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Case Western Reserve Law Review

Volume 57 | Issue 1

2006

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Recommended Citation

Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 Case W. Res. L. Rev. 55 (2006)
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TAKING FREE EXERCISE RIGHTS SERIOUSLY

Alan Brownstein†

INTRODUCTION

The Free Exercise Clause of the First Amendment provides little if any protection to religious individuals or institutions against neutral laws of general applicability. That was the holding of *Employment Division v. Smith*[1] in 1990. The Supreme Court has not done anything over the last fifteen years to significantly modify or mitigate this doctrinal rule.[2] Thus, under current constitutional authority, the political branches of government may freely ignore the impact of their laws and administrative decisions on religious practices and religiously motivated conduct. The courts have no mandate to intervene unless government targets religion and singles it out for unfavorable regulatory treatment.[3]

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1 494 U.S. 872 (1990). In the words of one scholar, after *Smith*, "generally applicable laws alleged to burden the exercise of religion . . . invariably will [withstand] constitutional attack." PETER K. ROFES, THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 163 (2005). *See also* James E. Woods, Jr., *Government Intervention in Religious Affairs: An Introduction*, *in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 10 (James E. Woods, Jr. & Derek Davis eds., 1993) ("Without any real basis for exemption given to the free exercise of religion, the majority opinion in *Smith* gives to the state the right to force compliance with all its valid laws without any balancing of the claims of the free exercise of religion with a compelling state interest.").

2 The only other free exercise case the Court has reviewed since *Smith*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), acknowledged and applied existing precedent. It did not modify the *Smith* holding or analysis. Further, in striking down a federal statute attempting to expand the protection provided to religious liberty in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court essentially reaffirmed the very limited understanding of free exercise rights that it had adopted in *Smith*.

3 *Smith*, 494 U.S. 877–79 (holding that while a state cannot prohibit acts or abstentions

The *Smith* decision received a torrent of criticism. Many church-state scholars denounced it.[4] Congress, and several state legislatures, responding to the Court's apparent abdication of its constitutional responsibilities regarding religion, enacted legislation to protect religious freedom more rigorously than the truncated version of the First Amendment adopted by the Court.[5] Underlying the academic and political reaction to *Smith* was a common theme. By limiting judicial review to only those situations in which the government discriminates against religious beliefs or practices, and refusing to protect religious activities against substantial burdens imposed by neutral and general laws, the Court was not taking religious liberty seriously. This was not the way that courts were supposed to go about the business of enforcing constitutional guarantees. The correct way to affirm and protect religious liberty, according to the critics of *Smith*, was for courts to strictly scrutinize any law or administrative decision that substantially burdened the exercise of religion.[6]

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solely because of their religious significance, "an individual's religious belief [does not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate").

[4] *See, e.g.*, Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77 (2000); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 9 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995). The criticism continues. *See* RONALD B. FLOWERS, THAT GODLESS COURT? SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS 162 (2d ed. 2005) ("[T]he Court in *Smith*, in the name of judicial passivity, abdicated its role as defender of minority or unpopular religious groups by abandoning the compelling interest test, relegating the Free Exercise Clause to the extreme margins of constitutionally guaranteed liberties, and exposed minority religions to the vagaries of legislative bodies—majoritarianism with a vengeance.").

[5] *See* FLOWERS, *supra* note 4, at 47 (explaining that critics of *Smith* petitioned Congress to enact the Religious Freedom Restoration Act in order to "restore the 'compelling state interest test' as the methodology courts used for adjudicating free exercise cases"); ROFES, *supra* note 1, at 157–59 (discussing Congress's efforts to "obliterate" the *Smith* decision through legislation); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 14 (1994) (noting that the only thing that the diverse critics of *Smith* could agree on when formulating congressional legislation was the need to subject all laws that substantially burdened religious practice to rigorous review). *See, e.g.*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000); Religious Freedom Restoration Act, R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (1998); Religious Freedom Restoration Act, 775 ILL. COMP. STAT. 35/1-21 (1993).

