1-23-2007

If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith

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Law Research Paper Series
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Draft 1/18/07

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by

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> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.[2]

In the almost two decades since the Supreme Court decided *Employment Division* v. *Smith*,[3] the standard academic commentary on the decision has been harshly critical.[4] As Professor Douglas Laycock put the matter in the immediate aftermath of its release, "*Smith* produced widespread disbelief and anger."[5] More recently, Professor Kent Greenawalt describes *Smith* as having "eviscerated" the Free Exercise Clause and asks if "*anything* that is not redundant remains."[6] *Smith* squarely held that neutral laws of general applicability that burden religiously-mandated behaviors

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[1] Professor of Law & Alumni Faculty Fellow, Washington and Lee University School of Law. I enjoyed the opportunity of presenting this article at a colloquium hosted by the Emory University School of Law; the article reflects the benefit of very helpful comments provided by members of the Emory law faculty. In particular, I wish to express appreciation to Professor Michael Perry for observations and suggestions that were both thoughtful and challenging. John B. Martin, W & L Class of 2008, provided very helpful research assistance. The Frances Lewis Law Center provided significant research support for this project. As always, any errors or omissions are my responsibility alone.

[2] The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed. 1961).

[3] 494 U.S. 872 (1990).

[4] *See*, *e.g.*, Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 149-51 (2004) (arguing that "[t]he Rehnquist Court has turned the constitutional law of religion nearly upside down" and noting that the *Smith* Court "strikingly[ ] abandoned the free exercise doctrine that prevailed during the previous quarter century"); Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 2-3 (arguing that "*Smith* is probably wrong as a matter of original intent" and that "the decision is inconsistent with the apparent meaning of the Constitution"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116-17 (1992) (objecting that the "Court has adopted an interpretation of the Free Exercise Clause that permits the state to interfere with religious practices. . . without any substantial justification, so long as the regulation does not facially discriminate against religion" and characterizing this position as "moving in the wrong direction").

[5] Laycock, *supra* note __, at 1.

[6] Greenawalt, *supra* note ___, at 156-57 (emphasis in the original).

need only bear a rational relationship to a legitimate government interest to survive review under the Free Exercise Clause.[7] The decision served as a sharp break with the interpretive approach to the Free Exercise Clause advocated by Justice William Brennan, Jr.: holding neutral laws burdening religious practice up to strict judicial scrutiny.[8]

Eminent constitutional scholars of the Religion Clauses, such as Michael McConnell and Douglas Laycock,[9] have excoriated the *Smith* decision as inconsistent with the text and original understanding of the Free Exercise Clause, a sharp break with established precedent, and, ultimately, a naked betrayal of basic human rights values.[10] They argue that the decision renders the Free Exercise Clause meaningless and, accordingly, that the Supreme Court should abandon it. With recent changes in the Court's composition, the prospect of overturning *Smith* has become more plausible.[11] Accordingly, it is an opportune moment to reexamine *Smith* and to consider whether

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[7] *Id.* at 877-79.

[8] *See* Sherbert v.Verner, 374 U.S. 398, 406 (1963); Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1416-17 (discussing Warren Court and Burger Court approach of constitutionally mandated accommodations for religiously motivated conduct that transgresses neutral laws of general applicability) [hereinafter McConnell, *Origins and Historical Understanding*].

[9] *See* Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 Ind. L.J. 295, 305 n.34 (2000) (describing Laycock and McConnell as "the two most formidable religious liberty scholars of their generation").

[10] *See* Laycock, *supra* note ___, at 3-4, 7-10, 54-68; McConnell, *supra* note ___, at 137-40, 170-75.

[11] Justice Scalia wrote the majority opinion in *Smith* and was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justices Brennan, Marshall, Blackmun, and O'Connor dissented. The Supreme Court effectively reconsidered *Smith* in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). In *Boerne*, six Justices agreed that *Smith* correctly interpreted the Free Exercise Clause (Chief Justice Rehnquist and Justices Stevens, Scalia, Kennedy, Thomas, and Ginsburg) and three Justices urged that *Smith* be reconsidered (Justices O'Connor, Souter, and Breyer). Assuming that the voting patterns of the incumbent Justices have not changed in the last ten years, *Smith* appears to have the allegiance of five members of the current Court (Justices Stevens, Scalia, Kennedy, Thomas, and Ginsburg) and to be opposed by two members (Justices Souter and Breyer). The views of Chief Justices Roberts and Associate Justice Alito on *Smith* are not yet known. Even if both new members of the Court vote to repudiate *Smith*, it would still be necessary to obtain one additional vote to overturn the precedent.

its approach to the Free Exercise Clause advances the values of religious liberty as effectively as the jurisprudence that it replaced.

One could conceive of the Free Exercise Clause as being primarily about promoting religious autonomy – facilitating the ability of religious adherents to practice their faiths, even when such practice entails violating generally applicable laws enacted without religiously discriminatory intent. Viewed from this vantage point, *Smith* is highly objectionable because it makes successful free exercise challenges to general laws virtually impossible to win. If the Free Exercise Clause exists to facilitate absolute religious autonomy, the *Sherbert* approach advocated by Justice Brennan and Justice O'Connor would better honor free exercise values.[12] Moreover, it certainly seems reasonable to frame the Free Exercise Clause in terms of religious autonomy.[13]

An alternative theory of the Free Exercise Clause exists, and presents a perfectly plausible understanding of the clause. Rather than advancing religious liberty or autonomy values, one could conceive of the Free Exercise Clause as being primarily an effort to promote religious equality. If equality among sects is the primary purpose of the Free Exercise Clause, the *Smith* test (or something like it) might offer a better reading of the clause.

Good reasons exist to question whether a compelling state interest test actually furthers religious equality. If judges are unable or unwilling to give the full benefit of the compelling state interest test to minority religionists, this approach to the Free Exercise Clause could actually have the perverse effect of exacerbating, rather than remediating, the problem of religious discrimination. To put the matter simply, if the government's interests in suppressing "odd" or "weird" religions are universally held to be compelling, but mainstream religionists routinely are able to obtain judicial

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[12] *See* McConnell, *supra* note ___, at 172 ("On the other hand, some would expand the scope of the Free Exercise Clause by treating the free exercise right as a right of personal autonomy or self definition.").

[13] *See id.* at 188 ("A final threat to religious autonomy arises from governmental control over many of the institutions of education and culture.").

relief from state-imposed impediments to religious practices, the Free Exercise Clause itself would actually contribute to the problem of religious discrimination.

Moreover, unlike "free speech," "religion" is a culturally loaded concept.[14] Asking a federal judge to draw a material equivalency between her religious commitments and Gozor worshippers requires a real leap of faith. The opinions of the Supreme Court in Free Exercise Clause cases reflect a strong pattern of cultural bias and religious insensitivity.[15] In the pre-*Smith* era, minority religionists often were told that their claims did not serve to trigger the application of the Free Exercise Clause; even when the Justices agreed that the clause was at issue, the Justices routinely found that the government's interests were compelling. If the *Sherbert* approach to the Free Exercise Clause would actually diminish religious equality, it should be rejected.

At the same time, however, *Smith* does not go far enough in advancing the equality project. Overt forms of discrimination against particular religions are going to be relatively rare. Adopting a test that places no burden whatsoever on the government to demonstrate that the law at issue actually advances a legitimate state interest on the facts presented creates a real risk that clever discriminators will beat the rap. Even granting the importance of these considerations, however, the risk of clever discriminators cannot justify the adoption of a test that, as applied, actually facilitates government discrimination against minority religionists. Accordingly, although a more demanding standard of review, something akin to rationality with bite, should be adopted to govern free exercise challenges, the Justices should not restore the *Sherbert*/*Yoder* strict scrutiny standard..

Thus, reviewing courts should require governments enforcing neutral laws of general applicability to shoulder the burden of establishing that, on the facts presented, the enforcement

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[14] As Professor Bill Marshall has observed, for example, crediting a free speech claim as "speech" is not the same as crediting a religious point of view, which implies divine sanction. "A holding under the Free Speech Clause that racist speech is protected does not have this same legitimizing effect because, unlike the free exercise claim, the protection of racist speech does not require the court to find that the idea in question stems from a divine belief." William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 323 n.79 (1991).

[15] *See infra* text and accompanying notes ___ to ___.

effort rationally advances the state's interest in maintaining the policy. Moreover, it might also be necessary to permit plaintiffs to rebut an initial showing of rationality by establishing that, on the facts presented, the government would likely not enforce the policy against secular violators. The focus of the inquiry should not be on whether religious autonomy values have been unreasonably squelched, but rather on whether covert discrimination animated (or even seriously influenced) the government's action. In other words, the gravamen of a free exercise claim should be denial of equal treatment, rather than on respect for religious autonomy.

An equalitarian reading of the Free Exercise Clause is necessary because federal and state court judges have proven themselves incapable of even-handed enforcement of an autonomy-based understanding of the clause. Simply put, minority religionists brought more cases pre-*Smith*, and lost a much higher percentage of them, than did majority religious groups, such as mainline Protestants.[16] The Free Exercise Clause should enhance the equal dignity of all sects, and not serve to amplify the preferred position of sects associated with dominant groups within the community.

Morever, and contrary to Judge Michael McConnell's thesis, I believe that the legislative history of the Free Exercise Clause clearly establishes that the framers of the clause, and particularly James Madison, understood the provision in equalitarian, rather than autonomy-enhancing, terms.[17] Accordingly, to the extent that one believes contemporary understandings of the Constitution should incorporate, to the extent feasible, the intentions of the framers, the equalitarian interpretation should be preferred to the autonomy-enhancing interpretation. To be clear, my argument in favor of an equalitarian reading of the Free Exercise Clause rests on both normative and empirical arguments in addition to the historical evidence regarding the framers' views. The Free Exercise Clause should be interpreted and applied in a way that will advance the equal dignity of all religious sects, rather than in a fashion that enhances the religious liberty of some, but not all, religionists.

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[16] *See infra* text and accompanying notes __ to __.

[17] *See infra* text and accompanying notes __ to __.

I. Free Exercise and Religious Autonomy

One approach to interpreting the Free Exercise Clause interprets the clause as creating a substantive right to exemptions from generally applicable laws that burden religious practice. Under this view, the Free Exercise Clause exists to protect religionists from choosing between their duties to God and their duties to the government. Although theorizing the Free Exercise Clause in autonomy terms enjoys substantial support in contemporary academic writing, in doctrinal terms it represents something of a newcomer.[18]

A. From *Reynolds* to *Sherbert*: Doctrinal Evolution of the Free Exercise Clause as Rights-Generating.

The Supreme Court initially rejected, rather flatly, any suggestion that the Free Exercise Clause created exemptions from general laws. In 1879, the Supreme Court observed that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[19] In rejecting a Free Exercise Clause defense to a criminal conviction in the territorial courts of Utah for polygamy, the Court drew a strong distinction between belief and action premised on belief: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[20] Because of long standing legal proscriptions against polygamy in the United States and, reaching back in time, in the United Kingdom, it was "impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[21]

Reynolds remained the Supreme Court's authoritative interpretation of the Free Exercise Clause for many years. For example, almost seventy years later, in *Prince* v. *Massachusetts*, the

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[18] *See infra* text and accompanying notes __ to __.

[19] Reynolds v. United States, 98 (8 Otto) U.S. 145, 166 (1879).

[20] *Id.* at 164.

[21] *Id.* at 165.

Supreme Court invoked *Reynolds* when rejecting a challenge to a state child labor law that prohibited the sale of religious tracts by minors.[22] And, in a reprise of *Reynolds* in the context of a Mann Act prosecution, the Supreme Court rejected a limited reading of the law in order to sustain convictions premised not on prostitution, but rather on polygamy.[23]

Indeed, as late as 1961, the Supreme Court reaffirmed the central holding of *Reynolds* in rejecting a challenge to Pennsylvania's Sunday closing law. The plaintiffs, Orthodox Jews, sought an exemption from the law because they voluntarily closed on Saturdays (their day of religious obligation).[24] Writing for the majority, Chief Justice Warren explained that "[c]ompulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden" and "[t]he freedom to hold religious beliefs and opinions is absolute."[25] Even so, "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[26] Invoking *Reynolds*,[27] the majority ridiculed the idea of a religious exemption from the Sunday closing law because "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion. . . would radically restrict the operating latitude of the legislature."[28]

Chief Justice Warren stated the test for a Free Exercise Clause violation as follows:

> If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its

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22 321 U.S. 158, 166-67 (1944).

23 Cleveland v. United States, 329 U.S. 14, 18-19 (1946).

24 Braunfield v. Brown, 366 U.S. 599, 601-02 (1961).

25 *Id.* at 603.

26 *Id.*

27 *Id.* at 603, 605.

28 *Id.* at 606.

> indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[29]

Chief Justice Warren's test would generally insulate neutral laws of general applicability from serious free exercise challenges.

In fact, Justice William Brennan wrote a partial dissent criticizing the majority's stated standard of review. Justice Brennan characterized "the appropriate standard of constitutional adjudication" in free exercise cases as being neither "whether the challenged law is rationally related to to some legitimate legislative end," nor whether "the State's interest is substantial and important, as well as rationally justifiable."[30] Instead Justice Brennan argued that the "compelling state interest" test should govern such cases.[31]

Thus, it was not until *Sherbert* v. *Verner,*[32] in 1963, that the Supreme Court endorsed the proposition that the Free Exercise Clause requires government to create exemptions to general laws that facilitate private religious practice. In *Sherbert*, Justice Brennan mustered a majority in favor of the proposition that if a neutral law of general applicability burdens religiously motivated conduct, the law must serve "some compelling state interest."[33]

Indeed, because *Sherbert* could be read as addressing religious discrimination,[34] one could date the idea of the Free Exercise Clause as a shield against general laws that inhibit religiously-

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[29] *Id.* at 607.

[30] *Id.* at 611 (Brennan, J., concurring in part and dissenting in part).

[31] *Id.* at 613-14.

[32] 374 U.S. 398 (1963).

[33] *Id.* at 406; *see id.* at 403 (quoting compelling state interest test as used in free speech and free association cases and holding it to be applicable in context of free exercise claims).

[34] *See id.* at 406 ("Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty."); *id.* ("The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.").

motivated behavior to 1972, and *Wisconsin* v. *Yoder*.[35] In *Yoder*, the Supreme Court invalidated, at least as applied to members of the Old Order Amish faith, a Wisconsin compulsory school attendance law that generally required minors to attend high school until attaining the age of 16.[36] In doing so, Chief Justice Burger squarely rejected the central holding of *Reynolds*. "But to agree that religiously grounded conduct must often be subject to the broad police power of the state is not to deny that there are areas of conduct protected by the Free Exercise Clause. . . and beyond the power of the State to control, even under regulations of general applicability."[37] Accordingly, the Court had a duty to consider "the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way."[38]

Thus, no later than 1972, and arguably as early as 1963, the Supreme Court embraced a broader conception of the Free Exercise Clause – indeed, a conception of the free exercise clause that applied the most demanding standard of review known to American constitutional jurisprudence. This development represented a complete revolution in free exercise doctrine. The reason for the change was clear: the Supreme Court asserted that religious minorities required the protection of the Free Exercise Clause because legislative bodies could not be relied upon to vindicate the rights of such groups.[39]

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[35] 406 U.S. 205, 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *see also Sherbert*, 374 U.S. at 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.").

[36] *Id.* at 207-08.

[37] *Id.* at 220.

[38] *Id.* at 221.

[39] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77, 87-88, 101-03, 116-17, 135-79 (1980) (arguing that constitutional text should be interpreted to facilitate "representation reinforcement" by correcting for systematic failures of democratic institutions to protect minority groups); *see also* U.S. v. Carolene Prods. Co. 304 U.S. 144, 152 n.4 (1938).

As will be developed below, the problem with this approach is that it assumes that judges are capable of applying strict scrutiny in free exercise disputes in an even-handed and principled fashion. The subsequent cases in the *Sherbert*/*Yoder* line strongly suggest that "religion" is such a deeply culturally defined concept that judges simply will not extend the full protection of the law to new non-traditional religious movements. Moreover, the devices used to deny protection degrade and marginalize minority religionists. The result is highly ironic: a jurisprudence developed ostensibly to protect the autonomy of religious minorities results in a greater, rather than lesser, disparity in religious freedom for members of minority (or non-traditional) religions.

B. *Smith* and Free Exercise Clause Atavism.

Sherbert and *Yoder* did not prevail for very long. In 1990, the Supreme Court effectively abandoned the *Sherbert*/*Yoder* line of cases and restored *Reynolds*. Writing for the majority in *Smith*,[40] Justice Scalia explained that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires," so that government efforts to regulate or compel religious beliefs are facially unconstitutional.[41] On the other hand, if a law "prohibiting the free exercise of religion. . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[42] Invoking *Reynolds*, Justice Scalia concluded that the Supreme Court's decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[43]

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[40] Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[41] *Id.* at 877.

