, 455 U.S. 252, 257–58 (1982).

159. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

160. *See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 345 (1992) (statement of Professor Douglas Laycock) (representing that "[RFRA] leaves all [exemption] claims just where they would be under the Free Exercise Clause if *Smith* had not so greatly reduced protection for religious practice"); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. FORUM 416, 428–31 (2016) (detailing legislative history showing that RFRA was intended to restore the actual pre-*Smith* approach); *see generally* Lupu, *supra* note 127, at 195 ("RFRA, literally construed, would . . . insulate religious exercise far beyond its most stringent protection in the prior law.").

161. *See supra* text accompanying note 139.

tions, would lead to far more exemptions than society would be willing to tolerate.[162] To mitigate that problem, judges working with precedents or statutes calling for strict scrutiny in exemptions cases often have an incentive to "apply some undefined level of lesser scrutiny while writing decisions in the language of strict scrutiny."[163] Alternatively, judges might try to "avoid the scrutiny issue altogether by finding no cognizable burden on religion as a threshold matter," an option that runs the risk of subjectively and inappropriately discounting the "import and significance of [certain] religious practices."[164] Based on ample evidence that judicially administered exemption regimes have exhibited these flaws in the past, some leading commentators have concluded such regimes are inherently unworkable.[165] Others have argued that, while the *Sherbert*-era exemption doctrine was "poorly developed and unacceptably subjective," the solution is not "abandonment of the enterprise," but "the development of a more principled approach" to making free exercise accommodations that does not involve a "free-wheeling balancing of incommensurate interests."[166] But there is no serious case to be made that the Court itself has ever done the amount of sustained hard reasoning that would be necessary to develop such an approach.[167]

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162. *See Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990) ("[I]f 'compelling interest' really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy . . . . Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.") (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)); Lupu, *supra* note 127, at 195 ("If government is truly required to employ the means least restrictive of religion, without regard to the loss to the state in attaining its objectives, [results under RFRA] would . . . frequently be insensible.").

163. Oleske, *supra* note 18, at 1326.

164. *Id.*

165. *See* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 74, 101 (2015) (contending that the "enduring qualities" of judicially administered exemption regimes have been "weakness, plasticity, erratic and unpredictable bursts of religion-protective energy, and the consequent tendency to produce deep inconsistencies," and concluding that "a general regime of judicial exemptions is a lawless, sometimes unconstitutional, and pervasively unprincipled charade"); Marshall, *supra* note 139, at 75 ("[A]t best, the Court's interpretation of RFRA will lead to a jumbled jurisprudence beset by the same problems that plagued the Court's *pre-Smith* free exercise decisions. At worst it may lead to results that are normatively problematic and constitutionally unsound.").

166. McConnell, *supra* note 2, at 1144–45; *see infra* text accompanying notes 297–99 (offering a specific proposal for such an approach).

167. As Professor Perry Dane has noted, former Justice David Souter did write an opinion in 1993 urging that the Court "begin to articulate, in a self-consciously

That said, the Court did do *some* work toward this end during the *Sherbert* era, even if it did not always show its work and ultimately deserved a grade no higher than "incomplete." On failing to show its work, one need look no further than the Court's pronouncement in *Lee* that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[168] The notion that business owners cannot claim religious immunity from commercial regulations, even if the Free Exercise Clause guarantees exemptions in other contexts, is wholly consistent with the Court's treatment of other First Amendment claims in the commercial realm.[169] But the Court made no effort in *Lee* to make that point or to explain exactly how its pronouncement fit into the doctrinal framework established in *Sherbert*.[170] Providing an explanation would not have been difficult, especially since the *Lee* Court did note a key dynamic that is relevant to one possible explanation. As the Court observed, because the employer in *Lee* was seeking an exemption from paying into the Social Security system, granting an exemption would have imposed the costs of the "employer's religious faith on the employees."[171] Therefore, one doctrinal explanation the *Lee* Court could have provided for its skepticism of granting religious exemptions to businesses is that the government has a compelling interest in preventing third-party harms, and "[i]n the commercial context, religious exemptions will almost always impose burdens on third parties, whether employees, customers, or business competitors."[172] But the *Lee* Court failed to provide this or any other explanation of its "commercial activity" pronouncement, a failure that undoubtedly made it easier for a differently inclined Court

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exploratory way, a more cogent defense of the idea of religion-based exemptions." Dane, *supra* note 106, at 97.

168. *United States v. Lee*, 455 U.S. 252, 261 (1982); *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402–03 n.5 (1968) (per curiam) (rejecting as "patently frivolous" a restaurant owner's argument that, by prohibiting racial discrimination, the 1964 Civil Rights Act "constitute[d] an interference with the 'free exercise of the Defendant's religion'" (quoting *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring)).

169. *See* James M. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142, 145–53 (2015) (discussing this treatment at length).

170. Indeed, the pronouncement was made in a concluding section of the Court's opinion (Part III) that was separate from the section (Part II) in which the Court applied its customary framework. *See Lee*, 455 U.S. at 256–61.

171. *Id.* at 261.

172. James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 132 (2015).

in *Hobby Lobby* to bury *Lee*'s inconvenient pronouncement in a footnote near the end of its opinion.[173]

Another deficiency in the Court's *Sherbert*-era jurisprudence was its sending of mixed messages about the propriety of courts evaluating religious practices. On the one hand, in *Thomas v. Review Board*,[174] the Court instructed that the resolution of exemption claims "is not to turn upon judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[175] The *Thomas* Court also emphasized that judges "should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with . . . clarity and precision."[176] But in one of the most celebrated exemption decisions of the *Sherbert* era, *Wisconsin v. Yoder*,[177] the Court made plain its favorable impression of the Amish,[178] "repeatedly emphasize[d] the long tradition of Amish beliefs,"[179] and "hinted that it would not be so kind to religious views it found less appealing."[180] As one commentator observed, "[i]t is not unfair to read [*Yoder*] as saying

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173. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735 n.43 (2014) (distinguishing *Lee* on the ground that it was a free exercise case and not a RFRA case).

174. 450 U.S. 707 (1981).

175. *Id.* at 714.

176. *Id.* at 715.

177. 406 U.S. 205 (1972).

178. *See, e.g.*, *id.* at 222 ("[T]he Amish community has been a highly successful social unit within our society . . . . Its members are productive and very law-abiding."); *id.* at 224–25 (referencing the "Amish qualities of reliability, self-reliance, and dedication to work"); *id.* at 225 (describing the Amish as having preserved a "highly self-sufficient community for more than 200 years in this country"); *id.* at 235 (referencing the Amish's "long history as a successful and self-sufficient segment of American society").

179. James D. Gordon III, Wisconsin v. Yoder *and Religious Liberty*, 74 TEX. L. REV. 1237, 1238 (1996); *see also* Philip B. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 237 (1973) ("Only the long-established churches are to be the beneficiaries of the broadened protection [in *Yoder*]. This was both implicit and explicit in the Chief Justice's opinion. The ancient lineage of the Amish religion was emphasized frequently.").

180. Nicholas J. Nelson, *A Textual Approach to Harmonizing* Sherbert *and* Smith *on Free Exercise Accommodations*, 83 NOTRE DAME L. REV. 801, 812 (2008); *see also* Gordon, *supra* note 179, at 1238 ("[T]he arguments almost imply that new religions may be less worthy of protection."); Kurland, *supra* note 179, at 237–38 ("The simple life, which the Court admired and protected, however, must be in response to the commands of such a long-lived and well-established religious tradition in order to come within the protection of the first amendment. The Court holds no truck with contemporaries who would also aspire to return to an agrarian democracy without interference by the states.").

that the claims of the Amish prevailed because they were a 'good' religion."[181]

In sum, the *Sherbert*-era exemption doctrine was grounded in a misrepresentation of past precedent, promised a high level of protection that it often failed to deliver, and gave courts an incentive to make value judgments about different religions. Against that background, the Court in *Smith* should have had a relatively easy time raising the bar in terms of honesty and clarity. Alas, the Court failed, and it did so in spectacular fashion.

### *C. The Sins of* Smith

Critiques of the Supreme Court's 1990 decision in *Employment Division v. Smith*,[182] which appeared to herald the end of constitutionally compelled religious exemptions,[183] are legion.[184] The analysis here will not endeavor to touch on all of the complaints, but instead will

181. Tushnet, *supra* note 139, at 382; *see also* Nelson, *supra* note 180, at 811 ("The *Yoder* Court was even rather explicit about its function as a stamp of government approval or disapproval of specific religious beliefs."); Peter J. Riga, Yoder *and Free Exercise*, 6 J.L. & EDUC. 449, 466 (1977) ("What the Court has done in Yoder comes dangerously close to that examination of beliefs which, in itself, is a violation of free exercise."); Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role?*, 24 AKRON L. REV. 393, 413 n.140 (1990) (arguing that despite the Court's admonitions in other cases about the impropriety of weighing the value of religious practices, "that is precisely what Burger did in *Yoder*"); Steven D. Smith, Wisconsin v. Yoder *and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805, 806–07 (1996) ("The opinion . . . dwells on the particulars of the Amish religious tradition, emphasizing their centuries-long history and the virtues of their way of life. A natural implication of this discussion . . . is that a different religion would likely not receive the same solicitude from the Court . . . .").