[6] The Religious Freedom Restoration Act itself explicitly states that the purpose of the Act is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1). Numerous commentators agreed that such rigorous review was necessary and appropriate. *See, e.g.*, Angela C. Carmella, *The Religion Clauses and Acculturated Religious Conduct: Boundaries for*

Debate surrounding the interpretation of the Free Exercise Clause today remains fixated on these two opposing, but equally simplistic and inflexible constitutional formulas. One side argues that the Free Exercise Clause means nothing more than protection against deliberate persecution.[7] The other side insists that there is only one way to take religious freedom seriously as a constitutional matter: any state action substantially burdening religion must be justified as necessary to the furtherance of a compelling state interest.[8]

I have no doubt that *Smith* was wrongly decided. It is less clear to me that the only way for courts to take religious liberty seriously is by a blanket commitment to strict scrutiny review of all laws that substantially burden the exercise of religion.[9] Certainly, constitutional doctrine in other areas of law is not limited to the bare choice of either protecting a right rigorously in all cases, or not protecting it at all. When the scope of a right extends broadly so that its protection implicates varying and important state interests, taking the right seriously does not mean we must always protect the right under rigorous review. Rather, it means that courts must develop a nuanced, complex, and sophisticated jurisprudence regarding the right. Doctrine must be carefully crafted in a way that respects both the right and the state interests that conflict with its exercise.

Freedom of speech is an obvious example. Everyone recognizes that American courts do and should take freedom of speech seriously. But no one argues that courts must adjudicate free speech claims under a unitary, one-size-fits-all-cases, standard of review. Free speech

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the Regulation of Religions, *in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 39–40 (James E. Woods, Jr. & Derek Davis eds., 1993); Stephen L. Carter, Comment, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 139–41 (1993); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 231–33; Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 254 (1995).

[7] While doctrinal debate regarding the meaning of the Free Exercise Clause is focused on two competing rules, I do not mean to suggest that the proponents of either rule agree on the reasons underlying their position. Some proponents of the holding in *Smith*, for example, are concerned about the consequences or fairness of providing religious individuals exemptions from generally applicable laws. *See, e.g.*, MARCI A. HAMILTON, GOD VS. THE GAVEL 293–95 (2005); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319–23 (1991). Other scholars may reject constitutionally mandated exemptions on the basis of history and the original understanding of the constitutional text. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 GEO. WASH. L. REV. 915, 936–46 (1992).

[8] *See supra* note 6.

[9] *See* Arnold H. Loewy, *Rethinking Free Exercise of Religion After* Smith *and* Boerne: *Charting a Middle Course*, 68 MISS. L.J. 105, 109 (1998) ("[An] 'almost everything or almost nothing' approach to the Free Exercise Clause is neither necessary nor desirable.").

doctrine requires courts to consider a variety of factors including the nature of the state action or regulation at issue,[10] the kind of speech being restricted,[11] and the location where speech occurs[12] in order to determine which of a range of possible standards of review is appropriate in any given circumstance.

Other constitutional guarantees may not reach the level of complexity of free speech doctrine, but their adjudication involves at least some internal distinctions. Certainly this is true for equal protection guarantees[13] or the freedom from unreasonable searches and sei-

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[10] Ward v. Rock Against Racism, 491 U.S. 781, 791, 797 (1989) (holding that content-neutral time, place, and manner regulations are not subject to strict scrutiny); Boos v. Barry, 485 U.S. 312, 316–21 (1988) (holding that content-based regulation "must be subject to the most exacting scrutiny").

[11] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561, 563–65 (1980) (holding that content-based regulation of commercial speech will be subject to a less exacting standard of review than is applied to content discriminatory regulations of other kinds of speech); Miller v. California, 413 U.S. 15, 23 (1973) (recognizing that "obscene material is unprotected by the First Amendment" and can be suppressed by government); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (suggesting that fighting words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment).

[12] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678–79 (1992) (holding that regulations of speech in a nonpublic forum such as an airport terminal that do not discriminate on the basis of viewpoint will be upheld as long as they are reasonable); Frisby v. Schultz, 487 U.S. 474, 479 (1987) ("To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ.").

[13] For example, we apply equal protection principles to some fundamental rights but not others—with varying degrees of rigor. The Court applied strict scrutiny under an equal protection analysis to strike down a poll tax that limited access to the right to vote in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The Court also employed an equal protection analysis to protect the right to travel, but here, the level of review applied has been inconsistent. *Compare* Sosna v. Iowa, 419 U.S. 393 (1975) (indeterminate balancing test) *with* Shapiro v. Thompson, 394 U.S. 618 (1969) (strict scrutiny). The Court has been less interested in equal protection concerns when it evaluates burdens on privacy and autonomy rights. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564, 578 (2003) (avoiding equal protection implications of its decision to strike down anti-sodomy laws as a violation of substantive due process); Harris v. McRae, 448 U.S. 297, 322-23 (1980) (upholding law that denies funding for abortions for indigent women).

