# REVISITING *SMITH*: STARE DECISIS AND FREE EXERCISE DOCTRINE

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .
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> —U.S. CONST. amend. I

*The Supreme Court held in* Employment Division v. Smith *that the Free Exercise Clause does not generally protect religiously motivated conduct from neutral laws of general applicability. That holding, although good law, remains controversial, with many scholars and judges now asking whether, if* Smith *was wrong, it should be overturned. Wading into this debate, this Article suggests that one common stare decisis consideration—a precedent's consistency with related decisions—likely cuts against retaining* Smith*, at least to the extent that* Smith*'s holding and rationale are compared to the Supreme Court's broader approach to the Religion Clauses. This Article first argues that* Smith *broke from prior Free Exercise Clause precedent and that, although* Smith *remains good law, it is in tension with many strains of Free Exercise Clause precedent today. This Article next argues that* Smith *is in tension with the ascendant focus on text, history, and tradition that has become increasingly*

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*central to contemporary Establishment Clause doctrine. While this Article does not fully resolve* Smith*'s stare decisis fate, it suggests one important weakness confronting any attempt to defend* Smith *on stare decisis grounds—with that weakness, and the doctrinal tensions it reveals, pointing the way toward how to reform contemporary Free Exercise Clause doctrine to better account for the text, history, and tradition of the Religion Clauses.*

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## INTRODUCTION

Breaking with prior precedent, the Supreme Court held in *Employment Division v. Smith*[1] that the Free Exercise Clause does not generally protect religiously motivated conduct from neutral laws of general applicability.[2] That decision has provoked extended debate over the years,[3] and even today it "remains controversial in many quarters."[4] But one question—until recently[5]—has received less attention: even if *Smith* was wrongly decided, does stare decisis counsel in favor of retaining it today? Wading into the unfolding debate, this Article suggests that one important stare decisis consideration—a precedent's consistency with related judicial decisions—presents some challenges for any attempt to defend *Smith* on stare decisis grounds. The most important of these challenges is that *Smith*'s approach to the Free Exercise Clause is in deep tension with many aspects of the Supreme Court's broader Religion Clauses jurisprudence.

To explore this particular challenge, this Article proceeds in two parts. Part I sets the stage by summarizing the Supreme Court's modern approach to stare decisis, with particular focus on how a

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

2. *See id.* at 878–79. For the test that the Supreme Court had previously applied to free exercise cases, see, for example, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940); *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 219–20 (1972); and *United States v. Lee*, 455 U.S. 252, 257–58, 260 (1982). For thoughtful commentary discussing this break, see *Smith*, 494 U.S. at 893–901 (O'Connor, J., concurring in the judgment); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in the judgment); and Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120–28 (1990).

3. *Compare* City of Boerne v. Flores, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part) (defending *Smith*), *with id.* at 544–65 (O'Connor, J., dissenting) (critiquing *Smith*); *compare also* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992) (defending *Smith*'s historical foundation), *with* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1427–28 (1990) (critiquing *Smith*'s historical foundation).

4. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

5. *See, e.g.*, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020).

precedent's consistency with related judicial decisions is relevant to assessing that precedent's stare decisis weight. Part II then explains why *Smith*'s holding and rationale are in deep tension with the Supreme Court's broader Religion Clauses jurisprudence. Part II.A first argues that *Smith* broke from prior Free Exercise Clause precedent, and that *Smith* has been undermined and muddled by subsequent free exercise precedent. Part II.B next argues that *Smith* is in tension with several lines of decision arising from the other half of the Religion Clauses—most importantly, the focus on text, history, and tradition that have long remained important and now seem dominant in contemporary Establishment Clause jurisprudence. Part II.C concludes by focusing on the doctrine of judicial consistency and offering some preliminary thoughts for why *Smith*'s tensions with the Religion Clauses not only favor revisiting *Smith*, but also favor ensuring that *Smith*'s replacement accounts for the text, history, and tradition of the Free Exercise Clause.

To be sure, this Article's focus on the tensions between *Smith* and the Court's Religion Clauses jurisprudence does not fully resolve *Smith*'s stare decisis fate. After all, this Article generally assumes conventional stare decisis principles, only focuses on one potential stare decisis consideration, and only discusses that consideration as far as Religion Clauses precedent is concerned. But if this Article is right, it suggests a simple takeaway: *Smith* is in tension with many strains of Religion Clauses jurisprudence, and those tensions both undermine *Smith*'s stare decisis weight and help point the way forward to where Free Exercise Clause doctrine should go from here.

## I. AN OVERVIEW OF STARE DECISIS DOCTRINE

The doctrine of stare decisis guides the judiciary in determining whether to overturn a settled decision.[6] Rooted in the "judicial power" vested by Article III,[7] the doctrine of stare decisis "reflects respect for the accumulated wisdom of judges who have previously

6. *See, e.g.*, Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018).
7. U.S. CONST. art. III, § 1.

tried to solve the same problem."[8] Over the years, the Supreme Court's view of that accumulated wisdom has changed,[9] and the precise role of stare decisis in our constitutional tradition remains deeply contested even today.[10] To some, stare decisis is a question of judicial policy, calling judges to weigh the legal merits and the practical consequences of overturning a settled rule.[11] To others, stare decisis is ultimately a question of epistemic humility, calling judges to consider the accumulated wisdom of the past but requiring them to subordinate that wisdom to the clear declarations of the written law.[12] At least as it currently stands, the Supreme Court's prevailing approach is decidedly one of judicial policy and weighs several interrelated considerations in an effort to strike an appropriate balance between reaching the right legal result and safeguarding important rule-of-law values such as consistency, predictability, and judicial restraint.[13] Within this prevailing multifactor framework, one important consideration—and a consideration that is embraced by most stare decisis theories today, whether they are grounded in policy or humility—is whether a precedent is consistent with related judicial decisions. In order to better contextualize this Article's explanation for why this consideration counsels against retaining *Smith*, this first Part briefly summarizes the Supreme Court's prevailing stare decisis doctrine and explains why a precedent's consistency with related judicial decisions is relevant for stare decisis purposes.

### *A. The Contemporary Doctrine*

The Supreme Court's contemporary stare decisis doctrine is not

8. Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part); *see also* THE FEDERALIST NOS. 37, 48, 78, 82 (Clinton Rossiter ed., 2003); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69–71 (1765). *Cf.* Gamble v. United States, 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring).

9. *See, e.g.*, *Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring in part).

10. *Compare, e.g.*, *id.*, *with Gamble*, 139 S. Ct. at 1980–89 (Thomas, J., concurring).

11. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991).

12. *See, e.g.*, *Gamble*, 139 S. Ct. at 1980–89 (Thomas, J., concurring).

13. *See Payne*, 501 U.S. at 827–28; Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

an "inexorable command."[14] Instead, it is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[15] As far as this Article's consideration of *Smith*'s stare decisis value is concerned, two features of this contemporary doctrine are most relevant—and so are briefly summarized (without endorsement or critique).

1. The Type of Precedent

The first feature of contemporary stare decisis doctrine that is most relevant for considering *Smith*'s stare decisis value is the Supreme Court's practice of generally affording different stare decisis weights to different types of precedents.[16] Under this prevailing approach, the Supreme Court generally gives relatively weaker weight to constitutional decisions,[17] at least when the political branches cannot adequately respond to those decisions, or when those decisions reflect a narrower construction of a constitutional right than the Court would adopt today.[18] In doing so, the Supreme Court's more flexible treatment of its constitutional precedent might be viewed as resting on two general rationales. The first rationale—explicit in the case law—focuses on the extent to which erroneous constitutional decisions are generally more difficult for the political branches to reverse than erroneous statutory (or common law) decisions.[19] The second rationale—perhaps implicit in the

14. *Payne*, 501 U.S. at 828.

15. *Id.* at 827; *see also* Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018).

16. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting); *compare* Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 455–56 (2015) (statutory interpretation), *with Janus*, 138 S. Ct. at 2478 (constitutional interpretation), *and* South Dakota v. Wayfair, Inc., 138 U.S. 2080, 2096–97 (2018) (constitutional common law interpretation).

17. *See Janus*, 138 S. Ct. at 2478; Agostini v. Felton, 521 U.S. 203, 235 (1997).

18. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

19. *See Burnet*, 285 U.S. at 406–07 (Brandeis, J., dissenting); *Janus*, 138 S. Ct. at 2478 (2018); BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT, 8 n. 52 (2018) (collecting, among others, the following sources); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008);

"one-way ratchet theory" of contemporary jurisprudence—may be viewed as focusing on the normative and institutional importance of the judiciary's role as a counter-majoritarian protector of individual rights.[20] Indeed, placing these two rationales together—the first explicit, the second implicit—may provide one explanation for both the general rule and the most important caveats, as well as the way in which they have played out in individual cases. Whatever the merits of this approach (or these rationales), this reduced stare decisis weight for decisions that adopt a narrower interpretation of a constitutional right remains relevant for any consideration of *Smith*'s stare decisis value—but one which is ultimately left aside here, given this Article's narrow focus on *Smith*'s precedential consistency with Religion Clauses jurisprudence.

### 2. The Multifactor Balancing Test

The second feature of contemporary stare decisis doctrine that is relevant for considering *Smith*'s stare decisis value is the Supreme Court's use of a multifactor balancing test in deciding whether to overrule past decisions[21]—a multifactor balancing test that might be explained primarily as a creature of policy,[22] perhaps one that currently reflects the liquidated meaning of Article III's "judicial power."[23] Notwithstanding variations in which factors are

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*Casey*, 505 U.S. at 954–55 (Rehnquist, J., concurring in the judgment in part and dissenting in part); Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989); Smith v. Allwright, 321 U.S. 649, 665 (1944).

20. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (overturning Plessy v. Ferguson, 163 U.S. 537 (1896)).

21. This approach is, concededly, open to critique. *See* Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1776–78 (1989).

22. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991).

23. Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) ("As the Court has exercised the 'judicial Power' over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison's words, sought to liquidate and ascertain the meaning of the Article III 'judicial Power' with respect to precedent." (citing THE FEDERALIST NO. 37, at 236 (James Madison) (J. Cooke ed., 1961)).

employed (or how they are weighed against each other),[24] the Supreme Court has identified several factors that may be most relevant, which include, inter alia: (1) the quality of the decision's reasoning; (2) the workability of the decision's rule; (3) factual developments since the decision was handed down; (4) reliance on the decision; and (5) the decision's consistency and coherence with previous or subsequent judicial decisions.[25] As Justice Kavanaugh recently explained in his partial concurrence in *Ramos*, these factors tend to fold into several broad, shared considerations—in his view, for example, whether the precedent was egregiously wrong, has caused significant jurisprudential or real-world consequences, and has induced significant reliance interests—which reflect the extent to which the traditional stare decisis considerations are interrelated and motivated by a shared set of functional and doctrinal underpinnings.[26]

### *B. One Ecumenical Stare Decisis Consideration: A Precedent's Consistency with Related Decisions*

Within this multifactorial framework, one important consideration—and the consideration that this Article focuses upon—is a precedent's consistency with related decisions.[27] That consideration, which focuses on a precedent's consistency with both previous and subsequent judicial decisions,[28] has long remained an important part of the Supreme Court's effort to craft a stare decisis doctrine that "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[29]

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24. *See, e.g.*, *id.*; Michael S. Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1172 (2008).

25. *See* Paulsen, *supra* note 24, at 1172–98; Janus v. AFSCME, 138 S. Ct. 2448, 2478–79 (2018).

26. *See Ramos*, 140 S. Ct. at 1414–16 (Kavanaugh, J., concurring in part).

27. *See, e.g.*, *id.*; *Janus*, 138 S. Ct. at 2478.

28. *See Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

29. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

A precedent's consistency with related judicial decisions—or what might be termed the doctrine of judicial consistency—might be viewed as resting on several grounds. Perhaps most uniquely amongst the conventional stare decisis values, the doctrine of judicial consistency reflects the law's need to work itself pure—to maintain internal coherence as an essential element of legality. This impulse ensures that the accumulated wisdom of the past is not stacked haphazardly into accidental and disjointed piles, but instead ordered into a coherent, integrated structure. In doing so, the doctrine of judicial consistency also furthers a variety of important goods with venerable foundations in rule-of-law values and sound judicial policy. Among other things, the doctrine promotes stability, notice, efficiency, fairness, and related judicial goods by culling jurisprudential anomalies, mitigating unpredictable surprises, and smoothing over jurisprudential tensions where distinct lines of doctrine meet. In short, the doctrine of judicial consistency constitutes both an inherent and an instrumental good, with these features justifying its role within the contemporary stare decisis framework.

