2008

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

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Printed in U.S.A.
Vol. 102, No. 3

IF JUDGES WERE ANGELS: RELIGIOUS EQUALITY, FREE EXERCISE, AND THE (UNDERAPPRECIATED) MERITS OF *SMITH*

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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.[†]

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[*] John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. I enjoyed the opportunity of presenting this Article at workshops hosted by the Emory University School of Law and the DePaul University School of Law; the Article reflects the benefit of very helpful comments provided by members of both faculties. I wish to express appreciation to Professor Michael Perry for observations and suggestions that were both thoughtful and challenging and also to Professor Steve Gey for helping me work through some of the thornier issues that the Article confronts. John B. Martin, Washington & Lee Class of 2008, provided very helpful research assistance. The Frances Lewis Law Center provided significant research support for this project. In addition, the Seattle University School of Law supported my work on this Article by hosting me as a Visiting Scholar in Residence during the summers of 2006 and 2007. As always, any errors or omissions are my responsibility alone.

[†] THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

I. INTRODUCTION

In the almost two decades since the Supreme Court decided *Employment Division v. Smith*,[1] the standard academic commentary on the decision has been harshly critical.[2] As Professor Douglas Laycock put the matter in the immediate aftermath of *Smith*'s release, "*Smith* produced widespread disbelief and outrage."[3] More recently, Professor Kent Greenawalt described *Smith* as having "eviscerated" the Free Exercise Clause and asked if "*anything* that is not redundant remains."[4] *Smith* squarely held that neutral laws of general applicability that burden religiously mandated behaviors

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

[2] *See, e.g.*, Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 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 SUP. 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 constitutional text"); 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").

[3] Laycock, *supra* note 2, at 1.

[4] Greenawalt, *supra* note 2, at 156–57 (discussing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), as illustrating how *Smith* adversely affected the scope of the Free Exercise Clause).

need only bear a rational relationship to a legitimate governmental interest to survive review under the Free Exercise Clause.[5] The decision served as a sharp break with the prior interpretive approach to the Free Exercise Clause advocated by Justice Brennan in *Sherbert v. Verner*, holding neutral laws burdening religious practice up to strict judicial scrutiny.[6]

Eminent constitutional scholars of the Religion Clauses,[7] including Judge Michael McConnell and Douglas Laycock,[8] have excoriated *Smith* 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.[9] They argue that the decision renders the Free Exercise Clause meaningless and, accordingly, that the Supreme Court should abandon it.[10] With recent changes in the Court's composition,

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[5] *Smith*, 494 U.S. at 877–79.

[6] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963); McConnell, *supra* note 2, at 137–30, 170–75; *see also* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412–20 (1990) [hereinafter McConnell, *Origins and Historical Understanding*] (discussing Warren Court and Burger Court approach of constitutionally mandated accommodations for religiously motivated conduct that transgresses neutral laws of general applicability incident to the *Sherbert* decision and subsequent cases in the line, which created a right to judicially crafted exemptions to laws burdening religiously motivated practices).

[7] The Religion Clauses consist of the Establishment Clause and the Free Exercise Clause. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the Free Exercise thereof. . . .").

[8] *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").

[9] *See* Laycock, *supra* note 2, at 2–4, 7–10, 54–68 (noting the predominantly negative scholarly reaction to *Smith*; discussing the case, and in his view, the unpersuasive nature of many of Justice Scalia's arguments, including the restoration of the pre-*Sherbert* belief-conduct dichotomy, and the pernicious enabling effect of *Smith* on would-be religious discriminators; and positing a series of objections that characterize *Smith* as providing a "legal framework for persecution"); McConnell, *supra* note 2, at 137–40, 170–75 (arguing that *Smith* effectively strands religious believers by treating religious exemption claims as unjustifiable demands for "a special benefit," incorrectly reduces the Free Exercise Clause to a "non-discrimination requirement," and creates a doctrinal framework that unduly empowers government to "homogenize" religion by discriminating against religious groups with unusual or unpopular beliefs).

[10] *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 233 (1991) ("*Smith* appears to leave the Free Exercise Clause without independent constitutional content and thus, for practical purposes, largely meaningless."); *see also* Laycock, *supra* note 2, at 2–4 (objecting to *Smith* as both "dubious" and "demonstrably wrong as a matter of text, precedent, and original intent" and arguing that post-*Smith* "the Free Exercise Clause itself now has little independent substantive value"); McConnell, *supra* note 2, at 138–40 (objecting to *Smith* on multiple grounds and positing that "[t]he freedom of citizens to exercise their faith should not depend on the vagaries of democratic politics, even if expressed through laws of general applicability"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (questioning *Smith*'s legitimacy because of its failure to use standard legal sources, including "text, history, and precedents," in support of its outcome and arguing that "*Smith* is contrary to the deep logic of the First Amendment").

the prospect of overturning *Smith* has become more plausible.[11] In consequence, it is an opportune moment to reexamine *Smith* and to consider whether its approach to the Free Exercise Clause advances the values of religious liberty as effectively as the jurisprudence that it replaced.

There are two competing conceptions of the Free Exercise Clause. First, one could conceive of the Free Exercise Clause as primarily 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. The alternative approach would conceptualize the Clause in terms of enhancing relative equality among and between religious sects.

Although the use of an autonomy rationale for considering free exercise claims could be paired with an alternative standard of review, such as rationality review[12] or intermediate scrutiny,[13] the Supreme Court's pre-*Smith* jurisprudence paired the autonomy rationale with strict judicial scrutiny.[14] Under strict scrutiny, the government bears the burden of establish-

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[11] *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 500 (2004) ("[T]here remains substantial sentiment on the Court to revisit the question of whether the Free Exercise Clause mandates that the government provide some measure of justification before trespassing upon religious practice."). 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. *See* Employment Div. v. Smith, 494 U.S. 872, 873 (1990). 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). *Id.* at 509. 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 Justice Roberts and 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.

[12] *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–16 (1993) (describing and applying the traditional rationality review standard). Under true rationality review—also called rational basis review—the plaintiff bears the burden of disproving any theoretical rational relationship between a governmental enactment and a legitimate state purpose; the government has no burden of proof or obligation to defend the enactment at all. *See id.*

[13] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996) (describing the intermediate scrutiny test as whether the government could establish a substantial relationship to an important governmental interest, a burden requiring "an exceedingly persuasive justification" for the gender-based classification); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that intermediate scrutiny applies to test gender-based classifications and that this standard requires the government to establish a substantial relationship between the classification and achieving an important governmental objective).

[14] Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies that burden."); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (holding that laws burdening religiously motivated conduct "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling inter-

ing a compelling state interest and demonstrating that the means selected to achieve that interest are narrowly tailored.[15]

Unlike other areas of constitutional law in which strict scrutiny applies,[16] however, strict scrutiny in the area of free exercise was quite far from being "strict in theory, but fatal in fact." As Judge McConnell has observed, "in the years between the test's formal appearance in 1963 and its formal abandonment in 1990, the Supreme Court rejected all but one claim for free exercise exemptions outside the field of unemployment compensation."[17] He observes, correctly, that "[i]n every other case decided on the merits, the Court found either that the claimant's exercise of religion was not burdened or that the government's interest was compelling."[18] Thus, in free exercise cases at the federal Supreme Court level, unlike equal protection cases involving racial classifications, "enforcement [of the strict scrutiny standard] was half-hearted or worse."[19]

This Article posits two reasons for this result. First, pervasive social hostility to religions that maintain nontraditional belief systems leads judges to discount the relative importance of religiously motivated behavior that conflicts with a neutral law of general applicability; courts either find that the governmental policy in question does not "burden" the religion (or burdens it only indirectly) or, alternatively, find that the legislative goals advanced by the law actually advance a compelling interest in a narrowly tailored way.[20]

Ironically, though, scholarly commentators like Judge McConnell and Professor Laycock decried *Smith*'s abolition of this ersatz regime of strict scrutiny in favor of a more truth-in-labeling approach of traditional rationality review. The argument in favor of strict scrutiny seems to be that if the government adopts and enforces a law that prohibits religiously motivated conduct (or that prescribes conduct offensive to religious beliefs such as us-

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est"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance the legitimate claims to the free exercise of religion."); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (describing the inquiry as "whether some compelling interest . . . justifies the substantial infringement of appellant's First Amendment right").

[15] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220, 224, 227, 237 (1995); Shaw v. Reno, 509 U.S. 630, 643 (1993); Korematsu v. United States, 323 U.S. 214, 216 (1944). For a thoughtful discussion of the Supreme Court's use of tiered scrutiny, see Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 494–515 (2004).

[16] *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing equal protection under the Warren Court as "aggressive . . . with scrutiny that was 'strict' in theory and fatal in fact").

[17] McConnell, *supra* note 2, at 127–28 (footnotes omitted).

[18] *Id.* at 128; *see also infra* text and accompanying notes 191–237.

[19] McConnell, *supra* note 2, at 128.

[20] *See infra* notes 191–237 and accompanying text.

ing a social security number[21]), it should have a very good reason for so doing.[22]

Thus, the standard approach is to link the importance of religious autonomy with a strict form of judicial scrutiny for governmental actions that have the incidental effect of denying religionists, including but not limited to members of minority religions,[23] the ability to engage in religiously motivated conduct. Viewed from this vantage point, *Smith* is highly objectionable because it makes successful free exercise challenges to general laws virtually impossible to win. Even if the federal courts have not applied strict scrutiny in an exacting fashion, lowering the standard of review to mere rationality virtually ensures that most free exercise claims will fail. Thus, the Justices who support strict scrutiny of neutral laws of general applicability that burden religiously motivated practices, such as Justice Brennan[24] and Justice O'Connor,[25] object strenuously to *Smith*'s change in the governing standard of review from earlier cases, such as *Sherbert* and *Wisconsin v. Yoder*,[26] the latter a case that upheld a free exercise claim brought

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

[22] *See* Perry, *supra* note 8, at 301, 303–06 (arguing that government may not justly treat some religions and religionists with "diminished concern and respect" or act out of "hostility" toward a religion, and that government should be able to proffer a "sufficiently good reason" for enforcing a rule when doing so impedes religiously motivated conduct in order to ferret out governmental actions motivated by "hostility and indifference").

[23] In this Article, I use a variety of terms to describe individuals and groups that hold odd or nontraditional religious convictions (at least when viewed through the prism of the dominant religious culture in the contemporary United States). Terms such as "minority religion," "unpopular sects," "nondominant religion" "nonmainstream religion," and the like, including variations using "religionists" rather than "religion," are meant to arrive at the same basic taxonomic concept: some religions have shorter, newer histories in the United States and maintain belief systems that do not look very much like those of preexisting religious denominations, and some religions have significantly fewer members than others. These newer, smaller, "weirder" groups will face more difficulty in convincing legislators, judges, and even fellow citizens to take seriously their claims for equal dignity and respect. Moreover, democratic politics are an unlikely source of relief for such groups. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–81 (1980). And, although Ely—and most scholars of the Free Exercise Clause—would argue that this state of affairs calls for more aggressive judicial review of laws imposing burdens or withholding benefits for members of minority religions, this ignores the basic fact that judges are no less a product of the common socio-legal culture and are subject to the same fears, phobias, and prejudices as everyone else. *See* Christina Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 117 ("Judges are . . . human. They remain subject to the same passions, fears, and prejudices that sweep the rest of the nation."); *see also infra* text and accompanying notes 236–89.

[24] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding that any "incidental burden on the free exercise of appellant's religion" must be justified "by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate" (citations omitted) (internal quotation marks omitted)).

[25] *See* Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring) (arguing that the Free Exercise Clause's "express textual mandate" requires "the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest").

[26] Wisconsin v. Yoder, 406 U.S. 205 (1972).

by Amish parents who wished to remove their children from the public schools after the eighth grade.[27] If the Free Exercise Clause exists to facilitate absolute religious autonomy, the *Sherbert* approach advocated by Justices Brennan and O'Connor would better honor free exercise values.[28] At the very least, it certainly seems reasonable to frame the Free Exercise Clause in terms of religious autonomy.[29]

Rather than as advancing religious liberty or autonomy values, one could alternatively conceive of the Free Exercise Clause as primarily promoting religious equality.[30] 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 than *Sherbert* and *Yoder*.[31]

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 has 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 held to be compelling, leaving minority religionists without protection from the laws that burden their religious practices, but mainstream religionists are able to obtain judicial 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.[32] Asking a federal judge to draw a material equivalency between her, more likely

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[27] *Id.* at 218–20, 234.

[28] *See* McConnell, *supra* note 2, 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.").

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

[30] *See* Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 306–12 (2006) (arguing that state practice prior to the adoption of the Fourteenth Amendment under state constitutions and early federal practice under the First Amendment both conceived of free exercise as an antidiscrimination, equality norm).

[31] *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 13–16 (2007) (arguing for an "Equal Liberty" approach to both of the Religion Clauses and suggesting that "an equality-based approach to free exercise is fair and workable, and is likely in the end to protect religious believers more effectively than the awkward idea that religiously-motivated conduct should be presumptively exempt from legal regulation").

[32] As Professor William 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).

mainstream, religious commitments and those of Gozer worshippers[33] requires a real leap of faith. Thus, if the primary function of the Free Exercise Clause is to secure equality among religious sects, a test or framing device that actually exacerbates inequality is deeply problematic and should be avoided.[34]

In fact, the opinions of the Supreme Court in free exercise cases reflect a strong pattern of cultural bias and religious insensitivity.[35] In the pre-*Smith* era, minority religionists often were told that their religious claims did not trigger the application of the Free Exercise Clause; and even when the Justices agreed that the Clause was at issue in these cases, the Justices routinely found that the government's interests were compelling.[36] If the *Sherbert* approach to the Free Exercise Clause would actually diminish religious equality, as this evidence suggests, it should be rejected in favor of an approach that promotes equality, but that also addresses the problem of legal discrimination—and the concomitant fact of social discrimination—against religious minorities.

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[33] "Gozer" worshippers provided the main antagonists in director Ivan Reitman's 1984 comic masterpiece *Ghostbusters* and, in the movie, were seeking to bring about the end of days by uniting two fictional Sumerian deities, "Zuul" and "Gozer," in contemporary New York City's fashionable Central Park West district (and at 55 Central Park West, to be precise). *See* Synopsis for Ghost Busters [sic] (1984), www.imdb.com/title/tt0087332/synopsis (last visited May 19, 2008); *see also* GHOSTBUSTERS (Sony Pictures 1984). Although *Ghostbusters* was an entirely fictional work, people do sometimes take fictional sources of religious inspiration more seriously than the author probably intended. For example, the creators of the Church of the Flying Spaghetti Monster clearly intended it as a snide attack on the proponents of Intelligent Design (and nothing more). *See* Church of the Flying Spaghetti Monster, www.venganza.org (last visited May 19, 2008) (home site of the Church of the Flying Spaghetti Monster, including links to Church dogma and accepted forms of worship). Oddly enough, however, "FSM," as its adherents call it, has taken on many of the attributes of a real religion (albeit a kind of fervent antireligion). *See* Justin Pope, *Pasta Theology: Scholars Mull Spaghetti Monster*, USA TODAY, Nov. 16, 2007, http://www.usatoday.com/news/religion/2007-11-16-spaghettimontster_N.htm (describing FSM and noting that some experts on religion argue that "Flying Spaghetti Monsterism exhibits at least some of the traits of a traditional religion—including, perhaps, that deep human need to feel like there's something bigger than oneself out there"); *see also* Dan Vergano, *Insta-Faith: Just Add Hot Water; Internet Fuels Cheesy Spoof of Evolution-Creation Wars*, USA TODAY, Mar. 26, 2006, at D1. Although my research assistant and I could not find evidence of active Gozer worship in the contemporary United States, there *are* signs that the *Ghostbusters* fictional Sumerian deities have attained at least some measure of acceptance and legitimacy. *See, e.g.*, Necronomicon Transhumanism—Glossary, http://necronomicontranshumanism.com/glossary.html (last visited Apr. 25, 2008) (listing "Gozer" on a list of mythological deities and using the descriptions from the motion picture).

[34] In fact, although the political economy of this proposition might seem deeply counterintuitive, equality would be enhanced, not reduced, if *no* group received exemptions from neutral laws of general applicability. From my perspective, however, this is not a troubling proposition because a serious commitment to prohibiting both overt and covert discrimination against unpopular minority religions and religionists would do a better job of securing both equality and significant breathing room for religiously motivated practices. Thus, the "no religious freedom for anyone" objection to an equality approach fails to take into account the potential power of the antidiscrimination regime that this Article advocates. *See infra* text and accompanying notes 405–27.

[35] *See infra* notes 148–90 and accompanying text.

[36] *See infra* notes 190–237 and accompanying text.

Even if equality is the goal, rather than some notion of absolute autonomy to pursue religiously motivated conduct, *Smith* does not go far enough in advancing the equality project because traditional rationality review permits clever discriminators to escape legal detection. Overt discrimination against particular religions is 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 creates a real risk that clever discriminators will beat the rap. The risk of clever discriminators, however, cannot justify the adoption of the *Sherbert* test, a test that, as applied, actually facilitates governmental discrimination against minority religionists. Accordingly, the Justices should not restore the *Sherbert-Yoder* strict scrutiny standard. Rather, the Court should adopt a more demanding standard of review than *Smith* propounds, something akin to "rationality with bite," to govern free exercise challenges.[37]

Traditional rational basis review only asks whether any theoretical, or hypothesized, rational relationship exists to a legitimate governmental interest; the challenger must essentially prove a negative by eliminating any real or imagined basis for the enactment.[38] By way of contrast, under "rationality with bite," the *government* bears the burden of establishing the actual reason for the law that would be advanced by applying the law on the facts presented at bar.[39] Although the standard of judicial review ostensibly remains the same—rationality—shifting the burden of proof to the government significantly improves the odds of success for plaintiffs, as does the requirement that the government establish the actual reason for the enactment. Thus, the government's obligation goes well beyond merely suggesting a purely theoretical interest that might or might not have actually motivated the legislative body that adopted the law in the first place. This shift, in the context of free exercise claims, could provide a powerful tool for rooting out more subtle forms of discrimination against unpopular minority religions and religionists.

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[37] *See infra* notes 383–404 and accompanying text.