182. 494 U.S. 872 (1990).

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

184. For a sampling, see *supra* notes 2 and 106. *See also* Angela C. Carmella, *Exemptions and the Establishment Clause,* 32 CARDOZO L. REV. 1731, 1731 (2011) (noting that the *Smith* decision "immediately provoked reaction (almost entirely negative) from the legal academy, and undoubtedly helped to reinvigorate sustained scholarly interest in religious exemptions"). *But see* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248 (1991) ("Smith rightly jettisoned the conduct exemption because it is manifestly contrary to the plain meaning of the Free Exercise Clause . . . . Critics of Smith who are serious about constitutional law, or who are not liberals, and especially critics who are both, should rethink their position."); Leslie C. Griffin, Smith *and Women's Equality*, 32 CARDOZO L. REV. 1831, 1834–35 (2011) (arguing that "full enforcement of Smith is essential to women's equality" and that "resistance to Smith and refusal to apply its holding have harmed women's rights").

highlight the shortcomings in *Smith* and its progeny that are most reminiscent of those in the *Sherbert* era.

First and foremost is *Smith*'s shamelessly dishonest treatment of free exercise precedent. As detailed above, Justice Scalia's opinion for the *Smith* Court described the *Sherbert* era cases in a manner that flatly contradicts both the language of those cases and his own description of those cases just one year prior to *Smith*.[185] If Justice Brennan's treatment of precedent in his *Braunfeld* dissent and his *Sherbert* majority gets an "F" for honesty—and it does—Justice Scalia deserves an "F-minus" for *Smith*.

Making matters worse, *Smith* not only misrepresented the Court's free exercise precedent, it engaged in a misleading discussion of the Court's free speech precedent in order to bolster its claim that a religious-exemption right would be a "constitutional anomaly."[186] Justice Scalia's majority opinion in *Smith* accurately noted that while laws targeted at the content of speech trigger strict scrutiny, "generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling interest analysis."[187] But what Justice Scalia left out is the fact that the Court *does* apply an intermediate level scrutiny to such laws under *United States v. O'Brien*.[188] So just as the strict scrutiny promised by *Sherbert* was an anomaly, so too is the complete lack of heightened scrutiny prescribed by *Smith*.[189]

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185. *See supra* notes 51–57.

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

187. *Id.* at 886 n.3.

188. 391 U.S. 367, 377 (1968) (asking whether a law that incidentally burdens speech "furthers an important or substantial governmental interest" and whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). Although the tailoring language in *O'Brien* sounds like the same "least restrictive means" requirement used in strict scrutiny, the Court has since made clear that *O'Brien* does not impose such a requirement. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 213–14 (1997) ("Content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution. Under intermediate scrutiny, the Government may employ the means of its choosing so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest.") (internal quotation marks and citations omitted).

189. *See* Oleske, *supra* note 18, at 1355, 1361 (observing that *Smith* swung the Court's jurisprudence "from one extreme . . . to another" and advocating for use of an intermediate-scrutiny test that would "mirror the free speech test for incidental restrictions on expressive conduct"); *id.* at 1355 n.202 (collecting articles making similar arguments); *see also* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemption*, 59 B.C. L. REV. 1595, 1621 (2018) ("[T]he *Smith* framework is anomalous in that it fails to *at least* provide intermediate scrutiny for religious exercise.") (emphasis in original). Professors Bar-

The discussion of *Sherbert* above also notes that Justice Brennan's majority opinion in that case is inconsistent with his reasoning in other cases.[190] The same could be said, and with considerably more force, about Justice Scalia's majority opinion in *Smith*. Although Justice Scalia was known as the nation's most influential advocate of originalism, the *Smith* opinion is wholly devoid of originalist analysis.[191] The oversight is particularly striking given that *Smith* was not a case in which the Court was adhering to a well-settled view that would have allowed it to say *stare decisis* militated against engaging in a new historical analysis. Instead, *Smith* involved a situation where the Court was reopening a contested constitutional issue, which would seem a most appropriate time to revisit any historical evidence that might inform the debate.

Another arguable sin of omission in *Smith* was the Court's failure to consider whether its no-required-exemptions rule could be reconciled with the so-called "ministerial exception" that had been widely recognized in the federal courts of appeals.[192] That exception provided that the government could not apply antidiscrimination laws to the decisions of religious institutions regarding the employment of ministers.[193] Twenty-two years after *Smith*, the issue reached the Supreme Court, which unanimously validated the ministerial exception in *Hosanna-*

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clay and Rienzi are right that there is a strong case for applying *O'Brien* level scrutiny in religious exemption cases, but they are wrong to imply that the Court's use of strict scrutiny in *Wooley v. Maynard*, 430 U.S. 705 (1972), justifies the Court's use of strict scrutiny in cases like *Wisconsin v. Yoder*, 404 U.S. 872 (1972). *See* Barclay & Rienzi, *supra*, at 1614–17 (describing *Wooley* as applying "the most heightened form of constitutional scrutiny" and attempting to analogize it to *Yoder*). *Wooley* concerned a *content-based* regulation of speech that compelled the display of a particular ideological message whereas *Yoder* involved the *incidental effect* on religion of a religiously neutral compulsory education law. Thus, consistent with the Court's longstanding distinction between targeted and incidental burdens on First Amendment rights, *see supra* note 118 and accompanying text, one would expect strict scrutiny to apply in *Wooley* and not in *Yoder*.

190. *See supra* note 119 and accompanying text.

191. *See* McConnell, *supra* note 2, at 1117 (noting that *Smith* reached its interpretation "without so much as referring to the history of the Free Exercise Clause"); Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 56 (2004) ("Like its 1960s precursor *Sherbert*, *Smith* never adverted to the historical record on free exercise exemptions. Without any briefing or argument on this pivotal question, the Supreme Court's *Smith* decision unexpectedly tacked sharply away from the post-colonial constitutional tradition of free exercise exemptions established in 1813 by *Philips* and endorsed a century and a half later by *Sherbert*.").

192. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) ("Since the passage of Title VII of the Civil Rights Act of 1964 . . . and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.").

193. *Id.*

*Tabor Evangelical Lutheran Church & School v. EEOC*.[194] Writing for the Court, Chief Justice Roberts distinguished *Smith* in a short paragraph:

> It is true that the [Americans with Disabilities Act]'s prohibition on retaliation [in this case], like Oregon's prohibition on peyote use [in *Smith*], is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[195]

This explanation for the divergent treatment of individual and institutional exemption claims is "woefully inadequate."[196] For one thing, the focus on physicality is just downright odd. The Court appears to assume that the acts of hiring and firing are not physical,[197] and indicates that granting religious immunity for such non-physical acts is less problematic than granting immunity for other acts. Does that mean that, notwithstanding *Smith*, an individual restaurant owner who religiously opposes racial integration would have a greater free exercise right to refuse employment (non-physical act) on the basis of race than to refuse food service (physical act) on the basis of race? And does it mean that a minister would have less of a right to refrain from physical acts associated with performing a wedding ceremony than a church would have to refrain from the allegedly non-physical act of hiring a minister? It is hard to imagine the Court would answer "yes" to either question,[198] but

194. *Id.*

195. *Id.* at 190.

196. Lupu & Tuttle, *supra* note 17, at 1292.

197. *But see* Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 114 (2016) (contending that "hiring and firing a church employee is just as physical or 'outward' an act as ingesting peyote").

198. On the issue of ministers presiding over weddings, see *Masterpiece Cakeshop, Ltd., v. Colo. C.R.. Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion."). *Cf.* DeGirolami, *supra* note 197, at 114 ("[I]ngesting peyote—or other 'physical acts' of individuals—might under certain circumstances constitute an 'internal church decision that affects the faith and mission of the church itself': for example, it might be the doctrinally prescribed method by which prospective members of the religion, or ministers themselves, are initiated.").

if the answers are both clearly "no," what work is "physical" doing in the passage above?

Turning to the contrast between "outward" and "internal," the Court's attempted distinction of *Smith* on this basis does not explain "why questions concerning sacraments should be treated as involving external matters while questions concerning an employment relationship between a minister and a church are treated as involving wholly internal matters."[199] More fundamentally, even if the taking of sacraments and the making of employment decisions could be distinguished on those grounds, the Court offers no explanation for why that distinction is constitutionally significant. There is undoubtedly something intuitively appealing about the internal-external distinction the *Hosanna-Tabor* Court invokes,[200] but given the Court's failure to tie it to any constitutional principle, intuition is left to do almost all the work.[201]

Elsewhere in his opinion for the Court, Chief Justice Roberts writes that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations."[202] But, of course, that is not quite right. "The First Amendment speaks of religion, not religious organizations. Religion is what gets special solicitude."[203] And if the Amendment's singling out of religion does not warrant requiring exemptions for individuals, that same singling out cannot alone explain a requirement of exemptions for institutions.