A precedent's consistency with related judicial decisions interacts with other stare decisis considerations—such as, for example, considerations focused on legal soundness, workability, and reliance—in interesting ways.

Take legal soundness, for example. A precedent's legal soundness is informed by its consistency with related decisions. This consistency may generally enhance confidence that the precedent's result or methodology is correct.[30] It may also confirm that the precedent coheres with the law's basic requirement of internal consistency, or suggest that a once ambiguous legal question has been settled under the agreed-upon terms of liquidation. Of course, precedential consistency (or dissonance) is not dispositive of the legal merits.[31] Prior or subsequent precedents might be built on a set of false assumptions or an unsound methodology, and so might be

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

31. *See, e.g.*, THE FEDERALIST NO. 37 (Clinton Rossiter ed., 2003); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

wrong. But as far as the legal merits are concerned, precedential consistency remains helpful both because it provides an opportunity for epistemic pause when the Court stumbles across a jurisprudential fork, and because it provides some indication of which fork the Court should ultimately take.

Next, take workability. If a precedent has been undercut by subsequent decisions, those intervening decisions may risk undermining the precedent's workability by tasking judges to navigate potentially conflicting rules or adverse methodological or substantive frameworks, particularly when a precedent has become riddled with internal exceptions that require judges to determine how far to extend the immediate decision in addressing new and unanticipated circumstances.[32] Those considerations also hold when a precedent has purported to leave older decisions standing, but those older decisions present rationales and holdings that judges must square with conflicting rationales and instructions from subsequent cases.[33] Similarly, even if the precedent's own internal line has remained intact, different precedential lines often interact in surprising ways—leading to challenges when judges are tasked to synthesize doctrinal lines that embrace different methodologies and distinct premises.[34]

Another example comes from the relationship between a precedent's consistency with related decisions and the extent of reliance interests on that decision. To the extent that a decision has been subsequently confirmed time and again, then the justification for relying on that decision (and the likelihood that such reliance has occurred) increases; conversely, to the extent that a decision has been slowly eroded over time, the justification for such reliance (and the likelihood of such reliance) is less.[35] These examples, noncomprehensive, suggest a relatively simple point: the various

32. *See* MURRILL, *supra* note 19, at 13–14.

33. *See id.* at 15.

34. *See id.* at 15–16.

35. *See, e.g.*, *Janus*, 138 S. Ct. at 2484–85 (noting that reliance is generally given less weight when previous decisions indicate that an overruling of the precedent in question is impending).

stare decisis factors frequently overlap, share similar concerns and questions, and influence each other's resolution and relevance.

Even apart from the Supreme Court's prevailing framework, there may be good reasons why a precedent's consistency with related decisions matters for a stare decisis framework that treats the accumulated wisdom of the past as epistemically useful but still requires judicial precedent to be subordinated to the clear declarations of the written law. As an initial matter, a precedent's consistency with previous and subsequent decisions may be epistemically useful.[36] To the extent that judicial precedents represent the accumulated wisdom for how past judges addressed a challenging question or reflect a set of shared methodological or substantive commitments (such as, for example, originalism or textualism), a precedent's consistency with the broader corpus juris may very well be relevant.[37] Moreover, a precedent's consistency with related judicial decisions may also be relevant insofar as precedential consistency is a component of one's first principles view of stare decisis or to the extent a settled line of cases may resolve a once-ambiguous legal answer under the agreed-upon rules of liquidation.[38] And a precedent's consistency with related judicial decisions may also help address the problem of second-best answers. Because the practical and systemic consequences of a decision frequently turn on the doctrinal decisions made in other areas of law, focusing on a precedent's relationship to the broader corpus juris may allow jurists to best preserve the overarching legal content or practical effect of a particular doctrine, even when substantive and methodological changes in the surrounding law risk upsetting the nature and balance of the original doctrinal framework.[39] And so, for most stare decisis approaches, doctrinal consistency remains important.

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36. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part); *cf.* William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018).

37. *See* MURRILL, *supra* note 19, at 7.

38. *See, e.g.*, *Ramos*, 140 S. Ct. at 1411, 1414–16 (Kavanaugh, J., concurring in part); *see generally* Baude, *supra* note 31.

39. *See Janus*, 138 S. Ct. at 2469–70; *cf.* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

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To summarize Part I, contemporary stare decisis doctrine, which generally affords constitutional precedents weaker weight, employs a multifactorial balancing test that considers, inter alia, a precedent's consistency with related decisions. That consideration remains of ecumenical importance, and it is the focus of the discussion that follows.

## II. *SMITH* AND STARE DECISIS: CONSISTENCY WITH RELATED DECISIONS

Having laid the groundwork, this Article now turns to consider what the Supreme Court's contemporary stare decisis doctrine means for *Smith*. In *Smith*, the Supreme Court held that the Free Exercise Clause does not generally protect religiously motivated conduct against neutral laws of general applicability. This Part argues that one stare decisis consideration—a precedent's consistency with related decisions—raises challenges for retaining *Smith* on stare decisis grounds in light of the Court's broader Religion Clauses jurisprudence. Subpart A focuses on this stare decisis consideration and argues that *Smith* is in tension with many previous and subsequent decisions drawn from the Supreme Court's Free Exercise Clause jurisprudence. Subpart B then turns to the other half of the Religion Clauses and argues that *Smith* is in tension with the focus on text, history, and tradition that has become increasingly dominant in the Supreme Court's Establishment Clause jurisprudence. And Subpart C then suggests that these tensions between *Smith*'s approach to the Free Exercise Clause and the Supreme Court's broader approach to the Religion Clauses help point the way toward a doctrine focused on text, history, and tradition. This Part leaves much aside—it only focuses on one stare decisis factor (a precedent's consistency with related decisions), and it only considers that factor insofar as *Smith*'s relationship with the Religion Clauses is concerned. But taken as true, it suggests a simple conclusion: to the extent that a precedent's consistency with related judicial decisions matters for stare decisis purposes, there are

significant challenges for defenders of *Smith*.

### *A. First Things: The Free Exercise Clause*

The first way in which *Smith* is likely in tension with related judicial decisions focuses on *Smith*'s relationship with the Court's broader Free Exercise Clause jurisprudence. Perhaps most importantly, *Smith*'s holding and rationale broke with a settled line of free exercise jurisprudence that held that religiously motivated conduct generally enjoys heightened protection even against neutral laws of general applicability.[40] And while *Smith* remains good law, the resulting doctrine after *Smith*—which consists of both the decisions that *Smith* purported to leave in place and subsequent decisions in tension with *Smith*'s rationale and substantive outcome—presents important challenges to the predictability, coherence, and stability that a precedent's consistency with related judicial decisions is designed to further.

#### 1. *Smith*'s Break with Precedent

*Smith*'s holding and rationale broke with a settled line of a free exercise jurisprudence that had held that—subject to only a few, well-delineated exceptions—the Free Exercise Clause provided heightened protection for religiously motivated conduct against even neutral laws of general applicability. Prior to *Smith*, preexisting free exercise jurisprudence rested on two foundational principles: first, that the Free Exercise Clause generally protected religious belief and religious conduct,[41] and second, that religious conduct generally warranted heightened protection even against neutral laws of general applicability.[42] While *Smith* purported to accept the former, it declined to accept the latter in a large variety of circumstances—replacing heightened scrutiny with rational-basis

40. *See, e.g.*, *Smith*, 494 U.S. at 893–901 (O'Connor, J., concurring in the judgment); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559–71 (1993) (Souter, J., concurring in part and concurring in the judgment); McConnell, *supra* note 2, at 1120–28 (1990).

41. *See* Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972).

42. *See id.;* Sherbert v. Verner, 374 U.S. 398, 402–04, 406 (1963).

scrutiny where neutral laws of general applicability were concerned, a significant doctrinal break.[43]

The first principle embraced by pre-*Smith* doctrine—which *Smith* purported to accept—was that the Free Exercise Clause generally protects religious belief and religious conduct. As *Yoder* explained, since incorporating the Free Exercise Clause, the Supreme Court had consistently maintained that the Free Exercise Clause protected both "religious belief and practice."[44] That was not always a foregone conclusion, at least not in the sense that the post-incorporation Court took it. In the 1879 case of *Reynolds v. United States*,[45] for example, the Court rejected a claim for religious exemptions from criminal prohibitions on polygamy only after emphasizing (in terms that left *Reynolds*'s full scope somewhat unclear) that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[46] "To permit [an exemption here]," the Court stated, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself, [with the result that] Government could exist only in name under such circumstances."[47] Nevertheless, the broader reading of *Reynolds* had been abandoned well before *Smith* by a line of decisions that had gradually eroded and narrowed that case and had embraced the conclusion that, while the state had greater leeway in regulating conduct than conscience, the free exercise of religion necessarily meant protection for religiously motivated conduct—not just belief.[48]

In the seminal decision incorporating the federal Free Exercise

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43. *Compare Smith*, 494 U.S. at 886–890 (majority opinion), *with id.* at 899–901 (O'Connor, J., concurring in the judgment).

44. *Yoder*, 406 U.S at 219. This Article brackets the question of the Free Exercise Clause's original public meaning and adopts a narrower temporal focus.

45. 98 U.S. 145 (1879).

46. *Id.* at 166.

47. *Id.* at 166–67; *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940); *Smith*, 494 U.S. at 879 (drawing from these lines).

48. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); *Yoder*, 406 U.S. at 215, 219–20.

Clause against the states, the Supreme Court in *Cantwell v. Connecticut*[49] rejected a broad reading of *Reynolds* and invalidated the convictions of three proselytizing Jehovah's Witnesses for inciting a breach of the peace and for violating a state statute that prohibited the solicitation of money for religious and other causes without prior approval from a state official.[50] The Court began by observing that "[t]he constitutional inhibition of legislation on the subject of religion has a double aspect."[51] Because "[o]n the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship," and "[o]n the other hand, it safeguards the free exercise of the chosen form of religion," the Court reasoned that "the Amendment embraces two concepts,—freedom to believe and freedom to act."[52] To be sure, *Cantwell* recognized that *Reynolds* still had some purchase and emphasized that, because the "freedom to act . . . cannot be [absolute]" and "[c]onduct remains subject to regulation for the protection of society," "[t]he freedom to act must [still] have appropriate definition to preserve the enforcement of that protection."[53] "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[54] But religious exercise still meant religious conduct.[55]

That central insight—potentially consistent with *Reynolds*, potentially a break with *Reynolds*'s central holding—was confirmed (and, arguably, expanded) in a long line of cases following *Cantwell* and had been a settled principle by the time *Smith* arose. One example comes from *Wisconsin v. Yoder*,[56] where the Supreme Court upheld a challenge by Amish parents seeking a religious exemption from a mandatory school attendance law.[57] Confirming *Cantwell*'s

49. 310 U.S. 296 (1940).
50. *See id.* at 300–11.
51. *Id.* at 303.
52. *Id.*
53. *Id.* at 303–04.
54. *Id.* at 304.
55. *See id.*
56. 406 U.S. 205 (1972).
57. *See id.* at 215, 219–20.

instructions that the Religion Clauses protected the "freedom to believe and the freedom to act,"[58] the Court in *Yoder* emphasized that "belief and action cannot be neatly confined in logic-tight compartments" and instructed that "to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*."[59]

Similarly, in the public benefits lines of cases that both preceded and followed *Yoder*, the Supreme Court held that conditioning public benefits upon an individual's agreement to cease engaging in religiously motivated conduct burdened the free exercise of religion because it "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs."[60] And in the context of a variety of other criminal and civil prohibitions even outside the context of the *Yoder* and *Sherbert* lines, the Supreme Court had followed its traditional approach of interpreting the Free Exercise Clause to protect religiously motivated conduct, finding the Free Exercise Clause to be implicated by individuals' religious objections to being required to pay Social Security taxes in *Lee*[61] and to serve in the military in *Gillette*.[62] Indeed, the *Smith* majority itself conceded that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts,"[63] suggesting some broad-level agreement with the first principle that had long animated the free exercise jurisprudence leading up to *Smith*. But *Smith*'s broad level agreement on this first principle did not extend to the second principle that

58. *Cantwell*, 310 U.S. at 303.