[38] *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–16, 320 (1993); Williamson v. Lee Optical, 348 U.S. 483, 487–89 (1955). *But cf.* Romer v. Evans, 517 U.S. 620, 631–33 (1996) (purporting to apply mere rationality review, but shifting the burden to the government to demonstrate the actual reason for its decision and furthermore requiring a basis other than fear or prejudice against gay or lesbian persons); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–45 (1985) (same with respect to mentally retarded persons); *see also* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review."); Goldberg, *supra* note 15, at 512–18 (describing and critiquing enhanced rationality review).

[39] *See, e.g.*, *Romer*, 517 U.S. at 632–33; *Cleburne Living Ctr.*, 473 U.S. at 440–45; U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973); *see also* Goldberg, *supra* note 15, at 534–41 (questioning the merits and analytical power of tiered scrutiny given the Supreme Court's consistent cheating with the scheme over time and suggesting that a more theoretically sound approach would be better, perhaps an "intracontextual" approach).

Thus, reviewing courts should require the federal and state governments, in enforcing neutral laws of general applicability, to shoulder the burden of establishing that the enforcement effort rationally advances the state's interest in maintaining the policy. Moreover, it might also be necessary to permit plaintiffs to rebut the government's 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 respect for religious autonomy.

An equalitarian reading of the Free Exercise Clause is necessary because federal and state court judges have proven incapable of evenhanded enforcement of an autonomy-based understanding of the Clause. Simply put, empirical data show conclusively that minority religionists brought more cases pre-*Smith*, and lost a much higher percentage of them, than did majority religious groups, such as mainline Protestants.[40] 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.

Moreover, and contrary to Judge Michael McConnell's thesis,[41] the legislative history of the Free Exercise Clause establishes that the Framers of the Clause, and particularly James Madison, understood the provision in equalitarian, rather than autonomy-enhancing, terms.[42] Accordingly, if one believes that contemporary understandings of the Constitution should incorporate, to the extent feasible, the intentions of the Framers, one should prefer the equalitarian interpretation to the autonomy-enhancing interpretation. Thus, 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

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[40] *See infra* text and accompanying notes 284–315; *see also* Sisk, Heise & Morriss, *supra* note 11, at 501 ("[R]eligion-based variables proved to be steady influences on judicial disposition of religious freedom claims, emerging as statistically significant across multiple models and independent of other background and political variables commonly used in empirical tests of judicial behavior.").

[41] McConnell, *supra* note 2, at 116–17, 137–40 (arguing that *Smith* adopts an "interpretation of the Free Exercise Clause that permits the state to interfere with religious practices . . . without any substantial justification, that a better reading of the Clause would "preserve what Madison called 'the full and equal rights of conscience' of religious believers and communities to define their way of life, so long as they do not interfere with the rights of others," and that *Smith* makes the state "more powerful" to advance "homogenization" of religion, by marginalizing unpopular religions with nontraditional practices, treating free exercise as an unwarranted "special benefit," and rendering the Free Exercise Clause little more than a weak "nondiscrimination" requirement); McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1413–16 (arguing that the historical evidence supports "*Sherbert*'s interpretation of the free exercise clause").

[42] *See infra* notes 325–71 and accompanying text.

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. Applying rationality with bite, rather than traditional rationality review, would significantly advance the core values of the Free Exercise Clause without creating the serious risks of discriminatory enforcement associated with the pre-*Smith Sherbert-Yoder* regime that relied on generic strict scrutiny review of all free exercise claims. Thus, a more narrowly tailored theory of the Free Exercise Clause (equality rather than autonomy), coupled with a less demanding standard of review (rationality with bite, rather than strict scrutiny), would actually better secure religious liberty for unpopular minority religions and religionists.

Part II considers the Supreme Court's efforts to define and enforce the Free Exercise Clause, the sustained scholarly support for *Sherbert* and *Yoder*, and the consistent scholarly disapprobation of *Smith*. Part III examines the plausibility of religious autonomy as the principal animating purpose of the Free Exercise Clause. It finds this approach unpersuasive, particularly when considered in light of the Supreme Court's alarmingly consistent ethnocentric rhetoric and the results in free exercise cases. This Part also brings to bear social science literature that strongly suggests that judges simply are not capable of treating culturally transgressive religions and religionists at full parity with more mainstream religions and religionists. In addition, Part III considers empirical evidence demonstrating persistent judicial bias in deciding free exercise claims under the strict scrutiny regime: in the pre-*Smith* era, minority religionists brought a disproportionate number of free exercise claims and lost a much higher proportion of these claims than members of more mainstream sects.

Part IV presents an alternative, equality-based theory of the Free Exercise Clause and, using original source materials, suggests that an equalitarian conception of the Clause better comports with the original intent of the Framers. This Part also argues that an equalitarian reading of the Free Exercise Clause helps to resolve the inherent tension between the Free Exercise and Establishment Clauses, and that *Smith* better advances equality among religious sects than did *Sherbert* and *Yoder*. Finally, in Part V, the Article advances some preliminary thoughts on how an equalitarian vision of the Free Exercise Clause might be operationalized in doctrinal terms.

II. FREE EXERCISE AND RELIGIOUS AUTONOMY

The Free Exercise Clause, according to one interpretation, creates a substantive right to exemptions from generally applicable laws that burden religious practice. Under this "religious autonomy" view, the Free Exercise Clause exists to protect religionists from choosing between their duties to God and their duties to the government. Many contemporary academics

support theorizing the Free Exercise Clause in autonomy terms, but doctrinally, this approach represents something of a newcomer.[43]

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, in the case of *Reynolds v. United States*, 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."[44] In rejecting a Free Exercise Clause defense to a criminal conviction for polygamy in the territorial courts of Utah, 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."[45] Because of longstanding legal proscriptions against polygamy in the United States and the United Kingdom, the Court reasoned that 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."[46]

Reynolds remained the Supreme Court's authoritative interpretation of the Free Exercise Clause for many years. Almost seventy years later, in *Prince v. Massachusetts*, the Supreme Court invoked *Reynolds* in rejecting a free exercise challenge to a state child labor law that prohibited minors from selling religious tracts on the public streets.[47] And, in a reprise of *Reynolds* in a Mann Act prosecution,[48] the Supreme Court rejected a limited reading of the Act in order to sustain convictions premised not on prostitution, but rather on polygamy.[49]

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[43] *See infra* notes 49–69 and accompanying text.

[44] 98 U.S. 145, 166 (1879).

[45] *Id.* at 164.

[46] *Id.* at 165.

[47] 321 U.S. 158, 166–67 (1944).

[48] White-Slave Traffic (Mann) Act, 18 U.S.C. §§ 2421–2422 (2000); *see also* Hoke & Economides v. United States, 227 U.S. 308, 322–23 (1913) (upholding the constitutional validity of the Mann Act). The Mann Act, also known as the "White Slavery Act," prohibited the transportation of a woman across state lines "for the purpose of prostitution or debauchery or any other immoral purpose." Polygamy, unlike prostitution or "debauchery," can occur in a stable set of consenting relationships and does not necessarily imply promiscuity or sexual licentiousness. In other words, fidelity within a polygamous relationship is not an oxymoron and arguably distinguishes such relationships in a material way from prostitution and debauchery. *See* Cleveland v. United States, 329 U.S. 14, 26–27 (1946) (Murphy, J., dissenting) (arguing that polygamy is an accepted part of some cultures and that it is entirely distinguishable from prostitution, debauchery, or "immoral purposes," and that to classify polygamy with these practices "do[es] violence to the anthropological factors involved").

[49] *Cleveland*, 329 U.S. at 18–19.

Indeed, as late as 1961, the Supreme Court reaffirmed the central holding of *Reynolds* in rejecting a challenge to Pennsylvania's Sunday closing law.[50] The plaintiffs, Orthodox Jews, sought an exemption from the law because they voluntarily closed on Saturdays (their day of religious obligation).[51] 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."[52] 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."[53] Invoking *Reynolds*,[54] 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."[55]

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 indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[56]

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

Justice William Brennan wrote a partial dissent criticizing the majority's stated standard of review.[57] Justice Brennan contended that "the appropriate standard of constitutional adjudication" in free exercise cases is neither "whether the challenged law is rationally related to some legitimate legislative end," nor whether "the State's interest is substantial and impor-

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[50] Braunfield v. Brown, 366 U.S. 599 (1961).

[51] *Id.* at 601–02.

[52] *Id.* at 603.

[53] *Id.*

[54] *Id.* at 603, 605.

[55] *Id.* at 606.

[56] *Id.* at 607.

[57] *Id.* at 610 (Brennan, J., concurring in part and dissenting in part).

tant, as well as rationally justifiable."[58] Instead, Justice Brennan argued that the "compelling state interest" test should govern such cases.[59]

It was not until *Sherbert v. Verner*,[60] in 1963, that the Supreme Court held the Free Exercise Clause to require the government to recognize exemptions to general laws in order to 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."[61]

Indeed, because *Sherbert* could be read as addressing religious discrimination,[62] one could date the idea of the Free Exercise Clause as a shield against general laws that inhibit religiously motivated behavior even later, to 1972 and *Wisconsin* v. *Yoder*.[63] 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 the age of sixteen.[64] In doing so, Chief Justice Burger squarely rejected the central holding of *Reynolds*. He stated:

> 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

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[58] *Id.* at 611.

[59] *Id.* at 612–14 (arguing that strict judicial scrutiny should apply "as the test of legislation under all clauses of the First Amendment" and then asking, "What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship?").

[60] 374 U.S. 398 (1963).

[61] *Id.* at 406; *see id.* at 403 (quoting the 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). South Carolina argued that maintaining the financial solvency of the state unemployment program and avoiding fraudulent claims required categorical exclusion of all persons able, but unwilling, to work in an otherwise available job (for whatever reason). *Id.* at 407–08. Justice Brennan found that the interest asserted was not sufficient and, moreover, that the means selected were not narrowly tailored to achieve the interest in preserving the solvency of the fund. *See id.* at 407 ("For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.").

[62] *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.").

[63] 406 U.S. 205, 215 (1972) ("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."). To be sure, it would be plausible to cite *Sherbert* as establishing a generic rule of strict scrutiny review for laws that prohibit or impede religiously motivated behaviors. *See 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.").

[64] *Yoder*, 406 U.S. at 207–08.

> protected by the Free Exercise Clause . . . and thus beyond the power of the State to control, even under regulations of general applicability.[65]

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."[66] Thus, *Yoder* squarely rejected the *Reynolds* belief-conduct dichotomy and established a regime of strict scrutiny of neutral laws of general applicability that materially burden religiously motivated conduct.

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 that applied the most demanding standard of review known to American constitutional jurisprudence.[67] This development was 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.[68]

The problem with this approach, however, 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 culturally defined concept that judges simply will not extend the full protection of the law to new, non-traditional religious movements.[69] Moreover, the devices used to deny protection, including finding no burden on religion, only an "indirect" burden on a religion, or that the government's interest is sufficiently compelling to overbear whatever burden the policy imposes on the religion and its adherents, degrade and marginalize minority religionists.[70] 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 nontraditional) religions.

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[65] *Id.* at 220.

[66] *Id.* at 221.

[67] *See supra* text and accompanying notes 12–16.

[68] *See* ELY, *supra* note 23, at 75–77, 87–88, 101–03, 116–17, 135–79 (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* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (noting that courts generally will presume the constitutional validity of legislative classifications provided that they rationally relate to a legitimate state purpose, but that courts must engage in more careful judicial review when a classification burdens a "discrete and insular minority" that might face systemic prejudice in a democratically elected legislature or when a law infringes a "fundamental right," such as the freedom of speech).

[69] *See infra* text and accompanying notes 191–237.

[70] *See infra* text and accompanying notes 212–37.

B. Smith *and Free Exercise Clause Atavism*

The religious autonomy approach of *Sherbert* and *Yoder* did not prevail for long. In 1990, the Supreme Court effectively abandoned the *Sherbert-Yoder* line of cases and restored *Reynolds*.[71] Writing for the majority in *Smith*, 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 governmental efforts to regulate or compel religious beliefs are facially unconstitutional.[72] On the other hand, if a law "prohibiting the 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."[73] Invoking *Reynolds*,[74] 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).'"[75]

Accordingly, the Supreme Court's opinion in *Smith* returned free exercise jurisprudence to its pre-Warren Court form.[76] In this sense, then, *Smith* constitutes a major revision of the Supreme Court's free exercise jurisprudence. One should also recognize, however, that *Sherbert* and *Yoder* were themselves departures from the baseline established in *Reynolds* in 1879, which was followed consistently until 1963.

After *Smith* the Supreme Court embraced an equalitarian vision of the Free Exercise Clause, rather than a theory of free exercise rooted in reli-

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[71] Employment Div. v. Smith, 494 U.S. 872 (1990).

[72] *Id.* at 877.

[73] *Id.* at 878.

[74] *See id.* at 879 ("We first had occasion to assert [the belief-conduct dichotomy] in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.").

[75] *Id.* at 879 (citations omitted).

[76] It bears noting that Justice Scalia did not formally overrule any prior precedents in *Smith*, but instead made nominal efforts to distinguish specific cases in the *Sherbert-Yoder* line that granted religious exemptions. *See id.* at 881–85. With respect to the unemployment cases, he argued that the programs involved individualized determinations not present in "a generally applicable criminal law" banning the possession or use of peyote, *see id.* at 884–85; with respect to the other exemption-granting cases, like *Yoder* itself, Justice Scalia argued that they all involved "hybrid" claims that implicated the Free Exercise Clause *and* some other substantive constitutional right, such as fundamental substantive due process rights, *see id.* at 881–82. The dissenting members of the Supreme Court, including Justices O'Connor and Blackmun, persuasively refuted these arguments. *See id.* at 895–97, 900–02 (O'Connor, J., dissenting); *id.* at 908–09 (Blackmun, J., dissenting). Moreover, scholarly commentary on this aspect of *Smith* has been uniformly critical. *See, e.g.*, Laycock, *supra* note 2, at 2–4, 7–10, 12, 17–21, 41–53 (critiquing both the merits of *Smith* and Justice Scalia's treatment of past precedent); Marshall, *supra* note 32, at 308–09 ("The *Smith* opinion itself, however, cannot be readily defended. The decision, as written, is neither persuasive nor well crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction.").

gious autonomy.[77] Thus, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 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.[78] The Supreme Court reasoned that, 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."[79] In conducting an inquiry into a law's neutrality, the Supreme Court ruled that "[f]acial neutrality is not determinative."[80] 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.[81]

The ordinances at issue in *Church of the Lukumi Babalu Aye* were neither neutral nor of general applicability.[82] Nor did the laws advance a compelling governmental interest in a narrowly tailored way; the laws specifically targeted Santerian practices and specifically exempted virtually all animal slaughter practices, save Santerian ritual animal sacrifice.[83] Accordingly, the Supreme Court invalidated the local ordinances on Free Exercise Clause grounds because they were adopted expressly to extirpate Santerian religious rites within the municipality and had the effect of banning Santerian, but no other, animal slaughter practices.

The key to the outcome in *Church of the 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. The Supreme Court reasoned that the government has an obligation to refrain from overtly discriminatory regulations of

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[77] *See* Meyler, *supra* note 30, at 276 ("Recent religion clause jurisprudence has placed a priority upon equality—whether rejecting only those laws targeted against, rather than those burdening, the practices of minority religions or upholding the evenhanded distribution of public funds to religious and nonreligious providers.").

[78] 508 U.S. 520 (1993).

[79] *Id.* at 531–32.

[80] *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). Because the legislative enactments themselves reflected facial discrimination based on religious belief, for example by specifying only animal "sacrifice" for proscription and then exempting all other slaughter methods, including other religiously inspired methods, such as those associated with kosher food preparation, Justice Scalia argued that the strict scrutiny standard of review applied and that Hialeah's ordinances failed to meet this standard of review. *Id.*

[81] *See id.* at 534–42 (majority opinion).

[82] *Id.* at 545–46.

[83] *See id.* at 546–47.

religious practices.[84] This approach to conceptualizing the Free Exercise Clause plainly rests on an equalitarian, rather than libertarian, basis.[85]

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.[86] Not all discriminators will approach their objective so transparently or even so self-consciously. Even if one agrees with *Smith*'s equalitarian orientation of the Free Exercise Clause, one should question whether the Supreme Court's current nondiscrimination rules are sufficiently robust to protect adequately against clever religious discriminators.[87]

In cases decided subsequent to *Church of the Lukumi Babalu Aye*, the Supreme Court has made clear that the rule against religious discrimination does not compel governmental funding of religion, religious institutions, or religious studies.[88] Characterizing "the State's disfavor of religion (if it can be called that)" as being "a far milder kind," the Court in *Locke v. Davey* noted that the funding program at issue did not impose "criminal [or] civil sanctions on any type of religious service or rite," nor did it "deny to ministers the right to participate in the political affairs of the community," and "it [did] not require students to choose between their religious beliefs and receiving a government benefit."[89] Accordingly, "[t]he State has merely chosen not to fund a distinct category of instruction," a policy not inconsistent with the requirements of the Free Exercise Clause.[90]

All the while, *Smith* has remained a viable judicial precedent. 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.[91] Although *Smith* has generated a great deal of negative scholarly commentary, the Supreme Court seems committed to its holding.

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[84] *Id.* at 533–35, 540.

[85] In fact, the majority even invokes equal protection reasoning, and case law, in support of its general analysis of the Church's Free Exercise Clause claim. *See id.* at 540–41.

[86] The case also shows that the standard of review can be decoupled from the underlying theory of the Free Exercise Clause; in *Church of the Lukumi Babalu Aye*, the Supreme Court deployed strict scrutiny in the service of promoting equality, rather than autonomy. *See id.* at 533–42. Obviously, though, even if one applied rationality with bite, Hialeah still would have lost the case because hatred of Santeria is not a legitimate governmental interest. *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973). Even if one applies strict scrutiny in cases involving overt forms of religious discrimination, this does not answer the question of the most appropriate standard of review in a case where the facts do not provide a "smoking gun." To make the framework a binary one—strict review or no review—underprotects religious minorities from clever discriminators.

[87] *See infra* notes 383–404 and accompanying text.

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

[89] *Id.* at 720–21.

[90] *Id.* at 721.

[91] *See* Cutter v. Wilkinson, 544 U.S. 709, 714–16 (2005).

The Justices essentially reaffirmed *Smith* in 1997[92] and again in 2006[93]—although it bears noting that some members of the Court have expressed continuing misgivings about the holding.[94]

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

Contemporary scholarly commentary has been harshly critical of *Smith* and generally more 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 by protecting an individual's ability to believe in a religious doctrine, but also by allowing one to conform her actions to the dictates of her religion.[95] In other words, the right to free exercise should extend to protect religiously motivated conduct and should support religious exemptions from neutral laws of general applicability.

