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BACKGROUNDER

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Fighting Antisemitism by Protecting Religious Liberty

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KEY TAKEAWAYS

Modern discourse often restricts the notion of antisemitism to acts that target the Jewish people because they are Jewish.

This approach overlooks the potential for facially neutral, general laws that burden Jewish religious practice under current free exercise doctrine from Smith.

The U.S. Supreme Court should abandon the Smith doctrine and restore a robust understanding of free exercise, an important bulwark against antisemitism.

Antisemitism is one of the oldest and most pernicious forms of bigotry. For millennia, civilizations around the globe have oppressed the Jewish people. Many of these governments were motivated by a hatred of Jews simply because they were Jews. Other nations bore no particular animus toward Jews as such, but instead considered Judaism as inconsistent with contemporary values. Throughout the ages, people with very different motivations have adopted a wide range of policies that suppressed the Jewish exercise of religion. Yet all roads lead to the same outcome—the prohibition of core precepts of Judaism.

Regrettably, modern discourse often restricts the notion of antisemitism to those acts that deliberately target the Jewish people *because* they are Jewish. This position parallels the United States Supreme

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Court's current approach to the Free Exercise Clause, which originated with its decision in *Employment Division v. Smith*.

This *Backgrounder* reorients the discussion of *Smith* in light of the present-day specter of antisemitism. The *Smith* rule would permit policies that impose constraints on Judaism: Indeed, adherence to *Smith* creates blinders to the full spectrum of antisemitic conduct. At present, a majority of the Supreme Court seems willing to revisit *Smith*. This moment presents an opportunity for antisemitism advocates to carefully re-evaluate their support of the *Smith* doctrine. A robust understanding of religious freedom guaranteed by the First Amendment is an important bulwark against antisemitism.

Free Exercise After *Employment Division v. Smith*

The First Amendment provides that "Congress shall make no law...prohibiting the free exercise" of religion. The Supreme Court announced its current approach to the Free Exercise Clause in *Employment Division v. Smith*.[1] In *Smith*, a Native American man lost his job and applied for unemployment benefits. However, the state denied those benefits because Smith had been fired for using peyote, an illegal controlled substance, as part of his religious rituals.

The Supreme Court found that this denial, which effectively punished Smith for following his faith, was permissible. The late Justice Antonin Scalia wrote the majority opinion. He held that the government can burden religion without facing constitutional scrutiny so long as it does so through laws that are "neutral" and "generally applicable."[2] However, the government cannot target religion or show animus toward a particular faith. This ruling provides minimal protections for the free exercise of religion.

The *Smith* Court recognized that its rule would harm the free exercise rights of religious minorities such as Jews. Under the *Smith* regime, neutral laws arguably could be used to criminalize ritual slaughter, prohibit ritual circumcision, and ban the wearing of head coverings in public buildings without running afoul of the First Amendment. Those who combat antisemitism should recognize how *Smith* constrains their cause. Nonetheless, groups like the Anti-Defamation League (ADL) have embraced *Smith*. The *Smith* rule would permit policy that punishes—rather than protects—the free exercise of Judaism.

The Supreme Court's *Fulton* Decision: Calling Smith into Doubt

Recently, a Supreme Court majority called *Smith* into doubt.[3] In *Fulton v. City of Philadelphia*, Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch would have overruled *Smith*. Justices Brett Kavanaugh and Amy Coney Barrett doubted whether *Smith* was correct, and they expressed an openness to reversing the case in the future. Nonetheless, at present, *Smith* remains the law of the land.

In *Smith*, Justice Scalia acknowledged that this rule would "place at a relative disadvantage those religious practices that are not widely engaged in." To this day, *Smith* disadvantages minority religions such as Judaism. Governments are able to enact "neutral" and "generally applicable" laws that prohibit core tenants of the Jewish faith—without showing *any* compelling need for these laws. Apart from a law that provides greater protection for religious freedom, like the Religious Freedom Restoration Act (RFRA), these burdens on religion are subject to minimal judicial scrutiny. Moreover, such laws are disproportionately likely to target religious minorities. Governments are more likely to burden the practices of religious minorities that run counter to the *Zeitgeist*. And voters of those minority faiths are less likely to have the political clout to block such laws.

