FEDERALISM, FREE EXERCISE, AND TITLE VII: RECONSIDERING REASONABLE ACCOMMODATION

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INTRODUCTION

The tide of Supreme Court federalism decisions is fast approaching the shores of Title VII.[1] Over the past decade, the Court has expanded the doctrine of state sovereign immunity and strictly enforced limits on Congress's power to abrogate that immunity. As a result, the enforcement provisions of several federal laws—including the Americans with Disabilities Act ("ADA"),[2] the Age Discrimination in Employment Act ("ADEA"),[3] and the Fair Labor Standards Act ("FLSA")[4]—have been dramatically weakened insofar as they apply to state employers.[5] The current Court's willingness to curtail federal legislation,[6] and civil rights laws in particular,[7] raises in stark form the

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[1] Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e-17 (2000).

[2] 42 U.S.C. §§ 12101-12213 (2000).

[3] 29 U.S.C. §§ 621-664 (2000).

[4] 29 U.S.C. §§ 201-219 (2000).

[5] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Title I of the ADA cannot be enforced in private suits against nonconsenting state employers); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (same—ADEA); Alden v. Maine, 527 U.S. 706 (1999) (same—FLSA); *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (same—Patent Remedy Act). *But see* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (holding that states are not immune from private suits brought under the family care provision of the Family and Medical Leave Act ("FMLA")).

[6] *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429-30 (2002) (observing that "the Court has held at least ten federal statutes to be constitutionally invalid" on federalism grounds since 1991).

[7] In addition to limiting the enforcement provisions of the ADA and the ADEA, the Court has also invalidated portions of the Violence Against Women Act of 1994, 42 U.S.C. §§ 13931-14040 (2000), and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2000). *See* United States v. Morrison, 529 U.S. 598, 613, 627 (2000) (holding that Congress did not have constitutional authority to enact 42 U.S.C. § 13981 under either the Commerce Clause or Section 5 of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act is unconstitutional insofar as it applies to the states). *See generally* Robert C. Post & Reva B. Siegel, *Equal Protection by*

following question: Could Title VII be the next victim of the states' rights revolution?

To help answer that question, this Article examines the most vulnerable aspect of Title VII—its requirement that state employers "reasonably accommodate" the religious practices of their employees unless doing so would result in an "undue hardship."[8] If that command is to be fully effectuated in the future, its defenders will have to run the gauntlet of the Court's controversial Eleventh Amendment jurisprudence, which holds that Congress cannot abrogate state sovereign immunity pursuant to its Article I powers, but can do so pursuant to its power under Section 5 of the Fourteenth Amendment to enforce constitutional rights by "appropriate legislation."[9] The

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Law: Federal Antidiscrimination Legislation after Morrison *and* Kimel, 110 YALE L.J. 441, 445 (2000) (observing that the Court's recent jurisprudence imposes "new and substantial restrictions on Congress's power to enact antidiscrimination laws").

[8] 42 U.S.C. § 2000e(j) (2000). The threat to Title VII's reasonable-accommodation provision has already been demonstrated in one federal circuit. *See* Holmes v. Marion County Office of Family & Children, 349 F.3d 914, 922 (7th Cir. 2003) (granting rehearing en banc) (holding that the reasonable-accommodation provision cannot be enforced in private suits in federal court against nonconsenting states), *appeal dismissed pursuant to Federal Rule of Appellate Procedure 42(b)*, (Jan. 20, 2004).

Also susceptible to challenge is Title VII's "disparate impact" provision. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see* Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 793-97 (1998) (contending that there is a "very real" risk that disparate impact claims against states will be barred); Ann Carey Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1146-50 (2001) (predicting that "Title VII disparate impact claims against states will fall"). *But see* Okruhlik v. Univ. of Ark., 255 F.3d 615, 626-27 (8th Cir. 2001) (holding that states are not immune to Title VII disparate impact claims); Crum v. Alabama (*In re* Employment Discrimination Litig.), 198 F.3d 1305, 1324 (11th Cir. 1999) (same).

[9] *See Garrett*, 531 U.S. at 363-65 (noting the Section 5 limitations on state sovereign immunity); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 & n.11 (1976) (holding that Congress has the power under Section 5 to abrogate state sovereign immunity, but leaving open the question whether Title VII's "substantive provisions" are a "proper exercise" of that power).

The Court's sovereign immunity doctrine, which applies to private suits against states for money damages, does not affect actions brought against states by the federal government and does not preclude individuals from suing state officials for injunctive relief. *See Garrett*, 531 U.S. at 374 n.9. As a number of commentators have observed, however, those alternative mechanisms for enforcing federal standards are of limited efficacy due to constraints on federal agency resources and the lack of financial incentives for attorneys to accept injunction-only cases; *see, e.g.*, Brant, *supra* note 8, at 770 (1998) (contending that the enforcement of these laws by the federal government is hampered by a lack of fiscal and personnel resources); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 143 (2001) ("A dramatic enlargement of the federal government's enforcement role would create enormous fiscal burdens while raising serious questions about the effectiveness of such an approach."); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 398-401 (2002) (citing the federal agencies' poor track record at enforcing federal civil rights and attorneys' reluctance to take on injunction-only cases); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1016-26 (2000) (citing the shortcomings of injunctive relief, suing state administrators personally, and

Court's Section 5 jurisprudence, in turn, teaches that appropriate enforcement legislation can prohibit "a somewhat broader swath of conduct" than the Constitution itself, but warns that there must a "'congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end.'"[10] Finally, the Court's Free Exercise Clause jurisprudence provides the constitutional baseline against which Title VII's reasonable-accommodation provision must be measured to determine if it constitutes appropriate Section 5 legislation.[11]

When the reasonable-accommodation requirement was first added to Title VII in 1972,[12] there would have been little reason to doubt that it was congruent and proportional to the requirements of the Free Exercise Clause. At that time, the Court's free exercise jurisprudence imposed a broad obligation on the states to accommodate religion by granting exemptions from generally applicable laws.[13] States that declined to grant exemptions from laws burdening religious practices were required to satisfy strict scrutiny,[14] a far more difficult task than establishing an undue-hardship defense under Title VII.[15] Thus, if anything, Title VII's reasonable-accommodation requirement initially appeared to impose less of a substantive obligation on state employers than the Free Exercise Clause itself.

In 1990, however, the constitutional baseline shifted significantly when the Court issued its landmark decision in *Employment Division v.*

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federal enforcement); Post & Siegal, *supra* note 7, at 451 (finding federal agency intervention "cumbersome and unwieldy").

[10] *Kimel*, 528 U.S. at 81 (citation omitted).

[11] *See City of Boerne*, 521 U.S. at 519 (recognizing that "Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion").

[12] *See* Equal Employment Opportunity Act of 1972, § 2(7), 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (2000)).

[13] *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (requiring an exemption from a compulsory education law and explaining that "there are areas of conduct protected by the Free Exercise Clause . . . and thus beyond the power of the State to control, even under regulations of general applicability"); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring an exemption from an unemployment compensation rule that imposed an "incidental burden on the free exercise of appellant's religion").

[14] *See Yoder*, 406 U.S. at 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion."); *Sherbert*, 374 U.S. at 406-07 (requiring the state to show that it had a "compelling state interest" and that "no alternative forms of regulation" would serve that interest); *see also* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

[15] *See* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (holding that an employer can establish an undue-hardship defense by showing that an accommodation would require it to bear "more than a *de minimis* cost"). As one commentator has observed, the *Hardison* standard can be likened to "something in between mere rationality review and intermediate scrutiny." Vikram David Amar, *State RFRAs and the Workplace*, 32 U.C. DAVIS L. REV. 513, 519 (1999).

Smith.[16] In *Smith*, the Court 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).'"[17] The Court drew a sharp distinction between laws that have the "object" of burdening religion and laws that have "merely the incidental effect" of burdening religion,[18] and the Court concluded that the Free Exercise Clause does not give religious adherents a "private right to ignore" the latter.[19] In reaching that conclusion, the Court went so far as to assert that requiring states to make religious exemptions from neutral and generally applicable laws "contradicts both constitutional tradition and common sense."[20]

At first glance, *Smith*'s emphatic rejection of free exercise exemptions would appear to cast serious doubt on the proposition that Title VII's reasonable-accommodation provision can be considered appropriate legislation enforcing the Free Exercise Clause. Indeed, in *City of Boerne v. Flores*,[21] the Court held that another federal statute—the Religious Freedom Restoration Act ("RFRA")[22]—exceeded Congress's Section 5 powers precisely because it required religious exemptions in contravention of *Smith*.[23] And the Seventh Circuit recently became the first court to extend *City of Boerne*'s reasoning to hold that Title VII's reasonable-accommodation provision, like RFRA, does not constitute appropriate enforcement legislation.[24] That holding was foreshadowed in an earlier case in which the Seventh Circuit offered the following summary of the Supreme Court's decisions: "*Smith* held that demands for accommodation . . . have no constitutional footing under the Free Exercise Clause," and *City of Boerne* "held that an accommodation requirement could not be thought to 'enforce' a constitutional norm that does not require accommodation."[25]

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[16] 494 U.S. 872 (1990).

[17] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[18] *Id.* at 878.

[19] *Id.* at 886.

[20] *Id.* at 885.

[21] 521 U.S. 507 (1997).

[22] 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

[23] *See City of Boerne*, 521 U.S. at 534 (noting that RFRA attempts a "substantive alteration" of the holding in *Smith*).

[24] *See* Holmes v. Marion County Office of Family & Children, 349 F.3d 914, 921-22 (7th Cir. 2003) (granting rehearing en banc) (finding a similar lack of congruence of the accommodation requirement with Congress's purpose in protecting the Free Exercise Clause), *appeal dismissed pursuant to Federal Rule of Appellate Procedure 42(b)*, (Jan. 20, 2004).

[25] Erickson v. Bd. of Governors, 207 F.3d 945, 947, 950 (7th Cir. 2000) (Easterbrook, J., joined by Eschbach, J.) (discussing the Court's religious accommodation jurisprudence in the course of addressing a challenge to the ADA, which requires reasonable accommodation of individuals with disabilities); *see Holmes*, 349 F.3d at 919 ("A requirement of accommodation does

Fortunately for those who would defend Title VII's reasonable-accommodation provision in the Supreme Court, the Seventh Circuit's assessment is somewhat exaggerated. Despite its sound and fury, the *Smith* decision did not overrule any of the Court's earlier pro-exemption cases, but instead narrowly reinterpreted those cases in a manner that left the door open to free exercise accommodations in certain circumstances.[26] Most importantly, the *Smith* Court indicated that religious exemptions may be necessary when a state makes available other exemptions from a general requirement.[27] This "selective-exemption rule,"[28] which has been embraced and expanded by a number of lower courts,[29] could prove critical to the Section 5 issue. For if rules in the state employment context are often subject to selective exemptions, as the evidence discussed later in this Article suggests,[30] a strong argument can be made that Title VII's requirement of religious accommodation in that context is an appropriate prophylactic measure.

Moreover, unlike RFRA, which openly attempted to reverse *Smith* by restoring a strict scrutiny religious exemption regime covering all state conduct,[31] Title VII's reasonable-accommodation provision demands only modest accommodations, and applies only when states act as employers. Accordingly, if a connection between the reasonable-accommodation provision and the Court's selective exemption rule can be established, the case for congruence and proportionality will be considerably stronger than it was in *City of Boerne*.[32]

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not 'enforce' the free exercise clause . . . for *Smith* holds that a state complies with the free exercise clause by maintaining neutrality toward religiously motivated practices" and accommodation is a "departure from neutrality.").

[26] *See* Employment Div. v. Smith, 494 U.S. 872, 881-82, 884 (1990).

[27] *Id.* at 884; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) (requiring a "'compelling reason'" when government does not extend exemptions to "'"religious hardship"'" (quoting *Smith*, 494 U.S. at 584)).

[28] This Article uses the term "selective-exemption rule," rather than the more commonly used "individualized-exemption rule," because there is considerable debate as to whether the rule is limited to situations when the government permits individualized exemptions or also covers situations where the government has made categorical exemptions. *See infra* Part IV.B.1. In either case, the government has engaged in some degree of selectivity among exemptions. Hence, the use of the term "selective-exemption rule."

[29] *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364-66 (3d Cir. 1999); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885-86 (D. Md. 1996).

[30] *See infra* notes 209-11 and accompanying text.

[31] *See* City of Boerne v. Flores, 521 U.S. 507, 512-16 (1997).

[32] In defending RFRA, the respondent in *City of Boerne* did not rely on the selective-exemption rule and instead argued that RFRA "prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices." *Id.* at 529. As discussed below, a similar argument has been made in support of Title VII's reasonable-accommodation provision, but that argument is not likely to prevail in the Supreme Court. *See infra* Part IV.A.

This Article develops the argument that Title VII's reasonable-accommodation provision is appropriate enforcement legislation and discusses how that argument implicates a number of unresolved questions concerning the Court's recent free exercise and Section 5 decisions. However, the purpose of this Article is *not* to challenge the basic premises of those decisions—that ground has been more than adequately covered elsewhere.[33] Rather, the focus here will be on how, within the broad confines of the Court's current jurisprudence, a state sovereign immunity challenge to Title VII's reasonable-accommodation provision should be resolved.

Part I of this Article provides an overview of the reasonable-accommodation provision and explains how the Court has interpreted that provision as affording religious adherents limited, but not insubstantial, protection from generally applicable workplace rules. Also discussed is the proposed Workplace Religious Freedom Act ("WRFA"), a measure that would amend Title VII to strengthen the reasonable-accommodation requirement. Part II turns to the Court's free exercise jurisprudence and concentrates on the issue of when religious accommodations may still be required by the Constitution in the wake of *Smith*. Part III provides background on two branches of the Court's federalism jurisprudence—state sovereign immunity and limited Section 5 power—that together make it necessary to establish a sufficiently close connection between Title VII's reasonable-accommodation provision and the Free Exercise Clause.

The task of determining whether the requisite connection exists is taken up in Part IV. Part IV.A explains why, notwithstanding the reasoning of one lower court,[34] the Supreme Court is unlikely to uphold the reasonable-accommodation provision on the ground that it targets intentional discrimination. Part IV.B then turns to the more promising argument that the Court should uphold the reasonable-

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[33] For critiques of the Court's free exercise jurisprudence, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-77 (1997) (Souter, J., concurring in part and concurring in the judgment); *Employment Division v. Smith*, 494 U.S. 872, 891-903 (1990) (O'Connor, J., concurring in the judgment); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; and Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise Revisionism*].

For critiques of the Court's Section 5 jurisprudence, see *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 376-89 (2001) (Breyer, J., dissenting); Colker & Brudney, *supra* note 9; Phillip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997) [hereinafter McConnell, *Institutions and Interpretation*]; Post & Siegel, *supra* note 7.

