NARROWLY TAILORED AND BACK AGAIN: AN AMENDMENT'S TALE – FROM *YODER* TO *SMITH* AND BACK AGAIN

Robert Badman[*]

ABSTRACT

The Free Exercise Clause of the First Amendment has undergone significant judicial reinterpretation. This is especially true in *Employment Division v. Smith* (1990), which held that neutral and generally applicable laws burdening religious exercise are not constitutionally suspect. The path the Court charted in *Smith* was a significant change from prior cases, such as *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972). *Sherbert* and *Yoder* applied a strict scrutiny framework with a least restrictive means test. This article examines the history of Free Exercise Clause protections, critiques the unworkable and inconsistent standard established by *Smith*, and responds to Justice Barrett's call in *Fulton v. City of Philadelphia* for legal scholars to propose alternatives to *Smith*. It argues that the Supreme Court should overrule *Smith* and adopt the test in the Religious Freedom Restoration Act (RFRA), which requires the government to justify burdens on Free Exercise using only the least restrictive means. The article then analyzes *stare decisis* factors and demonstrates that *Smith* was egregiously wrong, has caused significant jurisprudential and real-world harm, and lacks reliance interests. It concludes that restoring the least restrictive means test would restore historical Free Exercise protections, provide clarity to courts, and safeguard religious liberty.

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[*] Judicial Clerk to the Honorable Brian Hagedorn, Wisconsin Supreme Court. I am grateful to the several professors at Ave Maria School of Law who encouraged this work, especially Professor Patrick Gillen. I thank the editors of the *Journal of Law & Civil Governance at Texas A&M* for their thoughtful and diligent work on this article.

1. INTRODUCTION

This article deals with the Free Exercise Clause, "Congress shall make no law . . . prohibiting the free exercise" of religion.[1] Specifically, it seeks to explore the reinterpretation of the clause the Court provided in *Employment Division v. Smith*[2] in light of Justice Barrett's challenge to legal writers to answer a litany of questions in *Fulton v. City of Philadelphia*.[3] Then, it will advocate for adopting a "strict scrutiny" style test based on the Religious Freedom Restoration Act (RFRA).[4]

Before *Smith*, it seemed that the Court was somewhat inconsistent but generally applied a form of heightened scrutiny when the government

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1 U.S. CONST. amend. I.

2 *Compare* Empl. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 877–79 (1990), *with* Wisconsin v. Yoder, 406 U.S. 205, 215, 219 (1972), *and* Sherbert v. Verner, 374 U.S. 398, 403–04 (1963).

3 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

4 *See generally* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4.

impinged on the free exercise of religion.[5] In two significant cases, the Court applied a strict scrutiny analysis that used a least restrictive means test.[6] *Smith* radically changed the landscape of free exercise jurisprudence by holding: (1) neutral and generally applicable laws that burden the free exercise of religion are not constitutionally suspect, and (2) it is constitutionally impermissible for laws to target religion.[7] *Smith* was controversial at the time of the decision and remains criticized now.[8] Some of its most notable critics are current members of the Court, expressing a willingness to overturn it last term in concurring opinions in *Fulton*.[9]

The Court may be realizing the flaws in *Smith's* holding, the unworkable standard it provides, and the flaws in its reasoning, as some more recent decisions have limited its reach.[10]

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5 *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 412–13 (5th ed. 2022) (citing Memorandum from the Off. Legal Counsel, U.S. Dep't of Just. (June 29, 2007)); Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 526–27 (2022); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020 CATO SUP. CT. REV. 33, 38 (2020–2021).

6 *See Yoder*, 406 U.S. at 214–15; *Sherbert*, 374 U.S. at 407.

7 *Smith*, 494 U.S. at 877–79.

8 *See id.* at 891 (O'Connor, J., concurring); *see also* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 362, 364–65 (3d Cir. 1999) (Alito, Circuit J.) (criticizing the unworkable standard); Eugene Volokh, Fulton v. City of Philadelphia *and Free Exercise: A Debate Between Jordan Lorence (ADF) and Me*, VOLOKH CONSPIRACY, at 34:11–34:59 (Nov. 21, 2020, 12:47 PM), https://perma.cc/H72R-TKR3 (debating controversy); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1420 (1990) (referring to *Smith*); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 n.2–3 (1992) (citing works discussing *Smith*'s perspective).

9 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) (joined by Kavanaugh, J. and Breyer, J.); *id.* at 1883 (Alito, J., concurring) (joined by Thomas, J. and Gorsuch, J.); *id.* at 1926 (Gorsuch, J., concurring) (joined by Thomas, J. and Alito, J.); *see also* Andrew Lavender, *Constitutional Law—Answering Justice Barrett's* Fulton *Prompt: The Case for a Narrow Reconsideration of Free Exercise*, 44 W. NEW ENG. L. REV. 429, 430–31, 439 (2022) (explaining that the Court is ready to overturn *Smith* by counting justices in concurrence in *Fulton*); Justin Burnworth, *Replacing* Smith *with a "Graduated Scale" Approach to the Free Exercise Clause*, 54 U. TOL. L. REV. 1, 2 (2022) (same); Laycock & Berg, *supra* note 5, at 37–38 (same).

10 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012) (creating ministerial exception); Trinity Lutheran Church of Columbia, Inc. v.