In *Fulton*, Justice Alito recognized that "*Smith*'s interpretation can have startling consequences." He identified three types of laws that would undermine Judaism, yet still would likely be consistent with *Smith*. To wit:

1. "[A] State, following the example of several European countries" could make "it unlawful to slaughter an animal that had not first been rendered unconscious."

2. The government, "following the recommendations of medical associations in Europe, [could] ban[] the circumcision of infants."

3. A State could "enforce[] a rigid rule prohibiting attorneys from wearing any form of head covering in court."[4]

Justice Alito observed that each of these neutral and generally applicable laws would probably comply with *Smith*. This *Backgrounder* will consider each of these three hypotheticals, plus one involving eruvs, a ceremonial boundary. These examples demonstrate that facially neutral laws can still negatively impact the free exercise of Judaism.

Banning Kosher Slaughter: Constitutional Under *Smith*?

A neutral law to prohibit ritual kosher slaughter would likely be constitutional under *Smith*. Jewish people follow strict dietary laws. Kosher animals must be slaughtered in a specific fashion. The butcher, known as the *shochet*, must slit the animal's throat with a clean, sharp knife so the animal quickly loses consciousness. This process is known as *shechting* the animal.

In recent years, animal rights advocates have argued that ritual kosher slaughter inflicts undue pain on animals. In 2019, Belgium required that all animals be stunned before they are slaughtered. The stunning may involve an electric shock, or, for larger animals, firing a metal rod into the brain. This law was designed to prevent animals from feeling pain. But the laws of Kosher require an animal to be healthy when it is slaughtered.

In effect, Belgium made it illegal to perform kosher slaughter. Muslims also argued that the law prohibited ritual halal slaughter. Yet the European Court of Justice (ECJ), the highest court of the European Union, upheld the Belgian law. The court found that the Belgian laws "allow a fair balance to be struck between the importance attached to animal welfare and the freedom of Jewish and Muslim believers to manifest their religion and are, therefore, proportionate."[5] Other countries have followed Belgium's lead. Denmark, Iceland, Norway, Slovenia, and Sweden have enacted similar bans without exemptions for religious communities.[6]

A History of Banning Kosher Slaughter. Banning kosher slaughter has a long, dark history. In 1933, Nazi Germany outlawed kosher slaughter.[7] The law did not expressly prohibit the Jewish ritual, but instead required that animals must be stunned or anesthetized before slaughter. At the time, Germany enforced some of the strongest animal welfare laws in Europe. Of course, the Nazis also spread propaganda that Jews drained animal blood as part of an occult practice. This slander was yet another manifestation of the antisemitic blood libel.

Four decades earlier, Switzerland also prohibited kosher ritual slaughter.[8] Animals had to be stunned before killing.[9] Once again, proponents charged that the rules of Kosher were cruel, because animals could not be rendered unconscious before the slaughter. Jews in Switzerland were forced to import kosher meat from abroad. That law remains in effect to this day. Indeed, in 2007, there was an initiative to prohibit the importation of kosher meat,[10] but this move was defeated.

So far, no serious movement has emerged to ban kosher slaughter in the United States. But were such advocacy to develop and succeed, such a regime would likely be constitutional under *Smith* because these laws would

be facially neutral. At least in modern-day Europe, the governments are not motivated by animus toward Jews or Muslims; rather, these laws elevate the interests of animals above strict adherence to traditional dietary laws. We agree with Justice Alito: This regime "would be fine under *Smith* even though it would outlaw kosher and halal slaughter."[11]

Prohibiting Ritual Circumcision: Constitutional Under *Smith*?

A neutral law to prohibit ritual circumcision of young boys would likely be constitutional under *Smith*. The circumcision ritual performed on eight-day-old males, known as *brit milah*, results from a direct command[12] and represents the covenant between G-d and the Jewish people, dating back to the days of Abraham.[13] For millennia, circumcisions have been performed by *mohels*, who are usually rabbis trained to perform this task.

In recent years, a movement has grown to prohibit circumcision for minors. These advocates are not openly motivated by any sort of animus toward Jews; rather, they have raised concerns about the health of young boys.