[34] *See* Holmes v. Marion County Office of Family & Children, 184 F. Supp. 2d 828, 834-36 (S.D. Ind. 2002), *vacated by* Endres v. Ind. State Police, 334 F.3d 618 (7th Cir. 2003), *panel opinion revised, judgment vacated, and reh'g en banc granted*, Holmes v. Marion County Office of Family & Children, 349 F.3d 914 (7th Cir. 2003), *appeal dismissed pursuant to Federal Rule of Appellate Procedure 42(b)*, (Jan. 20, 2004).

accommodation provision under Section 5 because it sufficiently overlaps with the Court's selective-exemption rule. Consideration of that argument would provide the Court with an opportunity to: (1) clarify the breadth of the selective-exemption rule, which has been interpreted in different ways by different lower courts;[35] (2) demonstrate how it will handle close cases under the congruence-and-proportionality test, which requires in vague terms that there be "reason to believe" that "many" of the state actions affected by Section 5 legislation have a "significant likelihood" of being unconstitutional;[36] and (3) resolve the internal inconsistencies in its Section 5 jurisprudence concerning the role of legislative history.[37] After examining each of those issues, Part IV concludes that the Court can and should uphold the reasonable-accommodation provision as appropriate legislation enforcing the Free Exercise Clause.

Part V highlights the very real possibility that the Court would fracture along several different lines if confronted with a state employer challenge to Title VII's reasonable-accommodation provision. The Court remains deeply divided over both the validity of the sovereign immunity doctrine and the merits of *Smith*, and the lineup of Justices on those two issues differs. In addition, some members of the Court may believe that the reasonable-accommodation provision raises Establishment Clause concerns, while yet others may be inclined to treat Title VII's requirements with special solicitude.

In the end, it is near impossible to predict how exactly the Court would resolve a state sovereign immunity challenge to Title VII's reasonable-accommodation provision. However, should the Court wish to avoid a fractured decision that further muddies the constitutional waters, this Article offers a proposal for upholding the reasonable-accommodation provision in a manner that brings clarity to the Court's unsettled free exercise and Section 5 doctrines.

I. TITLE VII'S REASONABLE-ACCOMMODATION PROVISION

Title VII makes it unlawful for an employer "to discriminate against any individual" with respect to employment "because of such

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[35] *Compare* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (holding that the rule applies to situations in which the government makes categorical exemptions), *with* Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408-09 (9th Cir. 1992) (holding that the rule does not apply to situations where the government makes exemptions that cover "entire, objectively-defined categories").

[36] *City of Boerne*, 521 U.S. at 532.

[37] *Compare* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (stating that a "lack of support" in the legislative record "is not determinative of the § 5 inquiry"), *with Garrett*, 531 U.S. at 370 (indicating that Section 5 legislation "must be based" on a legislative record revealing a "pattern of unconstitutional discrimination").

individual's race, color, *religion*, sex, or national origin."[38] As initially passed in 1964, Title VII did not contain an explicit accommodation requirement, and it appeared to treat religion no differently than other protected classes. However, in a 1967 guideline, the Equal Employment Opportunity Commission ("EEOC") declared that employers had an obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."[39] Although that position was rejected by some courts as a "fundamental error" that conflated the "entirely different" concepts of religious discrimination and failure to accommodate,[40] it ultimately found favor with Congress.

In the Equal Employment Opportunity Act of 1972, which extended Title VII's coverage to state employers,[41] Congress added the following definition of religion: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[42] The Supreme Court has since recognized that the "intent and effect of this definition was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."[43]

In two decisions interpreting Title VII's reasonable-accommodation provision—*TWA, Inc. v. Hardison*[44] and *Ansonia Board of Education v. Philbrook*[45]—the Court limited the obligations of employers in several ways. The most intuitive of the limits was announced in *Hardison*, where the Court held that a requested accommodation is not reasonable if it would require an employer to

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[38] 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).

[39] 29 C.F.R. § 1605.1 (1968).

[40] Dewey v. Reynolds Metals Co., 429 F.2d 324, 335 (6th Cir. 1970) (issuing an order denying rehearing), *aff'd by an equally divided court*, 402 U.S. 689 (1971); *see also* Riley v. Bendix Corp., 330 F.Supp. 583, 591 (M.D. Fla. 1971) ("'Religious discrimination should not be equated with failure to accommodate.'" (quoting Dawson v. Mizell, 325 F. Supp. 511, 514 (E.D. Va. 1971)), *rev'd*, 464 F.2d 1113 (5th Cir. 1972)).

[41] *See* 86 Stat. 103, § 2(2) (removing the express exclusion of "a State or political subdivision thereof" from the definition of "employer"); *id.* at § 2(5) (amending the definition of "employee" to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision").

[42] *Id.* at § 2(7) (codified at 42 U.S.C. § 2000e(j) (2000)).

[43] TWA, Inc. v. Hardison, 432 U.S. 63, 74 (1977); *see* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 n.1 (1986) ("The reasonable-accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion.").

[44] 432 U.S. 63 (1977).

[45] 479 U.S. 60 (1986).

infringe on the rights of other employees.[46] Accordingly, the Court concluded that TWA did not have to accommodate Hardison's desire to take Saturdays off for Sabbath observance when other employees with greater seniority rights would have to work in his place.[47] Less compelling, but still defensible, was the Court's holding in *Ansonia* that an employer can satisfy its duty under Title VII by offering any reasonable accommodation, even if an alternative accommodation might better protect the interests of the affected employee.[48] Consistent with that view, the Court concluded that the Ansonia school board, which permitted employees to use three days of paid leave per year for religious reasons, did not have to provide Philbrook with additional days of paid leave to fulfill his religious obligations when it already allowed him to use unpaid leave for those purposes.[49]

The most significant, and most controversial, limitation placed on the accommodation requirement was the Court's holding in *Hardison*, reaffirmed in *Ansonia*, that "an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer."[50] Applying that rule in *Hardison*, the Court concluded that TWA could not be required to pay overtime rates to find a voluntary replacement for Hardison on Saturdays.[51]

Notwithstanding the Court's watered-down interpretation of the "undue hardship" standard,[52] which the lower courts have applied to

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[46] *See Hardison*, 432 U.S. at 79-81; *see also* US Airways, Inc. v. Barnett, 535 U.S. 391, 403-05 (2002) (reaching the same conclusion with respect to the ADA's reasonable-accommodation provision).

[47] *See Hardison*, 432 U.S. at 81 ("It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others . . . .").

The seniority rights threatened in *Hardison* were guaranteed by a collective bargaining agreement, and the Court bolstered its holding by relying on a provision in Title VII that affords special protection to such agreements. *Id.* at 67, 81-82. However, the Court has since made clear that *Hardison*'s rationale is not limited to collectively bargained rights. *See Barnett*, 535 U.S. at 403-04 (relying on *Hardison* when applying the ADA's reasonable-accommodation requirement outside the collective bargaining context).

[48] *See Ansonia*, 479 U.S. at 66-69.

[49] *See id.* at 70 ("The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work.").

The Court went on to explain, however, that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones." *Id.* at 71. Accordingly, the Court remanded for consideration of Philbrook's claim that the school board permitted a general category of paid leave to be used for "a wide range of secular purposes . . . but not for similar religious purposes." *Id.*

[50] *Ansonia*, 479 U.S. at 67 (quoting *Hardison*, 432 U.S. at 84).

[51] *Hardison*, 432 U.S. at 84-85, 84 n.15.

[52] For a critique of the Court's interpretation of "undue hardship," see, for example, *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting) ("As a matter of law, I seriously question whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than

preclude most accommodations that impose financial costs on employers,[53] there remains a substantial category of low-to-no-cost accommodations that employers are often required to provide. Included in this category are exemptions from dress codes and grooming rules,[54] scheduling changes that can be accomplished without overtime pay and without infringing on the rights of other employees,[55] and approved absences for occasional religious holidays or special events.[56] Although providing such accommodations could potentially lead to resentment among other employees, the courts have largely rejected defenses that are based on "hypothetical morale problems"[57] or "'proof that employees would grumble.'"[58] As a result,

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de minimis cost' . . . ."); *see also* Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 585 (2000) (contending that the Court's interpretation of the reasonable-accommodation provision "is clearly at odds with [the provision's] purpose").

[53] *See* Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices Under Title VII After* Ansonia Board of Education v. Philbrook, 50 U. PITT. L. REV. 513, 544-45 & nn.101-02, 546-47 (1989) (listing cases demonstrating that "cost alternatives are generally no longer available to employees seeking accommodation under Title VII").

[54] *See, e.g.*, Carter v. Bruce Oakley, Inc., 849 F. Supp. 673, 675-76 (E.D. Ark. 1993) (requiring an employer to make an exemption from its no-beard policy); EEOC v. READS, Inc., 759 F. Supp. 1150, 1160-61 (E.D. Pa. 1991) (requiring an employer to accommodate the wearing of a religious head covering); *see also Brink's to Pay $30,000 to Illinois Woman EEOC Says Wrongfully Fired over Uniform*, DAILY LAB. REP. (BNA, Washington, D.C.), Jan. 3, 2003, at A-3; *American Airlines Settles Bias Claim Brought on Behalf of Muslim Woman*, DAILY LAB. REP. (BNA, Washington, D.C.), Sept. 5, 2002, at A-3; *FedEx Will Moderate No-Beard Policy to Oblige Muslims Under Consent Decree*, DAILY LAB. REP. (BNA, Washington, D.C.), June 20, 2001, at A-2; *EEOC Settles Religious Headscarf Suit for $50,000*, DAILY LAB. REP. (BNA, Washington, D.C.), Dec. 27, 2000, at A-9; *Muslim Workers Fired for Wearing Scarves Receive Apologies, Payment from Company*, DAILY LAB. REP. (BNA, Washington, D.C.), Apr. 29, 1999, at A-3. *See generally* Amar, *supra* note 15, at 521 (observing that "the granting of exemptions from personal appearance and dress codes often does not impose significant costs on employers").

[55] *See, e.g.*, Opuku-Boateng v. California, 95 F.3d 1461, 1474-75 (9th Cir. 1996) (requiring an employer to accommodate Sabbath observance by changing an employee's schedule or allowing shift trades); Lake v. B.F. Goodrich Co., 837 F.2d 449, 451-52 (11th Cir. 1988) (requiring an employer to accommodate Sabbath observance by facilitating shift trades); Smith v. Pyro Mining Co., 827 F.2d 1081, 1089 (6th Cir. 1987) (same); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 135-37 (3d Cir. 1986) (requiring an employer to accommodate Sabbath observance by excusing an employee's absences); Brown v. Gen. Motors Corp., 601 F.2d 956, 958-62 (8th Cir. 1979) (requiring an employer to accommodate Sabbath observance by allowing an employee to leave at sunset on Friday); *see also* Amar, *supra* note 15, at 520-21 ("Authorizing and facilitating—though not initiating—shift swaps seems to involve little costs and is often required by lower courts.").

[56] *See, e.g.*, EEOC v. Ilona of Hung., Inc., 108 F.3d 1569, 1576-77 (7th Cir. 1997) (requiring employer to permit day off for observance of Yom Kippur); Wangsness v. Watertown Sch. Dist. No. 14-4, 541 F. Supp. 332, 334, 336-39 (D.S.D. 1982) (requiring employer to permit week off for attendance at the Feast of Tabernacles, a religious festival); *see also Court Awards $78,800 to Convenience Clerk Fired for Refusing Work on Easter Sunday*, DAILY LAB. REP. (BNA, Washington, D.C.), Oct. 20, 1997, at A-5.

[57] *Opuku-Boateng*, 95 F.3d at 1473.

[58] *Id.* (quoting Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978)); *see also* Brown v. Polk County, 61 F.3d 650, 655 (8th Cir. 1995) (en banc) ("'Undue

despite the limits announced by the Supreme Court in *Hardison* and *Ansonia*, Title VII still requires employers to provide religion with "preferential treatment" in "some circumstances."[59]

The EEOC's guidelines attempt to minimize the special treatment aspect of Title VII's religious accommodation provision by interpreting it to cover all "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[60] However, lower courts "have been somewhat reluctant to embrace the full spirit" of the EEOC guidelines and have generally "eschewed equating ethics with religion" when applying Title VII.[61] That resistance to the EEOC's view is consistent with the Supreme Court's teaching in the constitutional context that "purely secular" beliefs, "however virtuous and admirable," cannot be treated as

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hardship requires more than proof of some fellow-worker's grumbling . . . . An employer . . . would have to show . . . actual imposition on co-workers or disruption of the work routine.'" (alterations in original) (quoting Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978))); Lambert v. Condor Mfg., Inc., 768 F. Supp. 600, 604 (E.D. Mich. 1991) (applying the Ninth Circuit's conclusion that "'proof of co-workers' unhappiness' with a particular accommodation is not enough to cause a hardship" (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 614 (9th Cir. 1988))).

[59] 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 219 (Paul W. Cane, Jr. et al. eds., 3d ed. 1996); *see* Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 742 (1996) (observing that Title VII requires "special treatment" of employees' "religious practices"); *cf.* US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.").

In the disability context, Robert Burgdorf has argued that requiring reasonable accommodation of individuals with disabilities does not amount to preferential treatment because workplaces are inherently designed to accommodate the needs of individuals without disabilities. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 529-33 (1997). In the religious liberty context, an analogous argument has been made that accommodations ensure equal treatment of nonmainstream religions under laws that that are drafted from the perspective of the majority. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 139 (1992). The "equality" argument for religious accommodations is complicated, however, by the fact that there are two conflicting equality interests at issue: equality *among religions*, which may very well be advanced by religious accommodations, and equality *between religion and nonreligion*, which is compromised by religion-only accommodations. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1492-93 (1999) ("Any regime of *religious* exemptions by definition prefers those whose actions are motivated by religion over those whose identical actions are motivated by equally deeply held secular beliefs."); *cf.* Symposium, *Religion in the Workplace: Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Law and Religion*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 87, 131 (2000) (comments of Professor Vicki Schultz) ("I am not a fan of reasonable accommodation for anything except disability. Reasonable accommodation is based on a notion of unalterable difference . . . .").

[60] 29 C.F.R. § 1605.1 (2003).

[61] Amar, *supra* note 15, at 517; *see also* LINDEMANN & GROSSMAN, *supra* note 59, at 220-22 (also noting that "[m]ost courts have eschewed equating ethics with religion").

religious beliefs.[62] For example, the Court has explained that the beliefs of Henry David Thoreau, who "rejected the social values of his time and isolated himself at Walden Pond," would "not rise to the demands of the Religion Clauses" because they were "philosophical and personal rather than religious."[63] Because Title VII, like the Constitution, speaks specifically of "religion," it is best understood as providing some measure of protection to religiously motivated conduct that is not available to secular conduct.[64]

Title VII's special protection of religion may be further strengthened by the Workplace Religious Freedom Act ("WRFA"), which has been introduced in Congress several times in recent years,[65] and which enjoys broad bipartisan support.[66] The WRFA would overturn the *Hardison* Court's *de minimis* standard by amending Title VII to

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[62] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). Notably, the *Yoder* Court cited to Justice Harlan's separate opinion in *Welsh v. United States*, 398 U.S. 333 (1970), a case involving a federal statute that exempted religious objectors from the draft. A plurality of the *Welsh* Court concluded that the exemption could be read as encompassing individuals whose opposition to war stemmed from "moral, ethical, *or* religious beliefs about what is right or wrong." *Id.* at 339-40 (emphasis added). Justice Harlan, however, was of the view that the word "religion" is not "so plastic in meaning that the Court is entitled, as a matter of statutory construction, to conclude that any asserted and strongly held belief satisfies its requirements." *Id.* at 352 (Harlan, J., concurring in the result). Instead, Justice Harlan concurred in the result—granting an exemption to Welsh—on the ground that the Establishment Clause precluded Congress from limiting the conscientious objector provision to religious adherents. *See id.* at 356-67. The three dissenters agreed with Justice Harlan that the statutory exemption of religious objectors could not be construed to cover nonreligious objectors, but they disagreed with his conclusion that the Establishment Clause required Congress to extend statutory exemptions to nonreligious objectors. *See id.* at 367-74 (White, J., dissenting).