It is finally time for the Court to explicitly overrule *Smith* in its entirety and adopt an application of the least restrictive means test for the free exercise of religion.[11] There are enough votes on the Court to overturn *Smith*.[12] The least restrictive means test is arguably found in the Court's jurisprudence before *Smith*[13] and in Congress's approach to enforcing the First Amendment in the RFRA.[14] The legal profession is familiar with the least restrictive means test from other contexts.[15] Accordingly, locating the least restrictive means test within First Amendment jurisprudence should be easy. *Smith* was a break with the tradition and precedent of the Free Exercise Clause jurisprudence, so the *stare decisis* factors indicate that the law would be best served by returning to the Court's pre-*Smith* line of decisions.[16]

2. HISTORY

Stare decisis sometimes requires a departure from current jurisprudence, especially in constitutional cases.[17] The RFRA serves as a seminal

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Comer, 582 U.S. 449, 461 n.2 (2017); *Fulton*, 141 S. Ct. at 1877, 1924, 1926 (2021) (overturning Philadelphia's policy on narrow grounds) (two concurring opinions indicating that it is time to overturn *Smith*); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); *see also* Lavender, *supra* note 9, at 439 (explaining that the Court is ready to overturn *Smith* by counting justices in concurrence in *Fulton*); Burnworth, *supra* note 9, at 2 (same); Laycock & Berg, *supra* note 5, at 37–38 (same).

11 *See Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring) ("[*Smith*'s] severe holding is ripe for reexamination.").

12 Laycock & Berg, *supra* note 5, at 33–34 ("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, suggested that *Smith* was mistaken but that they were hesitant to overrule it without knowing what would replace it.").

13 Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972); Sherbert v. Verner, 374 U.S. 398, 407 (1963).

14 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-1.

15 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–32 (2006) (discussing applications of strict scrutiny outside the context of the First Amendment).

16 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2264–65 (2022) (explaining stare decisis factors); Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring) (same).

17 *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring).

reference point for examining the historical evolution of Free Exercise jurisprudence.[18] Congress explains the purpose of RFRA in part as "to restore the . . . test[s] . . . [from] *Sherbert v. Verner* and *Wisconsin v. Yode*r . . . ."[19] To understand past precedent, the appropriate places to begin a historical overview of the Court's interpretation of the Free Exercise Clause are the *Sherbert* and *Yoder* cases.[20]

The first case to consider is *Sherbert*, where the Court applied the least restrictive means test, demonstrating its commitment to protecting Americans' rights to exercise their religion free from governmental coercion.[21] Then it would be appropriate to consider *Yoder*, where the Court articulated and applied the least restrictive means test,[22] albeit not in those words.[23]

Smith is the connection between the modern mess of Free Exercise jurisprudence and the historical approach; it immediately preceded RFRA.[24] In *Smith*, the Court mostly eliminated the least restrictive means test by articulating a new test.[25] The new test means it is more challenging for litigants to sustain a challenge to government regulation as long as the regulation is neutral and generally applicable.[26] The Court claims that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[27] Not so.

> In . . . *Smith*, the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free

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18 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4.

19 § 2000bb (citations omitted).

20 *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

21 *See Sherbert*, 374 U.S. at 407.

22 *Yoder*, 406 U.S. at 228–29.

23 *Id.* at 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion.") (emphasis added).

24 *Compare* Empl. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990), *with* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4.

25 *Smith*, 494 U.S. at 878 ("[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. . . . Our decisions reveal that [this] reading is the correct one.").

26 *Id.* at 878–79.

27 *Id.*

> Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.[28]

2.1. *Sherbert*

In the *Sherbert* case, the Court held that a statute that denied unemployment compensation on the basis of religious belief violated the Free Exercise Clause as applied to appellant Adell Sherbert.[29] Ms. Sherbert's employer required her to work on Saturdays, but she refused because Saturdays are the Sabbath Day of her faith, and she would not work on Saturdays.[30] Ms. Sherbert applied for unemployment in the state of South Carolina when she could not find other employment that allowed her to not work on Saturdays.[31] South Carolina denied her claim.[32] South Carolina's Employment Security Commission, apparently responsible for reviewing unemployment claims, found that Ms. Sherbert refused suitable work offered to her.[33] The Court disagreed and reversed under the Free Exercise Clause.[34]

When the Court framed the test that it was using, it said that "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'"[35] In this case, the Court first asks if the state action "impose[d] *any* burden on the free exercise of [Sherbert's]

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28 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring) (citation omitted).

29 *Sherbert*, 374 U.S. at 410.

30 *Id.* at 399–400.

31 *Id.*

32 *Id.* at 401.

33 *Id.*

34 *Id.* at 402–03 ("Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.").

