

APPLYING STRICT SCRUTINY: AN EMPIRICAL ANALYSIS OF FREE EXERCISE CASES

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ABSTRACT

Strict scrutiny and free exercise have had an uneasy relationship in American jurisprudence. In this Article, we trace when strict scrutiny has been required for the advancement of free exercise cases over time and show the disjoint between cases and legislation in the historical trajectory. Using a unique dataset of cases over a 25-year period, we look at what characteristics of cases help predict the relative success of the government against free exercise claims. We also look at what types of cases are likely to be brought under free exercise.

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I. INTRODUCTION

Strict scrutiny is relatively simple in theory: it is a balancing test with a thumb on the scales.¹ The balancing aspect asks whether the asserted government interest is so compelling as to demand individual liberty take a back seat. If the government interest is strong enough, the next question is whether the government could achieve its interest without burdening liberty as much. If not, the regulation survives.²

Yet applying this test raises complex issues. What is a compelling interest? Just how compelling, and how specific, must that interest be? At what point does accommodation become so difficult to implement, or so frustrate the government's interests, that no accommodation is required?³ In *Employment Division v. Smith*, the Supreme Court said judges could not resolve these questions when religious liberty was at issue. It was concerned that attempting to resolve them would create a “private right to ignore generally applicable laws.”⁴ It therefore held that free exercise cases did not receive strict scrutiny. But within a few years, for reasons explained below, strict scrutiny was again required in a large number of cases.

This article examines whether reinstating strict scrutiny created a “private right to ignore generally applicable laws,” or whether that perennial concern is ex-

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1. Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 919 (2009).
 2. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–118 (1991)). For the history of strict scrutiny, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–85, 1297–1302 (2007); Adam Winkler, *Fatal in Theory, Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798–801, 805–09 (2006).
 3. These questions describe the nature of our society. Cf. ALASDAIR MACINTYRE, *AFTER VIRTUE* 254 (3d ed. 2007) (“The nature of any society . . . is not to be deciphered from its laws alone, but from those understood as an index of its conflicts.”).
 4. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 886 (1990).

aggregated.⁵ Put differently, we ask whether the government can prevail against religious liberty claimants in a strict scrutiny regime. This article answers these questions in a comprehensive, empirical manner. Using an original data set of 365 federal cases, we coded and statistically analyzed each case from 1990 to 2015 that applied strict scrutiny. This revealed that strict scrutiny is still strict but complicated.

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After this Introduction, Parts II and III recount the history of strict scrutiny in the free exercise context and describe how courts apply strict scrutiny. Those sections are aimed primarily at readers unfamiliar with free exercise jurisprudence, but they also place the empirical results in context. Using an original dataset of cases, Part IV empirically analyses strict scrutiny free exercise cases. Part V concludes.

II. A BRIEF HISTORICAL OVERVIEW

Religious liberty was important to many Framers,⁶ so it is no surprise that they protected the free exercise of religion.⁷ But “free exercise” is not completely self-defining. Despite best efforts, scholars and judges alike have found its original meaning elusive.⁸ More specifically, although it is commonly accepted that “target-

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5. See Christopher C. Lund, *Keeping Hobby Lobby in Perspective*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 285, 298 (Micah Schwartzman et al. eds., 2016); Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 373–74 (2010).
 6. See, e.g., JAMES MADISON, *Memorial and Remonstrance against Religious Assessments* ¶ 1 (June 20, 1785), in 8 THE PAPERS OF JAMES MADISON, 10 MARCH 1784–28 MARCH 1786, at 295, 299 (Robert A. Rutland & William M.E. Rachel eds., 1973); *Virginia Declaration of Rights*, art. 16 (June 12, 1776), in 1 KATE M. ROWLAND, THE LIFE OF GEORGE MASON, 1725–1792, at 438, 441 (1892).
 7. U.S. CONST., amend. I; see also *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (incorporating the Free Exercise Clause to the states).
 8. Compare *City of Boerne v. Flores*, 521 U.S. 507, 564 (1997) (O’Connor, J., dissenting) (concluding “the Free Exercise Clause is properly understood as an affirmative guarantee” of re-

ing religious beliefs as such is never permissible,”⁹ there is great disagreement about whether (and to what extent) the Constitution protects the right to act on those beliefs. In *Reynolds v. United States*, the Court held that the Constitution protected beliefs but not practices.¹⁰ Otherwise, the Court feared, one might “become a law unto himself.”¹¹ But this strict distinction between belief and practice is both dangerous and impractical, because religious belief often involves action. We are therefore fortunate the Court never carried the distinction to its logical conclusion. But at the same time, *Reynolds*’s central concern is valid: *some* restriction on religious practice is needed. At some point, the law must separate permissible from impermissible religious action.¹²

When religious liberty cases re-emerged some years after *Reynolds*, the Court (consistent with *Reynolds*’s concerns) applied a relatively low level of scrutiny. In *Braunfeld v. Brown*, for instance, a plurality held that because Sunday closing laws were generally applicable (and not covertly aimed at religion), were within state power, and were reasonable, they did not violate Jewish shopkeepers’ right to religious freedom. This was true even though the laws required the shopkeepers to close on both Saturday (for the Sabbath) and Sunday (to comply with the statute).¹³ Quite unlike *Reynolds*, however, the Court’s opinion in *Cantwell v. Connecticut* said that

ligious exemptions) and Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511–12 (1990) (arguing a right to exemptions “is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation”) with *Boerne*, 521 U.S. at 539 (Scalia, J., concurring in part) (responding that the better reading of history was that no exemption from neutral, generally applicable laws are required) and Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 948 (1992) (same).

9. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality op.)).
10. *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).
11. *Id.* at 166.
12. *Id.* at 166 (positing human sacrifice as an example of impermissible religious action); see also David Carrasco, *Human Sacrifice: Aztec Rites*, in 6 ENCYCLOPEDIA OF RELIGION 4185, 4187 (Lindsay Jones ed., 2d ed. 2005) (describing an Aztec human sacrifice ritual).
13. 366 U.S. 599, 606–09 (1961) (plurality).

government could not “unduly” burden religious activity. Although government could regulate the time, place, and manner of preaching, it could not “wholly deny the right to preach” or condition religious speech on an individualized assessment of its content.¹⁴ To be sure, *Cantwell* overlaps significantly with the Free Speech Clause, but the Court itself reached its decision under the Free Exercise Clause.¹⁵

Justice Brennan dissented in *Braunfeld*, arguing that strict scrutiny should apply because religion is a fundamental right.¹⁶ His wish was granted in 1963 when *Sherbert v. Verner* said religious burdens had to be justified by reference to a “paramount interest” advanced via the least restrictive means—that is, under a strict scrutiny standard.¹⁷ The height of *Sherbert*-style strict scrutiny was *Wisconsin v. Yoder*, where the Court exempted the Old Order Amish from compulsory education laws.¹⁸ But religious claimants did not always win during the so-called “*Sherbert*-era.” Instead, it is generally accepted that courts actually applied something akin to intermediate scrutiny.¹⁹ The Court also exempted two significant sectors (prisons and the military) from strict scrutiny altogether.²⁰ Still, from a doctrinal standpoint, strict scrutiny was required.

14. 310 U.S. 296, 304 (1940).

15. *Id.* at 303–04.

16. See *Braunfeld*, 366 U.S. at 612–14 (Brennan, J., dissenting); see also *Prince v. Massachusetts*, 321 U.S. 158, 175 (1944) (Murphy, J., dissenting).

17. 374 U.S. 398, 406 (1963). For a discussion of *Sherbert*’s relationship to earlier cases, compare LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1255 (2d ed. 1988) (finding continuity between *Sherbert* and earlier cases) with Jesse H. Choper, *The Rise & Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 655 (1991) (finding discontinuity).

18. 406 U.S. 205 (1972); see also, e.g., *Hobbie v. Unemp’t Appeals Comm’n*, 480 U.S. 136 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

19. See, e.g., PAUL HORWITZ, *THE AGNOSTIC AGE* 178 (2010); TRIBE, *supra* note 17, at 1261–62; Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1500 (1999) (collecting authorities).

20. *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisons); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military).

