Protecting Free Exercise under *Smith* and after *Smith*

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Fulton v. City of Philadelphia[1] is an important win for religious liberty. The Supreme Court ruled that Philadelphia could not terminate its foster-care services contract with Catholic Social Services (CSS) on the ground that CSS declines, because of its religious beliefs, to certify same-sex couples as foster parents. Teachings about sex and marriage are central to many religions; so are works of service. If religions lose the ability to serve because they act on their central teachings, the harm to free exercise of religion is severe. The Court prevented that—and the result was unanimous.

Fulton protected CSS under the current free-exercise rules of *Employment Division v. Smith*.[2] It held that Philadelphia's nondiscrimination policy failed *Smith*'s requirement that a law burdening religion be generally applicable, because the policy allowed exceptions in the city's unconstrained discretion. The majority opinion thus avoided deciding the broader question, central to free-exercise issues in other cases: whether the unprotective half of *Smith* should be overruled, so that government should have to provide strong justification for substantially burdening religion even through a generally applicable, formally religion-neutral law. Three concurring justices, in an opinion by Justice Samuel Alito, argued at length for overruling *Smith*; two others, in an opinion by Justice Amy Coney Barrett,

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[1] 141 S. Ct. 1868 (2021).

[2] 494 U.S. 872 (1990).

suggested that *Smith* was mistaken but that they were hesitant to overrule it without knowing what would replace it.

In this article, we first briefly examine free exercise under *Smith*, in light of *Fulton* and its effect on the current rules. Next, we briefly revisit the arguments for overruling aspects of *Smith* and reinstating strict or at least demanding scrutiny of the burdens on religion from generally applicable laws. But we give the most attention to describing, in the final part, how to replace *Smith* with a strong but workable doctrine protecting against generally applicable laws.

I. Free Exercise under *Smith*: What *Fulton* Does

Smith announced two rules. The better-known unprotective rule says that the Free Exercise Clause offers no protection against neutral and generally applicable laws.[3] No matter how severely such a law burdens the exercise of religion, it presents no free-exercise issue. Refusing religious exemptions requires no justification and need serve no government interest. But *Smith*'s protective rule says that if a law is not neutral, or not generally applicable, any burden it imposes on religion must be necessary to serve a compelling government interest.[4] *Fulton* clarifies *Smith*'s protective rule in ways that strengthen protection. It is the latest in a series of decisions protecting free exercise under *Smith*.[5]

First, *Fulton* confirms that neutrality and general applicability are distinct concepts, both of which must be satisfied. "Government fails to act neutrally," the Court said, "when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[6] CSS had presented evidence of nonneutrality; for example, the relevant city agency head had asserted that CSS should

[3] *Id.* at 878–79.

[4] See *id.* at 877–78; Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (following *Smith* and invalidating nonneutral ordinances under strict scrutiny).

[5] Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (finding that a COVID-related order restricting religious gatherings was not neutral or generally applicable); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (same); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (holding that the civil rights commission acted nonneutrally in imposing nondiscrimination penalties on a wedding-cake baker).

[6] Fulton, 141 S. Ct. at 1877 (citing Masterpiece Cakeshop, 138 S. Ct. at 1730–32).

change its policy because that would be more consistent with Pope Francis's attitudes.[7] But the Court found it "more straightforward to resolve this case under the rubric of general applicability."[8]

A law or policy fails general applicability in at least two situations. One is when it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[9] A law can fail general applicability when it permits or exempts even a small number of secular activities; it need not target religion.[10] Earlier this term, the Court phrased the rule as applying whenever regulations exempt or permit even one comparable secular activity: that is, "whenever they treat *any* comparable secular activity more favorably than religious exercise."[11]

The other failure of general applicability occurred in *Fulton*. Philadelphia's standard foster-care contract allowed a city official to grant exceptions to the nondiscrimination policy "in his/her sole discretion."[12] It therefore fell within the principle, dating back to *Smith*, that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'"[13] *Smith* had announced that principle to explain *Sherbert v. Verner*[14] and other cases protecting the right to unemployment benefits for people who refused work for religious reasons. Unemployment-benefits laws allow benefits claimants to refuse available work for "'good cause,'" a standard that "permit[s] the government to grant exemptions based on the circumstances underlying each application."[15] When government has "[such] a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[16]

[7] *Id.* at 1875 (quoting App. to Pet. for Cert. 366).

[8] *Id.* at 1877.

[9] *Id.* (citing Lukumi, 508 U.S. at 542–46).

[10] See Douglas Laycock & Steven T. Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 19–23 (2016).

[11] Tandon, 141 S. Ct. at 1296 (emphasis in original).

[12] Fulton, 141 S. Ct. at 1878.

[13] *Id.* at 1877 (quoting Smith, 494 U.S. at 884).

[14] 374 U.S. 398 (1963).

[15] Fulton, 141 S. Ct. at 1877 (quoting Smith, 494 U.S. at 884).

[16] *Id.* (quoting Smith, 494 U.S. at 884).

This principle is protective, since many laws have provisions for discretionary exemptions or determinations.[17] And *Fulton* holds that the principle applies whenever a law "create[s] a formal mechanism" for discretionary exceptions, even if officials never grant any. The discretion is enough to enable discrimination against religion, "because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude."[18] Discretion enables government to prohibit the religious practice without fear of later having to apply the same rule to some analogous secular practice it would prefer to permit.

Fulton also says that government cannot adopt a nonneutral or less-than-generally applicable policy just because it is setting rules for its contractors rather than regulating the general public.[19] Discrimination against religion is forbidden in whichever category covers public contracting, whether it is government "acting in its managerial role"[20] or government funding private entities for public purposes.[21]

Finally, *Fulton* holds that civil rights laws do not automatically, and in every context, serve a compelling government interest. Importantly, the liberals joined this holding. The specific holding depended on the finding that the city's policy was not generally applicable. The Court recognized that the interest in "the equal treatment of prospective foster parents and foster children" is "a weighty one"; "'gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.'"[22] But that interest could not justify denying CSS a religious exception, given "[t]he creation of a system of exceptions under the contract"; the city offered "no compelling reason" for "denying an exception to CSS while making them available

[17] See, e.g., Richard F. Duncan, Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty, 83 Neb. L. Rev. 1178 (2005) (collecting cases involving policies in public schools, state universities, government employment, and land-use regulation).

[18] 141 S. Ct. at 1879 (quoting Smith, 494 U.S. at 884).

[19] *Id.* at 1878.

[20] *Id.* (citation omitted); see Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) ("The Constitution does not permit government to discriminate against religions" in managing public lands.).

[21] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017).