[42] *Id.* at 878.

[43] *Id.* at 879 (internal citations omitted).

It is true that the Supreme Court's opinion in *Smith* returned free exercise jurisprudence to its pre-Warren Court form. In this sense, then, *Smith* constitutes a major revision of the Supreme Court's free exercise jurisprudence. Admitting this, however, one should also recognize and admit that *Sherbert* and *Yoder* were themselves departures from the baseline established in 1879, in *Reynolds,* and followed consistently for almost 100 years until 1963.

After *Smith* the Supreme Court appeared to embrace an equalitarian vision of the Free Exercise Clause, rather than a theory of free exercise rooted in religious autonomy. Thus, in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*,[44] the Supreme Court found that a series of local ordinances designed and enacted to prohibit Santerians from practicing ritual animal sacrifice violated the Free Exercise Clause. Although neutral laws of general applicability incidentally burdening religious practices need "not be justified by a compelling governmental interest," "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[45] In conducting an inquiry into a law's neutrality, "[f]acial neutrality is not determinative."[46] Instead, a reviewing court must consider not only the text of the law, but also the legislative history, to determine if a facially neutral law was the product of religious bias.[47] The ordinances at issue in *Church of Lukumi Babalu Aye* were neither neutral nor of general applicability.[48] Nor did the laws advance a compelling government interest in a narrowly tailored way.[49] Accordingly, the Supreme Court invalidated them on Free Exercise Clause grounds.

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[44] 508 U.S. 520 (1993).

[45] *Id.* at 531-32.

[46] *Id.* at 534. Justice Scalia objected to this methodology because it shifts the focus from "the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*." *Id.* at 558 (Scalia, J., concurring).

[47] *See id.* at 534-42.

[48] *Id.* at 545-46.

[49] *See id.* at 546-47.

The key to the outcome in *Church of Lukumi Babalu Aye* was not an autonomy interest in practicing animal sacrifice incident to Santerian rites. A generic animal cruelty law might well prohibit Santerian religious practices – and such a law would be constitutional against a free exercise objection if adopted without animus toward the Santerian (or another) sect. Rather, the outcome turned on the presence of overt religious discrimination against the Santerian faith. Government has an obligation to refrain from overtly discriminatory targeted regulations of religious practices. This approach to conceptualizing the Free Exercise Clause plainly rests on an equalitarian, rather than libertarian, basis.

Even if the Free Exercise Clause should be read as a mandate for religious equality, *Smith* might be insufficiently demanding of government. The City of Hialeah's bias was overt, outrageous, and glaringly obvious. Not all discriminators will approach their objective so transparently. Even if one agrees with *Smith*'s equalitarian orientation of the Free Exercise Clause, it remains open to doubt whether the non-discrimination rules are sufficiently robust to protect adequately against religious discrimination.[50]

Subsequently, the Supreme Court has made clear that the rule against religious discrimination does not compel government funding of religion, religious institutions, or religious studies.[51] At the same time, however, the Justices have held that legislatures may enact generic religious exemptions to general laws in order to safeguard religiously-motivated conduct.[52]

Although *Smith* has generated a great deal of negative scholarly commentary, the Supreme Court appears to be committed to maintaining the decision. The Justices essentially reaffirmed the

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[50] *See infra* text and accompanying notes __ to __.

[51] *See* Locke v. Davey, 540 U.S. 712, 720-21 (2004).

[52] *See* Cutter v. Wilkinson, 544 U.S. 709, 714-15 (2005).

decision in 1997[53] and again in 2006.[54] Although several members of the Supreme Court have expressed continuing misgivings about *Smith*'s approach to interpreting the Free Exercise Clause, it remains the controlling precedent on the subject.

C. Scholarly Support for an Autonomy-Enhancing Reading of the Free Exercise Clause.

Contemporary scholarly commentary has been harshly critical of *Smith* and generally sympathetic to *Sherbert* and *Yoder*. The dominant view is that the Free Exercise Clause should be read as creating a substantive right to pursue one's religion, not merely in terms of abstract belief, but also by conforming one's actions to the dictates of one's religion.

Professor Laycock, for example, objects that *Smith* left the Free Exercise Clause with "little independent substantive content" and opened the door to religious discrimination.[55] He objects that "[i]f the Court intends to defer to any formally neutral law restricting religion, then it has created a legal framework for persecution, and persecutions will result."[56] Of course, this perspective assumes that if the Supreme Court restored the *Sherbert*/*Yoder* approach to free exercise claims, federal and state court judges would enforce the pre-*Smith* regime of strict scrutiny in an even-handed fashion.

Laycock recognizes the problem of potential discrimination by judges: "judges are more likely to to respond sympathetically to religious claims that are familiar, easily understood, and unthreatening."[57] He suggests, however, that this "problem cannot be solved by judicial abdication, because legislators are even more likely to favor familiar faiths with enough adherents to matter at

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[53] City of Boerne v. Flores, 521 U.S. 507, 512-16, 532-34 (1997).

[54] Gonzales v. Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1216-17 (2006).

[55] Laycock, *supra* note ___, at 4.

[56] *Id.*

[57] *Id.* at 14.

th polls."[58] Even if judicial enforcement of free exercise rights is necessary because the political process cannot be relied upon to protect marginal or unpopular religious minorities,[59] this fact does not address whether *Sherbert*/*Yoder*'s autonomy-based vision, enforced through a strict scrutiny test, most effectively minimizes the risk of judicial bias.

Laycock argues that, even on its own terms, *Smith* fails adequately to advance the project of religious equality. "A serious requirement of formal neutrality must consider legislative motive, religious gerrymanders, exceptions, exemptions, defenses, gaps in coverage, actual or potential bias in enforcement, and whether the state regulates comparable secular conduct or pursues its alleged interests in secular contexts."[60] Laycock warns that Justice Scalia's concern for getting exemption cases out of the courts might imply that the courts will not be "vigorous about checking for bad motive or religious gerrymander."[61] He argues that "[t]he Court must perform at least this task, and insist that trial judges perform it" because "[i]f the Court will not do this much, it has created a legal framework for persecution.[62]

Laycock's argument for a meaningful commitment to religious equality does not necessarily require adherence to the strict scrutiny regime of *Sherbert* and *Yoder*. In fact, if the use of strict scrutiny incident to an autonomy-based construction of free exercise rights actually results in less religious equality, a reasonable observer might reject Justice Brennan's preferred doctrinal means of achieving the substantive end of equality.

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58 *Id.* at 14-15.

59 *See generally* ELY, *supra* note ___.

60 *Id.* at 42; *see also id.* at 54 (warning that post-*Smith* the federal courts "may be myopic or deferential in considering claims that analogous secular behavior has gone unregulated"); *id.* at 59 (arguing that a meaningful commitment to religious equality requires that "laws that burden religious practice must be scrutinized for evidence of anti-religious motive, religious gerrymander, or secular exemptions not available to churches or believers").

61 *Id.* at 54.

62 *Id.* at 59.

Like Professor Laycock, Professor Greenawalt endorses the regime of strict scrutiny that pre-existed *Smith* because "[a]part from genuinely neutral laws, we must worry that if the majority of the population is repelled by a religious faith, a legislature may cleverly adopt a law to discourage its exercise, but do so in an ostensibly neutral way that successfully disguises its real motivation."[63] He argues that unless "the administrative problems with a more protective standard are truly overwhelming," strict scrutiny review of neutral laws of general applicability would best protect minority religionists.[64] For Greenawalt (as well as for Laycock and McConnell) the problem of cultural bias, although acknowledged, is not sufficiently pressing to justify rejecting a regime of strict judicial review.

Interestingly, both McConnell and Laycock slide into the trap of judging religious claimants by virtue of the vintage of a faith. In criticizing *Smith*, McConnell objects that the Supreme Court "has adopted an interpretation of the Free Exercise Clause that permits the state to interfere with religious practices – even to make the central ceremonies of some *ancient faiths* illegal or impossible – without any substantial justification."[65] In a similar fashion, Laycock observes that the *Smith* Court "held that criminal punishment of the central religious ritual of an *ancient faith* raises no issue under the free exercise clause and requires no governmental justification."[66]

Why do both McConnell and Laycock, much like Chief Justice Burger in *Yoder*,[67] invoke the "ancient" nature of the particular sect denied relief in *Smith*? If the main reason for extending protection to minority religionists relates to the insensitivity of elected legislative and executive branch officials, why would advocates of religious tolerance themselves suggest the age of a religion

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[63] Greenawalt, *supra* note ___, at 154.

[64] *Id.* at 155.

[65] McConnell, *supra* note ___, at 116 (emphasis added).

[66] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1000 (1990) (emphasis added).

[67] *See infra* text and accompanying notes ___ to` ___.

as an appropriate marker for its bona fides? Arguably, newly founded religions should have a stronger claim on judicial protection under the Free Exercise Clause than long-standing or ancient religions, precisely because new religious organizations will have the least cultural salience – and therefore have the lowest standing before popularly elected government officials.

A related problem relates to the precise reason for embracing strict scrutiny. McConnell initially objects to characterizing free exercise claims in terms of "autonomy." "Rather than understanding religion as a matter over which we have no control – the demands of a transcendent authority – it has become common to regard religion as valuable and important only because it is *what we choose*."[68] Rejecting "the free exercise right as a right of personal autonomy or self-definition," McConnell suggests that religion is not "an individualistic choice" but rather "the irresistible conviction of the authority of God."[69] Accordingly, "[t]he Free Exercise Clause does not protect autonomy; it protects obligation."[70]

Of course, whether one views religiously motivated behavior as being volitional or not, from the perspective of a court considering a litigant's claim for a judicial exemption from a neutral law of general applicability, the claimant squarely presents an autonomy claim. Indeed, after so carefully rejecting the framing of free exercise claims in libertarian terms, McConnell himself slips into this precise nomenclature: "A final threat to religious *autonomy* arises from governmental control over many of the institutions of education and culture."[71] McConnell, speaking in everyday language, frames the interests of religious communities to be self-defining in the language of autonomy, rather than the language of obligation.

It thus should not be surprising that judges reviewing free exercise claims under the *Sherbert*/*Yoder* regime framed and analyzed claims in terms of autonomy/liberty, rather than

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[68] McConnell, *supra* note ___, at 172 (emphasis in original).

[69] *Id.*

[70] *Id.* at 173.

[71] *Id.* at 188 (emphasis added).

obligation. And, in weighing the merits of such claims against general community regulations, autonomy claims are plainly less pressing to most judges than claims seeking not special treatment, but merely *equal* treatment. If I am correct in thinking that claims to equal treatment present themselves as less demanding of the general community, a doctrinal approach to free exercise that frames claims in equalitarian terms might result in greater respect for religious minorities than a doctrinal approach that facially grants great protection (strict scrutiny), but cannot be operationalized in a fashion that ensures this result.

Professor Michael Perry does not go as far as Laycock and McConnell in arguing for the use of a strict scrutiny standard of review in free exercise cases. Indeed, Perry frames free exercise interests in expressly equalitarian concerns: "Government may not discriminate against religion in the guise of protecting an interest it may legitimately protect."[72] As he puts the matter, "[w]hether it [the Free Exercise Clause] is more than an antidiscrimination norm, the free exercise clause is an antidiscrimination norm."[73]

Perry's application of the antidiscrimination norm, however, is relatively demanding of the government. He explains that "if government wants to ban conduct that is a religious practice for some who engage in it, the free exercise norm requires that government do so for some reason other than diminished respect and concern for, much less outright hostility to, the religious group for whom the conduct is a religious practice."[74] Once again, the problem arises that this approach to free exercise requires a person (i.e., the judge) who likely shares the hostility toward the religionists to respect an autonomy claim by the religionists, in the face of widespread and generalized public hostility.

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[72] Perry, *supra* note ___, at 299; *see also* MICHAEL J. PERRY, A REVIEW OF RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 9-14, 24-29 (1997) (arguing that, at a minimum, the Free Exercise Clause prohibits government discrimination based on religious belief, and might also conceivably require some affirmative accommodations of religionists).

[73] Perry, *supra* note ___, at 299.

[74] *Id.* at 301.

A doctrinal test that requires less of government might well deliver more to minority religionists, if judges would be inclined to apply it with less ethnocentric bias. A test that asks merely for equality, rather than "respect and concern," stands a better chance of evenhanded application. Thus, I generally endorse Perry's suggestion that free exercise claimants should be permitted "the possibility of establishing and discerning *indirectly* that the challenged government action is based on, that it presupposes, diminished respect and concern for the religious group whose practice is banned"[75] and would go even further by placing some burden of justification on the government, rather than leaving it solely with the religionist. Perry seems to share this view, and takes a step further by proposing a presumption that "[i]f government could exempt a religious practice from a ban which the practice is designed to serve or any other important governmental objective, but government nonetheless refuses to do so, it shall be presumed that the refusal is based on diminished respect and concern for the religious group whose practice is banned."[76] This interpretative rule, in practice, restores a standard of strict scrutiny for claims of religiously-based exemptions. Although framed in equalitarian terms, the social costs of such an approach are likely to lead judges to reject most claims brought by unpopular minority religionists.[77]

Professor Perry is correct to posit equality, rather than autonomy or absolute religious liberty, as the animating purpose of the Free Exercise Clause. That said, his proposed means of operationalizing the antidiscrimination norm is so demanding of government that it essentially collapses back into a generalized grant of autonomy to religionists. Although I believe Professor Perry is essentially correct to frame the Free Exercise Clause in terms of equality, rather than

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[75] *Id.* at 303.

[76] *Id.*

[77] In his book, Perry argues that a meaningful commitment to equality requires "government to maximize the space for religious practice by exempting religious practice from an otherwise applicable ban or other regulatory restraint that would interfere substantially with a person's ability to engage in the practice, unless the exemption would seriously compromise an important public interest." Perry, *supra* note ___, at 25. This formulation of the test entirely tracks Justice Brennan's regime of strict scrutiny, and would accordingly lead to the same results in the real world.

autonomy, the antidiscrimination norm cannot be so demanding that it renders enforcement of neutral laws of general applicability against religious objectors impossible.

D. The Textual Objection to *Smith*.

Professors Laycock and Greenawalt have both strongly objected to *Smith* on textual grounds. Greenawalt has observed that "[w]ere there no Free Exercise Clause, targeting of religious practices and discrimination among religions might well violate the Establishment Clause, the Equal Protection Clause, and in some instances the Free Speech Clause."[78] He then asks post-*Smith*, "[w]hat, then, does the Free Exercise Clause do that would be left undone in its absence?"[79] He suggests that "[p]erhaps the Free Exercise Clause helps a court to decide that targeting and religious discrimination are 'suspect,' but it hardly seems necessary for that purpose."[80] Greenawalt concludes that, under *Smith*, the Free Exercise Clause "now does little work that could not arguably be done by some other provision, and the Rehnquist Court opinions have not undertaken to explain what work it does do."[81] "Given *Smith*, its importance has diminished radically."[82] Greenawalt's argument seems to be that a reading of the Free Exercise Clause that limits its effect so drastically should be rejected in favor an interpretation that gives the clause greater force.

Professor Laycock has advanced very similar objections in support of a textualist objection to *Smith*. He argues that "[i]f the Court feels free to enforce the unenumerated rights it likes, and to strip nearly all independent meaning from the enumerated rights it does not like, it is hard to see how the existence of a written Constitution affects its decisions."[83] In Laycock's view, "[t]he point

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78 Greenawalt, *supra* note ___, at 159.

79 *Id.*

80 *Id.*

81 *Id.* at 160.

82 *Id.*

83 Laycock, *supra* note ___, at 37.

of enumerating certain rights was to ensure that at least those rights get enforced."[84] He characterizes *Smith* as a rejection of a textual right "because it does not fit the Court's conception of neutrality" and objects that the decision "unabashedly substitutes the Court's preferences for the text of the Constitution," an outcome that "the opponents of judicial activism say they most fear."[85]

These textual objections to *Smith*, although not without some persuasive force, do not raise insurmountable objections to *Smith*'s interpretation of the Free Exercise Clause. Simply put – and as Professor Laycock himself recognizes – *Smith* does not strand the Free Exercise Clause.

At the time of the framing of the Bill of Rights, no Equal Protection Clause existed. Given the history of religious establishments in the colonies and early Republic, it would not be unreasonable for the Framers to seek not only to prohibit the creation of an official national church, but also any government effort to create preferences for particular sects. Viewed from this perspective, the Free Exercise Clause would be the mirror image of the Establishment Clause; both clauses exist to advance a project fundamentally rooted in equality, rather than an absolute liberty for religionists (whether to seek the support of the state or to seek freedom from government imposed strictures).[86] Nevertheless, the *Smith* skeptics argue that an interpretation of constitutional text that leaves it without meaning should be rejected.[87]

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[84] *Id.*; *see* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 185-89, 215-17 (2006) (discussing the importance and limitations of constitutional text in protecting human rights).