But in 1990, *Employment Division v. Smith* said that heightened scrutiny—whether strict or intermediate—was not required when a neutral and generally applicable law burdened religious exercise.²¹ The majority’s core concern echoed *Reynolds*: requiring the government to demonstrate a compelling interest advanced through the least restrictive means would permit each citizen “to become a law unto himself.”²² Given America’s religious pluralism, requiring exemptions “would be courting anarchy.”²³ To top it off, the Court said weighing government interests against religious liberty was a task ill-suited for judges.²⁴ The Court thus swept *Sherbert* aside, stating it only applied when there was an “individualized . . . assessment” of religious conduct.²⁵

Smith was not the final word, however. Both Congress and the Court have since required that judges apply strict scrutiny in a significant number of cases. Although Congress cannot “overturn” *Smith*, it has created statutory protections for religious liberty.²⁶ Congressional action first came through the almost unanimously

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21. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990). *Smith* did not specify whether rational basis would apply instead of strict scrutiny, but lower courts have almost unquestioningly interpreted *Smith* as applying rational basis. *See, e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 671 (7th Cir. 2013); *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999).
 22. *Smith*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).
 23. *Id.* at 888; *see* Richard F. Duncan, *Free Exercise is Dead, Long Life Free Exercise: Smith, Lukumi & the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 853 (2001) (“[*Smith*] appears to have been determined by a formula that can be stated as follows: Religious Pluralism plus Religious Liberty equals Anarchy.”).
 24. *Smith*, 494 U.S. at 889 n.5; *cf.* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 759 (1992) (describing one of *Smith*’s “central objectives” as “freeing courts from the federal constitutional obligation to weigh state interests against the impact upon religion worked by state policies”).
 25. *Smith*, 494 U.S. at 884. This distinction blends into the Court’s *Lukumi* decision. *See infra* notes 72–81 and accompanying text; Duncan, *supra* note 23, at 860, 882. The Court also said *Sherbert* was limited to the unemployment context, *Smith*, 494 U.S. at 884, but this was almost certainly an incorrect reading of *Sherbert*, *see* Michael W. McConnell, *Free Exercise Revisionism & the Smith Decision*, 57 U. CHI. L. REV. 1109, 1122–23 (1990).
 26. *See City of Boerne v. Flores*, 521 U.S. 507, 524–29 (1997) (defining Congress’s powers under Section 5 of the Fourteenth Amendment).

enacted Religious Freedom Restoration Act (RFRA),²⁷ which expressly brought back the rule articulated in *Sherbert v. Verner* and *Wisconsin v. Yoder*.²⁸ RFRA still applies to the federal government,²⁹ and many states have adopted similar statutes.³⁰ In 1997, *City of Boerne v. Flores* struck down the federal RFRA as applied to the states, holding it exceeded Congress' power under Section 5 of the Fourteenth Amendment.³¹ Congress responded in 2000 by unanimously enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA).³² RLUIPA requires states to apply strict scrutiny if a land use or institutional regulation burdens religious beliefs.³³ And to avoid a repeat of *Boerne*, Congress passed RLUIPA under both the Commerce Clause³⁴ and the Spending Clause.³⁵ Though RLUIPA is narrower than RFRA, the two statutes together require strict scrutiny in a large number of cases.

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27. 42 U.S.C. §§ 2000bb–2000bb-4. For a history RFRA's passage, *see generally* Robert F. Drinan & Jennifer I. Huffmann, Religious Freedom Restoration Act: A Legislative History, 10 J.L. & RELIGION 531 (1993–94).
 28. 42 U.S.C. § 2000bb(b)(1); *see also* S. Rep. No. 103-111, at 7–8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897–98.
 29. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (applying RFRA); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (applying RFRA even though it “was not required as a matter of constitutional law”).
 30. *See State Religious Freedom Restoration Acts*, NAT. CONF. OF STATE LEGS. (Oct. 15, 2015) (collecting statutes), perma.cc/SWU8-R8UM. Some states also impose strict scrutiny as a matter of state constitutional law. *See* Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of Hobby Lobby's Implications for State Law*, 9 HARV. L. & POL'Y REV. 89, 104 n.75 (2015) (collecting cases).
 31. 521 U.S. 507, 529–36 (1997).
 32. 42 U.S.C. §§ 2000cc–2000cc-5; *see* David W. Dunlap, *God, Caesar & Zoning*, N.Y. TIMES, Aug. 27, 2000, at RE1. *Cutter v. Wilkinson* upheld RLUIPA against an Establishment Clause challenge. 544 U.S. 709, 714 (2005).
 33. 42 U.S.C. §§ 2000cc(a) (land use regulation), 2000cc-1(a) (prisons).
 34. 42 U.S.C. §§ 2000cc(b)(2), 2000cc-1(b)(2). The Second Circuit affirmed RLUIPA against an as-applied Commerce Clause challenge. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007). Most circuits avoid this question. *See, e.g.,* *Smith v. Allen*, 502 F.3d 1255, 1274 n.9 (11th Cir. 2007) (doubting Commerce Clause applicability); *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003) (not reaching the question).
 35. 42 U.S.C. §§ 2000cc(b)(1), 2000cc-1(b)(1). Several lower courts upheld RLUIPA under the Spending Clause. *See, e.g.,* *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 328 n.34 (5th Cir. 2009); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006).

Unlike Congress, the Court can actually change how *Smith* operates. And in 1993, the Court held that *Smith* only applies if the challenged regulation is both neutral and generally applicable.³⁶ This means judges must look closely at the statute to uncover any religious discrimination.³⁷ If discrimination is found, strict scrutiny applies.³⁸ Even after *Smith*, then, strict scrutiny exists in many (if not most) religious liberty cases. How courts apply that doctrine is our next inquiry.

III. STRICT SCRUTINY APPLIED

Religious claimants prevail under strict scrutiny if they can invoke strict scrutiny and demonstrate that there is a substantial burden,³⁹ *and* if the govern-

36. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). These limits were implied in *Smith*, 494 U.S. at 879–91, but *Lukumi* brought them to the fore and dispelled any doubt as to their existence. Those doubts were not unfounded given that *Smith* cited the *Lukumi* district court opinion as an example of religious claimants seeking an impermissible exemption. *Smith*, 494 U.S. at 888–89 (citing Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989)).

37. Commack Self-Serv. Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 211 (2d Cir. 2012) (citing Gillette v. United States, 401 U.S. 437, 452 (1971)).

38. *Lukumi*, 508 U.S. at 546.

39. The religious claimant must demonstrate the existence of a substantial burden. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069 (9th Cir. 2008) (en banc); see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006) (noting church met the burden); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384–85, 389–92 (1990) (holding religious claimants had not demonstrated a substantial burden).

If RFRA or RULIPA applies, strict scrutiny is required. If neither applies, *Lukumi* allows the policy to survive if it is neutral and generally applicable. Some lower courts seem to place the burden of proving neutrality or generality on religious claimants. See Stormans, Inc. v. Wieman, 794 F.3d 1064, 1079 (9th Cir. 2015); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 653 (10th Cir. 2006); cf. Miller v. Johnson, 515 U.S. 900, 916 (1995) (placing burden on plaintiff in political gerrymandering cases). But the Second Circuit treats neutrality and generality as a defense, meaning the government must justify imposing the burden by pointing to a neutral and generally applicable law. See Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 575 (2d Cir. 2002); cf. Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir. 2004) (reversing grant of summary judgment for government, remanding for government to establish generality and neutrality). In the end, this ambiguity is inconsequential: most courts simply review the facts for themselves without discussing the burden of proof. See, e.g., *Lukumi*, 508 U.S. at 531–46; Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012); Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).

ment cannot demonstrate both a compelling interest and least restrictive means.⁴⁰ Conversely, the government wins if it shows that it has a compelling government interest furthered through the least restrictive means, *or* if the claimant cannot demonstrate either a substantial burden or grounds (statutory or otherwise) for applying strict scrutiny.