[22] Fulton, 141 S. Ct. at 1882 (quoting Masterpiece Cakeshop, 138 S. Ct. at 1727).

to others."[23] Under this reasoning, a nondiscrimination law with no exceptions might still serve a compelling interest in ensuring equal treatment in every instance. Or it might not; that issue remains open.

But the Court also said something striking concerning this issue: "CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else."[24] This is the underlying issue in the clashes between nondiscrimination and religious liberty: are religious objectors imposing on LGBTQ claimants, or vice versa, or can each group have room to follow its own commitments? For all three liberal justices to join the statement that religious social services are not imposing their beliefs is a symbolically powerful point. And the point logically applies whether or not Philadelphia's policy was generally applicable. It may depend—or more precisely, the weight of the government's interest in regulating the church depends—on whether there are ample alternative providers and whether the religious agency will refer same-sex couples to them.

For these reasons, *Fulton* is significant. Even so, its general applicability holding turns on specific features of Philadelphia's rules. Cities can rewrite their rules to eliminate discretionary exceptions. And to reach its conclusion, the Court had to hold that Philadelphia's public-accommodations ordinance does not cover foster-care placement; the nondiscrimination laws in other jurisdictions may explicitly cover such services.[25] Pennsylvania's courts could even reject the Court's interpretation of Philadelphia's ordinance, as Justice Alito pointed out; state-court interpretation of local law would be binding.[26]

If cities take those steps, however, they might ultimately lose because the Court decides to strike down burdens on religion even from generally applicable laws. *Fulton* indicates that at least five justices believe *Smith*'s unprotective rule was wrongly decided. Alito's concurrence, joined by Justices Clarence Thomas and Neil Gorsuch, argued at length that the Court should overrule *Smith* and apply some form of heightened scrutiny to generally applicable laws. And Justice Barrett, joined by Justice Brett Kavanaugh, wrote separately that "it is

[23] *Id.*

[24] *Id.*

[25] 141 S. Ct. at 1879–81 (majority op.); *id.* at 1927–28 (Gorsuch, J., concurring in the judgment).

[26] *Id.* at 1887 n.21 (Alito, J., concurring in the judgment).

difficult to see why the Free Exercise Clause . . . offers nothing more than protection from discrimination."[27] They joined the majority opinion because overruling *Smith* was unnecessary and because they were unclear what would replace it. To these five we should probably add at least Justice Stephen Breyer; he did not join Barrett's criticism of *Smith*, but he previously called for reconsidering it.[28]

II. Overruling *Smith*

Our main goal in this article is to sketch how review should work if the Court overrules the unprotective part of *Smith* and reinstates demanding scrutiny of burdens from generally applicable laws. But it is worth saying a little to supplement Justice Alito's concurrence: why *Smith*'s unprotective part should be overruled.

Justice Barrett found the historical materials "more silent than supportive" in challenging *Smith*, but the textual and structural arguments against it "more compelling."[29] The textual and structural arguments are indeed convincing, and straightforward. A law that prohibits religious exercise in a particular application still prohibits religious exercise, even if it applies to other behavior as well. Religious individuals or entities still cannot practice their faith.

But the historical arguments, laid out by Justice Alito, are also persuasive. If the Free Exercise Clause does not apply to neutral and generally applicable laws, it cannot serve its original purposes. Those purposes include protecting individual conscience and preventing human suffering, social conflict, and persecution. In the 18th century, every colony found that free exercise required exempting dissenters from oaths, military service, and other requirements that burdened their religious practices.[30] Those laws, although neutral and generally

[27] *Id.* at 1883 (Barrett, J., concurring).

[28] City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

[29] Fulton, 141 S. Ct. at 1883 (Barrett, J., concurring).

[30] Scholarship setting forth this history includes Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986); Douglas Laycock, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause, 81 Notre Dame L. Rev. 1793 (2006); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990). See also Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 8–15, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) [hereinafter CLS Brief] (presenting concise historical account and collecting sources), https://bit.ly/3f6K7Fm.

applicable, overrode conscience, caused psychological suffering and loss of liberty or property, inflamed social conflict, and discouraged people from settling or remaining in the colony.

And free-exercise exemptions are still needed today. Generally applicable laws without exemptions coerce individuals and cause them to suffer for their faith. In today's atmosphere of cultural-political polarization, properly defined protections for religious commitments can reduce fear, resentment, and social conflict.[31]

Overruling *Smith*'s unprotective rule is important even though, in cases culminating in *Fulton*, the Court has strengthened *Smith*'s protective rule, finding various laws to be nonneutral or not generally applicable. Those protections are important, and the Court should not undo them in the course of undoing *Smith*'s unprotective rule. We return to that point below.

But a threshold requirement to show that a law is not generally applicable has multiple problems. First, it vastly complicates every litigation. Which secular exceptions are sufficiently analogous to count? What standard of review applies to that question? The series of lawsuits over COVID restrictions and religious gatherings dramatized the complications in such questions. Were restricted worship services analogous to permitted big-box retail shopping, or casinos and bowling alleys, or dining outdoors (or indoors)?[32]

The general-applicability threshold also prolongs litigation. Again, Philadelphia could eliminate its discretionary exception, enact a public-accommodations ordinance clearly covering foster care, and relitigate general applicability. But it might be deterred if it knew that heightened scrutiny would apply anyway because *Smith* was no more. And finally, some claimants lose under general applicability when they should not. Courts sometimes erroneously find a rule generally applicable. And rules that are truly generally applicable sometimes seriously burden religion. To illustrate such problems, Justice Alito cited to the COVID cases, while Justice Gorsuch cited baker Jack Phillips of Masterpiece Cakeshop, who won in the Supreme Court but now faces new civil penalties for continuing to

[31] See CLS Brief, *supra* note 30, at 16–19.

[32] See Fulton, 141 S. Ct. at 1930 (Gorsuch, J., concurring in the judgment) ("In the last nine months alone, this Court has had to intervene at least half a dozen times to clarify how *Smith* works.").

refuse to create cakes that celebrate events he cannot conscientiously participate in.[33]

Here is another case that highlights the consequences of complications and uncertainty in free-exercise law. Mary Stinemetz was a Jehovah's Witness who needed a liver transplant without a blood transfusion. Bloodless transplants were available in Omaha. But Kansas Medicaid wouldn't pay for medical care more than 50 miles beyond the Kansas state line—an arbitrary limit in any event, and more so because transplants were cheaper in Omaha than in Kansas. The rule wasn't even generally applicable, because Kansas officials had "absolute discretion" to grant exceptions.[34] But through multiple hearings and appeals, they refused any exception for Stinemetz. They failed, a court concluded, "to suggest any state interest, much less a compelling interest," that justified their refusal.[35] They understood *Smith* to mean that they didn't need a justification.