[85] Laycock, *supra* note ___, at 38. Laycock actually answers his own objection later in the same article, arguing that "[t]he Free Exercise Clause stands as textual evidence that religious speech is central to the First Amendment, like fully protected political speech and not like commercial speech, obscenity, or other categories of speech with only limited constitutional protection." *Id.* at 45. Thus, Laycock acknowledges that establishing the centrality of religious speech constitutes work that the Free Exercise Clause undertakes post-*Smith*.

[86] For evidence that this interpretation of the Free Exercise Clause enjoys substantial support in the legislative history of the First Amendment, see *infra* text and accompanying notes __-to ___.

[87] *See, e.g.*, Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 308 (1986) ("As the analysis implied above suggests, including religion with race as suspect classifications under the equal protection clause has the same effect under modern doctrine as does such a limited interpretation of the free exercise clause."). Of course, Pepper's argument

Of course, the objection cannot be that Congress, the President, or the state governments cannot respect or enforce the Free Exercise Clause – each coordinate branch of the federal government and the state governments remain free post-*Smith* to rely on the Free Exercise Clause as a basis for supporting or opposing particular policies that affect religious practices. Moreover, there are many provisions of the Constitution that do not enjoy judicial enforcement.

For example, the Constitution vests the Senate with "the sole power to try impeachments."[88] In *Nixon*, the Supreme Court held that the Senate could define an impeachment "trial" in any way that it wished; the matter was non-justiciable because of an absence of clear standards for defining "trial" and the textual commitment of the matter to the Senate.[89] One could reject the impeachment trial clause as a useful analogue on the theory that the Free Exercise Clause, unlike the impeachment trial clause, does not lack judicially enforceable standards and its enforcement is not demonstrably textually committed to a coordinate branch of the federal government. Although these objections have some merit, the fact remains that the power of removing a federal Executive or Judicial official from office through impeachment is not judicially reviewable.

The Guaranty Clause[90] perhaps provides a better analogue to the Free Exercise Clause. The Supreme Court consistently has held that the Guaranty Clause is not judicially enforceable;

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presumes either a facial religious classification or that the plaintiff can establish religiously discriminatory intent with respect to a facially neutral classification. It would be possible to read the Free Exercise Clause to impose a burden of justification on the government even where discriminatory purpose is not evident on the face of a classification or in its legislative history. *See infra* text and accompanying notes ___ to ___. Such an approach *would* give the Free Exercise Clause an independent effect that would go well beyond existing Equal Protection Clause doctrine. *Cf.* Washington v. Davis, 426 U.S. 229, 239-43, 247-48 (1976).

[88] *See* U.S. Const. art. I, § 3, cl. 6 ("The Senate shall have the sole power to try all impeachments.").

[89] *See* Nixon v. United States, 506 U.S. 224, 229-37 (1993). Writing for the majority, Chief Justice Rehnquist explained that in addition to the clear "textual commitment" of the issue of the Senate, *see id.* at 236, there was no "judicially manageable standard" to apply in policing the metes and bounds of the power "to try," *id.* at 229, and that the Constitution's language "does not provide an identifiable textual limit on the authority which is committed to the Senate," *id.* at 237.

[90] U.S. Const. Art. IV, § 4 (providing, in relevant part, that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government").

enforcement of this clause rests with Congress and the President. The Supreme Court's reasoning for this approach relates to the lack of clear standards regarding whether a particular state government is "republican" in nature and the difficulties associated with divergent pronouncements regarding the legitimate government of a state.[91]

Again, however, advocates of a stronger judicial role in the enforcement of the Free Exercise Clause could object that the Guaranty Clause is a structural provision of the Constitution rather than a discrete human right. Policing the metes and bounds of political structures might be seen as less essential than enforcement of basic human rights. Although the ability to ensure some measure of political accountability from state and local governments strikes me as constituting an important human right, one can concede the imprecise nature of the analogy and still not concede the entire argument.

The federal judiciary has made little, if any, sustained effort to enforce the strictures of the Ninth Amendment. Although the *Casey* and *Roe* courts invoked the Ninth Amendment in passing, it has never served as the basis for any majority opinion protecting a fundamental, yet unenumerated, human right. Instead, the Equal Protection Clause and the Due Process Clauses have been deployed in a fashion that essentially renders the Ninth Amendment nugatory. Interestingly, not all advocates of vigorous enforcement of the Free Exercise Clause consistently champion the forlorn Ninth Amendment.

One could object that the Ninth Amendment, unlike the Free Exercise Clause, does not guarantee any particular right, but rather states a truism – that matters not left to the federal or state governments remain vested with the people. But this interpretation of the Ninth Amendment makes the amendment largely redundant with the Tenth Amendment, which directly addresses the notion of vertical federalism's requirement of limited and separated powers between the federal and state governments. Moreover, a generic guarantee of fundamental rights seems essentially more, not less,

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[91] *See* Baker v. Carr, 369 U.S. 186, 210-11 (1962); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-66 (1803).

important than a more specific guarantee. If the Ninth Amendment's banishment to the constitutional closet is not a cause for righteous indignation, then one should question whether an interpretation of the Free Exercise Clause that limits its importance (in light of the Free Speech, Equal Protection, and Due Process Clauses) should be rejected out of hand as anomalous.

Thus, the textual objection that *Smith*'s reading of the Free Exercise Clause unduly robs it of any substantive import is not a particularly compelling one. The Supreme Court leaves some clauses to the political branches; other times it chooses to ignore constitutional text in favor of achieving the same end using alternate text. An objection as to means seems far less compelling than an objection that relates to ends. If the Supreme Court permitted overt forms of religious discrimination, that policy would be highly objectionable. But, if the Justices choose to rely on equal protection, due process, or free speech principles to ward off such discrimination, an objection as to the precise means used to achieve the end is neither a serious nor meaningful substantive objection.

Moreover, in the case of the Free Exercise Clause reliance on alternate constitutional text to protect against religious discrimination has the salutary effect of resolving the potential tension that otherwise might exist between the Establishment Clause, on the one hand, and the Free Exercise Clause, on the other. Compelling governments to accommodate religious practices that transgress neutral laws of general applicability would entail at least some measure of privileging, if not "establishing," religion. Reliance on free speech, equal protection, and due process principles avoids this tension.

All of this said, however, the critics of *Smith* nevertheless possess a serious objection with substantial merit – it simply does not rest on a textualist basis. Even if the Free Exercise Clause retains independent meaning post-*Smith*, and even if the absence of such meaning would not make the *Smith* decision self-evidently wrong, *Smith* does suffer from a significant drawback. It frames the equality project in far too narrow terms, leaving the road relatively clear for clever discriminators. Nor has the Supreme Court modified due process, equal protection, or free speech

jurisprudence to take account of this potential for discrimination. Thus, even if, as the subsequent materials will show, the compelling state interest test under *Sherbert* and *Yoder* disserved equality values, *Smith*'s reflexive deference to government when government seeks to enforce neutral laws of general applicability underenforces the Free Exercise Clause's anti-discrimination mandate.

II. The Irony of Autonomy as a Model for the Free Exercise Clause

Before embracing *Sherbert*/*Yoder*'s regime of strict scrutiny as an essential means of protecting religious minorities, one should first seriously consider the possibility that the *Sherbert*/*Yoder* approach actually increased, rather than decreased, the differential in religious liberty enjoyed by members of minority religious sects. If use of the compelling state interest test in practice subordinated religious minorities relative to non-minorities, the test would be a poor means of advancing religious equality.[92]

As the materials that follow demonstrate, the pre-*Smith* approach led to more successful free exercise claims. Nevertheless, two troubling disparities exist. One relates to the attitude of the Supreme Court toward non-traditional religions and claims by non-traditional religionists. To state the matter simply, both the results and the rhetoric used to support the results arguably reflect consistent patterns of cultural bias. Second, empirical analysis of outcomes in free exercise cases establishes that minority religionists fared significantly less well than adherents of more traditional religious faiths. Thus, the pattern of winners and losers supports the argument that the *Sherbert/Yoder* approach actually increased, rather than decreased, inequality of religious liberty between majority and minority religious sects.

This section begins with an examination of the Supreme Court's rhetoric about non-conforming religious groups, both before and during the *Sherbert*/*Yoder* era. This examination establishes a systematic and consistent pattern of cultural bias that begins in the 19th century and

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[92] Of course, the test might still be defensible as a method of advancing the sum total of religious autonomy – if any sect wins claims against the government that would not be viable under *Smith*, then the *Sherbert*/*Yoder* approach enhances and advances religious liberty/autonomy. The identity of the winners and losers only matters if one thinks that the Free Exercise Clause should advance religious equality at least as much as it advances religious liberty.

continues to the present. The section continues by considering psychological, anthropological, and cultural reasons for this hostility toward non-conforming religious groups. It then takes up empirical reseach data that demonstrate the problem of judicial bias in applying heightened scrutiny to free exercise claims is both real and pressing (rather than merely hypothetical).

A. "Good" and "Bad" Religions: The Supreme Court's Rhetorical and Substantive Treatment of Minority and Majority Religionists.

Beyond the discrepancies in outcomes, the Supreme Court's *rhetoric* in Free Exercise Clause cases reflects a disturbingly judgmental tone. To state the matter plainly, the Justices seem to take some religions more seriously than others. This ethnocentrism ill serves either the equality or the autonomy project. If the Free Exercise Clause exists to advance equality, then all religions should be treated with equal dignity when they seek to invoke the protection of the Clause. If the Clause exists to advance autonomy, the autonomy claims of minority religions of recent vintage should be no less important or pressing than those advanced by majority religions of ancient vintage. Nevertheless, the Supreme Court's rhetoric strongly suggests that the Justices take some religions more seriously than others.

Late 19th century cases involving the Mormon Church provide perhaps the best exemplars of pejorative rhetoric. In discussing the Mormon practice of polygamy, Justice Field observes that "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries."[93] The practice "tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and to debase men."[94] He goes on to attack the effort to link polygamy to genuine religious duty: "To call their advocacy a tenet of religion is to offend the common sense of mankind."[95] He observes that:

> Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general

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93 Davis v. Beason, 133 U.S. 333, 341 (1890).

94 *Id.*

95 *Id.* at 341-42.

> consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime [polygamy] may be carried out without hindrance.[96]

Davis sustained an Idaho territorial law that stripped voting rights not only from those convicted of practicing polygamy, but also from any person who merely advocated the practice.[97] Clearly, the Supreme Court simply rejected out of hand the notion that either the practice or advocacy of polygamy could be assimilated into the concept of "religion" – rather than simply defined as a crime.

The *Davis* court not only defines the Mormon church's advocacy of polygamy as outside the proper bounds of religion, but also self-consciously identifies the United States as a "Christian" nation. Thus, the Supreme Court is drawing two different circles, one of exclusion ("polygamy") and one of inclusion ("Christian" nationhood).

Some eleven years earlier, in *Reynolds*, Chief Justice Waite rejected the notion that polygamy could be protected as an incident of the right to free exercise of religion.[98] Along the way, he observed that "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of Asiatic and of African people."[99] Once again, the Supreme Court is drawing boundary lines that limit the notion of legitimate religious practice to majoritarian traditions. The foreign nature of the practice of polygamy, and its observance in non-European cultures, makes the claim for a religious exemption from general laws prohibiting the practice entirely implausible to Chief Justice Waite.

Indeed, Mormonism was so unpopular that Congress legislated to abolish the church and seize its assets for the public treasury.[100] In sustaining Congress's action, Justice Bradley heaped

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[96] *Id.* at 343.

[97] *See id.* at 345-46.

[98] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879).

[99] *Id.* at 164.

[100] *See* The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); *see also* Laycock, *supra* note ___, at 62-63 (discussing the pervasive persecution of the Mormons by both the federal and state governments).

scorn on Mormonism because of its "belief in the practice of polygamy, or in the right to indulge in it" and the related assertion that polygamy "is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom."[101] "This is altogether a sophistical plea."[102] The Court had "no doubt of the power of Congress to do as it did."[103]

One might suggest that the 19th century decisions involving polygamy simply represent a more ethnocentric time; the decisions no longer signify the attitude of the federal courts toward minority religionists with odd practices. The hue and cry associated with Warren Jeffs and his polygamist cult suggests that cultural norms still play an important role in defining the scope of "legitimate" religious beliefs. But decisions of the Supreme Court itself well into the 20th century also reflect a highly ethnocentric conception of religion.

In *Cleveland* v. *United States*,[104] the Supreme Court adopted an expansive reading of the Mann Act to reach the transportation of a woman across state lines for the purpose of cohabitating in a polygamous relationship. Writing for the majority, Justice Douglas explained that "[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity," and that accordingly "[t]hough they have different ramifications, they [polygamous practices] are in the same genus as the other immoral practices covered by the [Mann] Act," such as prostitution.[105] Although the rule of lenity supposedly requires criminal laws to be construed favorably to the defendant, the *Cleveland* Court did just the opposite in order to bring interstate travel that facilitates polygamous cohabitation within the scope of federal criminal law.

Justice Murphy authored a very interesting dissenting opinion. Writing only for himself, and as the sole dissenter, Murphy noted that he disagreed "with the conclusion that polygamy is 'in

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101 *The Late Corporation*, 136 U.S. at 49.

102 *Id.*

103 *Id.* at 64.

104 329 U.S. 14 (1946).

105 *Id.* at 19.

the same genus' as prostitution and debauchery."[106] To be clear, his purpose was not "to defend the practice of polygamy or to claim that it is morally equivalent of monogamy."[107] He goes on to describe the "four fundamental forms of marriage" and suggests that "[w]e must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears."[108] Although "[i]t is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place," this "does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles."[109] He urged that "it must be recognized and treated as such."[110]

Justice Murphy directly accuses the majority of ethnocentrism. He argues in favor of cultural and religious pluralism, observing that "[i]t takes no elaboration here to point out that marriage, even when it occurs in a form of which we disapprove, is not to be compared to prostitution or debauchery or other immoralities of that character."[111] He concludes that "[t]he Court's failure to recognize this vital distinction and its insistence that polygyny is 'in the same genus' as prostitution and debauchery do violence to the anthropological factors involved."[112]

Justice Murphy exhibited a consistent concern for respecting cultural and religious pluralism. In *Prince* v. *Massachuestts*,[113] he objected to the majority's cavalier dismissal of Mrs. Prince, a Jehovah's Witness, who claimed that her niece had a religious duty to proselytize on the public

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106 *Id.* at 25 (Murphy, J., dissenting).

107 *Id.*

108 *Id.* at 25-26.

109 *Id.* at 26.

110 *Id.*

111 *Id.*

112 *Id.*

113 321 U.S. 158 (1944).

streets and sidewalks. Murphy argued that "[t]he sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God."[114]

Murphy viewed the prosecution as a form of religious harassment: "No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom."[115] He wrote movingly of the danger of religious intolerance:

> From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every run by the resurrection and enforcement of little used ordinances and statutes. . . . To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression.[116]

The majority took a somewhat different view of the case, concluding that "[p]arents may be free to become martyrs themselves," but that " it does not follow they are free, in identical circumstances, to make martyrs of their children."[117]

The problem is that judges do not exist in a cultural vacuum; they bring to bear a host of political, moral, and religious commitments. Consider, for example, Justice Sutherland's response to Douglas C. Macintosh's free exercise claim to refuse an oath to bear arms incident to naturalization:

> When he [Macintosh] speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in light of his entire statement, that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to

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114 *Id.* at 174 (Murphy, J., dissenting).

115 *Id.* at 175.

116 *Id.* at 176.

117 *Id.* at 170.

> survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.[118]

Macintosh was a professor of theology at the Yale Divinity School and a citizen of Canada. Moreover, he served as a chaplain for the Canadian army during World War I. In completing a questionnaire incident to his application for U.S. citizenship, he provided a qualified answer to the question "If necessary, are you wiling to take up arms in defense of this country?"; he responded "Yes, but I should want to be free to judge of the necessity."[119] Justice Sutherland's majority opinion simply dismissed out of hand the notion that duty to God could preclude taking up arms when commanded to do so by the federal government; as he puts it, calls to arms made by the general government simply are "not inconsistent with the will of God." Evidently, Macintosh was mistaken to think otherwise.

The price of his conscience was his U.S. citizenship. Sutherland noted that "[i]t is not within the province of the courts to make bargains with those who seek naturalization."[120] Instead, an applicant "must accept the grant and take the oath in accordance with the terms fixed by law, or forego the privilege of citizenship. There is no middle choice."[121] But what should strike the careful reader as particularly troubling is the majority's flat rejection of Macintosh's religious proposition (i.e., that the U.S. government might prosecute a war not consistent with God's will). Not only does the majority choose to disregard Macintosh's religious beliefs, but it takes the next step and asserts a contrary view as a theological truth.