The fact that the *Hosanna-Tabor* Court failed to provide a considered explanation for its distinction of *Smith* does not mean that no such explanations are available. Professors Ira Lupu and Robert Tuttle, for

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199. Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 982 n.39 (2012); *see also* Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 432–33 (2012) ("The Native American believers in *Smith* would no doubt have been interested to learn that their participation in the ritual that rested at the spiritual center of their personal faith was a mere 'outward physical act' that paled in comparison to a Lutheran congregation's 'internal faith and mission.'"); Lupu & Tuttle, *supra* note 17, at 1276 ("[I]t is utterly unpersuasive to assert that the peyote use involved in *Smith* is an outward act, while the treatment of Ms. Perich in *Hosanna-Tabor* is an 'internal church decision,' thereby distinguishing the cases. Both decisions involve acts that reflect internal church activities, and both have actual or potential external effects.").

200. *See generally Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J.) ("Religious activities which *concern only members of the faith* are and ought to be free—as nearly absolutely free as anything can be.") (emphasis added).

201. *See* Horwitz, *supra* note 199, at 982 n.39 ("Although I think the Court was correct in distinguishing *Smith*, its language was not terribly satisfying.").

202. *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC*, 565 U.S. 171, 189 (2012).

203. Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1192 (2014); *see also* Lupu & Tuttle, *supra* note 17, at 1277 n.63 (noting that "'the text of the First Amendment' makes no mention whatsoever of 'religious organizations'").

example, have developed the argument that the Establishment Clause prohibits the government from resolving "purely ecclesiastical questions," and that a church's decision about who is fit to serve as a minister of the faith is just such a question.[204] Another justification for the ministerial exception is that it flows naturally from the broader public-private distinction embodied in constitutional doctrine, which recognizes "that there are some areas of life, constituting a protected 'private sphere,'" in which choices about one's associates "must remain largely free from governmental control."[205] On a related note, it is worth observing that just as free exercise doctrine now distinguishes between incidental burdens on decisions not to associate (*Hosanna-Tabor*) and incidental burdens on other religiously motivated conduct (*Smith*), so too does freedom of expression doctrine distinguish between incidental burdens on decisions not to associate (*Boy Scouts of America v. Dale*[206]) and other incidental burdens on expression (*O'Brien*). So while *Hosanna-Tabor* rejected the argument that freedom of association was the only basis for protecting decisions about ministerial relations,[207] it would seem the associational nature of such decisions might well play a role in explaining why the ministerial exception should survive *Smith*'s repudiation of the broader exemption right embodied in *Sherbert*.[208] Finally, some commentators have developed broader "Freedom of the Church" arguments that could support the distinction between *Hosanna-Tabor* and *Smith*.[209] Whatever one may think of these various arguments, the *Hosanna-Tabor* Court's failure to address any of them in its discussion of *Smith*, and its reliance on a conclusory assertion instead, is all too

204. Lupu & Tuttle, *supra* note 17, at 1278, 1294–95.

205. Oleske, *supra* note 169, at 145; *see id.* at 153 (concluding that the placement of "ministerial relations" on the private side of the public-private distinction "fits comfortably" with the settled understanding of the distinction); *see* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,* 61 U. CHI. L. REV. 1245, 1311–13 (1994) (contending that "ideas about privacy" and "private association" support the right of religious organizations to select their leaders); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 280 (2010) (discussing the "crucial distinction between public and private realms" and observing that "[o]n the private side, the political community has only a limited authority to regulate the bonds of intimacy and association").

206. 530 U.S. 640, 647–48 (2000).

207. *Hosanna-Tabor*, 565 U.S. at 189.

208. *See* Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1677 (developing an argument along these lines).

209. *See, e.g.*, Richard W. Garnett, *The Freedom of the Church: (Toward) an Exposition, Translation, and Defense*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 39, 43, 55 (Micah Schwartzman et al. eds., 2016); Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 260–65 (2009).

typical of the Court's religious liberty jurisprudence over the past half-century.

More recently, Chief Justice Roberts offered another conclusory analysis that stands in tension with *Smith*. Dissenting in *Obergefell v. Hodges*,[210] the Chief Justice chastised the majority for underappreciating the interests of those who religiously oppose same-sex marriage, stating that "their freedom to exercise religion is—unlike the right [to same-sex marriage] imagined by the majority—actually spelled out in the Constitution."[211] Although the *Obergefell* majority did recognize that those who oppose same-sex marriage have a right "to 'advocate' and 'teach' their views of marriage," Chief Justice Roberts found that acknowledgment insufficient and emphasized that the First Amendment guarantees "the freedom to '*exercise*' religion."[212] The Chief Justice found it "ominous[]" that the Court did not use the word "exercise," and he asserted that "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage."[213] But hard questions only arise if one assumes that *Smith*, which Chief Justice Roberts nowhere acknowledges in his *Obergefell* dissent, was wrongly decided[214] or should have less force in the context of civil rights laws.[215]

It may well be that the Chief Justice's dissent in *Obergefell* is a harbinger of a coming reconsideration of *Smith*.[216] If so, history will be repeating, as Chief Justice Burger's suggested retreat from individual exemption rights in *Roy*[217] foreshadowed the Court's decision to make that retreat in *Smith*. As for the question of whether *Smith* can somehow be avoided in the civil rights context, that was one of the issues litigated (but not decided) in *Masterpiece Cakeshop, Ltd. v. Colorado*

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210. 135 S. Ct. 2584 (2015).

211. *Id.* at 2625.

212. *Id.*

213. In reaching this conclusion, the Chief Justice, like Justice Brennan in *Braunfeld* and *Sherbert*, elides the distinction between freedom from laws targeting religious exercise and freedom from laws incidentally impacting religious exercise. *See supra* text accompanying notes 82–87 and 117–22.

214. For a more extensive analysis of the Chief Justice's free exercise argument in *Obergefell*, and its inconsistency with *Smith*, see Oleske *supra* note 18, at 1350–54.

215. *But see* Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 674 (2016) (noting that in rejecting constitutional exemption rights in *Smith*, Justice Scalia "specifically worried that parties might seek accommodations for discrimination based on religious belief" and cited as an example *Bob Jones U. v. United States*, 461 U.S. 574, 601–03 (1983), a case involving a religious university that banned interracial marriage and dating among its students).

216. *See* Oleske, *supra* note 18, at 1354 (discussing this possibility).

217. *See supra* note 135 and accompanying text.

*Civil Rights Commission*.[218] The potential paths for avoidance are the two "exceptions" to the *Smith* rule contemplated in *Smith* itself as a way to distinguish rather than overrule the *Sherbert*-era decisions that had required religious exemptions.[219] These so-called exceptions concern cases involving either (1) a "hybrid" of multiple constitutional claims, which is how the *Smith* Court explained *Yoder*,[220] or (2) laws already subject to "individualized exemptions," which is how the *Smith* Court explained *Sherbert*.[221]

The hybrid-rights theory warrants little discussion, other than to note that it is yet another aspect of the Court's free exercise jurisprudence that has earned widespread scorn.[222] Even Justice Scalia appeared to disavow the theory subsequently,[223] and the lower courts have not given it effect.[224]

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218. 138 S. Ct. 1719 (2018).

219. *See supra* note 25; *see also* Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299, 319 (2015) ("*Smith* made two exceptions to the rule that 'neutral laws of general applicability' never violate the Free Exercise Clause.").

220. *Em't Div. v. Smith*, 494 U.S. 872,881–82 (1990).

221. *Id.* at 884.

222. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith,* since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 335 (1995) ("Most scholars assume this language was a make-weight to 'explain' *Yoder* that lacks enduring significance. . . . Justice Scalia's implicit claim—that free exercise claims are a *necessary* component of some successful 'hybrid' challenges but that claims of the same type can *never* succeed on their own—approaches, and possibly achieves, incomprehensibility."); Laycock, *supra* note 19, at 172 (noting that the hybrid-rights theory "never made any sense, and almost nothing has come of" it); McConnell, *supra* note 2, at 1122 (suggesting that "the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously").

223. *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 631–32, 632 n.23 (2003) (noting that "even its originator, Justice Scalia, seems to have given up on the [hybrid-rights] idea" and citing as evidence Scalia's concurring opinion in *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002)).

224. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 284 n.24 (3d Cir. 2009) ("Relying on dicta in *Smith*, some litigants pressing Free Exercise claims have presented a 'hybrid rights' theory . . . . Like many of our sister courts of appeals, we have not endorsed this theory . . . .") (citations omitted); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("The 'hybrid rights' doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise

The individualized-exemption theory, by contrast, may hold more promise for those hoping to limit the reach of *Smith*'s general rule. As discussed below, four justices have been receptive to efforts to expand the theory into a broader "selective-exemption rule" that, in certain circumstances, will require the government to make religious exemptions if a law contains *categorical* secular exemptions.[225] Given the potential consequences of that expansion, the scope of the selective-exemption rule is now poised to become the most important issue in free exercise law. More specifically, if the selective-exemption rule is not tailored to guard against the risk of intentional discrimination (*Smith*'s concern), and is instead broadened as some are urging to shield religious practices from the burdens of indifference or neglect (*Sherbert*'s concern), it will have become the vehicle for delivering yet another less-than-forthright reversal of free exercise doctrine. The prospect of such a reversal warrants careful consideration, which Part II of this Article aims to provide.