The court ultimately held that their refusal violated the federal Constitution, invoking *Smith*'s protective rule, and that it violated the Kansas constitution, rejecting *Smith*'s unprotective rule as a matter of state law.[36] But it was too late. During two years of administrative appeals and litigation, Stinemetz's condition had deteriorated, and she was no longer medically eligible for a transplant. She died of liver disease in the year after the court's decision.[37] She died for her faith while lawyers argued about general applicability.

After *Fulton*, the discretionary exception in Kansas's rules would clearly have entitled Stinemetz to relief. But governments have multiple ways to characterize their rules as neutral and generally applicable. If officials can argue over general applicability, they will. No matter how stringently general applicability is interpreted, free exercise under *Smith* will never protect in all the cases where it should.

[33] *Id.* at 1921–22 (Alito, J., concurring in the judgment); *id.* at 1930 (Gorsuch, J., concurring in the judgment) (citing AP, "Lakewood Baker Jack Phillips Sued for Refusing Gender Transition Cake," Mar. 22, 2021, https://cbsloc.al/3rPj0ny).

[34] Stinemetz v. Kan. Health Pol'y Auth., 252 P.3d 141, 155 (Kan. Ct. App. 2011).

[35] *Id.*

[36] *Id.* at 148–61.

[37] Brad Cooper, "Jehovah's Witness Who Needed Bloodless Transplant Dies," Kan. City Star, Oct. 25, 2012.

III. Free Exercise after *Smith*

Justices Barrett and Kavanaugh apparently believe that *Smith* is mistaken but want to know what should replace it. They did not need to overrule it in *Fulton*; the general-applicability holding was available. But some cases will rest primarily on challenging *Smith*. The Court denied certiorari in two such cases after *Fulton*,[38] but others are in the pipeline.

The Court can overrule *Smith* before it resolves every follow-on issue. But we want to lay out some considerations for a post-*Smith* approach and, in doing so, respond to the questions that Justice Barrett raised.

A. How Demanding Should Scrutiny Be, in General?

1. Compelling interest

We think the compelling-interest test of *Sherbert v. Verner*[39] and *Wisconsin v. Yoder*[40] should usually govern when a generally applicable law substantially burdens religious practice. That test properly holds that only the prevention of significant harm can justify prohibiting religiously motivated conduct. And it has a flexibility that allows it to apply to the wide range of circumstances in which religious exercise is prohibited.

The compelling-interest test is appropriate because the right to practice religion is a fundamental right. Substantial burdens on fundamental rights generally trigger the compelling-interest test. The test has applied to a variety of fundamental rights, from speech about public issues[41] or about labor organization[42] to decisions about procreation.[43] In particular, the test has frequently applied in cases of as-applied First Amendment challenges based on speech

[38] Ricks v. Idaho Contractors Bd., 435 P.3d 1 (Idaho Ct. App. 2018), cert. denied, (No. 19-66), 2021 WL 2637837 (U.S. June 28, 2021); Arlene's Flowers, Inc. v. Washington, 441 P.3d 1203 (Wash. 2019), cert. denied, (No. 19-333), 2021 WL 2742795 (U.S. July 2, 2021).

[39] 374 U.S. 398 (1963).

[40] 406 U.S. 205 (1972).

[41] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 442–44 (2015) (citing, e.g., Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

[42] Thomas v. Collins, 323 U.S. 516, 530 (1945) ("Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.").

[43] Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

or association. As in free-exercise cases, these challenges seek exemption from facially neutral and generally applicable laws, often including laws regulating conduct. These cases support the idea of exemptions, but more specifically they support application of the compelling-interest test.

One set of cases involves laws compelling organizational disclosures. *Brown v. Socialist Workers '74 Campaign Committee*[44] held that a law requiring disclosure of political parties' campaign contributions and expenditures, valid on its face, "cannot be constitutionally applied" to a minor party whose members and contributors would face "threats, harassment or reprisals" if their identities were known.[45] Disclosure requirements mostly regulate conduct, not speech; disclosure serves an anti-corruption purpose unrelated to suppressing expression. But the Court required an exemption where the law would significantly deter political association.

Brown reaffirmed *NAACP v. Alabama ex rel. Patterson*,[46] which unanimously exempted the NAACP from an order, entered pursuant to a generally applicable corporation statute, requiring it to disclose its membership lists. Because those members would face public reprisals, the burden on association from disclosure had to serve a compelling interest, even if it was the incidental effect of a law that "appear[ed] to be totally unrelated to protected liberties."[47] The Court's new decision striking down mandatory charitable-donor disclosures muddies the analysis but remains consistent with the proposition that serious burdens on association require compelling justification.[48]

[44] 459 U.S. 87 (1982).

[45] *Id.* at 101–02.

[46] 357 U.S. 449 (1958).

[47] *Id.* at 461; see *id.* at 463 (The "'subordinating interest of the State must be compelling.'") (citation omitted).

[48] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021). The plurality in this case applied "exacting scrutiny" and struck down the disclosure law on its face, not just when it created severe burdens. *Id.* at 2383, 2387–89 (Roberts, C.J., for three justices). But Justices Alito and Gorsuch, who provided the decisive votes, noted that *NAACP v. Alabama* had required a "compelling" interest; they declined to embrace a lower standard than strict scrutiny. *Id.* at 2391–92 (Alito, J., concurring in part and concurring in the judgment). And the dissent reaffirmed the *NAACP* and *Boy Scouts of America v. Dale* holdings that significant burdens on association trigger demanding scrutiny. *Id.* at 2393–96 (Sotomayor, J., dissenting).

Another set of cases applying the compelling-interest test involves expressive associations' conflict with nondiscrimination laws. The Court ordered an exemption from a generally applicable nondiscrimination law in *Boy Scouts of America v. Dale*,[49] holding that the Scouts could not be penalized for dismissing a scoutmaster whose public statements and identity conflicted with the organization's message. *Dale* said that, while public-accommodation laws generally serve compelling interests, those interests did not justify applying the laws when they "would significantly burden the organization's right" to express its message.[50] The Court granted a similar exemption in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[51] unanimously holding that parade organizers did not have to admit marchers with a message inconsistent with the organizers' message. *Hurley* applied at least demanding, and perhaps strict, scrutiny.[52] In cases involving business-related associations, the Court still applied the compelling-interest test but said the test was satisfied; the equality interest was strong, and the group's expressive interest was weaker because its membership was unrestricted apart from excluding women.[53]

A final example is *NAACP v. Button*,[54] which invalidated, as applied to the NAACP, a Virginia statute that prohibited any organization from retaining a lawyer in connection with litigation as to which it was not a party and had no pecuniary right or liability. The Court applied strict scrutiny even assuming that the law's purpose was "not to curtail free expression" but "merely to insure high professional standards" by preventing activity arguably analogous to barratry or champerty.[55] "However valid" those interests were concerning general civil litigation, and "however even-handed [the law's] terms appear," it unconstitutionally burdened the NAACP's litigation campaign.[56] That campaign was not a mere "technique of resolving private differences" but rather a form of "political

[49] 530 U.S. 640 (2000).