35 *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415 (1963)).

religion."[36] It plainly did.[37] Even if the state were to have a compelling interest, "it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation" would suffice to achieve its goals "without infringing First Amendment rights."[38] Ultimately, the Court found that, as applied to Ms. Sherbert, the South Carolina statute violated this test.[39]

Congress apparently liked the rule the Court used in *Sherbert* because Congress attempted to reinstate it in RFRA.[40]

2.2. *Yoder*

In the *Yoder* case, the Court held that a statute that compelled high school education despite religious objection violated the Free Exercise Clause as applied to respondents Yoder, Miller, and Yutzy.[41] Wisconsin required all children to attend school until age 16.[42] Respondents, who obeyed the tenets of their religion, did not send their 14 and 15-year-old children to school after eighth grade, violating the Wisconsin statute.[43] Wisconsin prosecuted, won in court, and fined respondents $5 each.[44] The Wisconsin Supreme Court held that enforcing the mandatory education law against the Amish families violated the Free Exercise Clause.[45] The Court agreed with the Wisconsin Supreme Court and affirmed its decision.[46]

The Court explained its test as "it must appear . . . that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[47] Later, the Court said, "[w]here fundamental claims of religious freedom are at stake . . . we must searchingly examine the interests that the State seeks to promote . . . ."[48] Additionally, "[t]he

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36 *Id.* (emphasis added).
37 *Id.*
38 *Id.* at 407.
39 *Id.* at 409–10.
40 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4.
41 Wisconsin v. Yoder, 406 U.S. 205, 207 n.1, 234 (1972).
42 *Id.* at 207.
43 *Id.*
44 *Id.* at 208.
45 *Id.* at 207.
46 *Id.* at 236.
47 *Id*. at 214.
48 *Id.* at 221.

essence of all that has been said and written on the subject is that only those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion."[49]

After its "searching[] examin[ation]," the Court concluded that the interest in an additional year or two of education was not "of sufficient magnitude" to violate the respondents' religious beliefs.[50] Therefore, Wisconsin violated the Free Exercise of Religion rights of respondents guaranteed in the First Amendment.[51]

Congress apparently liked the rule the Court used in *Yoder* because Congress attempted to reinstate it in RFRA.[52]

2.3. *Smith*

In the *Smith* case, the Court held that an Oregon statute that denied unemployment compensation on the basis of religious belief did not violate the Free Exercise Clause as applied to Alfred Smith.[53] This holding may seem utterly inconsistent with the Court's decisions in *Sherbert* and *Yoder*. It is. In the dissenting words of Justice Blackmun,

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means. . . . In short, [this decision] effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution.[54]

The Court explains that the test moving forward is "if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First

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49 *Id.* at 215 (emphasis added).
50 *Id.* at 214, 221, 234.
51 *Id.* at 234.
52 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4.
53 Empl. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990).
54 *Id.* at 907–08 (Blackmun, J., dissenting).

Amendment has not been offended."[55] On the other hand, it is still invalid for the government to intentionally target religion.[56]

2.4. RFRA as it Stands (or Sits) Now

The response to *Smith* was quick and decisive. *Smith* was decided in 1990.[57] Congress passed RFRA in 1993.[58] RFRA passed with overwhelming support.[59] The congressional findings specifically mentioned *Smith*.[60] The purpose was "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[61]

Congress implemented its purposes in RFRA.[62] It was not long before the Court had an opportunity to take up a case featuring RFRA.[63] In 1997, the Court decided *City of Boerne v. Flores*.[64] In *Boerne*, the Court decided that RFRA is invalid as applied to the states.[65] In 2006, the Court decided *Gonzales v. O Centre Espirita Beneficente Uniao do Vegetal*, in which it applied RFRA to a claim by a church against the federal government.[66] As a result, the Court now applies RFRA only to claims that a federal statute interferes with

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55 *Id.* at 878 (majority opinion).

56 *Id.* at 878–79; *see also* Laycock & Berg, *supra* note 5, at 34.

57 *See Smith*, 494 U.S. 872.

58 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4.

59 139 CONG. REC. 26416 (1993).

60 42 U.S.C. § 2000bb.

61 *Id.*

62 42 U.S.C. § 2000bb-1 ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . ." The exception reads, "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; and (2) is the least restrictive means of furthering that compelling governmental interest.").

63 *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

64 *See id.*

65 *See id.* at 519.

66 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006).

the free exercise of religion.[67] When the Court applies RFRA, it uses the compelling interest and least restrictive means tests established in RFRA.[68] RFRA does not elevate a claimant's First Amendment protections but provides a statutory cause of action in addition to the constitutional question that would be analyzed under *Smith*.[69]

The Court, then, has different standards to apply for free exercise claims depending on if the claim is brought against the federal government or a state government. There are also different standards within the constitutional analysis, which will be discussed later.[70] The traditional *stare decisis* factors[71] counsel against such an unworkable standard that imposes arbitrary tests on the same claims because *stare decisis* counsels against maintaining unworkable standards.[72]

2.5. RFRA is Different from the First Amendment

There is a difference between claims brought against the federal government under RFRA and claims brought against the states under the Free Exercise Clause of the First Amendment.[73] For claims against the federal government, the least restrictive means test applies against the government via RFRA.[74] For claims against individual states, the Free Exercise Clause neutral

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67 *See* Michael Dorf, *Symposium: Why is RFRA Still Valid Against the Federal Government?*, SCOTUSBLOG (Feb. 20, 2014, 12:06 PM), https://perma.cc/B33L-MQY6.

68 *See Gonzales*, 546 U.S. at 424; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014); Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014).

69 WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER 1 (2020), https://perma.cc/PCH6-7MRB ("RFRA creates a private cause of action for persons whose religious exercise has been substantially burdened . . . .").