59. *Yoder*, 406 U.S. at 220 (emphasis added).

60. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981); *see also* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 832–33, 835 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141–42 (1987); Sherbert v. Verner, 374 U.S. 398, 402–04, 406 (1963).

61. *See* United States v. Lee, 455 U.S. 252, 257–58, 260 (1982).

62. *See* Gillette v. United States, 401 U.S. 437, 462 (1971).

63. *See* Emp. Div. v. Smith, 494 U.S. 872, 877 (1990).

animated the free exercise jurisprudence from which *Smith* departed.

The second principle embraced by pre-*Smith* doctrine—and the key principle that *Smith* rejected—was that the Free Exercise Clause protects against both the targeting *and* the incidental burdening of religiously motivated conduct.[64] Religious targeting, *Smith* agreed, warranted heightened scrutiny. But not so for incidental burdens stemming from neutral laws of general applicability—those laws, *Smith* maintained, would be subject only to rational basis review. While it remains necessary to consider what pre-*Smith* case law thought about the relationship between the first and the second principles (as argued below, these principles were generally viewed by pre-*Smith* case law as going hand-in-hand), one might start the analysis here by noting—as Justice O'Connor and Professor Michael W. McConnell have—that the first principle might be most sensibly understood (under a certain set of methodological and substantive commitments) to encompass (or imply) the second principle.[65]

But whatever the best interpretation of the Free Exercise Clause, the first principle (that the Free Exercise Clause protects religiously motivated conduct) does not *necessarily* logically require the second principle (that the Free Exercise Clause protects against incidental burdens). In other words—and this is the explanation embraced by *Smith*—the fact that the Free Exercise Clause protects conduct does not necessarily answer what that conduct is protected *from*.[66] On the one hand, the Free Exercise Clause might merely provide

64. *See Yoder*, 406 U.S. at 215, 219–20; *Sherbert*, 374 U.S. at 402–04.

65. *See Smith*, 494 U.S. at 894 (1990) (O'Connor, J., concurring in the judgment) ("The First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices . . . Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice."); McConnell, *supra* note 2, at 1115 (suggesting that the more natural reading of "prohibiting" is that it prevents the government from making a religious practice illegal, rather than merely preventing the deliberate targeting of the religious practice).

66. *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1185 (1996).

heightened protection against laws that target religiously motivated conduct (the *Smith* principle); on the other hand, the Free Exercise Clause might extend more broadly, providing heightened protection against laws that only incidentally burden that conduct (the *Sherbert* principle).[67] But while either a *Smith*-style "targeting" rule or a *Sherbert*-style "incidental burdening" rule might potentially be logically consistent with protection for religiously motivated conduct, the important point for the purposes of this Article is that free exercise jurisprudence leading up to *Smith* generally embraced the *Sherbert*-style "incidental-burdening view" rather than the *Smith*-style "targeting-view." In other words, for pre-*Smith* jurisprudence, the first and second principles were both critical for understanding the Free Exercise Clause—but *Smith* rejected the latter.

Prior to *Smith*, laws incidentally burdening religiously motivated conduct were generally subjected to heightened scrutiny. While the early case of *Reynolds* had observed that laws could "reach actions which were in violation of social duties or subversive of good order,"[68] and the later case of *Cantwell* had confirmed (in weaker form) that "[c]onduct remains subject to regulation for the protection of society" and is not "absolute,"[69] the free exercise jurisprudence leading up to *Smith* did not give legislators and regulators carte blanche to override religious exemption claims in all instances. Instead, the Supreme Court, building on *Cantwell*'s clarification that "the power to regulate must be so exercised as not, in attaining a permissible end, [to] unduly . . . infringe the protected freedom,"[70] generally subjected incidental burdens on religious exercise to a form of heightened scrutiny, instructing that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[71]

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67. *See Smith*, 494 U.S. at 877–78; Dorf, *supra* note 66, at 1185 (suggesting that even if "the text is not dispositive, some readings are more sensible than others").

68. Reynolds v. United States, 98 U.S. 145, 164 (1879).

69. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

70. *Id.* at 304.

71. Wisconsin v. Yoder, 406 U.S. 205, 215, 219–20 (1972).

One example of this heightened scrutiny approach in the years before *Smith* comes from the Supreme Court's decision in *Yoder*, in which the Supreme Court granted religious exemptions from neutral and generally applicable compulsory attendance laws to parents of Amish school children.[72] After concluding that the Free Exercise Clause protected religiously motivated conduct and that the compulsory attendance law substantially burdened that conduct, the Supreme Court invalidated the law only after engaging in a balancing of the competing interests at play.[73] On the one hand, the Court reasoned, the state had a "high responsibility for education of its citizens," and so had the undoubted power "to impose reasonable regulations for the control and duration of basic education."[74] On the other hand, that important interest "is not totally free from a balancing process when it impinges on fundamental rights," and the "values underlying [the Religion Clauses] have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance."[75] As a result, even though the compulsory attendance law at issue was neutral and generally applicable (in the manner later contemplated by *Smith*), the *Yoder* Court concluded that it must be subject to heightened scrutiny.[76] "[O]nly those interests of the highest order and those not otherwise served," the Court explained, "can overbalance legitimate claims to the free exercise of religion."[77] While "religiously grounded conduct must often be subject to the broad police power of the State," the Court refused "to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[78] In short, balancing the competing interests at play, *Yoder* embraced a heightened scrutiny

72. *See id.* at 215, 219–20.
73. *Id.*
74. *Id.* at 213.
75. *Id.* at 214.
76. *See id.* at 215.
77. *Id.*
78. *Id.* at 220.

standard for religious exercise.

Another line of heightened-scrutiny cases in the years before *Smith* comes from the Supreme Court's review of the denial of unemployment benefits to religious claimants in *Sherbert*,[79] *Thomas*,[80] *Hobbie*,[81] and *Frazee*.[82] In these cases, the Supreme Court was tasked to review whether the denial of unemployment benefits to religious claimants who, for example, declined to seek employment that required labor on a religious day of rest,[83] or declined to continue working at a manufacturing plant that produced military resources, violated the Free Exercise Clause.[84] Recognizing that "even when the [religious] action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions,"[85] the Supreme Court instructed that if the state unemployment requirements are "to withstand [the claimant's] constitutional challenge, it must be for one of two reasons, either: (1) "[the claimant's] disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise," or (2) "any incidental burden on the free exercise of [the claimant's] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate[.]'"[86] In the Court's view, neither condition was satisfied.

The Court recognized that the denial of unemployment benefits—a denial that is likely less severe than the criminal sanctions posed by the type of law contemplated in *Smith*—was an infringement on the claimant's religious exercise. As the *Sherbert* Court explained, it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing

79. *See* Sherbert v. Verner, 374 U.S. 398, 402–04, 406 (1963).

80. *See* Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981).

81. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141–42 (1987).

82. *See* Frazee v. Ill. Dep't of Emp. Sec. Div., 489 U.S. 829, 832–33, 835 (1989).

83. *See Sherbert*, 374 U.S. at 402–04, 406.

84. *See Thomas*, 450 U.S. at 709.

85. *Sherbert*, 374 U.S. at 402 (alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961)).

86. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

of conditions upon a benefit or privilege."[87] Although the burden on the claimant was only "indirect," this indirect burden "force[d the claimant] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[88]

The Court also instructed that even in the context of indirectly and incidentally imposed burdens, the state law would only pass muster if it was justified under a heightened scrutiny standard. "It is basic," the Court explained, "that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[89] Instead, the Free Exercise Clause required the state to "demonstrate that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,' or represents 'the least restrictive means of achieving some compelling state interest.'"[90] And so, like *Yoder*, the unemployment benefits cases employed a heightened scrutiny test for incidental burdens on religious exercise.[91]

In doing so, the *Sherbert* unemployment cases—like *Yoder*—were representative of the Supreme Court's more general treatment of neutral laws of general applicability in most other contexts. In case after case—whether dealing with challenges to mandatory Social Security taxes,[92] military conscription,[93] child labor laws,[94] Sunday

87. *Id.* at 404.

88. *Id.*

89. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

90. Emp. Div. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring in the judgment) (quoting United States v. Lee, 455 U.S. 252, 257–58 (1982); Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981)).

91. *Compare* Wisconsin v. Yoder, 406 U.S. 205, 215, 219–20 (1972), *with Sherbert*, 374 U.S. at 402–04, 406.

92. *See Lee*, 455 U.S. at 257–61.

93. *See* Gillette v. United States, 401 U.S. 437, 462 (1971).

94. *See* Prince v. Massachusetts, 321 U.S. 158, 164–67 (1944).

closing laws,[95] or anti-discrimination tax-deduction schemes[96]—the Supreme Court carefully weighed the competing interests at play and applied some form of *Sherbert*-style heightened scrutiny. To be sure, the Supreme Court had declined to apply heightened scrutiny in certain unique contexts—which are discussed below, but generally fall into categories traditionally open to broader governmental regulation, such as the military and prisons,[97] or the context of the government's internal operations or development and use of its own land and resources.[98] But outside of these unique contexts, *Sherbert*-style heightened scrutiny constituted the general rule applied by the Court to neutral laws of general applicability—at least, before *Smith*.

* * *

The conclusion that laws incidentally and substantially burdening religiously motivated conduct were generally subject to heightened scrutiny, even in the context of *Smith*-style neutral laws of general applicability, is not a novel one. Indeed, the same point was made by Justice O'Connor's concurrence in the judgment in *Smith* itself and Justice Souter's later partial concurrence in *Lukumi*, with both opinions emphasizing the many times that the Supreme Court had subjected laws incidentally and substantially burdening religiously motivated conduct to heightened scrutiny.[99] In Justice O'Connor's *Smith* concurrence, she summarized the state of the doctrine leading up to *Smith* as markedly at odds with *Smith*'s holding and rationale, reasoning:

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95. *See* Braunfeld v. Brown, 366 U.S. 599, 603–07 (1961) (plurality opinion).

96. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983); Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989).

97. *See* Goldman v. Weinberger, 475 U.S. 503, 507, 509–10 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–50 (1987).

98. *See* Bowen v. Roy, 476 U.S. 693, 699–701 (1986); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–52 (1988).

99. *See* Emp. Div. v. Smith, 494 U.S. 872, 893–901 (1990) (O'Connor, J., concurring in the judgment); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 559–71 (1993) (Souter, J., concurring in part and concurring in the judgment); *see also* McConnell, *supra* note 2, at 1141–49.

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order." "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens."[100]

Similarly, Justice Souter's concurrence in *Lukumi* pointed out that the Supreme Court's traditional practice of applying heightened scrutiny to even neutral and generally applicable laws that substantially and incidentally burdened religiously motivated conduct was more than a little hard to square with *Smith*, observing:

> [W]e have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise: "'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" Other

100. *Smith*, 494 U.S. at 894–95 (O'Connor, J., concurring in the judgment) (citations omitted) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *Bowen*, 476 U.S. at 732 (O'Connor, J., concurring in part and dissenting in part)).

> cases in which the Court has applied heightened scrutiny to the enforcement of formally neutral, generally applicable laws that burden religious exercise include *Hernandez v. Commissioner*, 490 U.S. at 699; *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829, 835 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. at 141; *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257 - 258 (1982); *Thomas*, 450 U.S., at 718; *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); and *Cantwell v. Connecticut*, 310 U.S. 296, 304–307 (1940).[101]

And so, it is challenging to escape the conclusion that *Smith*, in holding that neutral laws of general applicability are subject only to rational basis review, marked a sharp break with the Supreme Court's traditional approach to the Free Exercise Clause.

* * *

Notwithstanding these apparent breaks with the past, the *Smith* majority suggested two defenses of its coherence with preexisting precedent. Neither is particularly persuasive.

Beginning with *Smith*'s first defense, the *Smith* majority first concluded that its holding that the Free Exercise Clause did not provide heightened protection against neutral laws of general applicability was justified by *Reynolds* (upholding a prohibition on polygamy) and *Gobitis* (upholding a mandatory pledge of allegiance for school children).[102] In *Smith*'s view, the provision of religious exemptions from neutral laws of general applicability would conflict with *Reynolds*'s instructions that "[l]aws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[103] That is, to permit "a man [to] excuse his practices to the contrary because of his religious belief" would "make the professed doctrines of

101. *Lukumi*, 508 U.S. at 565–66 (Souter, J., concurring in part and concurring in the judgment) (citation omitted) (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

102. *Smith*, 494 U.S. at 878–79; *see* Reynolds v. United States, 98 U.S. 145, 166–67 (1879); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940).