Professor Laycock, for example, asserts that *Smith* left the Free Exercise Clause with "little independent substantive content" and opened the door to religious discrimination.[96] He argues 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."[97] Laycock's recommendation necessarily 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 evenhanded fashion.

Even Laycock, however, admits that an evenhanded application of *Sherbert* is unlikely, because "judges are more likely to respond sympathetically to religious claims that are familiar, easily understood, and un-

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[92] *See* City of Boerne v. Flores, 521 U.S. 507, 532–34 (1997).

[93] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

[94] *See City of Boerne*, 521 U.S. at 546 (O'Connor, J., dissenting) ("I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims."); *id.* at 565–66 (Souter, J., dissenting) (arguing that *Smith* was wrongly decided and noting the existence of "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence"); *id.* at 566 (Breyer, J., dissenting) ("I agree with Justice O'Connor that the Court should direct the parties to brief the question whether [*Smith*] was correctly decided, and set the case for reargument."); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564, 570–71 (1993) (Souter, J., concurring) (calling for reconsideration of *Smith*). *O Centro Espirita* cited *Smith* in a neutral fashion and treated it as a background principle of law without provoking a concurring opinion. *See O Centro Espirita*, 546 U.S. at 424, 431–32, 439. Whether this says anything about a change of heart among the *Smith* skeptics is open to serious doubt because the case involved a purely statutory claim, involving the application of the Religious Freedom Restoration Act to the federal government, rather than the Free Exercise Clause itself.

[95] *But cf.* EISGRUBER & SAGER, *supra* note 31, at 81–90, 93–120 (defending *Smith* in a limited way and arguing that "an equality-based approach can provide a robust basis for accommodating religious conduct").

[96] Laycock, *supra* note 2, at 4.

[97] *Id.*

threatening."[98] 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 the polls."[99] Yet 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,[100] this reality does not address whether *Sherbert-Yoder*'s autonomy-based vision, enforced through a strict scrutiny test, most effectively minimizes the risk of judicial bias. Acknowledging the problem of bias in both judicial and legislative actors, but not addressing the problem in a serious way, represents an insufficient response to the problem—even if judges are relatively less biased than legislators (a proposition that Laycock does not support empirically), the problem of judicial bias constitutes a significant unresolved issue for any regime of selective exemptions from general laws.

Laycock argues that, even assuming that *Smith* correctly identified equality as the animating purpose of the Free Exercise Clause, *Smith* nevertheless fails adequately to advance religious equality. He states: "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."[101] Laycock is concerned that Justice Scalia's desire in *Smith* to keep exemption cases out of the courts might result in courts failing to vigorously check for "bad motive or religious gerrymander."[102] Deference to a legislature should not extend, even under an equality-based approach to the Free Exercise Clause, to facially neutral laws that suffer from a discriminatory purpose and that also have a discriminatory effect on religious minorities. 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."[103]

Despite Laycock's criticism of *Smith*, his argument for a meaningful commitment to religious equality does not necessarily require adherence to the strict scrutiny regime of *Sherbert* and *Yoder*. If the use of strict scrutiny incident to an autonomy-based construction of free exercise rights actually results in less religious equality because of culturally biased judges, a rea-

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[98] *Id.* at 14.

[99] *Id.* at 14–15.

[100] *See generally* ELY, *supra* note 23.

[101] Laycock, *supra* note 2, 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 . . . be scrutinized for evidence of anti-religious motive, religious gerrymander, or secular exemptions not available to churches or believers").

[102] *Id.* at 54.

[103] *Id.* at 59.

sonable observer might reject Justice Brennan's preferred doctrinal means of achieving the substantive end of equality.

Like Professor Laycock, Professor Greenawalt endorses the regime of strict scrutiny that existed before *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."[104] 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.[105] For Greenawalt (as well as for Laycock and McConnell) the problem of cultural bias among governmental officers generally (and presumably including not only legislators, but also judges and executive officers drawn from the same political community as legislators), although acknowledged, is not sufficiently pressing to justify a less demanding regime than strict judicial review.[106]

Interestingly, both McConnell and Laycock slide into the trap of judging religious claimants by the vintage of their 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."[107] 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."[108]

Why do both McConnell and Laycock, much like Chief Justice Burger in *Yoder*,[109] invoke the "ancient" nature of the particular sect denied relief in *Smith*? If a primary reason for extending judicial 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 as an appropriate marker of a bona fide religion? Arguably, newly founded religions should have a stronger claim on judicial protection under the Free Exercise Clause than longstanding or ancient religions, precisely because new religious organizations will have the least cultural salience, and therefore have the lowest standing before popularly elected governmental officials.

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[104] Greenawalt, *supra* note 2, at 154.

[105] *Id.* at 155.

[106] *See id.* at 154; Laycock, *supra* note 2, at 1–4, 7–10, 59–68; McConnell, *supra* note 2, at 172–75.

[107] McConnell, *supra* note 2, at 116 (emphasis added).

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

[109] *See* Wisconsin v. Yoder, 406 U.S. 205, 225, 227, 229 (1972) (invoking the age of the religion as reason for taking seriously the request for an exemption from a neutral law that prohibits truancy).

A related problem arises from 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*."[110] 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."[111] Accordingly, "[t]he Free Exercise Clause does not protect autonomy; it protects obligation."[112]

Of course, whether one views religiously motivated behavior as 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 same nomenclature: "A final threat to religious *autonomy* arises from governmental control over many of the institutions of education and culture."[113] Thus even McConnell, speaking in ordinary language, frames the interests of religious communities 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 or liberty, rather than 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.[114] If I am correct in thinking that

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[110] McConnell, *supra* note 2, at 172.

[111] *Id.*

[112] *Id.* at 173.

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

[114] A comparison of statutory enactments that define rights by reference to equality norms with statutes that define abstract rights to equality and invite open-ended balancing of autonomy claims against general governmental or social interests is highly instructive. *Compare, e.g.*, 42 U.S.C. § 1981 (2000), *and id.* § 1982, *and* Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6, *with, e.g.*, Americans with Disabilities Act, 42 U.S.C. §§ 12,101–12,213, *and* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to cc-5, *and* Title VII, 42 U.S.C. § 2000(e)(j) (proscription of discrimination based on religion, which is subject to an "accommodation" standard). *See also* Laura S. Underkuffler, *"Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581, 581–96, 610–11, 615–19, 624–25 (1989) (examining the phenomenon of employers with overtly religious identities and proposing that "[a]n employer's religious policies or practices should be considered discriminatory" only when they effectively preclude "equal employment opportunity" but suggesting that religious "reasonable accommodation" rules should protect a worker who "objects to exposure to a religious work environment," and canvassing the statutory rules and case law on this subject, because "religious neutrality" in employment cannot, and perhaps should not, be the goal of Title VII). Asking what constitutes a "reasonable accommodation" is a far less choate and limited inquiry than determining if African Americans have the same rights to "make and enforce contracts" as "white citizens," *see* 42 U.S.C. § 1981, or whether election officials in Bolivar County,

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 nominally facially grants strong protection (strict scrutiny) but in reality cannot be used 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."[115] As he puts the matter, "[w]hether or not [the free exercise norm] is more than an antidiscrimination norm, the free exercise norm is an antidiscrimination norm."[116]

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."[117] Once again, the problem arises that this approach requires a person (whether a police officer, a public prosecutor, a judge, or a member of a jury), who likely shares the general community's hostility toward the religionists, to respect

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Mississippi, are applying different registration rules based on race. *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 396–98 (2002) (discussing the reasonable accommodation concept in the context of the Americans with Disabilities Act (ADA)); Sutton v. United Air Lines, 527 U.S. 471, 475, 477–89 (1999) (reading the ADA narrowly to exclude correctable conditions from the scope of the Act); *cf.* St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609–13 (1987) (discussing scope of § 1981 and defining "racial discrimination" very broadly, to include all forms of ethnicity, as ethnicity was understood in the nineteenth century when Congress enacted § 1981); City of Rome v. United States, 446 U.S. 156, 173–78 (1980) (discussing and applying section 1 of the Voting Rights Act, which bans racially discriminatory voting practices, and the cases arising under it, and concluding that section 1 prohibits practices that have a discriminatory impact on voting based on race); Runyon v. McCrary, 427 U.S. 160, 168–69 (1976) (holding that § 1981 of Title 42 provides a private right of action for racial discrimination in the making or enforcement of private contracts). Leveling *up* to the standard that the majority sets for itself is an easier task than asking abstractly "what's fair?" Of course equality can be complicated too, because sometimes equal treatment requires different treatment. *See* Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1123–25 (2006); E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 80–89 (1997).

[115] Perry, *supra* note 8, at 299; *see also* MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 13–14, 24–29 (1997) (arguing that, at a minimum, the Free Exercise Clause prohibits governmental discrimination based on religious belief, and might also conceivably require some affirmative accommodations of religionists).

[116] Perry, *supra* note 8, at 299.

[117] *Id.* at 301.

an autonomy claim by the religionists in the face of widespread and generalized public hostility.

To illustrate this point, consider a religionist who claims that God required him to beat his wife because she appeared in public without wearing a burqa; neither a judge presiding over a criminal trial for assault and battery nor a jury empanelled to determine the facts would seriously credit the claim that a religious exemption from the general criminal law should apply on these facts. Strong cultural norms associated with promoting gender equality and discouraging spousal abuse will certainly overwhelm any consideration of religious autonomy; moreover, the discounting of the religious liberty claim will occur in a reflexive, largely unself-conscious fashion. Were the analysis to occur at a conscious level, it would look something like this: "Whether or not he believes God so commands him, a matter on which I harbor doubts, for God does not so command, the state's interest here clearly outweighs any crazy claim that assault and battery should be immune from criminal punishment." "Respect and concern" can apply only to religious claims that do not trespass against deeply held cultural norms.[118] Similarly, no matter how innocuous, for example, genital kissing[119] might be in its local cultural context, "respect and concern" for the practice would difficult, if not impossible, to secure in the contemporary United States.[120]

A doctrinal test that requires less of the government might well deliver more to minority religionists, if judges could 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. "Respectful" treatment requires members of the dominant culture to take seriously claims by religious minorities that seem strange, counterintuitive, or even deeply offensive. In an ideal world, "respect and concern" would be attainable goal, not only for judges, but also for legislators and executive officials. Sadly, we do not live in an ideal world.[121]

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[118] *See* WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 1–2, 8 (2005) (discussing the existence and effects of cultural bias on religious autonomy claims and positing that "[w]hat is arguably impossible is justly enforcing laws granting persons rights that are defined with respect to their religious beliefs or practices"); *see also id.* at 154 (noting that "religion is not always, in fact, absolutely free, legally speaking," and that "[t]he right kind of religion, the approved religion, is always that which is protected, while the wrong kind, whether popular or unpopular, is always restricted or even prohibited").

[119] State v. Kargar, 679 A.2d 81 (Me. 1996) (reversing a criminal conviction for genital kissing after reviewing evidence regarding prevailing Afghan cultural practices).

[120] *See* Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139, 1144–52 (1998) (examining the importance of cultural understandings of sexual behavior in the specific context of a traditional Pacific Island culture with non-Western adulthood rites). *But cf. Kargar*, 629 A.2d at 82–83 (discussing decision to charge and prosecute a Maine father for kissing his son's penis in public).

[121] *See* SULLIVAN, *supra* note 118, at 151 ("While the legal protection of religious freedom as a political idea was arguably once a force for tolerance, it has now arguably become a force for intolerance.").

Even so, 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,"[122] and would suggest that some burden of justification should rest with the government, rather than leaving it solely with the religionist. Perry seems to share this view, and takes it a step further by proposing a presumption that:

> If government could exempt a religious practice from a ban to which the practice is subject without seriously compromising either the objective the ban 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.[123]

This interpretative rule, in practice, restores a standard of strict scrutiny for claims of religious-based exemptions. Although framed in equalitarian terms, the social costs of such an approach—tolerating deeply offensive conduct or behavior, such as polygamy or spousal abuse, because a religionist sincerely believes that God commands it—are likely to lead judges to reject most claims brought by unpopular minority religionists.[124]

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 proposal to effect the antidiscrimination norm is so demanding of government that it essentially collapses back into a generalized grant of autonomy to religionists. 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 both strongly object to *Smith* on textual grounds. Greenawalt observes 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."[125] He then asks post-*Smith*, "[w]hat, then, does the Free Exercise Clause do that would be left undone in

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[122] Perry, *supra* note 8, at 303.

[123] *Id.* (footnote omitted).

[124] 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 115, 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.

[125] Greenawalt, *supra* note 2, at 159.

its absence?"[126] 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."[127] 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. Given *Smith*, its importance has diminished radically."[128] Greenawalt argues that a reading of the Free Exercise Clause that limits its effect so drastically should be rejected in favor of an interpretation that gives the Clause greater force.

Professor Laycock advances 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."[129] In Laycock's view, "[t]he point of enumerating certain rights was to ensure that at least those rights get enforced."[130] 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."[131]

These textual objections to *Smith*, although not without some persuasive force, do not raise insurmountable obstacles to *Smith*'s interpretation of 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,[132] it would not be unreasonable for the Framers to seek not only to prohibit the creation of an official national church, but also any governmental effort to create preferences for particular sects. Viewed from this perspective, the Free Exercise Clause

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[126] *Id.*

[127] *Id.*

[128] *Id.* at 160.

[129] Laycock, *supra* note 2, at 37.

[130] *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).

[131] Laycock, *supra* note 2, 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*.

[132] *See* Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 302 n.69 (2003) (collecting and describing authorities on the commonplace practice of maintaining an established, official church in the states in the pre-Revolutionary and even post-Revolutionary period).

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).[133] Nevertheless, the *Smith* skeptics argue that an interpretation of constitutional text that leaves it without meaning should be rejected.[134]

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.

Likewise, the textual objection that *Smith*'s reading of the Free Exercise Clause leaves the Clause without meaning is not especially persuasive. Of course, the objection to *Smith* cannot be that Congress, the President, or the state governments cannot respect or enforce the Free Exercise Clause because 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.[135] The Free Exercise Clause matters, and has important legal ef-

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[133] 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 325–73.

[134] *See, e.g.*, Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 308 ("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 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 381–404. 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).

[135] *See* Eakin v. Raub, 12 Serg. & Rawle 330, 346–47, 353–56 (Pa. 1825) (Gibson, J., dissenting) (arguing that legislators are no less bound to enforce constitutional norms, and no less capable of this duty, than are judges; that courts should not invalidate a law "if that law has been passed according the forms established in the constitution"; and that "it rests with the people [rather than the courts], in whom full and absolute sovereign power resides to correct legislation, by instructing their representatives to repeal the obnoxious act"); *see* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 16–29 (noting that the fact that "the Constitution is a 'written' one yields little or nothing as to whether acts of Congress may be given the force of positive law notwithstanding the opinion of judges," that "[u]nwillingness of the courts to give effect to acts of Congress which the Supreme Court might conclude were repugnant to the Constitution is thus quite unnecessary to the accomplishment of

fects, if it influences legislative and executive action more frequently than it receives judicial enforcement. 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."[136] In *Nixon v. United States*, the Supreme Court held that the Senate could define an impeachment "trial" in any way that it wished; the matter was nonjusticiable because of an absence of clear standards for defining "trial" and the textual commitment of the matter to the Senate.[137] 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. This important, indeed crucial, structural right that goes to the very legitimacy of the federal government is not subject to judicial superintendence. In light of this fact, is it so untenable to vest primary responsibility for the enforcement of the Free Exercise Clause in the political branches?

The Guaranty Clause[138] perhaps provides a better analogue to the Free Exercise Clause. The Supreme Court consistently has held that the Guaranty Clause is not judicially enforceable;[139] enforcement of the 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.[140]

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several significant purposes which might still be served," and that nothing in the text of the Constitution itself compels the conclusion that the Judiciary must enjoy primacy over the executive and legislative branches in interpreting and enforcing constitutional limitations on the federal and state governments); *cf. id.* at 34–45 (arguing that the merits lie with Chief Justice John Marshall's claim for judicial supremacy in interpreting the Constitution if one takes into account extratextual sources, such as James Madison's *Notes on the Federal Convention*, the *Federalist Papers*, and the contemporary practice at the time of the Framing in several state supreme courts, which enjoyed the power of judicial review).

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

[137] *See* Nixon v. United States, 506 U.S. 224, 229–38 (1993). Writing for the majority, Chief Justice Rehnquist explained that in addition to the clear "textual commitment" of the issue to the Senate, *id.* at 236, there was no "judicially manageable standard" to apply in policing the metes and bounds of the power "to try," *id.* at 230, and the Constitution's language "does not provide an identifiable textual limit on the authority which is committed to the Senate," *id.* at 238.

[138] 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").

[139] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 42–45 (1849); *see also* Baker v. Carr, 369 U.S. 186, 218–26 (1962) (discussing *Luther* and the other cases holding the Guaranty Clause to be nonjusticiable).

[140] *See Baker*, 369 U.S. at 220–22; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–67 (1803) (observing in dicta that "the President is invested with certain important political powers in the

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. Judicial policing of 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 may actually constitute an important human right, one can concede the imprecise nature of the analogy and still not concede the entire argument. One could draw a distinction, for example, between collective human rights (the Guaranty Clause) and individual human rights (the Free Exercise Clause). However, this objection also can be met, at least in part.

Even constitutional provisions securing individual human rights, however, are not uniformly subject to stringent judicial enforcement. The federal Judiciary has made little, if any, sustained effort to enforce the strictures of the Ninth Amendment.[141] Although the *Casey* and *Roe* courts invoked the Ninth Amendment in passing,[142] the Amendment 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. If no rights-granting provision should be rendered "redundant" with other constitutional provisions, the judicial stranding of the Ninth Amendment is very difficult to explain.

The Petition Clause[143] presents an even clearer example of a rights-granting provision that lacks significant judicial enforcement.[144] The Supreme Court has merged the Petition Clause into the other provisions of the First Amendment, holding that these rights are all "cut from the same

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exercise of which he is to use his discretion, and is accountable only to his country in his political character, and to his own conscience"; that the Judiciary possesses "no power to control that discretion"; and accordingly that "the decision of the executive is conclusive" over such matters, thus establishing the theoretical, textual, and doctrinal basis for the political question doctrine, under which the Supreme Court subsequently has held that the Guaranty Clause is not subject to judicial enforcement).