70 See *infra* Section 3.2 (discussing exceptions to the *Smith* test of neutrality and general applicability in Free Exercise Jurisprudence).

71 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

72 *Id.* at 2272. ("Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner.")

73 *Compare Gonzales*, 546 U.S. 418, *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

74 *See Gonzales*, 546 U.S. at 423.

and generally applicable test is the norm.[75] Even when the Court situates its reasoning outside the bounds of *Smith*, meaning when it finds a law is not neutral and generally applicable, it applies a narrowly tailored analysis.[76] The federal government is held to a higher standard than state governments because of these conflicting standards. The Court should heed the requirements of *stare decisis* and equalize the state governments with the federal governments by overturning *Smith* with a return to pre-*Smith* jurisprudence. Congress agreed with the pre-*Smith* jurisprudence and tried to codify it in RFRA.[77] After discussing the insufficiency of Congressional protections because Free Exercise is protected by the Constitution, Justice Alito says, "[i]t is high time for us to take a fresh look at what the Free Exercise Clause demands."[78] The Court should elevate the protections found in RFRA to Constitutional dimensions.

3. THE TWO TESTS

The history[79] provides a background from which the issue can be presented. Does *Smith* require strict adherence according to *stare decisis*?[80] Or is it "appropriate for the Court to overrule" because it is an "erroneous decision"?[81]

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75 *See supra* Section 2.3.

76 *See infra* Section 3.2.

77 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1889 (2021) (Alito, J., concurring)

78 *Id.*

79 *See supra* Part 2.

80 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring).

81 *See id.*

3.1. Least Restrictive Means Under RFRA

As discussed,[82] RFRA does not apply to every challenge that a litigant brings against a government action thought to impinge on the free exercise of religion.[83] The Court, however, has applied it in a number of cases.[84]

In *Gonzales*, the Court expressly mentions *Smith* and RFRA.[85] It adopts the standards promulgated by Congress in RFRA as the applicable law for deciding if the federal government can burden the free exercise of religion.[86] The government conceded that the burden placed on O Centro Espirita Beneficente Uniao do Vegetal's free exercise of religion was substantial.[87] Since RFRA bars substantial burdens on religious exercise, the government must show that the burden was placed "in furtherance of a compelling governmental interest."[88] The Court found that a generalized interest in enforcing the Controlled Substances Act was not a compelling interest in the face of the substantial burden on the Free Exercise of the religious group.[89] As a result, the Court did not analyze whether the burden was the least restrictive means of accomplishing the government's interest.[90]

In *Burwell*, the Court once again applied RFRA as the applicable law for determining if the federal government, through an administrative agency, can burden the free exercise of religion.[91] The Court said that its "decision on that statutory question makes it unnecessary to reach the First Amendment claim . . . ."[92] The Court found that the Department of Health and Human Services (HHS) contraceptive mandate substantially burdened the free

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82 *See supra* Section 2.4.

83 *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (declining to apply RFRA against the states).

84 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014); Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014).

85 *Gonzales*, 546 U.S. at 423–24.

86 *Id.* at 423.

87 *Id.* at 426.

88 42 U.S.C. § 2000bb-1(b)(1).

89 *Gonzales*, 546 U.S. at 430–31.

90 *Id.* at 429.

91 Burwell v. Hobby Lobby, 573 U.S. 682, 688–90 (2014) (holding that RFRA can apply to protect rights of for-profit companies).

92 *Id.* at 736.

exercise of religion.[93] The Court also assumed, without deciding, that the HHS mandate furthers a compelling government interest.[94] Since the first prong of the RFRA test was satisfied, the decision whether to uphold the law is based on if the mandate was the least restrictive means of achieving the interest.[95] Here, the Court calls the test "exceptionally demanding."[96] It points to a hypothetical situation in which the HHS could achieve its interest without imposing on the organization's religious exercise.[97] It also points to an existing program that makes exceptions to the HHS mandate for non-profit organizations.[98] In this case, RFRA required the government to show that no current method of accommodation existed that burdens religious exercise less *and* that no hypothetically feasible situation existed in which religious exercise is less burdened than by the challenged government action.[99]

In *Wheaton College* and *Zubik*, the Court uses RFRA as the applicable law.[100] In both cases, the Court did not express an opinion on the merits.[101]

3.2. Free Exercise Tests

In addition to the RFRA least restrictive means test, the Court has a seemingly endless arsenal of tests to apply in cases where the litigant brings a claim under the Free Exercise Clause. This article will next discuss the application of the *Smith* test and the numerous exceptions thereto.[102] Since

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93 *Id.* at 691.

94 *Id.* at 691–92.

95 *Id.* at 692.

96 *Id.* at 728.

97 *Id.* at 728–30.

98 *Id.* at 730–32.

99 *Id.* at 728 ("HHS has not shown . . . that this is not a viable alternative.").

100 Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting); Zubik v. Burwell, 578 U.S. 403, 406–07 (2016).

101 *Wheaton Coll.*, 573 U.S. at 958; *Zubik*, 578 U.S. at 409.

102 For individualized exceptions, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). For internal church decisions see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021, n.2 (2017); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021). For hybrid rights see Empl. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 882 (1990); *Lukumi*, 508 U.S. at 559 (Souter, J., concurring).