With regard to the review of classifications based on personal characteristics, courts also draw numerous distinctions. Racial classifications receive strict scrutiny. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984). Gender discrimination receives intermediate level scrutiny. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–98 (1976). Age classifications receive rational basis review. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976). The list could go on.

Further, even within a particular classification category, important doctrinal distinctions are recognized. *Compare* Foley v. Connelie, 435 U.S. 291, 295–96 (1978) (suggesting that state laws barring non-citizens from government jobs that involve discretionary decision-making authority over citizens are reviewed under highly deferential, rational basis review) *with* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (stating that state laws discriminating against non-citizens with regard to their access to welfare benefits are reviewed under strict scrutiny). Nor is it clear that the Court applies the same standard of review with equal rigor in all equal

zures.[14] Given the relative depth of doctrine in these other areas of constitutional law, why should anyone assume that a doctrinal framework adequate to adjudicate freedom of religion conflicts should be limited to a single, simple formula—whether it is a rule that provides no protection against neutral laws of general applicability or one that requires the rigorous review of all laws that substantially burden religious exercise? Or to ask the question more bluntly—why would anyone think that courts take religious liberty seriously when they reduce issues as complex as those relating to religious liberty in a religiously diverse society to a single rule of decision making?

The goals of this essay are interrelated and modestly ambitious. I hope to lay out a foundation for thinking about free exercise doctrine seriously. Of course, at best, this can only be a sketch of what a full doctrinal framework might look like. Constitutional doctrine evolves incrementally. It does not spring fully formed out of the heads of law professors or judges. It would be absurd to imagine anyone sitting down and drafting contemporary free speech doctrine from scratch. The same is true for free exercise doctrine. Thus, the purpose of this essay is to initiate a discussion, not to present a finished model.

More specifically, this article is not going to attempt to resolve the question of how rigorously courts should review laws that regulate religious conduct in different circumstances. Its focus is more basic than that. The problem it seeks to resolve is whether meaningful doc-

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protection cases. Benign and remedial racial classifications and invidious racial classifications materially disadvantaging racial minorities may both receive strict scrutiny review. But the Court has emphasized that the former classification is less constitutionally problematic than the latter. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228–30 (1995) (explaining that while strict scrutiny is the appropriate standard of review for both invidious and remedial race-based classifications, in applying that standard the Court may take into account the difference between "'an engine of oppression' and an effort 'to foster equality in society'").

14 *See* Camara v. Municipal Court, 387 U.S. 523, 536–37, (1967) (recognizing that at least some Fourth Amendment exceptions are determined by "balancing the need to search against the invasion which the search entails"); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 34 (2d ed. 2003) ("Modern search and seizure law is astoundingly complex and contradictory . . . . A partial list [of 'exceptions' to the warrant requirement] would include exigent circumstances (such as flight or destruction of evidence), the direct observation of crime, plain view, open fields, community caretaker functions, brief investigative stops, brief frisks for weapons, inventory searches, protective sweeps, automobile searches, border searches, school searches, prison searches, arrests in public places, searches incident to arrest, fire investigations, and administrative searches."); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965 (1987) ("[T]he Court has balanced in determining the scope of the Fourth Amendment, the definition of a search, the reasonableness of a search, the reasonableness of a seizure, the meaning of probable cause, the level of suspicion required to support stops and detentions, the scope of the exclusionary rule, the necessity of obtaining a warrant, and the legality of pretrial detention of juveniles.").

trinal distinctions can be drawn in this area of law. Thus, the goal is to determine whether distinctions can be drawn that justify the application of different levels or standards of review in different circumstances in the adjudication of free exercise cases, and to demonstrate that something other than results-oriented standards such as strict scrutiny or rational basis review can be meaningfully employed here. Working out exactly how rigorous judicial review should be in one context or another is obviously an important part of the project of developing free exercise doctrine, but it will have to be the substance of another article.