[141] U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). For an argument that the federal courts should undertake greater efforts to enforce the Ninth Amendment, see Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006). *See also* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY (1955); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936).

[142] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.); Roe v. Wade, 410 U.S. 113, 120–22 (1973).

[143] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

[144] *See* Ronald J. Krotoszynski, Jr. & Clint Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239 (2008); *see also* McDonald v. Smith, 472 U.S. 479, 482–85 (1985).

cloth"[145] and "inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble."[146] Thus, the Supreme Court routinely dismisses Petition Clause claims, invoking the "cut from the same cloth" language as a justification for refusing to give the Petition Clause a significant doctrinal role in securing expressive freedom separate and distinct from the Speech, Press, and Assembly Clauses. Why is the Free Exercise Clause more important than the Ninth Amendment or the Petition Clause, if the objection rests on a rule that all provisions of the Bill of Rights must do significant independent work?

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,[147] 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, 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. But the Petition Clause is the first cousin of the Free Exercise Clause; clearly no absolute textual imperative exists for giving every provision of the Bill of Rights, or *even the First Amendment itself*, strong judicial enforcement.

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 and the Free Exercise Clause. 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 put forth a serious objection with substantial merit—although it 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 of terms, leaving

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[145] *McDonald*, 472 U.S. at 482.

[146] *Id.* at 485.

[147] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

the road relatively clear for clever discriminators. Moreover, the Supreme Court has not modified due process, equal protection, or free speech jurisprudence to take into account this potential for discrimination. Thus, even though, as the subsequent materials show, the compelling state interest test under *Sherbert* and *Yoder* disserved equality values, *Smith*'s reflexive deference to government underenforces the Free Exercise Clause's antidiscrimination mandate.

III. THE IRONY OF AUTONOMY AS A MODEL FOR THE FREE EXERCISE CLAUSE

Before embracing *Sherbert-Yoder*'s strict scrutiny regime as an essential means of protecting religious liberty, one should first consider the possibility that the *Sherbert-Yoder* approach actually decreased, rather than increased, the religious liberty enjoyed by members of minority religious sects. If use of the compelling state interest test in practice subordinated religious minorities relative to nonminorities, the test would be a poor means of advancing religious equality, even if the approach provided benefits to members of traditional religious groups.[148]

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 nontraditional religions and claims by nontraditional religionists. In many cases, both the results and the rhetoric used to support the results arguably reflect consistent patterns of cultural bias. Second, empirical analysis of outcomes in pre-*Smith* 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 Part begins with an examination of the Supreme Court's rhetoric about nonconforming 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 nineteenth century and continues to the present. Next, this Part considers psychological, anthropological, and cultural reasons for the Court's expressed hostility toward nonconforming religious groups. It then reviews empirical research data, which demonstrate that the problem of judicial bias in applying *Sherbert-Yoder* heightened scrutiny to free exercise claims is both real and pressing, rather than merely hypothetical.

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[148] 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.

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. The Justices seem to take some religions more seriously than others. This ethnocentrism ill serves both the equality and 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 nineteenth century cases involving the early Mormon Church provide perhaps the best exemplars of pejorative rhetoric. In discussing the Mormon practice of polygamy, Justice Field in *Davis v. Beason* observed that "[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries."[149] The practice "tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman[,] and to debase man."[150] He went 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."[151] He observed 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 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.[152]

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 it or refused to take an oath denouncing the practice.[153] The Supreme Court considered the practice and advocacy of polygamy as mere crimes, simply rejecting out of hand the notion that either could be assimilated into the concept of "religion."

The *Davis* Court not only defined the Mormon Church's advocacy of polygamy as outside the proper bounds of religion but also self-consciously identified the United States as a "Christian" nation. Thus, the Supreme

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[149] 133 U.S. 333, 341 (1890).

[150] *Id.*

[151] *Id.* at 341–42.

[152] *Id.* at 343.

[153] *Id.* at 345–47.

Court drew two different circles: one of exclusion ("polygamy") and one of inclusion ("Christian" nationhood).

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.[154] He observed that "[p]olygamy 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 the life of Asiatic and of African people."[155] Once again, the Supreme Court drew boundary lines that limited the notion of legitimate religious practice to majoritarian traditions. The foreign nature of the practice of polygamy, and its observance in non-European cultures, made 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.[156] In sustaining Congress's action, Justice Bradley heaped 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. This is altogether a sophistical plea."[157] The Court had "no doubt of the power of Congress to do as it did."[158]

One might suggest that the nineteenth century decisions involving polygamy simply represent a more ethnocentric time; those 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,[159] however, suggests that cultural norms still play an impor-

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[154] Reynolds v. United States, 98 U.S. 145, 161–67 (1879).

[155] *Id.* at 164.

[156] *See* The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 5–8 (1890); *see also* Laycock, *supra* note 2, at 62–63 (discussing the pervasive persecution of the Mormons by both the federal and the state governments).

[157] *Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 49.

[158] *Id.* at 64.

[159] *See* John Dougherty, *After Polygamist Leader's Arrest, Community Carries On*, N.Y. TIMES, Sept. 4, 2006, at A10 (discussing Jeffs and what many term his "polygamous cult"). The recent travails of the members of the Fundamentalist Church of Jesus Christ of Latter Days Saints (FLDS), in Eldorado, Texas, provide a powerful example of how highly transgressive behavior can bring down a heavy state response. On April 3, 2008, the Texas Department of Family Protective Services raided the Yearning for Zion Ranch, a compound on which FLDS church members and their children lived, and "took possession of all 468 children at the Ranch without a court order." *In re* Tex. Dep't of Family & Protective Servs., 51 Tex. Sup. Ct. J. 967, slip op. at 2 (Tex. May 29, 2008) (per curiam), *available at* http://www.supreme.courts.state.tx.us/historical/2008/may/080391.pdf. Although a local trial court sustained the ex parte seizure of all 468 children on an "emergency basis," resting the decision on the theory that the FLDS parents would subject the girls to sexual abuse and inculcate the sexual abuse of women as a religious precept in the boys, *see In Re* Sara Steed, No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652, *4–5 (Tex. Civ. App. May 22, 2008), *mandamus denied sub nom In re Tex. Dep't of Family & Protective Servs.*, 51 Tex. Sup. Ct. J. 967, the Texas Court of Appeals reversed this order and re-

tant role in defining the scope of "legitimate" religious beliefs. Moreover, decisions of the Supreme Court well into the twentieth century also reflect a highly ethnocentric conception of religion.

In *Cleveland v. United States*,[160] the Supreme Court adopted an expansive reading of the Mann Act[161] 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, [polygamous practices] are in the same genus as the other immoral practices covered by the [Mann] Act," such as prostitution.[162] Although the rule of lenity ostensibly requires criminal laws to be construed favorably to the defendant,[163] the *Cleveland* Court broadly construed the Mann Act's prohibitions to bring interstate travel that facilitates polygamous cohabitation within the scope of federal criminal law.

Justice Murphy authored a very interesting dissenting opinion in *Cleveland*. Writing as the sole dissenter, Murphy noted that he disagreed "with the conclusion that polygamy is 'in the same genus' as prostitution and debauchery."[164] His stated purpose was not "to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy."[165] Yet he went on to describe the "four fundamental forms of marriage" and suggested that "[w]e must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious be-

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quired the Department to immediately return the children to their parents. *See id.* at *8–15. The Texas Supreme Court subsequently declined to review the Court of Appeals decision. *See In re Tex. Dep't of Family & Protective Servs.*, 51 Tex. Sup. Ct. J. 967, slip op. at 5.

The FLDS parents litigated and won the appeal not on the basis of religious freedom, but rather on the state's violation of more general parental rights protected under both the Due Process Clause of the Fourteenth Amendment and the Texas Family Code. Moreover, the Texas appellate courts considered and decided the appeal solely on the basis of parental rights and Texas statutory protections of those rights.

This approach to the litigation reflects a very prudent strategic decision by the lawyers for the FLDS parents: it is much easier to successfully invoke a right to equal treatment than it is to demand respect for highly transgressive religious beliefs and the conduct that such beliefs mandate. *See* Stephanie Simon, *Role of Belief in Polygamy Case*, WALL ST. J., Apr. 25, 2008, at A10 (discussing the litigation strategy of the FLDS parents and the Department's view that the inculcation of the FLDS beliefs constituted a serious form of child abuse).

[160] 329 U.S. 14 (1946).

[161] For a description of the Mann Act, also known as the "White Slavery Act," see *supra* note 48.

[162] *Cleveland*, 329 U.S. at 19.

[163] *See* James v. United States, 127 S. Ct. 1586, 1603 (2007) (Scalia, J., dissenting) ("The rule of lenity, grounded in part on the need to give 'fair warning' of what is encompassed by a criminal statute, demands that we give [an ambiguous criminal statute] the more narrow reading of which it is susceptible." (citation omitted)); *see also* United States v. Bass, 404 U.S. 336, 348 (1971); McBoyle v. United States, 283 U.S. 25, 27 (1931).

[164] *Cleveland*, 329 U.S. at 25 (Murphy, J., dissenting).

[165] *Id.*

liefs and social mores of those societies in which it appears."[166] 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."[167] He urged that "[i]t must be recognized and treated as such."[168]

Justice Murphy directly accused the majority of ethnocentrism. He argued 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 with prostitution or debauchery or other immoralities of that character."[169] He concluded 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."[170]

Justice Murphy exhibited a consistent concern for respecting cultural and religious pluralism. In *Prince v. Massachusetts*,[171] 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 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."[172] 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."[173] 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 still 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 turn 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

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[166] *Id.* at 25–26.
[167] *Id.* at 26.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] 321 U.S. 158 (1944).
[172] *Id.* at 174 (Murphy, J., dissenting).
[173] *Id.* at 175.

> therefore hesitate before approving the application of a statute that might be used as another instrument of oppression.[174]

The majority took a somewhat different view of the case, concluding that "[p]arents may be free to become martyrs themselves," but "it does not follow they are free, in identical circumstances, to make martyrs of their children."[175]

The problem with any system of balancing exemption claims against general legal requirements is that judges do not exist in a cultural vacuum; they bring to bear a host of political, moral, and religious commitments when hearing and deciding cases. Consider, for example, Justice Sutherland's response, writing for the Court, to Douglas C. Macintosh's free exercise claim to refuse an oath to bear arms incident to naturalization:

> When [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 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.[176]

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 willing to take up arms in defense of this country?" He responded, "Yes; but I should want to be free to judge of the necessity."[177] Justice Sutherland's majority opinion simply dismissed the notion that duty to God could preclude taking up arms when commanded to do so by the federal government; as Sutherland put it, calls to arms made by the general government simply are "not inconsistent with the will of God." Evidently, according to the Court, Macintosh was mistaken to think otherwise.

The price of Macintosh's 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."[178] Instead, an applicant "must

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[174] *Id.* at 175–76 (citation omitted).

[175] *Id.* at 170 (majority opinion).

[176] United States v. Macintosh, 283 U.S. 605, 625 (1931) (citation omitted).

[177] *Id.* at 617–18.

[178] *Id.* at 626.

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."[179] 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 disregard Macintosh's religious beliefs, but it asserts a contrary view as a theological truth.

More recently still, the Supreme Court had to decide whether a member of the Jehovah's Witnesses had a right to collect unemployment benefits after refusing to work on a production line making munitions at the Blaw-Knox Foundry & Machinery Company, even though other members of the religion employed at the plant did not think that the work in question violated the tenets of the faith.[180] Chief Justice Burger, in granting the free exercise claim to the unemployment benefits, noted in passing that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[181] This is a telling passage, for it reflects an innate bias of the Judiciary that burdens the ability of minority religionists to claim a full and equal share in the free exercise project. It most likely will be small, minority religions, perhaps of recent vintage, whose beliefs will strike the average federal or state court judge as too "bizarre" to be "entitled to protection."[182] Conversely, religions with deep roots in American culture, or those whose beliefs and ethics are consistent with dominant moral and social norms, should fare better. 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,[183] not twice,[184] but three

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[179] *Id.*

[180] Thomas v. Review Bd., 450 U.S. 707, 709–11 (1981).

[181] *Id.* at 715.

[182] *See, e.g.*, Tony & Susan Alamo Found. 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." (footnote omitted)). 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 odd for the Supreme Court to school a religion on the proper interpretation of its own doctrines. Justice White provides a *cf.* citation to *United States v. 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.

[183] 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

times.[185] The age of a religion, however, has nothing to do with the impact of a neutral law of general applicability on sect members' observation of 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 sought to be advanced by enacting and enforcing the law in the first place. But Chief Justice Burger's ethnocentrism runs much deeper than this.

Burger both celebrated and idealized the Amish, even as he disparaged 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."[186] He also suggested "that probably few other religious groups or sects could make" a showing sufficient to justify the exemption at issue in *Yoder*.[187] The Old 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."[188] And he emphasized 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."[189] In sum, he stated, "[e]ven their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."[190]

Chief Justice Burger's majority opinion in *Yoder* is a portrait of unself-conscious 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, such as whether the group believes in taking public assistance or engages in agricultural pursuits. Such an interpretation of the Free Exercise Clause—that it exists simply to amplify the rights of politically popular religious sects holding inoffensive

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on their rights . . . to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries.").

[184] *Id.* at 226–27 ("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 there 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.").

[185] *Id.* at 235 ("Aided by a history of three centuries as an identifiable religious sect and a long 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 with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities . . . , and the hazards presented by the State's enforcement of a statute generally valid as to others.").

[186] *Id.* at 235.

[187] *Id.* at 236.

[188] *Id.* at 225–26.

[189] *Id.* at 222.

[190] *Id.* at 226.

theological viewpoints—grossly disserves the equalitarian concerns of its Framers, including James Madison.[191]

The problem with any effort to interpret and apply 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.[192] Nevertheless, his fit of conscience was sufficiently offensive to the reviewing district court that it chose to deny his citizenship application. Moreover, the more deeply contrarian a religious sect's views—and hence the less likely the sect can obtain protection through the majoritarian political process—the less likely that judges will take the religionists' claims seriously.

It may be tempting to dismiss the rawest language in *Davis* and *Reynolds* as nothing more than relics of a less noble time. More recent cases, however, continue to disparage the practices of religious minorities, even if they do not use equally disparaging language. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court told Native Americans seeking to preserve a sacred mountain 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."[193] The Court held that the destruction of a government-owned site crucial to 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.[194] 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 governmental action on a religious objector's spiritual development."[195] Yet, in *Sherbert* and subsequent cases in the *Sherbert* line, the Court held that the government was required to provide unemployment benefits to Saturday Sabbatarians. Thus, while

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[191] *See supra* text and accompanying notes 318–73.

[192] *See* MULFORD Q. SIBLEY & PHILIP E. JACOB, CONSCRIPTION OF CONSCIENCE 18–36 (1952); *see also* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 166–67 (1990) ("Given the centrality of non-violence to the religious beliefs of many pacifist sects and the long history of political acceptance of religiously based exemptions from conscription, a strong case may be made on balance that these exemptions should be sustained against establishment clause challenge." (footnote omitted)).

[193] 485 U.S. 439, 452 (1988).

[194] *See id.* at 450–51.

[195] *Id.* at 451.

destruction of a religious site *did not* trigger the Free Exercise Clause, state unemployment programs that provided benefits in some cases but not others and that did not order anyone to work on a Saturday *did* trigger the Free Exercise Clause.[196]

In *Bowen v. Roy*,[197] the Supreme Court held that 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 Aid to Families with Dependent Children benefits, did not raise a meritorious free exercise objection.[198] Roy, a member of the Abenaki tribe, believed that obtaining and using a Social Security number for his daughter would "'rob the spirit' of his daughter and prevent her from attaining spiritual power."[199] 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."[200] The *Roy* majority placed great emphasis on the fact that the plaintiff did not assert a claim of discrimination[201] or an affirmative compulsion to either refrain from religiously motivated conduct or to engage in religiously prohibited conduct.[202] Of course, cases in the *Sherbert* line involved a denial of benefits rather than overt discrimination or governmental compulsions by threat of sanctions.[203] The real

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[196] *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.").

[197] 476 U.S. 693 (1986).

[198] *See id.* at 699–701.

[199] *Id.* at 696.

[200] *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.").

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

[202] *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." (footnotes omitted)).

[203] *See, e.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Thomas v. Review Bd., 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."). Chief Justice Burger expressly acknowledges this point in *Roy*: "We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Roy*, 476 U.S. at 706. In turn, this difference in the import of direct versus indirect burden free exercise claims "is relevant to the standard that the government must meet to justify the burden," *id.* at 707, which must mean that some

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 observed 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 benefits programs is an important goal."[204] In analyzing the burden on the government, however, Chief Justice Burger made no effort to establish how many religious objectors would refuse to use Social Security numbers. Instead, he seemed to assume that regardless of whether a large number of persons would object, *any* objection resulting in noncompliance would create an intolerable burden on the government.[205] Given this method of analysis, his conclusion was forgone 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 the programs."[206]

But this measure of the burden on the government improperly stacks the deck by assuming that any exemption will fatally undermine the government's interest in fiscal accountability. Even if "the Government"[207] 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 million persons" for "$11 billion in food stamps,"[208] 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 likely *always* be compelling. And, if even one exemption, presenting a "slight risk"[209] to the government's interests, justifies a slippery slope argument[210] that "if we allow one, how many more will surely fol-

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sort of "strict scrutiny lite" applies in indirect burden cases (*Sherbert*'s language to the contrary notwithstanding).

[204] *Roy*, 476 U.S. at 709.

[205] *Id.* at 709–11.

[206] *Id.* at 711–12.

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

[208] *Roy*, 476 U.S. at 710.

[209] *Id.* at 711–12.

[210] *See* Courtney Megan Cahill, *Same Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1544–45, 1550–54 (2005) (describing, discussing, and critiquing the "slippery slope" trope

low?," strict scrutiny review reduces to a weak form of rationality review; only if there is no rational relationship to a legitimate state interest will the risk of mass noncompliance not justify refusing the first exemption (which opens the floodgates to subsequent exemption claims).