## II. THE DANGER OF MORE DISHONESTY

Notwithstanding *Smith*'s general rule that the government need not make religious exemptions to neutral and generally applicable laws, the Court has recognized an exception for "circumstances in which individualized exemptions from a general requirement are available."[226] In such cases, "the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"[227] As noted above,[228] this individualized-exemption rule was born out of an observation made by a plurality of the Court in *Bowen v. Roy*[229] that it "suggests a discriminatory intent" for the government to deny exemptions

claim in this manner. We decline to be the first.") (citations omitted); Steven H. Aden & Lee J. Strang, *When A "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 574 (2003) (surveying "the doctrine's course of treatment in the courts and legal commentaries and conclud[ing] that hybrid rights claims have overwhelmingly failed to succeed").

225. *See infra* notes 265–66 and accompanying text (discussing opinions joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch); *but see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004) ("Smith's 'individualized exemption' exception is limited . . . to systems that are designed to make case-by-case determinations. The exception does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons."); *see generally* Oleske, *supra* note 26, at 306–14 (discussing at length the debate in the lower courts over the scope of the selective-exemption rule).

226. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993).

227. *Id.* (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990)).

228. *See supra* note 28 and accompanying text.

229. 476 U.S. 693 (1986).

for religious hardship if it otherwise allows individualized exemptions under a "good cause" standard.[230] Under those circumstances, the *Roy* plurality explained, it is "appropriate to require the State to demonstrate a compelling reason for denying the requested exemption."[231] But the *Roy* plurality sharply distinguished individualized-exemption cases from those where there "is nothing whatever suggesting antagonism by [government] towards religion generally or towards any particular religious beliefs."[232]

So understood, as a tool to protect against the danger of intentional discrimination, the individualized-exemption rule dovetails nicely with the *Smith* Court's overall "equal protection" interpretation of the Free Exercise Clause.[233] It also mirrors a rule familiar from the free speech context, where content-neutral permit requirements are generally allowed, but will be invalidated if they "delegate overly broad licensing discretion to a government official."[234] The reason for heightened skepticism of discretionary licensing is that it "has the potential for becoming a means of suppressing a particular point of view."[235] If the discretionary authority to grant and withhold licenses "'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the licensing authority, 'the danger of censorship . . . is too great' to be permitted."[236] Likewise, although the *Smith* rule generally permits neutral laws to incidentally burden religion, there is a danger of discrimination that warrants closer scrutiny when government officials have

230. *Id.* at 708 (plurality) ("[T]o consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion."); *see Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (2004) (explaining that "a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct").

231. *Roy*, 476 U.S. at 708 (plurality).

232. *Id.* (plurality); *see Smith*, 494 U.S. at 884 (relying upon the reasoning of the *Roy* plurality and distinguishing *Sherbert* as a case that involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct").

233. *See supra* note 27 and accompanying text.

234. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). *See* Brownstein, *supra* note 2, at 194 ("The problem [with individualized-exemption mechanisms] is similar to that which arises under free speech doctrine when officials are granted unbridled discretion in licensing, or granting permits for, expressive activity."); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 573 (1999) (noting that the individualized-exemption rule addresses "[i]dentical concerns" to those that have long informed the Court's close scrutiny of discretionary "licensing authority over expressive activity").

235. *Forsyth Cty*, 505 U.S. at 130–31 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

236. *Id.* at 131 (quoting *Cantwell v. Connecticut,* 310 U.S. 296, 305 (1940), and *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975)).

discretionary authority to make exemptions from those neutral laws for "good cause."[237]

Notwithstanding the original rationale for the individualized-exemption rule as an anti-discrimination tool, and notwithstanding its close resemblance to a longstanding anti-discrimination tool from the free speech context, some advocates of religious exemptions have seized upon it to make a more novel and sweeping argument. Relying principally on the Supreme Court's post-*Smith* decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[238] these advocates contend that *Smith* and its progeny are best read as embodying a much broader selective-exemption rule that is *not* about combatting intentional discrimination. Instead, the argument goes,

> *Smith* and *Lukumi* create a special kind of equality rule that goes well beyond the traditional bounds of equal protection and nondiscrimination law. *Smith* and *Lukumi* require that laws and regulations be generally applicable, which means that they must apply to everyone, or at least to nearly everyone, and to all conduct that significantly undermines the state's alleged interest. . . . Religion need not be singled out, and the state need not act with bad motive [for there to be a free exercise violation]. Laws that burden religion and apply to some but not all analogous secular conduct are not generally applicable. . . . Even a single secular exception that undermines the state's asserted interest makes the law less than generally applicable.[239]

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237. *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081 (9th Cir. 2015) (noting that "an open-ended, purely discretionary standard like 'without good cause' easily could allow discrimination against religious practices or beliefs"), *cert. denied*, 136 S. Ct. 2433 (2016); *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) ("To ensure that individuals do not suffer unfair treatment on the basis of religious animus, subjective assessment systems that 'invite consideration of the particular circumstances' behind an applicant's actions, such as the government benefits regime in *Sherbert,* trigger strict scrutiny.") (quoting *Smith*, 494 U.S. at 884).

238. 508 U.S. 520 (1993).

239. Brief of Const. Law Professors as Amici Curiae in Support of Appellees at 1–2, *Stormans, Inc. v. Selecky*, *decided sub nom.*, *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016) [hereinafter Brief of Constitutional Law Professors]; *see id.* at 7–8 (arguing that the recognition of the individualized-exemption rule in *Smith* "established a requirement of equal treatment without exceptions"); *id.* at 17 (asserting that "laws that burden religion and *some* analogous secular conduct, but *not all* analogous secular conduct . . . are subject to strict scrutiny"). Professor Richard Duncan, one of the signatories to the *Stormans* brief, has aptly described the broad version of the selective-exemption rule as requiring that religious practices be given "a kind of most-favored-nation status." Richard

This effort to convert *Smith*'s requirement of general applicability into a requirement of uniform or near-uniform applicability, and to constitutionally compel religious exemptions from even modestly underinclusive laws that bear no indicia of discriminatory intent, has been critiqued by a number of commentators[240] and rejected by several lower courts.[241] That rejection makes perfect sense, as a "broad selective-exemption rule that goes beyond situations suggesting discriminatory intent cannot be reconciled with the Supreme Court's current understanding of the Free Exercise Clause."[242] The Court's most relevant and forceful articulation of that understanding came in *City of Boerne v. Flores*,[243] which held that the federal RFRA[244] exceeded Congress's

F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 880 (2001).

240. *See* Brownstein, *supra* note 2, at 193–203 (discussing at length efforts to expand *Smith*'s individualized-exemption rule into a broader selective-exemption rule and concluding that there are "too many conceptual and practical problems with the [expansion] for it to be accepted" and arguing that "the very foundation for the most favored nation framework is intellectually incoherent"); Oleske, *supra* note 26, at 335 ("The selective-exemption rule is properly viewed as a [narrow] tool to guard against the type of intentional discrimination prohibited by the Free Exercise Clause under *Smith*, not a [broad] shield against the type of unintentional neglect or indifference that was actionable under the Court's post-*Sherbert*/pre-*Smith* jurisprudence."); Volokh, *supra* note 30, at 1539–42 (providing several reasons for rejecting the broad version of the selective-exemption rule); Colin A. Devine, Comment, *A Critique of the Secular Exceptions Approach to Religious Exemptions*, 62 UCLA L. REV. 1348 (2015) (same).

241. *See, e.g.*, *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("General applicability does not mean absolute universality. Exceptions do not negate that [laws] are generally applicable."); *Grace United*, 451 F.3d at 651 (10th Cir. 2006) ("Consistent with the majority of our sister circuits, . . . we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption."); *Thomas v. Anchorage Equal Rights Comm'n.*, 165 F.3d 692, 701–02 (9th Cir. 1999) ("Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister."), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134, 1137 (9th Cir. 2000); *Chabad Lubavitch of Litchfield Cty., Inc. v. Borough of Litchfield*, 853 F. Supp. 2d 214, 223 (D. Conn. 2012) ("The fact that a law contains particular exceptions does not cause the law not to be generally applicable, so long as the exceptions are broad, objective categories, and not based on religious animus."). *But see Blackhawk v. Pennsylvania*, 381 F.3d 202, 2110–11 (3d Cir. 2004) (applying the selective-exemption rule to a situation involving a categorical exemption adopted long before the requested religious exemption even though there was no reason to suspect discriminatory intent in the original adoption of that exemption); *cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (applying the selective-exemption rule to a situation involving a categorical "decision to provide medical exemptions while refusing religious exemptions" because the decision was "sufficiently suggestive of discriminatory intent").

242. Oleske, *supra* note 26, at 331.

243. 521 U.S. 507 (1997).

244. *See supra* notes 123–124, 141–60 and accompanying text (discussing RFRA in detail).

power to enforce constitutional rights against the States because it attempted to "alter[] the meaning of the Free Exercise Clause" and effect "a substantive change in constitutional protections."[245] In reaching that conclusion,

> [t]he Court found that RFRA was not designed to confront . . . unconstitutional laws, because "Congress' concern was with the *incidental burdens* imposed [by state legislation], not *the object or purpose* of the legislation." And while Congress did compile evidence indicating that religious minorities had been burdened as the result of government neglect and indifference, that was not sufficient. The problem with RFRA was clear: "Laws valid under *Smith* would fall under RFRA without regard to whether they had *the object of stifling or punishing free exercise*."[246]

Given *City of Boerne*'s teaching that the Free Exercise Clause is only violated by government action that has the object of discriminating against religion, a broad selective-exemption rule sweeping beyond cases of intentional discrimination would seem doctrinally untenable.[247] Moreover, because so many laws contain secular exceptions,[248] requiring religious exemptions whenever a law contains even "a single secular exception that undermines the state's asserted interest"[249] would largely eviscerate *Smith*'s no-exemptions-required rule.[250]

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245. *City of Boerne*, 521 U.S. at 519, 532.