To be useful, however, even a basic sketch of free exercise doctrine must satisfy certain requirements. There are reasons offered to justify the current, very limited constitutional protection provided to religious activities. Any projection of a more complex framework has to confront and respond to those arguments and concerns. The first part of this essay will summarize the primary rationales presented for reducing the scope of free exercise protection to the very limited rules set out in *Employment Division v. Smith*. Then, the core of the article will set out a framework for understanding and protecting free exercise rights that avoids or mitigates those concerns.

I. THE PROBLEMS ASSOCIATED WITH PROTECTING FREE EXERCISE RIGHTS

An array of arguments suggests that free exercise rights do not deserve careful constitutional attention,[15] or, alternatively, that there are unavoidable and insurmountable difficulties in developing meaningful free exercise jurisprudence. These arguments can be categorized as follows: (1) the justification problem, (2) the anomalous treatment argument, (3) the anarchy problem, (4) the argument against privileging religion, (5) the balancing problem, and (6) the problem of definition. Each category warrants some brief explanation and discussion.

A. The Avoidable Problems: Justification, Anomalous Treatment, and Anarchy

These three arguments can be dispensed with fairly briefly. The justification problem goes to whether religious liberty deserves any

[15] As noted earlier, for those committed to an original intent methodology for interpreting the Constitution, the question may not be a matter of whether free exercise rights "deserve" constitutional protection, but rather whether the Constitution authorized courts to protect the free exercise of religion against neutral laws of general applicability. *See supra* note 7 and accompanying text.

greater constitutional protection than it receives under the *Smith* regime. There is an extensive literature on the justifications for protecting religious freedom for readers interested in this subject.[16] Readers who doubt the legitimacy or value of protecting religious liberty should turn to that literature. I will not contribute to that discussion here, however, because I have little to add to the existing commentary and the purpose of this article presupposes an affirmative position on this issue. My goal is to discuss *how* to take free exercise rights seriously, not why we should do so. This essay is intended for an audience that respects religious liberty as a fundamental value but is uncertain of the efficacy of protecting it through constitutional law.[17]

The anomalous treatment argument is also easily circumvented. This argument is really a limited challenge to a broadly applied strict scrutiny regime. The Court in *Smith* contends that other guarantees such as the right to freedom of speech and to equal protection of the laws do not require courts to strictly scrutinize neutral laws of general applicability that burden speech or result in the incidental disparate treatment of protected minorities. Therefore, it would be anomalous to insist on such unusually rigorous review for laws that burden religious liberty.[18]

Whatever the strength or weakness of this argument might be with regard to a uniformly applied strict scrutiny standard,[19] it is largely

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[16] *See, e.g.*, JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996); STEVEN D. SMITH, GETTING OVER EQUALITY—A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA (2001); Thomas Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997); Alan Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504 (2003); Andrew Koppelman, *Is It Fair To Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Michael W. McConnell, *Religion and Constitutional Rights: Why Is Religious Liberty the "First Freedom?"*, 21 CARDOZO L. REV. 1243 (2000); Michael Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597 (1997).

[17] It is also worth noting that the Court's opinion in *Smith* does not dispute the value or legitimacy of protecting religious liberty or accommodating religious practice. Its focus is on how that goal should be accomplished and which branch of government should bear primary responsibility for achieving it. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[18] *Id.* at 885–86.

[19] To the extent that the *Smith* Court suggested that it would be anomalous to provide the exercise of religion any constitutional protection against neutral laws of general applicability, even under more lenient standards of review than strict scrutiny, its argument is exaggerated and in error. *See* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7, 14–26 (1996); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J. L. & POL. 119, 150–65 (2002) [hereinafter *False Messiahs*]; Gedicks, *supra* note 4, at 84.

Professor Gedicks turns Justice Scalia's argument about doctrinal anomalies against him. Gedicks suggests that it would be anomalous not to subject laws that incidentally burden free exercise rights to some form of intermediate level scrutiny because a similar level of review is applied to laws that incidentally burden freedom of speech. Gedicks, *supra* note 4, at 84–88. His

irrelevant to the doctrinal project I am proposing. The goal of this article is to create a multifaceted framework for adjudicating free exercise cases analogous in complexity, although not necessarily parallel in content, to free speech and equal protection doctrine. If doctrine of that kind can be developed for free exercise rights, almost by definition, it cannot be criticized as anomalous to other constitutional areas. Indeed, the goal of this project is to reduce the discrepancy between free exercise jurisprudence and that of other constitutional guarantees.