The Supreme Court also deployed a similar, and equally pernicious, standard analytical move during the pre-*Smith* era: in applying the strict scrutiny test, the Justices would measure the burden on the government of a religious exemption on the assumption that no one would agree to meet the government's condition.[211] Thus, for example, in *United States v. Lee*, the Supreme Court rejected an effort by an Old Order Amish farmer to avoid the payment of payroll taxes for his workers.[212] Chief Justice Burger found that the federal government had a compelling interest in the collection of such taxes because:

> The 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. Because 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.[213]

At least the Amish, unlike the Native Americans in *Lyng*, were credited with a genuine free exercise claim.[214]

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 made no effort to isolate the claim or the burden. If the Supreme Court had adopted the same analytical approach in *Yoder*, it would

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as a rhetorical feature of legal arguments and decisions, with particular focus on its use in the context of same-sex marriage).

[211] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988); *Roy*, 476 U.S. at 709–11; Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (rejecting a free exercise exemption from Air Force regulations that prohibited a Jewish officer from wearing a yarmulke while on duty and measuring the burden of an exemption to the dress code on the military by positing a kind of dress code free-for-all); *id.* at 512–13 (Stevens, J., concurring) (warning that religious exemptions from the Air Force dress code regulations would result in a rag tag military or require unjustified discrimination against some religionists); Braunfield v. Brown, 366 U.S. 599, 608–09 (1961); *see also* Employment Div. v. Smith, 494 U.S. 872, 905–06 (1990) (O'Connor, J., concurring) (analyzing the social cost of exemption from a general criminal ban on peyote for members of the Native American Church by assuming a generalized social effect flowing from the exemption, rather than measuring the social effect based on the very small number of number of persons belonging to the Native American Church, and therefore, entitled to the exemption were the courts to recognize one); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 228–29 (1972) (balancing the social cost of a limited exemption from the state's truancy laws for the Old Order Amish, but no other groups, when determining the potential social cost of recognizing an exemption from the state's general policy).

[212] 455 U.S. 252 (1982).

[213] *Id.* at 260 (citations omitted).

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

not have asked if Wisconsin had a compelling interest in forcing Amish children to attend school to age sixteen, but rather whether Wisconsin had a compelling interest in making *any* children attend school to age sixteen. Framing the burden on an as-applied versus universal basis prefigures the outcome of the balancing exercise. Simply put, "strict scrutiny" meant different things for different religions, a state of affairs that hardly advanced the goal of religious nondiscrimination; preferred religions, like the Qld Order Amish, benefited whereas dispreferred religions and religionists, like the Scientologists, did not. In the pre-*Smith* era, the Justices routinely manipulated the burden in order to force congenial outcomes.[215]

Native Americans and the Amish were not the only groups that failed to realize the benefit of the *Sherbert-Yoder* line of cases in circumstances where the religionists' interests seemed reasonably strong but the government's interest appeared less than compelling (at least if one measured the numerator of the burden by counting only those seeking an exemption based on a sincere religious belief). During the pre-*Smith* era, the Supreme Court in *Goldman v. Weinberger* rejected a devout Jew's desire to wear a yarmulke while in military uniform on a stateside base.[216] 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.[217] He did explain that "[t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."[218] 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."[219] *Goldman* demonstrates how easily strict scrutiny can be evaded through the twin devices of generalizing the exemption to create a parade of horribles and overtly placing a thumb on the scale in favor of the government's interests. If one steps back, it is exceedingly difficult to fathom why a ban on yarmulkes on the facts presented advanced a significant governmental interest; indeed, Congress itself ultimately legislated to overturn the result in *Goldman*.[220]

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[215] *See supra* note 211.

[216] 475 U.S. 503.

[217] *Id.* at 504–05.

[218] *Id.* at 509.

[219] *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 512–13 (Stevens, J., concurring).

[220] National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508, 101 Stat. 1019, 1086–87 (1987) (codified at 10 U.S.C. § 774 (2000)).

Hernandez v. Commissioner[221] provides perhaps the most glaring modern example of religious bias by the Supreme Court when considering a free exercise claim. 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 kinds of quid pro quo donative arrangements, such as pew fees, mandatory tithes, and intercessionary masses. The majority squarely held that auditing session "payments are not deductible"[222] 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."[223]

According to the Court, 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 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."[224] Even if the Court 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."[225] Finally, the majority declined to consider 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."[226]

Justice O'Connor authored a powerful dissent that had at its heart the idea that "the IRS cannot constitutionally be allowed to select which religions will receive the benefit of its past rulings."[227] 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."[228] 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

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[221] 490 U.S. 680 (1989).

[222] *Id.* at 684.

[223] *Id.* at 691.

[224] *Id.* at 699.

[225] *Id.* (citations omitted) (internal quotation marks omitted).

[226] *Id.* at 702.

[227] *Id.* at 704 (O'Connor, J., dissenting).

[228] *Id.* at 709–11.

view the Church of Scientology as a legitimate religion and are unwilling to treat it at parity with Methodism, Judaism, or Roman Catholicism.[229]

To be sure, the federal government did not declare the Church of Scientology an illegal institution and declare its assets forfeited to the state—a fate suffered by the Mormon Church in the late nineteenth century.[230] The IRS simply withheld from members of the Church of Scientology a valuable tax benefit that was routinely available to members of other faiths who made mandatory financial contributions for religious services (such as tithes, pew rents, and fees for intercessional masses). Nor did the *Hernandez* Court resort to name calling or vilification.[231] But the fact that Justice Marshall's discrimination came in a civil wrapper does not alter the fact that the Church of Scientology was not treated at parity with the Old Order Amish (at least in *Yoder*) or the Seventh Day Adventists.

Other cases reflect the Court's failures to give the full benefit of strict scrutiny to religionists with unpopular viewpoints. For example, Bob Jones University faced the loss of "charitable" status as a 501(c)(3) entity because of its racially discriminatory policies; this, in turn, would have ended the deductibility of gifts made to the university for purposes of the federal income tax.[232] In *Bob Jones University v. United States*, 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."[233] Thus, Bob Jones University did not even make the threshold of

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[229] *See* Elbert Lin et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 223 (2002) ("[W]hile the idea of funding mainstream churches is exceedingly popular, only 38% of Americans approve of giving federal money to mosques, only 29% of Americans are willing to support the Nation of Islam with taxpayer[] dollars, and 26% support granting public funds to the Church of Scientology."). *See generally* Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85 (1997).

[230] *See* The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 5–8 (1890) (describing legislation enacted by Congress disbanding the Mormon Church and seizing its assets for the public treasury).

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

[232] Bob Jones Univ. v. United States, 461 U.S. 574, 577–82 (1983).

[233] *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 "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

establishing a viable free exercise claim—unlike Mrs. Sherbert or any of the other plaintiffs denied benefits as a result of practicing their religious tenets. 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."[234] Thus, as in *Lee* and *Roy*, the government's interest was compelling, so the existence or nonexistence 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."[235] Once again, the Court made no effort to ascertain with precision the nature of the burden that granting the free exercise claim would place on the government's goal of nondiscrimination.

Thus, in the pre-*Smith* era, the Supreme Court routinely rejected claims by minority religionists whose beliefs seemed nonmainstream.[236] Moreover, the Court often did this without even crediting the existence of a viable free exercise claim. In some instances, the Justices found that the government had not "prohibited" the plaintiffs' free exercise of religion (for example, *Lyng*, *Roy*, and *Hernandez*). In other cases, the Court found a viable free exercise claim but then proceeded to measure the burden on the government on the assumption that any noncompliance would be unduly burdensome (for example, *Lee* and *Roy*).[237]

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

[234] *Bob Jones Univ.*, 461 U.S. at 604.

[235] *Id.*

[236] One particularly disturbing consideration relates to the pattern of claimants whom the Supreme Court finds have properly invoked the Free Exercise Clause versus those it views as complaining only about an "indirect burden." *See, e.g.*, *Braunfield*, 366 U.S. at 603, 605–07. The religions that fail to establish a claim are almost uniformly non-Christian; the only Christian groups that fail 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 complained of merely noncognizable "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 observes, "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 and 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 (for example, *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.

[237] 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 offsite 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 pe-

In short, the Supreme Court's rhetoric and practice during the *Sherbert-Yoder* era reflected ethnocentric conceptions of "valid" and "invalid" religious precepts, and the Court's application of the compelling state interest test to minority religionists and majority religionists was far from consistent. 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 in favor of well-established, well-accepted religious sects should not be surprising. The very notion of "religion" triggers deep-seated, largely unconscious cultural associations and understandings.[238] 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, she might well prove unwilling to accept that the other group is a legitimate "religion" in the same way as her own. "The attitude that most affects social and political behavior is prejudice against people who are different."[239]

If one considers the psychological and anthropological literature on the 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 require judges to treat minority religions as fully

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nological objectives to that end." *Id.* at 351–52. New Jersey accommodated Christian religious observance by not scheduling offsite work details on Sunday; the Muslim religionists could have been accommodated by a rule exempting them from offsite 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. *See 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 S. CAL. L. REV. 215, 243–44 (1977) (discussing systematic discrimination against African-American Muslims in state prison systems and the failure of the lower federal courts to reliably remediate this discrimination via the Free Exercise Clause).

[238] *See generally* SULLIVAN, *supra* note 118. Professor Sullivan served as an expert witness in the *Warner* case, a small but highly telling free exercise case arising under Florida's state Religious Freedom Restoration Act; the case involved efforts by the city of Boca Raton, Florida, to force the families of persons buried in a city-owned cemetery to remove "vertical" (i.e., raised) memorials and shrines. *See id.* at 9–12, 82–88. Her experience as an expert witness in this case led Professor Sullivan to become deeply skeptical about the ability of the legal system in the contemporary United States to protect idiosyncratic and highly individualized forms of religion and religious expression. *Id.* at 1–9, 138–39, 147–59.

[239] JOSEPH F. BYRNES, THE PSYCHOLOGY OF RELIGION 151 (1984).

equal to their own, it is highly unlikely that such an admonition would be honored in practice.

1. Religion and Religious Concepts Are Deeply Culturally Embedded.—Unlike the concept of "speech," people have fixed and largely subconscious understandings of "religion."[240] 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, however, "[r]eligious ideas and behavior are part of the surrounding world, in relation to which people define themselves."[241] When a person is confronted with religious propositions that seem odd, foreign, or even offensive, cognitive dissonance can result.[242] "When dissonance is present, in addition to trying to reduce it[,] the person will actively avoid situations and information likely to increase the dissonance."[243] For most people, most of the time, "[e]mphasis is on the compatibility of different thoughts or different feelings."[244] When faced with beliefs radically inconsistent with one's own, one will likely 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."[245] Although a person "is not merely the product of his culture, . . . it has undoubtedly provided him with much evidence of what is

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[240] SULLIVAN, *supra* note 118, at 147–49 (noting that "there is no religious center in the United States" today, that because of this "lines must be drawn," and that "[d]ecisions about legal accommodation can be an appropriate acknowledgment of differences but they can also be discriminatory, giving legal muscle to only some easy competing anti-egalitarian normative regulatory schemes"); *see also* Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Dichotomy*, 50 STAN. L. REV. 1295, 1310–19 (1998) (discussing psychological, anthropological, and economic causes for hostility toward strange or offensive religious beliefs in general and toward the now-abandoned practice of polygamy in particular). Professor Sullivan also observes that judges do not necessarily shrink from the prospect of "talking theology all day" and applying their own religious experiences and beliefs to judge the value, if not the legitimacy, of the beliefs held by plaintiffs seeking religiously motivated accommodations. *See* SULLIVAN, *supra* note 118, at 136–37. Deep-seated cultural understandings operate at both a conscious and an unconscious level to shape the metes and bounds of both "religion" and religiously motivated behavior—something that worked very much to the detriment of the *Warner* plaintiffs. *See id.* at 1–8, 96–99, 108–09, 133–37, 147–59.

[241] BYRNES, *supra* note 239, at 157.

[242] In fact, Professor Leon Festinger, the originator of the concept of "cognitive dissonance," based his early work on the idea of a doomsday cult and its reaction when the ostensible day of absolute reckoning came—and went—without incident. *See* LEON FESTINGER, WHEN PROPHECY FAILS (1956); *see also* LEON FESTINGER, CONFLICT, DECISION, AND DISSONANCE (1964).

[243] BYRNES, *supra* note 239, at 153 (quoting LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 3 (1957)). For a discussion of cognitive dissonance theory, see JACK W. BREHM & ARTHUR R. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962). *See also* Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 618–20 (2002).

[244] BYRNES, *supra* note 239, at 152.

[245] *Id.* at 156.

'true' and much of the data which his personal construct system has had to keep in systematic order."[246] In turn, "[r]eligious sects and denominations frequently represent the characteristic cultural controls which operate in the construct systems of a group of people."[247]

The effect of cultural learning on one's attitudes toward nonconforming individuals and groups occurs across a culture.[248] 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."[249] Therefore, even someone who does not accept majority religions is influenced by their traditions and could undergo cognitive dissonance from exposure to a minority religion's practice or belief.

The most transgressive religious organizations find themselves excluded from the construct of religion entirely and saddled with the pejorative label of "cult."[250] These groups resist the dominant social order and make such resistance sacred.[251] Professors 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. At the same time, these movements typically possess few allies and consequently are vulnerable to imposition

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[246] *Id.* at 157–58 (quoting 2 GEORGE A. KELLY, THE PSYCHOLOGY OF PERSONAL CONSTRUCTS 688 (1955)).

[247] *Id.* at 158 (quoting 2 KELLY, *supra* note 246, at 702).

[248] *See* Harmer-Dionne, *supra* note 240, at 1310–15, 1319–40 (discussing sources of religious prejudice and belief and examining the social and political history of the early Mormon Church's advocacy of polygamy as a prism for ways in which culture and belief can conflict, with the Mormon Church ultimately abandoning its endorsement of polygamy as a theological necessity in order to avoid further governmental efforts at suppression of the group and also to achieve broader social acceptance within the national community); *see also* Stern, *supra* note 243, at 619–20 (describing and explaining psychological research that shows how individuals within larger groups take their cues from other group members, and how shared points of view can provide powerful reinforcement to "groupthink"; and concluding that "there is a bias in favor of belief perseverance," that "people strive for consistency between their attitudes and behaviors," and that "public commitments exacerbate the consistency bias"). Whether the efforts of the Mormon Church and its members to achieve broad-based acceptance within the national culture has been successful unfortunately remains open to serious doubt. *See* Laurie Goodstein, *Romney's Run Has Mormons Wary of Scrutiny*, N.Y. TIMES, June 11, 2007, at A1 (discussing the pride of Church members in Governor Mitt Romney's (ultimately unsuccessful) bid for the GOP presidential nomination but noting also that "the moment is fraught with anxiety because his candidacy is bringing intense scrutiny to their church, and could exacerbate longstanding bigotry," and noting that "many Mormons hope that Romney's candidacy will re-introduce Americans to a church that has been maligned and misunderstood").

[249] BYRNES, *supra* note 239, at 158.

[250] 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.L. & HEALTH 145, 172 (1996–1997).

[251] David G. Bromley & J. Gordon Melton, *Violence and Religion in Perspective*, *in* CULTS, RELIGION, AND VIOLENCE 1, 2 (David G. Bromley & J. Gordon Melton eds., 2002).

of social control."[252] Even so, Professor Davis suggests that "[i]t is impossible, on both theoretical and empirical grounds, to draw a bright line between 'real' religions and 'destructive cults,' or between sincere conversion to a religious belief and being the object of 'coercive persuasion.'"[253]

Nevertheless, in the 1970s and 1980s, mainstream politicians and academics embraced a strong anticult sentiment.[254] The "anticult movement developed its own apocalyptic ideology which created the specter of a proliferation of rapidly growing, destructive cults that were accumulating economic and political power . . . . The key elements in this ideology were 'cults' and 'brainwashing' that permitted the linking of diverse movements and organizational practices."[255] The goal of the movement, 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, such as the Unification Church (commonly known as "the Moonies"), seen as incompatible with American culture.[256] "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."[257]

A broad-based cultural, political, governmental, and media effort worked to publicize the dangers of new religious movements and to discourage participation in them.[258] "Parents of converts to new religious movements have banded together to form an anticult movement that has rejected the religious legitimacy of the groups and affiliations with them."[259]

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[252] *Id.*; *see also* Cynthia Norman Williams, Note, *America's Opposition to New Religious Movements: Limiting the Freedom of Religion*, 27 LAW & PSYCHOL. REV. 171, 173 (2003) ("Whichever definition is chosen, a 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.").

[253] Davis, *supra* note 250, at 172.

[254] *See* David G. Bromley, *Dramatic Denouements*, *in* CULTS, RELIGION, AND VIOLENCE, *supra* note 251, at 11, 20–23; *see also* Davis, *supra* note 250, at 147–51; James T. Richardson & Mary White Stewart, *Medicalization and Regulation of Deviant Religions: An Application of Conrad and Schneider's Model*, *in* REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 507, 521–23 (James T. Richardson ed., 2004).

[255] Bromley, *supra* note 254, at 21.

[256] *See id.* at 21–23. On the history of the Unification Church in the United States, and its generally hostile reception in many quarters, see generally CARLTON SHERWOOD, INQUISITION: THE PERSECUTION AND PROSECUTION OF THE REVEREND SUN MYUNG MOON (1991); for a more negative and critical approach to the subject, see ERICA HEFTMANN, DARK SIDE OF THE MOONIES (1982).

[257] Bromley, *supra* note 254, at 23.

[258] J. Gordon Melton & David G. Bromley, *Challenging Misconceptions About the New Religions-Violence Connection*, *in* CULTS, RELIGION, AND VIOLENCE, *supra* note 251, at 42, 42.

[259] *Id.*; *see also* Davis, *supra* note 250, 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 as violative of Establish-

But "there are few truly new religions."[260] "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."[261] Professors Melton and Bromley suggest that "the criteria for distinguishing newness are much more complex than can be conveyed through any simple dichotomy."[262] 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."[263]

Existing religious groups often react with hostility to perceived newcomers. "[T]he resistance that new religious movements offer to the established order [can be characterized] as political, albeit through a religious format."[264] Professor Lionel Rothkrug drives even more directly at this 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."[265] The unwillingness 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 exemplify this phenomenon.[266]

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ment Clause principles, see Richard Delgado, *When Religious Exercise is Not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief*, 37 VAND. L. REV. 1071 (1984).

[260] Melton & Bromley, *supra* note 258, at 43.

[261] *Id.*; *see also* Davis, *supra* note 250, 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.").

[262] Melton & Bromley, *supra* note 258, at 43.

[263] Davis, *supra* note 250, at 149.

[264] Melton & Bromley, *supra* note 258, at 45.

[265] LIONEL ROTHKRUG, DEATH, TRUST, & SOCIETY: MAPPING RELIGION & CULTURE 39 (2006); *see also* Williams, *supra* note 252, 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.").