A. Substantial Burden

The Free Exercise Clause only bars government actions that coerce someone⁴¹ into violating her sincere religious beliefs.⁴² It is not enough for government action to make religious exercise more difficult—such as when the government builds a road through a National Forest, incidentally making it more difficult for Native Americans to worship there.⁴³ There must instead be a forced choice between (1) following religious convictions and (2) avoiding punishment or securing government benefits.⁴⁴ For example, in *Sherbert v. Verner*, there was a forced choice between working on Saturday and receiving unemployment benefits.⁴⁵ In *Wisconsin v. Yoder*, the choice was between preserving Amish culture and paying a \$5 fine.⁴⁶ For

40. The government bears the burden of proof here. 42 U.S.C. §§ 2000bb-1(c), 2000cc(a)(1), 2000cc-1(a); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

41. RFRA protects corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). For a discussion of corporate religious liberty, *see generally* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman et al. eds., 2016). *Hobby Lobby* did not address whether the Constitution also protects corporations.

42. Religious beliefs are not determined by referencing theological texts. Instead, the Court asks whether the beliefs are sincerely held and subjectively religious. *United States v. Ballard*, 322 U.S. 78, 85–88 (1944).

43. *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450–51 (1988).

44. Note that these requirements need not be in the criminal code; requirements for optional benefits count for these purposes. *See Thomas*, 450 U.S. at 717–18; *Sherbert v. Verner*, 374 U.S. 398, 404–05 & n.6 (1963); *see also* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1446 & n.26 (1968) (citing *Sherbert* as one of many cases breaking down the right-privilege distinction).

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

46. 406 U.S. 205, 208–09 (1972).

a religious inmate, the choice might be between keeping Kosher (but starving) and eating unclean foods.⁴⁷

But it is not enough to face a choice; the burden must be “substantial.”⁴⁸ There is some confusion about which half of the choice must be substantial: is it the religious conviction or the gravity of the penalty? Professor Lupu noted this distinction even before *Smith*,⁴⁹ but the Court has not fully resolved the issue. Sometimes the Court looks at the spiritual conviction that comes after one violates a religious commandment, just as the Court did in *Wisconsin v. Yoder*.⁵⁰ But other times, it weighs the penalty imposed or the benefit withheld. This can be seen in *Hernandez v. Commissioner*⁵¹ and *Jimmy Swaggart Ministries v. Board of Equalization*.⁵² Frustratingly, the Court has recently taken to citing *both* conceptions.⁵³

Doctrinally, the better approach is to follow *Hernandez* and *Jimmy Swaggart* by looking at the cost of noncompliance.⁵⁴ This means a law might so impede religious exercise that it violates the Constitution even if that religious belief is not cen-

47. See *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007).

48. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391–92 (1990); *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (citing *Hobbie v. Unemp’t Appeals Comm’n*, 480 U.S. 136, 141–42 (1987); *Thomas*, 450 U.S. at 717–19; *Yoder*, 406 U.S. at 220–21).

49. Ira Lupu, *Where Rights Begin: The Problem of Burdens on The Free Exercise of Religion*, 102 HARV. L. REV. 933, 961 (1989) (distinguishing the “coercion theory” from the “substantial impact” theory of burdens); cf. Michael C. Dorf, *Incidental Burdens of Fundamental Rights*, 109 HARV. L. REV. 1175, 1214 (1996) (“[N]either *Sherbert* nor *Yoder* gives a satisfactory explanation of the substantiality threshold of RFRA.”).

50. *But see Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 n.12 (9th Cir. 2008) (en banc) (arguing that “the undue burden [in *Yoder*] was the penalty of criminal sanctions on the parents for refusing to enroll their children in such school”).

51. 490 U.S. at 699.

52. 493 U.S. 378, 391–92 (1990).

53. See *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–76 (2014).

54. See Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. (forthcoming 2016) (manuscript at 36–37) (advocating this approach), <http://ssrn.com/abstract=2728952>. We thank Trenton Van Oss for suggesting the “compliance” and “noncompliance” phrasing.

tral to or mandated by the religion. This is what several lower courts have done,⁵⁵ and for good reasons. First, *Lyng* requires that there be *some* element of coercion.⁵⁶ If there is no penalty for noncompliance, there is no coercion. Second, following *Yoder*'s approach requires looking into religious beliefs. Because even idiosyncratic religious beliefs are protected,⁵⁷ this inquiry is doomed from the start.⁵⁸ Quite simply, the Court is incompetent to judge religious beliefs.⁵⁹ Third, both *Lyng* and RLUIPA say that religious beliefs need not be "central" to one's religion for strict scrutiny to apply.⁶⁰ If non-central religious beliefs are protected, then the importance of the re-

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55. See, e.g., *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir.) *vacated and remanded sub nom.*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) ("Is the penalty for noncompliance substantial?"); *Korte v. Sebelius*, 735 F.3d 654, 682–94 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140–41 (10th Cir. 2013) *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Kaemmerling v. Lappin*, 553 F.3d 669, 678–79 (D.C. Cir. 2008) (citing *Thomas*, 450 U.S. at 718).
 56. 485 U.S. 439 (1988); see also Russell W. Galloway, *Basic Free Exercise Clause Analysis*, 29 SANTA CLARA L. REV. 865, 871 (1989).
 57. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).
 58. Both sides in the recent contraception mandate controversy putatively agree. *Compare* *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 219–226 (2d Cir. 2015) *vacated and remanded sub nom.*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (agreeing that courts could not gauge religious beliefs, but holding the challenged requirement did not actually trigger the religiously prohibited conduct) *with* *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 941–43 (8th Cir. 2015) *vacated and remanded sub nom.*, *Zubik*, 136 S. Ct. 1557 (holding the exemption scheme actually did impose a substantial burden); see also Recent Case, *Seventh Circuit Denies Preliminary Injunction to Wheaton College*, 129 HARV. L. REV. 851, 855 n.48 (2016) (discussing circuit split).
 59. 450 U.S. 707 (1981); see also Frederick Mark Gedicks, "Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA, 85 GEO. WASH. L. REV. (forthcoming 2017) (manuscript at 15) (discussing the "Religious Question Doctrine" and citing authorities), <http://ssrn.com/abstract=2657733>. But see *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (Posner, J.), *vacated by* *O'Leary v. Mack*, 522 U.S. 801 (1997) (vacating and remanding for further consideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997)); Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. 19, 20–21 (arguing religious beliefs must be considered, at least to some extent).
 60. 42 U.S.C. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457–58 (1988).

ligious belief drops out. To maintain the distinction of “substantial” from “unsubstantial” burdens, the *penalty* must therefore be what is substantial.⁶¹

But demonstrating a substantial burden is only one step on the path to victory for religious claimants. They must somehow invoke strict scrutiny—the inquiry to which we turn next.

B. Strict Scrutiny “Hook”

There are two ways to invoke strict scrutiny. First, either RFRA or RLUIPA might apply. Second, following *Lukmi*, the decision might make an “individualized determination” of a religious claim, or otherwise fail to have a neutral and generally applicable policy. Either situation raises the specter of discrimination. Courts generally apply RFRA or RLUIPA before looking at neutrality or generality. This is because “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”⁶² We follow the same sequence.

61. To be sure, this approach is not perfect. Because obedience to law is often a religious duty, any penalty can create a crisis of conscience. It would be bizarre if doctrine required religious claimants to be willing to break the law and then said such lawbreaking was not substantial enough. Following *Yoder* in addition to *Hernandez* and *Jimmy Swaggart* permits this analysis.

Moreover, a necessary caveat would be that discriminatory treatment is always a substantial burden. This essentially says that a burden becomes more onerous because it is intentionally applied against religious actors. *Cf.* *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 263 (3d Cir. 2007) (citing *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 170 (3d Cir. 2002) and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849–50 (3d Cir. 1994)); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007) (holding that “arbitrary and capricious” zoning practices are substantial burdens).

62. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citations omitted); *see* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1025–35 (1994) (discussing the “last resort” canon).