[63] *Yoder*, 406 U.S. at 216; *see also* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 833 (1989) ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause.' Purely secular views do not suffice." (alteration in original) (quoting Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 713 (1981))); *Thomas*, 450 U.S. at 713 ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); Jamar, *supra* note 59, at 751 (observing that a "purely rational, philosophical ethical system, regardless of how moral and central to a person's life would appear not to meet the [Court's] definition").

[64] *See* Brown v. Gen. Motors Corp., 601 F.2d 956, 960 (8th Cir. 1979) (stating that the reasonable-accommodation provision "does not require an employer to reasonably accommodate the purely personal preferences of its employees" and does not cover "employees who wish to have Friday night off for secular reasons"); Jamar, *supra* note 59, at 753 ("[I]t is hard to imagine . . . that the Title VII prohibition of employment discrimination based on religion was intended to protect an employee's assertion of non-religious, value-based discrimination . . . .").

[65] *See* Kaminer, *supra* note 52, at 628 & nn.371-73 (listing several WRFA bills).

[66] The most recent version of the WRFA, which was introduced in the Senate on April 11, 2003, was sponsored by Rick Santorum (R) and has the following co-sponsors: Evan Bayh (D), Sam Brownback (R), Hillary Rodham Clinton (D), Norm Coleman (R), John Cornyn (R), Jon Corzine (D), Larry E. Craig (R), Michael D. Crapo (R), Richard J. Durbin (D), John E. Ensign (R), Orrin G. Hatch (R), John F. Kerry (D), Joseph I. Lieberman (D), Barbara A. Mikulski (D), Patty Murray (D), Charles E. Schumer (D), Gordon Smith (R), Arlen Specter (R), Debbie Stabenow (D), Jim Talent (R), and Ron Wyden (D). *See* Bill Summary & Status for S. 893, 108th Cong. (2003), http://thomas.loc.gov/home/thomas.html (last visited Feb. 27, 2004).

define an "undue hardship" as a "significant difficulty or expense."[67] That is the same standard Congress used in the ADA's accommodation provision,[68] and it is considerably more difficult for employers to meet than the *Hardison* standard.[69]

A bolstering of Title VII's religious accommodation requirement would be significant for two reasons. First, it would likely lead to renewed efforts to challenge Title VII on Establishment Clause grounds—efforts that have thus far been uniformly rejected by the courts of appeals.[70] Second, and more important for purposes of this Article, the stronger Congress makes Title VII's religious accommodation requirement, the greater the danger that the requirement will go too far beyond the demands of the Free Exercise Clause to be considered appropriate Section 5 enforcement legislation that can abrogate state sovereign immunity.

In sum, Title VII currently requires employers, including state employers, to provide some accommodation for religion, and Congress is seriously contemplating requiring more accommodation. Whether ultimately enhanced or not, Title VII's religious accommodation provision is in considerable tension with the anti-accommodation trend of the Court's recent Free Exercise Clause jurisprudence, and it is that jurisprudence to which this Article now turns.

II. THE SUPREME COURT AND FREE EXERCISE ACCOMMODATION

The Free Exercise Clause of the First Amendment, which has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment,[71] provides that "Congress shall make no

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[67] S. 893, 108th Cong. § 2(a)(4) (2003).

[68] 42 U.S.C. § 12111(10) (2000).

[69] *See* Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1048-49 & n.12 (7th Cir. 1996) (rejecting the *de minimus* standard of reasonable accommodation as applied to the ADA, but ruling against the claimant for other reasons).

[70] *See* EEOC v. Ithaca Indus., Inc., 849 F.2d 116, 119 (4th Cir. 1988) (en banc) (holding that Title VII poses no constitutional problem and noting that "[e]very court of appeals that has addressed this issue has held that [the accommodation provision] does not violate the First Amendment"); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 135 (3d Cir. 1986) (same); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1244-46 (9th Cir. 1981) (holding that Title VII does not violate the Establishment Clause). *See generally* Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 22 (2001) ("Enough cases have been decided since *Hardison* to give us reasonable assurance that requiring minimal cost accommodation is constitutionally permissible. But, that conclusion leaves open the issue of whether requiring more costly accommodations might violate the Establishment Clause.").

[71] *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress's power to enforce the Free Exercise Clause follows from our holding in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), that the 'fundamental concept of liberty embodied in [the Fourteenth Amendment's

law . . . prohibiting the free exercise" of religion.[72] Although there is widespread agreement that this guarantee provides protection from laws that intentionally burden religious practices,[73] there is considerable debate as to whether it also provides protection from generally applicable laws that incidentally burden religious practices.

When the Supreme Court first interpreted the Free Exercise Clause in the late nineteenth century, it squarely rejected the argument that the government must make religious accommodations from generally applicable laws.[74] The Court again rejected that argument in the middle of the twentieth century, explaining that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[75] However, the Court fundamentally changed its approach to religious liberty in 1963, and for more than a quarter of a century thereafter adhered to the view that states are indeed under a constitutional obligation to provide religious accommodations.

For example, in the seminal case of *Sherbert v. Verner*,[76] the Court held that a South Carolina law requiring unemployment compensation beneficiaries to be available for work on Saturdays could not be applied to an individual whose religion obligated her to refrain from work on Saturdays.[77] The Court explained that applying the law to the religious adherent would force her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[78] To justify the imposition of such a burden on religion, the Court held that a state would have to demonstrate that it had a "compelling state interest" that could not be served by any "alternative forms of regulation."[79] Likewise, in

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Due Process Clause] embraces the liberties guaranteed by the First Amendment.'") (alteration in original).

[72] U.S. CONST. amend. I.

[73] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . regulates or prohibits conduct because it is undertaken for religious reasons."); *id.* at 559 (Souter, J., concurring in part and concurring in the judgment) ("This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice.").

[74] *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (explaining that a religious accommodation requirement would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself").

[75] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940), *overruled on other grounds by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[76] 374 U.S. 398 (1963).

[77] *Id.* at 399-401, 410.

[78] *Id.* at 404.

[79] *Id.* at 406-07.

Wisconsin v. Yoder,[80] the Court held that a compulsory education law could not be applied to Amish parents who kept their children out of school for religious reasons unless the state could satisfy strict judicial scrutiny.[81] In perhaps the most famous sentence ever written in support of religious exemptions, the Court concluded that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*."[82]

Not surprisingly, when the reasonable-accommodation provision was added to Title VII in 1972—nine years after *Sherbert* was decided, and the same year *Yoder* was decided—its supporters believed they were acting in full accord with the Constitution. Senator Jennings Randolph, the chief proponent of the reasonable-accommodation provision, explained that the provision was necessary because some lower courts had declined to interpret Title VII's prohibition of religious discrimination as encompassing "the same concepts as are included in the first amendment."[83] In support of that assertion, Senator Randolph placed in the record reprints of two decisions in which lower courts had distinguished *Sherbert* and refused to construe Title VII as imposing an accommodation requirement.[84] Furthermore, Senator Harrison Williams stated outright that the reasonable-accommodation provision would "promote[] the constitutional demand" in regard to "free exercise" of religion.[85]

Senator Williams's assessment would still have been considered accurate in 1987, when the Court reaffirmed its pro-accommodation view of the Free Exercise Clause in *Hobbie v. Unemployment Appeals Commission*.[86] The *Hobbie* Court explicitly rejected the argument that a state law burdening religion need only be "'neutral and uniform in its application'" and promote a "'legitimate public interest'" to survive free exercise review.[87] Instead, the Court followed *Sherbert*'s teaching that the failure to make a religious exemption from such a law must be "subjected to strict scrutiny."[88]

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[80] 406 U.S. 205 (1972).

[81] *Id.* at 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

[82] *Id.* at 220 (emphasis added).

[83] 118 CONG. REC. 705, 705-06 (1972).

[84] *Id.* at 706, 708, 711, 713.

[85] *Id.* at 706.

[86] 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices . . . .").

[87] *Id.* at 141 (quoting Bowen v. Roy, 476 U.S. 693, 707-08 (1986)).

[88] *Id.*

Three years later, however, the Court sent a dramatically different message in *Employment Division v. Smith*,[89] which held that the Free Exercise Clause does *not* require states to provide religious exemptions from "neutral law[s] of general applicability."[90] *Smith* concerned the application of an Oregon drug law to members of the Native American Church who ingested peyote during a religious ceremony.[91] Rather than applying strict scrutiny to determine whether there was sufficient reason to deny a religious exemption from the law, the Court applied no scrutiny at all, explaining that when prohibiting religious exercise is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[92]

The Court's decision in *Smith* appeared to be driven by two concerns. First, the Court expressed doubt about the viability of a constitutional regime that makes "an individual's obligation to obey [the] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling.'"[93] In the Court's view, maintaining such a regime in a religiously diverse society would be "courting anarchy."[94] Second, the Court was troubled by the prospect of judges making value judgments about different religious practices under an exemption regime that requires judges to "weigh the social importance of all laws against the centrality of all religious beliefs."[95] Accordingly, the Court concluded that the granting of "nondiscriminatory religious practice exemption[s]" should be left to state legislatures, not federal courts.[96]

Had the Court given full effect to its message in *Smith* by flatly overruling *Sherbert* and its progeny, the free exercise landscape would be relatively clear. Clarity, however, is not a virtue that can be attributed to the *Smith* decision. Rather than taking the direct route, the Court endeavored to distinguish all of its pro-exemption decisions and, in the process, appeared to create two important exceptions to its newly announced no-exemption rule.

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[89] 494 U.S. 872 (1990).

[90] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[91] *See id.* at 874.

[92] *Id.* at 878. *Smith* essentially marked a return to the Court's pre-1963 jurisprudence. *See supra* notes 74-75 and accompanying text. For a more extensive discussion of that jurisprudence, see James M. Oleske, Jr., Note, *Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence of Doubt,"* 85 GEO. L.J. 751, 754-59 (1997).

[93] *Smith*, 494 U.S. at 885.

[94] *Id.* at 888.

[95] *Id.* at 890; *see id.* at 887 ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" (quoting *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring in the judgment))).

[96] *Id.* at 890.

The first exception covers "hybrid situations" in which free exercise claims are made "in conjunction" with other constitutional claims.[97] According to *Smith*, the hybrid-rights theory explains why an exemption was required in *Yoder*, as that case involved both a free exercise claim and a parental rights claim.[98] Citing other decisions, the *Smith* Court indicated that free exercise claims could also be successfully hybridized with free speech, free press, and free association claims.[99]

The second *Smith* exception provides that where a state "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[100] According to the *Smith* Court, *Sherbert* fell into this category because the unemployment compensation program at issue in *Sherbert* permitted beneficiaries to refuse available work for "good cause."[101] The *Smith* Court concluded that the "good cause" standard created a "'mechanism for individualized exemptions'" from the program's general work requirement; thus, the state could not deny an exemption to an individual who refused available work for religious reasons.[102]

The *Smith* exceptions have been the subject of considerable discussion in both the lower courts and the legal academy. With respect to the hybrid-rights exception, the courts have been openly skeptical, and most have either rejected the theory as nonbinding dictum or found ways to avoid applying it.[103] That reticence is understandable. The notion that an inadequate free exercise claim can be fused with another inadequate constitutional claim[104] to create a successful claim has struck many commentators as incoherent.[105] Moreover, as Alan Brownstein has persuasively argued, the hybrid-rights theory "has it

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[97] *Id.* at 881-82.

[98] *Id.* at 881 & n.1.

[99] *Id.* 881-82.

[100] *Id.* at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[101] *Id.*

[102] *Id.* (quoting *Roy*, 476 U.S. at 708).

[103] *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL'Y 119, 188 & nn.241-42, 189 & nn. 243-44 (2002) (collecting cases and observing that the "lower courts have not welcomed the hybrid rights exception with open arms"); William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242 (1998) ("Analysis of hybrid claims in the lower courts leads to the unmistakable conclusion that the hybrid 'calculus' or logical interpretation (i.e., two loser constitutional claims = one winner constitutional claim) simply is not being applied.").

[104] In cases where the second constitutional claim is sufficient on its own to require an exemption, the hybrid-rights theory serves no purpose.

[105] *See* Brownstein, *supra* note 103, at 188 ("The conventional criticism of the hybrid rights exception . . . is that it is intellectually incoherent. To use the crude local vernacular, it just makes no sense.").

exactly backwards"—special exemptions for religious adherents are *least appropriate* when other fundamental rights are implicated because "[p]art of the core idea of fundamental rights is that all citizens have an equal right to exercise them."[106] In addition, as Brownstein further notes, it appears that even *Smith*'s author has abandoned his support for the concept of free exercise hybridization.[107]

In short, although it may be "malpractice" for lawyers representing religious adherents not to invoke the hybrid-rights theory,[108] the future of the theory is not bright.

By contrast, based on the early results, there is considerable support for the selective-exemption rule.[109] Not only has that rule been invoked favorably by the Supreme Court in a post-*Smith* decision,[110] it has also been well received in the lower courts,[111] and has considerable support among commentators.[112] Moreover, unlike the hybrid-rights theory, the selective-exemption rule dovetails nicely with the general rule in *Smith*. As noted above, one of the concerns animating the general rule is that requiring religious exemptions from all laws could lead to anarchy. However, by requiring religious exemptions only when states make other exemptions, the selective-exemption

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[106] *Id.* at 191-93.

[107] *Id.* at 190 n.249 (citing Watchtower Bible & Tract Soc'y, Inc. v. Vill. of Stratton, 536 U.S. 150, 171 (2002) (Scalia, J., concurring in the judgment) ("If a licensing requirement is otherwise lawful [under the Free Speech Clause], it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forego speech rather than observe it. That would convert an invalid free-exercise claim into a valid free-speech claim . . . .") (citation omitted)).

[108] Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 858 (2001).

[109] For an explanation of why this Article uses the term "selective-exemption rule," rather than the more commonly used "individualized-exemption rule," see *supra* note 28.

[110] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537-38 (1993).

[111] *See, e.g.*, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d. 144, 165-68 (3d Cir. 2002); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365-66 (3d Cir. 1999); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1072-73 (D. Haw. 2002); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885-86 (D. Md. 1996); Rader v. Johnston, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996).