More recently still, Chief Justice Burger, in granting a free exercise claim to unemployment benefits brought by a Jehovah's Witness, noted in passing that "[o]ne can, of course, imagine an

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118 United States v. Macintosh, 283 U.S. 605, 625 (1931).

119 *Id.* at 617-18.

120 *Id.* at 626.

121 *Id.*

asserted claim so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause."[122] This is a telling passage, for it reflects an innate bias that burdens the ability of minority religionists to claim a full and equal share in the free exercise project. For it will be small, minority religions, perhaps of recent vintage, whose beliefs are most likely to strike the average federal or state court judge as too "bizarre" to be "entitled to protection."[123]

Conversely, religions with deep roots in American culture should fare better. So too religions whose beliefs and ethics are consistent with dominant moral and social norms. One could read *Yoder* as a confirmation of these predictions.

In *Yoder*, Chief Justice Burger references the 300 year history of the Old Order Amish in the United States not once,[124] not twice,[125] but three times.[126] The age of a religion, however, has

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[122] Thomas v. Review Board, 450 U.S. 707, 715 (1981).

[123] *See*, *e.g.*, Tony & Susan Alamo Foundation v. Sec'y of Labor, 471 U.S. 290, 304-05 (1985) ("Even if the Foundation were to pay wages in cash, or if the associates' beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily. We therefore fail to perceive how application of the Act would interfere with the associates' right to freely exercise their religious beliefs."). Justice White essentially rewrites the associates' theology to permit them to accept payment for good works, provided that they relinquish the payment. A religious commitment could plausibly prohibit even the initial receipt of wages for good works – the very contention asserted by the Alamo Foundation with respect to its members' beliefs. Needless to say, it seems very odd for the Supreme Court to school a religion on the proper interpretation of its own doctrines. Justice White provides a *cf.* citation to *Lee*, a case in which the Court accepted as valid a religious objection by the Old Order Amish against paying into or receiving benefits from the Social Security system. *See id.* at 305 (citing United States v. Lee, 455 U.S. 252, 257 (1982). Thus, the Old Order Amish enjoy a presumption of doctrinal legitimacy that the Supreme Court proves unwilling to afford the Alamo Foundation.

[124] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("We come then to the quality of the claims of respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights. . .to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries.").

[125] *Id.* at 227 ("The independence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country are strong evidence that thre is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education.").

[126] *Id.* at 235 ("Aided by a history of three centuries as an identifiable religious sect and along history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief

nothing to do with the relationship of a neutral law of general applicability to the ability of the sect's members to observe their religious duties. Nor does it have anything to do with the burden that a religious exemption from the law would place on the state's ability to achieve the objective in enacting and enforcing the neutral law of general applicability in the first place. But Chief Justice Burger's ethnocentrism runs much deeper than this.

Burger both celebrates and idealizes the Amish, even as he disparages other, more recently founded religious sects. "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life."[127] He also suggests "that probably few other religious groups or sects could make" a showing sufficient to justify the exemption at issue in *Yoder*. The Older Order Amish, after all, "singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society."[128] And, we should not forget that "[i]ts members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms."[129] In sum, "[e]ven their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."[130]

Chief Justice Burger's majority opinion in *Yoder* is a portrait of utterly unselfconscious ethnocentrism. It applies viewpoint and content based standards in weighing the merits of the free exercise claim at bar, and appears to condition the existence of free exercise rights on the vintage of the group pressing the claim – and a host of other irrelevancies. If the Free Exercise Clause exists

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with their mode of life, the vital role that belief and daily conduct play in the continued survival of the Old Order Amish communities . . . and the hazards presented by the State's enforcement of a statute generally valid as to others.").

127 *Id.* at 235.

128 *Id.* at 225-26.

129 *Id.* at 222.

130 *Id.* at 226.

simply to amplify the rights of politically popular religious sects holding inoffensive theological viewpoints, it grossly disserves the equalitarian concerns of its framers, including James Madison.[131]

The problem with any effort to construct the Free Exercise Clause as creating a right to religious autonomy is the inability of judges drawn from the majority culture to accept fully the legitimacy of new, seemingly oddball religionists. Macintosh's views, for example, were not particularly idiosyncratic; many religious groups, such as the Quakers, have a history of refusing to participate in wars prosecuted by the U.S. federal government. Nevertheless, his fit of conscience was sufficiently offensive to the district court reviewing his citizenship application that it chose to deny it. Moreover, the more deeply contrarian a religious sect's views – and hence the less likely the sect to obtain protection through the majoritarian political process – the less likely judges will be to take seriously the claims of the religionists.

It would be too easy, then, to dismiss the rawest language in *Davis* and *Reynolds* as nothing more than relics of a less noble time. More recent cases, if not using equally disparaging language, nevertheless visit disparaging treatment on religious minorities. Native Americans seeking to preserve a sacred mountain are told that "[h]owever much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[132] Indeed, the destruction of a government-owned site crucial the religious practices of the tribes did not even constitute a valid free exercise claim because the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not "prohibit" the free exercise of religion.[133] Thus, "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a government action on

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131 *See supra* text and accompanying notes ___ to ___.

132 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

133 *See id.* at 450-51.

a religious objector's spiritual development."[134] Yet, in *Sherbert* and subsequent cases in the *Sherbert* line, government was required to provide unemployment benefits to Saturday sabbatarians. State unemployment programs that provided benefits in some cases but not others, and which did order anyone to work on a Saturday, *did* trigger the Free Exercise Clause.[135]

In a similar fashion to *Lyng*, a Native American's refusal to seek or use a Social Security number for his daughter, Little Bird of the Snow, incident to an application for AFDC benefits did not raise a meritorious free exercise objection.[136] Roy, a member of the Abenaki tribe, believed the obtaining and using a Social Security number for his daughter would "'rob the spirit' of his daughter and prevent her from obtaining spiritual power."[137] Once again, the strictness of strict scrutiny did not demand much of the government. Chief Justice Burger flatly rejected Roy's free exercise claim, explaining that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[138] The *Roy* majority placed great emphasis on the fact that the plaintiff did not assert a claim of discrimination[139] or an affirmative compulsion to either refrain from religiously motivated conduct or to engage in religiously prohibited conduct.[140] Of course, cases in the *Sherbert* line did

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[134] *Id.* at 451.

[135] *Cf. id.* at 465-66 (Brennan, J., dissenting) ("The land-use decision challenged here will restrain respondents from practicing their religion as surely and completely as any of the governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' injury as nonconstitutional are both unjustified and ultimately unpersuasive.").

[136] *See* Bowen v. Roy, 476 U.S. 695, 699-701 (1986).

[137] *Id.* at 696.

[138] *Id.* at 699; *see id.* at 700 ("The Free Exercise Clause affords an individual protection from certain forms of government compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.").

[139] *Id.* at 703 ("There is no claim that there is any attempt by Congress to discriminate invidiously or any cover suppression of particular religious beliefs.").

[140] *Id.* ("It may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons.").

not involve discrimination or government compulsion either.[141] The real difference seems to be more cultural than legal; refusing to obtain or use a Social Security number is too weird to be creditable as a sincere religious belief, whereas having an objection to working on Saturday is not.

Another interesting aspect of *Roy* involves Chief Justice Burger's framing of the burden on the government, were Little Bird of the Snow to win a religious exemption from using a Social Security number when applying for welfare benefits. He observes that "[t]he Social Security number requirement clearly promotes a legitimate and important public interest" and that "[n]o one can doubt that preventing fraud in these benefit programs is an important goal."[142] In analyzing the burden on the government, however, Chief Justice Burger makes no effort to establish how many religious objectors would refuse to use Social Security numbers. Instead, he seems to assume that a large number of persons would object, thereby making the burden on the government intolerable to bear.[143] Given this method of analysis, his conclusion that "[a]ppellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of its programs,"[144] was a foregone conclusion. But this *isn't* the proper measure of the burden.

Even if "the Government"[145] must process claims by "roughly 3.8 million families" for benefits worth "$7.8 billion through federally funded AFDC programs" and claims by another "20

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[141] *See, e.g.*, Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1988); Thomas v. Review Board, 450 U.S. 707 (1981). In *Sherbert* itself, a claim of differential treatment could have served as the basis for the decision in favor of Sherbert. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("Significantly, South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty.").

[142] *Id.* at 709.

[143] *Id.* at 709-11.

[144] *Id.* at 711-12.

[145] Indeed, Chief Justice Burger's odd – and consistent – capitalization of "government" is itself meant to signify where the merits lie.

million persons" for "$11 billion in food stamps,"[146] this tells us absolutely nothing about how many of the 23.8 million recipient households and individuals would, like Little Bird of the Snow and her father, refuse to use a Social Security number incident to the application process. If the compelling state interest test in the Free Exercise Clause context assumes that everyone will demand an exemption, the government's interest in the status quo will *always* be compelling.

This was a standard analytical move during the pre-*Smith* era: in applying the strict scrutiny test, the Justices would measure the claim for a religious exemption on the assumption that no one would agree to meet the government's condition. Thus, for example, in *United States* v. *Lee*,[147] the Supreme Court rejected an effort by an Old Order Amish farmer to avoid the payment of payroll taxes for his workers. Chief Justice Burger found that the federal government had a compelling interest in the collection of such taxes because "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[148] "Because of the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[149] At least the Amish, unlike the Native Americans in *Lyng*, were credited with a genuine free exercise claim.[150]

Obviously, the real question is not whether government would have a compelling interest in mandatory participation if everyone opted out, but rather how disruptive it would be if religiously-motivated objectors opted out. Chief Justice Burger makes no effort to isolate the claim or the burden. If the Supreme Court had adopted the same analytical approach in *Yoder*, it would not have

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146 *Id.* at 710.

147 455 U.S. 252 (1982).

148 *Id.* at 260.

149 *Id.*

150 *See id.* at 257 ("Because the payment of taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.").

asked if Wisconsin has a compelling interest in forcing Amish children to attend school to age 16, but rather whether Wisconsin had a compelling interest in making any children attend school to age 16. Framing the burden on an as applied versus universal basis clearly prefigures the outcome of the balancing exercise. In the pre-*Smith* era, the Justices routinely manipulated the burden in order to force congenial outcomes.

Native Americans were not the only group that failed to claim the full benefit of the *Sherbert/Yoder* line of cases. During the pre-*Smith* era, the Supreme Court rejected a devout Jew's desire to wear a yarmulke while in military uniform on a stateside base. Then-Justice Rehnquist did not declare the nation to be a Christian one, perhaps because he did not have to do so – the regulations at issue, which permitted religious apparel that was not visible (such as a scapular), did not burden the wearing of Christian religious garb. He did explain that "[t]he desirability of dress regulations in the military is decided by appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."[151] This result obtained because "the First Amendment does not require the military to accommodate [religious] practices in the face of its view that they would detract from the uniformity sought by the dress regulations."[152]

Hernandez v. *Commissioner*[153] provides perhaps the most glaring example of religious bias by the Supreme Court in considering free exercise claims. In rejecting the Church of Scientology's claim that donations to the church for auditing sessions should be treated as charitable contributions for personal income tax purposes, Justice Marshall cast a blind eye on the tax treatment of other

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[151] Goldman v. Weinberger, 475 U.S. 503, 509 (1986).

[152] *Id.* at 509-10. Justice Stevens reached the same result, but used overtly equalitarian reasoning to support his conclusion: "If exceptions from dress code regulations are to be granted on the basis of a multifactored test. . . inevitably the decisionmaker's evaluation of the character and the sincerity of the requestor's faith – as well as the probable reaction of the majority to the favored treatment of a member of that faith – will play a critical part in the decision." *Id.* at ___ (Stevens, J., concurring).

[153] 490 U.S. 680 (1989).

kinds of quid pro quo donative arrangements, such a pew fees, mandatory tithes, and intercessionary masses. The majority squarely held that auditing session "payments are not deductible"[154] because "these payments were part of a quintessential *quid pro quo* exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions."[155]

The IRS's unfavorable tax treatment of the Church of Scientology did not even represent a viable free exercise claim because "[n]either the payment of taxes nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically."[156] Even if one conceded, for the sake of argument, a cognizable free exercise burden, "even a substantial burden would be justified by the broad public interest in maintaining a sound tax system."[157] Finally, the majority declined to consider seriously the claim of unfair differential treatment. "We do not know, for example, whether payments for other faiths' services are truly obligatory or whether any or all of these services are generally provided whether or not the encouraged 'mandatory' payment is made."[158]

Justice O'Connor authored a powerful dissent that had its heart the idea that "the IRS cannot constitutionally be allowed to select which religions will receive the benefit of its past rulings."[159] Citing multiple examples of quid pro quo donative arrangements involving pew rents, tickets to particular services, mandatory tithes for access to religious facilities, and Mass stipends, she found "no discernible reason why there is a more rigid connection between payment and services in the religious practices of Scientology than in the religious practices of the faiths described above."[160]

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154 *Id.* at 684.

155 *Id.* at 691.

156 *Id.* at 699.

157 *Id.* (internal quotations and citations omitted).

158 *Id.* at 702.

159 *Id.* at 704 (O'Connor, J., dissenting).

160 *Id.* at 709-11.

The reason for the differential treatment is self-evident: many people in the United States (and evidently on the Supreme Court and at the IRS) do not view the Church of Scientology as a legitimate religion and are unwilling to treat it at parity with Methodism, Judaism, or Roman Catholocism.

To be sure, the Church of Scientology was not declared illegal and its assets forfeited to the state – as was the Mormon Church in the late 19th Century.[161] Nor did the *Hernandez* Court resort to name calling or vilification.[162] But the fact the Justice Marshall's discrimination came in a civil wrapper does not alter the fact that the Church of Scientology plainly was not treated at parity with the Old Order Amish or the Seventh Day Adventists.

Other cases reflect failures to give the full benefit of strict scrutiny to religionists with unpopular viewpoints. In *Bob Jones University*,[163] for example, the Supreme Court found that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools [that practice racial discrimination], but will not prevent those schools from observing their religious tenets."[164] Thus, Bob Jones University did not even make the threshold of

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[161] *See* The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 7-12 (1890) (describing legislation enacted by Congress disbanding the Mormon Church and seizing its assets for the public treasury).

[162] *Cf. id.* at 48-50 (attacking Mormon faith for advocating practice of polygamy and analogizing practice to "right of assasination," "practice of sutte by the Hindu widows," and "offering of human sacrifices" and sustaining federal government seizure of church property and revocation of church's corporate charter)

[163] 461 U.S. 574 (1983).

[164] *Id.* at 603-04. This was the same methodology that Chief Justice Warren deployed in *Braunfield* v. *Brown*, 366 U.S. 599 (1961). In *Braunfield*, Orthodox Jews objected to being forced to close on Sundays under Pennsylvania state law, when their day of worship ran from sundown Friday to sundown Saturday, rather than on Sunday. *Id.* at 601-02. Rejecting a free exercise claim, Chief Justice Warren explained that "[c]ompulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden," but that "this is not the case at bar." *Id.* at 603. According to Warren "the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets." *Id.* "[T]he Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605. He concluded that "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*,

establishing a viable free exercise claim – unlike Mrs. Sherbert or any of the other plaintiffs denied unemployment benefits because they refused to work on a particular day of the week. Moreover, even if the Court assumed the existence of a viable claim, "[t]he government interest at stake here [in eradicating racial discrimination] is compelling."[165] Thus, as in *Lee* and *Roy*, the government's interest was compelling, so the existence or non-existence of a viable free exercise claim did not matter: "That government interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." Once again, the Court made no effort to ascertain with precision the nature of the burden granting the free exercise claim would place on the government's non-discrimination project.

Thus, in the pre-*Smith* era, the Supreme Court routinely rejected claims by minority religionists whose beliefs seemed non-mainstream.[166] Moreover, the Court often did this without even crediting the mere existence of a viable free exercise claim. In some instances, the Justices find that the government had not "prohibited" the plaintiffs' free exercise of religion (e.g., *Lyng*, *Roy*, *Herandez*). In other cases, the Court finds a viable free exercise claim, but then proceeds to

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legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Id.* at 606.

[165] *Id.* at 604.