1. RFRA and RLUIPA

If RFRA or RLUIPA applies, strict scrutiny is available. RFRA applies to all federal government actions,⁶³ and it is relatively straightforward: if there is a substantial burden on religion, then government must demonstrate a compelling governmental interest furthered via the least restrictive means.⁶⁴

RLUIPA applies the same way as RFRA in most cases, but it only extends to institutions (like prisons) and to land use regulations (such as zoning).⁶⁵ RLUIPA also says governments may not “treat[] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”⁶⁶ The statute’s construction make clear that a substantial burden is not required; discriminatory treatment is enough.⁶⁷ The crucial inquiry, then, is whether a religious institution has been the victim of unequal treatment.⁶⁸ If there is unequal treatment, most cir-

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- 63. Several cases apply RFRA in bankruptcy cases, where creditors seek to recover religious donations. *See, e.g.*, *In re Young*, 82 F.3d 1407, 1417 (8th Cir. 1996), *vacated sub nom.* *Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997) (vacating and remanding for further consideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997)). *But see* *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015) (holding RFRA did not apply). We do not determine whether RFRA (or RLUIPA, for that matter) should apply in these quasi-governmental cases.
 - 64. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).
 - 65. The Prison Litigation Reform Act requires inmates to exhaust administrative remedies before seeking redress in court. 42 U.S.C. § 1997e(a).
 - 66. 42 U.S.C. § 2000cc(b)(1). There are other equality and nondiscrimination rules in § 2000cc(b)(2)–(4).
 - 67. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 381 (7th Cir. 2010) (en banc).
 - 68. Courts are split on how to define unequal treatment. *See Centro Familiar*, 651 F.3d at 1169 n.25 (noting circuit split); *see also* Andrew Cleves, Comment, *Equal Terms: What Does It Mean and How Does It Work: Interpreting the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA)*, 80 U. CIN. L. REV. 179, 187 (2011) (same).

cuits hold the regulation invalid *per se*,⁶⁹ but the Eleventh Circuit requires strict scrutiny.⁷⁰

2. Neutrality and Generality

Smith repeatedly emphasized that the laws challenged in that case were neutral and generally applicable.⁷¹ *Lukumi* made this into a prerequisite (or at least confirmed its existence as such): if a law fails to be neutral or generally applicable, it must receive strict scrutiny.⁷² Yet courts cannot merely examine the text of a given law to determine neutrality and generality; a lawmaker with any degree of political savvy would craft a facially neutral law that in practice only applied to religious adherents. So under *Lukumi*, a law lacks neutrality if its “object,” whether explicitly or implicitly, “is to infringe upon or restrict practices because of their religious motivation.”⁷³ General applicability refers to the law’s breadth: one that only restricts religiously motivated conduct is not generally applicable.⁷⁴ Both of these concerns are about “religious gerrymandering.”⁷⁵ This does not mean that governments must write perfectly-tailored laws, but that substantial over- or underbreadth may indicate that the law is actually targeted at religion.

For instance, *Lukumi* struck down local ordinances that targeted Santeria, a religion that requires animal sacrifice at important religious events. The ordinances

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- 69. *Centro Familiar*, 651 F.3d at 1171 n.37; *River of Life*, 611 F.3d at 370–71; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007).
 - 70. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1308 (11th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004).
 - 71. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 879–81 (1990).
 - 72. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).
 - 73. *Lukumi*, 508 U.S. at 533; *see also* *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 193–96 (2d Cir. 2014); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1130–31 (9th Cir. 2009).
 - 74. *See Lukumi*, 508 U.S. at 543; *see also Stormans*, 586 F.3d at 1134; *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 165 (3d Cir. 2002).
 - 75. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (2d Cir. 2012) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

prohibited “unnecessary” animal killings—but only when in a ceremony and when the purpose was not consumption. This permitted activities like deer hunting and kosher slaughter.⁷⁶ The Court deemed overblown concerns about public health and animal cruelty because the law applied even if the sacrifices were performed under sanitary conditions and because the city could have simply prohibited particular methods of slaughter.⁷⁷ This indicated non-neutrality. Similarly, the ordinances were not generally applicable because they failed to prohibit behavior that implicated the government’s concerns. For instance, they did not prohibit hunters from bringing their trophies home.⁷⁸ In the end, the Court concluded the ordinances were actually aimed at religion—and at Santeria in particular.

After *Lukumi*, “courts have taken a broad view of what it means for a law to fail the test of neutrality and general applicability.”⁷⁹ In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, a Muslim officer wanted to wear a short beard, but the police department had a rule against facial hair. The department granted medical exemptions, but it denied the officer’s request for a religious one. This failed under *Lukumi*. Then-Judge Alito wrote: “when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny.”⁸⁰ It was discriminatory enough to simply not give religious justifications the same recognition as secular reasons. The policy failed heightened scrutiny for similar reasons: the secular ex-

76. See *Lukumi*, 508 U.S. at 535–38.

77. See *id.* at 538–39.

78. See *id.* at 544.

79. HORWITZ, *supra* note 19, at 183.

80. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

emption demonstrated there was not a compelling interest in having clean-shaven officers.⁸¹

C. Compelling Government Interest

Once strict scrutiny is implicated, courts look for a compelling government interest. If this requirement “really means what it says,”⁸² then interests are compelling only when they are “of the highest order.”⁸³ Classic examples include preventing “threat[s] to public safety, peace or order.”⁸⁴ But it is not enough to cite a general interest. The government must instead demonstrate how its interest would be furthered *in that instance*.⁸⁵ And the policy’s breadth indicates, at least in part, whether the interest is compelling: “a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that suppos-

81. *Id.* at 366. Other cases have reached similar conclusions. *See, e.g.,* Rader v. Johnston, 924 F. Supp. 1450 (D. Neb. 1996). Not all exemptions indicate religious gerrymandering, however. *See, e.g.,* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134–35 (9th Cir. 2009) (holding that because secular exemption furthered policy goals but religious exemption would frustrate them, the regulation was valid); Am. Family Ass’n, Inc. v. FCC, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (finding rule neutral and generally applicable because it did not target or otherwise single out religion).

These differences result from competing approaches to defining neutrality and generality. *See* Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 143–44 (2009) (“Some courts have said that all laws are generally applicable unless they were enacted with anti-religious motive or single out religion for uniquely disadvantageous treatment. Other courts . . . have said that a law that is generally applicable is a law that applies to everybody. If a law has a secular exception that undermines its purpose, then it must also have a religious exception—or a compelling reason why not.”) (citations omitted).

82. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 888 (1990).

83. *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)); *see also* *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2741 (2011) (describing strict scrutiny as requiring a “high degree of necessity”); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“paramount interests”); *Korte v. Sebelius*, 735 F.3d 654, 685–86 (7th Cir. 2013). *But see* Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 582 (2015) (arguing for a broad reading of “compelling interest”).

84. *Sherbert*, 374 U.S. at 403.

85. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431–32 (2006); *Wisconsin v. Yoder*, 406 U.S. 205, 221, 236 (1972). As *O Centro* noted, this is similar to how strict scrutiny is applied elsewhere. *See* *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995).

edly vital interest unprohibited.”⁸⁶ This is a question of law, but it heavily depends on facts in individual cases.⁸⁷

Numerous articles have pointed out that *Sherbert*-era opinions repeatedly diluted the meaning of “compelling government interest” such that strict scrutiny appeared more like intermediate scrutiny.⁸⁸ This can make it difficult to predict which interests are actually compelling.⁸⁹ RFRA directly references *Sherbert*, which implies a narrow definition of “compelling interests.”⁹⁰ But *Lukumi* makes no such reference, and *Sherbert*-era opinions that arguably weaken the meaning of “compelling” are still good law. In short, then, compelling government interests are required, but it is sometimes unclear what that means. This article helps clarify this ambiguity.