[50] *Id.* at 659.

[51] 515 U.S. 557 (1995).

[52] *Id.* at 577 (noting the requirement "that a challenged restriction on speech serve a compelling, or at least important, governmental object"); *id.* at 580.

[53] See Roberts v. U.S. Jaycees, 468 U.S. 609, 623–28 (1984).

[54] 371 U.S. 415 (1963).

[55] *Id.* at 438–39.

[56] *Id.* at 439, 436.

association," and likely "the most effective form" given the hostility of the white majority and elected officials.[57]

The compelling-interest test is demanding, but it will be satisfied more often in religious-exemption cases than in speech cases. Government has interests in regulating conduct that do not apply to belief or speech. "The [freedom to believe] is absolute but, in the nature of things, the [freedom to act] cannot be."[58] And conduct regulations that are neutral and generally applicable will be justified more often than those that are discriminatory or selective. A pattern of exceptions undercuts the government's asserted interest and causes it to fail strict scrutiny. "[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[59]

The compelling-interest test sets a strong but workable standard. When Congress reimposed the test in 1993 in the Religious Freedom Restoration Act (RFRA), it found that "compelling interest" was "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[60] Before *Smith*, the government had proved compelling interests in free-exercise cases involving racial equality in education,[61] tax collection,[62] and the military draft.[63] But the Court had always affirmed that the government had to show that the conduct "'posed some substantial threat to public safety, peace or order.'"[64]

The compelling-interest standard has not come close to producing the "anarchy" of which *Smith* warned.[65] One comparison of the

[57] *Id.* at 429, 431.

[58] Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[59] Lukumi, 508 U.S. at 547 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

[60] 42 U.S.C. § 2000bb(a)(5).

[61] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[62] United States v. Lee, 455 U.S. 252 (1982).

[63] Gillette v. United States, 401 U.S. 437 (1971).

[64] Yoder, 406 U.S. at 230 (quoting Sherbert, 374 U.S. at 403). For our fuller examinations of the pre-*Smith* case law, see Thomas C. Berg, What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act, 39 Vill. L. Rev. 1, 9–12, 26–28 (1994); Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 224–28 (1994).

[65] 494 U.S. at 888.

results of strict scrutiny under various claims from 1990 through 2003 found that free-exercise claims, including RFRA claims, were the least likely to invalidate the government action: the government won 59 percent of the time, 74 percent if the category were limited to challenges to generally applicable laws (where strict scrutiny is triggered only by a RFRA claim).[66] Other studies show similar results.[67]

That is not a high success rate for religious claimants. RFRA has surely been underenforced—as one of us has concluded concerning its counterpart, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which also applies the compelling-interest test.[68] But the success rates are also far from meaningless. Federal and state RFRAs have protected a number of minority religious practices.[69] Protection is important to those faiths, and to the larger faiths that have succeeded in important cases.

The compelling-interest test need not govern every situation. For example, interference with a religious organization's key internal governance decisions, like its selection of ministers, is absolutely barred under the *Hosanna-Tabor* decision, which Barrett mentions.[70] Indeed, the compelling-interest approach should not be all-or-nothing in nature. It is most workable and sensible, as one of us has long argued, when it balances the burdens on religion against the

[66] Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 857–58, 861 (2006). By contrast, the government won only 22 percent of free-speech cases. *Id.* at 844.

[67] Stephanie H. Barclay & Mark L. Rienzi, Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions, 59 B.C. L. Rev. 1595, 1640 (2018) (the government prevailed in 50 percent of RFRA appellate cases from 2014–2017, 71 percent if contraception-mandate cases are excluded); Luke W. Goodrich & Rachel N. Busick, Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases, 48 Seton Hall L. Rev. 353, 379–80 (2018) (government prevailed in 56 percent of cases, 65 percent if contraception cases are excluded); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions, 65 Ohio St. L.J. 491, 544–45, 555 (2004) (finding 35.6 percent success rate for "free-exercise/accommodation" cases in federal appellate and trial courts from 1986 to 1995).

[68] Douglas Laycock & Luke W. Goodrich, RLUIPA: Necessary, Modest, and Under-Enforced, 39 Fordham Urb. L.J. 1021 (2012).

[69] Christopher C. Lund, RFRA, State RFRAs, and Religious Minorities, 53 San Diego L. Rev. 163, 165–71 (2016) (collecting cases).

[70] Fulton, 141 S. Ct. at 1883 (Barrett, J., concurring) (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012)).

government interests, with a heavy thumb on the scale for religious freedom.[71] We return to that point below.[72] Our point here is that the overall approach should not be substantially weaker than "compelling interest."

2. The flawed analogy to categories with weaker scrutiny

Justice Barrett noted that "this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced" than strict scrutiny.[73] But if that is meant to propose a weak version of heightened scrutiny for free-exercise conflicts with generally applicable laws, it rests on an analogy that is flawed in many, even most, cases.

Barrett did not specify what she meant by "generally applicable laws" affecting speech or assembly. She might have been referring to cases of symbolic or expressive conduct like *United States v. O'Brien*,[74] which held that a war protester who burned his draft card could not claim exemption, based on the expressive nature of his act, from a general law that prohibited destroying a draft card. *O'Brien* applied a weak version of intermediate scrutiny; the Court accepted reasons of administrative convenience that usually fail anything beyond low-level rational-basis review.[75]

But as we already noted, in multiple other decisions involving conduct with expressive implications, the Court has used strict scrutiny. *Boy Scouts v. Dale*, for example, used it to strike down the application of the general law against discrimination in public accommodations.[76] The Court distinguished *O'Brien*, saying that the nondiscrimination law in *Dale* "directly and immediately affects associational rights . . . that enjoy First Amendment protection," while the draft-card law "only incidentally affects the free speech rights

[71] Douglas Laycock, The Religious Exemption Debate, 11 Rutgers J.L. & Religion 139, 151–52 (2009).

[72] See *infra* Part III.B.4.

[73] Fulton, 141 S. Ct. at 1883 (Barrett, J., concurring).