246. Oleske, *supra* note 26, at 330–31 (quoting *City of Boerne*, 521 U.S. at 531, 534) (emphasis added); *see* Oleske, *supra* note 26, at 330 n.207 (collecting additional quotes from *City of Boerne* to the same effect).

247. As I have previously acknowledged, I failed to account properly for the lessons of *City of Boerne* when addressing the selective-exemption rule in a 2004 article. *See* Jim Oleske, *One Notable Cost of Fidelity to Smith (re:* Masterpiece Cakeshop*)* TAKE CARE (Sept. 28, 2017), https://takecareblog.com/blog/one-notable-cost-of-fidelity-to-smith-re-masterpiece-cakeshop [https://perma.cc/DMT2-R7YP] (discussing and criticizing my earlier analysis of the rule in James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525 (2004)).

248. *See supra* note 30 and accompanying text.

249. Brief of Constitutional Law Professors, *supra* note 239, at 2.

250. Indeed, advocates of the broad selective-exemption rule have acknowledged that their approach would require religious exemptions "[i]n a wide range of cases." Brief of Douglas Laycock, Thomas C. Berg, et al., at 34, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *See* Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 195 (2001) ("[A]s some critics have pointed out, if the presence of just one secular exception means that a religious claim for exemption wins as well, the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws.").

One vivid example of that potential evisceration concerns the nation's most prominent antidiscrimination law: Title VII of the 1964 Civil Rights Act.[251] Title VII exempts businesses with fewer than 15 employees from its prohibition of employment discrimination on the basis of race, color, religion, sex, and national origin.[252] Two leading proponents of the broad selective-exemption rule, Professors Thomas Berg and Douglas Laycock,[253] have argued to the Supreme Court that if "an anti-discrimination law exempts very small businesses, then the Constitution prima facie requires exemptions for religious conscience, subject to the compelling interest test."[254] Thus, despite the fact that the *Smith* Court specifically cited laws "providing for equality of opportunity for the races" as examples of generally applicable laws to which strict scrutiny should *not* apply,[255] the Berg/Laycock approach *would* apply such scrutiny to Title VII.[256]

Undeterred by this conflict with *Smith*, and without addressing the relevant teachings of *City of Boerne*, Professors Berg and Laycock re-

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251. 42 U.S.C. §§ 2000e *et seq*. (2012).

252. *See* §§ 2000e(b) & 2000e-2(a) (2012).

253. Professor Laycock has co-authored several briefs advancing the broad version of the selective-exemption rule, including the ones cited in notes 38, 239, and 250 above and notes 254 and 257 below. *See also* Oleske, *supra* note 26, at 314–22 (discussing an earlier brief in which Laycock made the same argument). He has also advocated for the broad version of the selective-exemption rule in his scholarship. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 25 (2016) (arguing in favor of a "rule that even a single secular exception, if it undermines the asserted reasons for the law, makes a law not generally applicable"). Professor Berg co-authored with Professor Laycock the briefs cited in note 250 above and notes 254 and 257 below. *See also* Berg, *supra* note 30, at 1193 ("Mandating a religious exemption because the statute in question already has one or more exemptions has proven the most fruitful means of preserving free exercise rights in the face of *Smith*.").

254. Brief for American Jewish Committee as Amicus Curiae Supporting Respondents at 31, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

255. *Emp't Div. v. Smith*, 494 U.S. 872, 889 (1990).

256. In a more recent brief to the Supreme Court, Professors Berg and Laycock reiterated their argument about the effect of a small business exemption, but added the qualifier that such an exemption might only trigger strict scrutiny "if that exemption reflects a purpose to respect [small business owners'] privacy or free them from the burden of regulation." Brief of Douglas Laycock, Thomas C. Berg et al., *supra* note 250, at 34. This would not seem to change the analysis with respect to Title VII given the evidence that its small business exemption was aimed at both of those purposes. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (reviewing the legislative history and noting the discussion of "the burdens placed upon a small business forced to comply with federal regulations and defend against a Title VII suit" and "the protection of intimate and personal relations existing in small businesses"); Davida H. Isaacs, Note, *"It's Nothing Personal"-but Should It Be?: Finding Agent Liability for Violations of the Federal Employment Discrimination Statutes*, 22 N.Y.U. REV. L. & SOC. CHANGE 505, 535 & n.121 (1996) (collecting statements from the legislative history illustrating a focus on the "private nature of small businesses").

cently renewed their argument that "even narrow secular exemptions make a law less than generally applicable" and that such underinclusion is problematic "regardless of targeting, motive, or an improper object."[257] The occasion was the Supreme Court's consideration of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[258] which involved a bakery owner, Jack Phillips, who opposes same-sex marriage on religious grounds.[259] After Phillips refused to make a wedding cake for a same-sex couple, the couple filed a complaint under Colorado's civil rights law—which requires businesses to provide equal service regardless of sexual orientation—and Phillips raised a free exercise defense.[260]

Such a defense would appear to run headlong into *Smith*'s no-religious-exemptions-required rule, and the *Masterpiece* Court indicated that ordinarily it would. The Court explained that "while . . . religious and philosophical objections [to same-sex marriage] are protected [views], it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[261] Nonetheless, based on a factual finding that the Colorado Civil Rights Commission had demonstrated "clear and impermissible hostility" toward religion in its

257. Brief of Christian Legal Society et al., at 21–23, in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). For my earlier critiques of the Berg/Laycock arguments in *Masterpiece*, *see* Jim Oleske, Masterpiece Cakeshop *and the Effort To Rewrite* Smith *and its Progeny*, TAKE CARE (Sept. 21, 2017), https://takecareblog.com/blog/masterpiece-cakeshop-and-the-effort-to-rewrite-smith-and-its-progeny, and Jim Oleske, *Doubling Down on a Deeply Troubling Argument in Masterpiece Cakeshop* TAKE CARE (Nov. 14, 2017), https://takecareblog.com/blog/doubling-down-on-a-deeply-troubling-argument-in-masterpiece-cakeshop [https://perma.cc/8DAP-GFHP].

258. 138 S. Ct. 1719 (2018).

259. *Id.* at 1723.

260. *Id.* Phillips also raised a free speech defense, but the Court strongly indicated that such a defense could plausibly apply only to refusals to make "a special cake with words or images celebrating the marriage," and not refusals to "sell any cake at all," explaining that "[i]t is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Id.* at 1723, 1728. *See* Laycock, *supra* note 19, at 182 ("If cake decorating is speech, lots of businesses may involve elements of speech."). For a further discussion of the free speech issue, see Robert Post, *What About the Free Speech Clause Issue in Masterpiece?*, TAKE CARE (June 13, 2018), https://takecareblog.com/blog/what-about-the-free-speech-clause-issue-in-masterpiece [https://perma.cc/LS6N-YL6T].

261. *Masterpiece*, 138 S. Ct. at 1727. For a further discussion of the importance of this line, see Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J. FORUM 201, 208, 210–13 (2018).

proceedings,[262] the Court held that the "Commission's consideration of [Phillips'] case was inconsistent with the State's obligation of religious neutrality."[263] This aspect of the *Masterpiece* opinion has been subject to well-deserved criticism for "for distorting free exercise and animus doctrine."[264] And while the Court's shoddy animus analysis is not the focus here, that shoddiness is yet another brick in the wall standing between the Court and an honest free exercise jurisprudence.

In any event, the Court's finding of hostility in *Masterpiece* made it unnecessary for the Court to address the Berg/Laycock argument for a broad selective-exemption rule that would protect against more than intentional discrimination. But given that three concurring justices in *Masterpiece* did indicate an openness to the argument,[265] and given that a fourth justice has done so elsewhere,[266] the argument must be confronted, no matter how irreconcilable with *Smith* and *City of Boerne* it may seem. Examining the argument in the specific context of *Master-*

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262. *Masterpiece*, 138 S. Ct. at 1729.

263. *Id.* at 1723.

264. Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L REV. 133, 164 (2018); *see id.* at 153 (describing how, after finding evidence of discriminatory motive, the Court ignored the burden-shifting and strict-scrutiny frameworks applied in past cases, and explaining that "[h]ad the Court pursued either inquiry, it would have been forced to confront the very substantive questions that its animus determination had avoided"); Rick Hills, *SCOTUS Term: Does* Masterpiece Cakeshop*'s Easy Inference of Hostile Intent Overturn* Employment Division v Smith*?*, PRAWFSBLAWG (June 4, 2018), http://prawfsblawg.blogs.com/prawfsblawg/2018/06/scotus-term-does-masterpiece-cakeshops-easy-inference-of-hostile-intent-overturn-employment-division.html [https://perma.cc/NA9V-CG66] (criticizing the Court for ignoring its customary "framework for dealing with evidence of bad intent" and noting that the Court's "easy inference of hostility to religion" seems "oddly inconsistent" with both free exercise and equal protection precedents); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1749, 1751 (2018) (Ginsburg, J., dissenting) (noting that the case did not involve "hostility to religion of the kind we have previously held to signal a free-exercise violation" and was "far removed from the only precedent upon which the Court relies"); Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 295 ("[T]he majority took statements that were factually correct and read into them a veneer of hostility and derision that was not readily apparent to most observers.").