[266] *See* WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? 20–31, 39–41 (2006); *see also* Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561 (2007). *See generally* ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW (2002); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006).

Over time, of course, the unfamiliar becomes less so.[267] As one commentator notes, "there are widely accepted religious groups that are no longer thought of as cults in the negative connotation of the word."[268] This set of now-accepted groups includes "Mormonism, the Jehovah's Witnesses, and the Masonic Lodge."[269] 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 [their] members, and the controls placed on such groups are not seen as burdens by the courts."[270]

2. Both Academics and Average Citizens Use Nomenclature Strategically to Separate "Real" Religions from Bogus Ones.—As detailed above, the Supreme Court's nomenclature and doctrine reflect the de facto existence of a tiered understanding of religionists.[271] Longstanding 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 nineteenth and twentieth century decisions involving the Mormon practice of polygamy do not take seriously the plausibility of a religious obligation to practice polygyny.[272] Indeed, Justice Murphy's dissent in *Cleveland* is remarkable for its willingness to consider carefully the practice of polygamy in overtly sociological and anthropological terms, largely divorced from the contemporary cultural significance of the practice in the United States.[273] Although the Supreme Court has never adopted labels for various religious sects, the broader culture maintains a careful nomenclature to distinguish legitimate religious groups from groups perceived

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[267] *See* Harmer-Dionne, *supra* note 240, at 1332–40 (canvassing the history of polygamy in the Mormon Church and the decision to abandon the tenets of the faith requiring the practice of polygamy as part of a "radical assimilation and accommodation" effort that "secularized Mormon theology, turning it toward Protestant neoorthodoxy," thereby becoming "models of patriotic, law-abiding citizenship" with Church leadership "no longer composed of radical visionaries, but rather. . . drawn from the ranks of successful businessman, attorneys, scholars, and LDS church bureaucrats"). As Harmer-Dionne argues, "for a liberal polity such as the United States that purports to value the freedom of religion, speech, and conscience, there is a marked philosophical difference between theological developments that result from organic evolution and those that result from massive persecution and forced cessation of social customs and marital practices." *Id.* at 1339; *see also* Goodstein, *supra* note 248, at A1 (noting that "[t]he Church of Jesus Christ of Latter-day Saints. . . has been fighting for legitimacy since its founding 177 years ago in upstate New York" but that "Mormons are by now successfully integrated and prospering in the American mix"; even so, however, "memories of that persecution are still fresh").

[268] Williams, *supra* note 252, at 176.

[269] *Id.*

[270] *Id.* at 182.

[271] *See supra* notes 147–94 and accompanying text.

[272] *See supra* text and accompanying notes 147–68.

[273] Cleveland v. United States, 329 U.S. 14, 24–27 (1946) (Murphy, J., dissenting).

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."[274] No truly objective definition of a "religion" that distinguishes it from a "cult" exists; any effort to establish such definitions involves the adoption and application of essentially subjective criteria. Notwithstanding the definitional difficulties, some countries have tried to distinguish religious groups by their characteristics and label them as "cults," "sects," or "destructive/dangerous groups."[275]

The decisions of the federal courts reflect the same sort of effort to classify religion into acceptable denominations verses unacceptable cults. 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.[276] The Ballard family—Guy, Edna, and Donald—operated a religious organization called the "I Am," in which Guy claimed to communicate with the deity through the active intercession of "St. Germain."[277] The Ballards actively solicited financial contributions and claimed that devotees would obtain myriad benefits, including good health and financial rewards.[278] The government brought federal criminal fraud charges against all the Ballards, alleging that they did not in fact believe what they preached.[279]

Although Justice Douglas proclaimed that "[h]eresy trials are foreign to our Constitution,"[280] he wrote a majority opinion in *Ballard* that effectively permits the government to deploy the criminal law of fraud as a weapon against oddball minority religions and religionists. 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."[281] The Supreme Court's opinions illustrate that this problem of cultural bias is not limited to laypeople or juries. 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."[282]

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[274] BYRNES, *supra* note 239, at 167.

[275] Bromely & Melton, *supra* note 251, at 3; *see* Horwitz, *supra* note 229, at 118–27 (discussing Germany's efforts to proscribe the Church of Scientology); *see also* Michael Browne, *Should Germany Stop Worrying and Learn to Love the Octopus? Freedom of Religion and the Church of Scientology in the United States*, 9 IND. INT'L & COMP. L. REV. 155 (1998); Michael Cieply & Mark Landler, *Plot Thickens in a Tom Cruise Film, Long Before Cameras Begin to Roll*, N.Y. TIMES, June 30, 2007, at B7.

[276] *See* United States v. Ballard, 322 U.S. 78, 86–87 (1944).

[277] *Id.* at 79–80.

[278] *Id.*

[279] *Id.* at 80–81.

[280] *Id.* at 86.

[281] *Id.* at 92 (Jackson, J., dissenting).

[282] Tushnet, *supra* note 236, at 400.

3. Because Judges Are Part of the Culture, They Are Generally Incapable of Escaping Their Own Cultural Biases.—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.[283] 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 no governmental effort to protect minority religionists—whether a judicial interpretation of the Free Exercise Clause or statutory civil rights enactments, whether at the federal, state, or local level—will necessarily prove reliable. In court, these claims will either be rejected as too extravagant to be credited, or the government's interests in regulation will easily outweigh the burden on the minority group's religious practices. The problem inheres in the very nature of the concept of religion, and unless judges are somehow able to remove themselves from the general culture, this bias may prove to be entirely 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."[284] Alternatively, should the group establish a claim, the government's interests nearly always prove to be sufficiently "compelling," "important," or "substantial" to justify applying the law against members of the sect.[285]

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."[286] He suggests that "[i]n the absence of objective criteria, decisionmakers tend to fall back on the familiar experience or the romantic ideal."[287] This approach results in "at best, reasoning by induction from conventional Western patterns of religion, and, at worst, simple equations of religion with Christianity."[288]

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 exer-

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[283] *See* Marshall, *supra* note 32, at 311 ("A court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm . . . ."); Tushnet, *supra* note 236, at 381–83 ("[A] subtle preference for claims readily understandable by those adherents of mainstream religion . . . . occurs because it is a normal human reaction to be skeptical about the sincerity of a person who claims to hold unconventional beliefs.").

[284] *See supra* notes 193–203, 221–31, and accompanying text; *supra* note 236.

[285] *See supra* text and accompanying notes 192–216.

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

[287] *Id.* at 958.

[288] *Id.* (footnote omitted).

cise claims,[289] 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 the Free Exercise Clause as promoting religious autonomy will have the perverse effect of increasing, rather than decreasing, the differential in religious liberty enjoyed by majority and minority religionists. This is so because many judges are unlikely to credit outlandish beliefs as sincerely held, are unwilling to credit offensive beliefs as really enjoying divine sanction (that is, the beliefs, even if sincerely held, are clearly mistaken), or find in any event that the general social interest in enforcing the regulation at issue simply overwhelms whatever meager autonomy interest might exist. 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.

Where beliefs are familiar, a court is more likely to take them seriously and to consider ordering accommodations (whether under the Free Exercise Clause or a civil rights statute, such as the Religious Freedom Restoration Act, that provides a statutory right to exemptions). The whole purpose of judicially enforced human rights, however, is not so much to better secure the rights of popular groups (who can seek relief through legislatures and the democratic process), but rather to ensure that unpopular minorities do not suffer unduly from the caprice of democratically elected governmental officials. An approach to free exercise that makes *effectively* securing the rights of unpopular religious minorities the central project of the Free Exercise Clause would better achieve the core purpose of the Clause.

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. Empirical data also 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 Religious Freedom Restoration Act (RFRA) periods.[290] Their findings are highly instructive on the questions of which religions win

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[289] *Id.*

[290] 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, *supra* note 254, at 535.

and which religions lose under a strict scrutiny approach. Using 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.[291] 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."[292]

The results are striking. Their findings "indicate that religions in tension with society are more likely to be involved with the judiciary."[293] 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."[294] 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."[295] 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.[296] Wybraniec and Finke observe that if one aggregates these and other 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."[297]

The contrary pattern holds true for "mainline" Protestant churches. Although membership in mainline Protestant sects represents 21% of total church membership, these groups account for "only 4% of the cases on religion, including free exercise cases."[298] Similarly, Roman Catholics provide 38% of national church membership, but account for only 8% of free exercise cases.[299]

The pattern is reasonably clear: minority religious groups bring far more cases than do more traditional majority religious groups. But even though minority religionists bring far more cases, their success rate in the federal courts is much lower.[300] Minority religionists bring and lose more cases; majority religionists bring fewer cases and win a larger percentage of them.[301] Wybraniec and Finke report that "higher tension religions are less

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[291] *Id.* at 540–42.
[292] *Id.* at 542.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.* at 542–49.
[301] *Id.*

likely to receive a favorable decision" than are more culturally familiar sects.[302]

Over the entire period, cults won around 37% of their free exercise cases, whereas mainline Protestants won about 65% of their cases.[303] However, "the statistics do not explore the consequences of the *Smith* decision or the [RFRA]."[304] If one takes *Smith* and the RFRA into account, the net disparity between minority and nonminority religions *decreases*. Thus, *Smith* had the effect of lowering success rates for free exercise cases across the board. This decrease in overall success rates resulted in a decrease in the net difference between successful claims brought by the majority religionists and those brought by minority religionists. Wybraniec and Finke explain that "the odds of a favorable decision for religious freedom cases outside of the *Smith*-period were almost 2 to 1 for cases prior to *Smith* and were over 2 to 1 for the RFRA period following *Smith*."[305] Success rates fell significantly after *Smith* and before enactment of the RFRA, to success rates of around 30% (as opposed to 66%).[306] 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."[307]

Surprisingly, the authors found that the RFRA did not return success rates to pre-*Smith* levels. "In fact, the striking finding is that [the] RFRA, though not significant, is negatively related to a positive outcome in court decisions."[308] Wybraniec and Finke explain that "citing *Smith* remained significant," and "even when *Smith* and [the] RFRA are placed in the equation together, the more powerful factor is the original decision from *Smith*."[309] They conclude that the "RFRA, a legislative act, has apparently not been able to counteract the strength of the legal ruling of *Smith*."[310]

This conclusion suggests that the underlying content of free exercise doctrine plays a significant role in the adjudication of statutory civil rights cases that involve free exercise claims. Even if Congress or a state legislature wishes to use statutory means to expand the scope of religious freedom, Wybraniec and Finke's study suggest that these means are less effective than one would otherwise assume.[311] If courts apply statutory protections

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[302] *Id.* at 542.

[303] *Id.*

[304] *Id.* at 543–44.

[305] *Id.* at 545.

[306] *See id.* at 546–48.

[307] *Id.* at 548.

[308] *Id.* at 549.

[309] *Id.*

[310] *Id.*

[311] The empirical study undertaken by Professors Sisk, Heise, and Morriss, which considered both constitutional and statutory claims for religious exemptions at the state and federal level, found that "religious affiliation variables—both those of judges and of claimants—were the most consistently signifi-

that secure religious exemptions in the same way that they applied the Free Exercise Clause itself pre-*Smith*, unpopular minority religious groups, which are most in need of protection from hostile or indifferent legislative or executive officials, would probably receive the least net benefit from the statute (whereas more traditional religious groups would likely bring fewer net claims and yet win a higher percentage of those cases).

Looking at cases in the pre-*Smith* era, the authors found that:

> [H]igh-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 unfavorable rulings. . . . [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*]. By contrast, the mainline Protestants seldom appeared in the courts and their rate of favorable rulings towered over all other religious groups.[312]

Because *Smith* decreased favorable decisions for all religious groups prior to the RFRA, it necessarily reduced the net disparity between mainline Protestants (part of the cultural mainstream) and unpopular minority sects. Because majority religionists enjoyed a substantial advantage in winning cases, any reduction in the net number of wins reduced 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 of them. *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 applicability will ac-

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cant influences on judicial votes in the religious freedom cases included in [the] study." Sisk, Heise & Morriss, *supra* note 11, at 501. It bears noting, then, that the problem of judicial bias might depend on the precise source of the legal claims at bar; the Sisk, Heise, and Morriss study found higher success rates for minority religionists than other studies found, but it also considered statutory and other constitutional avenues of seeking relief. *Id.* at 567–71. Because the study considered multiple means of securing judicial protection, including pure equal protection and free speech claims, it is less useful in isolating the question of judicial bias with respect to only those litigants asserting a free exercise claim. *See id.* (positing that clever litigants would adopt alternative theories to support their legal claims, finding a "notable change in litigant strategy" along these lines because of the reduced "litigative potential of the Free Exercise Clause" post-*Smith*, and noting that their study "considered not only multiple claim cases in which religious expression or religious discrimination claims were raised in addition to Free Exercise claims, but also those cases in which litigants sought to bypass *Smith* altogether by eschewing any reliance on the Free Exercise Clause and instead couching a claim solely upon free speech or equality principles"). These findings tend to support, rather than undermine, my argument that enforcement of the Free Exercise Clause *vel non* presents cultural difficulties not present with respect to minority religionists raising free speech or equal protection claims. In other words, asking a court to vindicate a free exercise claim triggers a different judicial reaction than asking a judge to validate a free speech or equal protection claim.

[312] Wybraniec & Finke, *supra* note 290, at 549.

tually protect highly unpopular religious minorities. The radical disjunction in the number of cases brought and the success rate for those cases suggests that unpopular minority religious groups simply did not receive the full benefit of *Sherbert-Yoder* autonomy-based strict scrutiny doctrine.[313]

A second study, undertaken by Professor James Richardson, considered the exercise of discretion within the legal system. He analyzed whether "controversial religious groups" faced bias in the federal and state courts.[314] Richardson found pervasive bias against adherents of unpopular religious faiths:

> Problems of either accepting questionable evidence where 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.[315]

In sum, Richardson's work and conclusions are entirely consistent with the Wybraniec and Finke study.[316]

Proponents of a return to the *Sherbert-Yoder* approach should explain why a rule that in practice produced such skewed results represents a better approach than *Smith*. Surely the religious autonomy of religious minorities is no less deserving of respect than are 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 liberties of groups that have the least to fear from democratically elected legislators and executive branch personnel.

Of course, one might attempt to find fault with either the Wybraniec and Finke or the Richardson study. 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,

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[313] Again, one cannot overestimate the importance of culture in prefiguring the ability of a judge to credit a claim that God commands a particular course of conduct (regardless of its legal status). As Professor Stephen Carter has noted, "[a] devout Christian will not see the world the same way as a devout Muslim, who will not see the world the same was as a devout Jew, who will not see the world the same way as a devout Hindu." STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 30 (2000). Carter suggests that differences between and among communities of faith "are not trivial" and that they fundamentally affect the way a person exists in the world; in a word, "[t]hey are about life." *Id.*

[314] James T. Richardson, *Regulating Religion: A Sociological and Historical Introduction*, *in* REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE, *supra* note 254, at 1, 8.

[315] *Id.*

[316] The conclusions are also consistent with the larger findings of the Sisk, Heise, and Morriss empirical study. *See* Sisk, Heise & Morriss, *supra* note 11, at 614 ("In our study of religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decisionmaking was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.").

Sixth, and Ninth Circuits.[317] The selection of these particular courts was not accidental. Most commentators perceive the Fourth Circuit to be a conservative bench,[318] the Ninth Circuit to be a progressive or liberal bench,[319] and the Sixth Circuit to lack (at least historically) a firm ideological personality.[320] By examining the decisions from ideologically diverse courts, we hoped to control for the possibility of ideological bias by judges in applying *Sherbert-Yoder* and *Smith*.

As the table in the Appendix shows,[321] our study generally confirms 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.

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 with greater respect for cultural difference, might advance, rather than retard, both religious equality and religious autonomy. Whether because of its liberal bent[322] or its diverse population, or perhaps some combination of both, the Ninth Circuit seems to be less biased against minority religions (or perhaps is more hostile to traditional religious groups). Perhaps heterogeneity helps to secure a more culturally sensitive Judiciary; that is to say, familiarity might breed respect, rather than contempt. Whatever the precise reason, the Ninth Circuit was less likely to rule in favor of dominant religious groups and against minority religious groups in free exercise cases. The results from the Fourth and Sixth Circuits, how-

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[317] The results of this study appear in a grid form in the Appendix.

[318] *See* Robert L. Boone, Comment, Booker *Defined: Examining the Application of* United States v. Booker *in the Nation's Most Divergent Circuit Courts*, 95 CAL. L. REV. 1079, 1094 (2007) ("As legal scholars and practitioners are aware, the Fourth Circuit has come to be known as the most conservative federal court of appeals. Conversely, the Ninth Circuit has a reputation as the most liberal circuit court.").

[319] *See* Stephen J. Wermeil, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 355–58 (2006) (arguing that, although there is a tendency to overstate the degree to which the Ninth Circuit is a relatively liberal bench, careful examination of decisions does reflect a progressive cast to this Court of Appeals; and introducing an entire symposium dedicated to the normative and empirical study of the U.S. Court of Appeals for the Ninth Judicial Circuit that generally bears out this assertion).

[320] *See* Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1295 (2006) (describing the Sixth Circuit as "usually moderate"); *see also* Pierre H. Bergeron, *En Banc Practice in the Sixth Circuit: An Empirical Study, 1990–2000*, 68 TENN. L. REV. 771 (2001); Emery G. Lee, III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767 (2003) (noting the stability of intracircuit precedent in the Sixth Circuit).

[321] *See infra* Appendix.

[322] *See supra* note 319.

ever, squarely reconfirm Wybraniec and Finke's findings. Accordingly, we found that *Smith* had the effect of increasing religious equality because overall it significantly reduced the differential success rates that prevailed under the pre-*Smith* regime.

IV. 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 an autonomy-based conception of the Clause. Although Judge McConnell's contrary interpretation of the available record is plausible,[323] his reading of the record fails to account completely for all the available evidence and engages in more spin than may be warranted. I readily will concede that reading the Free Exercise Clause to encompass exemptions from general laws is not utterly implausible. Nevertheless, a fuller review of the House debates makes the case in favor of mandatory exemptions much more difficult to make than McConnell admits.

In fact, the legislative history of the Free Exercise Clause in the House of Representatives establishes that the Framers, particularly Madison, understood the Clause in equalitarian terms. Moreover, the subsequent changes in Madison's nomenclature that the House considered during the debates do not appear to have carried with them any substantive import; certainly, there is no recorded debate to this effect.[324] Further, 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.[325] Indeed, Madison himself, in proposing a free exercise guarantee, used "full and equal rights of conscience" and "equal rights of conscience" as synonyms.[326] Given that Madison himself did not attach any

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[323] *See* McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1473–1513.