[166] One particularly disturbing pattern relates to the pattern of claimants who the Supreme Court finds have properly invoked the Free Exercise Clause, versus those it holds complain only about an "indirect burden," *see Braunfield*, 366 U.S. at 603, 605-07. The religions that fail to establish a claim are almost uniformly non-Christian; the only Christian group that fails to at least cross the threshold of invoking the Free Exercise Clause are racial discriminators (*Bob Jones University*). The non-Christian plaintiffs in *Braunfield*, *Lyng*, and *Hernandez*, all evidently complain of merely non-cognizable indirect burdens, whereas the plaintiffs in cases like *Sherbert*, *Frasee*, *Thomas*, *Hobbie*, *Yoder*, and *Lee* all raised complaints about "direct" burdens that were sufficient to trigger the application of the Free Exercise Clause. As Mark Tushnet has observed, "the pattern of the Court's results in mandatory accommodation is troubling because, put bluntly, the pattern is that sometimes Christians win but non-Christians never do." Mark Tushnet, *"Of Church and State the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 381. Tushnet overstates the matter somewhat – it would be more accurate to say that Christians were more successful at invoking the clause, even when the facts suggested that only an indirect burden on religious practice existed (e.g., *Sherbert*). This is, of course, quite significant because the benefit of heightened scrutiny will only obtain if the plaintiffs meet the threshold requirement of establishing a "prohibition" on the free exercise of their religious beliefs.

measure the burden on the government on the assumption that noncompliance would be, if not universal, very close to it (*Lee*, *Roy*).[167]

In short, the Supreme Court's rhetoric reflected ethnocentric conceptions of "valid" and "invalid" religious precepts and the Court's application of the compelling state interest test to minority religionists was far from consistent. Both these trends should raise serious concerns regarding the fundamental fairness of the *Sherbert*/*Yoder* approach to free exercise claims for minority religionists.

B. Cognitive Dissonance and the Problem of Distinguishing Genuine "Religions" from Illegitimate "Cults"

The Supreme Court's bias toward well-established, well-accepted religious sects should not be surprising. The very notion of "religion" triggers deep-seated, largely unconscious, cultural associations and understandings. To ask someone to characterize a particular group as a "religion" requires her to draw a material equivalency between the beliefs of the group in question and her own beliefs; if the equivalency seems unwarranted because of the bizarre nature of the group's theology, the person might well prove unwilling to accept that the other group is a legitimate "religion" in the

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[167] For another example of this approach, see *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987). In *Estate of Shabazz*, the Supreme Court sustained New Jersey prison off-site work regulations that effectively precluded Muslim prisoners from observing mandatory Friday prayers (*Jumu'ah*). Chief Justice Rehnquist wrote that "[w]hile we in no way minimize the central importance of Jumu'ah to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end." *Id.* at 351-52. New Jersey accommodated Christian religious observance by not scheduling off-site work details on Sunday; the Muslim religionists could have been accommodated by a rule exempting them from off-site work details on Friday. The burden was direct and the state prison officials protected Christian prisoners from being excluded from Sunday services. An equalitarian focus would likely produce a different outcome in *Estate of Shabazz*, in that the differential treatment seems to suggest discrimination against a non-Christian sect. *Cf. id.* at 361-63 (Brennan, J., dissenting) (noting that Muslim prisoners throughout the federal penitentiary system are permitted to participate in *Jumu'ah* and that this accommodation has not proven unduly disruptive to "safety, security, and good order" in the federal prison system); Richard Delgado, *Organically Induced Behavioral Change in Correctional Institutions: Release Decisions and the 'New Man' Phenomenon*, 50 SO. CAL. L. REV. 215, 243-44 (1977) (discussing systematic discrimination against African-American Muslims in state prison systems and deferential federal court review of free exercise claims challenging this treatment).

same way as her own. "The attitude that most affects social and political behavior is prejudice against people who are different."[168]

If one considers the psychological and anthropological literature associated with recognition and acceptance of religious beliefs, it becomes increasingly clear that any effort to protect religious minorities from majoritarian hostility or indifference cannot rest on an autonomy-based theory. Although we could establish rules that ask judges to treat minority religions as fully equal to their own, it is highly unlikely that such an admonition will be honored in practice.

1. Religion and religions concepts are deeply culturally embedded. Unlike the concept of "speech," people have fixed and largely subconscious understandings of "religion." A person can credit the ravings of the Ku Klux Klan or the World Church of the Creator as "speech" without necessarily disparaging or undermining her own viewpoints. Unlike speech, "[r]eligious ideas are part of the surrounding world, in relation to which people define themselves."[169] When a person is confronted with religious propositions that seem odd, foreign, or even offensive, cognitive dissonance can result. "When dissonance is present, in addition to trying to reduce it the person will actively avoid situations and information likely to increase the dissonance."[170] For most people, most of the time, "[e]mphasis is on the compatibility of different thoughts and feelings."[171]

When faced with beliefs radically inconsistent with one's own, people will attempt to resolve "discrepancies, whether large or small, [that] produce discomfort, anxiety, and tension" by engaging in "behavior aimed at reducing the discrepancy and ensuring that it will not occur in the future."[172] Although a person "is not merely the product of his culture. . . it has undoubtedly provided him with much evidence of what is 'true' and much of the data which his personal construct system has had

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168 JOSEPH F. BYRNES, THE PSYCHOLOGY OF RELIGION151 (1984).

169 *Id.* at 157.

170 *Id.* at 153.

171 *Id.* at 152.

172 *Id.* at 156.

to keep in systematic order."[173] In turn, "[r]eligious sects and denominations frequently represent the characteristic cultural controls which operate in the construct systems of a group of people."[174]

The effect of cultural learning on one's attitude toward noncomforming individuals and groups occurs across a culture. Thus, "[e]ven when people are not formal adherents of a given powerful religious tradition, they cannot help but be affected by it through the surrounding culture."[175]

The most transgressive religious organizations find themselves excluded from the construct of religion entirely, and saddled with the pejorative label of "cult."[176] "These groups not only offer radical resistance to the dominant social order, they also sacralize that resistance."[177] Bromley and Melton observe that "[t]he challenge these movements pose is therefore fundamental in nature, as they threaten the logic and organizational forms through which the dominant social order is maintained."[178] "At the same time, these movements typically possess few allies and consequently are vulnerable to imposition of social control."[179] Even so, Professor Davis suggests that "[i]t is impossible, on both theoretical and empirical grounds, to draw a bright line between 'real' religions

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[173] *Id.* at 157-58.

[174] *Id.* at 158.

[175] *Id.*

[176] As Professor Davis explains, "[n]ew religions which demand a high degree of commitment from adherents are bound to be disturbing to outsiders, especially to family members of those who join." Dena S. Davis, *Joining a Cult: Religious Choice or Psychological Aberration?*, 11 J. LAW & HEALTH 145, 172 (1996-1997).

[177] DAVID G. BROMLEY & J. GORDON MELTON, CULTS, RELIGION, AND VIOLENCE 2 (2002).

[178] *Id.*

[179] *Id.*; *see also* Cynthia Norman Williams, *Note, America's Opposition to New Religious Movements: Limiting the Freedom of Religion*, 27 LAW & PSYCH. REV. 171, 173 (2003) ("Whichever definition is chosen, c cult is a religious practice that goes against the mainstream by displacing the ideals of the majority and embracing its own unique brand of worship.").

and 'destructive cults,' or between sincere conversion to a religious belief and being the object of 'coercive persuasion.'"[180]

Nevertheless, in the 1970s and 1980s, mainstream politicians and academics embraced a strong anti-cult movement.[181] This "anticult movement developed its own apocalyptic ideology which created the specter of a proliferation of rapidly growing, destructive cults that were acculumating economic and political power."[182] "The key elements in this ideology were 'cults' and 'brainwashing' that permitted the linking of diverse movements and organizational practices."[183] The goal, of course, was to establish and enforce a firm wall of separation between legitimate and illegitimate religious sects. The anticult movement advocated a variety of cultural and legal responses to suppress, if not eliminate, new religious movements seen as incompatible with American culture.[184] "Perhaps the anticult movement's greatest success was the cultural diffusion of the cult/brainwashing symbols that became the lens through which a diverse array of groups and events were thematized."[185]

A broad based cultural, political, governmental and media effort worked to publicize the dangers of new religious movements and to discourage participation in them.[186] "Parents of converts

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[180] Davis, *supra* note ___, at 172.

[181] *See* Bromley & Melton, *supra* note ___, at 20-23;JAMES T. RICHARDSON, REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 521-23 (2004); *see also* Davis, *supra* note ___, at 147-52.

[182] BROMLEY & MELTON, *supra* note __, at 21.

[183] *Id.*

[184] *See id.* at 21-23.

[185] *Id.* at 23.

[186] *Id.* at 42-45.

to new religious movements have banded together to form an anticult movement that has rejected the religious legitimacy of of the groups and affiliations with them."[187]

But new religious movements are seldom truly new; "there are truly few new religions."[188] "For example, Hare Krishna derives from Bengali Hinduism; Aum Shinrikyô from Buddhism; the Church Universal and Triumphant from Theosophy; the Branch Davidians from Adventism; the United Order from Mormonism; Happy, Healthy, Holy from Sikhism; Mahikari from Shintoism; and ECKANKAR from Sant Mat."[189] Professors Melton and Bromley suggest that "the criteria for distinguishing newness are much more complex than can be conveyed through any simple dichotomy."[190] Moreover, as Professor Davis has observed, "even if one posited that there could be a demonstrable theoretical difference between exercising one's 'religion' and joining a 'cult,' in practice it turns out that one person's cult is another's valid religion."[191]

Existing religious groups often react with hostility to perceived newcomers. Such opposition relates in part to "the resistance that new religious movements offer to the established order as political, albeit through a religious format."[192] Professor Rothkrug drives even more directly at this

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[187] *Id.* at 42; *see also* Davis, *supra* note ___, at 145-46 (noting that parents justified abusive deprogramming for their children in part by claiming that "these were not 'genuine religious movements – i.e., not worthy of tolerance and respect – and the converts' choices were not actually free choices at all, but the result of 'brainwashing,' sometimes called 'coercive persuasion,' 'thought reform,' or 'mind control."). For an argument that coercive deprogramming efforts should not be viewed a violative of Establishment Clause principles, see Richard Delgado, *When Religious Free Exercise in Not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief*, 37 VAND. L. REV. 1071 (1984).

[188] *Id.* at 43.

[189] *Id.* at 43; *see also* Davis, *supra* note ___, at 149 ("Anti-cult evangelicals, not surprisingly, while vociferous against groups such as DLM [Divine Light Movement] and the "Moonies" [The Unification Church], protest that 'aggressiveness and proselytizing . . . are basic to authentic Christianity,' and that Jews for Jesus and Campus Crusade for Christ are *not* to be labeled as cults.").

[190] Bromley & Melton, *supra* note ___, at 43.

[191] Davis, *supra* note ___, at 149.

[192] BROMLEY & MELTON, *supra* note ___, at 45.

point: "Evangelicals, Fundamentalists, and other militant Protestant groups exemplify a mentality prepared to make a public issue out of practices, however trifling, that are deemed to be contrary to their convictions."[193] One could see the willingness of some religious organizations to accept same-sex marriage, and the concerted legal effort to establish and enforce constitutional prohibitions against state recognition of such relationships, as an example of this phenomenon.

Over time, of course, the unfamiliar becomes less so. As one commentator has noted, "there are widely accepted religious groups that are no longer thought of as cults in the negative connotation of the word."[194] This set of now-accepted groups includes "Mormonism, the Jehovah's Witnesses, and the Masonic Lodge."[195] Even so, this is of little comfort to groups that have not yet achieved mainstream acceptability. "Today there pervades a hatred and distrust for marginal religious groups that are seen as destructive to its members, and the controls placed on such groups are not seen as burdens by the courts."[196]

2. Both academics and average citizens use nomenclature strategically to separate "real" religions from bogus ones. As detailed earlier, the Supreme Court's nomenclature and doctrine reflect the de facto existence of a tiered understanding of religionists. Long standing religions that maintain belief systems largely consistent with dominant political, economic, and cultural views might not always win, but they uniformly receive a respectful hearing. For example, Chief Justice Burger's opinion in *Yoder* puts great weight on the age of the Old Order Amish and on the consistency of the Old Order Amish with traditional ideals of the Protestant work ethic. By way of contrast, both 19th and 20th century decisions involving the Mormon practice of polygamy do not

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193 LIONEL ROTHKRUG, DEATH, TRUST, & SOCIETY: MAPPING RELIGION & CULTURE 39 (2006); *see also* Williams, *supra* note ___, at 174 ("Mainstream America feels threatened by new religious movements that allow and even encourage physical and sexual abuse, sexual deviation and experimentation, and mass suicides.") .

194 Williams, *supra* note ___, at 176.

195 *Id.*

196 BYRNES, *supra* note ___, at 182.

take seriously the plausibility of a religious obligation to practice polygyny. Indeed, Justice Murphy's dissent in *Cleveland* is remarkable for its willingness to consider carefully the practice of polygyny in overtly sociological and anthropological terms, largely divorced from the contemporary cultural significance of the practice in the United States.

Although the Supreme Court has never itself adopted labels for various religious sects, the broader culture certainly does maintain a careful nomenclature to distinguish legitimate religious groups from groups perceived to be illegitimate. Studies of religion themselves involve "sociological discussions of 'churches,' 'sects,' and 'cults' – definition of the different types of religious groups being the main problem."[197] In point of fact, no truly objective definition of a "religion" in distinction from a "cult" even exists – any effort to sort involves the adoption and application of essentially subjective criteria. Notwithstanding the definitional difficulties, "[t]here have been initiatives in a number of nations to distinguish a subset of religious groups as 'cults,' 'sects,' or 'destructive/dangerous groups' and to create profiles of their characteristics."[198]

The decisions of the federal courts reflect the same sort of effort. Indeed, the Supreme Court has assumed that it would be possible to prosecute the subjective good faith belief of a religious leader without putting the faith itself on trial.[199] Although Justice Douglas proclaimed that "[h]eresy trials are foreign to our Constitution,"[200] he wrote a majority opinion in *Ballard* that effectively permits government to deploy the criminal law of fraud as a weapon against oddball minority religions and religionists. In my view, Justice Jackson had the better of the argument in *Ballard* when, in dissent, he countered that "I do not see how we can separate an issue as to what is believed from considerations as to what is believable."[201] The problem of cultural bias is not limited to juries;

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197 *Id.* at 167.

198 BROMELY & GORDON, *supra* note ___, at 3.

199 *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944).

200 *Id.* at 86.

201 *Id.* at 92 (Jackson, J., dissenting).

indeed, as Professor Mark Tushnet has argued, the "men and women who are our judges" are "situated with respect to religion" and this fact will "induce predictable and normatively troubling distortions in outcome."[202]

3. Because judges are part of the culture, they are generally incapable of escaping their own cultural bias. Judges do not exist separate and apart from the general culture. Accordingly, a judge cannot avoid bringing cultural bias to the bench when confronted with a novel claim by a new religious movement. Moreover, the plausibility and importance of the movement's beliefs will be measured against a yardstick derived from religions familiar to those within the culture.

If this is so, then any effort, whether through a judicial interpretation of the Free Exercise Clause or through statutory civil rights enactments, whether at the federal, state, or local level, will not prove effective at protecting minority religionists. The claims will either be flatly rejected as too extravagant to be credited or the government's interests in regulation will easily overbear the burden on the minority group's religious practices. The problem inheres in the very nature of the concept of religion itself, and unless judges are somehow able to remove themselves from the general culture, this bias will prove unavoidable. Indeed, a review of the Supreme Court's opinions over time suggests that highly transgressive religions have difficulty invoking the Free Exercise Clause at all (because the burden on their religious practice is merely "indirect" rather than "direct") or, should the group establish a claim, the government's interests prove to be sufficiently "compelling," "important," or "substantial" to justify applying the law against members of the sect.

Professor Ira Lupu warns that "the question of what counts as religiosity for purposes of free exercise" presents a difficult "definitional problem," a problem "compounded by its relation to the likelihood of discrimination against unusual spiritual claims."[203] He suggests that "[i]n the absence of objective criteria, decisionmakers tend to fall back on the familiar experience or the romantic

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[202] Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 Sup. Ct. Rev. 373, 400.

[203] Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 957-58 (1989).

ideal."[204] This approach results in "at best, reasoning by induction from conventional Western patterns of religion, and, at worst, simple equations of religion with Christianity."[205]

The problem, however, is that truly neutral rules simply do not exist that allow for the easy categorization of groups as "religions," "sects," or more pejoratively "cults." In practice, contrary to Lupu's admonition against the use of "ethnocentric models of religion" in analyzing free exercise claims,[206] such models are commonplace and probably largely unavoidable.

4. Any autonomy based iteration of the Free Exercise Clause will privilege majoritarian religionists. The necessary conclusion to be drawn is that any effort to frame free exercise principles as facilitating religious autonomy will have the perverse effect of increasing, rather than decreasing, the differential in religious liberty enjoyed by majority and minority religionists. A test that restricts government in the name of religious autonomy will expand the rights of dominant sects, but will have far less effect on the de facto rights of minority religious sects.

C. Empirical Evidence Demonstrates that the *Sherbert/Yoder* Approach Systematically Disadvantages Minority Religionists Vis á Vis Majority Religionists.