103. *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166).

religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[104] That principle, *Smith* argued, was a necessary one, because the rule urged by the challenger would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[105] And in a similar vein, the *Smith* majority added, was Justice Frankfurter's conclusion in *Gobitis* that:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . . .[106]

But the *Smith* majority's reliance on the *Reynolds*-*Gobitis* principle is unpersuasive—as far as *Smith*'s consistency with related decisions is concerned.

As an initial matter, the principles that *Smith* distilled from *Reynolds* and *Gobitis* and sought to rely upon had already been rejected by the Supreme Court before *Smith* arose. As for *Reynolds*, since incorporating the Free Exercise Clause in *Cantwell*,[107] the Supreme Court had rejected *Reynolds*'s apparent premise that the Free Exercise Clause only protected religious conscience but not religious conduct,[108] and it had subjected *Reynolds*-style generally applicable laws to a *Sherbert*-style heightened scrutiny standard.[109] Without repeating the discussion above, it is worth recalling that in *Yoder*, for example, the Supreme Court had concluded that the Free Exercise Clause protected both religious "belief and action," which "cannot

104. *Id.* (quoting *Reynolds*, 98 U.S. at 166–67).

105. *Smith*, 494 U.S. at 888.

106. *Id.* at 879 (quoting *Gobitis*, 310 U.S. at 594–95).

107. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

108. *See* Wisconsin v. Yoder, 406 U.S. 205, 215, 219–20 (1972); Sherbert v. Verner, 374 U.S. 398, 402–04, 406 (1963).

109. *See Yoder*, 406 U.S. at 215, 219–20; *Sherbert*, 374 U.S. at 402–04, 406.

be neatly confined in logic-tight compartments,"[110] a conclusion that was borne out by the Court's decision to subject incidental burdens on religiously motivated conduct to heightened scrutiny both before[111] as well as after *Yoder*.[112]

And as for *Gobitis*, the *Smith* Court's reliance on Justice Frankfurter's rejection of religious exemptions for schoolchildren runs into similar problems with these same subsequent cases—a consideration only strengthened by recalling that, only three years after *Gobitis* was announced, the Court in *Barnette* overruled it and abandoned its central rationale (over Justice Frankfurter's dissent).[113]

Moreover, to the extent that *Smith* relied on *Reynolds*'s functional considerations that religious exemptions would open the floodgates and make "every citizen . . . a law unto himself"[114] and undermine "civic obligations of almost every conceivable kind,"[115] those functional considerations had not only been rejected by the Supreme Court's precedent but had been foreclosed by the Supreme Court's practice.[116] As Justice O'Connor's concurrence in *Smith* observed, "[t]he Court's parade of horribles not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."[117] Indeed, in cases addressing the specific cases that Justice Scalia had warned would be undermined by religious exercise, the Court had *upheld* the law against free exercise claims under a heightened standard of

110. *Yoder*, 406 U.S. at 219–20.

111. *See Sherbert*, 374 U.S. at 402–04, 406.

112. *See, e.g.*, Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141–42 (1987); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 832–33, 835 (1989).

113. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

114. Reynolds v. United States, 98 U.S. 145, 167 (1879).

115. *See* Emp. Div. v. Smith, 494 U.S. 872, 888 (1990).

116. *See id.* at 901–02 (O'Connor, J., concurring in the judgment); *cf.* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

117. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) (citation omitted).

review.[118] For example, applying a form of heightened scrutiny, the Court upheld compulsory military service in *Gillette*,[119] mandatory taxation in *Lee*,[120] routine traffic laws in *Cox*,[121] wage-and-hour laws in *Tony* and child-labor laws in *Prince*,[122] and anti-discrimination laws in *Bob Jones*.[123] Similarly, in more specialized contexts—such as the military uniform requirement in *Goldman*,[124] the prison regulations in *O'Lone*,[125] or the specialized government operations at stake in *Lyng*[126] and *Bowen*[127]—the Court had upheld routine government functions from religious-based challenges based on a more deferential standard, reflecting the Court's ability to appropriately adapt the test to unique circumstances.

Turning to *Smith*'s second defense, the *Smith* majority next concluded that its holding and rationale were consistent with preexisting free exercise precedent. First, *Smith* reasoned that *Sherbert*-style heightened protection for religious exercise no longer represented the predominant, governing test.[128] That was so, in the Court's view, because heightened scrutiny for religious exercise had been reserved for two exceptional areas of law: *Sherbert*-style individual exemption schemes and *Yoder*-style hybrid rights.[129] And second, *Smith* also reasoned that the Court in recent years had either declined to apply such heightened scrutiny in a variety of contexts and, even when applying it, had almost always found it satisfied.[130] But *Smith*'s effort to cabin and avoid such unfavorable precedent is

118. *See id.* at 896 (collecting cases).

119. *See* Gillette v. United States, 401 U.S. 437, 462–63 (1971).

120. *See* United States v. Lee, 455 U.S. 252, 257–58, 260 (1982).

121. *See* Cox v. New Hampshire, 312 U.S. 569, 573–75 (1941).

122. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 304–05 (1985) (concluding that the challenged Act did not interfere with the claimant's religious exercise rights); Prince v. Massachusetts, 321 U.S. 158, 164–71 (1944).

123. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983).

124. *See* Goldman v. Weinberger, 475 U.S. 503, 507, 509–10 (1986).

125. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–50 (1987).

126. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–52 (1988).

127. *See* Bowen v. Roy, 476 U.S. 693, 699–701 (1986).

128. *See Smith*, 494 U.S. at 883.

129. *See id.* at 881–83.

130. *See id.* at 883.

unpersuasive for three reasons.

First, the decisions that *Smith* relied upon to establish the individual exemption and hybrid rights exceptions—most importantly, *Sherbert* and *Yoder*—were not so limited. Instead, their interpretation and understanding of the free exercise right reflected the view that the Free Exercise Clause generally required heightened scrutiny for even incidental burdens on religiously motivated conduct, regardless of whether the asserted free exercise right turned on an individual exemption scheme or a hybrid right situation.[131]

Start with *Smith*'s reliance on the 'individual exemption' theory.[132] Contrary to *Smith*'s interpretation of the unemployment compensation cases, those decisions did not turn on the presence of an unemployment scheme or individualized exemptions.[133] Instead, as discussed above, they turned on the incidental burdening of a religious adherent's religiously motivated conduct more generally. As the Court in *Thomas* observed:

> "[A] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." . . . Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[134]

Nothing in that analysis turned on the presence of other, individualized exemptions, as demonstrated by the application of the

131. *See id.* at 893–97 (O'Connor, J., concurring in the judgment).

132. *See id.* at 882–84 (majority opinion).

133. *See* Sherbert v. Verner, 374 U.S. 398, 402–04, 406 (1963); Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 771–18 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141–42 (1987); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 832–33, 835 (1989).

134. *Thomas*, 450 U.S. at 717–18 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

*Sherbert*-style heightened scrutiny to areas outside of the unemployment compensation context, as discussed above.

Next, take *Smith*'s reliance on the hybrid rights theory.[135] Notwithstanding *Smith*'s insistence that *Sherbert*'s application outside of the unemployment context had only ever involved hybrid rights, the main cases upon which *Smith* sought to derive its hybrid rights theory—most importantly, *Yoder*—had not purported to rely on any type of hybrid rights analysis.[136] Instead, although various liberty interests were at stake, the analysis turned on the free exercise of religion itself.[137] In *Yoder*, the Supreme Court granted certiorari to address whether "respondents' convictions of violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment."[138] Recognizing that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education," the Court emphasized that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children."[139]

While *Yoder* focused on the traditional interest of parents in the religious upbringing of their children—*Smith*'s hook for cabining *Yoder* to hybrid-rights cases—the *Yoder* decision was not so limited on its own terms. Instead, the best reading of *Yoder* is that it turned not on the "hybrid" nature of the rights at stake, but on the fact that the specific parental interest at issue was a subset of the basic right to the free exercise of religion. As *Yoder* explained, "It follows that in order for [the State] to compel school attendance beyond the eighth grade against a claim that such attendance interferes with

135. *See Smith*, 494 U.S. at 881–82.

136. *See id.*

137. *See* Cantwell v. Connecticut, 310 U.S. 296, 307 (1940); *Yoder*, 406 U.S. at 219–20.

138. *Yoder*, 406 U.S. at 207.

139. *Id.* at 213–14.

the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[140] After concluding that the religiously motivated practice "ha[d] the protection of the Religion Clauses" and that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs," the *Yoder* Court concluded that the State had failed to make the "particularized showing" necessary to "justify the severe interference with religious freedom" presented by the mandatory attendance scheme.[141] So, while portions of *Yoder* reference the rights of parents as a distinct aspect of the free exercise right, the best reading of *Yoder* is as a discussion of the free exercise of religion—driven by that right and turning on it. As Justice O'Connor observed in her *Smith* concurrence, although the majority "endeavors to escape from [the Court's] decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions . . . there is no denying that both cases expressly relied on the Free Exercise Clause and that [the Court] ha[s] consistently regarded those cases as part of the mainstream of [its] free exercise jurisprudence."[142]

Second, the Supreme Court purported to apply heightened scrutiny to incidental burdens on religious exercise even outside the context of *Sherbert*-style individual exemption schemes and without any mention of the *Yoder*-style hybrid rights doctrine—further suggesting that, far from representing isolated and anomalous doctrines, the *Sherbert* and *Yoder* lines reflected a broad and cohesive free exercise doctrine that *Smith* fundamentally altered. For example, the Supreme Court in *United States v. Lee*[143] rejected a religion-

140. *Id.* at 214.

141. *Id.* at 215–16, 218, 227.

142. Emp. Div. v. Smith, 494 U.S. 872, 896 (1990) (O'Connor, J., concurring in the judgment) (citations omitted).

143. 455 U.S. 252 (1982).

based challenge to mandatory Social Security taxes only after subjecting the Social Security tax mandate to heightened scrutiny—even though no hybrid-rights theory was advanced and none of the analysis turned on an individual exemption scheme.[144] Similarly, the Supreme Court in *Gillette v. United States*[145] rejected a religion-based challenge to a military conscription regime under a heightened scrutiny standard, even though no hybrid right was asserted and no one had suggested that the analysis hinged on the availability of other types of individual exemptions.[146]

And while the Supreme Court had not applied heightened scrutiny in a few exceptional cases,[147] nowhere before *Smith* did the Supreme Court suggest that heightened scrutiny was necessarily inappropriate outside of the context of individualized-exemption regimes or hybrid-rights situations. In two of the cases in which the Court had declined to apply *Sherbert—Bowen* (rejecting a challenge to the government's use of social security number for dispensing welfare benefits)[148] and *Lyng* (rejecting a challenge to government development on sacred Native Americans lands)[149]—the Court had not repudiated *Sherbert*-style heightened scrutiny but had instead rejected the immediate challenges by reasoning that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[150] So *Bowen* and *Lyng* did not address a circumstance like the criminal prohibition in *Smith*, which necessarily dealt with what the government could do to an individual, and left

144. *See id.* at 257–58, 260.

145. 401 U.S. 437 (1971).

146. *See id.* at 461–62.

147. *See* Bowen v. Roy, 476 U.S. 693, 699–701 (1986) (involving internal government operations); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–52 (1988) (involving government development of its own land); Goldman v. Weinberger, 475 U.S. 503, 507, 509–10 (1986) (involving the sensitive area of internal military regulations); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–50 (1987) (involving the unique context of prison regulations).

148. *Bowen*, 476 U.S. at 699–701 (1986).

149. *Lyng*, 485 U.S. at 449.