[112] *See, e.g.*, Duncan, *supra* note 108, at 860-63, 882-84 ("The Free Exercise Clause has evolved into a leaner, meaner religious-liberty-protecting machine in the wake of . . . *Smith* and *Lukumi*."); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1277-82, 1287-90 (1994); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 115-19 (2000) ("Fundamental rights/equal protection analysis makes clear that any law or government action that excuses—by administrative exemption, legislative exemption, or otherwise—one or more secular activities but not *comparable* religious practices creates a classification that impermissibly burdens the fundamental right of free exercise of religion, and thus should normally be subject to strict scrutiny."); Laycock, *supra* note 33, at 48-51. *But cf.* Brownstein, *supra* note 103, at 193-203 (contending that the selective-exemption rule is "arguably coherent" if limited to situations where the government makes individualized exemptions, but unworkable if extended to cases involving categorical exemptions); Volokh, *supra* note 59, at 1539-42 (contending that the selective-exemption rule is unwise and unworkable as applied to categorical exemptions).

rule leaves states with the option of eliminating exemptions altogether if they perceive a threat to societal order.[113]

More fundamentally, the general *Smith* rule and the selective-exemption rule can be read in tandem to stand for the proposition that the valuation of religious practices by government actors is inherently dangerous and should be minimized to the extent possible. Thus, when a state maintains an across-the-board prohibition that does not distinguish between religiously and secularly motivated conduct, the general rule prevents judges from increasing the risk of impermissible valuation by keeping them out of the business of balancing the state's interest against the claims of religious adherents. By contrast, when a state permits some exemptions to be made from a prohibition, but denies a religious exemption, there is a serious risk that the state has "devalue[d] religious reasons for [conduct] by judging them to be of lesser import than nonreligious reasons,"[114] and the selective-exemption rule helps mitigate that risk by imposing a strong judicial presumption in favor of the religious exemption.[115]

In short, the selective-exemption rule provides a principled basis for continuing to require religious accommodations in certain circumstances notwithstanding *Smith*'s general rule. The availability of such accommodations under the Free Exercise Clause is relevant to the fate of Title VII's reasonable-accommodation provision because, as Part III explains, the Court's federalism doctrine requires that there be a sufficiently close connection between the requirements of the Constitution and the requirements of a federal statute before that statute can be meaningfully applied to the states.

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[113] *See* Duncan, *supra* note 108, at 881 ("Under *Smith* and *Lukumi*, the majority may rule without any fear of religious anarchy, so long as the burdens it creates are not imposed selectively.").

[114] *Lukumi*, 508 U.S. at 537-38.

[115] Because the selective-exemption rule counteracts state action that threatens to devalue religion, one could argue that it is not so much an exception to *Smith* as it is a subset of *Smith*'s general rule that the government must be neutral towards religion. *See Tenafly Eruv Ass'n*, 309 F.3d at 165-66 (explaining that state officials "contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct"). In addition, some courts and commentators have treated the selective-exemption rule as part of *Smith*'s general applicability requirement. *See Rader*, 924 F. Supp. at 1553 (explaining that compliance with the selective-exemption rule is a minimum requirement of fulfilling general applicability); Duncan, *supra* note 108, at 861 (claiming that the selective-exemption rule should be understood as "nothing more than a subset of the general applicability requirement"). *But see Lukumi*, 508 U.S. at 532, 537-38 (discussing the selective-exemption rule in a section on "neutrality," not "general applicability"); Gedicks, *supra* note 112, at 116 (arguing that "[n]either religious neutrality nor the Court's definition of general applicability can account for" the selective-exemption rule).

III. THE RESTRICTIONS OF FEDERALISM: STATE SOVEREIGN IMMUNITY AND A MODEST SECTION 5 POWER

In a series of cases decided since the mid-1990s, the Supreme Court has consistently enforced limits on congressional authority in the name of federalism.[116] Two branches of the Court's recent federalism jurisprudence are relevant here. The first concerns state sovereign immunity under the Eleventh Amendment, and the second concerns Congress's power under Section 5 of the Fourteenth Amendment. Together, the Court's decisions in those two areas have had the effect of sharply limiting the number of federal statutory rights that can be effectively enforced against the states.[117]

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State."[118] Over the vigorous dissent of four Justices, the current Court has repeatedly adhered to the following expansive interpretation of the Eleventh Amendment:

> Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States. The ultimate guarantee of the Eleventh Amendment is that nonconsenting states may not be sued by private individuals in federal court.[119]

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[116] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act); Printz v. United States, 521 U.S. 898 (1997) (invalidating the Brady Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating RFRA); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (invalidating part of the Indian Gaming Regulatory Act); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act); *see also* Fallon, *supra* note 6, at 429 ("It seems agreed on all sides now that the Supreme Court has an agenda of promoting constitutional federalism."); Frickey & Smith, *supra* note 33, at 1718 ("In the fifteen years of the Rehnquist Court, the law has changed dramatically in ways limiting federal power over states and their citizens."); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1145 (2002) ("As most people know by now, five Justices of the Supreme Court are beginning to rewrite the map of American federalism.").

[117] A great deal of scholarly attention has been paid to the impact of the Court's Eleventh Amendment and Section 5 doctrines, largely because of the threat they pose to civil rights laws. *See, e.g.*, Colker & Brudney, *supra* note 9, at 131 (contending that the Court has "effectively invited challenges to core civil rights legislation, and states are lining up to claim additional Eleventh Amendment immunities"); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 158-59 (contending that the Court has "created powerful incentives to test the validity of federal antidiscrimination statutes as Section 5-based legislation"); Post & Siegel, *supra* note 7, at 455 ("The Court's new interest in constraining Section 5 power . . . raises disconcerting questions for the future of federal antidiscrimination law.").

[118] U.S. CONST. amend. XI.

[119] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (citations omitted); *see Seminole Tribe*, 517 U.S. at 54 ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh

The Court has further held that Congress lacks the power to "abrogate" Eleventh Amendment immunity when acting pursuant to its Article I powers, but can do so when legislating under Section 5 of the Fourteenth Amendment.[120] As a result, a statute that has been validly enacted under the Commerce Clause can only be applied in private suits against the states to the extent that it also qualifies as proper Section 5 legislation.[121]

Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation," the due process and equal protection guarantees found in Section 1 of the Fourteenth Amendment.[122] At one time, the Court maintained the view that Section 5 grants Congress "the same broad powers" in enforcing Fourteenth Amendment rights as the Necessary and Proper Clause grants Congress in exercising its Article I powers.[123] In 1997, however, the Court announced a new "congruence and proportionality" test for Section 5 legislation,[124] and the Court has already found five federal statutes lacking under that test.[125] The Court's aggressive application

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Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" (alteration in original) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991))); *see also* Alden v. Maine, 527 U.S. 706 (1999) (extending the sovereign immunity doctrine to cover federal suits brought in state court). *But see* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 98-99 (2000) (Stevens, J., dissenting in part and concurring in part, joined by Souter, Ginsburg, and Breyer, JJ.) ("The kind of judicial activism manifested in cases like *Seminole Tribe* [and] *Alden v. Maine* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."); Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 40 (2001) ("Historians and legal scholars have concluded, virtually unanimously, from the language, context, and 'legislative history' of the Eleventh Amendment, that the Amendment was not intended to insulate states from federal court suits to enforce *federal* obligations.").

The irony of the current Court's nontextual approach to the Eleventh Amendment has not been lost on commentators. *See, e.g.*, Rubenfeld, *supra* note 116, at 1151 ("Once upon a time, judicial conservatives criticized those who saw in the Constitution words that were not there, like 'privacy.' *Garrett* goes one better. *Garrett* reads a word that *is* in the Constitution to mean its opposite.").

[120] *See Garrett*, 531 U.S. at 364.

[121] *See id.* An additional requirement is that Congress unequivocally express its intent to subject states to suit in the language of the statute. *See Kimel*, 528 U.S. at 73. The Court has already held that such intent "is clearly present" in Title VII. Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976); *see* Equal Employment Opportunity Act of 1972, § 2(1), 86 Stat. 103 (amending the definition of "person" in Title VII to include "governments, governmental agencies, [and] political subdivisions"); *id.* at § 2(2) (removing the express exclusion of "a State or political subdivision thereof" from the definition of "employer"); *id.* at § 2(5) (amending the definition of "employee" to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision"); *id.* at § 4(a) (adding specific procedures to govern private suits involving "a government, governmental agency, or political subdivision").

[122] U.S. CONST. amend. XIV, § 5.

[123] Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

[124] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[125] *See Garrett*, 531 U.S. 356 (ADA); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act); *Kimel*, 528 U.S. 62 (2000) (ADEA); Fla. Prepaid Postsecondary Educ.

of the congruence-and-proportionality test has led most observers to conclude that the Court has significantly tightened the reins on Section 5 legislation.[126]

The central theme that emerges from the Court's recent decisions is that the Court will carefully scrutinize Section 5 legislation to ensure that Congress has not crossed the line between enforcing constitutional rights and altering those rights.[127] Although Congress has the power under Section 5 to remedy and deter constitutional violations by prohibiting "a somewhat broader swath of conduct" than the

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Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Patent Remedy Act); *City of Boerne*, 521 U.S. 507 (RFRA). *But see* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (holding that the family care provision of the FMLA satisfies the congruence-and-proportionality test).

[126] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 959 (3d ed. 2000) (concluding that Section 5 legislation has "been saddled with something between intermediate and strict scrutiny"); Colker & Brudney, *supra* note 9, at 104 (concluding that the "new framework impose[s] on Congress a much higher burden of proof in establishing the constitutionality of its actions under Section 5"); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 91 (concluding that the pattern of the Court's recent Section 5 decisions "suggests that congruence and proportionality is a demanding standard"); Estreicher & Lemos, *supra* note 117, at 114 (concluding that the Court "now seems prepared to subject Section 5-based legislation to more searching scrutiny in order to protect against congressional overreaching"); Post & Siegel, *supra* note 7, at 477 (concluding that the Court has used the congruence-and-proportionality test to impose restrictions "that seem analogous to the narrow tailoring required by strict scrutiny").

[127] *See Garrett*, 531 U.S. at 365 (explaining that it is "the responsibility of this Court, not Congress, to define the substance of constitutional guarantees" (citing *City of Boerne*, 521 U.S. at 519-24)). In addition to this "separation of powers" concern, the Court has explicitly relied on principles of federalism to justify its careful scrutiny of Section 5 legislation. *See Morrison*, 529 U.S. at 620 (explaining that limitations on the Section 5 power "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government" (citing *City of Boerne*, 521 U.S. at 520-24)).

Several commentators have suggested that the Court's narrowing of Congress's Section 5 power is being driven by Eleventh Amendment concerns. *See* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1019 (2002) ("Having held that Congress may not abrogate state sovereign immunity under Article I, the Court does not want to see Congress use the Section Five power to abrogate state sovereign immunity, except in a limited domain.") (citation omitted); Estreicher & Lemos, *supra* note 117, at 114 ("Because the Court has vested Congress with more power to restrict state sovereignty—by abrogating sovereign immunity—under Section 5 than under Article I, it now seems prepared to subject Section 5-based legislation to more searching scrutiny . . . ."); Post & Siegel, *supra* note 7, at 512 ("[H]aving worked so hard in *Seminole Tribe* to establish state Eleventh Amendment immunity from suits predicated upon federal commerce power, the Court was not about to cede to Congress free rein to override that immunity under Section 5.").

There is also considerable suspicion that other motives may be at work. *See* Fallon, *supra* note 6, at 434, 469, 481-84 (contending that many of the Court's decisions are better explained by "substantive conservatism" than federalism); Post & Siegel, *supra* note 7, at 522 ("We suggest that the *City of Boerne* test is actually a tool for restraining Congress whenever the Court is indifferent or hostile to the constitutional values at stake in particular instances of Section 5 legislation."); Rubenfeld, *supra* note 116, at 1144 (contending that "some of the Court's federalism cases are not really federalism cases at all" and "are better understood as part of an anti-antidiscrimination agenda").

Constitution itself,[128] Congress goes too far when it passes legislation that "effects a substantive redefinition of the Fourteenth Amendment right at issue."[129] The Court has acknowledged that the line between appropriate prophylactic measures and inappropriate definitional measures "is a fine one,"[130] but has emphasized that the "distinction exists and must be observed."[131] Thus, the Court requires that there be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[132]

To determine whether a statutory prohibition is congruent and proportional to the requirements of the Constitution, the Court examines (1) the scope of the statutory prohibition as compared to the scope of the Court's own constitutional jurisprudence in the area, and (2) the legislative record compiled by Congress when enacting the statute.

In applying the first factor, the Court asks whether "there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[133] To date, the Court has not come close to answering this question affirmatively, as it has largely dealt with statutes imposing requirements that far exceed those imposed by its own jurisprudence.[134] For example, in *City of Boerne v. Flores*,[135] the Court addressed RFRA,[136] which was an open attempt to restore the strict scrutiny religious-exemption regime that the Court had explicitly rejected in *Smith*.[137] More

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[128] *Kimel*, 528 U.S. at 81; *see City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . .").

[129] *Kimel*, 528 U.S. at 81.

[130] *Id.*

[131] *City of Boerne*, 521 U.S. at 520.

[132] *Id.*

[133] *Id.*; *see Kimel*, 528 U.S. at 88 (concluding that the "ADEA prohibits very little conduct likely to be held unconstitutional"); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) ("[I]t simply cannot be said that 'many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional.'" (alteration in original) (quoting *City of Boerne*, 521 U.S. at 532)).

[134] In the one case where the Court found that a statutory requirement satisfied the congruence-and-proportionality test, it relied principally on the legislative record factor, not the scope-of-coverage factor. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1978-1981 (2003) (discussing the legislative record of the FMLA). Indeed, the Court in *Hibbs* did not even address the question whether many of the state actions affected by the FMLA had a significant likelihood of being unconstitutional, and instead focused on the fact that Congress was confronting a "difficult and intractable problem" that more modest measures had failed to cure. *Id.* at 1982 (brackets omitted) (quoting *Kimel*, 528 U.S. at 88).

[135] 521 U.S. 507 (1997).

[136] 42 U.S.C. § 2000bb (2000).

[137] *See City of Boerne*, 521 U.S. at 512-16, 532-35; *see also* TRIBE, *supra* note 126, at 960 ("Unlike most § 5 legislation, RFRA was . . . aimed directly at judicial procedures and rules of decision for every federal and state court in the nation, and, as if to dare the Court to defend its turf, RFRA

recently, in *Kimel v. Florida Board of Regents*[138] and *Board of Trustees of the University of Alabama v. Garrett*,[139] the Court confronted statutes prohibiting state actions (age and disability discrimination) that are rarely deemed unconstitutional because they are only subject to rational-basis review.[140] In short, the Court has not yet confronted a case that has required it to provide detailed guidance on the scope-of-coverage factor.[141]

With respect to the legislative record factor, the Court asks "whether Congress had evidence of a pattern of constitutional violations on the part of the States."[142] However, the Court's decisions send mixed messages as to the import of the legislative record inquiry. In *Kimel*, the Court indicated that a strong legislative record can save a statute that falls short on the scope-of-coverage factor,[143] but it made clear that a "lack of support [in the legislative record] is not determinative of the § 5 inquiry."[144] In *Garrett*, however, the Court appeared to come to the opposite conclusion when it asserted that Section 5 legislation "must be based" on a pattern of unconstitutional state conduct.[145]

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was written less like an ordinary statute than like an opinion reversing or overruling the Supreme Court's decision in *Employment Division v. Smith*.").