[74] 391 U.S. 367 (1968).

[75] See, e.g., *id.* at 378–79 (holding that the card gave an "easy and painless" way of showing that the holder had registered and a "potentially useful" reminder to holders to notify the draft board of changed address or status).

[76] Dale, 530 U.S. at 657–58.

of those who happen to use a violation of that law as a symbol of protest."[77]

The Court sometimes calls the effect of generally applicable laws "incidental,"[78] but that was not *Dale*'s usage, for the public-accommodations law was generally applicable yet the Court called its effect "direct." The difference between *Dale* and *O'Brien* appears to be that a prohibition on symbolic conduct leaves open many other ways to express the same views. Burning a draft card was dramatic but was far from the only way of protesting the war. Sleeping in the park on the National Mall was far from the only way to call attention to the plight of homeless persons.[79]

Adequate alternative channels are also crucial in the other category of "generally applicable laws" where review is (in Justice Barrett's words) "nuanced": namely, content-neutral time, place, and manner restrictions. The Court permits application of these laws if they "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[80] In other words, the law is often upheld, under moderate review, if—but only if—it leaves ample alternative channels.[81] A total ban on signs on residential property leaves insufficient alternatives.[82] So does a ban on door-to-door canvassing of residences, as applied to religious and political speech.[83] And the law can be invalid in application if alternatives are inadequate for the particular speaker—as alternatives to litigation were inadequate for the NAACP, even if not for all speakers, because the political process was closed to Southern blacks.

[77] *Id.* at 659.

[78] See Smith, 494 U.S. at 878.

[79] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984).

[80] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted).

[81] See generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 57–58 (1987) (discussing alternative channels of communication as part of overarching question whether a content-neutral law "unduly constrict[s] the opportunities for free expression").

[82] City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994).

[83] Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 166–68 (2002).

Substantial burdens on religious practice are usually more like the restrictions in *Boy Scouts v. Dale* than like restrictions on symbolic conduct or on the time, place, and manner of expression. By their nature, burdens on religious practice often leave no adequate alternatives. Most obviously, believers who are prohibited from acting on their belief cannot simply change the belief: if Native Americans are barred from using peyote in worship, they can't switch to wine. Nor can the government say they still have the "alternative" of following their other beliefs. In *Holt v. Hobbs*, where a generally applicable prison rule barred a Muslim inmate from wearing a half-inch beard, officials claimed that he'd suffered no substantial burden because he could still use a prayer rug, receive Islamic literature, correspond with a religious advisor, and observe religious diets and holidays.[84] The unanimous Court rejected that argument: "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a 1/2-inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise."[85]

From the standpoint of the constitutional interest, telling the free-exercise claimant to practice his other beliefs instead of this one would be like telling the free-speech claimant to communicate other messages instead of this one. In that sense, a prohibition on a religious practice is more like a content-based restriction on speech: it is not "practice-neutral," and for a free-exercise claim, the practice is what matters. Put differently, religious practices are rarely fungible. Assessing whether another practice is close enough to the one restricted would involve courts in difficult religious judgments based on a mistaken premise of near fungibility.

Likewise, if a law blocks a person or institution from pursuing a form of religiously motivated service, it does not help that they can switch to another form of service. When CSS lost the ability to provide foster-care services in Philadelphia, it was no answer to say that it could serve vulnerable persons in other ways. When religious progressives prosecuted for assisting undocumented migrants with food and water raised a RFRA defense, it was no answer to say—as one magistrate judge did—that the defendants could have avoided

[84] 574 U.S. 352 (2015).

[85] *Id.* at 361–62.

the burden because their beliefs compelled them "only . . . to aid persons in distress," not specifically to "aid undocumented migrants."[86] The district judge in another such case ruled, more sensibly, that punishment for aiding the people you believe are most in need is a substantial burden.[87]

Often, those providing religiously based service believe God commands them to do so. Those who aid migrants follow the scriptural directives to care for the stranger and sojourner; CSS follows the directives to care for the orphan.[88] At a minimum, they have chosen this service as their very mission. The Court properly noted that caring for orphans is "a mission that the Catholic Church has undertaken since ancient times."[89] Excluding a religious entity from a field of service thus imposes a severe burden analogous to that in *Button*. There it was irrelevant that the NAACP could still advocate for civil rights in multiple other ways. Under the circumstances, litigation was its "most effective form of political association."[90]

There are cases in which courts can assess the adequacy of alternative means of exercising religion; we discuss them below.[91] But alternatives are inadequate in several recurring, important contexts: when a law penalizes a practice stemming from religious tenets (like sacramental peyote use), interferes with a religious organization's internal governance, or significantly burdens a religious organization's ability to provide a service. In those cases, judicial scrutiny must be highly demanding.

3. Serious intermediate scrutiny?

Justice Barrett cited one pre-*Smith* case in which the Court asked whether the government's interest was "substantial," not "compelling."[92] *Gillette v. United States* held that applying the draft law to persons with conscientious objections to a particular war was

[86] United States v. Warren, No. CR 18-002230TUC-RCC(BPV), 2018 WL 5257807, at *2 (D. Ariz. May 31, 2018).

[87] United States v. Hoffman, 436 F. Supp. 3d 1272, 1285–87 (D. Ariz. 2020).

[88] See, e.g., Matthew 25:31–46; James 1:27.

[89] Fulton, 141 S. Ct. at 1885 (Alito, J., concurring in the judgment).

[90] Button, 371 U.S. at 431.

[91] See *infra* Part III.B.4.

[92] Fulton, 141 S. Ct. at 1883 (Barrett, J., concurring) (citing Gillette v. United States, 401 U.S. 437, 462 (1971)).

"strictly justified by substantial governmental interests that relate directly to the very impacts questioned."[93] That reference to a direct relation incorporated the opinion's earlier conclusion that Congress had acted permissibly when it exempted objectors to all wars but not objectors to particular wars. The Court, after lengthy discussion, had found that granting selective objections, unlike categorical objections, would pose "a real danger of erratic or even discriminatory decisionmaking in administrative practice," including problems in distinguishing moral objections to a particular war from policy arguments committed to the political process.[94]

Perhaps "strictly justified" indicated strict scrutiny; perhaps "substantial" indicated something less. *Gillette* would have reached the same result either way. The Court would certainly hold the interests in conscription compelling in general. And the fairness and consistency problems with selective-objector exemptions, and the heavy overlap with political judgments, could make denying such exemptions the least restrictive means of serving those interests. Assuming that *Gillette* used intermediate scrutiny, it was a serious version, not the weak version used in *O'Brien*.