150. *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

the Court's broader free exercise doctrine in such circumstances undisturbed. And in the other two cases in which the Court had declined to apply *Sherbert—Goldman* (rejecting a challenge to military dress regulations)[151] and *O'Lone* (rejecting a challenge to a prison's decision to decline to exempt an inmate from work duties to attend religious service)[152]—the Supreme Court dealt with specialized contexts that lent themselves to particularly deferential judicial review, and did not purport to disturb the Court's more general free exercise doctrine.[153] And confirming that the unique cases of *Bowen*, *Lyng*, *Goldman*, and *O'Lone* had not abandoned *Sherbert*'s heightened scrutiny test more generally, two decisions in the years immediately leading up to *Smith—Hobbie* (a challenge to unemployment compensation denial) and *Hernandez* (a challenge to payment of income taxes)—affirmed the ongoing vitality of the *Sherbert* heightened-scrutiny regime.[154]

And third, the *Smith* majority's focus on the Court's de facto retreat from a religious exemption regime—tallying up the win-loss rates for different free exercise challenges before the Court—failed to fully address the central question of whether *Smith*'s holding and rationale were consistent with the Court's preexisting free exercise precedent. To be sure, the fact that the Supreme Court had consistently rejected free exercise challenges against a wide variety of government programs (even under *Sherbert*-style heightened scrutiny), as well as the fact that *Smith*'s results largely cohered with those cases' real-world results, were certainly relevant considerations.[155] And perhaps given the precedential hurdles that the *Smith* majority faced—as the majority seemed to acknowledge by nodding to cases in which the Court had "purported to apply the *Sherbert* test in

151. *Goldman*, 475 U.S. at 507, 509–10 (1986).

152. *O'Lone*, 482 U.S. at 349–50.

153. *See Smith*, 494 U.S. at 900–02 (O'Connor, J., concurring in the judgment).

154. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141–42 (1987); Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989).

155. *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part); Luke Goodrich, *Will the Supreme Court Replace the* Lemon *Test?*, HARV. L. REV. BLOG (Mar. 11, 2019), https://blog.harvardlawreview.org/will-the-supreme-court-replace-the-_lemon_-test/ [https://perma.cc/KSU7-R5LL].

contexts other than [unemployment compensation challenges]"[156]—this practical answer of de facto retreat was the best option available to the Court, save overruling those unfavorable cases. But the fact that *Smith*'s practical results largely mapped on to the holdings of these previous cases is not a perfect answer, either practically or doctrinally. As a practical matter, the small sample of cases that had come before the Court does not necessarily provide a universe of cases that are representative or predictive of the types of free exercise challenges that might arise. Additionally, even that win-loss rate does not necessarily require accepting *Smith*'s conclusion that there is little practical daylight between the results of a *Smith*-style rational basis test and *Sherbert*-style heightened scrutiny test. And as a doctrinal matter, it is certainly relevant that *Smith*'s rationale remained strikingly at odds with many of those cases. So, whatever the force of *Smith*'s de facto retreat argument, it is not fully satisfactory, even if it helps mitigate some of the practical consequences of *Smith*'s potential inconsistencies with the Court's prior free exercise precedent.

### 2. Ongoing Tensions and Confusion

While *Smith* remains good law,[157] the state of free exercise jurisprudence after *Smith*—which consists not only of *Smith* itself, but also of the decisions that *Smith* purported to leave in place (such as *Yoder* and *Sherbert*),[158] as well as subsequent decisions—reflects a doctrine at war with itself. Significant tensions and ambiguities left by *Smith*, or created by later efforts to cabin *Smith*, have undermined the internal coherence, doctrinal stability, and practical workability of the Court's free exercise doctrine, suggesting that much good may come from revisiting the *Smith* regime today.

One challenge to *Smith*'s ability to foster a consistent and predictable free exercise jurisprudence stems from the difficulties

156. *Smith*, 494 U.S. at 883.

157. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019–21 (2017); City of Boerne v. Flores, 521 U.S. 507, 512–14 (1997); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

158. *See Smith*, 494 U.S. at 881–85.

associated with determining whether a law is generally applicable and thus subject to *Smith*'s rational-basis primary rule. As Professor Douglas Laycock and Steven T. Collis have argued, the central difficulty posed by the general applicability inquiry is that general applicability inevitably rests on "circular categories and circular government interests," in which "[e]very law applies to everything it applies to."[159] Some laws may come closer to resembling the type of "across-the-board . . . prohibitions" contemplated by *Smith* (consider, for example, a statewide ban on marijuana use).[160] But most laws do not. Instead, they reflect determinations about what comparably weighty government interests to pursue or leave aside. They make determinations about how to best pursue those interests, with the decision of what conduct to proscribe/discourage or permit/encourage turning on both the nature of the compromise-based legislative process and the inevitable necessity of deciding how far to pursue particular interests at the expense of other cross-cutting interests. Consider, for example, how a statewide ban on marijuana use may leave comparable conduct unregulated or may contain various exceptions for medicinal, research, or other uses.[161]

In light of such circular categories and circular government interests, judges tasked to consider whether a law is generally applicable for the purposes of *Smith* have a challenging task. Among other things, they must determine whether exempted or nonregulated secular conduct (for example, the medicinal marijuana exception) is "comparable" to non-exempted religious conduct. That determination turns on a challenging comparison of the relative harms to the asserted legislative purposes that are posed by the non-exempt religious conduct, and it also turns—at least to some extent—on the relevant comparative benefits associated with both the exempted secular conduct and the non-exempted religious conduct.[162] This

159. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 16 (2016); *see also* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540–42 (1999).

160. *See* Laycock & Collis, *supra* note 159, at 9–23.

161. *See id.*; Volokh, *supra* note 159, at 1540–42.

162. *See* Emp. Div. v. Smith, 494 U.S. 872, 878–79, 882–84 (1990).

determination—which quickly begins to resemble the types of policy judgments that judges are traditionally reluctant to engage in—is further complicated by considering the frequent variant in which secular exemptions are available to religious and secular adherent alike but no specific exemptions for religiously motivated conduct have been provided.[163] On the one hand, as Professor Laycock and Collis argue, providing exemptions for secular conduct but not for comparable religious conduct must constitute "unequal treatment of religious and secular conduct."[164] After all, controlling for benefits and harms, if the state permits marijuana to be used for medicinal usage but not for religious usage—assuming the absence of some other justification or meaningful distinction between these practices—the law appears unlikely to be generally applicable. On the other hand, such controlled assumptions are frequently contested and uncertain in practice. It may very well be the case that providing across-the-board secular exemptions makes it challenging to determine whether religious conduct has been singled out or merely incidentally burdened. While the former description may be more persuasive as a general matter, determining which description matches a particular law raises significant workability challenges—particularly because it requires generalist judges to make expert decisions regarding the similarity of particular sets of religious and secular conduct, and how the religious conduct fits with the "circular categories and circular government interests" represented by the statutory scheme.[165]

To be sure, it might be the case that problems associated with *Smith*'s general applicability standard will only prove troublesome for a small minority of statutes—leaving the doctrine's application generally workable in most cases. But that argument is likely unpersuasive. As an initial matter, most apparently generally applicable laws still involve "circular categories and circular government interests."[166] That is so, as Professor Laycock and Collis explain,

163. *See id.*
164. Laycock & Collis, *supra* note 159, at 27.
165. *Id.* at 16.
166. *Id.*

because those laws make determinations of what interests to pursue and forego, and what conduct to regulate or leave alone.[167] And the problems of circular categories and circular government interests are particularly pronounced where, as in contemporary legislation and regulation, most prohibitions and regulations of conduct are carefully tailored in their regulatory scope. These laws and regulations frequently fail to regulate categories of roughly comparable secular conduct and provide numerous secular and related exemptions, complicating the decision about whether, in a given case, a particular law is truly generally applicable.[168]

A second challenge to the coherence, stability, and predictability of contemporary free exercise jurisprudence arises from the extent to which *Smith* purported to leave *Yoder* and *Sherbert* standing as good law.

As an initial matter, these cases are in significant doctrinal dissonance with the *Smith* decision—undermining the internal coherence of the Court's free exercise doctrine. Contrary to *Smith*'s holding, both *Yoder* and *Sherbert* concluded, "in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality."[169] That was so because *Yoder* and *Sherbert* instructed that religious exercise encompassed religiously motivated conduct and that conduct was subject to heightened protection even from neutral laws of general applicability. In *Yoder*, for example, the Court reasoned:

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of

167. *See id.* at 16–17; *cf.* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 74–75 (2006) (discussing the fine-tuned nature of the compromise-based legislative process and the relevant role of judges in interpreting legislative enactments).

168. *Cf.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

169. *Lukumi*, 505 U.S. at 565 (Souter, J., concurring in part and concurring in the judgment).

> individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. . . . [I]n this context belief and action cannot be confined in logic-tight compartments. . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.[170]

Similarly, the Supreme Court in *Thomas*—affirming *Sherbert* in the same language offered by *Yoder*—confirmed that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[171]

In this way, the *Yoder* and *Sherbert* lines—representative of the Court's broader free exercise jurisprudence at the time[172]—embraced a logical framework that was deeply at odds with *Smith*'s holding that incidental burdens on religious conduct were subject only to rational basis scrutiny, as well as *Smith*'s functional, institutional, and related rationales for why that holding made sense. While that break from the past is significant in its own right, the *Smith* majority's decision to formally retain—even if in modified form—the *Yoder* and *Sherbert* decisions suggests another problem. As Justice Souter put it in his *Lukumi* concurrence, "Because *Smith* left those prior cases standing, we are left with a free-exercise

170. Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972) (citations omitted).

171. Thomas v. the Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981) (quoting *Yoder*, 406 U.S. at 220); *see also* Sherbert v. Verner, 374 U.S. 398, 402–04, 406 (1963).

172. *See supra* Part II.A.1.

jurisprudence in tension with itself, a tension that should be addressed."[173]

Recognizing the tension between the rule it announced and the rationale underlying *Yoder* and *Sherbert*, the *Smith* majority sought to cabin these cases by relegating *Yoder* to the realm of "hybrid rights" situations and *Sherbert* to the zone of "individual exemption" regimes. While this effort was understandable, and perhaps the best way to establish *Smith*'s rule without overruling *Yoder* and *Sherbert* outright, the result seems to be neither doctrinally stable nor practically workable. This suggests that, despite best efforts, *Smith*'s unresolved inconsistencies with *Sherbert* and *Yoder* have undermined the coherence, stability, and predictability of the free exercise jurisprudence that *Smith* sought to synthesize, thereby undermining *Smith*'s stare decisis value.

Start with the *Yoder* exception. As an initial matter, *Smith*'s attempted relegation of *Yoder* to the context of "hybrid rights" is likely unstable and incoherent. Even leaving aside the fact that *Yoder* did not purport to restrict itself to hybrid rights situations,[174] it is challenging to conclude that its internal logic—that the Free Exercise Clause itself protects religiously motivated conduct even against incidental burdens from neutral laws of general applicability—depends, in any sense, on the presence or absence of additional, possibly coextensive rights claims. Once the Free Exercise Clause protects religiously motivated conduct, and once that protection is understood to require *substantive* rather than *formal* equality, the *Smith* majority's attempt to limit *Yoder* to hybrid rights seems unlikely to fully grapple with the doctrinal dissonance at stake. That dissonance was central to Justice Souter's critique of *Smith* in his *Lukumi* concurrence, in which he concluded:

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid

173. *Lukumi*, 508 U.S. at 564 (Souter, J., concurring in part and concurring in the judgment).

174. *See Yoder*, 406 U.S. at 219–20.

> exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[175]

Particularly as the scope of other constitutional rights—such as those provided by the First Amendment's Free Speech Clause or the Fourteenth Amendment's Due Process Clause—grows, the conceptual problems with *Smith*'s effort to limit *Yoder* to the situation of "hybrid rights" seem likely to present significant practical consequences.

Moreover, *Smith*'s interpretation of *Yoder* to recognize a "hybrid rights exception" leaves at least three important issues unaddressed—leaving insufficient guidance for future courts and causing *Smith*'s apparently simple categorical rule to devolve into a case-by-case balancing test.

First, *Smith* fails to articulate how strong the components of the "hybrid right" must be to count toward the heightened scrutiny threshold, and exactly what those components must be. It is unclear, for example, whether the rights asserted alongside the free exercise right must merely be alleged or colorable or must instead be sufficient to secure protection with or without the free exercise right. It is also unclear whether the rights asserted alongside the free exercise right are limited to certain categories of rights (whether common law, statutory, or constitutional) or certain subcategories of that right (perhaps particularly "fundamental" constitutional rights). And, perhaps most importantly, it is unclear how judges are to consistently make the probability-of-success or weight-of-the-interest determinations, even had clearer instructions been provided.

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175. *Id.* at 567.