[138] 528 U.S. 62 (2000)

[139] 531 U.S. 356 (2001)

[140] *See Kimel*, 528 U.S. at 83-84 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."); *Garrett*, 531 U.S. at 366-68, 372-74 (explaining that rational basis scrutiny applies to discrimination based on disability because negative attitudes and fear alone do not necessarily amount to constitutional violations).

[141] *See generally* Estreicher & Lemos, *supra* note 117, at 153 (observing that the Court's jurisprudence "provides scant guidance for either Congress or lower courts as to the degree of congruence and proportionality required between legislative ends and means"); Post & Siegel, *supra* note 7, at 510 (observing that "neither *Boerne* nor *Kimel* specifies the degree of congruence and proportionality that will be demanded of Section 5 legislation").

[142] Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1978 (2003); *see Garrett*, 531 U.S. at 368 ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."); *Kimel*, 528 U.S. at 89 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

[143] The *Kimel* Court noted:

> That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies .... One means by which we have [determined the appropriateness of such remedies] in the past is by examining the legislative record containing the reasons for Congress's action.

528 U.S. at 88. The Court recently gave effect to this rationale in *Hibbs*, 123 S. Ct. at 1982; *see supra* note 134.

[144] *Kimel*, 528 U.S. at 91.

[145] *Garrett*, 531 U.S. at 370; *see id.* at 374 ("[T]here must be a pattern of discrimination by the States which violates the Fourteenth Amendment, *and* the remedy imposed by Congress must be congruent and proportional to the targeted violation.") (emphasis added); *id.* at 376

In light of the tension between *Kimel* and *Garrett*, it is far from certain what the Court would do in a case where a statute appears congruent and proportional based on the scope-of-coverage factor, but lacks support in the legislative record.[146] As discussed below, Title VII's reasonable-accommodation provision might very well present such a case.

IV. REASONABLE ACCOMMODATION AT THE CROSSROADS OF TWO UNSETTLED DOCTRINES

A state sovereign immunity challenge to Title VII's reasonable-accommodation provision would present the Supreme Court with a unique opportunity to resolve some of the lingering uncertainties in both its free exercise and Section 5 doctrines. Specifically, such a challenge would permit the Court to (1) address the breadth of the exceptions to the no-free-exercise-accommodation rule announced in *Smith*, (2) give more concrete meaning to its teaching that enforcement legislation is appropriate if there is "reason to believe" that "many" of the state actions affected by the legislation have a "significant likelihood of being unconstitutional,"[147] and (3) explain the role of the legislative record in cases where enforcement legislation goes somewhat beyond the requirements of the Constitution, but does not have the type of "indiscriminate scope" that has troubled the Court in past cases.[148]

There is, however, one important caveat. The Court need only confront the unresolved issues noted above if it first rejects what may be called the "easy" answer to the reasonable-accommodation/Section 5 question. That answer, which was initially accepted by a federal district court in the first case to raise the issue, *Holmes v. Marion County Office of Family and Children*,[149] is that Title VII's reason-

(Kennedy, J., concurring) ("The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity.").

[146] The Court has faced the opposite situation. *See* United States v. Morrison, 529 U.S. 598, 619-20, 625-26 (2000) (acknowledging the existence of a "voluminous congressional record" revealing "pervasive bias in various state justice systems against victims of gender-motivated violence," but holding that the Violence Against Women Act is not congruent and proportional to the Equal Protection Clause because its remedies are "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias").

[147] City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[148] *See Kimel*, 528 U.S. at 91; *City of Boerne*, 521 U.S. at 532-34 ("Sweeping coverage ensures [RFRA's] intrusion at every level of government, displacing laws . . . of almost every description and regardless of subject matter . . . . The stringent test RFRA demands of state laws . . . is the most demanding test known to constitutional law.").

[149] 184 F. Supp. 2d 828 (S.D. Ind. 2002), *vacated sub nom.*, Endres v. Ind. State Police, 334 F.3d 618 (7th Cir. 2003), *panel opinion revised, judgment vacated, and reh'g en banc granted*, Holmes

able-accommodation requirement satisfies the congruence-and-proportionality test because it is a modest measure designed to enforce the Free Exercise Clause's undisputed prohibition of intentional discrimination.[150] As discussed below in Part IV.A, the easy answer ultimately proves too easy as it cannot be squared with either the actual operation of the reasonable-accommodation provision or its legislative history.[151] Accordingly, Part IV.B turns to the more plausible, albeit messy, argument for sustaining Title VII's reasonable-accommodation provision—that it appropriately enforces the free exercise accommodation requirements that have survived *Smith*, whatever they may be.[152]

A. Reasonable Accommodation and Intentional Discrimination

In holding that Title VII's reasonable-accommodation provision constitutes appropriate Section 5 enforcement legislation, the district court in *Holmes* concluded that the provision targets the same "core injury" as the Free Exercise Clause, that is, "intentional discrimination."[153] To understand why that reasoning is unlikely to prevail in the Supreme Court, it is helpful to begin with the Court's analysis in *Kimel* and *Garrett*.

In both of those cases, the Court placed particular emphasis on the low level of judicial scrutiny that would apply to the challenged state conduct (age and disability discrimination, respectively) under the Constitution.[154] The reason for that emphasis is clear: When a law prohibits state employer conduct that is subject to rational basis review under the Constitution, the law is almost certain to affect "substantially more state employment decisions and practices than would

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v. Marion County Office of Family & Children, 349 F.3d 914 (7th Cir. 2003), *appeal dismissed pursuant to Federal Rule of Appellate Procedure 42(b)*, (Jan. 20, 2004).

[150] *See Holmes*, 184 F. Supp. 2d at 836-37.

[151] The Seventh Circuit's panel decision in *Holmes* properly rejects the easy answer. *See* 349 F.3d at 919-20. However, in doing so, the panel decision fails to discuss much of the district court's contrary reasoning, including its key assertion that the burden imposed by the reasonable-accommodation provision is so modest that only employers with "invidious" motives will fail to comply. 184 F. Supp. 2d at 836. Part IV.A directly addresses the district court's analysis in *Holmes* and explains why it is unsound.

[152] This argument was not addressed by either the district court or the Seventh Circuit panel in *Holmes*.

[153] *Holmes*, 184 F. Supp. at 836.

[154] *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2000) ("[S]uch legislation incurs only the minimum 'rational-basis' review applicable to general social and economic legislation."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (noting that the elderly have neither a "'"history of purposeful unequal treatment,"'" nor are they a "discrete and insular minority" (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 28 (1973)))).

likely be held unconstitutional."[155] By contrast, when a law regulates conduct that is subject to strict scrutiny under the Constitution, there is good reason to believe that the law will prohibit "little, if any, constitutional behavior."[156]

Given the importance of judicial scrutiny to the Court's Section 5 analysis,[157] one argument for upholding Title VII's reasonable-accommodation provision is that religious classifications, unlike classifications based on age and disability, are subject to strict scrutiny under the Constitution. Indeed, the court in *Holmes* was receptive to that argument and explicitly distinguished Title VII from the ADA by pointing out that "'[r]ational discrimination against persons with disabilities is constitutionally permissible in a way that rational discrimination against religious practices is not.'"[158] However, that observation misses a crucial point. Although *discrimination against* religion is subject to strict scrutiny under the Constitution, the failure to make *accommodations for* religion is subject to no scrutiny so long as a state is acting pursuant to a neutral and generally applicable policy.[159] Thus, the issue is not merely one of degree (how much scrutiny), but also one of kind (what type of state conduct will trigger judicial scrutiny in the first place).[160]

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[155] *Kimel*, 528 U.S. at 86.

[156] Nanda v. Bd. of Trs., 303 F.3d 817, 830 (7th Cir. 2002) (finding Title VII to be appropriate Section 5 legislation insofar as it prohibits disparate treatment on the basis of race and sex), *cert. denied*, 123 S. Ct. 2246 (2003).

[157] Robert Post and Reva Siegel have argued persuasively that the level of judicial scrutiny applying to particular state conduct should not play such a large role in the Court's Section 5 analysis, especially in contexts where principles of "judicial restraint" have led the Court to adopt a rational basis standard of review. Post & Siegel, *supra* note 7, at 462-66. In their view, Section 5 provides Congress with authority to fill the "gap between conduct that the Court in principle recognizes might be unconstitutional and conduct that the Court is willing in adjudication to hold unconstitutional." *Id.* at 465. The Court, however, appears to have rejected that position. *Compare Garrett*, 531 U.S. at 372 (concluding that, even if Congress had found a "pattern of unconstitutional discrimination by the States," the ADA would not be appropriate enforcement legislation because the burden it imposes on states "far exceeds" that which the Court's rational basis standard would impose), *with id.* at 383 (Breyer, J., dissenting) ("The problem with the Court's approach is that neither the 'burden of proof' that favors States nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power.").

[158] *See Holmes*, 184 F. Supp. 2d at 837 (quoting Erickson v. Bd. of Governors, 207 F.3d 945, 951 (7th Cir. 2000)).

[159] *See* Employment Div. v Smith, 494 U.S. 872, 878 (1990) (holding that if a prohibition of religion is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended").

[160] *See generally* Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 104:

> The *Smith* and *Flores* Courts are best understood as emphasizing a deep point about the *conceptual structure* of religious liberty, not simply a view about *how much* religious liberty is desirable . . . . The point is this: the only sound conception of religious liberty is founded upon protecting religious exercise against persecution, discrimination, insensitivity, or hostility. There is no coherent normative basis for insisting that religious

That same point plays out when considering a related contention that is based on the relative ease of establishing an undue-hardship defense under Title VII. In *Kimel*, the Court explained that one of the reasons the ADEA was "'so out of proportion'"[161] to the Constitution was that its bona-fide-occupational-qualification ("BFOQ") defense provided only "'"an extremely narrow exception"'" to liability for age discrimination.[162] In light of that analysis, it would be tempting to conclude that Title VII's reasonable-accommodation provision can be sustained simply because its undue-hardship defense provides "a very broad exemption from liability."[163] Like the "scrutiny" argument, however, the "defense burden" argument falls wide of the mark because it glosses over the critical distinction between legislation that imposes a *quantitatively greater* burden than the Constitution and legislation that imposes a *qualitatively different* burden.

The ADEA fits into the former category because, even though it prohibits more conduct than the Constitution, it prohibits the same type of conduct—intentional discrimination. Thus, if the statutory defense was lowered from the BFOQ standard to something closer to the Court's rational basis standard, the ADEA might very well be deemed congruent and proportional to the requirements of the Constitution. By contrast, Title VII's reasonable-accommodation provision falls into the latter category because it imposes a substantive requirement (accommodation) that is different in nature than the core requirement of the Free Exercise Clause under *Smith* (nondiscrimination).[164] The mere fact that the defense to Title VII's accommodation

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commitments receive better treatment than other, comparably serious commitments . . . .

[161] 528 U.S. 62, 86 (2000) (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

[162] *Id.* at 87 (quoting W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 412 (1985) (citation omitted in original)).

[163] *Holmes*, 184 F. Supp. 2d at 835.

[164] *See* Holmes v. Marion County Office of Family & Children, 349 F.3d 914, 921 (7th Cir. 2003) (granting rehearing en banc) (explaining that "there is a difference and a potential tension between an anti-discrimination rule and an accommodation requirement"), *appeal dismissed pursuant to Federal Rule of Appellate Procedure 42(b)*, (Jan. 20, 2004).

Professor Christine Jolls has argued that accommodation and antidiscrimination should not be treated as "fundamentally distinct" because the "disparate impact" branch of antidiscrimination doctrine already functions as an accommodation requirement when it is broadly applied. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 651-52 (2001). However, because disparate impact liability is not a branch of *constitutional* antidiscrimination doctrine, *see* Washington v. Davis, 426 U.S. 229, 239 (1976), it does not form part of the relevant baseline for purposes of the Court's Section 5 analysis. Accordingly, disparate impact provisions must themselves be tested against the Constitution's intentional discrimination baseline. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372-73 (2001) (contrasting the ADA's disparate impact provision with the requirements of the Constitution). Professor Jolls acknowledges this point, but nevertheless treats disparate impact liability as an appropriate measuring stick for other accommodation requirements because "existing doctrine holds Title VII's disparate-impact branch to be within Congress's power under Section 5." Jolls, *supra*, at 677. However,

requirement may be broad is of no significance unless it can be shown that the requirement itself is sufficiently related to a "constitutional value" that Congress has the authority to enforce.[165] And if the only constitutional value in the Free Exercise Clause is freedom from intentional discrimination, the requisite relationship will be difficult to establish.

The inadequacy of focusing solely on the breadth, rather than the nature, of a statutory defense is well illustrated by the district court's effort in *Holmes* to draw an analogy between Title VII's undue-hardship defense and the defense available to employers under the Equal Pay Act ("EPA"),[166] a statute that has been upheld as appropriate Section 5 legislation by several courts of appeals.[167] Under the EPA, a plaintiff can establish a prima facie case of gender discrimination without showing discriminatory intent, but a defendant can then avoid liability by showing that the existing wage disparity is based on any factor other than sex. Seizing upon the breadth of that defense, the *Holmes* court offered the following analysis:

> [T]he EPA allows a broad exemption from liability for any employer who can prove a neutral explanation for a disparity in pay. As a result, the Seventh Circuit [has] concluded that the EPA [i]s congruent to the Fourteenth Amendment because, like the Fourteenth Amendment, the EPA effectively targets only "employers who intentionally discriminate against women."

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that "existing doctrine" has never been approved by the Supreme Court and has only been tested by the Seventh and Eleventh Circuits since the Court announced its congruence-and-proportionality test in *City of Boerne*. *Id.* at 673 n.151. Moreover, as Jolls points out, the rationale employed by one of those courts is difficult to "'take[] seriously'" as it "seem[s] to suggest an almost airtight link between disparate impact liability and intentional discrimination." *Id.* at 676 (quoting Post & Siegel, *supra* note 7, at 452).

In any event, it is hard to escape the conclusion that the disparate impact theory is itself "fundamentally distinct" from Title VII's reasonable-accommodation requirement. Whereas the former only applies when an employment practice systematically disadvantages an entire group of people, the latter can be triggered by the needs of an individual employee. *Cf. City of Boerne*, 521 U.S. at 535 (contrasting RFRA's accommodation requirement with disparate impact theory and observing that "[w]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens").

[165] *See* Estreicher & Lemos, *supra* note 117, at 142 (recognizing that, at the very least, the congruence-and-proportionality test limits Congress's Section 5 power "to those areas the Court has identified (or is prepared to identify) as implicating the constitutional values that inhere in the Fourteenth Amendment").