Up to this point, the argument against an autonomy based approach to theorizing free exercise principles has rested on largely normative and social science arguments. As it happens, empirical data confirm that *Sherbert*/*Yoder*'s autonomy-based conception of the Free Exercise Clause increased, rather than decreased, the differential treatment of minority sects.

Professors John Wybraniec and Roger Finke undertook a comprehensive empirical examination of free exercise cases during the pre-*Smith*, post-*Smith*, and RFRA periods.[207] Their findings are highly instructive regarding the question of which religions win, and which religions

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204 *Id.* at 958.

205 *Id.*

206 *Id.*

207 John Wybraniec & Roger Finke, *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule in* REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 535 (James T. Richardson, ed. 2004)

lose, under a strict scrutiny approach. Looking at a sample comprised of cases reported in *The Religious Freedom Reporter*, Wybraniec and Finke coded the cases for the religious affiliation of the plaintiffs and for the eventual outcome of the litigation.[208] They coded the religious groups "according to whether the group (or the individual's affiliation) was a church, sect, cult, or another non-Christian tradition."[209]

The results are striking. Unsurprisingly, "the results indicate that religions in tension with society are more likely to be involved with the judiciary."[210] For example, Protestant sects constitute only "15% of the total U.S. church membership," but were "involved in almost 27% of the free exercise claims."[211] New religious movements (pejoratively labeled "cults") present an even starker disparity between number of adherents and claims: "Only representing 1% of church membership, they are involved in over 16% of the free exercise court cases."[212] Although Jews, Muslims, and Native American religions make up only 3% of the religious population, these groups account for 18% of the free exercise claims brought to court.[213] Wybraniec and Finke observe that if one aggregates these minority religious groups, they comprise "only about 18% of the church membership in the U.S., but together they account for nearly 62% of the free exercise cases coming to the courts, and nearly one half of all court cases on religion."[214]

The contrary pattern holds true for "mainline" Protestant churches. Although membership in mainline Protestant sects equals only 21% of total church membership, these groups account for

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208 *Id.* at 540-42.

209 *Id.* at 542.

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

"only 4% of the cases on religion, including free exercise cases."[215] Similarly, Roman Catholics provide 38% of national church membership, but account for only 8% of free exercise cases.[216]

The pattern is reasonably clear: minority religions bring far more cases than more traditional majority religious groups. Logically, one would expect that religious minorities would also win more cases, or at least win an equal percentage of cases as do members of majority religious groups. However, this is not the case. Even though minority religionists bring far more cases, their success rate in the federal courts is much lower. Minority religionists bring and lose more cases; majority religionists bring fewer cases and win a larger percentage of them.[217] Wybraniec and Finke explain that "higher tension religions are less likely to receive favorable decision" than more culturally familiar sects.[218]

Over the entire period, cults won around 37% of their free exercise cases, whereas mainline Protestants won about 65% of their cases.[219] In other words, a member of a mainline Protestant church is almost twice as likely to win a free exercise claim as a member of a cult. However, "the statistics do not explore the consequences of the *Smith* decision or the Religious Freedom Restoration Act (RFRA)."[220]

If one takes *Smith* and the RFRA into account, the net disparity between minority and non-minority religions *decreases*, rather than *increases*. *Smith* had the effect of lowering success rates for free exercise cases across the board and this resulted in a decrease in the net difference of successful claims brought by majority as opposed to minority religionists. Wybraniec and Finke explain that "the odds of a favorable decision for religious freedom cases outside the *Smith*-period

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215 *Id.*

216 *Id.*

217 *Id.* at 542-49.

218 *Id.* at 542.

219 *Id.*

220 *Id.* at 542-43.

were almost 2 to 1 for cases prior to *Smith* and were over 2 to 1 for the RFRA period following *Smith*.[221] Success rates fell significantly after *Smith* and before enactment of the RFRA, to success rates of around 30% (as opposed to 66%).[222] The statistical models found "a strong negative relationship between the citing of *Smith* and favorable decisions by the courts, even when controlling for exogenous and other control variables."[223]

Perhaps surprisingly, the authors found that the RFRA did not return success rates to pre-*Smith* levels. "In fact, the striking finding is that RFRA, though not significant, is negatively related to a positive outcome in court decisions."[224] Wybraniec and Finke explain that "citing *Smith* remained significant" and "even when *Smith* and RFRA are placed in the equation together, the more powerful factor is the original decision from *Smith*."[225] They conclude that "RFRA, a legislative act, has apparently not be able to counteract the strength of the legal ruling of *Smith*."[226]

This conclusion suggests that the underlying content of free exercise doctrine plays a significant role in the adjudication of statutory civil rights cases involve free exercise-type claims. Even if Congress or a state legislature wishes to use statutory means of expanding the scope of religious freedom, Wybraniec and Finke's study suggest that these means are less effective than one would otherwise assume.

Looking at cases in the pre-*Smith* era, the authors found that "high-tension faiths (i.e., religions holding a high level of separation, antagonism, and distinctiveness within the surrounding social-cultural environment), were more likely to be involved in court cases and to receive

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221 *Id.* at 545.

222 *See id.* at 546-48.

223 *Id.* at 548.

224 *Id.* at 549.

225 *Id.*

226 *Id.*

unfavorable rulings."[227] "[T]he overall trend shows sects, cults, and other minority religions holding high rates of involvement in court cases and a low rate of favorable rulings" pre-*Smith*.[228] "By contrast, the mainline Protestants seldom appeared in the courts and their rate of favorable rulings towered over all other religious groups."[229]

Because *Smith* had the effect of "lower[ing] [the] rate of favorable decisions for religious groups prior to the RFRA," it necessarily had the effect of reducing the net disparity between mainline Protestants (part of the cultural mainstream) and unpopular minority sects. When majority religionists enjoy a substantial advantage in winning cases, any reduction in the net number of wins reduces the disparity between the winners and the losers. That is to say, unpopular minorities lost most of the many cases they brought prior to *Smith*, whereas members of mainline religious groups brought fewer cases and won a much greater percentage. *Smith* reduced the differential win/loss ratios and thereby advanced equal treatment among sects.

Wybraniec and Finke's study raises a serious question about the assumption that strict scrutiny of neutral laws of general application will actually protect highly unpopular religious minorities. The radical disjunction in the number of case brought and the success rate for those cases suggests that unpopular minority religious groups simply did not receive the full benefit of *Sherbert/Yoder* strict scrutiny doctrine.

A second study, undertaken by Professor James Richardson, considered the exercise of discretion within the legal system. He undertook analysis of whether "controversial religious groups" faced bias in the federal and state courts.[230] Richardson found pervasive bias against against adherents of unpopular religious faiths. "Problems of either accepting questionable evidence where

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227 *Id.*

228 *Id.*

229 *Id.*

230 James T. Richardson, *Regulating Religion: A Sociological and Historical Introduction in* Richardson, *supra* note ___, at 1, 8.

its introduction might undercut rights of a minority religious group, or refusing to accept evidence that could support claims by such a group, can result in court decisions that can be characterized as discriminatory, and not in the interest of social justice or religious freedom."[231] In sum, Richardson's work and conclusions are entirely consistent with the Wybraniec and Finke study.

Proponents of a return to the *Sherbert*/*Yoder* approach should explain why a rule that produced such skewed results represents a better approach than *Smith*. Surely the religious autonomy of religious minorities is no less deserving of respect than the rights of members of more popular sects. Yet, this is precisely how the regime of strict scrutiny pre-*Smith* worked – in a perverse way, strict scrutiny enhanced the religious liberty of groups that have the least to fear from democratically elected legislators and executive branch personnnel.

Of course, one might attempt to find fault with either the Wybraniec and Finke or Richardson studies. As a means of checking their results, my research assistant and I conducted an empirical analysis of pre- and post-*Smith* free exercise cases in the U.S. Courts of Appeals for the Fourth, Sixth, and Ninth Circuits.[232] The selection of these particular courts was not accidental. Most commentators perceive the Fourth Circuit to be a conservative bench, the Ninth Circuit to be a progressive or liberal bench, and the Sixth Circuit to lack (at least historically) a firm ideological personality. By examining the decisions from ideologically diverse courts, we hoped to control for the possibility of ideological bias in applying *Sherbert*/*Yoder* and *Smith*.

As the chart in the appendix shows, our study generally confirmed the findings of the Wybraniec and Finke study. Members of majority religions bring fewer claims and win more of them than do minority religions. *Smith* had the effect of lowering success rates across the board, and this in turn reduced the relative disparity in successful claims between majority and minority religionists.

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231 *Id.*

232 The results of this study appear in a grid form as an appendix.

The one exception to this pattern is the Ninth Circuit, in which minority religionists actually won a greater percentage of their claims pre-*Smith* than did majority group religionists. This would support the argument that strict scrutiny, applied with sufficient sensitivity to the dangers of unreflective ethnocentrism and respect for cultural difference, might advance, rather than retard, both religious equality and religious autonomy. The results from the Fourth and Sixth Circuits, however, squarely re-confirm the Wybraniec and Finke's findings. Accordingly, we found that *Smith* had the effect of actually increasing religious equality because overall it significantly reduced the differential success rates that prevailed under the pre-*Smith* regime.

III. An Alternative Conception of the Free Exercise Clause: Free Exercise as an Equalitarian Guarantee

This Part considers the original understanding of the Free Exercise Clause and, relying on the legislative history of the clause in the House of Representatives, argues that an equalitarian understanding of the clause better comports with these historical materials than does a autonomy based reading of the materials. Although Judge McConnell's contrary interpretation of the available record is certainly plausible,[233] in my view his reading of the record fails to account completely for all the available evidence and engages in more spin than may be warranted. After considering the legislative history of the clause, the Part offers additional normative and policy arguments in favor of an equalitarian reading of the Free Exercise Clause.

A. The Original Understanding: Madison and an Equalitarian Reading of the Free Exercise Clause.

The legislative history of the Free Exercise Clause suggests that its purpose was the prevention of religious discrimination, rather the creation of some sort of generalized right to religious autonomy. Madison, the principal architect of the amendments that were to become the Bill of Rights, introduced language that reflects an equalitarian, rather than libertarian, purpose.

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[233] *See* McConnell, *Origins and Historical Understanding*, *supra* note ___, at 1473-1511.

Madison introduced a resolution containing the first draft of the Free Exercise Clause on Monday, June 8, 1789. The fourth amendment that Madison proposed provided that:

> That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to-wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[234]

This language is significant in that it casts the right to free exercise in overtly equalitarian terms – "full and *equal* rights of conscience." Unlike the final language adopted by Congress and submitted to the states ("free exercise of religion"), the original draft expressly referenced equality concerns.

McConnell suggests that this language necessarily implies mandatory exemptions from general laws, arguing that the language "implies that the liberty has both a substantive and an equality component: the rights must be both 'full' and 'equal.'"[235] He concludes that "[h]ence, the liberty of conscience is entitled not only to equal protection, but also to some absolute measure of protection apart from mere governmental neutrality."[236] Nothing in the immediate context of Madison introducing the resolution suggests this highly expansive interpretation of the language. Moreover, "full" could simply be a description of the level of equality required; partial equality, or a reduced measure of religious equality, would not be sufficient. In other words, the language "full rights of conscience" could plausibly be interpreted as simply synonymous with "equal rights of conscience." Neither verbal formulation necessarily implies anything more than freedom of belief, as opposed to freedom of conduct.

Madison's preferred approach to amendments was to insert them into the pre-existing text of the Constitution, rather than to incorporate them as a separate series of amendments. Article I, § 9 contains limitations on the scope of federal legislative power; Madison's text if adopted would

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234 I ANNALS OF CONGRESS: THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (Joseph Gales, Sr. ed. 1834), *reprinted in* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY 110 (1955).

235 McConnell, *Origins and Historical Understanding*, supra note ___, at 1481.

236 *Id.*

have appeared after the Bill of Attainder and Ex Post Facto Clauses, and before the prohibition against direct taxes. In addition to a proscription against federal legislation that would deny religious equality, Madison also proposed an amendment to Art. I, § 10, which contains limitations on the scope of state legislative powers: "Fifthly. That in article 1st, section 10, between clauses 1 and 2, be inserted this clause, to-wit: No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[237] Thus, the language employed with respect to state governments omitted the "full" language, and relied entirely on the "equal" clause.

McConnell simply ignores this text, focusing exclusively on the text related to the federal government.[238] If the additional language "full" carried the weight that McConnell suggests, it seems odd that Madison would have omitted it from the version of the clause he proposed to apply to the states. After all, state governments presented a far greater threat to religious freedom in Madison's view than did the federal government; writing a weaker form of the clause with respect to the states would have done little to secure meaningful religious equality.

In discussing his proposed amendments, Madison does not suggest that he intended to hold the federal government to a higher standard of care than the state governments with respect to rights of conscience. Instead, he overtly makes exactly the *opposite* argument. Madison observes that "[a]lthough I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience come in question in that body [the Parliament of Great Britain], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, repecting which the people of America are most alarmed."[239] He emphasized that "[t]he freedom of the press and rights of conscience, those choicest privileges of

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237 Annals of Congress, *supra* note ___, at 111 [451] (June 8, 1789).

238 McConnell, *Origins and Historical Understanding*, *supra* note ___, at 1481-83.

239 Annals of Congress, *supra* note ___, at 113 (June 8, 1789).

the people, are unguarded in the British constitution."[240] This language, of course, tracks the text of Madison's proposed amendment to Article I, § 10, that would bind the state governments.

If the "equal rights of conscience," along with the right to a free press and jury trial in a criminal case represent the "choicest" of rights, it seems odd that Madison would protect those rights imperfectly against the states, but completely against the federal government. In light of this discussion, the best interpretation of the proposed amendments is that they were intended to have equivalent effect, and to secure equal rights of conscience for all citizens, against both the federal and state governments.

Madison later addresses this very point in his address, noting that if amendments are necessary to secure the liberties of the people, "I wish also, in revising the constitution, we may throw into that section, which also interdicts the abuse of certain other powers in the State Legislatures, some other provisions of equal, if not greater importance than those already made."[241] "I think that there is more danger of those powers being abused by the State governments than by the Government of the United States."[242] He explains that "I should therefore wish to extend this interdiction, and add, as I have stated in the 5th resolution, that no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases; because it is proper that every Government should be disarmed of powers which trench upon those particular rights."[243] Madison emphasized the real threat that state governments presented to securing fundamental human rightss:

> I cannot see any reason against obtaining even a double security on those points; and nothing can give a more sincere proof of the attachment of those who oppose this constitution to these great and important rights, than to see them join in obtaining the security I have now proposed; because it must be admitted, on all hands, that the

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240 *Id.*

241 *Id.* at 117.

242 *Id.*

243 *Id.*

> State Governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be cautiously guarded against.[244]

Judge McConnell makes no reference to these remarks, which is consisent with his failure even to mention Madison's proposed free exercise amendment for the states. When one reads Madison's reasons for proposing a free exercise right against the state governments, it is patently clear that his language was not intended to convey a more limited right against state governments than the national government. In consequence, McConnell is simply incorrect to suggest that the language "free and equal rights of conscience" held any greater significance – at least for Madison – than language protecting "the equal rights of conscience." McConnell's failure to address this aspect of Madison's proposal, and the reasons Madison offered in support of it, raise serious problems for McConnell's preferred interpretation of the text.

On July 21, 1789, the House of Representatives referred Madison's resolution proposing amendments to the Constitution to a special committee "to consist of a member from each State, with instruction to take the subject of amendments to the constitution of the United States more generally into their consideration and to report thereupon to the House."[245] The House appointed Madison to serve as Virginia's member of the special committee, along with Representatives Vining, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot, and Gale.[246] The decision to constitute a committee consisting of one representative per state merits a brief comment. Given that the Framers established the House of Representatives on a basis of proportional representation,[247] it was, at least superficially, odd to assign such an important task to a committee that did not itself reflect proportional representation of the states. On reflection, however, because ratification of amendments would require the consent of 3/4ths of the state legislatures (or

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244 *Id.*

245 *Id.* at 132.

246 *Id.*

247 *See* U.S. CONST., Art. I, § 2, cl. 3.

conventions in the states called for the purpose of considering the amendments),[248] it undoubtedly made sense to create a committee constituted in a fashion that would lead to the drafting of amendments that might enjoy the broadest support among the states. A committee dominated by members from the more populous states, such as Virginia, New York, and Massachusetts, might not be as effective at crafting amendments likely to secure the necessary support to ensure ratification.

On Saturday, August 15, 1789, the House of Representatives considered an amendment proposed by the special committee that would amend Article I, § 9, by adding a new provision between the existing third and fourth clauses, to read "no religion shall be established by law, nor shall the equal rights of conscience by infringed."[249] Thus, the committee essentially adopted Madison's language, although it dropped the "full and" language from its proposed text, using instead the language that Madison had proposed for incorporation against the state governments in Article I, § 10. Most of the debate over the proposed amendment related to the prohibition against establishments, rather than to the "equal rights of conscience."