D. Least Restrictive Means

At this point in the analysis, the question is not whether the government may burden religious exercise. It may. The question is whether the proposed policy *un-*

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86. *Lukumi*, 508 U.S. at 547 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part & concurring in judgment)).
 87. In the prison context, courts should defer to prison administrators on certain factual questions. *See Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (citing 146 CONG. REC. S7774, S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)); *cf. Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). For example, if an inmate wants to grow a beard but the prison objects on safety grounds, courts should defer to the prison’s safety assessment even though the legal question—whether the safety interest is compelling in this particular instance—is for the courts.
 88. *Supra* note 19; John P. Forren, *Revisiting Four Myths About the Peyote Case*, 8 U. PA. J. CONST. L. 209, 214 (2006); Robert D. Kamenshine, *Scrapping Strict Scrutiny in Free Exercise Cases*, 4 CONST. COMMENT. 147, 147, 154 (1987). Empirical data supports this position. *See Winkler, supra* note 2, at 815 (noting government policies survive in 59% of religious liberty cases, compared to 22% of free speech cases and 27% of discrimination cases).
 89. *See Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 222 (1994) (“The compelling interest test has fallen into disarray, especially in the lower courts.”).
 90. *See id.* at 224, 226 (arguing RFRA courts should adopt *Sherbert*’s stringent view of compelling interests).

duly burdens religious exercise.⁹¹ This “exceptionally demanding”⁹² comparative approach says that if there is way to achieve the government’s interest without imposing as great a religious burden, then the chosen policy is not the least restrictive alternative.⁹³

RFRA and RLUIPA clearly invoke the least restrictive means requirement.⁹⁴ And despite some confusion on this point, this is also the constitutional requirement. On occasion, the Court has said the Constitution imposes a “narrow tailoring” requirement.⁹⁵ (Narrow tailoring only requires that the policy be no more extensive than necessary; it does not require that the policy impose the least burden possible.⁹⁶) But as Justice Ginsburg noted in her *Hobby Lobby* dissent, pre-*Smith* cases *did* invoke the least restrictive means test, sometimes by name.⁹⁷ The *Hobby Lobby* majority was agnostic about this point for strategic, not doctrinal, reasons: to show RFRA protected corporations, it argued that “[b]y enacting RFRA, Congress went

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91. See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384 (1990) (quoting *Yoder*, 406 U.S. at 220).
 92. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014)).
 93. *Id.* at 864 (citing *Hobby Lobby*, 134 S. Ct. at 2780; *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 815 (2000)) (internal alterations omitted).
 94. 42 U.S.C. §§ 2000bb(1)(b)(2), 2000cc(a)(1)(B), 2000c-1(a)(2).
 95. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); see also *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (stating, without citation, that pre-*Smith* cases did not use a least restrictive means test); *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1182 (D. Wyo. 2015) (stating the Free Exercise Clause requires narrow tailoring, not the least restrictive means); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. FORUM 416, 429 (2016) (stating RFRA “had the potential, if read literally, to be much more restrictive than anything the Court had insisted upon in its pre-*Smith* jurisprudence”).
 96. See *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477–78 (1989); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). “Least restrictive means” is a subset of “narrowly tailored.” See Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1788 (1996) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).
 97. *Hobby Lobby*, 134 S. Ct. at 2793 (Ginsburg, J., dissenting) (citing *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); Thomas C. Berg, *The New Attacks on Religious Freedom Legislation and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 424 (1999)).

far beyond what this Court has held is constitutionally required.”⁹⁸ The (purported) move from narrow tailoring to least restrictive means was cited as an example of this shift—but it was an example the majority was happy to give up if proven incorrect.⁹⁹ And when *Lukumi* struck down the city’s ordinance because the asserted policy goals “could be achieved by narrower ordinances that burdened religion to a far lesser degree,”¹⁰⁰ it was requiring the city choose the least restrictive means—despite its mention of narrow tailoring.

IV. EMPIRICAL ANALYSIS

This article rides the coattails of Professor Winkler’s pivotal study on strict scrutiny, which persuasively demonstrated that strict scrutiny is not “strict in theory, fatal in fact.”¹⁰¹ It builds on that study by asking *how* the government is able to survive strict scrutiny. Even though Part III describes the leading strict scrutiny precedents, an empirical analysis of a large number of cases provides further evidence of *actual* court behavior, rather than just an academic discussion. This is not an attempt to determine whether *Smith* made matters better or worse. That would

98. 134 S. Ct. at 2767 & n.18.

99. *Id.* at n.18.

100. *Lukumi*, 508 U.S. at 546.

101. See generally Winkler, *supra* note 2. Another article considered how the U.S. Circuit Court of Appeals treated religious exemption claims from 1980–1990. James E. Ryan, Note, *Smith & the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416–37 (1992). Our article differs, however, in substantial respects: it considers cases from 1990–2015, it includes all federal courts, and it is more explicitly empirical.

This is not the first empirical study of free exercise cases, but most others have looked at judicial ideology and decisionmaking. See, e.g., Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371 (2013); Gregory C. Sisk, Michael Heise, & Andrew P. Morris, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004). To the extent studies did not focus on judicial decisionmaking, they tended to be incredibly limited in scope. See, e.g., Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 251–52 (2012) (finding that Muslim claimants won about 22.2% of cases, compared to the 38.0% success rate for other religions); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 585 (1998) (arguing “RFRA failed to produce any substantial improvement in the legal atmosphere surrounding religious liberty”).

require analyzing cases before or after *Smith*. Our analysis is instead a snapshot that seeks to understand what it takes to succeed on a free exercise claim.

To begin, we compiled a list of published, federal cases from 1990 to 2015.¹⁰² The search term for these cases was intentionally broad, as the goal was to find every case that mentioned both strict scrutiny and free exercise.¹⁰³ Running this search term in WestlawNext produced a list of 1,578 cases.

Next, we read each case to determine whether it actually applied strict scrutiny in the free exercise context. For example, if a case applied strict scrutiny in a free speech case and then mentioned that the plaintiff’s free exercise claim was irrelevant, the case was set aside. If the court directly considered the free exercise claim but found there was no substantial burden on the plaintiff’s religious beliefs, the case was also set aside (although we briefly consider trends within these cases in Part IV.A). And if the court found that there was no strict scrutiny “hook,” and therefore applied rational basis under *Smith*, that case was not considered any further. In each such instance, the case was simply beyond this article’s scope, which is only concerned with how strict scrutiny applies to free exercise cases.

This winnowing process reduced the number of cases to 265.¹⁰⁴ These cases were coded to quantify the following information: date; District, Circuit, or Supreme Court; geographic region; procedural posture; the strict scrutiny “hook” (if indi-

102. Technically, we started in April 1990, as we excluded cases before *Smith*.

103. The following search term (for published, federal opinions) was entered into WestlawNext:
adv: DA(1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004
2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015) & “strict scrutiny” “strictest
scrutiny” “exacting scrutiny” ((compelling /2 interest) /s (narrow! “least restrictive”)) &
“free exercise” “religious liberty” “religious freedom” “freedom #of religion”

See Winkler, *supra* note 2, at 810 n.101 (using a similar search term). The search was first run in October 2015. It was run again in January 2016 to collect opinions issued between October and December 2015.

104. Sixteen cases appeared twice in the dataset because of appeals and fourteen cases appear twice for different motions. Twenty cases appear multiple times, for a total of 52 observations, because they have multiple claims that the court analyzed individually.

cated); the asserted government interest; the outcome of the case; and the court’s reasoning. Summary statistics appear in Table 1.¹⁰⁵ With this dataset in hand, we can trace each stage of the process discussed in Part III. In each subpart, we first look at the summary statistics related to that stage; then we gauge the likelihood of succeeding on a free exercise claim under different factors in that stage.

A. Substantial Burden

Given that religious burdens are specific to a religion, we first look to whether there may be significant differences in success rates across burdens and religion. Although the remaining analyses in this Article look to only those cases that passed the substantial burden threshold, we did collect data for those cases in which there was a discussion of strict scrutiny’s potential application, but where the court ultimately decided there was no substantial burden. We speculate that these are “borderline” cases: if the lack of burden was so obvious, no discussion of a potential application would be needed at all. 49 cases in our dataset meet this criteria. The plurality of these cases ($n=17$) related to prison policies and to Judaism ($n=20$).

Table 1 shows the differences between these borderline cases and cases that pass the substantial burden test, using a z-test to test significant differences in proportions. We found significant differences in several domains. Reassuringly, there are significant differences in whether the policy is the least restrictive means or not—presumably, the vast majority of cases underlying those non-substantial burden cases should have policies that are the least restrictive means ($n=33$). Indeed, this statistic demonstrates the relationship between the scope of the policy and the extent of the perceived burden, in turn suggesting that substantial burdens are more about the cost of noncompliance than the centrality of belief.

105. Descriptions of specific categories appear later in this Article, as well as in the Appendix.

Similarly, there are significant differences in the discussion of compelling interests. 76% of the non-substantial burden cases are found to have a compelling interest, in any case, but that number drops to 40% among the substantial burden cases. Additionally, there are significant differences in the proportion of cases at the motion to dismiss stage or in cases that are appeals. This makes sense, because having a non-substantial burden might be grounds for dismissal if there are no additional causes of action. Altogether, the outcome for defendants is less favorable under strict scrutiny: when a substantial burden is not found, defendants will ultimately succeed on their motion (or defeat plaintiff's motion) in only 75% of the claims in our dataset, compared to 25% of victories that successfully pass this first stage of free exercise.