[166] 29 U.S.C. § 206(d) (2000).

[167] *See* Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541 (7th Cir. 2001); Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999); Ussery v. Louisiana *ex rel.* La. Dep't of Health & Hosps., 150 F.3d 431 (5th Cir. 1998).

> The Court concludes that the same is true with respect to Title VII, which also contains a very broad exemption from liability for employers.[168]

The fatal flaw in this reasoning is that Title VII, unlike the EPA, does *not* exempt "any employer who can prove a neutral explanation" for its behavior. Quite the opposite, Title VII's reasonable-accommodation requirement by definition contemplates nonneutral treatment, and a genuine desire to treat all employees equally is not a defense.[169]

Equally unpersuasive is the district court's attempt in *Holmes* to bolster its reasoning by posing the following rhetorical question: "If the employer cannot show that an accommodation would have involved anything more than a de minimis cost, what explanation can there be for the employer's conduct other than that some invidious purpose is probably at work?"[170] Contrary to the court's implicit assumption, there are a number of noncost, nondiscriminatory reasons why a state employer might decline to make a religious exception to a work rule. For example, a state employer might simply wish to avoid favoritism in the workplace. Indeed, in most contexts, we *want* the government to avoid favoritism, especially religious favoritism, and it seems quite odd to conclude that a state employer who does just that should be presumed to have engaged in "invidious" discrimination.[171] In addition, the *Holmes* court overlooks a number of other possible rationales, ranging from the all-too-common bureaucratic response

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[168] *See* 184 F. Supp. 2d at 835 (citation omitted) (quoting Varner v. Ill. State Univ., 226 F.3d 927, 934 (7th Cir. 2000)).

[169] *See Holmes*, 349 F.3d at 921 (explaining that "accommodation requires consciousness of religion and entails a demand that believers and nonbelievers receive different treatment").

A better, though not perfect, analogy would be to the FMLA, which requires employers to accommodate certain family and medical needs of employees by providing twelve weeks of unpaid leave. *See* 29 U.S.C. § 2612(a)(1) (2000). Even though the FMLA does not contain an equality of treatment defense, the Supreme Court recently upheld the FMLA's family care provision as appropriate Section 5 legislation. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003). However, the Court rested its decision in *Hibbs* on the fact that Congress drafted the FMLA in response to a continuing pattern of sex discrimination that represented a "'difficult and intractable problem'" necessitating "added prophylactic measures." *Id.* at 1982 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62,88 (2000)). The Court is not likely to apply a similar rationale in the religion context. *See City of Boerne*, 521 U.S. at 530 (observing that RFRA's extensive legislative history contains no episodes of religious discrimination "occurring in the past 40 years"); *Holmes*, 349 F.3d at 919-20 (refusing to extend *Hibbs* and explaining that religious discrimination by states "does not have the same history as discrimination on account of race or sex").

[170] *Holmes*, 184 F. Supp. 2d at 836.

[171] *Cf.* Bowen v. Roy, 476 U.S. 693, 707 (1986) (plurality opinion) (arguing that when religious exemptions from a government requirement are requested, "legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants").

that "this is the way we do things,"[172] to the perhaps more thoughtful concern that making one exemption from a work rule will set a precedent and make it harder to deny future exemptions, whether religious or not.[173]

In the end, the court's conclusion in *Holmes* that the reasonable-accommodation provision "targets" intentional discrimination is based on a wholly unfounded assumption that state employers who deny accommodations are likely to have invidious motives. Moreover, the court's assumption appears to be in tension with the legislative history of the reasonable-accommodation provision. During his floor speech in support of the provision, Senator Randolph, the chief proponent of the measure, never expressed a belief that employers were denying accommodations out of religious bias. Rather, he stated: "I think that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind and heart. I do not think they try to present problems. I do not think they try to have abrasiveness come into these decisions."[174] That view finds support in the facts of the lead pre-amendment case Senator Randolph placed in the record, *Dewey v. Reynolds Metals Co.*[175] In *Dewey*, the employer "did endeavor to make accommodation," and simply would not go as far as the employee desired.[176] Likewise, in the only other case placed in the record, *Riley v. Bendix Corp.*,[177] the court observed that there was no evidence of discrimination,[178] and found that the burden on the plaintiff's religion was "simply an incident" of a rule "applied uniformly to all employees no matter what their religious affiliation happened to be."[179] Against that background, Title VII's reasonable-accommodation provision is best understood as a measure targeting incidental burdens, not intentional discrimination.[180]

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[172] *Cf.* Volokh, *supra* note 59, at 1484 (observing that RFRA's supporters hoped it "would give religious objectors a tool to fight rigid-thinking petty bureaucrats").

[173] *See* Amar, *supra* note 15, at 519 (observing that the fear of "'setting a precedent of granting exceptions'" is "often asserted as a reason for denying" an accommodation but does not qualify as an undue hardship).

[174] 118 CONG. REC. 705, 706 (Jan. 21, 1972) (statement of Sen. Randolph).

[175] 429 F.2d 324 (1970), *reprinted in* 118 CONG. REC. at 706.

[176] 429 F.2d at 335.

[177] 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972), *reprinted in* 118 CONG. REC. at 711.

[178] 330 F. Supp. at 589-90.

[179] *Id.* at 589.

[180] *Cf.* City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (discussing how the legislative history of RFRA reveals that Congress was concerned about "laws of general applicability which place incidental burdens on religion," not "'deliberate persecution'" (quoting Religious Freedom Restoration Act of 1991, Hearings on H. R. 2797 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess., 331-334 (1993) (statement of Douglas Laycock)); Estreicher & Lemos, *supra* note 117, at 134 ("In its brief and

It bears repeating that Congress's effort to minimize incidental burdens on religious employees was wholly consistent with the Court's free exercise jurisprudence in 1972, when the reasonable-accommodation provision was enacted.[181] Nevertheless, the Court's doctrine has since changed, and the broad accommodation requirements of *Sherbert* and *Yoder* have been replaced by the less accommodation-friendly *Smith* rule. Given that development, it is not altogether surprising that the district court in *Holmes* sought to reformulate Title VII's reasonable-accommodation provision as a measure targeting the Constitution's undisputed prohibition of intentional discrimination. But as the above discussion reveals, there is no reason to believe that state employers affected by the reasonable-accommodation requirement are necessarily engaged in such discrimination.

Fortunately for those defending the reasonable-accommodation provision under Section 5, there is an alternative to the intentional discrimination argument. The better option is to seize upon the fact that, even under *Smith*, the Court has not quite moved to a "religion-blind" Free Exercise Clause. Rather, the Court still requires religious accommodation under certain circumstances, and the fate of Title VII's reasonable-accommodation provision will likely depend on how closely it can be tied to those circumstances.

B. Reasonable Accommodation, the Smith *Exceptions, and the Vagaries of "Congruence and Proportionality"*

To determine whether Title VII appropriately enforces the free exercise accommodation requirements that have survived *Smith*, it is first necessary to ascertain the health of the survivors. As discussed in Part II, although the *Smith* Court recognized two exceptions to its general rule rejecting free exercise accommodations, one of those exceptions—the hybrid-rights rule—has been roundly criticized as unprincipled and unworkable, and there is good reason to doubt that the Court will actually apply it in the future.[182] By contrast, the second *Smith* exception—the selective-exemption rule—has found considerable favor among lower courts and commentators,[183] and was reaffirmed by the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[184] Given those circumstances, the focus of the following

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in oral argument before the Court, the United States attempted to characterize RFRA as a remedial measure aimed at rooting out intentional discrimination that might not be captured by the *Smith* test. This characterization is more than a little implausible . . . .") (footnote omitted).

[181] *See supra* notes 76-85 and accompanying text.

[182] *See supra* notes 103-08 and accompanying text.

[183] *See supra* notes 109-12 and accompanying text.

[184] 508 U.S. 520 (1993).

analysis will be on whether Title VII's reasonable-accommodation provision can be upheld as a measure that appropriately enforces the selective-exemption rule.

A Section 5 inquiry into the relationship between the reasonable-accommodation provision and the selective-exemption rule would require the Court to confront several unresolved issues. First, the Court would have to clarify the scope of the selective-exemption rule in order to determine how often that rule is likely to be implicated in state employment cases covered by Title VII's reasonable-accommodation provision. Second, the Court would have to decide whether the degree of overlap between the reasonable-accommodation provision and the selective-exemption rule satisfies the vague standard announced in *City of Boerne*, that is, whether there is "reason to believe" that "many" of the state employment decisions affected by the reasonable-accommodation provision will have a "significant likelihood" of being deemed unconstitutional under the selective-exemption rule.[185] Finally, even if that standard is met, the Court would have to determine whether the reasonable-accommodation provision can be deemed appropriate enforcement legislation despite the lack of any evidence in the legislative record of unconstitutional state action.

Based on a review of those issues, this Article concludes that the Court can and should uphold Title VII's reasonable-accommodation requirement under Section 5. The question, however, is much closer than many might like to admit.

1. *Selective Exemptions and State Employment*

The basic thrust of the selective-exemption rule is that government officials should not be permitted to make value judgments that disfavor religious practices as compared to similar secular practices.[186] Accordingly, the Supreme Court has instructed that when "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"[187] By presumptively requiring religious exemptions when other exemptions are available, the Court's rule ensures that state officials do not "devalue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons."[188]

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[185] 521 U.S. at 532.

[186] *See supra* text accompanying notes 113-14.

[187] *Lukumi*, 508 U.S. at 537 (quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986))).

[188] *Id.* at 537-38.

The Court has only discussed the selective-exemption rule on two occasions,[189] and is unclear whether the rule only covers situations in which the government makes individualized exemptions, or more broadly applies to situations involving categorical exemptions. Resolution of that issue is necessary to determine how often the selective-exemption rule is likely to arise in the state employment context. Interestingly enough, the lead lower court decision addressing the issue, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[190] arose in the employment context.

Newark Lodge concerned a police department policy that prohibited uniformed officers from wearing beards, but included a categorical exemption for officers who had medical reasons for not shaving.[191] When two officers whose religious beliefs prohibited them from shaving were denied similar exemptions, they brought suit and argued that the police department's policy "devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons."[192] The Third Circuit agreed, and gave the following explanation for why categorical exemptions should be treated similarly to individualized exemptions:

> While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.[193]

Consistent with that reasoning, the court found that "the medical exemption raises concern because it indicates that the Department

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[189] *See id.*; *Smith*, 494 U.S. at 884 ("[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." (quoting *Roy*, 476 U.S. at 708)). Prior to *Smith*, a three-justice plurality of the Court had endorsed the selective-exemption rule in *Roy*, 476 U.S. at 708 (Burger, C.J., joined by Powell and Rehnquist, JJ.) ("If a state creates [a mechanism for individual exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent.") In addition, Justice Stevens expressed views consistent with the selective-exemption rule in three pre-*Smith* cases. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 147-48 (1987) (Stevens, J., concurring in the judgment); *Roy*, 476 U.S. at 721-22 & n.17 (Stevens, J., concurring in part and concurring in the result) ("To the extent that other . . . applicants are, in fact, offered exceptions and special assistance in response to their inability to 'provide' required information, it would seem that a religious inability should be given no less deference."); United States v. Lee, 455 U.S. 252, 263-64 n.3 (1982) (Stevens, J., concurring in the judgment).

[190] 170 F.3d 359 (3d Cir. 1999).

[191] *Id.* at 360.

[192] *Id.* at 365.

[193] *Id.*

has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[194]

Although *Newark Lodge* has been embraced by a number of scholars who believe that it represents a logical extension of the Supreme Court's reasoning in *Smith* and *Lukumi*,[195] others are more skeptical.[196] The principal arguments against the broad *Newark Lodge* approach are (1) that it is too far-reaching because "virtually all laws . . . contain many secular exemptions,"[197] (2) that it prevents legislatures from promoting the common good by favoring particularly beneficial secular activities over all other activities, whether secular or religious,[198] and (3) that categorical exemptions are less likely to be the product of discrimination than are "discretionary, case-by-case decisions made by unelected officials."[199] As shown below, all three arguments are in tension with the Supreme Court's decision in *Lukumi*.

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[194] *Id.* at 366. The policy also included an exemption for undercover officers, but the court found that exemption to be irrelevant because it did not undermine the purpose of the no-beard policy, which was to foster a "uniform appearance" among those officers who were "'held out to the public as law enforcement person[nel].'" *Id.* (quoting Reply Brief at 9); *see* Gedicks, *supra* note 112, at 119 ("Religion is treated unequally only if nonexempted religious conduct is in the same relationship to the purpose of a law as exempted secular conduct."); *cf.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 697-98 & n.3 (10th Cir. 1998) (suggesting in dicta that secular exemptions do render a rule nonneutral towards religion when the exemptions are consistent with the purpose of the rule).

[195] *See, e.g.*, Duncan, *supra* note 108, at 872-74 ("[The *Newark Lodge* judge's] excellent opinion closely tracked the reasoning of *Lukumi* regarding underinclusiveness as the key to locating the boundary between general applicability and non-general applicability."); Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 31-33 (2000) (opining that the distinction between individualized and categorical exceptions "makes no sense," and praising the *Newark Lodge* decision as "promising").

[196] *See, e.g.*, Daniel O. Conkle, *The Free Exercise Clause: How Redundant, and Why?*, 33 LOY. U. CHI. L.J. 95, 109 (2001) (finding the extension of the selective-exemption rule to categorical exemptions "plausible and potentially attractive," but expressing "doubt that the Supreme Court's free exercise doctrine stretches" so far).

Prior to *Newark Lodge*, both the Ninth and Tenth Circuits rejected efforts to apply the selective-exemption rule to situations where the only exemptions permitted by the government covered "entire, objectively-defined categories." Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408-09 (9th Cir. 1992) (involving exemptions to an immigration reporting law for independent contractors, household employees, and employees hired prior to November 1986); *see Swanson*, 135 F.3d at 701 (involving exemptions to a school board's "no-part-time-attendance" policy for fifth-year seniors and special education students). However, because *American Friends* was decided prior to the Supreme Court's decision in *Lukumi*, and because *Swanson* involved exemptions that did not undermine the purpose of the general rule in that case, *see id.* at 697-98 & n.3, it is not clear that either case is squarely in conflict with *Newark Lodge*. *See supra* note 194.

[197] Volokh, *supra* note 59, at 1540.

[198] *See id.* at 1540-42 (arguing that it "may be perfectly proper" for a legislature to value "'the exempted secular activities more highly' than the religious activities" (footnote omitted) (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 51)).