Smith destroyed the old judicial least restrictive means test, none of the recent cases apply it, in keeping with the precedent of *Smith*. If a law is not neutral and generally applicable, then the Court instead applies a narrow tailoring test,[103] which it has explained in a number of cases. These cases are the *Lukumi Bablu Aye, Inc. v. City of Hialeah*, *Fulton v. City of Philadelphia*, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, *Espinoza v. Montana Department of Revenue*, *Our Lady of Guadalupe School v. Morrissey-Berru*, *Kennedy v. Bremerton School District*, *Carson v. Makin*, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Note that all of these Free Exercise cases deal with state governments and not the federal government.[104]

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC is a case that deals with whether a church is able to choose its own ministers.[105] This case is recognized as the original beginning point for the Supreme Court jurisprudence for Free Exercise that recognizes the so-called "ministerial exception."[106] It "shields churches from improper government influence."[107] The Court distinguishes *Smith* by noting the difference between individual action that may be implicated by something like peyote ingestion (*Smith*) and government influence over a particular church's selection of its own ministers.[108]

> [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,

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103 *See infra* note 104 and accompanying text.

104 *Lukumi*, 508 U.S. at 528 (Florida); *Fulton*, 141 S. Ct. at 1874 (Pennsylvania); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2367 (2020) (Pennsylvania); Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246, 2251 (2020) (Montana); Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2056–58 (2020) (collecting two cases from California private schools); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416–17 (2022) (Washington); Carson v. Makin, 142 S. Ct. 1987, 1993 (2022) (Maine); *Hosanna-Tabor*, 565 U.S. at 177 (Michigan); Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1724–25 (2018) (Colorado).

105 *Hosanna-Tabor*, 565 U.S. at 176–77.

106 John R. Vile, *Ministerial Exception*, FREE SPEECH CTR. (Jan. 1, 2009), https://perma.cc/4NCY-Y82N.

107 *Id.*

108 *Hosanna-Tabor*, 565 U.S. at 190.

> concerns government interference with an internal church decision that affects the faith and mission of the church itself. See *id.*, at 877, 110 S.Ct. 1595 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma"). The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[109]

The Court continues, noting that in *Hosanna-Tabor* itself, the ministerial exception applies.[110] The holding in *Hosanna-Tabor* demonstrates more of the Court's continual distancing of itself from *Smith* to fashion rules that work in particular instances, irrespective of the consistency of the law or the pre-*Smith* precedent.[111]

Church of the Lukumi Babalu Aye, Inc. v City of Hialeah is a case that deals with a Florida city, Hialeah, that sought to outlaw a religious practice of the Santeria religion.[112] Virtually all evidence from city council meetings, the content of the regulations they passed, and the exceptions in the rule made it clear that the law was made to restrict the practice of the Santeria religion.[113] Since the law at issue was not neutral or generally applicable, it needed to satisfy strict scrutiny to be upheld by the Court.[114] In this case, that means that the law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[115] The Court proceeds to note that the interests asserted by the government are not compelling.[116] Additionally, the law is not narrowly tailored.[117] In either event, the law failed strict scrutiny.

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109 *Id.*

110 *Id.* at 190–92.

111 *Id*. (discussing *Smith*); *see also* Feldman, *supra* note 5, at 539–40.

112 508 U.S. 520, 526 (1993).

113 *Id.* at 534–35.

114 *Id.* at 531–32, 546. ("A law failing to satisfy [the elements of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

115 *Id.* at 546 (internal quotations omitted).

116 *Id.*

117 *Id.* at 547.

For this article, it bears mentioning that the old least restrictive means test is absent from the reasoning in this case.[118] If the Court adopted the RFRA perspective, the state would have been required to prove that its law targeting the Santeria religion was "the least restrictive means of furthering that compelling governmental interest."[119] The case may have come out the same way under the RFRA standard, but the elevated standard would still provide more and clearer protections for this unique, minority religion.

Fulton v. City of Philadelphia is a case in which Philadelphia, Pennsylvania, refused to continue its contractual relationship with the Catholic Church for placing foster children in families because Catholic Social Services would only refer same-sex couples to other foster agencies instead of certifying the couple itself.[120] Catholic Social Services sued, claiming that Philadelphia violated its Free Exercise rights.[121] The Court analyzed the challenge under the Free Exercise Clause of the First Amendment.[122] It was plain that there was a burden on the exercise of religion.[123] However, the Court located the dispute outside the bounds of *Smith* by saying that the city's standard anti-discrimination policy does "not meet the requirement of being neutral and generally applicable."[124] While examining the interest that the city of Philadelphia sought to serve, the Court revisited the very compelling interest test that *Smith* sought to eliminate from *Sherbert* and *Yoder*.[125]

Notably, the reliance on pre-*Smith* cases creates something of an inconsistency. Those cases were thought to be irrelevant, but now the Court has revisited them. If the Court were to overrule *Smith* and expressly adopt the RFRA standard into its Free Exercise jurisprudence, this problem would vanish.

The city's refusal to allow Catholic Social Services to continue as a contractor is evaluated under strict scrutiny.[126] However, it is strict scrutiny

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118 *Id.* at 546–47 (discussing strict scrutiny in Part III of the opinion).