Second, in addition to its failure to explain which variables count for the sum, *Smith* also fails to articulate how to conduct the ultimate "hybrid rights" analysis. *Smith* does not provide instructions as to how to address the assertion of multiple rights in conjunction with a free exercise claim, leaving it unclear whether each hybrid right pair must be analyzed separately or whether courts must engage in an exercise of rights arithmetic that takes the sum of the liberty interests presented and weighs them, in the aggregate, against the asserted government interest.

And third, *Smith* also fails to provide instruction as to what level of scrutiny to apply to different validly asserted hybrid rights. Not only is it unclear what type of heightened scrutiny *Smith* contemplated would apply as a baseline matter to "hybrid rights" claims, but—given that *Smith* seems to contemplate rights "reinforc[ing]" each other[176]—it remains unclear whether hybrid rights of differing strengths might warrant different levels of scrutiny. And these uncertainties—complicated by the dramatic expansions in other rights doctrines (such as substantive due process or the freedom of speech)—increase the risk that *Smith*'s advertised bright-line holding may devolve into the very case-by-case adjudication and balancing that *Smith* purported to reject.[177]

Next, take the *Sherbert* exception. As an initial matter, *Smith*'s effort to limit *Sherbert* to the context of individualized exemption regimes raises problems of internal coherence and doctrinal stability. Like *Yoder*, *Sherbert*—taken on its own terms—did not purport to limit itself to individualized exemption regimes, and for good reason. It is challenging to conclude that *Sherbert*'s internal logic—that the state may not place undue pressure on a religious adherent to choose between engaging in particular religiously motivated conduct and the receipt of government benefits, even if the state does so incidentally—depends, in any meaningful sense, on the presence of an individualized-exemption regime or the possibility of

176. Emp. Div. v. Smith, 494 U.S. 872, 882 (1990).

177. *See* Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1189–96 (2015) (surveying lower court confusion).

comparable secular exemptions.[178] Because *Sherbert* was premised on a broader requirement of "substantive neutrality," while *Smith* was premised on a minimal requirement of "formal neutrality,"[179] the premises of *Sherbert* and *Smith* are in tension with one another. But even accepting *Smith*'s restatement of *Sherbert*'s rule as only requiring heightened scrutiny when a state has in place an individualized exemption regime, the *Sherbert* exception may still swallow the *Smith* rule in a large variety of cases.[180] In many cases today—perhaps in most cases—conflicts between religiously motivated conduct and state interests arise in the context of statutes or regulatory schemes that are riddled with individualized exemptions, suggesting that the type of neutral and generally applicable law contemplated by *Smith* may increasingly be the outlier and the individualized exemption scheme falling under *Sherbert* now the dominant rule.[181] And even in the context of across-the-board prohibitions that lack any individualized exemptions and are truly neutral and generally applicable, those prohibitions frequently involve individualized discretion along the way to penalizing the religious adherent, as Professor McConnell has argued, whether that discretion is performed by prosecutors, conducted during the trial or adjudication process, or at the back-end through commutation or pardoning.[182] While the scope of judicial review of such decisions is narrow under our current doctrine, there is certainly a greater level of individualized decisionmaking that *Smith* contemplated.

Moreover, *Smith*'s interpretation left behind several challenging questions that risk blurring the lines between *Smith*'s main rule and the

178. *See* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 832–33, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141–42 (1987); Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981); Sherbert v. Verner, 374 U.S. 398, 402–04, 406 (1963).

179. *See Lukumi*, 508 U.S. 520, 576 (1993) (Souter, J., concurring in part and concurring in the judgment).

180. *See supra* Part II.A.2.

181. *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

182. *See, e.g.*, McConnell, *supra* note 2, at 1124; *In re* Stevens, 956 F.3d 229, 233–34 (4th Cir. 2020) (Richardson, J.).

*Sherbert* exception, thereby undermining the consistent and predictable application of *Smith*'s central instructions. As discussed above, most statutes and regulations involve complex schemes—reflecting the "circular government interests" and "circular categories" articulated by Professor Laycock and Collis—that contain fairly significant individualized (and categorical) exceptions. These exceptions may relate to what reasons may permit an exemption, what costs or benefits should be attached to such an exemption, and—relating to enforcement—whether to take an adverse action against an individual and what that enforcement action should look like.[183] Because few laws pursue a particular interest at all costs, and even fewer—perhaps none—require their executing officials to do so without any discretion attuned to broader policy objectives or individualized circumstances, it is often challenging to determine where *Smith* ends and *Sherbert* begins.[184]

For instance, it is unclear whether a law with categorical exceptions—consider, for example, a flat ban on marijuana possession that categorically excepts comparably potent and deleterious substances or that categorically exempts marijuana possession for research purposes—falls under *Smith*'s formal rule or the various heightened scrutiny exceptions. Moreover, given that most laws contain some form of individualized exemption or at least require individualized determinations, policing the line between the *Smith* rule and the *Sherbert* exception in a manner that will avoid the exception swallowing the rule has become particularly challenging, even leaving aside the questions of prosecutorial discretion or trial-like individualized determinations that are at stake. And finally, in determining whether withholding a religious exemption in a particular context is permissible, it is difficult to determine whether the religious conduct that would be covered by an exemption is indeed comparable to exempted secular conduct, and whether the state has offered a sufficiently good reason for declining to exempt that religious conduct.[185]

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183. *See* Laycock & Collis, *supra* note 159, at 15–16.

184. *Cf.* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025–2026 (2017) (Gorsuch, J., concurring).

185. *Compare* Sherbert v. Verner, 374 U.S. 398 (1963) (analyzing tailored exemption scheme), *with* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018)

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Although *Smith* remains good law,[186] the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[187] announcing a "ministerial exception" from a neutral law of general applicability, reflects two ways in which *Smith*'s stare decisis weight has been undermined.[188]

The first way in which *Hosanna-Tabor* has undermined *Smith*'s stare decisis weight is the extent to which *Hosanna-Tabor* relied heavily on history and tradition for its interpretation of the original meaning of the Free Exercise Clause—a historically oriented approach that was at odds with *Smith*'s own approach and, depending on one's view of the history, might ultimately point to a conclusion that is contrary to *Smith* in substance.[189]

Start with the methodological differences. As an initial matter, while *Smith* principally relied on a combination of functionalist, institutional, and precedential justifications for its interpretation of the Free Exercise Clause,[190] the *Hosanna-Tabor* decision relied heavily (although not entirely) on the historical origins and traditional understanding of the Religion Clauses, a consideration that was largely absent from the *Smith* decision.[191] In *Hosanna-Tabor*, the Court concluded that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers," before immediately turning to emphasize that "[c]ontroversy between church and state over religious offices is hardly new."[192] Indeed, the Court observed, our history has long

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(similarly analyzing tailored exemption scheme).

186. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993); *Trinity Lutheran Church*, 137 S. Ct. at 2019–21.

187. 565 U.S. 171 (2012).

188. *See id.* at 173.

189. *Compare id.* at 182–85 (engaging in in-depth historical analysis), *with* Emp. Div. v. Smith, 494 U.S. 872, 876–90 (1990).

190. *See Smith*, 494 U.S. at 876–90 (engaging in primarily doctrinal and functional analysis).

191. *Compare Hosanna-Tabor*, 565 U.S. at 182–85, *with Smith*, 494 U.S. at 879 (relying on Reynolds v. United States, 98 U.S. 145, 167 (1879)).

192. *Hosanna-Tabor*, 565 U.S. at 181–82.

been marked by significant conflicts between church and state over the selection and control of a church's minister—with those conflicts represented by, among other things, the very first clause of the Magna Carta, the Acts in Restraint and of Uniformity promulgated to centralize the English religious establishment, and the varied policies of the early colonies.[193] The Court then concluded that "[i]t was against this background that the First Amendment was adopted."[194] After tracing a few additional examples that the Court concluded reflected this interpretation as the historical and traditional view of the Religion Clauses, the Court explained why this interpretation was also reflected in subsequent precedent, before concluding:

> We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[195]

In contrast, the *Smith* majority, although it relied in *Reynolds* and subsequent precedent, had declined to perform the same type of originalist-oriented inquiry, which suggests a methodological tension between *Smith* and *Hosanna-Tabor*.[196]

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193. *See id.* at 182–83.

194. *Id.* at 183.

195. *See id.* at 188–89.

196. Perhaps the best defense of *Smith*'s methodological consistency with a historically-driven approach to the Religion Clauses comes from *Reynolds*. *Smith* relied on

The second way in which *Hosanna-Tabor* has undermined *Smith*'s stare decisis weight is the extent to which *Hosanna-Tabor*'s rationale and holding have raised tensions with *Smith*'s rationale and blurred *Smith*'s clear delineating boundaries. Although acknowledging *Smith*'s core holding, the *Hosanna-Tabor* Court held that *Smith*'s general rule was ultimately inapplicable because, while "*Smith* involved government regulation of only outward physical acts," religious issues like the selection of a minister constituted "internal church decision[s] that affect[] the faith and mission of the church,"[197] implicating the difference between "the government's regulation of 'physical acts'" and its "lend[ing] its power to one or the other side in controversies over religious authority or dogma."[198] In so distinguishing *Smith*, the *Hosanna-Tabor* Court appears to have adopted a line of analysis that is at odds with that case. To the extent that the internal "faith and mission of the church" rationale extends beyond the selection of ministers, it may often be unclear which religious acts are external, physical acts subject to *Smith* and which are internal church decisions that affect the faith and mission of the church itself. In many cases, the line is not

*Reynolds*'s view of the Free Exercise Clause, see Emp. Div. v. Smith, 494 U.S. 872, 879 (1990), and *Reynolds* itself was based in larger part on the Supreme Court's view of the history of the Free Exercise Clause, see Reynolds v. United States, 98 U.S. 162–64 (1879). But this argument does not fully stave off the charge that *Smith* is out of step with the text, history, and tradition test. First, it is challenging to read *Smith*'s reliance upon *Reynolds* as reflecting *Smith*'s embrace of an originalist approach (even assuming that *Reynolds*'s originalism is the same originalism embraced by the Supreme Court in recent years). Essentially nowhere in the opinion does *Smith* engage in any in-depth historical analysis. Nor does *Smith*, in relying on *Reynolds*, purport to embrace *Reynolds*'s originalist commitments or analysis. And in reaching its result, *Smith* brushes past decades of precedents that had, themselves, relied in significant part upon history and tradition to reach their decisions, making it hard to read *Smith* as a truly originalist opinion (let alone one with a particularly rigorous historical methodology). And second, even if *Smith* were read to reflect an originalist methodology, that would not resolve the other charge—that *Smith*'s result is out of step with what text, history, and tradition identify as the requirements of the Free Exercise Clause. As a result, the *Reynolds*-based defense of *Smith* is respectable, but unlikely to be all that persuasive—let alone dispositive, when weighed against the relevant countervailing considerations.

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

198. *Id.* (quoting *Smith*, 494 U.S. at 877).

so clear. Consider communion wine, for instance. On the one hand, as in the case of peyote, the *Smith* principle might permit the government to prohibit its ingestion by minors insofar as ingestion of alcohol is a physical act of external concern that the state has a legitimate interest in controlling.[199] On the other hand, the *Hosanna-Tabor* principle may protect communion insofar as it is a central component of the faith and mission of the church itself.[200] But perhaps more importantly, the rationale for distinguishing *external* from *internal* church acts may be subject to some tension. Given that the state interest frequently remains the same between the two (consider an across-the-board antidiscrimination statute, for example), and the analysis turns to consider the *weight* of the religious interest, it is unclear whether internal, personnel decisions in church leadership may not be of comparable weight to other, potentially external decisions (like communion, for example). These examples suggest that there may be considerable conceptual and practical difficulties with distinguishing between physical, external acts and conduct that implicates the faith and mission of the church or its internal organization, undermining *Smith*'s consistency and predictability.

### *B. The Other Half of the Religion Clauses: The Establishment Clause*

A second important consideration for assessing *Smith*'s consistency with related decisions requires comparing *Smith*'s approach to the Free Exercise Clause with the Supreme Court's approach to the other half of the Religion Clauses—the Establishment Clause.[201] Determining this relationship is important, given the

199. *See Smith*, 494 U.S. at 877–79.

200. *See Hosanna-Tabor*, 565 U.S. at 188; *cf.* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 439 (upholding a preliminary injunction against the Controlled Substance Act's ban of a religious sect's sacramental use of substance in religious ceremonies).