[199] Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1081 (2000). *But see* Gedicks, *supra* note 112, at 118

First, with respect to the ubiquity of categorical exemptions, the *Lukumi* Court explicitly recognized that "[a]ll laws are selective to some extent," but nevertheless concluded that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[200] The Court went on explain that the four city ordinances at issue in *Lukumi* were underinclusive because they failed to prohibit nonreligious conduct that endangered the city's interests "in a similar or greater degree" than the prohibited religious conduct.[201] Admittedly, the Court found the underinclusion in *Lukumi* to be particularly troubling because the combined effect of the four ordinances was to exempt all but a few nonreligious activities.[202] However, the Court was careful to point out that the city's conduct fell "*well below* the minimum standard necessary to protect First Amendment rights."[203] Indeed, even when the Court focused on one particular ordinance that contained only a single categorical exemption, it still faulted the city for failing to explain why the exempted conduct did not implicate the purposes of the ordinance to the same degree as the covered religious conduct.[204] Notably, the Court nowhere indicated that such underinclusive burdening of religion could be tolerated simply because many laws are underinclusive.

The argument that the government should be permitted to value select secular activities more highly than other activities, including religious activities, is undermined by *Lukumi*'s treatment of the city of Hialeah's decision to make exemptions to its animal cruelty ordinance for "hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia."[205] The Court held that exempting such conduct while refusing to exempt ritual sacrifices impermissibly "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[206] Moreover, the Court

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(arguing that the reasoning underlying the individualized-exemption rule "need not be confined to situations in which government actors exercise administrative discretion").

[200] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

[201] *Id.* at 543; *see also id.* at 546 ("The proffered objectives are not pursued with respect to analogous nonreligious conduct . . . .").

[202] *See id.* at 543 ("[T]he ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.").

[203] *Id.* (emphasis added).

[204] *See id.* at 545. The Court discussed the single-exemption ordinance in two separate sections of its opinion, one on "neutrality," and the other on "general applicability." *Id.* at 532, 539-40, 542, 545. In the neutrality section, the Court found it unnecessary to decide whether the single-exemption ordinance "could survive constitutional scrutiny if it existed separately." *Id.* at 540. However, in the "general applicability" section, the Court concluded that "*all four* ordinances [were] overbroad or underinclusive in substantial respects." *Id.* at 546 (emphasis added).

[205] *Id.* at 537.

[206] *Id.* at 537-38.

found the exemptions to be problematic even though they were incorporated from laws passed by the Florida legislature, and the Court rejected out of hand the argument that food consumption, pest control, and euthanasia could be treated as "'obviously'" more "'important'" and "'justified'" than animal sacrifice.[207]

Finally, the contention that the selective-exemption rule can be limited to discretionary decisions made by unelected bureaucrats ignores the fact that the *Lukumi* Court applied the rule to decisions made by the elected attorney general of Florida and the elected council members of the city of Hialeah.[208] Of course, one could attempt to narrow the contention by jettisoning the "unelected bureaucrat" element and focusing solely on the "discretionary decision" element. However, even such a modified argument would be in tension with *Lukumi*, which nowhere focuses on the dangers of discretionary decision making, and instead expresses a more general concern about government actions that devalue religious activities by treating them less favorably than secular activities. As the Third Circuit observed in *Newark Lodge*, the Supreme Court's concern would appear to be no less implicated by the categorical favoring of secular activities than by the discretionary favoring of such activities.[209]

In the end, although *Lukumi* does not compel the conclusion that the Free Exercise Clause requires exemptions for religious conduct whenever the government makes categorical exemptions for comparable conduct, it does provide considerable support for that conclusion. And were the Court to adopt such a "most-favored-nation"[210] approach, it is likely that the selective-exemption rule would often be implicated in the state employment context.

For example, whenever leave and attendance policies make allowances for family obligations, as is increasingly common,[211] the failure

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[207] *Id.* at 544 (quoting Respondents' Brief at 21); *see also* Duncan, *supra* note 108, at 875 ("The decision of the legislature to value secular conduct that is not expressly protected by the constitution more than analogous religiously motivated conduct is precisely the kind of unequal treatment that should be the minimum standard for constitutional protection of the free exercise of religion.").

[208] *Lukumi*, 508 U.S. at 537.

[209] Notably, in applying the selective-exemption rule, the *Lukumi* Court relied on a prior opinion by Justice Stevens indicating that when regulations provide categorical exemptions for individuals "with mental, physical, and linguistic handicaps," those with "a religious inability should be given no less deference." Bowen v. Roy, 476 U.S. 693, 721-22 (1986) (Stevens, J., concurring in part and concurring in result), *cited in Lukumi*, 508 U.S. at 538. Against that background, the Third Circuit's holding in *Newark Lodge* that a categorical exemption for medical inability must be matched by an exemption for religious inability hardly seems extraordinary.

[210] Duncan, *supra* note 108, at 880 & n.191 (contending that "religious practice is entitled to a kind of most-favored-nation status" under *Lukumi*).

[211] *See, e.g.*, National Partnership for Women & Families, *State Family Leave Benefit Initiatives in the 2001-2002 State Legislatures: Making Family Leave More Affordable* ("At least 40 states have laws

to make comparable allowances for religious obligations would be subject to heightened scrutiny. The same would be true whenever dress codes or grooming rules include medical exemptions,[212] but not religious exemptions, or whenever special breaks are permitted for smokers,[213] but not for religious adherents. Thus, under the "categorical exemption" approach, a strong argument could be made that the Free Exercise Clause itself would require accommodation in many of the same situations affected by Title VII's reasonable-accommodation provision.

If, however, the Court were to limit the selective-exemption rule to situations involving individualized rather than categorical exemptions, the universe of accommodation claims implicating the Free Exercise Clause would be more limited. As to what might remain in that universe, there are two principal answers. First, the narrower rule would still apply when, by policy or practice, managers and supervisors are given discretion to make individualized adjustments to workplace rules on a case-by-case basis. Second, the narrower rule might be triggered during the disciplinary appeal process where state employers typically must show "cause" for disciplining employees.[214]

Turning to the first category, intuition might suggest that there will be many situations in which managers and supervisors will make discretionary allowances for individual employees. And with respect to certain matters, such as excusing occasional tardiness, that

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or regulations allowing public employees to use sick leave to care for certain sick family members."), *at* http://www.nationalpartnership.org/index.cfm (last visited Feb. 27, 2004); 1 Collective Bargaining Negot. & Cont. (BNA) 14:1303 (Sept. 11, 1997) ("In an effort to accommodate family obligations, a growing number of contracts allow workers to use some of their paid sick leave to care for family members."); 2 Collective Bargaining Negot. & Cont. (BNA) 180:1907 (Dec. 16, 1999) (describing a sick leave/family care provision in a contract covering employees at Pennsylvania State University). The trend toward accommodating family needs in collective bargaining agreements is significant because approximately thirty-five percent of state employees are represented by unions. *See Data on Union Membership in 2002 by Industry, Occupation, State*, DAILY LAB. REP. (BNA, Washington, D.C.), Feb. 26, 2003, at E-1, E-3.

[212] *See e.g.* FLA. ADMIN. CODE ANN. r. 33-208.101(2)(e) (2000) (providing a medical exemption to a no-facial-hair rule for state correctional employees); Weaver v. Henderson, 984 F.2d 11, 11-12 & n.1 (1st Cir. 1993) (describing a Massachusetts State Police Department policy that prohibited facial hair, but contained a medical exemption); 2 COLLECTIVE BARGAINING NEGOT. & CONT. (BNA) 180:705 (Sept. 6, 2001) (describing a contract provision at the University of San Francisco that requires medical exemptions from a dress code).

[213] *See, e.g.*, North Carolina Department of Transportation, *Smoking Policy* ("Employees should be allowed reasonable time to go to [designated smoking areas] for smoking."), *at* http://www.ncdot.org/services/personnel/manualandpolicies/hrmanual/Word/SMOKINGPOLICY.doc (last visited Feb. 27, 2004); California Department of Personnel Administration, *State Policies* ("'Smoke breaks' usually are permitted at the discretion of the supervisor in lieu of the time regularly allotted for breaks and rest periods."), *at* http://www.dpa.ca.gov/benefits/general/orientation/orie3.shtm (last modified Nov. 12, 2003).

[214] 1 ISIDORE SILVER, PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE 237 (3d ed. 2001) ("Cause is the key concept in the law of public employment discipline and discharge.").

supposition is probably correct.[215] Less clear, however, is how often supervisors will have discretion to make individualized exemptions from the types of workplace rules commonly challenged under Title VII's reasonable-accommodation provision, such as rules governing scheduling, leave, and employee appearance. In the state employment context, the contours of those rules will often be established by collective bargaining agreements or state law, and the notion that supervisors will frequently be given discretion to act contrary to those authorities is far from intuitive.[216] Moreover, intuition aside, it could prove difficult as a practical matter to establish in litigation that such discretionary exemptions are routinely made in state workplaces. Unlike categorical exemptions, which can be readily identified in existing collective bargaining agreements and state laws, discretionary exemptions are largely a matter of informal practice, not written policy. Thus, in the absence of any congressional findings about the informal practices of state employers, the Court might be reluctant to conclude that state managers and supervisors are particularly likely to make discretionary exemptions from the types of workplace rules affected by Title VII's reasonable-accommodation provision.

That leaves the argument that individualized exemptions are regularly made in the state employment context due to use of the "cause" standard in disciplinary proceedings. On the surface, that argument is appealing because it seems reminiscent of the *Smith* Court's treatment of the "good cause" standard used in the unemployment compensation context. In *Smith*, the Court explained that because unemployment compensation programs typically permit individuals to reject work for good cause, a "distinctive feature" of those programs "is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment."[217] In other words, the good cause standard constitutes a "'mechanism for individualized exemptions'" from the general requirement that beneficiaries accept available work.[218]

Based on *Smith*, one could argue that the "cause" standard in state disciplinary proceedings constitutes a mechanism for individualized exemptions because it invites "consideration of the particular circumstances" behind an employee's discipline.

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[215] *See* FRANK ZEIDLER, MANAGEMENT'S RIGHTS UNDER PUBLIC SECTOR COLLECTIVE BARGAINING AGREEMENTS 30 (1980) ("It is sometimes the practice of management to excuse tardiness when the excuse offered seems reasonable to the immediate supervisor.").

[216] *But cf.* Opuku-Boateng v. California, 95 F.3d 1461, 1474 n.26 (9th Cir. 1996) (describing a situation in which ad hoc scheduling adjustments were made to accommodate the personal needs of individual employees).

[217] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

[218] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

However, despite the surface appeal of the analogy between the unemployment compensation context and the employee discipline context, the analogy ultimately breaks down because the "particular circumstances" being analyzed in the two contexts are fundamentally different. In unemployment compensation proceedings, the "good cause" standard is used to judge the merits of an *employee's* reason for refusing to work. By contrast, in disciplinary proceedings, the "cause" standard is used to judge the merits of an *employer's* grounds for disciplining an employee. In the latter context, once it is determined that certain conduct (such as chronic absenteeism or refusal to comply with work rules) constitutes cause for discipline, an employee's personal motivation for engaging in that conduct does not entitle the employee to an exemption from discipline. Thus, the decision maker is not put in the position of weighing the value of religious reasons for employee conduct versus other personal reasons, and the principal concern animating the selective-exemption theory is not implicated.

In sum, if the Court declines to interpret the selective-exemption rule as covering situations involving categorical exemptions, it could be difficult to demonstrate congruence and proportionality between the selective-exemption rule and Title VII's reasonable-accommodation provision. By contrast, if the Court does interpret the selective-exemption rule as covering categorical exemptions, as *Lukumi* appears to foreshadow, a strong argument could be made that the rule will often be implicated when religious accommodations are denied in state workplaces. The Court would then have to address the question of "how often is often enough" to demonstrate sufficient congruence and proportionality under Section 5.

2. *Deciphering "Congruence and Proportionality"*

The Supreme Court's recent jurisprudence indicates that the basic test for determining if federal legislation is congruent and proportional to the Constitution is whether there is "reason to believe" that "many" of the state actions affected by the legislation have a "significant likelihood of being unconstitutional."[219] To date, however, the Court has not had to struggle with the precise meaning of that standard because it has primarily dealt with legislation that has

[219] City of Boerne v. Flores, 521 U.S. 507, 532 (1997); *see* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (concluding that "it simply cannot be said that 'many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional'" (alteration in original) (quoting *City of Boerne*, 521 U.S. at 532)).

prohibited "very little conduct likely to be held unconstitutional."[220] Thus, to determine whether Title VII's reasonable-accommodation provision constitutes appropriate enforcement legislation, the Court will have to engage in a more thorough application of its congruence-and-proportionality test than it has in prior cases.

Looking first at the "significant likelihood of unconstitutionality" aspect of the test, there can be little doubt that a state employer's failure to make a reasonable accommodation will have a significant likelihood of being unconstitutional in those situations where the selective-exemption rule is implicated and heightened scrutiny is applied. Indeed, in those circumstances, Title VII provides less protection to an employee than the Constitution because, as interpreted by the Court, the undue-hardship standard is considerably easier for a state employer to meet than the compelling interest standard employed in the Court's selective-exemption cases. Moreover, even if the Court were to conclude that it should apply an intermediate level of scrutiny in free exercise cases arising in the public employment context, as it has done in certain free speech cases arising in that context,[221] the constitutional inquiry would still be more demanding than the Title VII inquiry because the undue-hardship standard is best understood as imposing "something in between mere rationality review and intermediate scrutiny."[222]

Once it is determined that there is a significant likelihood of unconstitutionality *when* a failure to make a reasonable accommodation implicates the selective-exemption rule, the key question becomes whether there is "reason to believe" that "many" failures to accommodate will implicate the selective-exemption rule. The answer to that question is far from self-evident. For example, the material cited in the previous section indicates that states are increasingly making accommodations for employees' family needs by permitting liberal use of sick leave, and it appears that forty states make at least some level of accommodation through the use of sick leave.[223] Is that enough to conclude that "many" state practices affected by Title VII's reasonable-accommodation provision will also implicate the selective-

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[220] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000); *see supra* notes 133-41 and accompanying text.

[221] *See* Brown v. Polk County, 61 F.3d 650, 658 (8th Cir. 1995) (en banc) (citation omitted):

> [W]e believe that the Supreme Court might well adopt, for free exercise cases that arise in the context of public employment, an analysis like the one enunciated in *Pickering v. Board of Education.* That case dealt with free speech rather than the free exercise of religion, but . . . we see no essential relevant differences between those rights . . . .

See also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 n.7 (3d Cir. 1999) ("[W]e will assume that an intermediate level of scrutiny applies since this case arose in the public employment context . . . .").

[222] Amar, *supra* note 15, at 519.

[223] *See supra* note 211.

exemption rule? If not, is the threshold crossed when one adds the fact that some state employers make medical exemptions to their dress codes and grooming rules?[224] Or when one adds the evidence that some state employers provide special accommodations for smokers?[225]

In the end, the difficulty of determining when exactly "less-than-many" becomes "many" militates in favor of using the "reason to believe" aspect of the Court's congruence-and-proportionality test to give Congress the benefit of the doubt in close Section 5 cases. If the Court truly believes what it has repeatedly stated—that Congress is entitled to "'wide latitude'" when enforcing constitutional rights[226]—the congruence-and-proportionality test should not be used to enforce some arbitrary, fixed definition of "many" developed by the Court. Rather, so long as one *could reasonably believe* that "many" of the state actions affected by a piece of legislation will involve the requisite circumstances, a sufficient predicate for enforcement legislation should be found.[227] Applying that approach to the state employment context, where the practice of granting selective exemptions is not an isolated occurrence, but rather is formalized in a number of different states through laws and collective bargaining agreements covering significant numbers of employees, one could certainly hold a reasonable belief that many of the state employment decisions affected by Title VII's reasonable-accommodation provision

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[224] *See supra* note 212.