[324] *See infra* notes 330–60.

[325] *See infra* Part IV.A.

[326] *See* 1 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 434–35 (Joseph Gales & W.W. Seaton eds., 1834) (June 8, 1789) [hereinafter ANNALS OF CONG.] ("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. . . . No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.").

Note that two printings exist of the first two volumes of the Annals of Congress. They contain different pagination, running heads, and back titles. The printing with the running head "History of Congress" conforms to the remaining volumes of the series, while the printing with the running head "Gales & Seaton's History of Debates in Congress" is unique. All page citations herein are to the former printing. Readers with the "Gales & Seaton's History" printing can most easily find parallel citations by referring to the date. *See* McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1427 n.84.

particular importance to the precise language used to express the concept of religious equality, the best reading of the record is that the varying nomenclature did not signify any substantive differences in meaning.[327]

After considering the legislative history of the Clause, this Part offers additional normative and policy arguments in favor of an equalitarian reading of the Free Exercise Clause. Beyond the intentions of Madison, and the other Framers, an equality-based approach would help to resolve tension between the Establishment Clause and the Free Exercise Clause: The Establishment Clause prohibits government from favoring any particular religious group or organization, whereas the Free Exercise Clause prevents government from attempting to squelch or discourage religious groups that it disfavors.[328] This Part concludes that, under an equalitarian reading of the Free Exercise Clause, *Smith* arguably advances the core purpose of the Clause, equality, more effectively than did the *Sherbert-Yoder* regime that it displaced.[329]

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 to prevent religious discrimination, rather than to create some sort of generalized right to religious autonomy. James Madison, the princi-

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[327] 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 & n.247 (1997). The use of "law of the land," dating back to the Magna Carta, rather than the use of 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* Edwin S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 380–84 (1911) (discussing the "law of the land" clause in the North Carolina bill of rights as endowing rights equivalent to those guaranteed by clauses requiring "due process of law"); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 881–82 (1976) ("Long before the adoption of the Fourteenth Amendment, state courts had begun to develop a body of substantive due process law, drawing on state constitutional due process or 'law of the land' provisions."); Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 10–11 (2005) ("It is well-known that the federal Due Process Clause has its origins in the 'Law of the Land' clause of Magna Carta."); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948–84 (tracing the development of the concept of due process from Magna Carta's "law of the land" clause in Chapter 39 to the early years of the Republic and concluding that state law cases from the late eighteenth and early nineteenth centuries "unquestionably establish that law of the land clauses and other provisions in state constitutions protecting life, liberty, and property could be treated by courts as limitations upon legislative competence" and that some of the cases "suggest an underlying theory closely akin to substantive due process"). *See generally* Hyman, *supra*, at 10–20 (discussing "law of the land" clauses in state constitutions in the early years of the Republic).

[328] *See infra* notes 381–85, 425–26 and accompanying text.

[329] *See infra* notes 374–380 and accompanying text.

pal architect of the amendments that were to become the Bill of Rights,[330] introduced language that reflects an equalitarian, rather than libertarian, purpose.

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 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.[331]

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 original language proposed by Madison necessarily offers 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.'"[332] 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."[333] Yet 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 be interpreted as synonymous with "equal rights of conscience." Neither verbal formulation necessarily implies anything more than freedom of belief, as opposed to freedom of conduct.

Further, the language of another proposed amendment addressing the states supports this equalitarian conception of the Free Exercise Clause. Madison's preferred approach to amendments was to insert them into the

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[330] Wallace v. Jaffree, 472 U.S. 38, 97–98 (1985) (Rehnquist, J., dissenting) (noting that James Madison "undoubtedly was the most important architect among the members of the House of the Amendments which became the Bill of Rights"); *see* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1586–87 (1982) ("No Founder contributed to the cause of religious liberty more than Madison, who is considered the chief architect of the Constitution and prime drafter of the Bill of Rights."); Bruce Fein, *On Reading the Constitution*, 90 MICH. L. REV. 1225, 1227 (1992) (describing Madison as the "chief architect of the Bill of Rights"). *See generally* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEALS IN THE MAKING OF THE CONSTITUTION (1996).

[331] 1 ANNALS OF CONG., *supra* note 326, at 434 (June 8, 1789).

[332] McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1481.

[333] *Id.*

preexisting text of the Constitution, rather than to incorporate them as a separate series of amendments.[334] Article I, Section 9 contains limitations on the scope of federal legislative power; Madison's text if adopted would have appeared after the Bill of Attainder and Ex Post Facto Clauses, and before the prohibition against direct taxes. In addition to the above proscription against federal legislation that would deny religious equality, Madison also proposed an amendment to Article I, Section 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."[335] 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.[336] 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;[337] writing a weaker form of the clause with respect to the states would have done little to secure meaningful religious equality.[338]

In discussing his proposed amendments, Madison did not suggest that he intended to hold the federal government to a higher standard than the state governments with respect to rights of conscience. In fact, he made exactly the *opposite* argument. Madison observed:

> Although 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, respecting which the people of America are most alarmed.[339]

He emphasized that "[t]he freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British consti-

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[334] *See* 1 ANNALS OF CONG., *supra* note 326, at 434–35 (June 8, 1789) (suggesting the amendments as modifications to existing text).

[335] *Id.* at 435.

[336] McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1481–83.

[337] 1 ANNALS OF CONG., *supra* note 326, at 440–41 (June 8, 1789) (noting his fear that "there is more danger of those powers being abused by the State Governments than by the Government of the United States" and specifically reiterating the need to prohibit states from "violat[ing] the equal right of conscience").

[338] *Id.*

[339] *Id.* at 436.

tution."[340] This language, of course, tracks the text of Madison's proposed amendment to Article I, Section 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, 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 interdicts the abuse of certain powers in the State Legislatures, some other provisions of equal, if not greater importance than those already made."[341] "I think that there is more danger of those powers being abused by the State Governments than by the Government of the United States."[342] 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."[343] Madison emphasized the real threat that state governments presented to securing fundamental human rights:

> 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 opposed 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 State Governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be cautiously guarded against.[344]

Judge McConnell makes no reference to these remarks, which is consistent 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 clear that his language was not intended to convey a more limited right against state governments than against the national government. In consequence, McConnell is simply incorrect to suggest that the language "full and equal rights of conscience"[345] held any greater significance—at least for Madison—than did language protecting "the equal rights of conscience." McConnell's failure to address

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[340] *Id.*

[341] *Id.* at 440.

[342] *Id.*

[343] *Id.* at 440–41.

[344] *Id.* at 441.

[345] McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1443, 1481–83.

this aspect of Madison's proposal, and the reasons Madison offered in support of it, raises 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 generally into their consideration and to report thereupon to the House."[346] 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.[347] 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,[348] 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 three-fourths of the state legislatures (or conventions in the states called for the purpose of considering the amendments),[349] 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, Section 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."[350] 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, Section 10.[351] 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 es-

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[346] 1 ANNALS OF CONG., *supra* note 326, at 665 (July 21, 1789).

[347] *Id.*

[348] *See* U.S. CONST. art. I, § 2, cl. 3.

[349] *See* U.S. CONST. art. V.

[350] 1 ANNALS OF CONG., *supra* note 326, at 729 (Aug. 15, 1789).

[351] *Id.*; *see also id.* at 435 (June 8, 1789).

tablished national church.[352] He also observed that some ratifying conventions worried that the Necessary and Proper Clause of Article I, Section 8, Clause 18 "enabled [Congress] to make laws of such 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."[353] This once again frames the Establishment and Free Exercise Clauses as mirror images of one another: 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 the idea of free exercise.[354] Moreover, the working draft retained the nomenclature "rights of conscience" to express the concept of free exercise of religion.[355]

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."[356] 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, one could reasonably conclude that the members viewed the changes as merely technical, rather than as 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: "No person religiously scrupulous shall be compelled to bear arms."[357] 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 redundant. That debate about this amendment immediately followed

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[352] *Id.* at 730 (Aug. 15, 1789).

[353] *Id.*

[354] *See id.* at 731 (reporting on a proposal by Representative Livermore to modify the committee's language to provide that "Congress shall make no laws touching religion, or infringing the rights of conscience").

[355] *Id.* (noting that the House of Representatives adopted Representative Livermore's proposed language by a vote of thirty-one to twenty).

[356] *Id.* at 766 (Aug. 20, 1789).

[357] *Id.*

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

Representative Scott opposed the conscientious objector amendment, while Representative Boudinot supported it, questioning whether "any dependence . . . [can] be placed in men who are conscientious in this respect."[358] Representative 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.[359]

Representative Boudinot was evidently persuasive because after adding the words "in person" after the words "bear arms," the House of Representatives adopted the proposed amendment.[360]

Although Judge McConnell acknowledges the debate over a proposed amendment securing rights of conscientious objection to military service,[361] he does not bother to note that the debate followed immediately after the adoption of an amendment that incorporated the language "free exercise" for the first time into the House's working draft of the Religion Clauses. The timing of this debate, as discussed above, is significant: 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 made such a suggestion. Both an opponent and a proponent of the amendment assumed 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.

McConnell offers three reasons why consideration of the conscription amendment should not be read as precluding an autonomy-based, exemptions-generating interpretation 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 was an intention in the gen-

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[358] *Id.* at 766–67.

[359] *Id.*

[360] *Id.*

[361] *See* McConnell, *Origins and Historical Understanding*, *supra* note 6, at 1500–03.

eral government to compel all citizens to bear arms."[362] 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."[363]

Given that the first debate on this question occurred immediately after adoption of the free exercise language (again, something McConnell 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 interchangeably."[364] 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 interchangeably."[365]

Even with these important caveats, however, McConnell argues that the free exercise nomenclature supports an exemptions-granting interpretation of the Clause.[366] 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."[367] 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."[368]

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 turned 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.

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362 *Id.* at 1501.

363 *Id.* (emphasis added).

364 *Id.* at 1482–83.

365 *Id.* at 1488.

366 *See id.* at 1488–1500.

367 *Id.* at 1490.

368 *Id.*

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. If McConnell is correct, then Representative Ames's amendment had the effect of radically expanding the scope of the proposed religious freedom amendment, effectively disallowing 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 have made the exemption relatively weak. If a person has a religious objection to all wars, it 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.[369]

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."[370] The House agreed to this language, as did the Senate, and it was ratified as the First Amendment.[371]

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 than full protection against both overt and covert forms of discrimination cannot be squared with the Framers' intentions.

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[369] *See* 1 ANNALS OF CONG., *supra* note 326, at 767 (Aug. 20, 1789).

[370] *Id.* at 913 (Sept. 24, 1789).

[371] 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 15. The closed nature of Senate deliberations in the first Congress accordingly explains "the meagerness 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. *See supra* note 330. 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.

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.[372] That is, a potential conflict exists between a clause that disallows governmental 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 the Clauses must have independent significance that gives each provision meaningful force and effect. Although the textualist objection to *Smith* lacks merit because *Smith* does not entirely strand the Clause,[373] a broader equalitarian 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 argues, 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.[374] 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 governmental efforts to impose religion, whereas the other prohibits governmental 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

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[372] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."); *see also* Locke v. Davey, 540 U.S. 712, 718–19 (2004) (quoting and applying the "play in the joints" metaphor to sustain the exclusion of divinity school studies related to preparation for a career in the ministry from a Washington State scholarship program). *See generally* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 3–4, 24–34 (discussing permissible governmental accommodation of religion, which represents the operationalization of the "play in the joints").

[373] *See supra* notes 123–45 and accompanying text.

[374] 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.").

merits of differing religious claims."[375] 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."[376] Similarly, in *Roy*, Justice Stevens observed that "[m]embers of the Abenaki Indian Tribe are unquestionably entitled to the same constitutional protection against governmental action 'prohibiting the free exercise' of their religion as are the adherents of other faiths."[377]

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 distinguishing 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 overruled 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."[378] This balancing, in turn, would necessitate a subjective evaluation of the plausibility of the religionists' claims and a weighing of those claims against the interests of the government.

C. Smith *Better Advances the Equalitarian Project than Does* Sherbert-Yoder

An approach to the Free Exercise Clause that requires subjective evaluation and weighing of religious and governmental interests does not often redound to the benefit of groups or organizations at the outer 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 located squarely within the cultural mainstream 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.[379]

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

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

[376] *Id.*

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

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

[379] *See* Pfeffer, *supra* note 374, 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 eyes of government officials or of the majority of Americans.").

separate an issue of what is believed from considerations as to what is believable."[380] 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 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 be on the claimant."[381] 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 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."[382]

Professor Pepper is correct 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. Judges' 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.[383] 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 from community norms; the degree and kind of deviance permitted under *Yoder* (and now the RFRA) will be a function of the cultural sensibilities of individual federal judges."[384] Accordingly, "the substantive meaning of the 'right to free exercise' is (at least in part) culturally determined."[385] If these arguments are correct, free exercise doctrine must take into account the probability of cultural bias and somehow correct for it.

An open-ended balancing test with few firm guideposts limiting the discretion of an individual judge is not the best way to correct the problem

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

[381] Pepper, *supra* note 134, at 328.

[382] *Id.*

[383] *See supra* notes 189–233 and 236–66 and accompanying text.

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

[385] *Id.*; *see supra* notes 236–85 and accompanying text.

of cultural bias. Instead, free exercise doctrine should be designed such that the problem of bias (both by judges and other governmental actors) is the central question in the inquiry. A theory of free exercise that relies on notions of equality and equal treatment better achieves this purpose than does the *Sherbert-Yoder* approach.

V. IMPLEMENTING AN EQUALITARIAN FREE EXERCISE CLAUSE: A PROPOSED DOCTRINAL REVISION

If the Free Exercise Clause should be framed in equalitarian, rather than libertarian or autonomy-enhancing terms, the next logical question is whether existing legal doctrine adequately advances the equality project. Thus, even assuming that the Free Exercise Clause should be so framed, one must further inquire: Does existing legal doctrine adequately advance the equality project? At least arguably, *Smith*, as clarified by *Church of the 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.[386] 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

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[386] *See* Employment Div. v. Smith, 494 U.S. 872, 879–85, 890 (1990) (holding that neutral laws of general applicability receive only rationality review and do not trigger heightened judicial review in the absence of evidence that the law or policy reflects religious animus, i.e., it was adopted because of, not despite, its effect on a particular religious group, or that the claim implicates another coordinate constitutional right, such as the freedom of speech or substantive due process, rendering it a "hybrid" claim); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 529–32 (1993) (applying strict scrutiny review to Hialeah, Florida ordinances prohibiting ritual animal sacrifice because the plaintiffs successfully established that the ordinances facially targeted the practices of the Santerian Church and that the legislative history of the enactments at the time of their adoption reflected pervasive, open, and outrageous hostility toward the Santerian Church); Steven R. Salbu, *AIDS and the Blood Supply: An Analysis of Law, Regulation, and Public Policy*, 74 WASH. U. L.Q. 913, 966 (1996) ("Because motives exist in the mind of the individual, they are subject to degrees of concealment and subterfuge. A prospective discriminator who is clever and reasonably well versed in the law can achieve a discriminatory goal while leaving no evidence of discriminatory motives." (footnote omitted)). *See generally* Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643 (2001) (arguing that effective enforcement of constitutional antidiscrimination norms requires a more nuanced understanding of causation, such as the creative approaches used in tort law, because imposing a highly formalistic approach that places a heavy burden on government to show a clear causal link, the "cause in fact," in tort nomenclature, between past participation in discriminatory outcomes and a current remedy through affirmative action results in the systematic inability of government to correct effectively for its past contributions to a less equal society). As Adam suggests, a highly formalistic approach to proving discriminatory intent has the same effect by precluding claims that have merit but lack the overwhelming proof present in *Church of the Lukumi Babalu Aye*.

merely formal neutrality, but also equality of application.[387] Accordingly, if government cannot establish that application of a particular rule rationally advances a legitimate governmental interest on the facts presented, a presumption of discriminatory motive would be justified.

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

If the primary purpose of the Free Exercise Clause is to prevent religious discrimination, the *Smith-Church of the Lukumi Babalu Aye* standard is not up to the task. Discriminators are seldom as shameless as the Hialeah city council.[388] An approach to enforcing religious equality that requires minority religionists to proffer a smoking gun—direct evidence of discriminatory intent[389]—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 plausible rational basis for the enactment—whether or not it was the actual basis for the law—allows 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 statute books—as opposed to the actual enforcement of formally neutral laws—the possibility of undetected religious discrimination would be further increased.

One possible reason for the failure of courts to evenhandedly apply the *Sherbert-Yoder* regime relates to the precise nature of a free exercise claim. A free exercise claim, at least if premised on autonomy, requires a judge to credit the idea that "Jehovah commands thusly." Crediting the plausibility of a divine sanction for racism, sexism, or homophobia has to be more jarring for the average federal judge than conceding that the Ku Klux Klan engages in "speech." A free exercise claim, if credited, carries with it the plausibility of the claimant's assertion of divine sanction. The social cost of calling racist speech "speech" is not the same as holding that a group of religionists can plausibly claim that God commands segregation of the races in all public places, or strict prohibitions against miscegenation, or the

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[387] *See* Perry, *supra* note 8, at 299–303 (discussing the free exercise norm as an antidiscrimination norm).

[388] 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 Babalu Aye*, 508 U.S. at 541. 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 541–42.

[389] 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).

shunning of gays and lesbians, including pervasive forms of employment discrimination in violation of a particular state's human rights laws.

A judge naturally recoils when asked to credit the idea that God commands racism, sexism, or homophobia. Yet an autonomy-based theory of free exercise relies on the good faith of judges to credit radically transgressive religious commitments. Federal judges proved unwilling to do this before *Sherbert* and *Yoder*; and they proved unable to do it during the *Sherbert-Yoder* period. Any theory of the Free Exercise Clause that depends on judges validating the divine provenance of bizarre or offensive beliefs will not lead to the routine protection of minority religionists.

Even if the Free Exercise Clause does not convey a right to religionists 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 governmental 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,[390] adoption of the 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 disserves the equality project. The appropriate equalitarian test 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*,[391] *City of Cleburne* v. *Cleburne Living Center*,[392] and *Plyler v.*

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[390] *See* Meyler, *supra* note 30, at 276 ("[A]pproaching the Free Exercise Clause from the vantage point of equality—or, more specifically, equal protection—is neither new nor entirely susceptible to those critiques that have been articulated.").