Madison, who served on the drafting committee, noted that ratifying conventions in the states had requested a textual prohibition against an established national church and also observed that some ratifying conventions worried that the Necessary and Proper Clause of Article I, § 8, cl. 18 "enabled them [Congress] to make such laws of a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of language would admit."[250] This once again frames the Establishment and Free Exercise Clauses as mirror images of each other: one prevents Congress from imposing a religion on the citizenry, while the other prevents Congress from attempting to burden particular religious groups in a discriminatory way by infringing the rights of conscience. Subsequent debate continued to use the nomenclature "rights of conscience" to express

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248 *See* U.S. CONST., Art. V.

249 Annals of Congress, *supra* note ___, at 160 (August 15, 1789).

250 *Id.* at 161.

the idea of free exercise.[251] Moreover, the working draft retained the nomenclature "rights of conscience" to express the concept of free exercise of religion.[252]

On Thursday, August 20, 1789, the House of Representatives returned to the subject of an amendment to secure religious freedom. Representative Ames proposed amending the language to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[253] The members agreed to this language, and debate moved on to other proposed amendments. The record contains no explanation for the change of language or the intended substantive effect of the new language. Given the absence of any explanation for the addition of the new "free exercise" language, and no debate regarding its adoption, it would be logical to conclude that the members viewed the changes as merely technical, rather than substantive in nature.

Significantly, however, *immediately* after adoption of this revised language, which specifically referenced "the free exercise" of religion, the House of Representatives considered a "sixth amendment," which provided that "No person religiously scrupulous shall be compelled to bear arms."[254] If the adoption of language safeguarding the free exercise of religion secured religious exemptions from general laws, this amendment should have been rejected as entirely redundant. At a minimum, if the just-adopted free exercise language was thought to generate exemptions from general laws, someone surely would have asked whether this more specific amendment was entirely redundant. The fact that debate about this amendment immediately

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[251] *See id.* at 161-63 (reporting on proposal by Rep. Livermore to modify the committee's language to provide that "Congress shall make no laws touching religion, or infringing the rights of conscience").

[252] *Id.* at 162 (noting that the House of Representatives adopted Rep. Livermore's proposed language by a vote of 31-20).

[253] *Id.* at 198 (August 20, 1789).

[254] *Id.*

followed adoption of language protecting both the "rights of conscience" and "free exercise" leaves little room for interpretive doubt.

Rep. Scott opposed the conscientious objector amendment, while Rep. Boudinot supported it, questioning whether "any dependence. . . [can] be placed in men who are conscientious in this respect."[255] Rep. Boudinot argued:

> I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person. Now, by striking out the clause [protecting conscientious objectors], people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.[256]

Rep. Boudinot was evidently persuasive, because after adding the words "in person" after the words "bear arms," the House of Representatives adopted the proposed amendment.[257]

Remarkably, Judge McConnell acknowledges the debate over an amendment securing rights of conscientious objection to military service,[258] he does not bother to note that the debate followed immediately after the adoption of an amendment that incorporated the language "free exercise" into the House's working draft of the Religion Clauses. The timing of this debate is significant, for if the adoption of the "free exercise" language carried significant substantive weight regarding constitutional exemptions from general laws, one would have expected someone to suggest that the conscientious objector amendment was unnecessary and redundant; yet, no one makes such a suggestion. Both an opponent and a proponent of the amendment assume that the amendment would be necessary to protect conscientious objectors from involuntary conscription. The House as a whole even adopted an amendment that would limit the exemption to an obligation of "in person" service in the armed forces, leaving a conscriptee potentially liable for funding the cost of his replacement.

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255 *Id.*

256 *Id.*

257 *Id.* at 197.

258 *See* McConnell, *Origins and Historical Understanding*, supra note ___, at 1500-03.

McConnell offers three reasons why consideration of this amendment should not be read as precluding an exemptions-generating interpretaton of the Free Exercise Clause. He suggests that 1) "the militias are arms of the state governments except when in actual service," so that the Free Exercise Clause might not apply to them; 2) "it does not necessarily follow from the fact of the free exercise exemptions that the particular case of military service will be held exempted," and 3) "if Congress struck out the militia exemption clause" – as it ultimately did – "this would create an inference that there in an intention in the general government to compel all citizens to bear arms."[259] In fact, remarkably McConnell argues that consideration of this provision "strongly suggests that the general idea of *free exercise* exemptions was part of the [Framers'] legal culture."[260]

Given that the first debate on this question occurred immediately after adoption of the free exercise language (again, something McConnell conveniently ignores), it is difficult to credit the notion that the free exercise language, of its own accord, was understood to generate exemptions from neutral laws of general applicability. In fairness to McConnell, he never expressly argues that the *only* plausible interpretation of the Free Exercise Clause is that the Framers understood it to generate judicially cognizable exemptions from neutral laws of general applicability. For example, he notes that "[i]n many contexts, the phrases 'rights of conscience' and 'free exercise of religion' seem to have been used interchangably."[261] He also concedes that "[i]t is possible that these changes in language [from "free and equal rights of conscience" to "free exercise"] were without substantive meaning, for in many of the debates in the preconstitutional period, the concepts of 'liberty of conscience' and 'free exercise of religion' were used interchangably."[262]

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259 *Id.* at 1501.

260 *Id.* (emphasis added).

261 *Id.* at 1482-83.

262 *Id.* at 1488.

Even with these important caveats, however, McConnell argues that the free exercise nomenclatures supports an exemptions-granting interpretation of the clause.[263] And, he directly asserts that "[b]y using the term 'free exercise,' the first amendment extended the broader freedom of action to all believers" and that "the freedom of religion was almost universally understood (with Jefferson being the prominent exception) to include conduct as well as belief."[264] He concludes, accordingly, that "free exercise is more likely than mere liberty of conscience to generate conflicts with, and claims for exemptions from, general laws and social mores."[265]

If the meaning of "free exercise" was as clear as McConnell asserts, however, then the debate about the military service exemption amendment is wholly inexplicable. Having just adopted language that McConnell claims incorporates religious exemptions from general laws, the House turns to consider an amendment that has this effect in a particular context – conscription. The timing of this debate is important, and it suggests (rather strongly) that the House did not understand the just-adopted "free exercise" language to generate exemptions from neutral laws of general applicability.

Moreover, the complete absence of any debate regarding the change of language is striking, if the new language had the substantive effect that McConnell claims for it. If McConnell is correct, then Rep. Ames's amendment had the effect of radically expanding the scope of the proposed religious freedom amendment, to disallow any law the impedes religiously motivated conduct. For such a sweeping change, the absence of *any* debate is simply stunning. Moreover, the House of Representatives adopted a military exemption clause that protected only against personal induction, and not against an obligation to find and fund a surrogate. The adoption of the "in person" limitation would make the exemption relatively weak, for if a person has a religious objection to all wars, it

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263 *See id.* at 1488-1500.

264 *Id.* at 1490.

265 *Id.*

seems odd to honor that objection by forcing him to fund personally another person to fight in his stead; yet, that seems to be exactly the import of the "in person" amendment.

I am not claiming that the case against reading the Free Exercise Clause to encompass exemptions from general laws is irrefutable. Instead, I am suggesting the McConnell's treatment of the House of Representatives debates was not complete and that a fuller review of the House debates makes the case in favor of mandatory exemptions much more difficult to make that McConnell admits.

On September 24, 1789, the House of Representatives considered and adopted a proposed amendment that provided "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[266] The House agreed to this language, as did the Senate, and it was ratified as the First Amendment.[267]

The legislative history of the Free Exercise Clause in the House of Representatives establishes that the Framers, and particularly Madison, understood the clause in equalitarian terms. The subsequent changes in nomenclature do not appear to have carried with them any substantive import – certainly there is no recorded debate to this effect. Moreover, the phrases "rights of conscience," "free and equal rights of conscience," and "free exercise" all seem to have been used interchangeably over the course of the summer of 1789. Indeed, Madison himself, in proposing a free exercise guarantee, used "full and equal rights of conscience" and "equal rights of conscience"

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[266] Annals of Congress, *supra* note ___, at 210.

[267] It bears noting that the legislative history of the Free Exercise Clause in the Senate is largely lost to history because "the Legislative as well as Executive sittings of the Senate were held *with closed doors* until the second session of the third Congress, with the single exception of the discussion of the contested election of A. Gallatin, as Senator from Pennsylvania, during which discussion the galleries were opened by a special order of the Senate." *Id.* at 213. The closed nature of Senate deliberations in the first Congress accordingly explains "the meagreness of the report of the Senate proceedings." *Id.* Moreover, James Madison, then a member of the House of Representatives, has generally been credited as the principal architect of the Bill of Rights. Accordingly, even without the lack of a similar record of the Senate's proceedings, Madison's views should be of particular relevance to understanding the original intention of the Free Exercise Clause.

as synonyms.[268] Given that Madison did himself did not attach any particular importance to the precise language used to express the concept of religious equality, the best reading of the record would accept that the varying nomenclature did not signify any substantive differences in meaning.[269]

What is clear from Madison's proposal and the subsequent House debates is that the free exercise clause exists to protect against any form of government-sponsored religious discrimination that violates "the full and equal rights of conscience." An interpretation of the clause that offers anything less that full protection against both overt and covert forms of discrimination cannot be squared with the Framers' intentions.

B. An Equalitarian Reading of the Free Exercise Clause Helps to Resolve the Tension Between the Religion Clauses.

The Supreme Court has repeatedly noted that "play in the joints" exists between the Establishment Clause and the Free Exercise Clause. The tension relates to the potential conflict between a clause that disallows government preferences in favor of religion (the Establishment Clause) and a companion clause that explicitly safeguards religion from adverse governmental action (the Free Exercise Clause). If one reads the Free Exercise Clause broadly to generate exemptions for religiously motivated violations of general laws, the potential tension between the clauses increases significantly.

At the same time, however, both clauses must have independent significance that gives each provision meaningful force and effect. Although the textualist objection to *Smith* lacks merit

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[268] *See id.* at 110-11 (June 8, 1789).

[269] In a similar fashion, some state constitutions use the phrase "law of the land," rather than "due process of law," to express the concept that government must act in a fundamentally just fashion. *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 592-94 & 593 n. 247 (1997). The use of "law of the land," relating back to Magna Charta, rather than the more contemporary "due process of law" does not indicate a difference in substantive content; rather, it is simply another means of expressing the same basic concept of rational, fundamentally fair governance. *See id.* at 593 n. 247; *see also* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 981-84; Edwin S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 380-84 (1911).

because *Smith* does not entirely strand the clause,[270] a broader reading of the Free Exercise Clause could be maintained without raising an irreconcilable conflict with the Establishment Clause. In other words, the potential conflict between the clauses does not preclude a stronger reading of the Free Exercise Clause than *Smith* offered.

As this article has argued, a perfectly plausible reading of the Free Exercise Clause – and one consistent with the clause's legislative history, would focus on the prevention and eradication of discrimination against unpopular religions and religionists.[271] Such a reading would not exacerbate the conflict between the Religion Clauses. Instead, an equalitarian reading of the Free Exercise Clause would render the clause a mirror image of the Establishment Clause: one clause prohibits government efforts to impose religion, whereas the other prohibits government efforts to discriminate among religions and religionists.

Justice Stevens has been a proponent of interpreting the Free Exercise Clause in equalitarian terms. For example, in *Lee*, Justice Stevens concurred in the result, not because government has a compelling interest in collecting payroll taxes to support the Social Security system, but rather because of an "overriding interest in keeping the government – whether it be the legislature or the courts – out of the business of evaluating the relative merits of differing religious claims."[272] He cautioned that "[t]he risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."[273] Similarly, in *Roy*, Justice Stevens observed that "[m]embers of the Abenaki Indian Tribe are unquestionably entitled to the same constitutional protection against

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270 *See supra* text and accompanying notes ___ to ___.

271 Leo Pfeffer, *Equal Protection for Unpopular Sects*, 9 N.Y.U. REV. L. & SOC. CHANGE 9, 11 (1980-1981) ("The purpose of the first amendment's guarantee of freedom of religion was and is the protection of unpopular creeds and faiths.").

272 United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).

273 *Id.*

governmental action 'prohibiting the free exercise' of their religion as are the adherents of other faiths."[274]

Justice Stevens fears that differential grants of religious exemptions from general laws, in the name of advancing religious liberty, could have the perverse consequence of effectively defining genuine, legitimate religions from ersatz religions – which undoubtedly will be newer faiths with which members of the judiciary have less personal familiarity. Nevertheless, "[i]f *Smith* were overrule or limited, courts would be back in the business of weighing governmental interest against individual interest to decide whether to compel religious exemptions from otherwise valid laws under the Free Exercise Clause."[275] This balancing, in turn, would necessitate a subjective evaluation of the plausibility of the religionists' claims and a weighing of the those claims against the interest of the government.

C. *Smith* Better Advances the Equalitarian Project Than Does *Sherbert/Yoder*

An approach the Free Exercise Clause that requires subjective evaluation and weighing of religious and governmental interests will never redound to the benefit of groups or organizations at the margins of American culture. Instead – and as was the case in the pre-*Smith* era – courts are far more likely to find merit in claims brought by religious organizations understood to lie within the cultural mainstrain than in claims brought by cultural outliers. This produces the ironic effect of turning a countermajoritarian protection into a means of enhancing relative majoritarian privilege.[276]

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[274] Bowen v. Roy, 476 U.S. 693, 716 (1986) (Stevens, J., concurring in part and concurring in the result).

[275] Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1626 (1993).

[276] *See* Pfeffer, *supra* note ___, at 11 ("It needs no constitution to assure security for the Episcopalians, Methodists, Presbyterians, or other well-established and long-accepted religions. The heart of the First Amendment would be mortally wounded if the religions we now call cults were excluded from the zone of its protection because of their disfavor in the eye of government officials or the of the majority of Americans.").

Part of the problem inheres in the difficulty of taking seriously religious views that are foreign, strange, or even offensive. As Justice Jackson, in his dissenting opinion in *Ballard*, explained, "I do not see how we can separate an issue of what is believed from considerations as to what is believable."[277] He suggested that attempts to "try religious sincerity" cannot be "severed from religious verity" without "isolat[ing] the dispute from the very considerations which in common experience provide its most reliable answer."[278] "All schools of religious thought make enormous assumptions, generally on the basis of revelation authenticated by some sign or miracle."[279] And, because of this, "[t]he appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce."[280]

Any open-ended test for measuring the reasonableness of burdens on religious practice cannot fail to take into account the reasonableness of the religious belief. But, unlike questions of math or science, subjective and cultural norms will prefigure the willingness of judges to find merit in a particular claim for a religious exemption to a neutral law of general applicability.

One means of solving the problem is simply to make it the plaintiff's problem. As Professor Pepper puts it, "[j]udging credibility is a staple of the adjudicatory process and administrative processes, and there is no reason why the burden of proof on this issue ought not to be on the claimant."[281] He suggests that religious exemption claims could be sorted by considering "[c]onsistency of the claimed belief with past conduct, with current conduct other than that at issue, and corroborating witnesses" and that "[i]ncorrectly denying some sincere persons shelter for their

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277 United States v. Ballard, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting).

278 *Id.* at 93.

279 *Id.* at 94.

280 *Id.*

281 Pepper, *supra* note ___, at 328.

religious conduct, an occasionally necessary result if sincerity is to be judged, will simply be a cost of granting a meaningful constitutional privilege in this area."[282]

Pepper is correct only if the core purpose of the Free Exercise Clause is maximizing religious autonomy, but he is badly mistaken if the objective of the clause is ensuring religious equality. Mistakes regarding the sincerity or centrality of religious beliefs and practices will not fall randomly across all believers; those with the most bizarre, most fantastic beliefs will face the highest probability of an erroneous rejection.[283] If free exercise jurisprudence should advance equality in equal measure with liberty, it must take into account the limits of judges to evaluate fairly that which is radically unfamiliar, strange, and perhaps even vaguely threatening.

I have previously suggested that "[t]he First Amendment right to the free exercise of religion permits some deviance form community norms; the degree and kind of deviance permitted under *Yoder* (and now the RFRA) will be function of the cultural sensibilities of individual federal judges."[284] Accordingly, "the substantive meaning of the 'right to free exercise' is (at least in part) culturally determined."[285] If these arguments are correct, free exercise doctrine must take into account the probability of cultural bias and must somehow correct for it.

In my view, an open ended balancing test with few firm guideposts limiting the discretion of an individual judge would not be the best way of correcting for the problem of cultural bias. Instead, free exercise doctrine should be designed in such a fashion that the problem of bias (both by judges and other government actors) stands front and center as the central question in the inquiry. A theory of free exercise that relies on notions of equality and equal treatment will better achieve this purpose than the *Sherbert*/*Yoder* approach.