Serious versions of intermediate scrutiny have appeared in several decisions in recent years. The Court requires that sex classifications rest on an "exceedingly persuasive" justification, with a "'strong presumption'" that they are invalid.[95] It now judges mandatory disclosures of organizational members or donors or of political contributors under at least "exacting scrutiny," which requires not only "a substantial relation" to "a sufficiently important government interest," but also "narrow tailoring" of the mandates."[96]

Serious intermediate scrutiny would be better than *Smith*'s total abdication of review. But intermediate scrutiny often declines into excessive deference, as in *O'Brien*. If lower courts have underenforced the compelling-interest test,[97] they could just as easily underenforce intermediate scrutiny. If the Court wants anything less than strict scrutiny for challenges to generally applicable laws—if

[93] Gillette, 401 U.S. at 462.

[94] *Id.* at 455; see *id.* at 455–60.

[95] United States v. Virginia, 518 U.S. 515, 532–33 (1996) (citation omitted).

[96] Ams. for Prosperity Found., 141 S. Ct. at 2383–84 (Roberts, C.J., for three justices).

[97] See *supra* notes 65–68 and accompanying text.

it wants to confine strict scrutiny to a near absolute presumption of invalidity—then to prevent underenforcement, it must give clear instructions about the demanding nature of the intermediate review.

B. Key Features of Free-Exercise Challenges

Several elements in the logic and purposes of free exercise can help generate a demanding but workable standard for deciding challenges to generally applicable laws.

1. Considering government interests at the margin

One key feature allowing the doctrine to be protective but workable is that religious-exemption claims are as-applied challenges: they seek to invalidate only one application of the law "while leaving other applications in force."[98] Thus they avoid "nullify[ing] more of a legislature's work than is necessary."[99] They allow courts "to tailor their relief to the religious-freedom claimant and avoid undercutting regulation broadly. . . . By examining government interests and ordering relief 'at the margin,' the court can preserve the law's core purposes while also protecting religious freedom."[100]

Because a free-exercise claimant seeks only an exemption at the margin, the court must measure the government's interest at the margin. *Fulton* applied the rule that had controlled previous cases: "[R]ather than rely on 'broadly formulated interests,' courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'"[101] The Court has held that the interest in preventing illegal drug use may be compelling in general, but not as applied to limited use of a drug as a sacrament in worship services.[102] The interest in preserving the unemployment-benefits fund may be compelling in general, but not as applied to the few claimants who would refuse work for religious reasons.[103] And the state

[98] Ayotte v. Planned Parenthood, 546 U.S. 320, 329 (2006).

[99] *Id.*

[100] Thomas C. Berg, Religious Accommodation and the Welfare State, 38 Harv. J.L. & Gender 103, 121–22 (2015).

[101] Fulton, 141 S. Ct. at 1881 (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006)).

[102] O Centro, 546 U.S. at 432–34.

[103] Sherbert, 374 U.S. at 407–09.

interest in requiring education of children is compelling in general, but not as applied to Amish children after eighth grade.[104]

In *Fulton* as in previous cases, the government's interest, "[o]nce properly narrowed" in this way, could coexist with an exemption. "Maximizing the number of foster families and minimizing liability are important goals," the Court said, but "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[105] Likewise, while the interests underlying nondiscrimination laws may be generally compelling, they are less likely so when there are multiple alternatives to the objecting religious provider or when the alleged discrimination is inside the church itself.

2. Self-interested exemptions: cumulative claims and religious incentives

Even under the marginal-interest analysis, in some cases allowing one exemption will trigger many others and undermine a law's basic coverage, not just a few of its applications. If the free-exercise claim coincides strongly with secular self-interest, or is otherwise highly attractive in this-worldly terms, granting one claim may encourage many other people to assert it. This helps explain why the Court refused religious exemptions from tax laws, even under strict scrutiny; many people want to avoid paying taxes.[106] Draft exemptions likewise could generate multiple claims, which helps explain why the Court lets Congress decide whether to have such exemptions.

The incentive created by a claim that strongly tracks self-interest also implicates a basic purpose of the Religion Clauses. The clauses should prevent government from discouraging religious practices; exemptions from generally applicable laws are warranted precisely because civil or criminal penalties or loss of government benefits profoundly discourages the prohibited religious practice. But neither

[104] Yoder, 406 U.S. at 221 (examining "the impediment to [state] objectives that would flow from recognizing the claimed Amish exemption").

[105] 141 S. Ct. at 1881–82.

[106] United States v. Lee, 455 U.S. 252, 260 (1982) (refusing claim of Amish employers who objected to paying Social Security taxes for their Amish employees, reasoning that "[t]he tax system could not function" if multiple exemptions were claimed as a matter of right). One of us has criticized *Lee* on the ground that the specific claim of the Amish, who also refused to receive Social Security benefits, "posed little risk of strategic behavior." Berg, *supra* note 64, at 10, 43 n.193.

should exemptions create affirmative incentives for religious practice. The Religion Clauses "require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice."[107] Exemption is appropriate when it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice."[108]

Some exemptions would incentivize assertions of religious belief, sincere or otherwise. Exempting secular income from taxes based on religious objections would encourage people to adopt or claim the religious belief that gained the exemption. Draft exemptions limited to theistic claims could encourage objectors to orient or characterize their beliefs that way. But most exemptions do not have such an effect. Nonbelievers will not suddenly start observing the sabbath, or traveling by horse and buggy, or holding their children out of high school, just because observant Jews or Adventists or Amish are permitted to do so. Most exemptions of religious practices have value only for believers in some particular faith, so most exemptions create neutral incentives, leaving religious choice far less distorted by government than regulation would.

3. Laws with exceptions for other interests

Under *Smith*, exceptions in a law for secular interests—even a small number of such exceptions—can make the law nonneutral or less than generally applicable and trigger strict scrutiny.[109] This protection is important and must not be lost if *Smith*'s unprotective part is overruled. If that part is overruled, neutrality and general applicability will no longer be a threshold hurdle; strict or at least heightened scrutiny will apply to all substantial burdens on religion. But other exceptions in a law will still be relevant to the compelling-interest analysis. To reiterate: the government cannot show a compelling interest "when it leaves

[107] Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality toward Religion, 39 DePaul L. Rev. 993, 1001 (1990). See *id*. (connecting this standard to "voluntarism," or protection of choice in religious matters); Thomas C. Berg, Religion Clause Anti-Theories, 72 Notre Dame L. Rev. 693, 703–04 (1997) (same).

[108] Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting on other grounds).

[109] See *supra* notes 9–11 and accompanying text.

appreciable damage to that . . . interest unprohibited."[110] Even one exception for another activity that undercuts the government's asserted interest can indicate that the government does not regard the interest as compelling. Even if the test is less stringent, any meaningful number of exceptions that undercut the asserted interest indicate that the interest is not so important.