201. One important point warrants emphasis at the beginning. Despite acknowledged tensions between the Free Exercise Clause and the Establishment Clause, the Supreme Court has consistently held that the Establishment Clause does not require *Smith*'s test or result. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 409–10 (2004) (citing

textual, historical, and functional relationship between the Free Exercise and Establishment Clauses, but also challenging, given the broad uncertainty over current Establishment Clause doctrine. Because the Establishment Clause dust has yet to settle, and a variety of potential theories of the Establishment Clause remain relevant and viable, this Subpart proceeds to consider *Smith*'s consistency with the Supreme Court's Establishment Clause jurisprudence by comparing *Smith* with the largely ascendant "history and tradition" test advanced by *Town of Greece v. Galloway*,[202] *Hosanna-Tabor*,[203] and the *American Legion v. American Humanist Association*[204] plurality.

While this "history and tradition" test does not formally govern in all Establishment Clause cases, it has become increasingly important in some Establishment Clause contexts and attracted wide support from a broader coalition of current members of the Court. In general, there are two potential ways in which *Smith* is in tension with this "history and tradition" test, relating to *Smith*'s jurisprudential methodology and its substantive outcome. While more definitive conclusions about the stare decisis weight of *Smith*'s interpretation of the Free Exercise Clause require greater clarity in the Court's Establishment Clause doctrine, this Subpart suggests that there are significant reasons for concluding that the Court's Establishment Clause jurisprudence raises important tensions with *Smith*.[205]

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Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)); Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972); *see also Smith*, 494 U.S. at 890; *cf.* Cutter v. Wilkinson, 544 U.S. 709 (2005).

202. *See* 572 U.S. 565, 578 (2014).

203. *See* 565 U.S. at 182–85.

204. *See* 139 S. Ct. 2067, 2087–89 (2019) (plurality opinion).

205. While this Article leaves aside any comparison of *Smith* and *Lemon*, it is worth noting that whatever conceptual coherence (or tension) may exist between these lines must also take account of the extent to which *Lemon* has been repeatedly diminished, *see* Hunt v. McNair, 413 U.S. 734, 741 (1973), ignored, *see, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001), and replaced or rejected, *see* Marsh v. Chambers, 463 U.S. 783, 786–92 (1983); Van Orden v. Perry, 545 U.S. 677, 686–90 (2005) (plurality opinion); *Town of Greece*, 572 U.S. at 575–78; *see generally Am. Legion*, 139 S. Ct. 2067, by the Supreme Court in a number of contexts—reducing (although not entirely preventing) *Lemon*'s ability to offer assistance to *Smith*'s stare decisis defense. Indeed, any comparison of *Lemon* and *Smith* might lead one to

### 1. Methodological Tensions

The first potential way in which *Smith* is in tension with the "history and tradition" test relates to methodology. In contrast to the increasingly important role that history and tradition have played in the Establishment Clause context—sometimes governing the Court, other times driving influential pluralities and concurrences[206]—the Supreme Court's holding in *Smith* rested to a great extent on functionalist and institutional concerns.[207] While *Smith* concluded that religious exemptions would be contrary to "constitutional tradition and common sense," it declined—apart from a brief discussion of *Reynolds*[208] and more recent precedents[209]—to stake its holding on the historical or traditional practice of religious exemptions. Instead, it grounded its rationale in a combination of (a) functional concerns that a contrary rule would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"[210], and (b) structural commitments that would both preclude judges from weighing the value of different religious beliefs and require the zone of conduct to be left to the political process as "an unavoidable consequence of democratic government."[211] Thus, the *Smith* majority never staked its holding on the type of in-depth review of the various historical practices and longstanding traditions that the Supreme Court relied upon in its Establishment Clause decision in *Town of Greece*[212] or, as discussed in the previous Subpart, its Free Exercise Clause decision

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wonder why, at least up until now, the *Smith* rule has not driven the outcome of any free exercise cases since it was announced. *Cf.* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (raising similar questions about *Lemon*). This issue, however, is noted rather than resolved in order to focus on the emerging focus of Establishment Clause doctrine.

206. *See, e.g.*, *Town of Greece*, 572 U.S. at 575–78; *Marsh*, 463 U.S. at 786–92; *Am. Legion*, 139 S. Ct. at 2087–89 (plurality opinion); Lynch v. Donnelly, 465 U.S. 668, 673–78 (1984); *Van Orden*, 545 U.S. at 686–90 (plurality opinion).

207. *See* Emp. Div. v. Smith, 494 U.S. 872, 877–90 (1990).

208. *See id.* at 879 (relying on Reynolds v. United States, 98 U.S. 145, 164–67 (1879)).

209. *See id.* at 877–90.

210. *Id.* at 888.

211. *Id.* at 890.

212. *See Town of Greece*, 572 U.S. at 575–78.

in *Hosanna-Tabor*.[213] That *Smith* is not an originalist—or somewhat originalist—decision is not necessarily dispositive, for much of the Free Exercise or Establishment Clause precedent is not. But to the extent that history and tradition play a central role in the broader Establishment Clause context, and to the extent that they appears critical from the Court's more recent precedents, *Smith*'s relatively scant attention to history or tradition, in favor of relying almost entirely on a distinct set of functionalist and institutionalist concerns, presents one methodological tension with the Court's Establishment Clause jurisprudence.[214]

### 2. Substantive Tensions

The second way in which *Smith* is potentially in tension with the "history and tradition" test relates to substance. While this Article cannot resolve the historical or traditional conception of either the Free Exercise Clause or the Establishment Clause, it draws from the work of others to identify a few of the more important tensions between *Smith* and some of the more salient views of the Religion Clauses that have been proposed in recent years.

As an initial matter, *Smith*'s holding conflicts with the view, advanced by some, that the Free Exercise Clause was originally and traditionally understood to provide religious exemptions even from neutral laws of general applicability.[215] Drawing from Professor McConnell's review of the origins and historical understanding of the free exercise of religion[216]—a review which draws from, inter

213. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–85 (2012).

214. *See* McConnell, *supra* note 2, at 1116–19 ("Interestingly, the Court did not pause to consider whether the historical context surrounding the adoption of the Free Exercise Clause might have a bearing on the . . . permissible readings of the text. This is particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning.").

215. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 544–65 (O'Connor, J., dissenting); McConnell, *supra* note 3, at 1427–28.

216. *See, e.g.*, McConnell, *supra* note 3, at 1421–73; Note, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J.L. & PUB. POL'Y 971 (2019).

alia, early colonial charters, state constitutions, understandings reflected in prevailing popular, theological, and political philosophical conceptions, and the text and structure of the federal Free Exercise Clause—Justice O'Connor has argued that "[t]he historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause," concluding that "[t]he record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with [the Court's] pre-*Smith* jurisprudence."[217] To be sure, that historical conclusion—or its relevance for constitutional jurisprudence today—is subject to some critique. Drawing from Professor Hamburger's work,[218] for example, Justice Scalia has defended *Smith*'s functional conclusion as reflecting the original meaning of the Free Exercise Clause, as well as its state predecessors.[219] And others, questioning the entire enterprise, might very well question whether the original meaning of the Free Exercise Clause is even sufficiently determinate, let alone jurisprudentially relevant, to inform our understanding of the Free Exercise Clause today. But to the extent that history is relevant to interpreting the Free Exercise Clause,[220] *Smith*'s methodological and substantive inconsistencies with an originalist interpretation the Free Exercise Clause suggest one potential problem for stare decisis defenses of *Smith*.

Moreover, *Smith*'s holding that the Free Exercise Clause does not provide religious exemptions from neutral laws of general applicability may also be in tension with the original meaning and historical tradition of the Establishment Clause—depending, of course, on one's views of the particular relationship between the two clauses.[221] While definitive conclusions on these potential tensions

217. *City of Boerne*, 521 U.S. at 549 (O'Connor, J., dissenting).

218. *See* Hamburger, *supra* note 3, at 818–19.

219. *See City of Boerne*, 521 U.S. at 537–44 (Scalia, J., concurring in part).

220. *Cf.* McConnell, *supra* note 3, at 1415 ("Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive.").

221. *See generally, e.g.*, Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991) (discussing the relationship between the two clauses); McConnell, *supra* note 3 (explaining the original public meaning of the Free Exercise

are beyond the scope of this Article, one potential view of the Establishment Clause—such as the view that it embodies a "benevolent neutrality,"[222] which reflects "the best of our traditions" and respect for "the religious nature of our people"[223]—may present some tensions with *Smith*. Under this view, the types of historical accommodations for religion asserted by some to characterize Founding-era constitutional, legislative, and executive practice may very well constitute the types of historical protections for religious exercise (on the Free Exercise Clause side) and communal religious expression and support for religion (on the Establishment Clause side) that are relevant for avoiding the "callous indifference" presented when religious exercise is burdened by neutral laws of general applicability.[224] While that view is not clearly the current status of the Establishment Clause—and rests on a variety of historical and jurisprudential assumptions outside the scope of this Article—it suggests one potential way in which *Smith* may risk becoming further out of step with significant strands within the Supreme Court's Establishment Clause jurisprudence.

### *C. Reforming the Free Exercise Clause Doctrine*

This Article so far has argued that *Smith* is inconsistent with the Supreme Court's overarching approach to the Religion Clauses, and that this inconsistency provides one reason for revisiting the *Smith* decision. In closing, this Subpart suggests one additional line of thought to address where the Supreme Court should go from here.[225] *Smith*'s inconsistency with related judicial decisions is not only relevant to the question of whether *Smith* should be

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Clause); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003) (explaining the original public meaning of the Establishment Clause).

222. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

223. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

224. *Id.* at 673 (quoting *Zorach*, 343 U.S. at 314).

225. That is a relevant question today. *See* Transcript of Oral Argument at 30, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123) (question of Barrett, J.) ("What would you replace *Smith* with? Would you just want to return to *Sherbert v. Verner?*").

overturned. It is also relevant to the question of what *Smith* should be replaced *with*. To the extent that text, history, and tradition have become increasingly important to the Supreme Court's approach to the Religion Clauses, the doctrine of judicial consistency offers significant justification for replacing the *Smith* doctrine with a basic inquiry into the text, history, and tradition of the Free Exercise Clause. Under this suggested reform, the doctrinal transition would be relatively simple. Rather than asking whether a statute or regulation is "a valid and neutral law of general applicability,"[226] the Supreme Court would instead ask whether a law is consistent with the text, history, and tradition of the Free Exercise Clause.[227] To explain why such a doctrinal shift may be justified, this Subpart briefly outlines a two-step argument that draws from this Article's broader analysis. The purpose is not to determine *Smith*'s replacement, but to highlight some relevant considerations that counsel in favor of ensuring that the Religion Clauses doctrine after *Smith* adequately accounts for text, history, and tradition.

#### 1. Judicial Consistency's Relevance to Reform

The first step of the analysis, which has more or less been explained above,[228] is that the doctrine of judicial consistency bears not only on the question of whether to overturn a decision, but what to replace that decision with. This first step seems uncontroversial. The need for judicial consistency, after all, counsels in favor of both culling old doctrinal anomalies, and of ensuring that new doctrinal lines are planted in a neat, orderly, and consistent fashion. Judicial consistency represents an inherent rule-of-law value, reflecting a need for internal coherence that is rooted in one view of the nature of legality itself. It also serves several other important values, such as notice, stability, and fairness in the law. And the doctrine also seems to have relatively strong historical

226. *See* Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).

227. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–85 (2012); *cf.* District of Columbia v. Heller, 554 U.S. 570, 624–25 (2008).

228. *See supra* Part I.B.

foundations–-a point that seems relevant to the extent that an originalist jurist is contemplating replacing *Smith* with a doctrine that is itself tied to the text, history, and tradition of the Religion Clauses. The principles and values justifying the doctrine of judicial consistency, like the internal logic of the doctrine, seem likely to apply to both the question of whether to overturn an old precedent, and how to do so.