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282 *Id.*

283 *See supra* text and accompanying notes ___ to ___.

284 Ronald J. Krotoszynski, Jr., *Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change*, 47 CASE WESTERN L. REV. 423, 440 (1997).

285 *Id.*

IV. Implementing an Equalitarian Free Exercise Clause: A Proposed Doctrinal Revision

If one finds persuasive the argument that the Free Exercise Clause should be framed in equalitarian, rather than libertarian or autonomy-enhancing terms, the next logical question entails whether existing legal doctrine adequately advances the equality project. In other words, how should free exercise jurisprudence reflect this particular focus? At least arguably, *Smith*, as clarified by *Church of Lukumi Babalu Aye*, does not adequately protect against religious discrimination.

Because *Smith* does not place any burden of justification on the government when a neutral law of general applicability burdens religious practice, it permits clever discriminators to fly under the radar screen. An equalitarian approach to the Free Exercise Clause should require that government shoulder a burden of justification whenever it elects to apply a neutral law of general applicability in a way that burdens religiously-motivated conduct. This is not because the Clause, properly understood, conveys an autonomy interest that trumps neutral laws of general applicability, but rather because a meaningful commitment to religious equality requires not merely formal neutrality, but also equality of application.[286] Accordingly, if government cannot establish that application of a particular rule rationally advances a legitimate government interest on the facts presented, a presumption of discriminatory motive would be justified.

A. *Smith* Does Not Adequately Protect Against Religious Discrimination.

If, as I have argued, the primary purpose of the Free Exercise Clause is to prevent against religious discrimination, *Smith*/*Church of Lukumi Babalu Aye* arguably are not up to the task. Discriminators are seldom as shameless as the Hialeah city council.[287] An approach to enforcing

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[286] *See* Perry, *supra* note ___, at 299-303.

[287] At the meeting to consider one of the anti-animal sacrifice ordinances, representative comments included statements by council members such as "people were put in jail for practicing this religion" in pre-revolution Cuba, the statement that the Santerian Church's members "are in violation of everything this country stands for," and "What can we do to prevent the Church from opening?." Church of the Lukumi Babalua Aye v. Hialeah, 508 U.S. 520, 541 (1993). Indeed, comments from members of the city council, city officials, and members of the public all reflect strong and overt prejudice against the church and the Santerian religion in general. *See id.* at 541-

religious equality that requires minority religionists to proffer a smoking gun – direct evidence of discriminatory intent[288] – provides insufficient protection.

When a facially neutral law of general applicability impinges on religiously motivated conduct, courts should demand something more than merely theoretical rationality from the government. Requiring the plaintiff to refute any theoretical rational basis for the enactment will allow many governmental religious discriminators to avoid detection. Moreover, if one were to adopt Justice Scalia's approach and look solely to the facial neutrality of laws in books – as opposed to the actual enforcement of formally neutral laws – the possibility of undetected religious discrimination would be enhanced even more.

Even if the Free Exercise Clause does not convey a right to disregard laws that conflict with conscience, it should convey a meaningful, and not merely theoretical, right to equal treatment. Requiring the plaintiff in a free exercise case to refute any theoretical rational basis for a law or its application puts the shoe on the wrong foot. Moreover, shifting the burden to the government to establish the actual reason for the application of a law or policy on the facts presented would distinguish the Free Exercise Clause from the Equal Protection Clause, giving the Free Exercise Clause significant independent force. This approach also would resolve, at least in part, the conflict between the Establishment Clause and the Free Exercise Clause: both clauses exist to advance religious equality and to safeguard this equality from arbitrary or discriminatory government actions.

B. Equality Should Require Government to Give Real Reasons When Burdening Religiously-Motivated Behavior.

If one conceives of the Free Exercise Clause in equalitarian terms, adoption of rationality with bite test would be a plausible means of advancing the project. To the extent that *Smith* leaves minority religionists largely unprotected absent overt discrimination, it arguably disserves the

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[288] Indeed, Justice Scalia would not even permit plaintiffs to rely on the legislative history of a facially neutral law to establish discriminatory purpose; instead, he would require plaintiffs to establish discrimination on the face of the statute or ordinance. *See id.* at 558 (Scalia, J., concurring).

equality project. The equality project should require, at a minimum, that government shoulder the burden of offering the actual reason for applying the law on the facts presented, and a reasonable showing of how application of the law on the facts presented rationally advances the government's purpose in maintaining the law.

When the Supreme Court has feared bias against an unpopular group in the equal protection context, it has sometimes required "rationality with bite" in place of the traditional rationality test. Thus, in cases like *Romer* v. *Evans*[289] and *Cleburne* v. *Cleburne Living Center*,[290] the Supreme Court has required the government to offer the actual reason for the enactment and to establish that the government's purpose was actually advanced by the application of the law on the facts presented. Even when the government has not utilized a suspect or quasi-suspect classification, as was the case in *Romer* (sexual orientation) and *Cleburne* (mental retardation), the Justices are sufficiently wary of bias that they shift the burden of justification from the plaintiff to the defendant and demand a meaningful relationship between means and ends.

An alternative way of framing a revised standard of review for free exercise claims would be to look to administrative law cases applying the Administrative Procedure Act's "arbitrary and capricious" standard of review.[291] Although "[t]he scope of review under the arbitrary and capricious standard is narrow," the courts require an administrative agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[292] Factors that point to an arbitrary and capricious decision include failure "to consider an important aspect of the problem," the presence of "an explanation for

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[289] 517 U.S. 620 (1996).

[290] 473 U.S. 432 (1985).

[291] *See* 5 U.S.C. § 706(2)(A) (a reviewing court must set aside agency action if the action is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law").

[292] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations and quotations omitted).

its decision that runs counter to the evidence before the agency," or a decision "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[293] When an agency changes its policies, moreover, it has a duty to provide a "reasoned analysis" for the change.[294] The essence of judicial review under the arbitrary and capricious standard is a "searching and careful" application of a "narrow" standard of review.[295]

Another aspect of review under the arbitrary and capricious standard that differs from traditional rationality review is the obligation to provide the *actual* reason for the agency's action, and not merely "'*post hoc*' rationalizations" that "have traditionally been found to be an inadequate basis for review."[296] In other words, a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given."[297]

Requiring government to give the actual reasons that motivated the decision to either enact or enforce a law that burdens religiously-motivated conduct would go a long way towards smoking out clever discriminators. If a law has moldered in the law books unused for decades, its sudden deployment against a new sect of Gozor worshippers ought to raise a suspicious judicial eyebrow. The requirement of formal neutrality is not enough; rather, attention must be paid to the actual enforcement of facially neutral laws against minority religionists.

In addition, maintaining a theoretical standard of review that courts manipulate (either by imposing threshold requirements to invoke the clause or by treating the exemption as universally available) should be dispreferred to adopting a standard of review that produces results that judges

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293 *Id.*

294 *Id.* at 42, 57.

295 Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974); *see also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its own judgment for that of the agency.").

296 *Citizens to Preserve Overton Park*, 401 U.S. at 419.

297 *Bowman Transp., Inc.*, 419 U.S. at 285-86.

are willing to live with. Professor Lupu has suggested that the social costs of free exercise claims led courts to manipulate the application of strict scrutiny. As he put the matter, "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chains of exemption demands from religious deviants of every stripe."[298] This concern about social costs incented judges, during the pre-*Smith* era, to avoid claims through subterfuge.[299]

It bears noting that Justice Scalia's opinion in *Smith* directly embraces this concern. Justice Scalia wrote that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or *in which judges weigh the social importance of all laws against the centrality of all religious beliefs*."[300] He also categorically rejected an approach to the Free Exercise Clause that requires judges to ascertain the "centrality" of a particular religious belief as a prerequisite to applying strict scrutiny. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[301]

The problem with Scalia's approach is that it makes little sense to say the uncertainties of judicial enforcement of the Free Exercise Clause justify complete judicial abdication. Even if judges are not better positioned to weigh abstract autonomy claims than are legislators, judges are better positioned to ferret out discriminatory government behavior than are legislators.[302]

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298 Lupu, *supra* note ___, at 947.

299 *See supra* text and accompanying notes ___ to ___.

300 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (emphasis added).

301 *Id.* at 887.

302 *See* McConnell, *supra* note ___, at 139 (arguing that religions "close to the center of prevailing culture in America" will either be unregulated or obtain legislative exemptions whereas

C. Heightened Scrutiny Review (Short of Strict Scrutiny) Would Probably Benefit Majority Religionists More Than Minority Religionists, But Perhaps the Equalitarian Focus Would Help Judges Past the Problem of Cognitive Dissonance and Eccentric Religious Believers

To be sure, majority religions might well derive a greater benefit from any system of heightened scrutiny. In this sense, then, the suggestion to apply rationality with bite might be subject to the same objections that I have made against the strict scrutiny regime of *Sherbert*/*Yoder*. It is possible, however, that judges will do a better job of applying an equality rule to unpopular, marginalized groups than they have done, or would do, with an autonomy rule. Equality rules do not require judges to establish the same material equivalency between minority religious practices and their own. Moreover, if the paradigmatic free exercise case involves discriminatory enforcement of facially neutral, general laws (i.e., *Hernandez*) – rather than enforcement of laws targeting a specific sect (i.e., *Church of Lukumi Babalu Aye*) – a requirement of rationality with bite might well benefit minority religions more than it benefits non-minority religious groups precisely because problems of discriminatory enforcement are far more likely to arise in the context of minority religions..

Popularly elected police and public prosecutors are less likely to enforce generic rules against loitering, disturbing the peace, littering, or tax evasion when the potential defendants are popular institutions within the community. Targeted enforcement of generic laws, through selective prosecution, would provide a very easy means of attempting to discourage an unpopular religious group from remaining within the community. And, to the extent that efforts to discriminate rely on generic, neutral laws of general applicability, proving discriminatory intent to trigger strict scrutiny

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"[r]eligous groups whose practices and beliefs are outside the mainstream are most likely to need exemptions" but not receive them); *id.* (arguing that *Smith* is objectionable because "it introduces a bias in favor of mainstream over non-mainstream religions" and that this bias "is not consistent with the original theory of the Religion Clauses"); *but see* Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1700 (1988) (arguing that legislative accommodations of religion will produce an "overall distribution of burdens and benefits" that "is likely to be reasonably fair").

will be impossible in most cases (again, consider the IRS's disallowance of charitable deductions from personal income taxes to target the Church of Scientology in *Hernandez*).

Precisely because of the problem of discriminatory enforcement of the strict scrutiny regime, some prominent constitutionalists, notably including Professor Mark Tushnet and Professor William Marshall, have endorsed *Smith* as an improvement over *Sherbert* and *Yoder*. Professor Tushnet explains that "the pattern of the [Supreme] Court's results in mandatory accommodation is troubling because, put bluntly, the pattern is that sometimes Christians win but non-Christians never do."[303] Tusnet posits that courts will establish and enforce lines that distinguish "between religion and non-religion, and on occasion some adherents of what the Court regards as non-religion will be insulted by that judgment."[304] Moreover, "the fewer adherents there are to a denomination or a sect, the more likely it is that the Court will unconsciously undervalue the harm done to the individual believer by rigid application of the state's rules."[305] Tushnet warns that "[u]nfamiliarity, here, may breed not respect, but, as is usually the case, insensitivity."[306]

In particular, Tushent argues that *Yoder*'s majority opinion comes perilously close to "saying that the claims of the Amish prevailed because they were a 'good' religion."[307] This sort of insensitivity is inevitable because "there is a systematic connection between the mandatory accommodation doctrine, at least when the doctrine incorporates a balancing test, and invidious comparisons among religions, to the disadvantage of non-mainstream denominations, sects, and cults."[308] Thus, "it is a normal human reaction to be skeptical about the sincerity of a person who

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303 Tushnet, *supra* note ___, at 381.

304 *Id.* at 380.

305 *Id.*

306 *Id.*

307 *Id.* at 382.

308 *Id.*

claims to hold unconventional beliefs."[309] The strict scrutiny doctrine builds in "a subtle preference for claims readily understandable by those adherents of mainstream religion who are likely to administer the mandatory accommodation doctrine."[310]

Bill Marshall makes similar arguments in favor of *Smith*. After noting the difficulties associated with defining "religion" and "religious beliefs,"[311] Marshall observes that "minority belief systems – not majority belief systems – will bear the brunt of the definition and the sincerity inquiries."[312] "A Court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous."[313] The outcome of accommodation cases, accordingly will "closely parallel or directly relate to the culture's predominant religious traditions."[314]

Marshall agrees with critics of *Smith* that reliance on legislatures to protect minority religionists is not a reliable means of securing meaningful protection. "A society is never likely to find a strong regulatory interest in a measure that is hostile to the majoritarian tradition and accordingly is unlikely to pass such a measure in the first place."[315] "Legislators are more likely to be aware of majoritarian religious practices (their own) when they fashion general regulations, and

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309 *Id.*; *see also* United States v. Ballard, 322 U.S. 78, 92-93 (1944) (Jackson, J., dissenting) ("If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.").

310 Tushnet, *supra* note ___, at 382.

311 William Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 310-11 (1991).

312 *Id.* at 311.

313 *Id.*

314 *Id.*

315 *Id.* at 316.

thus are unlikely to pass disabilities on those practices."[316] Conversely, legislators "are less likely to be concerned with religious practices outside their religious tradition and accordingly more likely to place burdens on those practices inadvertently."[317]

I agree with much of what Tushnet and Marshall have to say about mandatory judicial accommodations under *Sherbert* and *Yoder*.[318] Yet, both Tushnet and Marshall have little to say with respect to the fact that legislatures are unlikely to protect minority religionists, even if judges failed to do so reliably under the pre-*Smith* regime of mandatory accommodations under a regime of strict scrutiny. In my view, a third way presents the logical response to the concerns of academics like Greenawalt, Laycock, and McConnell for minority religionists and the equally valid concerns of Tushnet and Marshall that cultural factors will make even-handed enforcement of a regime of mandatory accommodations impossible. A doctrinal approach that places a greater burden on government to justify discretionary applications of law, without the prospect of the parade of horribles associated with the full and fair application of strict scrutiny, might well achieve a more equal measure of justice for minority religionists.

It also bears noting that Tushnet and Marshall are assuming a free exercise jurisprudence premised on a theory of religious autonomy, rather than a theory of religious equality. Judges might be more willing to undertake inquiries into whether government has afforded a particular group equal treatment than whether a particular belief is "religious" in nature and a plausible demand for autonomy. Because *Smith* does so little to advance the equality project, it leaves minority religionists at the mercy of legislators that everyone agrees are unlikely to be sympathetic.

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316 *Id.* at 318.

317 *Id.*

318 So does Judge McConnell. *See* McConnell, *supra* note ___, at 127-28 (noting that the Supreme Court rejected most mandatory accommodation requests and that "the Supreme Court rejected all but one claim for free exercise exemption outside the field of unemployment compensation"). McConnell observes that "[t]he doctrine was supportive, but its enforcement was half-hearted or worse." *Id.* at 128.

Finally, the failure of generic statutory accommodation statutes to substantially benefit minority religionists suggests that any autonomy-based scheme of protecting free exercise presents serious enforcement problems. Even when Congress enacts a statute like RFRA, instructing courts to apply strict scrutiny in the aid of religious autonomy, problems of cultural bias subvert the ability of minority religionists to claim an equal benefit under the law. Whether the basis of a free exercise claim is constitutional or statutory, such claims would likely fare better if framed in terms of equal treatment, rather than in terms of selective exemptions. Equality has a cultural salience that religious autonomy simply lacks.

V. Conclusion

The best reading of the Free Exercise Clause would be to cast the clause as the mirror image of the Establishment Clause. Just as the Establishment Clause prevents efforts to use government to advance particular religious principles or sects, the Free Exercise Clause prevents efforts by government to suppress particular religious principles or sects. Advancing religious equality, rather than religious autonomy, should inform the Supreme Court's reading of both the Free Exercise and Establishment Clauses. *Smith* was fundamentally correct to reject the autonomy-based vision of *Sherbert* and *Yoder*, which ill-served religious minorities and produced the perverse effect of increasing, rather than reducing, disparities in religious liberty between majority and minority religious sects. Even so, *Smith* fails to attend adequately to the non-discrimination project.

An approach to the Free Exercise Clause that requires government at least to establish the rationality of applying a neutral law of general applicability to prevent religiously-motivated conduct would advance the non-discrimination project more effectively than *Smith*. A serious commitment to eradicating religiously-motivated discrimination requires more than merely facially neutral laws passed in the absence of overt religious hostility; instead, such a commitment requires equal application of such laws. *Smith*'s failure to address this aspect of the equality project makes its effort to reshape free exercise jurisprudence unacceptably incomplete. Paradoxically, however,

a return to the pre-*Smith* regime of *Sherbert* and *Yoder* would disserve the equality project even more than *Smith.*