265. *Masterpiece*, 138 S. Ct. at 1734 (Gorsuch, J., concurring, joined by Alito, J., concurring); *id.* at 1740 (Thomas, J., concurring) (indicating agreement with Gorsuch's analysis).

266. *See Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2439 (2016) (Alito, J., dissenting from the denial of certiorari, joined by Roberts, C.J., and Thomas, J.) (indicating that a religious exemption might be required from a state rule requiring pharmacies to dispense all FDA approved drugs because the rule contained a secular exemption that "allows a pharmacy to refuse to fill a prescription because it does not accept the patient's insurance or because it does not accept Medicaid or Medicare," thus rendering the rule "substantially underinclusive").

*piece* quickly reveals that its flaws go beyond inconsistency with prior precedent.

Adopting the broad version of the selective-exemption rule would greatly increase the number of cases in which courts would have to answer what Professors Berg and Laycock describe as "complicated questions."[267] Most notably, because their proposed "requirement that analogous religious and secular conduct be treated equally depends on the identification of analogous secular conduct,"[268] courts will have to determine if any secular exemptions included in a given law are sufficiently comparable to the requested religious exemption from that law. Berg and Laycock explain that this requires asking whether the exempted conduct "endangers" the state's interest in its law to "a similar or greater degree" than would the non-exempted religious conduct.[269]

What was the secular exemption in *Masterpiece* that supposedly undermined Colorado's civil rights law to the same degree as would exempting religious business owners who discriminate against gay couples? According to Berg and Laycock, it was the following "implicit" exemption: Because Colorado did not require businesses to adorn products with messages "denouncing same-sex marriage" when requested by a "conservative Christian customer," the state had permitted businesses to engage in religious discrimination.[270] In other words, under the Berg/Laycock theory, a state that has a civil rights law protecting against both sexual-orientation discrimination and religious discrimination is *constitutionally obligated* to treat the following two cases as equivalent instances of discrimination:

> **Case 1:** A bakery routinely makes wedding cakes for straight couples but refuses to make a wedding cake for a gay couple.
>
> **Case 2:** A bakery does not routinely make cakes with messages condemning people and refuses to make a cake for a conservative Christian customer that depicts a same-sex cou-

267. Brief of Christian Legal Society, *supra* note 257, at 34.

268. *Id.* at 25.

269. *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993)); *see* Oleske, *supra* note 26, at 338 (agreeing that the selective-exemption rule requires asking whether "the granted [secular] exemptions undermine the government's interests as much as, or more than, would the requested religious exemption").

270. Brief of Christian Legal Society, *supra* note 257, at 4. *See* Laycock, *supra* note 19, at 182–83 ("The Colorado public-accommodations law had no explicit secular exceptions. But we said that it had been enforced in discriminatory ways that created an *implicit* secular exception, and this secular exception meant that the law was not generally applicable.").

> ple covered by a red "X" alongside the words "God hates sin" and "Homosexuality is a detestable sin."[271]

The reality, of course, is that the cases are not remotely comparable. When a state declines to bring charges in the second case it is not creating an "exemption" or, as Justice Gorsuch called it, an "accommodation."[272] Rather, there is simply no violation of the law in the second case. While Case 1 involves *unequal* treatment on the basis of sexual orientation—the gay couple is denied a service provided to straight couples, Case 2 involves *equal* treatment regardless of religion—the conservative Christian requesting a cake condemning same-sex couples is treated the same as any other customer requesting such a condemnatory cake would be treated.[273]

Despite this elemental difference between the two cases, which Justice Elena Kagan emphasized in her *Masterpiece* concurrence,[274] Justice Neil Gorsuch insisted in his own concurrence that the cases "share all legally salient features."[275] I have discussed elsewhere how Justice Gorsuch's analysis went so awry,[276] but it is worth emphasizing the far-reaching consequences of his argument that distinguishing between Case 1 and Case 2 amounts to a presumptively unconstitutional "double standard."[277] If that were really true, a state's decision to distinguish

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271. The description of the requested cake in Case 2 is based on cakes that were actually requested from three Colorado bakeries shortly after the Colorado Civil Rights Commission ruled against Masterpiece Cakeshop. See *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n*, 138 S. Ct. 1719, 1749 (2018) (Ginsburg, J., dissenting) (quoting the record's description of the cakes).

272. *Id.* at 1734 (Gorsuch, J., concurring).

273. As for the underlying equal-service obligation in the civil rights law, it is religiously neutral and generally applicable because it applies regardless of whether a business owner's motivation for discriminating against a protected class is religious or secular. In Case 1, the bakery would be violating the law regardless of whether the refusal was religiously motivated. In Case 2, the bakery would not be violating the law regardless of whether the refusal was religiously motivated.

274. *Masterpiece*, 138 S. Ct. at 1733–34 (Kagan, J., concurring).

275. *Id.* at 1735 (Gorsuch, J., concurring). *See also* Laycock, *supra* note 19, at 189 (insisting that Colorado's failure to find a violation of the law in Case 2 "undermined its interest in ending discrimination to the same extent as" would failing to find a violation in Case 1).

276. *See* Jim Oleske, *Justice Gorsuch, Kippahs, and False Analogies in* Masterpiece Cakeshop, TAKE CARE (June 19, 2018), https://takecareblog.com/blog/justice-gorsuch-kippahs-and-false-analogies-in-masterpiece-cakeshop [https://perma.cc/7YKV-5CVW]. For other critiques of Gorsuch's opinion, see Kendrick & Schwartzman, *supra* note 264, at 154–57; Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 185–87 (2019).

277. *Masterpiece*, 138 S. Ct. at 1736. The text accompanying this footnote says, "presumptively unconstitutional" because Justice Gorsuch indicates that a state could justify the distinction if it met "strict scrutiny." *Id.* at 1737.

between any of the following pairs of cases would also be vulnerable to a free exercise challenge:

> **Case 3:** A bakery routinely makes wedding cakes but, based on a conviction that Islam is a "false religion" and that facilitating a Muslim wedding would please Satan,[278] refuses to make a wedding cake requested by a customer wearing a hijab.
>
> **Case 4:** A bakery does not routinely make cakes condemning people and refuses to make a cake for customer who requests a cake with a red "X" covering an image of a woman wearing a hijab and the words "Islam is a false religion."
>
> ***
>
> **Case 5:** A bakery routinely makes wedding cakes but, based on a religious conviction that such remarriages represent adultery, refuses to make a wedding cake for a customer who is divorced and remarrying.[279]
>
> **Case 6:** A bakery does not routinely make cakes condemning people and refuses to make a cake for customer who requests a cake with a red "X" covering an image of a divorced and remarried politician and the words "divorce is a detestable sin."
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278. *See generally* Stoyan Zaimov, *Megachurch Pastor Robert Jeffress: Paris Attacks Prove Islam Inspired by Satan*, CHRISTIAN POST (Nov. 17, 2015) (quoting a statement by Pastor Robert Jeffress that "Islam is a false religion, and it is inspired by Satan himself"), https://www.christianpost.com/news/megachurch-pastor-robert-jeffress-paris-attacks-islam-satan-150239/ [https://perma.cc/M245-RDF4]; Michael W. Chapman, *Rev. Graham: Obama's Wrong, Islam 'Is a False Religion*,*'* CNSNEWS.COM (Oct. 27, 2014, 12:48 PM) (quoting a statement by Rev. Franklin Graham that Islam is a "false religion") https://www.cnsnews.com/news/article/michael-w-chapman/rev-graham-obama-s-wrong-islam-false-religion [https://perma.cc/P5ZP-BBRU]; Jenna Johnson, *Trump Calls for "Total and Complete Shutdown of Muslims Entering the United States*,*"* WASH. POST (Dec. 7, 2015), https://web.archive.org/web/20161108033056/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration [https://perma.cc/FB4D-N793].

279. *See generally* Oleske, *supra* note 172, at 144 (noting that "the New Testament quotes Jesus explicitly condemning divorce and remarriage as adultery," and that "such remarriages violate the current teachings of the largest Christian denomination in America," but "state laws prohibiting discrimination based on marital status do not contain exemptions allowing commercial businesses to refuse to facilitate the remarriages of divorced people").

> **Case 7:** A restaurant owner refuses service to black customers based on religious opposition to integration.[280]
>
> **Case 8:** A restaurant owner refuses service to customers wearing hats with the words "God hates blacks."
>
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>
> **Case 9:** A bank refuses to issue checks to married women in their name alone based on a religious belief that men are the head of married households.[281]
>
> **Case 10:** A bank refuses to issue checks in the name of a "Wives Must Obey Their Husbands" advocacy group.