European Union Countries. In 2017, the Belgian Bioethics Advisory Committee recommended banning circumcision for minors. The report stated that "the physical integrity of the child takes precedence over the belief system of the parents."[14] The Belgian Health Minister rejected that recommendation.[15] In 2018, Iceland considered banning child circumcision.[16] One of the bill's sponsors said that "everyone has the right to believe in what they want, but the rights of children come above the right to believe." This bill was not enacted, although, according to some reports, it remains a "work in progress."[17] In 2020, a similar bill was considered, but was later scrapped in Finland.[18] A 2020 survey showed that 86 percent of Danish people supported a ban on non-medical circumcisions for minors.[19]

Banning circumcision also has a long, dark history. The ancient Greeks disapproved of ritual circumcision. King Antiochus IV of Syria banned circumcision in 170 BC. The Roman Emperor Hadrian also outlawed circumcision. More recently, the Soviet Union prohibited ritual Jewish circumcision.

Unlike kosher food, it is impossible to import a circumcision from abroad. To comply with a law prohibiting circumcision, Jewish parents would have to transport their eight-day-old sons out of the country to receive a *brit milah*. Throughout the ages, "in times of persecution, Jews risked their lives to fulfill the commandment" of circumcision.[20] Some observant Jews might simply leave countries that adopted such policies altogether.

The U.S. Regrettably, the anti-circumcision movement has already gained traction in the United States. In 2011, activists in San Francisco, California, managed to place on the ballot a ban on circumcision for minors.[21] This measure included an exemption for "clear, compelling, and immediate health need," but not for religious rituals.[22] More than 12,000 residents signed the ballot proposal. Fortunately, a state court judge ruled that the initiative was preempted by state law.[23] Only the state, and not local municipalities, could regulate medical procedures. As a result, the initiative was removed from the ballot.

Should support for such policy build and succeed in some city, and—if the bill was properly crafted—it could survive constitutional review under *Smith*. Again, these laws are not necessarily motivated by any sort of hostility toward Jewish people, and such a ban would not be limited to Jews. Unlike Kosher slaughter, people of different faiths circumcise their male children. Moreover, this law would be generally applicable so long as it prohibited circumcision of minors *without exception*.

However, a law that only permits circumcisions by medical professionals—thereby precluding circumcisions by most *mohels*—would be problematic. An exemption for medical emergencies may render the scheme not generally applicable, though this conclusion is not clear. In most cases, the state has wide latitude to regulate medical procedures to promote public health. Once again, we agree with Justice Alito in *Fulton*: A carefully crafted minor circumcision ban would pass constitutional muster under *Smith*. As he wrote, "a categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice."[24]

Prohibiting Yarmulkes: Constitutional Under *Smith*?

A neutral law to prohibit the wearing of yarmulkes in public buildings would likely be constitutional under *Smith*. Many Jewish men wear a head covering, known as a *yarmulke* or *kippah*, during most of the day. These head coverings do not impact third parties. Yet in 2004, France prohibited the wearing of "conspicuous" religious symbols in French public schools. This law was designed to expand the French separation of church and state, which is known as *laïcité*. France banned yarmulkes for Jewish boys, as well as crosses for Christian students, headscarves for Muslim girls, turbans for Sikh boys, and many other religious symbols.

In 2018, the French Education Ministry instructed teachers to discipline those who "test the application" of the law.[25] As a result of this law, observant

Jewish students, teachers, and other staff are barred from wearing kippahs in public schools. They are confronted with a choice: Follow the precepts of their faiths or stay out of public schools.

Fortunately, France's radical secularism has not spread to other nations. Would this principle be assailable under *Smith*? Probably. France's policy is generally applicable to all religions, but the law is primarily targeted at stopping the spread of Islamism, and therefore may not be considered neutral. Still, an American city could prohibit head coverings in government buildings. Such a law would have some precedent.