TABLE 1: SUMMARY STATISTICS

	Substantial Burden (N=265)		No Substantial Burden (N=49)		Significant Differences [1]
	Number of Cases	Percentage	Number of Cases	Percentage	
Court [2]					
Supreme Court	4	1.5%	0	0.0%	
First Circuit	9	3.4%	1	2.0%	
Second Circuit	44	16.6%	8	16.3%	
Third Circuit	22	8.3%	3	6.1%	
Fourth Circuit	16	6.0%	3	6.1%	
Fifth Circuit	20	7.6%	1	2.0%	
Sixth Circuit	14	5.3%	2	4.1%	
Seventh Circuit	26	9.8%	3	6.1%	
Eighth Circuit	15	5.7%	4	8.2%	
Ninth Circuit	47	17.7%	11	22.5%	
Tenth Circuit	25	9.4%	4	8.2%	
Eleventh Circuit	11	4.2%	6	12.2%	
D.C. Circuit	12	4.5%	3	6.1%	
Government's Role					
Plaintiff	15	5.7%	5	10.2%	
Defendant	240	90.6%	43	87.8%	
Neither [3]	10	3.8%	1	2.0%	

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Motions [4]

Preliminary injunction	57	21.5%	5	10.2%	
Motion to dismiss	22	8.3%	13	26.5%	**
Summary judgment	128	48.3%	24	49.0%	

Appeals

Yes	88	24.9%	9	81.6%	*
By plaintiff	58	16.4%	6	66.7%	***
By defendant	29	8.2%	2	22.2%	
Cross-appeal	1	0.3%	1	11.1%	***
No	177	50.1%	40	18.4%	*

Criminal Case

Yes	11	4.2%	3	6.3%	
No	254	95.8%	45	93.8%	

RFRA

Yes	111	41.9%	27	55.1%	
No	154	57.0%	22	44.9%	

RLUIPA

Yes	107	40.4%	17	34.7%	
No	158	59.6%	32	65.3%	

Lukumi

Yes	13	4.9%	1	2.0%	
No	250	94.3%	48	98.0%	
Question of fact unresolved	2	0.8%	0	0.0%	

Sector

Prison	128	47.9%	17	35.4%	
Nature	21	8.1%	4	8.3%	
Bodily Integrity	45	17.2%	11	22.9%	
Institutional	54	20.7%	10	20.8%	
Money	9	3.5%	2	4.2%	
Family	3	11.5%	1	2.1%	*
Procedural	2	0.8%	1	2.1%	
Other	3	1.2%	2	4.2%	

Religion

Christianity	87	33.3%	20	40.8%	
Judaism	20	8.4%	5	10.2%	

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Islam	41	18.3%	9	18.4%	
Rastafarian	10	3.6%	0	0.0%	
Sikh	11	3.3%	0	0.0%	
Native American	48	14.7%	5	0.1%	
Other	48	18.5%	10	20.4%	
Who Won? [5]					
Plaintiff	179	67.8%	12	24.5%	***
Defendant	67	25.4%	37	75.5%	***
Question of fact unresolved	18	6.8%	0	0.0%	
Compelling Interest					
Yes	107	40.4%	38	77.6%	***
Not compelling as presented	118	44.5%	5	10.2%	***
Never compelling	40	15.1%	6	12.2%	
Compelling Interest Stated [6]					
No asserted interest	35	13.2%	1	2.0%	**
Prison security and security	95	35.9%	18	36.7%	
Public health	45	17.0%	9	18.4%	
Gender equality	29	10.9%	6	12.2%	
Preserving Native American heritage	6	2.3%	2	40.8%	***
Land/wildlife preservation	17	6.4%	3	6.1%	
Enforcing Establishment Clause	11	4.2%	4	8.2%	
Enforcing other laws	29	10.9%	9	18.4%	
General operations	69	26.0%	9	18.4%	
Public policy	10	3.8%	2	4.1%	1
Protection of groups	8	3.0%	3	6.1%	
Least Restrictive Means					
Yes	52	19.6%	33	67.4%	***
No	85	32.1%	2	4.1%	***

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Question of fact unresolved	38	14.3%	2	4.1%	**
Not reached	90	34.0%	12	24.5%	

Notes:

- [1] * Significant at 5%, ** Significant at 1%, *** Significant at .1%
- [2] The circuit in which this case was located; not all cases were heard by circuit courts.
- [3] Typically bankruptcy proceedings.
- [4] Filed by either plaintiff or defendant.
- [5] Filed by either plaintiff or defendant.
- [6] Victory by plaintiff is on non-free exercise grounds, i.e. equal protection.

Of particular interest is the finding that family-related cases (for example, forcing family members to testify against one another) are more represented among substantial burden cases, though these are a relatively small proportion. Altogether, these cases are borderline for a reason, and it could very well be that cases that are immediately dismissed on account of their insubstantial burden on religious exercise have different demographics.

We turn now exclusively to the subset of cases in which burdens have been deemed substantial ($n=265$). As seen in Table 1, the plurality of these cases are prison related (48%), followed by institutional pressures on free exercise (for example, zoning or education). The plurality of cases relate to Christianity (33%), followed by other religions (19%)¹⁰⁶ and Islam (18%).

B. Compelling Government Interests

Table 2 shows the “success rate” of asserted compelling interests among various categories—that is, the percentage of cases where the policy appears to further a compelling interest. Based on summary statistics of success rates alone, there

106. Our religion categories are Christianity, Judaism, Islam, Rastafarian, Sikh, all Native American religions, and Other (which is comprised of groups such as Buddhism, Wicca, Santeria, and Odinism).

appears to be a variety of success rates based on the category of the compelling interest stated and the sector of the case. For instance, a case relating to nature (namely wildlife and national parks) has a 76% compelling interest success rate, whereas a case relating to bodily integrity (for example, contraception, autopsies) has a 19% success rate. In parallel, when the government states that its compelling interest is land/wildlife preservation, it has a 77% success rate, but when it claims a compelling interest in public health, that success rate drops to 25%.¹⁰⁷

To test the statistical validity of these differences, we followed up with a logistic regression analysis with the statistical software STATA, into which the variables in Table 2 were entered. Each of the categories was compared to the baseline model, which was set as a prison case impacting Christianity, but with no stated compelling interest.¹⁰⁸

TABLE 2: COMPELLING INTEREST

	Compelling Interest		Logistic Regression		
	Number of Cases	Percentage with this outcome	Odds ratio	Standard error	Significance [1]
Criminal Case					
Yes (N=11)	9	81.8%	4.0	4.8	
No (N=251)	97	38.7%			
RFRA					
Yes (N=114)	56	49.1%	3.1	1.8	*
No (N=151)	51	33.8%			

107. Note that these rates are not identical because a case involving nature, for example, may not necessarily name life/wildlife preservation as a compelling interest, although it often does. *See, e.g.,* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007) (the government cited complying with the multi-use mandate for national parks, ensuring parkgoers' safety, and avoiding an Establishment Clause violation as reasons to use artificial snow made from treated sewage on a ski area atop a sacred mountain).

108. With regard to overfitting concerns, we tested subsets of variables (e.g., sector only, compelling interest only) and found that results were similar to the full model.