The customer behavior in Cases 4, 6, 8, and 10 might seem outlandish, but the same could be said about the customer behavior in Case 2, which was only pursued for the purpose of creating a test comparator after Colorado brought charges against Masterpiece Cakeshop.[282] And just as Professors Berg and Laycock are now suggesting that more Case 2 "testers" can be sent out to establish selective-exemption arguments on behalf of Case 1 businesses,[283] Case 4, 6, 8, and 10 "testers" could just as easily be sent out to establish selective-exemption arguments on behalf of Case 3, 5, 7, and 9 businesses. Moreover, the examples above do not provide an exhaustive list of possibilities. To use one last

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280. *See generally Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (rejecting as "patently frivolous" the argument that restaurant owners with religious objections to racial integration have a constitutional right to discriminate in the provision of their services).

281. *See* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. (forthcoming) (manuscript at 42–45) (detailing how married women were denied credit in their own name well into the 1970s); Oleske, *supra* note 18, at 1339 ("Explanations for male-headship marriage, like explanations for opposite-sex-only marriage today, often sounded in religion and natural law.").

282. Abby Ohlheiser, *This Colorado Baker Refused to Put an Anti-Gay Message on Cakes. Now She is Facing a Civil Rights Complaint.*, WASH. POST (Jan. 28, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/01/22/this-colorado-baker-refused-to-put-an-anti-gay-message-on-cakes-now-she-is-facing-a-civil-rights-complaint/?utm_term=.d264a5ff3cf4 [https://perma.cc/83YW-VZKN] ("The purpose of his request, [the customer] explained . . . was to see if the Colorado Civil Rights Commission would handle . . . 'discrimination against Christians' the same as it had handled a previous charge that another Colorado bakery participated in 'discrimination against gays.'").

283. Laycock, *supra* note 19, at 186 ("Wedding vendors seeking exemptions can send testers . . . to request an offensively conservative religious version of the same goods or services."); Douglas Laycock & Thomas Berg, *Symposium:* Masterpiece Cakeshop — *Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018), http://www.scotusblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear/ [https://perma.cc/FQT3-WXP9] (making same argument).

illustration, imagine a baker who refuses on religious grounds to make wedding cakes for interfaith couples.[284] Under the Berg/Laycock/Gorsuch approach, a state could only require that baker to provide equal wedding cake services to interfaith couples if it also required bakers to make cakes condemning interfaith marriages.

As perverse as that result might seem, it is precisely the type of result that would be risked by adopting the broad version of the selective-exemption rule, under which those championing religious exemptions would have a strong incentive to make aggressively creative arguments about the existence of allegedly analogous unregulated conduct. That is exactly what happened in *Masterpiece*, where Professors Berg and Laycock suggested analogizing very dissimilar conduct to make an exemption argument that—taken to its logical end—would render every civil rights law in the nation vulnerable to free exercise challenges.[285] Needless to say, that is the opposite of what the *Smith* Court contemplated.[286] Yet three justices in *Masterpiece* embraced the Berg/Laycock argument,[287] and that argument will no doubt be renewed when the Court eventually takes up the issues left unresolved by the majority in that case.

The wedding vendor context is not the only one in which advocates will likely press the broad selective-exemption rule in the future. In fact, given the particular difficulty of showing that the rule is implicat-

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284. *See* Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 733–34 (2019) (positing a similar hypothetical involving a florist).

285. In a recent article, Professor Berg attempts to refute this assessment by arguing that the exemption theory he and Professor Laycock have offered would only apply to "expressive goods or services" and would not apply if a state could prove that it has a "compelling interest in denying an exemption." Thomas C. Berg, *Religious Freedom and Nondiscrimination*, 50 LOY. U. CHI. L.J. 181, 200–03 (2018). But as Laycock has acknowledged in his own recent article on *Masterpiece*, "it is hard to find a logical stopping point" to the expressive goods argument, as was evidenced by the fact that the attorney for Masterpiece Cakeshop "had great difficulty persuading justices that she could draw a manageable line between products that were speech and products that were not." Laycock, *supra* note 19, at 182. Moreover, requiring the government to justify its actions under the strict-scrutiny compelling-interest test, as opposed to the rational-basis review that currently prevails under *Smith* or the modestly heightened scrutiny proposal in this Article, would by definition make government action more vulnerable to challenge. *See Smith*, 494 U.S. at 888 (1990) (explaining that application of the compelling-interest test renders government action "presumptively invalid").

286. *See Emp't Div. v. Smith*, 494 U.S. 872, 888–89 (1990) (rejecting a rule that "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," including "laws providing for equality of opportunity for the races").

287. *See Masterpiece*, 138 S. Ct. at 1734–40 (Gorsuch, J., concurring, joined by Alito, J., concurring); *id.* at 1740 (Thomas, J., concurring) (indicating agreement with Gorsuch's analysis).

ed by the standard operation of civil rights laws,[288] its prospects for adoption might be greater in other areas. But again, as discussed above,[289] the *rule itself* is fundamentally inconsistent with the Court's current understanding of the Free Exercise Clause and adopting it would most accurately be described as pulling on a "loose thread[]" to "cause the entire fabric of *Smith*'s anti-discrimination rule to unravel."[290]

## III. A CALL FOR AN HONEST FREE EXERCISE JURISPRUDENCE

Unraveling the *Smith* rule may well be warranted, but the Court should not do it in the same disingenuous fashion that the *Smith* Court unraveled the *Sherbert* rule and that the *Sherbert* Court unraveled the *Reynolds* rule.[291] If the Court believes *Smith* was wrong to limit the Free Exercise Clause to a nondiscrimination rule, it should say so directly. If the Court believes the Clause is best interpreted as providing some measure of protection against burdens on religion flowing from indifference and unintentional neglect, it should develop a doctrine for addressing those burdens in all cases, not just cases that fit some Rube Goldberg exception to *Smith*.[292]

An honest free exercise jurisprudence would acknowledge not only the lack of candor in past precedent, but also the lack of analytical ri-

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288. *See supra* text accompanying notes 270–73.

289. *See supra* notes 242–56 and accompanying text.

290. Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 942 (2018).

291. *See supra* Part I.

292. *See generally* Nancy R. Daspit, *The Family and Medical Leave Act of 1993: A Great Idea but a "Rube Goldberg" Solution?*, 43 EMORY L.J. 1351, 1352 (1994) ("Rube Goldberg was an American cartoonist known for drawing ridiculously complicated mechanical gadgets. The term 'Rube Goldberg' is now defined as 'accomplishing by extremely complex roundabout means what actually or seemingly could be done simply.'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1983 (1986)). For an excellent discussion of why the selective-exemption rule is such a "bizarre manner of distributing constitutional exemptions," see Lund, *supra* note 223, at 644–65. *Cf.* Laycock, *supra* note 19, at 201 (acknowledging that overruling *Smith* "would be a better solution than" adopting the "more complicated" selective-exemption argument that Laycock believes *Masterpiece* can be read to support). Professors Laycock and Lund, along with Professor Berg and several others, joined a recent brief urging the Supreme Court to overrule *Smith*, relying in part on the argument that lower courts have been plagued by "confusion" in implementing *Smith* and determining "the significance of secular exceptions." Brief of Amici Curiae Ten Legal Scholars in Support of Petitioner at 3, 21–22, *Ricks v. Idaho Contractors Bd.* (No. 19-66), https://www.supremecourt.gov/DocketPDF/19/19-66/112058/20190812162931642_Ricks%20-%20Amici%20Brief%20for%20Ten%20Legal%20Scholars%20TO%20FILE.pdf [https://perma.cc/XF8G-5STU] (petition for cert. filed July 10, 2019).

gor. *Sherbert* simply assumed that incidental burdens on religion warrant the *same scrutiny* as targeted burdens on religion. *Smith* simply assumed that incidental burdens on religion warrant *no scrutiny* because they are different from targeted burdens on religion. Neither case confronted the obvious possibility, long recognized by the Court in other areas of constitutional law, that incidental burdens warrant *some scrutiny*, but not as much as targeted burdens.[293]

In neglecting to entertain this option, the *Smith* Court proceeded as if the only way to provide protection against incidental burdens was to adopt a balancing test. Writing for the *Smith* majority, Justice Scalia emphasized that utilizing such a test would be an anathema, for "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[294] This concern about balancing tests in the context of religious liberty claims is understandable given the "lack of constitutional competence on the part of judges to decide the significance of religious burdens and weigh them against secular interests."[295] But what the *Smith* Court ignores is the fact that heightened judicial scrutiny can be employed without using balancing.

As noted above, the Court's standard heightened scrutiny tests are actually phrased as a serious of "yes/no" questions.[296] And although courts and commentators often treat those tests as calling for comparative balancing of individual interests against state interests,[297] nothing would prevent the Court from making clear that no such balancing can be done when scrutinizing government justifications for imposing incidental burdens on religion. Rather, the Court could take the following two-step approach, which does not call for either judicial determinations about the relative import of different religious practices or judicial balancing informed by such determinations:

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293. *See* Oleske, *supra* note 18, at 1355 (collecting commentary arguing that "consistent with its approach to incidental burdens in other areas—the Court should apply some modestly heightened level of scrutiny to incidental burdens on religious practices").

294. *Emp't Div. v. Smith*, 494 U.S. 872, 889, 890 n.5 (1990).

295. Lupu & Tuttle, *supra* note 17, at 1295 n.155.

296. *See supra* text accompanying notes 144–46.

297. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1363 (1995) ("A study of the many cases where the Court has applied [intermediate free speech scrutiny to incidental burdens] suggests that in any given case the factors are assessed *with reference to each other*. In other words, the factors are balanced against each other.").