The Las Vegas Metropolitan Police Department, for example, prohibits all forms of head coverings. In 2007, a Jewish police officer requested an accommodation to wear a kippah on duty, but the department refused to grant any exemption to its policy. The department contended that "wearing religious symbols would undermine officer neutrality and erode public trust."[26] The court found that the policy was "neutral" and "generally applicable." Therefore, under *Smith*, the policy was constitutional.[27]

This rationale is likely not limited to the employment context. In *Fulton*, Justice Alito speculated that "a rigid rule prohibiting attorneys from wearing any form of head covering in court" would pass muster under *Smith*.[28] So long as this rule applied equally to all types of head coverings, it would be neutral. And unless particular groups are exempted, the policy would be generally applicable. We agree with Justice Alito that "the rule would satisfy *Smith* even though it would" cause many religious adherents to choose between appearing in court and following the tenants of their faith.[29]

Prohibiting Eruvs: Constitutional Under *Smith*?

A neutral law to prohibit eruvs on utility poles would likely be constitutional under *Smith*. On the Sabbath, Jews are generally prohibited from carrying any objects outside their home—even mundane items such as keys or baby supplies. Many Jews set up an eruv to encircle their neighborhoods. They believe that this ceremonial boundary creates a zone in which carrying objects is permissible. Eruvs are an essential element for many Orthodox Jewish communities. In the absence of an eruv, it is difficult to leave one's home on the Sabbath. It is forbidden to push an infant in a stroller or even to use a wheelchair.

With an eruv, all members of a family—including parents with small children—can visit a synagogue for prayer services. Today, eruvs are often built by placing thin strips of hard material, known as *lechis*, vertically along utility poles and then stringing thin wires between those poles. There are more than 100 eruvs in the United States.[30]

Many cities regulate the placement of materials, such as signs, on utility poles. And several towns have used this authority to prevent the construction of eruvs by prohibiting the placement of lechis. So long as these ordinances are evenly enforced, do not allow for any discretion, and do not target Jewish practice, they would pass constitutional muster under *Smith*. However, several local governments have engaged in blatantly unconstitutional actions to block the construction of eruvs.

Tenafly. Perhaps the most infamous case involves the Borough of Tenafly, New Jersey. The borough had an ordinance that prohibited the posting of any materials on utility poles. In 2000, the borough relied on this law to prohibit the placement of lechis. But this rationale was a pretext.

The U.S. Court of Appeals for the Third Circuit declared Tenafly's policy unconstitutional.[31] First, the Court found that the policy was not truly neutral because it was motivated by antisemitism. Council members made brazenly antisemitic comments. One council member expressed "a concern that the Orthodoxy would take over." Another Council member "voiced his 'serious concern' that 'Ultra–Orthodox' Jews might 'stone[] cars that drive down the streets on the Sabbath."[32] And residents broadly feared that the construction of "an eruv would encourage Orthodox Jews to move to Tenafly" from nearby Rockland County, New York.[33] Second, the law was not generally applicable, because exemptions were granted to other groups. For example, the government had permitted other postings, such as holiday wreaths and other types of signs.

Mahwah. Nearly two decades later, a similar incident occurred in Mahwah, New Jersey. The town relied on a facially neutral law to prohibit posting materials on poles. But there was strong evidence of animus toward Jews. Residents referred to Orthodox Judaism as a "cult" and an "infection."[34] More than 1,000 people signed a petition calling for the eruv to be banned.[35] One commenter wrote, "I do not want them controlling our school board and siphoning funds for their yeshivas." Another charged, "I don't want these rude, nasty, dirty people who think they can do what they want in our nice town." In light of this animus, the New Jersey Attorney General sued the township.[36] Eventually, the parties reached a consent order and a final judgment.[37]

But imagine a different scenario. A township neutrally enforces its sign ordinance that permits no discretion, and there is no evidence of hostility. Such a regime would likely be valid under *Smith*.

Practical Consequences. These anecdotes illustrate the practical consequences of *Smith*. With *Smith* as the governing rule, Jews must rely on popular sentiments to ensure their deeply rooted traditions are protected.

Absent the RFRA, courts can provide no refuge. If sentiments shift, kosher slaughter, brit milah, kippahs, and eruvs could be restricted with minimal constitutional difficulties. We are already seeing such movements afoot in Europe.