### 2. One Reform: Accounting for Text, History, and Tradition

The second step of the analysis requires putting the doctrine of judicial consistency into conversation with the tensions between *Smith*'s approach to the Free Exercise Clause and the Supreme Court's Religion Clauses jurisprudence. This step of the analysis is complicated by the fact that, over the years, the Supreme Court has adopted a variety of substantive and methodological commitments in the context of the Religion Clauses.[229] Some decisions are originalist; others are not. And some decisions reflect benevolent accommodation and encouragement of religion, while others insist on strict separation and neutrality. Despite this inconsistency, this Article submits that at least one lesson can be drawn from the Supreme Court's decisions so far. Because text, history, and tradition constitute an important aspect of the Supreme Court's approach to the Religion Clauses, the doctrine of judicial consistency suggests that text, history, and tradition should similarly inform the Supreme Court's approach to the Free Exercise Clause. To explain why, the following analysis discusses each half of the Religion Clauses in turn.

Start with the Establishment Clause. Text, history, and tradition have long been important to the Supreme Court's interpretation of the Establishment Clause. In the first decision incorporating the Establishment Clause, the Supreme Court in *Everson v. Board of Education*[230] observed that "[t]he meaning and scope of the First

229. *Compare* Lemon v. Kurtzman, 403 U.S. 602 (1971), *with Hosanna-Tabor*, 565 U.S. at 171.

230. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

Amendment, preventing establishment of religion or prohibiting the free exercise thereof," had traditionally been interpreted "in the light of its history and the evils it was designed forever to suppress."[231] This traditional approach was carried forward in several decisions that followed, including the Court's decisions in *McGowan* (upholding Sunday closing laws),[232] *Torcaso* (invalidating state religious test for office),[233] and *Walz* (upholding state tax exemptions for churches).[234] To be sure, this traditional approach has not always emerged triumphant over the years. The *Lemon* test, for example, is more than a little hard to square with an historical understanding of the Establishment Clause—at least on one historical account of the Establishment Clause.[235] So, too, are many of the *Lemon*-era decisions that invalidated longstanding, historically accepted practices and traditions.[236] But in recent years, the Supreme Court has reaffirmed the traditional focus on text, history, and tradition that characterized many of its early Establishment Clause

231. *Id.* at 14–15; *see also id.* at 33 (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.").

232. McGowan v. Maryland, 366 U.S. 420, 437, 439–40 (1961) (upholding Sunday closing laws by relying on both *Everson* and *Reynolds* for the proposition that history should drive the analysis and finding "the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive").

233. Torcaso v. Watkins, 367 U.S. 488, 489–95 (1961) (striking down a state religious test for office under the First Amendment more generally after relying upon "prior cases . . . [that] have thoroughly explored and documented the history behind the First Amendment, the reasons for it, and the scope of the religious freedom it protects" and concluding that this historical tradition prohibited religious tests for office).

234. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 680 (1970) (upholding tax exemptions for churches by observing that "at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment"); *see also id.* at 675–76 (relying on historical practice and noting Justice Holmes's aphorism that "a page of history is worth a volume of logic" (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921))).

235. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring in the judgment).

236. *See id.* Consider, for example, *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989), or *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

cases. In *Town of Greece*,[237] the Supreme Court—building on *Marsh*'s historical approach to legislative prayer[238]—upheld the constitutionality of a public prayer tradition at city council meetings by holding that the "Establishment Clause must be interpreted 'by reference to historical practices and understandings,'" and so "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[239] Similarly, in *Hosanna-Tabor*,[240] the Court—in a decision recently built upon by *Our Lady of Guadalupe*—[241] recognized the "ministerial exception" by turning, in large part, to the "background [against which] the First Amendment was adopted."[242] And in *American Legion*,[243] the Court—building upon the *Van Orden* plurality's historical approach to passive religious monuments[244]—upheld a war-cross memorial by affirming that text, history, and tradition were critical factors in understanding the demands of the Establishment Clause.[245] And so, while Establishment Clause doctrine has sometimes reflected a wavering commitment to originalism, the dominant trend—particularly in recent years—has been to rely upon text, history, and tradition as important considerations in interpreting the Establishment Clause. So too, the doctrine of judicial consistency counsels, should these considerations inform the other half of the Religion Clauses.

Next, take the Free Exercise Clause. While text, history, and tradition have featured less prominently in the Free Exercise Clause

237. Town of Greece v. Galloway, 572 U.S. 565 (2014).

238. *See* Marsh v. Chambers, 463 U.S. 783 (1983).

239. *Town of Greece*, 572 U.S. at 575–77 (citation omitted) (quoting *Cty. of Allegheny*, 492 U.S. at 670).

240. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

241. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

242. *Hosanna-Tabor*, 565 U.S. at 183, 188.

243. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087–90 (2019).

244. Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) (noting that its "analysis is driven both by the nature of the monument and by our Nation's history").

245. *See Am. Legion*, 139 S. Ct. at 2081–82, 2081 n. 16 (plurality opinion); *id.* at 2097 (Thomas, J., concurring in the judgment); *id.* at 2101–02 (Gorsuch, J., concurring in the judgment).

jurisprudence than in that of the Establishment Clause, there are two reasons why relying upon text, history, and tradition cohere with the doctrine of judicial consistency. These reasons relate to both the methodology and substance of existing Free Exercise Clause precedents.

The first reason is methodological. As an initial matter, several of the Supreme Court's early religious exercise cases relied upon text, history, and tradition. In the 1879 decision of *Reynolds*, for example, the Court explained that because "the word 'religion' is not defined in the Constitution. . . . [The Court] must go elsewhere . . . to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."[246] In reaching its conclusion that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order" (a conclusion since repudiated by *Cantwell* and *Yoder*, among other cases), the *Reynolds* Court focused extensively on the historical understanding and evolution of the free exercise of religion—turning to early colonial, state, and federal legislation, and the ratification history of the First Amendment.[247] Similarly, while much of the ensuing Free Exercise precedent did not expressly use a similarly originalist approach, several decisions relating to the free exercise of religion found text, history, and tradition to be important considerations. For example, in *Meyer v. Nebraska*,[248] the Court recognized that the Due Process Clause protected, among other things, the right "to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[249] For another example, in the *Torcaso* decision (discussed above), the Supreme Court relied upon the history

246. Reynolds v. United States, 98 U.S. 145, 162 (1879). Recall that this decision was a principal precedent upon which *Smith* relied. *See supra* Part II.A.1.

247. *See Reynolds*, 98 U.S. at 162–64.

248. 262 U.S. 390 (1923).

249. *Id.* at 399.

of the Religion Clauses to strike down religious tests,[250] while also collecting a variety of cases "in this Court [that] have thoroughly explored and documented the history behind the First Amendment, the reasons for it, and the scope of the religious freedom it protects," including the Supreme Court's decisions in *Reynolds* (upholding a polygamy ban against Free Exercise Clause challenge), and *Everson* (upholding public funding for busing to parochial school against Establishment Clause challenge).[251]

And even after *Smith*, the text, history, and tradition of the Free Exercise Clause has begun to reassert its importance. For example, the Supreme Court's recent decision in *Hosanna-Tabor* relied heavily on text, history, and tradition in reaching its holding (which rested on both the Establishment Clause and the Free Exercise Clause).[252] As discussed above, the Court in *Hosanna-Tabor* concluded that the Religion Clauses protected a church's ministerial selection decisions only after interpreting the Religion Clauses in light of the "background [against which] the First Amendment was adopted."[253]

The second reason for turning to text, history, and tradition is substantive. This substantive rationale, however, is strengthened by making an important assumption about what doctrine emerges from these considerations—specifically, by assuming that the text, history, and tradition of the Free Exercise Clause result in a doctrine that looks more like *Sherbert* and less like *Smith*. That assumption is contentious, with scholars and judges landing on both sides of this originalist debate. Some, like Justice Scalia and Professor Philip Hamburger, argue that the Free Exercise Clause *did not* originally protect religiously motivated conduct from neutral laws of general applicability (a doctrine that looks like *Smith*).[254] Others, like Justice

250. Torcaso v. Watkins, 367 U.S. 488, 490–92 (1961).

251. *Id.* at 492 & n.7 (citing, among other cases, Reynolds v. United States, 98 U.S. 145 (1879), and Everson v. Bd. of Educ., 330 U.S. 1 (1947)).

252. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

253. *See id.* at 182–83.

254. *See* Hamburger, *supra* note 2, at 916–17; Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).

O'Connor and Professor McConnell, argue that the Free Exercise Clause did originally provide such protections—exempting religiously motivated conduct from neutral laws of general applicability absent a sufficient government interest and sufficient tailoring in pursuit of that interest (a doctrine that looks, more or less, like *Sherbert*).[255]

In any event, to the extent that text, history, and tradition support a *Sherbert*-style heightened scrutiny regime, rather than a *Smith*-style rational basis regime, the substantive reasons for turning to text, history, and tradition on account of the doctrine of judicial consistency are particularly strong. That is so because such a move is supported by the decades of heightened-scrutiny precedent that prevailed before *Smith*, as well as being consistent with the substantive commitments that characterize the *Hosanna-Tabor* doctrine. In other words, under a particular set of assumptions about the doctrinal output of an originalist inquiry here, there is a strong substantive case rooted in the doctrine of judicial consistency for turning to text, history, and tradition in the context of the Free Exercise Clause.

There are, of course, several significant objections to the argument that the doctrine of judicial consistency requires replacing *Smith* with an inquiry into text, history, and tradition—again, assuming that *Smith* and originalism part ways. First, an inquiry into text, history, and tradition may be objectionable on its own terms—perhaps because originalism is legally flawed, normatively undesirable, or too difficult or costly to implement effectively. Second, an inquiry into text, history, and tradition may be objectionable from a comparative standpoint—perhaps because originalism does not govern all of the most relevant areas of constitutional law, or because incorporating originalism at this point would cause too much disruption in existing Free Exercise Clause precedent. Third, even if judicial consistency favors turning away from *Smith* and toward originalism, such consistency remains just one relevant

255. *See* McConnell, *supra* note 2, at 1427–28; *Smith*, 494 U.S. at 893–901 (O'Connor, J., concurring in the judgment).

consideration—with other considerations, such as legal merit and functional consequences remaining relevant as well. And fourth, even if this Article's basic analysis is right, it may be objected that more work remains to be done. Perhaps most important is the need to see what the substantive outcome of an inquiry into text, history, and tradition actually looks like—that is, whether it looks more like *Smith* or *Sherbert*. Any effort to replace the *Smith* doctrine with an inquiry into text, history, and tradition will need to respond to these objections. It will require analyzing the historical meaning of the Free Exercise Clause (and the Establishment Clause). It will also require explaining why that historical meaning matters here—explaining why originalism (or at least, greater focus on the historical meaning) makes sense, why it is supported in enough of the surrounding law, and why the relevant considerations (including judicial consistency) favor an originalist approach to the Free Exercise Clause over the approach and outcome in *Smith*. While this Article cannot fully respond to the relevant objections and offer the necessary response here, it can offer this modest conclusion: to the extent that doctrinal consistency matters, the Court's reliance on text, history, and tradition in the context of the Religion Clauses suggests that any post-*Smith* doctrine should at least account for the text, history, and tradition of the Free Exercise Clause.

* * *

In short, this Subpart has suggested a two-step argument for why the doctrine of judicial consistency provides some support for revisiting *Smith* and replacing it with a basic inquiry into the text, history, and tradition of the Free Exercise Clause. First, the doctrine of judicial consistency—described and explained above—is relevant not only to the question of whether to overturn a decision, but also to what to replace that decision with. And second, because text, history, and tradition reflect an important consideration in the Supreme Court's contemporary approach to the Religion Clauses generally, the doctrine of judicial consistency provides some support for turning toward text, history, and tradition for purposes of understanding the Free Exercise Clause specifically.

## CONCLUSION

This Article has suggested that one stare decisis consideration—a precedent's consistency with related judicial decisions—counsels against retaining *Smith* to the extent that *Smith*'s holding and rationale are compared to the Supreme Court's Religion Clauses jurisprudence more generally. To be sure, this Article has not resolved *Smith*'s stare decisis fate. Other stare decisis considerations are relevant (consider, for example, legal soundness, workability, factual assumptions, and reliance interests). And other doctrinal lines beyond the Religion Clauses merit comparisons to *Smith* as well (consider, for example, the Fourteenth Amendment). But if this Article is right, it suggests a simple takeaway. *Smith*'s approach to the Free Exercise Clause is in tension with many aspects of the Supreme Court's broader approach to the Religion Clauses. Those tensions matter both because they favor revisiting *Smith* and because they suggest how Free Exercise Clause doctrine should be reformed moving forward.