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RLUIPA

Yes (N=107)	41	38.3%	1.9	1.1
No (N=158)	66	41.8%		

Lukumi

Yes (N=13)	4	30.8%	0.7	0.7
No (N=250)	103	41.2%		
Question of fact unresolved (N=11)	0	0.0%		

Sector

Prison (N=128)	62	48.4%		
Nature (N=21)	16	76.2%	1.0	0.9
Bodily Integrity (N=45)	8	17.8%	0.1	0.1
Institutional (N=54)	10	18.5%	0.3	0.2
Money (N=9)	4	44.4%	1.3	1.7
Family (N=3) [2]	3	100.0%		
Procedural (N=2) [2]	2	100.0%		
Other (N=3)	2	66.7%	3.3	4.9
				*

Religion

Christianity (N=88)	23	26.1%		
Judaism (N=20)	7	35.0%	0.5	0.4
Islam (N=41)	19	46.3%	1.4	0.8
Rastafarian (N=10)	6	60.0%	1.2	1.0
Sikh (N=11) [2]	11	100.0%		
Native American (N=48)	30	62.5%	1.4	0.9
Other (N=48)	23	47.9%	1.2	0.7

Compelling Interest Stated

No asserted interest (N=35)	5	14.3%		
Prison security and security (N=95)	52	54.5%	6.7	4.4
Public health (N=45) [3]	11	24.4%		
Gender equality (N=29) [2]	7	24.1%		
Preserving Native American heritage (N=6) [2]	5	83.3%		
Land/wildlife preservation (N=17)	13	76.5%	16.7	26.2

Enforcing Establishment Clause (N=11)	3	27.3%	8.8	9.2	*
Enforcing other laws (N=29)	12	41.4%	4.3	4.2	
General operations (N=71)	31	43.7%	7.2	5.6	*
Public policy (N=10)	7	70.0%	23.5	27.5	**
Protecting groups (N=8)	3	37.5%	2.4	3.5	
Multiple interests [2]	81		8.6	5.7	***

Notes:

[1] * Significant at 5%, ** Significant at 1%, *** Significant at .1%

[2] The logistic regression predicted outcomes perfectly here; because of this, the software dropped these automatically from the logistic regression analysis.

[3] Because of the nature of the logistic regression analysis, cases with multiple stated compelling interests were grouped separately. This led to, for example, public health not being represented in the logistical analysis, since it was always grouped together with another variable.

We found that the odds of having a compelling interest are much higher in cases invoking RFRA, while policies in the institutional sector are more likely to fail the compelling interest prong of strict scrutiny. With regard to articulated compelling interests, a court would find nearly anything more favorable than not stating one at all (our baseline). However, wildlife preservation, enforcing laws, and protecting groups were not significantly different from not stating a compelling interest at all.

Finally, the model was able to perfectly predict success rates for cases in the family and procedural sectors, for cases involving the Sikh faith, and cases in which the compelling interest was public health, gender equality, or preserving Native American heritage. When this occurs, it suggests that the odds of success are either very high or very low—that is, these factors either predict that the policy will pass or fail the compelling interest prong. As seen from Table 2, the court finds a compelling interest for all of the family, procedural and Sikh cases in our dataset. But this is less clear for the other compelling interests stated. In our dataset, we find that public health and gender equality are nearly always bound together in cases involving

contraception funding, and that that is often an insufficiently compelling interest for the court.¹⁰⁹ Similarly, preserving Native American heritage does not appear to be an interest that stands on its own—it is always bound with other interests, most often wildlife preservation. Given that stating multiple interests is generally more likely to yield success on the compelling interest prong, this may explain why the majority of cases citing Native American heritage pass the compelling interest prong.

C. Least Restrictive Means

After a policy passes the compelling interest prong, the court looks to the least restrictive means prong. Like Table 2, Table 3 shows the “success rate” of least restrictive means justifications. Here, however, these rates are based on having passed the compelling interest analysis. Again, there appear to be differences by criminal case status, sector and even religion at this stage. But because significantly fewer cases passed the compelling interest analysis ($n=107$) and the least restrictive means prong, we were limited in our statistical ability to appropriately analyze whether specific sectors, religions, or compelling interests have particularly high success rates.

TABLE 3: COMPELLING INTEREST AND LEAST RESTRICTIVE MEANS

	Number of Cases	Percentage
Criminal Case		
Yes (N=9)	7	77.8%
No (N=97)	40	41.2%
RFRA		
Yes (N=56)	28	50.0%
No (N=51)	19	37.2%

109. See, e.g., *Zubik v. Sebelius*, 983 F. Supp. 2d 576 (W.D. Pa. 2009), *rev'd sub nom. on other grounds*, *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

RLUIPA

Yes (N=41)	14	34.2%
No (N=66)	33	50.0%

Lukumi

Yes (N=4)	0	0.0%
No (N=103)	47	47.0%

Sector

Prison (N=62)	26	41.9%
Nature (N=16)	10	62.5%
Bodily Integrity (N=8)	0	0.0%
Institutional (N=10)	5	50.0%
Money (N=4)	3	75.0%
Family (N=3)	2	66.7%
Procedural (N=2)	1	50.0%
Other (N=3)	0	0.0%

Religion

Christianity (N=23)	7	30.4%
Judaism (N=7)	4	57.0%
Islam (N=19)	3	15.8%
Rastafarian (N=6)	5	83.3%
Sikh (N=11)	0	0.0%
Native American (N=30)	16	53.3%
Other (N=23)	12	52.2%

Compelling Interest Stated [3]

No asserted interest (N=5)	2	40.0%
Prison security and security (N=52)	19	36.5%
Public health (N=11)	3	6.7%
Gender equality (N=7)	1	14.3%
Preserving Native American heritage (N=5)	1	20.0%
Land/wildlife preservation (N=13)	9	69.2%
Enforcing Establishment Clause (N=3)	3	100.0%
Enforcing other laws (N=12)	9	75.0%
General operations (N=30)	11	36.7%
Public policy (N=7)	1	14.3%
Protecting groups (N=3)	1	33.0%
Multiple Interests (N=36) [3]	12	33.0%

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Notes:

[1] * Significant at 5%, ** Significant at 1%, *** Significant at .1%

[2] The logistic regression predicted outcomes perfectly here; because of this, the software dropped these automatically from the logistic regression analysis.

[3] Includes outcomes from cases analyzed in other compelling interests.

Still, some of the summary statistics are of particular interest. For instance, even though cases that cite upholding the Establishment Clause have a 27% success rate on the compelling interest prong, if a case passes that threshold, they are likely to find success on least restrictive means and on strict scrutiny more broadly. However, looking to the three cases that pass strict scrutiny on account of the Establishment Clause, it appears that all three cases have unusual facts and unsympathetic plaintiffs. One plaintiff was a prisoner who refused to be housed with an inmate of a different race,¹¹⁰ another was a teacher fired due to frequent classroom proselytizing,¹¹¹ and the third was a student who wanted his public school district to pay for his Catholic school translator.¹¹² This suggests that the Establishment Clause is an otherwise weak interest for the government to cite.

By contrast, though public policy cases have a 70% success rate as a compelling interest, they only have a 14% success rate when examined for least restrictive means. The only case that succeeded under this scenario is *Combs v. Homer Center School District*, where the plaintiffs home-schooled their children but refused to turn in a curriculum for review by the district.¹¹³

110. See *Walker v. Beard*, 789 F.3d 1125, 1131–32 (9th Cir. 2015).

111. See *Helland v. S. Bend Cmty. Sch. Corp.*, 93 F.3d 327, 329 (7th Cir. 1996).

112. See *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1192 (9th Cir. 1992), *rev'd on other grounds*, 509 U.S. 1 (1993).

113. 468 F. Supp. 2d 738 (W.D. Pa. 2006).

D. Discussion

The fact is that many strict scrutiny cases are favorable to the religious claimants. Table 4 (on the next page) shows the breakdown of potential outcomes of each case. The majority of cases proceed to the next stage. Strict scrutiny appears to be strict. But the same time, cases are heterogeneous.

As with any quantitative analysis, we are cautious given the small number of cases we have. It is difficult to establish causality with the few cases that pass both prongs of strict scrutiny. Nonetheless, to the authors' knowledge, this is the first quantitative analysis of its kind in the post-*Smith* era. In looking at both how frequently certain cases advance through strict scrutiny analysis and also their representation, we are able to speak to trends more precisely than has been done before.