> **Question 1: Would the application of the legal rule at issue impose a substantial secular burden on an exemption claimant who engages in certain conduct or refrains from certain conduct for sincere, religiously motivated reasons?** This inquiry should not include any judicial evaluation of the religious significance of the particular behavior at issue, but instead, assess only "the substantiality of the civil penalties triggered by religious exercise."[298] If the adverse legal consequences of engaging in the religiously motivated behavior at issue are not trivial, and if the exemption claimant can show a sincere religious belief is motivating the behavior, the claimant should be permitted to move forward.
>
> **Question 2: Does the state have an actual and substantial interest in denying an exemption to the claimant?** This inquiry would put the burden on the state to show that it has more than a *de minimis* interest in denying the claimed exemption. To meet this burden, the state would have to explain why its interest could not easily be served through means other than denying the exemption. If the state cannot meet its burden, the religious claimant is entitled to an exemption.[299]

To be clear, as with any heightened scrutiny test, courts would still be doing some *weighing* under this approach. But *weighing* and *balancing* are not always the same thing. Balancing two interests *against* each other (what *Smith* warned against in the free exercise context) is a different process than weighing each of those interests *separately* to determine whether or not they meet a pre-set threshold. The test above

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

299. This would mirror the accommodation analysis courts have been performing for more than 40 years in the employment context. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (interpreting Title VII's requirement that employers reasonably accommodate the religious practices of their employees absent undue hardship to mean that the employer can decline to make an accommodation if it would impose "more than a *de minimis* cost"). Although this analysis would impose an accommodation requirement that is considerably less demanding than one backed by strict scrutiny, the protection provided would not be insubstantial. *See* Oleske, *supra* note 247, at 534 (2004) ("[T]here remains a substantial category of low-to-no-cost accommodations that employers are often required to provide [under Title VII as interpreted by *Hardison*]. Included in this category are exemptions from dress codes and grooming rules, scheduling changes that can be accomplished without overtime pay and without infringing on the rights of other employees, and approved absences for occasional religious holidays or special events. Although providing such accommodations could potentially lead to resentment among other employees, the courts have largely rejected defenses that are based on 'hypothetical morale problems' or 'proof that employees would grumble.'").

only calls for the latter process. Moreover, so long as the interest in not having one's religious conduct burdened is weighed only with reference to the substantiality of legal consequences for engaging in that conduct, and not the religious import of the conduct, courts can apply heightened scrutiny without implicating the *Smith* Court's concern about judges illegitimately determining the "significance of religious practice."[300]

In layman's terms, the modestly heightened scrutiny proposed above could be roughly translated as follows: "[G]overnment should not lightly impose burdens on the exercise of anyone's religion, but if government is not merely being insensitive but instead has solid and legitimate reasons for declining to exempt religious objectors from complying with a general law, courts should defer to such democratic judgments."[301]

This is not to deny that the terms "solid and legitimate," "trivial," "*de minimis*," and "substantial" are subjective. And the Court could well conclude—apart from concerns about judicial evaluation of religious interests—that the difficulty of determining the substantiality of *secular* burdens[302] or *state* interests warrants against applying heightened scrutiny in religious exemption cases.[303] Or the Court could conclude that as a matter of original meaning, the Free Exercise Clause only protects individuals against religious targeting, not incidental burdens on their religious practices.[304] But whatever the Court does, it should not repeat Justice Scalia's mistake in *Smith* of assuming that protecting

300. *Emp't Div. v. Smith*, 494 U.S. 872, 889, 890 n.5 (1990).

301. Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be A Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2041–42 (2011) (suggesting that this is what the pre-*Smith* cases were really trying to achieve); *see generally* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 334–35 (1986) ("[S]ignificant protection for religious conduct would be provided merely by requiring . . . that government show a non-speculative, identifiable, measurable, non-trivial injury to a legitimate interest.").

302. *See* Helfand, *supra* note 298, at 1796 ("Evaluating the substantiality of civil costs, even as it avoids theological questions, can be quite dicey.").

303. *But see* Oleske, *supra* note 18, at 1364–70 (using hypothetical scenarios to illustrate how courts might apply modestly heightened scrutiny in exemption litigation and concluding that while "there will be challenging cases that require courts to build out the new doctrine," doing so would be within "the institutional competence of the courts"). It bears noting that the Court routinely determines the substantiality of governmental interests is other areas of constitutional law. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 67–68 (2006) (regulation of expressive conduct); *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (time, place, or manner regulation); *New York v. Burger*, 482 U.S. 691, 708–09 (1987) (searches of businesses in closely regulated industries).

304. For a survey of originalist arguments on both sides of the exemption debate, see Clark B. Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 OR. L. REV. 369, 377–82 (2006).

against incidental burdens would necessarily require dangerous relative balancing of particular religious interests against particular state interests,[305] any more than it should repeat Justice Brennan's mistake in *Braunfeld*[306] and *Sherbert*[307] of assuming that targeted and incidental burdens warrant the same level of concern.

On that last point, the Court's recent free speech decision in *Janus v. AFSCME*[308] does not inspire confidence that the Court will be properly attentive to the distinction between targeted and incidental burdens. *Janus* involved a state law providing that when public employees elect a union to represent them, all represented employees—including those who choose not to become union members—can be required to contribute through "agency fees" to the representational activities of the elected union.[309] As the Court has made clear in the past, such requirements are designed "to eliminate free riders—employees in the bargaining unit on whose behalf the union [i]s obliged to perform its statutory functions, but who refuse[] to contribute to the cost thereof."[310] Unlike the requirement in *Barnette* that students pledge allegiance to the flag,[311] the requirement that represented employees pay an agency fee is not targeted at compelling individual expression of a particular ideological message. Rather, it is aimed at compelling conduct (payment for a legally guaranteed benefit) for non-expressive reasons (ensuring adequate financial support for the entity obliged to provide that benefit). Any speech-related burden the payment of agency fees puts on employees who object to the elected union's speech is no less incidental than the burden on any American who must pay taxes to support a government that engages in speech she opposes.[312] Nonetheless, like Justice Brennan in *Braunfeld*, the *Janus* majority invoked *Barnette* on the way to applying "exacting scrutiny" without ever acknowledging the critical distinction between targeted burdens and incidental burdens.[313]

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305. *Emp't Div.* at 882–85, 889 n.5 (1990)

306. *Braunfeld v. Brown*, 366 U.S. 599, 613–14 (1961) (Brennan, J., concurring and dissenting).

307. *Sherbert v. Verner*, 374 U.S. 398, 408–09 (1963).

308. 138 S. Ct. 2448 (2018).

309. *Id.* at 2460.

310. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 447 (1984).

311. *W. Va. State Bd. of Educ. V. Barnette*, 319 U.S. 624, 626 (1943).

312. *See* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171–72 (2018) ("The employees in *Janus* were not compelled to speak or to associate. They were compelled to pay, just as we all are compelled to pay taxes; our having to pay taxes doesn't violate our First Amendment rights, even when the taxes are used for speech we disapprove of—likewise with their having to pay agency fees.").

313. *See Janus v. AFSCME*, 138 S. Ct. 2448, at 2463–65 (2018); *Braunfeld v. Brown*, 366 U.S. 599, 611 (1961) (Brennan, J., concurring and dissenting).

In fairness to the *Janus* Court, prior compelled-fee decisions had also elided the distinction between targeted and incidental burdens.[314] But before *Janus* greatly increased the consequences of the elision and overruled a four-decade-old precedent allowing agency fees,[315] it would have been well advised to critically reexamine the predicate assumptions in its prior cases.[316] As it is, *Janus* seems all too similar to *Sherbert* in its cavalier expansion of First Amendment rights, and the Court is no more likely to carry the case to its logical end (free speech exemptions from all sorts of compelled payments) than it was to ever carry *Sherbert* to its logical end (free exercise exemptions from all sorts of laws).

## CONCLUSION

For over five decades, the Supreme Court's free exercise jurisprudence has been a doctrinal disaster area. As this Article has detailed, one principal reason for that state of affairs has been the Court's unwillingness to confront past precedent candidly while it has repeatedly shifted its position on religious-exemption rights. The result has been a confusing morass of irreconcilable decisions, all of which are still technically on the books. Unfortunately, the Court may be on the cusp of shifting its position on religious exemptions yet again by creatively reinterpreting currently prevailing caselaw. Doing so would be a mistake, as it would only further deepen the credibility hole the Court has dug for itself. It is long past time for the Court to engage in a forthright reexamination of its sharply conflicting precedents and seriously consider the nuances and middle-ground arguments those precedents have steadfastly ignored. By finally turning to that task, the Court could deliver what has been missing from its free exercise jurisprudence for so long: honesty.

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314. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (invoking *Barnette*, claiming its principles "are no less applicable to the case at bar," and holding that public employees cannot be forced to subsidize the political activities of unions that represent them, although they can be required to pay agency fees to subsidize representational activities), *overruled on other grounds by Janus*, 138 S. Ct. at 2486 (holding that *Abood* should have disallowed agency fees as well).

315. *See, Abood*, 431 U.S. at 225–32 (permitting charges to "finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment").

316. For a more thorough critique of both *Janus* and the premise upon which it rests, see Baude & Volokh, *supra* note 312.