119 42 U.S.C. § 2000bb–1(b)(2).

120 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021).

121 *Id.* at 1876.

122 *Id.*

123 *Id.*

124 *Id.* at 1877.

125 *Id.* at 1881 (citing the discussion of *Sherbert* and *Yoder* from Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006)).

126 *Id.*

remixed—it is neither the pre-*Smith* strict scrutiny nor the RFRA version of strict scrutiny.

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217 (internal quotation marks omitted). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.[127]

The Court explains that the city's interests are not compelling government interests, so it fails under the alternate *Smith* rule.[128] Once again, adopting the standard presented in RFRA would guarantee Free Exercise protections across the board instead of only in cases where the government interest is not compelling.

Masterpiece Cakeshop is a case in which Jack Phillips decided not to use his artistic talent as a baker to publicly support a same-sex wedding ceremony because it would have violated his sincerely held religious beliefs.[129] When adjudicating the claim made against him by the couple under its anti-discrimination law, the state acted with hostility to Phillips.[130] The Court found that the hostility evinced against Phillips violated the *Smith* standard of neutrality and general applicability.[131] Therefore, the Court found that the state decision, which punished Phillips for his refusal to bake the cake, was impermissible.[132] A concurrence by Justice Gorsuch in *Masterpiece Cakeshop* makes it clear that the standard the Court should be applying is strict scrutiny, which is unmentioned in the majority opinion.[133] He is confident that the hostility evinced by the state would never pass strict scrutiny.[134] A separate concurrence by Justice Thomas points out that the Supreme Court

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127 *Id.*

128 *Id.* at 1881–82 (noting the state interests are "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children").

129 Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1723 (2018).

130 *Id.* at 1729.

131 *Id.* at 1731.

132 *Id.* at 1732.

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

134 *Id.* at 1737.

should not be deciding whether strict scrutiny was satisfied "in the first instance" because the court of appeals did not make that decision.[135]

The previous four cases, *Hosanna-Tabor*, *Lukumi*, *Fulton*, and *Masterpiece*, all situate the reason for the decision outside the *Smith* rule of neutrality and general applicability.[136] It is interesting, then, that they do not use the old heightened least restrictive means test found in RFRA.[137] This is why some commentators have noted that the Court's enforcement of RFRA may be more rigorous than the precedent that RFRA was allegedly modeled on.[138]

Other Supreme Court decisions employ a multitude of exemptions to the *Smith* test.[139]

Kennedy v. Bremmerton School District deals with a high school football coach who wanted to pray after games.[140] The Court found that Coach Kennedy's religious exercise was burdened by the school's insistence on stopping his prayer and eventual discharge.[141] It also found that the school did not act in a neutral and generally applicable way when it restricted Coach Kennedy's exercise of his religion.[142] Since we are now in the familiar area of *Smith*-style strict scrutiny, the Court says the government must show "that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end."[143] It does not follow the least restrictive means test that RFRA would require.[144] In any event, we do not get a close look at narrow tailoring because the school district's actions would fail any level of scrutiny—including intermediate.[145] The government's interest

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135 *Id.* at 1746.

136 *See supra* Section 3.2.

137 *Id.*

138 *See e.g.* MCCONNELL, *supra* note 5, at 149–50.

139 Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2372–73 (2020) (contraception mandate); Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring) (situating scholarship aid outside the *Smith* test); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (ministerial exception); Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 181 (2012) (ministerial exception).

140 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415 (2022).

141 *Id.* at 2422.

142 *Id.* at 2422–23.

143 *Id.* at 2426.

144 *See id.*

145 *Id.*

is essentially nonexistent, according to the Court.[146] The Court does not need to explain if the means used to achieve the government's ends are narrowly tailored, the least restrictive means, or otherwise, because there is no compelling interest.

4. THE SOLUTION

Justice Kavanaugh suggested a three-part analysis for the Court to use when deciding whether to overrule a case based on historical *stare decisis* factors.[147] "*First*, is the prior decision not just wrong, but grievously or egregiously wrong?"[148] "*Second,* has the prior decision caused significant negative jurisprudential or real-world consequences?"[149] "*Third,* would overruling the prior decision unduly upset reliance interests?"[150] At least five Justices on the Court seem to adopt Justice Kavanaugh's approach in *Dobbs*.[151] When it handed down the *Dobbs* decision, the Court declared, "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."[152] The Court could, and hopefully will, say the same about *Smith* soon.

Five Justices currently on the Court have indicated that they are willing to overturn *Smith*, some more eagerly than others.[153]

In separate concurrences, Justices Alito and Gorsuch respond to their colleague with a *tour de force* of originalism, history, and *stare decisis* analysis.[154] Justice Alito's analysis of the *stare decisis* factors is staggering.[155] He also clearly demonstrates why the *Smith* test is unworkable through the exceptions built-in to *Smith* itself and the ongoing development of doctrine

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146 *Id.* at 2426–33.

147 Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

148 *Id.*

149 *Id.* at 1415.