TABLE 4: SUCCESS AT EACH STAGE

	Compelling Interest and Least Restrictive Means		Compelling Interest but not Least Restrictive Means		Neither Compelling Interest nor Least Restrictive Means		Non-Government Victory at this Stage [1]	
	Number of Cases	Percentage with this outcome	Number of Cases	Percentage with this outcome	Number of Cases	Percentage with this outcome	Number of Cases	Percentage with this outcome
Motions [2] Preliminary injunction (N=57) Motion to dismiss (N=22) Summary judgment (N=128)	3	5.3%	11	19.3%	17	29.8%	44	77.2%
	6	27.3%	1	4.6%	1	4.6%	13	59.1%
	21	16.4%	15	11.7%	18	14.1%	76	59.4%
	20	22.7%	10	11.4%	14	15.9%	52	59.1%
	13	22.4%	5	8.6%	10	17.2%	31	53.5%
Appeals Yes (N=88) By plaintiff (N=58) By defendant (N=29) No (N=176)	7	24.1%	4	13.8%	4	13.8%	20	69.0%
	27	15.3%	28	15.9%	33	18.8%	118	67.1%
Criminal Case Yes (N=11) No (N=251)	7	63.6%	1	9.1%	0	0.0%	3	27.3%
	40	15.9%	36	14.3%	47	18.7%	166	66.1%

RFRA									
Yes (N=114)	28	24.6%	23	20.2%	21	18.4%	73	64.0%	
No (N=151)	19	12.6%	15	9.9%	26	17.2%	98	64.9%	
RLUIPA									
Yes (N=107)	14	13.1%	11	10.3%	21	19.6%	66	61.7%	
No (N=158)	33	20.9%	27	17.1%	26	16.5%	105	66.5%	
Lukumi									
Yes (N=13)	0	0.0%	4	30.8%	3	23.1%	12	92.3%	
No (N=250)	48	18.8%	34	13.7%	44	17.6%	158	63.2%	
Question of fact unresolved (N=11)	0	0.0%	0	0.0%	0	0.0%	1	50.0%	
Sector									
Prison (N=128)	25	19.5%	22	17.2%	15	12.1%	69	55.7%	
Nature (N=21)	10	47.6%	6	28.6%	1	4.8%	11	52.4%	
Bodily Integrity (N=45)	0	0.0%	6	13.3%	14	31.1%	39	86.7%	
Institutional (N=54)	5	9.3%	2	3.7%	14	25.9%	43	79.6%	
Money (N=9)	3	33.3%	1	11.1%	1	11.1%	1	11.1%	
Family (N=3)	2	66.7%	1	33.3%	0	0.0%	1	33.3%	
Procedural (N=2)	1	50.0%	1	50.0%	0	0.0%	1	50.0%	
Other (N=3)	0	0.0%	2	66.7%	0	0.0%	1	100.0%	

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Religion									
Christianity (N=88)	Judaism (N=20)	7	8.0%	11	12.5%	21	23.9%	66	75.0%
	Islam (N=41)	4	20.0%	1	5.0%	7	35.0%	11	55.0%
	Rastafarian (N=10)	3	7.3%	10	24.4%	6	14.6%	31	75.6%
	Sikh (N=11)	5	50.0%	0	0.0%	2	20.0%	3	30.0%
	Native American (N=48)	0	0.0%	0	0.0%	1	9.1%	6	54.6%
	Other (N=48)	16	33.3%	10	20.8%	4	8.3%	26	54.2%
		12	25.0%	7	14.6%	6	12.5%	29	60.4%
Compelling Interest Stated [3]									
No asserted									
interest (N=35)	Prison security and security (N=95)	2	5.7%	1	2.9%	5	14.3%	29	82.9%
	Public health (N=3)	19	20.0%	18	19.0%	14	14.7%	51	53.7%
	Gender equality (N=29)	3	6.7%	7	15.6%	15	33.3%	35	77.8%
	Preserving Native American heritage (N=6)	1	3.5%	6	20.7%	12	41.4%	26	89.7%
	Land/wildlife preservation (N=17)	1	16.7%	4	66.7%	1	16.7%	5	83.3%
		9	52.9%	4	23.5%	1	588.0%	8	47.1%

Enforcing Establishment Clause (N=11)	3	27.3%	0	0.0%	1	9.1%	8	72.7%
Enforcing other laws (N=29)	9	31.0%	2	6.9%	4	13.8%	19	65.5%
General operations (N=69)	11	15.9%	11	15.9%	14	20.3%	43	62.3%
Public policy (N=10)	1	10.0%	4	40.0%	2	20.0%	1	60.0%
Protecting groups (N=8)	1	12.5%	2	25.0%	0	0.0%	3	37.5%

Notes:

[1] The victory statistic is different than "neither compelling interest, nor narrowly tailored" in that we include cases that advance to the next stage on the high likelihood of these factors being met (e.g., restraining orders). For instance, these include cases in which least restrictive means have not yet been decided. For this reason, the number of cases in a row will not sum up to the total N.

[2] Filed by either plaintiff or defendant.

[3] Victory by plaintiff is on non-free exercise grounds, i.e. equal protection.

VI. CONCLUSION

Whether and how to regulate religious activity has been a long and contentious struggle. Even though *Smith* eliminated strict scrutiny for neutral, generally applicable laws, *Lukumi* (along with RFRA and RLUIPA) revived it. Despite *Smith*'s concerns, therefore, courts still often require the government to demonstrate a compelling interest furthered through the least restrictive means. But are there de facto guidelines that courts might use?

In our analysis, we looked at what characteristics allow free exercise claims through each prong of the analysis: substantial burden, compelling interest, and least restrictive means. We found that a majority (75%) of cases with free exercise claims succeed on a motion or judgment if they pass the substantial burden test, as opposed to 25% if they do not. This jump in success rates suggests that the substantial burden may be the most substantial hurdle in this process. But there appear to be few differences in the relative distribution of sectors, religion, and compelling interest between cases that passed or failed the substantial burden test. This suggests that, for the most part, no category of facts are more sympathetic to judges.¹¹⁴

Whether a law passes the compelling interest and least restrictive means prongs varies on the type of case and the issues addressed. Though that seems obvious, our dataset allowed us to see what cases have been most represented at each step. Prison-related cases—in which the government invokes prison safety and security as a concern—make up the plurality of cases represented in a compelling interest analysis. But the sectors and interests that passed the compelling interest test at the highest rates (for example, family and procedural sectors, or preserving Native American heritage) were relatively small. This suggests that success turns

114. Note, however, that the stated interest of “preserving Native American heritage” represented a statistically higher proportion of cases rejected on substantial burden grounds relative to other interests.

on the specific facts of the case. Yet compelling interest and least restrictive means do not always run together, as a substantial portion of cases are found to have laws supporting compelling interests but without the least restrictive means. For example, 83% of cases with preserving Native American heritage pass compelling interest, but only 20% pass the least restrictive means test. Moreover, courts usually defer to the religious claimant when a question of fact is presented, allowing the case to continue.

This area is ripe for future research. Although we have limited our scope to religious liberty and free exercise, it is likely that the standards set by the court may spill over into other areas—particularly in cases with hybrid claims. Similarly, some are hesitant to apply strict scrutiny in free exercise cases because it might weaken strict scrutiny elsewhere.¹¹⁵ A comprehensive study of other contexts, such as free speech, is needed before the truth of this claim can be determined.¹¹⁶

The use of strict scrutiny has been well documented in other domains, but occasionally that means statements about strict scrutiny are distilled into catch-all analyses and flowcharts. Yet as we see here, strict scrutiny is tailored to the facts. Government can—and does—win cases against religious claimants. But when it does win, it does so only in the instant case.¹¹⁷ Put simply, strict scrutiny makes the government prove its case in every case.

115. See Volokh, *supra* note 19, at 1500.

116. See Lund, *Perspective*, *supra* note 5, at 299 n.62 (doubting the existence of such evidence).

117. If its asserted interest is not deemed compelling, it is almost always because it was not compelling as applied.

APPENDIX I

Descriptions of Selected Case Categories

Sector:

- **Bodily Integrity:** includes policies that address concerns around a person's body, e.g. with regard to contraception, health care and burial.
- **Institutions:** includes laws that are primarily enforced by or enacted on behalf of a larger institution, e.g. a workplace or school.
- **Money:** includes disputes centering around the distribution of funds (e.g., bankruptcy, taxes).
- **Family:** includes policies that deal with family bonds (primarily marriage and whether family members can be compelled to testify in court against one another).
- **Procedural:** includes policies that address aspects of the court system (i.e., speedy trial, search and seizure, bail, and parole).

Compelling Interest:

- **Enforcing Other Laws:** whether the policy is meant to improve the enforcement of fraud prevention and drug laws.
- **General Operations:** whether the policy is meant to account for general and traffic safety, cost, and economic development.
- **Public Policy:** whether the policy is meant to advance an abstract public policy not delineated by statute. This includes the prevention of litigation and maintenance of order and discipline in the workforce.
- **Protecting Groups:** whether the policy is meant to further the well-being of particular constituencies, including the homeless, minors and workers.