[225] *See supra* note 213.

[226] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)); *see* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999) (same).

[227] The approach advocated in this Article—which accepts the Court's jurisprudence as the baseline for the congruence-and-proportionality test, and merely grants Congress leeway on the quasi-factual "many" question—is considerably more modest than what others have sought from the legislative branch. For example, as discussed above, some have argued that the level of judicial scrutiny the Court applies to particular state conduct should not necessarily be used as a measuring stick for Section 5 legislation because institutional constraints sometimes lead the Court to adopt standards that underprotect constitutional rights. *See supra* note 157. Others have gone farther and argued that Congress should, within reason, be permitted to pass legislation that is premised on a different *substantive* view of the Constitution than is adhered to by the Court. *See* McConnell, *Institutions and Interpretation*, *supra* note 33, at 156 (contending that Congress should be permitted to adopt a different "interpretation" of the Constitution than the Court, so long as it chooses "from among the textually and historically plausible meanings of the clause in question"); TRIBE, *supra* note 126, at 961 ("[I]t may not make much sense to speak of *the* meaning of a given constitutional provision; one may instead have to talk about a *set of plausible meanings*, with a different subset corresponding to each of the key legal institutions empowered to ascribe meaning to the provision for purposes peculiar to that legal institution's work.") (emphasis in original). By contrast, the analysis in this Article assumes that Section 5 legislation should be judged by reference to the Court's own judicial tests and constitutional interpretations, and simply argues for deference when applying that analytical framework.

will involve selective exemptions and, thus, implicate the Court's free exercise jurisprudence.[228]

Further bolstering the argument in favor of Title VII is the fact that, even in those situations where Title VII affects conduct that does not implicate the selective-exemption rule, the burden imposed on states by Title VII's reasonable-accommodation provision is quite modest. Unlike RFRA, which "pervasively prohibit[ed] constitutional state action" by imposing "the most demanding test known to constitutional law" whenever states declined to make religious accommodations to generally applicable laws,[229] Title VII only requires state employers to make accommodations when they can be achieved at a de minimis cost. Rather than imposing a broad duty to make "'religious exemptions from civic obligations of almost every conceivable kind,'"[230] Title VII merely requires accommodation in the employment context, and then only in limited circumstances. Thus, it does not have the type of "sweeping coverage"[231] and "indiscriminate scope"[232] that has characterized the laws considered in the Court's previous Section 5 cases.[233]

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[228] If the Court were writing on a clean Section 5 slate, an argument could be made that it should judge the appropriateness of enforcement legislation on an "as applied" basis. Under such an approach, the reasonable-accommodation provision would not be deemed valid in *all* its applications simply because *many* applications arise in contexts involving selective-exemptions. Rather, the provision would only be deemed valid in those cases that actually involve selective exemptions. Whatever the merits of the as applied approach, it has been eschewed by the Court, which has exclusively used the "facial" congruence-and-proportionality test in recent years. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1985-86 (2003) (Scalia, J., dissenting) (faulting the Court for failing to supplement its congruence-and-proportionality test with an as applied inquiry); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 653-54 & n.4 (1999) (Stevens, J., dissenting) (faulting the Court for failing to perform an as-applied analysis). *See generally* Catherine Carroll, Note, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026, 1034-44 (2003).

On a related note, the Court's recent Section 5 decisions have contained no discussion of "severability" issues, prompting concerns that the Court's new approach might not allow for distinctions between appropriate and inappropriate provisions in the same statute. *See id.* at 1053-58, 1064-65. However, such concerns appear to have been obviated by the Court's decision in *Hibbs*, which found the FMLA's "family-care provision" to be appropriate under Section 5 without addressing the propriety of three other leave provisions in the FMLA. *See* 123 S. Ct. 1972, 1976, 1984 (addressing only 29 U.S.C. § 2612(a)(1)(C), and not 29 U.S.C. §§ 2612(a)(1)(A), (B), and (D)); *see also* Hale v. Mann, 219 F.3d 61, 68-69 (2d Cir. 2000) (finding 29 U.S.C. § 2612(a)(1)(D) to be inappropriate without addressing 29 U.S.C. §§ 2612(a)(1)(A), (B), and (C)). As relevant here, the Court's approach in *Hibbs* indicates that Title VII's reasonable-accommodation provision should be judged separately from Title VII's other provisions.

[229] *See City of Boerne*, 521 U.S. at 533-34.

[230] *Id.* at 534 (quoting Employment Div. v. Smith, 494 U.S. 872, 888 (1990)).

[231] *Id.* at 532.

[232] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2001).

[233] *See* Holmes v. Marion County Office of Family & Children, 349 F.3d 914, 920 (7th Cir. 2003) (granting rehearing en banc) (finding that the reasonable-accommodation provision satisfies the "proportionality element" of the congruence-and-proportionality test because it

In sum, because there is reason to believe that many of the state employment decisions affected by Title VII's reasonable-accommodation provision will implicate the selective-exemption rule, and because the burden imposed on state employers by the reasonable-accommodation provision is far from onerous, the Court should conclude that the provision is both congruent and proportional to the requirements of the Free Exercise Clause. That, however, may not be enough.

3. *The Curious Role of the Legislative Record*

Perhaps the most troubling aspect of the Court's recent Section 5 jurisprudence is the impression given in *Garrett* that an objective finding of congruence and proportionality will not be sufficient to sustain a piece of legislation if the legislative record lacks evidence of Congress's subjective intent.[234] A strict legislative record requirement would spell certain doom for Title VII's reasonable-accommodation provision as there is absolutely no evidence that Congress, which enacted the provision in 1972, was attempting to enforce the Court's selective-exemption rule, which was not articulated until 1986, and was not approved by a majority of the Court until 1990.

Nonetheless, there is hope for Title VII. Although *Garrett* indicates that an adequate legislative record is a prerequisite for all prophylactic legislation, *Kimel* states quite clearly that it is not.[235] And if ever there was a situation demonstrating why the Court should choose the *Kimel* approach over the *Garrett* approach, it is that of the reasonable-accommodation provision.

When Congress first passed the reasonable-accommodation provision, it would have had no reason to think that it needed to support its action with explicit findings in the legislative record. For one thing, the Court at that time did not impose a legislative record requirement, and it would not so much as mention one for another

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"demands much less" of states than RFRA), *appeal dismissed pursuant to Federal Rule of Appellate Procedure 42(b)*, (Jan. 20, 2004). Notwithstanding its conclusion on proportionality, the *Holmes* court determined that the reasonable-accommodation provision is not appropriate Section 5 legislation because it is not "congruent" to the Free Exercise Clause's prohibition of intentional discrimination. *Id.* at 628-30. However, the *Holmes* court did not consider the argument, developed here, that the reasonable-accommodation provision is congruent to the Supreme Court's selective-exemption rule.

[234] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001) (reviewing the legislative record and stating that Section 5 legislation "must be based" on a "pattern of unconstitutional discrimination"); *id.* at 374 (stating that "there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, *and* the remedy imposed by Congress must be congruent and proportional to the targeted violation") (emphasis added).

[235] *See Kimel*, 528 U.S. at 91 (stating that a "lack of support" in the legislative record "is not determinative of the § 5 inquiry").

twenty-seven years. Many have noted the unfairness of imposing a legislative record requirement retroactively,[236] as well as the oddity of its embrace by justices who generally eschew reliance on legislative history,[237] but those observations appear to have fallen on deaf ears. However, the tension is heightened considerably in the case of the reasonable-accommodation provision because the Court's underlying substantive law was also different in 1972. Thus, even if Congress had known about the legislative record requirement at that time, it would not have had reason to be concerned about that requirement because the reasonable-accommodation provision did *not* prohibit a "broader swath of conduct" than the Court's then-existing free exercise jurisprudence. It was only after the *Smith* Court changed the law in 1990, and disavowed the notion that religious exemptions are generally required, that there was any reason to believe that the reasonable-accommodation provision might go beyond the requirements of the Free Exercise Clause and, thus, need to be justified by legislative findings.

Given that chronology, the following passage from *City of Boerne*—in which the Court chided Congress for not paying proper attention to its precedents—takes on an ironic significance:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[238]

When Congress enacted Title VII's reasonable-accommodation provision, it acted "against the background of a judicial interpretation" characterized by *Sherbert* and *Yoder*, and it is the Court, not Congress, that has since failed to treat those precedents with the "respect due them under settled principles."

Nonetheless, had the Court been willing to overturn *Sherbert* and *Yoder* in *Smith*, irony would not be a sufficient basis for upholding a law that could no longer be viewed as enforcing the Constitution. The *Smith* Court, however, declined to overturn its prior decisions and instead reinterpreted them as selective-exemption and hybrid-rights cases. Having gone to such lengths to preserve its own precedent, the Court is hardly in a position to condemn congressional legislation that remains objectively consistent with that revised

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[236] *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting) (noting requirement is "quite unfair"); Colker & Brudney, *supra* note 9, at 105-17; Frickey & Smith, *supra* note 33, at 1723.

[237] *See* Colker & Brudney, *supra* note 9, at 136-39; Frickey & Smith, *supra* note 33, at 1750-51.

[238] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

precedent simply because Congress did not predict the Court's revisions in the legislative record.

In short, Title VII's reasonable-accommodation provision provides an excellent example of why the legislative record should not be treated as an indispensable part of every Section 5 inquiry. Because Title VII's reasonable-accommodation requirement can be deemed congruent and proportional to the selective-exemption rule, from an objective point of view, it should be upheld as appropriate Section 5 legislation.

V. ADDITIONAL CONSIDERATIONS (FINDING FIVE VOTES)

In the event that a state sovereign immunity challenge to Title VII's reasonable-accommodation provision does make its way to the Court, litigants should be aware that much more may be at play than the relationship between the reasonable-accommodation provision and the Court's post-*Smith* free exercise jurisprudence.

For example, it is not difficult to imagine a scenario in which four Justices (Justices Stevens, Souter, Ginsburg and Breyer) vote to uphold the reasonable-accommodation provision on the ground that the Court's state sovereign immunity jurisprudence should be reversed,[239] and a fifth member of the Court (Justice O'Connor) votes to uphold the reasonable-accommodation provision on the ground that the Court's decision in *Smith* should be reversed.[240] On the other hand, it is not inconceivable that one of the antisovereign immunity Justices (Justice Stevens) would vote to strike down the reasonable-accommodation provision on the ground that it violates the Establishment Clause.[241]

A further complication is the EEOC's attempt to avoid Establishment Clause problems by interpreting the reasonable-accommodation provision to cover all deeply held moral and ethical beliefs rather than just religious beliefs. Although such an interpretation would no doubt alleviate Justice Stevens's establishment concerns, it might give Justice O'Connor pause because the pre-*Smith*

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[239] *See Kimel*, 528 U.S. at 98-99 (Stevens, J., dissenting in part and concurring in part, joined by Souter, Ginsburg, and Breyer, JJ.) ("The kind of judicial activism manifested in [the sovereign immunity cases] represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.").

[240] *See City of Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting, joined by Breyer, J.) ("*Smith* is demonstrably wrong. Moreover, it is a recent decision. As such, it has not engendered the kind of reliance on its continued application that would militate against overruling it.").

[241] *See id.* at 536-37 (Stevens, J., concurring) (concluding that RFRA violates the Establishment Clause because it grants exemptions for religion "that no atheist or agnostic can obtain").

jurisprudence to which she adheres made clear that the Free Exercise Clause covers only religion.[242]

In addition to the above considerations, one might also suspect that at least some of the justices will have an instinctual aversion to casting a vote against Title VII, regardless of where they may stand on state sovereign immunity, Section 5, free exercise, or establishment.[243] Indeed, one might even suspect that the most dedicated federalists on the Court (Justices Scalia, Kennedy, and Thomas) will be reluctant to press their fight with Congress into the realm of Title VII. That said, any intangible advantage enjoyed by Title VII could be undermined if Congress, with full knowledge of the Court's concerns about religious accommodation, chooses to bolster the reasonable-accommodation requirement by passing the WRFA.[244]

Putting aside the risk of compromising Title VII's aura, the enactment of the WRFA has the potential to both help and hurt the cause of those who would defend the reasonable-accommodation provision as appropriate Section 5 legislation. The upside is that Congress presumably would have had the opportunity to develop a detailed legislative record documenting state employment practices that involve selective exemptions, both individualized and categorical. The downside is that by raising the burden on states and requiring them to provide accommodations absent a "significant difficulty or expense,"[245] the WRFA would make it harder to argue that the reasonable-accommodation provision is a modest measure that is unlikely to prohibit much constitutional state conduct. In addition, a reinforced reasonable-accommodation requirement increases the risk that Justice Stevens (and perhaps others) will be receptive to an Establishment Clause argument.

In the end, whether or not the WRFA is passed, a state sovereign immunity challenge to Title VII's reasonable-accommodation provision would involve too many variables to allow for confident predictions about how the Court might resolve the matter. Thus, although the analysis in Part IV above suggests that the Court *could* use Title VII's reasonable-accommodation provision as a vehicle for bringing

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[242] *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 833 (1989) ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause.' Purely secular views do not suffice." (citation omitted) (quoting Thomas v. Review Bd., 450 U.S. 707, 713 (1981)); Thomas v. Review Bd., 450 U.S. 707, 713 (1981) (stating that the "Free Exercise Clause . . . by its terms, gives special protection to the exercise of religion"); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (explaining that "purely secular" beliefs, "however virtuous and admirable," cannot be treated as "religious beliefs").

[243] *Cf.* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 701 (2000) (asserting that "it is unthinkable that the Court will ever strike down damages actions under . . . Title VII").

[244] *See* S. 893, 108th Cong. (2003).

[245] S. 893 § 2(a)(4), 108th Cong. (2003).

clarity to its unsettled free exercise and Section 5 doctrines, it is far from clear that five members of the Court *would* agree to do so.

CONCLUSION

When Title VII's reasonable-accommodation provision was enacted in 1972, it was a fitting compliment to the Supreme Court's own pro-accommodation view of the Free Exercise Clause. However, the Court has since changed its approach, and religious accommodations are now the constitutional exception, not the rule. As a result, a serious question arises under the Court's current federalism jurisprudence as to whether the reasonable-accommodation provision can be considered appropriate Section 5 legislation that abrogates state sovereign immunity. This Article proposes that the Court answer that question by focusing on the relationship between the reasonable-accommodation provision and the selective-exemption rule that was announced in *Smith* and reaffirmed in *Lukumi*. By doing so, the Court could preserve the ability of state employees to vindicate their rights under Title VII while bringing much needed clarity to its free exercise and Section 5 doctrines.