150 *Id.*

151 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

152 *Id.*

153 Lavender, *supra* note 9, at 430–31, 439.

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

155 *Id.* at 1883 (Alito, J., concurring).

that the Court has engaged in since *Smith*.[156] Justice Gorsuch is particularly upset about the lack of enthusiasm for revisiting *Smith*.[157]

4.1. *Smith* was Egregiously Wrong

As discussed, *Smith* has so many exceptions that it is difficult to discern if there is a rhyme or reason to the Court's Free Exercise jurisprudence anymore.[158] Similar to the treatment that *Dobbs* gave *Roe*, the Court could easily find that *Smith* was egregiously wrong. Two Justices in the original *Smith* case wrote withering separate opinions that garnered the support of four of the nine justices.[159] Cases that get cabined over and over again are eventually overturned.[160] In any event, many constitutional decisions are eventually overturned, regardless of cabining or not.[161]

Smith should be overturned in its entirety. An express overruling would save much litigation in the coming years and make the Court's job easier. Cases are being litigated under all sorts of exceptions to *Smith*, and the Court is blamed for changing its own rules.[162] Applying strict scrutiny

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156 *Id*.

157 *Id.* at 1926 (Gorsuch, J., concurring).

158 *See supra* Section 3.2.

159 Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 891 (O'Connor, J., concurring); *id.* at 907 (Blackmun, J., dissenting).

160 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1411–12 (2020) (Kavanaugh, J., concurring in part) (collecting cases). Some famous examples include Roe v. Wade, 410 U.S. 113 (1973) (overturned by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)); Plessy v. Ferguson, 163 U.S. 537 (1896) (overturned by Brown v. Bd. of Educ., 347 U.S. 483 (1954)); Korematsu v. United States, 323 U.S. 214 (1944) (overruling acknowledged in Trump v. Hawaii, 138 S. Ct. 2392 (2018)); Scott Bomboy, *Did the Supreme Court Just Overrule the Korematsu Decision?*, NAT'L CONST. CTR. (June 26, 2018), https://perma.cc/8UXW-D5UL (explaining *Trump* overruled *Korematsu*); Lemon v. Kurtzman, 403 U.S. 602 (1971) (overruling announced in Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022)); Ryan Colby, *Supreme Court Overrules* Lemon *Test, Rules in Favor of Prayer for Football Coach*, BECKET (June 27, 2022), https://perma.cc/MZB4-EMSY (explaining *Kennedy* overruled *Lemon*).

161 *Ramos*, 140 S. Ct. at 1411–12 (Kavanaugh, J., concurring in part) (listing an extensive number of cases that the Supreme Court has overruled, especially noting *Brown v. Bd. of Educ.*).

162 Noah Feldman, *The Supreme Court Has Just Eroded First Amendment Law: Noah Feldman (Correct)*, BLOOMBERG L. (Jun 21, 2022, 11:52 AM), https://perma.cc/2WUN-

with a least restrictive means test would give lower courts clarity.[163] Instead of fitting tendentious decisions into already-created exceptions or creating new exceptions *ex nihilo*, the Court can apply its uniform rule: unless the substantial imposition on the free exercise of religion is for a compelling government interest and is the least restrictive means of achieving that interest, free exercise wins over government control.

The constant exceptions and eager litigiousness of advocacy groups could end with a clear rule adopting the standards presented in RFRA and making somewhat of a return to Free Exercise jurisprudence prior to *Smith*.

4.2. *Smith* has Significant Real-World Consequences

Most of the foregoing arguments can be summarized broadly and supplemented by characterizing the least restrictive means test as a better and more convenient rule. It is better to overrule cases that are already mostly dead and that most of the current Justices would like to overrule. It is also more convenient to build precedent upon a solid foundation rather than the sinking sands of bad case law. It is more convenient to have only one rule instead of many rules occupying the same field. Finally, it is better to apply a rule that looks familiar and is the historical rule. It is also more convenient to apply the least restrictive means test than narrowly tailored because the test itself allows for less leeway and less judicial freewheeling per opinion.

In the cases already discussed, Americans were forced to litigate cases to vindicate their Free Exercise rights guaranteed by the Constitution.[164] In other situations, a violation of constitutional rights is a *per se* irreparable injury.[165] In every case that parties litigated all the way to the Supreme Court

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MSYT; Kelsey Dallas, *The Supreme Court Came Together on Religion this Term. Then, It Fell Apart*, DESERET NEWS (Jul 4, 2022, 9:00 PM), https://perma.cc/L4U6-RDE5; Bradley Girard & Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, AM. BAR ASS'N (July 5, 2022), https://perma.cc/NAU4-9FV7.

163 Laycock & Berg, *supra* note 5, at 50–51 (arguing that the Court needs to give lower courts clear instructions if it expects them not to underenforce its precedent).

164 *See supra* Part 2.

165 *See* Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 744 (2012) (discussing *per se* irreparable standard).

then, the party asking to exercise his constitutional rights was suffering harm until the Court granted relief. In *Dobbs*, it is unclear what damaging consequences *Roe* had except for "enflamed debate and deepened division."[166] Surely violations of constitutional rights are damaging, as well. Perhaps even more so than "enflamed debate."