Where governments know that a policy will prohibit deeply held Jewish beliefs but instead choose to favor a contemporary value without offering an accommodation to ensure that Jews can both follow their conscience and fully participate in society, an antisemitic act has occurred. Regrettably, modern discourse often restricts the notion of antisemitism to those acts that deliberately target the Jewish people. *Employment Division v. Smith* is problematic from a constitutional perspective—but for Judaism, it is disastrous from a practical perspective.

Smith and the ADL

However, the leading organization that fights antisemitism, the Anti-Defamation League, has vigorously defended *Smith* for decades. In *Fulton*, the ADL urged the Court to maintain Smith.[38] The ADL contends that faith-based exemptions would *harm* the free exercise of religion. This idea is counterintuitive. How could *Smith* promote religious liberty by denying religious groups a meaningful opportunity to challenge the constitutionality of laws that burden their faith?

The ADL worries that granting exemptions from anti-discrimination laws, for example, could harm vulnerable minorities. They explain that anti-discrimination laws "have changed the course of American history and made major strides in reversing centuries of discrimination and oppression against religious minorities."[39] The ADL adds, "[O]pening the door to faith-based exemptions from these laws would harm religious freedom by undermining their effectiveness and promoting discrimination instead of discouraging it."

While acknowledging the force of this argument, the ADL's fear is, in fact, ultimately unfounded. Even if *Smith* were overturned, religious liberty would not automatically trump the state's other interests. In a post-*Smith* world, the government could still burden religious exercise if it demonstrated that doing so was the least restrictive means to further a compelling government interest. This analysis would require a case-by-case consideration.

Overruling *Smith* would not lead to the elimination of the core anti-discrimination laws that allow unpopular minorities to fully participate in American life. *Sherbert v. Verner* was decided in 1963 and the landmark

Civil Rights Act was enacted in 1964. Strict scrutiny for free exercise claims and Title VI of the act peacefully coexisted for nearly three decades until *Smith*.

Third-Party Harms? There are valid concerns regarding religious-based exemptions from antidiscrimination laws. Nonetheless, the ADL's objections extend far beyond anti-discrimination laws. The organization opposes granting *any* religious exemptions that would harm a third party. If taken seriously, this so-called third-party-harm doctrine inevitably swallows all conceivable faith-based exemptions. After all, every law is intended to benefit someone or something, and every exception from such a law detracts from that goal to some degree.

Recently, the ADL criticized the ECJ's ruling that upheld the Belgian prohibition on kosher slaughter.[40] ADL CEO Jonathan Greenblatt said:

> Tolerance and protection of a safe religious practice, which may offend some, is the essence of religious freedom. Sadly, the ECJ has effectively declared that there is no room for observant Jewish people in the European Union.[41]

But it is not clear how the ADL could oppose similar legislation in the United States on constitutional grounds. Such laws are not targeted at religion and are generally applicable. Moreover, there are possible harms to third parties: animals. Here, the ADL's commitment to the logic of *Smith* would handcuff the organization from challenging in court one of the most ancient machinations of antisemites: prohibiting kosher slaughter.

The *Smith* rule creates blinders to the full spectrum of potentially antisemitic conduct. The ADL and similar groups should abandon their commitment to this shaky precedent.

Conclusion

Antisemitisim never vanishes: It simply changes forms. Today, progressive societies would criminalize millennia-old rituals to promote other secular values. States may ban kosher slaughter, circumcision for young Jewish boys, wearing yarmulkes in government building, and the construction of eruvs. Unfortunately, under the Supreme Court's current approach to the Free Exercise Clause, such prohibitions would likely be lawful, as illustrated by Justice Alito's hypotheticals in his *Fulton* concurrence. Those who fight antisemitism should recognize that *Employment Division v. Smith* allows the government to punish minority faiths.

In *Smith*, the Court held that in most cases, the government can burden religious liberty through neutral and generally applicable laws. As a result, *Smith* creates blinders to the full spectrum of potentially antisemitic conduct. Opponents of antisemitism should reconsider their adherence to this rule, and the Supreme Court should formally abandon it. A robust understanding of free exercise is needed to promote the flourishing of the Jewish people. Our society can fight antisemitism by protecting religious liberty.

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