[391] 517 U.S. 620, 631–33 (1996).

[392] 473 U.S. 432, 440–42, 447 (1985).

Doe,[393] 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.[394] Even when the government has not utilized a suspect or quasi-suspect classification, as was the case in *Romer* (sexual orientation), *Cleburne* (mental retardation), and *Plyler* (children of illegal immigrants), the Justices are sufficiently wary of bias that they shift the burden of justification from the plaintiff to the government and demand a meaningful relationship between means and ends.[395]

It is true, of course, that the standard of review need not track the particular theory that animates the Free Exercise Clause.[396] One could adopt an autonomy-enhancing theory of the Clause with a rationality with bite standard of review or, conversely, a form of strict scrutiny under an equalitarian approach. If reducing the risk of cultural bias in the application of the Free Exercise Clause is an important goal, an equality-based theory with a relatively weak standard of review probably represents the most prudent approach.[397]

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[393] 457 U.S. 202, 216–17, 217 n.14, 223 (1982). Justice O'Connor's concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring), also reflects a "rationality with bite" approach, in that it demands a concrete policy, other than mere dislike of sexual minorities, to sustain a ban on same-sex, but not opposite-sex, sodomy (whether as written or as enforced).

[394] For a discussion of the various burdens of proof under tiered scrutiny, see *supra* notes 38–39 and accompanying text. *See also* Goldberg, *supra* note 15, at 484–94, 508–27.

[395] *See Romer*, 517 U.S. at 631–36 (invoking the rationality standard of review, but putting the burden of proof on the government to establish an actual reason for the classification at issue other than simple animus toward gay and lesbian persons); *Cleburne Living Ctr.*, 473 U.S. at 440 (same with respect to mentally retarded persons); *Plyler*, 457 U.S. at 217–20, 223–24 (same with respect to the children of illegal immigrants residing unlawfully in the United States); *see also* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 12–18 (2000) (exploring the theoretical, doctrinal, and policy considerations that could justify heightened judicial scrutiny of governmental actions; suggesting a truth in advertising approach could better serve these interests; concluding that "[t]he theoretical inadequacies of any approach based on consideration in the abstract of the characteristics of a particular class or classification, and the Court's inability to apply this approach with any even apparent consistency, suggest that there is a need for a different way of understanding what should and does trigger strict scrutiny"; and positing that "an examination of the Court's cases provides just such an understanding," namely that "a decision to examine a classification closely reflects a judgment that there are particular harms or risks that may render the use of a characteristic in the particular way at issue inconsistent with basic principles of human dignity").

[396] I am indebted to Michael Perry for making this point. It is true that the Supreme Court has deployed identical standards of review to equality claims arising under the Equal Protection Clause and to autonomy claims arising under the doctrine of substantive due process. There is no necessary relationship between a right being premised on equality or autonomy and the specific standard of review to be used in measuring the merits of a claim; thus, rationality review, rationality with bite, intermediate scrutiny, and strict scrutiny could apply to either autonomy- or equality-based claims. My concern is with adopting a theory, and a standard of review, that both acknowledges and attempts to control for the fact of cultural bias with respect to religious groups.

[397] I do not insist that rationality with bite is the only possible standard or even the best standard of review; my claim is more limited. We know that judges will not apply strict scrutiny in an evenhanded

The equality theory shifts the judicial focus from the reasonableness of a sect's beliefs to the reasonableness of the government's actions (particularly when contrasted to others who are not members of the group). A standard of review that routinely imposed unacceptably high social costs incident to protecting religious equality would simply invite artful (and not so artful) judicial evasion. Better to adopt a less demanding standard of review, but to apply that standard in evenhanded fashion to all, than to adopt a more demanding standard of review, but to apply that standard on a highly selective basis.

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.[398] 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."[399] Factors that point to an arbitrary and capricious decision include a failure "to consider an important aspect of the problem," the presence of "an explanation for 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."[400] When an agency changes its policies, moreover, it has a duty to provide a "reasoned analysis" for the change.[401] The essence of judicial review under the arbitrary and capricious standard is a "searching and careful" application of a "narrow" standard of review.[402]

Another aspect of review under the arbitrary and capricious standard that differs from traditional rationality review, and would better serve equality concerns in free exercise cases, is the obligation to provide an *actual* reason for the agency's action, and not merely "'*post hoc*' rationalizations, which have traditionally been found to be an inadequate basis for

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fashion and that true rationality review underprotects religious minorities. Rationality with bite would be a logical standard of review, but arguably intermediate scrutiny might work equally well. The key inquiry in either case would be whether judges are capable of applying the standard equally to all claimants. *See generally* Pat Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988) (discussing the difference between "good" bias and "bad" bias in judging).

[398] *See* 5 U.S.C. § 706(2)(A) (2000) (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").

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

[400] *Id.*

[401] *Id.* at 42, 57.

[402] 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.").

review."[403] Accordingly, a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given."[404]

Requiring the government to give the actual reasons that motivated the decision either to enact or to enforce a law that burdens religiously motivated conduct would go a long way towards illuminating clever discriminators. If a law has moldered in the law books unused for decades, its sudden deployment against a new sect of Gozer worshippers[405] 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 could manipulate (either by imposing threshold requirements to invoke the Free Exercise Clause or by treating the exemption as universally available) should be rejected in favor of adopting a standard of review that produces results that judges 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 chain of exemption demands from religious deviants of every stripe."[406] This concern about social costs incentivized judges, during the pre-*Smith* era, to avoid claims through subterfuge.[407]

It bears noting that Justice Scalia's opinion in *Smith* directly embraces this concern. Justice Scalia wrote:

> It 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*.[408]

Scalia 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."[409]

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[403] *Citizens to Preserve Overton Park*, 401 U.S. at 419 (citation omitted).

[404] *Bowman Transp., Inc.*, 419 U.S. at 285–86.

[405] *See supra* note 33.

[406] Lupu, *supra* note 286, at 947.

[407] *See supra* notes 195–233 and accompanying text.

[408] Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (emphasis added).

[409] *Id.* at 887.

The problem with Justice Scalia's approach is that it makes little sense to concede that 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 governmental behavior than are legislators.[410]

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 make against the strict scrutiny regime of *Sherbert-Yoder*. Is it reasonable to believe 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? Such a premise seems entirely plausible.[411] 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*[412])—rather than enforcement of laws targeting a specific sect (i.e., *Church of the Lukumi Babalu Aye*[413])—a requirement of

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[410] *See* McConnell, *supra* note 2, at 139 (arguing that religions "close to the center of prevailing culture in America" will either be unregulated or will obtain legislative exemptions whereas "[r]eligous groups whose practices and beliefs are outside the mainstream are most likely to need exemptions" but will 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 benefits and burdens [that] is likely to be reasonably fair").

[411] *See* SULLIVAN, *supra* note 118, at 149–50 (questioning the use of religion as a construct for protecting human rights because "[f]air legal accommodation of differences among humans is a major problem for the law"; asking "[w]hat would be lost if the law focused not on the special category of religion but on the accommodation of difference generally, and what compromises any such accommodations imply for commitments to equality?"; and asserting that "equality has arguably been and continues to be *the* dominant political value of American politics and of constitutional jurisprudence").

[412] Hernandez v. Comm'r, 490 U.S. 680, 696–700 (1989) (affirming the IRS's decision to deny members of the Church of Scientology the ability to deduct payments for Church-provided "auditing" sessions because of the quid pro quo nature of the payments and refusing to consider seriously whether the IRS has permitted the deductibility of arguably indistinguishable quid pro quo payments for religious services procured by adherents of more traditional religious groups).

[413] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–48 (1993) (invalidating local ordinances dealing with the ritual slaughter of animals by Santerians because the city council manifested overt and obvious religious bias against the Santerians at the time it adopted the ordinances and, moreover, because the city council tailored the ordinances to target religious practices in

rationality with bite might well benefit minority religions more than it benefits nonminority religions precisely because problems of discriminatory enforcement are far more likely to arise in the context of minority religions.

Popularly elected public officials, public prosecutors, and the police 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.[414] Targeted enforcement of generic laws, through selective prosecution, would provide an 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 will be impossible in most cases (again, consider the IRS's denial of charitable deductions from personal income taxes to target the Church of Scientology in *Hernandez*).

Because of the problem of discriminatory enforcement of the strict scrutiny regime, some prominent constitutionalists, notably 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

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general, and Santerian animal sacrifice in particular, but specifically excluded from the scope of the laws some religiously motivated rules that address the killing of animals).

[414] *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 745–50 (1994); Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1625 (2000); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6, 9–25 (1984); *see also* Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Jurors Through Community Representation*, 52 VAND. L. REV. 353, 354–58, 360–65, 385–89 (1999) (discussing the systematic exclusion of minorities from juries and the implications of the failure to adequately represent various groups on juries, notably including inaccurate or unjust jury verdicts); Heather K. Gerken, *Second Order Diversity*, 118 HARV. L. REV. 1099, 1106–08, 1121–26, 1134–35, 1144–45 (2005) (discussing how majority rule often implies bad things for minorities, with particular attention to problems of discrimination against electoral minorities (however constituted); and arguing that rethinking the structures of government to vest minorities with decisional authority over smaller units of government might achieve fair outcomes more reliably than would placing more minorities in majority-dominated institutions, where their voices will necessarily be rather muted); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Seizures Without Cause*, 3 U. PA. J. CONST. L. 296, 296–304, 307 (2001) (describing and critiquing the myriad studies that show persistent race bias in law enforcement across jurisdictions (local, state, and federal) and at all points in the criminal process, from police stops, to prosecutorial charging and plea negotiations, to jury behavior, to judicial sentencing practices); Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 81–84 (1994) (discussing the importance of facilitating the participation of minorities, whether racial, religious, cultural, or otherwise, in the process of democratic deliberation, and arguing that courts should strive to confer the broadest First Amendment protection on dissenting speech by members of such groups because they face the highest prospect of governmental efforts to silence them); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African American Males: An Overview*, 23 CAP. U. L. REV. 23 (1994) (documenting and critiquing disturbing patterns of bias by juries in cases with racial minority defendants); Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 YALE L.J. 845 (1990) (arguing that, perhaps ironically, racial bias affects the legal system's effort to enforce laws aimed at eradicating hate crimes).

troubling because, put bluntly, the pattern is that sometimes Christians win but non-Christians never do."[415] Tushnet 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."[416] 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."[417] Tushnet warns that "[u]nfamiliarity, here, may breed not respect, but, as is usually the case, insensitivity."[418]

In particular, Tushnet argues that *Yoder*'s majority opinion comes perilously close to "saying that the claims of the Amish prevailed because they were a 'good' religion."[419] This sort of bias 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."[420] Thus, "it is a normal human reaction to be skeptical about the sincerity of a person who claims to hold unconventional beliefs."[421] The strict scrutiny doctrine builds in "a subtle preference for claims readily understandable by those adherents of mainstream religions who are likely to administer the mandatory accommodation doctrine."[422]

William Marshall makes similar arguments in favor of *Smith*. After noting the difficulties associated with defining "religion" and "religious beliefs,"[423] Marshall observes that:

> Minority belief systems—not majority belief systems—will bear the brunt of the definition and the sincerity inquiries. 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.[424]

The outcome of accommodation cases, accordingly, will "closely parallel or directly relate to the culture's predominant religious traditions."[425]

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[415] Tushnet, *supra* note 236, at 381.

[416] *Id.* at 380.

[417] *Id.*

[418] *Id.*

[419] *Id.* at 382.

[420] *Id.*

[421] *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.").

[422] Tushnet, *supra* note 236, at 382.

[423] Marshall, *supra* note 32, at 310–11.

[424] *Id.* at 311 (footnote omitted).

[425] *Id.*

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. . . . Legislators are more likely to be aware of majoritarian religious practices (their own) when they fashion general regulations, and thus are unlikely to place disabilities on those practices.[426]

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."[427]

I agree with much of what Tushnet and Marshall have to say about mandatory judicial accommodations under *Sherbert* and *Yoder*.[428] It bears noting, however, that Tushnet and Marshall assume a free exercise jurisprudence premised on a theory of religious autonomy, rather than on a theory of religious equality. Judges should be more willing to undertake inquiries into whether government has afforded a particular group equal treatment than into whether a particular belief is "religious" in nature under a plausible demand for autonomy. In addition, the failure of generic statutory accommodation statutes, such as the federal RFRA, 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.

Neither Tushnet nor Marshall has much to say about 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. Because *Smith* does so little to curb covert discrimination, it leaves minority religionists at the mercy of legislators that everyone agrees are unlikely to be sympathetic.[429] 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-

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[426] *Id.* at 316, 318.

[427] *Id.*

[428] So does Judge McConnell. *See* McConnell, *supra* note 2, 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.

[429] *See* Laycock, *supra* note 108, at 1015–16; Laycock, *supra* note 2, at 10–15, 42–43; Marshall, *supra* note 32, at 318–19; McConnell, *supra* note 2, at 139; Perry, *supra* note 8, at 299–301; Tushnet, *supra* note 410, 1700–01. Thus, both supporters and opponents of *Smith* agree that legislative indifference to minority religions and religionists presents a serious problem for securing religious equality.

handed enforcement of a regime of mandatory accommodation 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,[430] may well achieve a more equal measure of justice for minority religionists. Finally, it also would reflect the cultural reality that asking a court to vindicate a free exercise claim implicates a more profound cultural commitment than does asking a court to credit a racist screed as "speech" for purpose of the Free Speech Clause.

Would an overtly equalitarian approach, with a less demanding standard of review, make a difference? Possibly. First, an equality-based approach inquires first and foremost into the government's actions, not the religionist's beliefs. To be sure, some preliminary assessment of the existence of a sincere religious belief would still be necessary. But the gravamen of a free exercise claim would be unjustified disparate treatment, not the legitimacy of the religionist's autonomy claim. A focus on unequal treatment is more likely to produce consistent results than is a highly abstract inquiry into unfair or unjust treatment.

Even during the Jim Crow era, the Supreme Court was willing to enforce equal protection principles against overt forms of racial discrimination[431] and the discriminatory enforcement of facially neutral rules.[432] Simply put, the notion that government must treat all citizens equally has more cultural salience than the proposition that the community must respect any and all forms of religiously motivated behavior. 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.

VI. CONCLUSION

The best reading of the Free Exercise Clause, and the reading most consistent with the Framers' intent, casts it as the mirror image of the Establishment Clause. Just as the Establishment Clause prevents the government from advancing particular religious principles or sects, the Free Exercise Clause prevents the government from suppressing particular religious principles or sects. Advancing religious equality, rather than religious autonomy, should inform the Supreme Court's reading of both the

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[430] The Supreme Court's standard modus operandi is, of course, to assume the universal availability of an exemption and to weigh the government's interest from this vantage point. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699–701 (1986); Goldman v. Weinberger, 475 U.S. 503, 507–08 (1986); United States v. Lee, 458 U.S. 252, 258–61 (1982); *see also supra* notes 195–233 and accompanying text; *cf.* Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972).

[431] *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

[432] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Free Exercise and Establishment Clauses. *Smith* was fundamentally correct to reject the autonomy-based vision of *Sherbert* and *Yoder*, which, as the empirical evidence demonstrates, ill served religious minorities and had the perverse effect of increasing disparities in religious liberty between majority and minority religious sects. Even so, *Smith* fails to attend adequately to the nondiscrimination project.

A serious commitment to eradicating religiously motivated discrimination requires more than mere 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 does *Smith*. An approach to the Free Exercise Clause that removes the burden from a religionist claiming discriminatory treatment and that places it instead on the government would constitute a significant step in the right direction. Thus, courts, in interpreting the Free Exercise Clause, should require the government to establish at least the rationality of applying a neutral law of general applicability to prevent religiously motivated conduct; such an approach would advance the nondiscrimination project more effectively than does *Smith*.

APPENDIX

Table 1: Free Exercise Cases of Majority and Minority Religions in Three Circuits[433]

	Losses	Wins	Loss Percent	Win Percent	Cases
4th Cir. Minority Pre-*Smith*	8	3	72.72	27.28	11
4th Cir. Minority Post-*Smith*	4	1	80	20	5
4th Cir. Majority Pre-*Smith*	5	1	83.33	16.67	6
4th Cir. Majority Post-*Smith*	6	3	66.67	33.33	9
4th Cir. Maj.-Min. Pre-*Smith*	-3	-2	10.61	-10.61	n/a
4th Cir. Maj.-Min. Post-*Smith*	2	2	-13.33	13.33	n/a
6th Cir. Minority Pre-*Smith*	13	2	86.67	13.33	15
6th Cir. Minority Post-*Smith*	5	1	83.33	16.67	6

[433] The results come from two searches on LexisNexis. The first one was a narrow search using the terms "religion and free exercise and neutral and discrimination," which was performed in each of the three circuits. The second search was a broader search for the terms "free exercise and religion," which also covered each circuit. All searches were limited in time from January 1, 1890 (shortly after *Reynolds*) to May 24, 2006. All searches were Shephardized in an effort to minimize the risk of missing important cases. Only cases in the U.S. courts of appeals for a given circuit were recorded, and no data were recorded on any state court cases, U.S. district court cases, or U.S. Supreme Court cases. The researcher disregarded all unpublished opinions, all opinions to which citation is limited by the local or federal rules of procedure, and all cases in which the opinion does not reveal the religious beliefs or affiliations of the litigants. All litigants who were not mainstream Protestants, Catholics, or Jews were considered minorities for this study, with the excepted religions being considered majorities.

6th Cir. Majority Pre-*Smith*	2	3	40	60	5
6th Cir. Majority Post-*Smith*	4	2	66.67	33.33	6
6th Cir. Maj.-Min. Pre-*Smith*	-11	1	-46.67	46.67	n/a
6th Cir. Maj.-Min. Post-*Smith*	-5	1	-16.66	16.66	n/a
9th Cir. Minority Pre-*Smith*	19	3	86.36	13.64	22
9th Cir. Minority Post-*Smith*	14	4	77.78	22.22	18
9th Cir. Majority Pre-*Smith*	10	0	100	0	10
9th Cir. Majority Post-*Smith*	19	6	76	24	25
9th Cir. Maj.-Min. Pre-*Smith*	-9	-3	13.64	-13.64	n/a
9th Cir. Maj.-Min. Post-*Smith*	5	2	-1.78	1.78	n/a