Moreover, if the law includes numerous other exceptions, it clearly discriminates against religion. At the extreme, a minor penalty imposed solely on religious activity is invalid. As Justice Harry Blackmun once said, the targeting of religion is itself the burden.[111]

4. Balancing burdens and government interests, including by categories

Justice Barrett declared herself "skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime."[112] As noted above, we agree that the compelling-interest approach, or heightened scrutiny more generally, should not be all-or-nothing in nature. It is most workable and sensible, as one of us has previously argued, when it balances the burdens on religion against the government interests, with the thumb on the scale for religious exercise; the government interest must "compellingly outweigh the burden on religion."[113]

In weighing the burden on religion, courts cannot be entirely barred from assessing the importance of the religious practice in question. Although such assessments have hazards, to avoid them entirely is very likely to undermine protection. *Smith* argued that it would be "utterly unworkable" to apply the same compelling-interest test to laws preventing people from "throwing rice at church weddings" as to laws preventing church weddings entirely—but also that it was unworkable to decide that one such practice was "central" and the other was not.[114] That supposed dilemma led the Court to say it would no longer order exemptions from generally ap-

[110] Lukumi, 508 U.S. at 547 (citation omitted).

[111] *Id.* at 579 (Blackmun, J., concurring in the judgment).

[112] Fulton, 141 S. Ct. at 1883 (Barrett, J., concurring).

[113] See Laycock, *supra* note 71, at 152; Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 31–33.

[114] Smith, 494 U.S. at 887 n.4.

plicable laws. Even if exemptions still exist in theory, an inability to gauge burdens on religion would lead courts to balance by inflating government interests: "watering down" the governing test, as *Smith* warned.[115]

A total refusal to assess the importance of religious practice in religious-exemption cases therefore threatens to invert the proper priority among Religion Clause values. It risks reading the value of nonentanglement in religious questions—a value designed to promote freedom of religious practice—so strictly that it undermines that freedom by undermining any workable doctrine of religious exemptions. It also ignores a kind of waiver argument: claimants who seek an exemption put their sincerity and the significance of their belief or practice at issue. They cannot object to the court inquiring into the belief or practice more than would otherwise be permitted.

All this is consistent with our earlier argument that many restrictions on religious practice by their nature leave no adequate alternatives and thus are unlike permissible time, place, and manner restrictions on speech.[116] Our point there was not that religious practices are never minor; it was that religious practices are often not fungible. If a prohibition on one channel of speech leaves a dozen other channels by which you can communicate the message, there is a good chance that the alternatives are adequate. But if a prohibition on following one significant religious practice or tenet leaves a dozen others you can follow, that fact doesn't matter. A religion can have many significant practices; they are not fungible, so prohibiting any one of them prohibits religious exercise.[117]

Although courts should not refuse entirely to assess the importance of religious practices, such assessments do present dangers. That importance varies from person to person; judges may be prone to substitute what would be important to them for what is important to the person or group being burdened. For these reasons, judgments about importance will usually have to be approximate, with reasonable deference to the claimant's self-understanding. But these difficulties do not mean that courts should wholly ignore the importance

[115] *Id.* at 888.

[116] See *supra* notes 73–85 and accompanying text.

[117] Holt, 574 U.S. at 361–62.

of the religious practice when they are asked to decide a claim to exemption. They can distinguish getting married in church from throwing rice at the wedding.

We offer several points and suggestions for striking a workable balance between burdens on religion and government, with the thumb on the scale for protecting religion.

a. The substantiality of the burden, including the importance of the religious interest, should not be an all-or-nothing threshold. Treating it as all or nothing greatly magnifies the cost of misjudging the religious interest: any underestimate leads the court to deny judicial protection entirely, instead of according it somewhat less protection. Rather, the importance of the practice should affect the balance: the greater the burden, the greater the justification required. The test tends to work that way in practice, and sometimes the Court explicitly describes it that way.[118]

b. The prospect of free-form balancing may worry the Court, so balancing can sometimes be resolved into categorical rules. Already such a rule exists for cases involving religious institutions' autonomy over their internal governance. The ministerial exception is absolute within its scope; civil authorities must not interfere with a religious institution's "authority to select, supervise, and if necessary, remove a minister."[119] There is no override, even for compelling interests. Any balancing occurs in drawing the boundaries of the category: for example, defining who is a "minister."

The shield is absolute partly because of the severity of the burden. Interference with a religious organization's key governance decisions, including who should fill "key roles,"[120] tends to affect not just one of its practices but many. "The members of a religious group put their faith in the hands of their ministers"; "a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith."[121] In part, the shield is absolute because religious bodies' internal government has

[118] See Laycock, *supra* note 71, at 152 n.47 (collecting phrasing from free-exercise and free-speech cases that present the compelling-interest test as weighted balancing of interests).

[119] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

[120] *Id.*

[121] Hosanna-Tabor, 565 U.S. at 188; Our Lady, 140 S. Ct. at 2060.

less effect on societal interests. "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."[122] Denying someone a position as minister does not generally deny broad employment opportunities. Ministers can find another congregation, denomination, or other religious entity, or any secular occupation.

One of Justice Barrett's questions was whether "entities like [CSS]" should "be treated differently from individuals."[123] Our response is that entities have governance and autonomy interests that rarely or never arise in cases involving individuals. But claims based on conscientious objection—a conflict with religious tenets—should generally be treated the same for both.

c. Sometimes the burden on religion is fully measurable in secular terms. If a law bars a religious entity from providing services at some locations but allows it to do so at others, courts can and should consider whether the alternatives may be adequate. Such laws are essentially time, place, and manner restrictions on religious exercise. If the case involves a land-use regulation, RLUIPA governs, and the adequacy of alternatives is relevant to whether the regulation "substantially burdens" religious exercise. Courts in those cases may be too ready to find alternatives adequate and the burden insubstantial.[124] But there is no bar to them engaging in the evaluation, under RLUIPA or under the Constitution.

d. Some categories of burdens should not by themselves trigger strict or demanding scrutiny. Justice Barrett asked whether the Court should reaffirm *Braunfeld v. Brown*, which rejected strict scrutiny for "indirect burdens" that do not bar a religious practice but bar other behavior and so affect the religious practice.[125] The blue law in *Braunfeld* kept Orthodox Jewish shopkeepers from opening on Sundays, which did not violate their tenets but did hamper the recoupment of business they lost by closing on Saturdays—their Sabbath. *Braunfeld* seems correct that strict review of such indirect burdens would generate an unmanageable range of claims, many

[122] Watson v. Jones, 80 U.S. 679, 729 (1872).