4.3. Reliance Interests Would Not Be Upset by Overruling *Smith*

Reliance interests may be furthered by overruling *Smith*. There is a legal economy advantage to restoring the least restrictive means test to Free Exercise jurisprudence. There are other areas of the law where strict scrutiny means courts will apply the least restrictive means test.[167] "Outside the Free Exercise area as well, the Court has noted that '[c]ontext matters' in applying the compelling interest test and has emphasized that 'strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose . . . .'"[168]

The least restrictive means test is a satisfactory test for protecting other constitutional rights, so applying it to the First Amendment guarantee of the Free Exercise of Religion makes sense. It has been noted that the Court's alleged tiers of scrutiny are unevenly applied and somewhat imprecise.[169] Be that as it may, the tiers of scrutiny are the tools used by lawyers, professors, bar prep courses, and the Court to determine how much protection the Constitution gives certain rights.[170] Restoring Free Exercise protection to the least restrictive means strict scrutiny test simplifies the overall

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166 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

167 *See* R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 SAINT MARY'S L.J. 973, 976 (2021) (discussing many levels of scrutiny); Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 350 (2022) (discussing least restrictive means in free speech cases); Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003) (explaining least restrictive means is found in First Amendment cases, Equal Protection cases, and Dormant Commerce Clause cases).

168 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431–32 (2006) (citations omitted).

169 Kelso, *supra* note 167, at 975; MASSEY & DENNING, AMERICAN CONSTITUTIONAL LAW 636–37 (6th ed. 2019) (noting general difficulties in applying the tiers of scrutiny and multiple exceptions).

170 Chemerinsky, *supra* note 167, at 342 n.1 (collecting research pointing to "conventional wisdom" regarding "three tiers of scrutiny").

scheme. It also makes the protection offered to individuals by the Constitution more easily defendable in courts by advocates and demonstrates to the public a strong commitment to constitutional principles.

The prevailing Free Exercise test for when a law is not neutral and generally applicable is narrowly tailored, similar to the least restrictive means test.[171] Some sources do not distinguish between narrowly tailored and least restrictive means as the tests for strict scrutiny.[172] It would be a minor change to apply the least restrictive means test to all laws that substantially burden religion instead of the narrow tailoring test to some laws that burden religion to any degree.

5. RESPONSE TO *FULTON*

Justice Barrett asks what would replace *Smith*, other than the sort of strict scrutiny that might be found in RFRA or *Sherbert*.[173] She also asks a barrage of questions for legal authors to try to answer.[174] The challenge should be met, and others have attempted a response.[175] Three recent articles follow a general format of answering each question that Justice Barrett poses.[176]

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171 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

172 Ruth Ann Strickland, *Narrowly Tailored Laws*, FREE SPEECH CTR. (July 5, 2024), https://perma.cc/L37F-E54A; *Least-Restrictive-Means Test*, BLACK'S LAW DICTIONARY (6th pocket ed. 2021) ("The rule that a law or governmental regulation should be crafted in a way that will protect individual civil liberties as much as possible and should be only as restrictive as necessary to accomplish a legitimate governmental purpose."); *Strict Scrutiny*, BLACK'S LAW DICTIONARY (6th pocket ed. 2021) ("In due-process analysis, the standard applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights). • Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question"); J. Mance Gordon, *Strict Scrutiny Standard – Explained*, THE BUS. PROFESSOR (Apr. 21, 2024), https://perma.cc/3JN5-NCET.

173 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

174 *Id*.

175 *See* Laycock & Berg, *supra* note 5, at 41; Lavender, *supra* note 9, at 440–47; Burnworth, *supra* note 9, at 6–14.

176 Laycock & Berg, *supra* note 5, at 41; Lavender, *supra* note 9, at 440–47; Burnworth, *supra* note 9, at 6–14.

Professors Laycock and Berg pointed out that the "Court can overrule *Smith* before it resolves every follow-on issue."[177] One of the strengths of the common law system is to resolve the case before the Court, not every instance that may come up. In fact, one of the criticisms of *Roe* that led to its overturning was that the "scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body."[178] The Court does not need a complex scheme to return to a textual understanding of the Free Exercise Clause.

The most relevant question for this article to attempt to answer is "if the answer [to what replaces *Smith*] is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws comes out the same way?"[179] If Justice Scalia is to be believed, his list of garden-variety rules to which Justice Barrett is referring from pre-*Smith* is merely to demonstrate that "courts would constantly be in the business of determining [these cases.]"[180] This would be "horrible to contemplate."[181] It is clear the Court is still in this business,[182] so perhaps the solution is to adopt a clear rule like RFRA's least restrictive means, then continue to deal with the cases as they arise in the future.

6. CONCLUSION

The Free Exercise Clause of the First Amendment contains a fundamental guarantee of American liberty. It demands clarity, stability, and protection. The current state of the law, flowing from *Smith*, is egregiously wrong, confusing, and has no reliance interests; in short, it is inadequate and has been criticized from the time of the decision to the present.

The step from narrowly tailored to least restrictive means is small, but the benefits of stability in the law and full constitutional protections are large. *Stare decisis* demands an overruling of *Smith*; it is time for the Court to overturn *Smith* and return to the least restrictive means test. This test,

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177 Laycock & Berg, *supra* note 5, at 41.

178 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2268 (2022).

179 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).

180 Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 889–90 n.5 (1990).

181 *Id*.

182 *See supra* Parts 2–3.

arguably used before *Smith* and found in the Religious Freedom Restoration Act, provides the clarity and stability needed in this area of law.