[123] Fulton, 141 S. Ct. at 1882 (Barrett, J., concurring).

[124] See Laycock & Goodrich, *supra* note 68, at 1046–48, 1054–57.

[125] 366 U.S. 599 (1961).

of which would involve attenuated or avoidable burdens.[126] The *Braunfeld* shopkeepers should have won, not because they deserved an exemption from a neutral and generally applicable law, but because the Sunday closing law was not religiously neutral; its origins in the Christian-majority sabbath were unmistakable, and it may have been an establishment of religion.[127]

Pre-*Smith* decisions also rejected strict scrutiny in cases challenging the government's internal operations or its management of its own land. The impulse is understandable; again, strict review could cripple government or raise countless claims, often involving attenuated burdens. The Court was correct in *Bowen v. Roy* to find no burden on religious objectors from the government simply assigning them a Social Security number (as opposed to requiring them to provide or use the number).[128] But it was more troubling that the Court found no burden on Native American religion when activities on federal land disturb or even destroy sites that have been vital to tribal religious practices for centuries.[129] Of course the Court was right that the government is generally entitled to manage its own property. But it might have attached significance to the fact that the government acquired the property from its original owners in a coerced transaction, and it might have implied an easement or a duty to protect important religious functions.[130] The harms to tribal sacred sites affect the ability to worship in a concrete, empirical sense: they have "substantial external effects."[131] And the government, by seizing sacred lands, took control over the tribes' ability to practice their traditions fully—in somewhat the same way that prisons control inmates' ability to practice their faith.[132]

[126] See *id.* at 606 (noting, as examples, that taxes make it harder for some people to fulfill their tithing obligation, and weekend court closures make scheduling harder for lawyers who observe weekday sabbaths).

[127] McGowan v. Maryland, 366 U.S. 420, 445 (1961), upheld the Sunday laws on the ground that they served the secular purpose in a "uniform day of rest."

[128] 476 U.S. 693 (1986).

[129] Lyng, 485 U.S. at 447.

[130] See Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 973–76 (1989).

[131] Lyng, 485 U.S. at 470–71 (Brennan, J., dissenting).

[132] Stephanie Hall Barclay & Michalyn Steele, Rethinking Protections for Indigenous Sacred Sites, 134 Harv. L. Rev. 1294, 1320–43 (2021).

The sacred-sites cases dramatize the costs of an all-or-nothing approach; more nuance would resolve them far better. The *Lyng* Court said that because it could not define a practice as "central" to overcome a threshold for strict scrutiny, it had to forego any scrutiny whatsoever.[133] But if, as we have suggested, centrality is a matter of degree—one factor affecting the balance of burdens and government interests—courts can easily consider competent evidence about a given site's historic importance to tribal rites. And if the Court remains concerned that strict scrutiny would cripple federal land management, a serious intermediate level of scrutiny would give the government more flexibility but still push it to avoid harm to sacred sites whenever possible.

e. Still, much of the weighing in religion cases must occur through specification of the government interests that are sufficient to limit religious practice. In general, physical harms, actual or likely, are most likely to implicate overriding interests. As Justice Alito noted in *Fulton*, the original meaning of free exercise harmonizes with Founding-era state constitutional provisions; the majority of those provisions limited the right when it interfered with public "peace or safety."[134] Significant damage to property also fits comfortably within that standard. And the increase in the complexity of modern life expands the scope of government's regulatory interests. But it cannot be that every expansion of regulation produces an equal constriction of freedom to practice religion. Scrutiny of generally applicable laws—especially scrutiny of government interests at the margin rather than in the abstract—prevents that zero-sum result.

Over time, courts can use their experience with cases to develop distinctive rules for categories of cases, much as they have developed categorical rules for different free-speech areas like defamation or incitement of illegal conduct.[135] Consider, for example, liability for different religious actors in cases involving nondiscrimination laws.

[133] Lyng, 485 U.S. at 457.

[134] Fulton, 141 S. Ct. at 1901–03 (Alito, J., concurring in the judgment) (collecting provisions). See also McConnell, *supra* note 30, at 1461–66 (same).

[135] See, e.g., N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (adopting "actual malice," i.e., recklessness, as the liability standard for defaming a public official); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (protecting advocacy of illegal conduct except where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

Under any serious form of heightened scrutiny, religious nonprofits, like schools and social services, should generally have more protection than ordinary for-profit businesses operated by religious believers, like bakers or florists. The latter are protected; they can face significant burdens. But their exemptions should be narrower, because government's interests are generally stronger, than in nonprofit cases.[136]

The for-profit context increases government's interest in ensuring that all persons have access to basic goods and services and that market actors do not get unfair commercial advantages. Moreover, employees and clients of a religious nonprofit generally have notice that it may adhere to standards stemming from its religious identity; employees or clients of ordinary for-profit businesses often will lack such notice.[137] We do not think that every denial of service necessarily implicates a compelling interest in preventing discrimination. In particular, to the extent that the government's interest is in preventing the customer's offense at the refusal of service, such offensiveness cannot override First Amendment free-exercise rights any more than it overrides speech rights.[138] Nevertheless, it stands to reason that lack of notice will increase the concrete burdens of refusal on customers.

These differences suggest different presumptive rules for a religious nonprofit and an ordinary for-profit. The former should have significant protection from nondiscrimination liability unless it operates as a "choke-point," with market power to reduce services materially, or unless its religious nature is sufficiently attenuated that others no longer have constructive notice that it adheres to religious tenets. But for-profit exemptions should be limited to small vendors in religiously significant contexts like weddings or marriage counseling where alternatives are readily available.

[136] For further discussion of the following factors, see Berg, *supra* note 100, at 127–30.

[137] See Micah Schwartzman, Richard Schragger, & Nelson Tebbe, "Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter," Balkinization, Dec. 9, 2013, http://perma.cc/VWZ6-JEA6 (noting "the reasonable expectation that employees who work for churches and religious-affiliated non-profits understand that their employers are focused on advancing a religious mission").

[138] Texas v. Johnson, 491 U.S. 397, 414 (1989) (flag burning); Hustler Mag. v. Falwell, 485 U.S. 46, 50–57 (1988) (intentional infliction of emotional distress); Cohen v. California, 403 U.S. 15, 18–26 (1971) (profanity).

Conclusion

Smith's protective rule can do much to shield free exercise of religion, but its unprotective rule still weakens that shield. In answer to Justice Barrett, we think that the logic and purposes of free exercise can generate a protective but workable doctrine for challenges to generally applicable laws.