A somewhat similar analysis applies to the so-called anarchy problem. This is another concern explicitly expressed in Justice Scalia's majority opinion in *Smith.* Scalia suggests that if courts took free exercise rights seriously and required exemptions for religious conduct from neutral laws of general applicability, anyone asserting a religious basis for their actions could avoid laws and regulations that they experienced as burdensome. Every person would be "a law unto himself."[20]

This almost apocalyptic prediction of anarchy is predicated on the presumption that courts cannot reasonably evaluate the merits of free exercise claims. Underlying this presumption are two implicit contentions. First, there is no way to distinguish one free exercise claim from another. Second, the balancing of free exercise rights against important state interests is impossible or illegitimate.[21] Therefore, the argument goes, we only have two choices; either we refuse to protect religious exercise against neutral laws of general applicability or we have to protect all religiously motivated conduct against all but the most compelling of state interests[22]—which is a recipe for anarchy.

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assumption is that analogous rights should receive roughly similar protection against incidental burdens.

I am less confident that as a formal matter analogies between the free exercise of religion and freedom of speech, or analogies between any rights, necessarily justify similar doctrinal rules. I do agree, however, that the ability and willingness of courts to balance the state's interest in avoiding certain kinds of harms against the individual's interest in freedom of speech suggests that some form of balancing is possible and justified in free exercise cases. *See infra* notes 185–201 and accompanying text.

[20] *Smith*, 494 U.S. at 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)). *See also* Loewy, *supra* note 9, at 105 ("[T]he [*Reynolds*] Court concluded that allowing Reynolds a free exercise defense would 'permit every citizen to become a law unto himself' and practice human sacrifices if they were an essential element of his religious worship.").

[21] *Smith*, 494 U.S. at 887. *See* Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 604–08 (1990) (discussing three reasons why "the courts in deciding who is eligible for exemptions will inevitably make decisions that are arbitrary, unpredictable, and discriminatory").

[22] *See* CATHARINE COOKSON, REGULATING RELIGIONS 132–33 (2001) ("[T]his is the way

Thus, the anarchy problem, like the anomalous treatment argument, assumes that the goal of this article cannot be achieved. No nuanced free exercise jurisprudence is possible. However, if a doctrinal framework can be developed that allows courts to adjudicate free exercise claims reasonably and effectively, avoiding the extreme alternatives postulated in *Smith,* the anarchy problem no longer exists.

B. The Critical Problems: Privilege, Balancing, and Definition

The remaining three problem areas are critical to the development of free exercise doctrine. Any framework of analysis has to confront and respond to these issues if it is to be persuasive. Accordingly, it is important to fully understand the nature of these concerns so that they can be adequately taken into account in any proposed adjudicatory framework.

1. The Problem of Privileging

The problem of privilege includes five related concerns. First, there is the equity argument. It is simply unfair for government to treat religious individuals and associations more favorably than individuals and associations adhering to secular beliefs. If two persons are hired by a government agency, and they both want to have Saturday off from work, but the agency's activities require that one of them must be assigned to work on Saturday, why should a Jewish employee be given a preference over his secular colleague in obtaining the desired work schedule in order to accommodate his observance of the Sabbath?[23] All else being equal, individuals who hold religious beliefs, or specific religious beliefs, should not receive preferential treatment. We should all be equal under the law.

To some extent, this form of the privilege problem overlaps the issue of justifying the protection of religious exercise against non-discriminatory government interference. Arguing that the exercise of religion should not be privileged resonates with the argument that there is nothing distinctive about religion that supports providing it

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the Court painted the issue in the *Smith* case: Either the anarchy of the individual religious conscience would rule, or the government bureaucracy must be left alone to regulate as it deems necessary for (what Justice Scalia characterized as) society's best interests. There could be no middle course, because judges would then be faced with the impossible task of 'weigh[ing] the social importance of all laws against the centrality of all religious beliefs.'").

[23] *See, e.g.*, Murphy v. Edge Memorial Hospital, 550 F. Supp. 1185 (M.D. Ala. 1982) (noting that granting Sabbatarian's request for religious accommodation would deprive other workers of the benefit of a neutral scheduling system).

special constitutional protection.[24] The overlap is not precise, however. There are not always similarly situated secular individuals who might reasonably assert inequitable treatment based on the accommodation provided a religious person. Some exemptions give religious individuals and associations the opportunity to accept burdens or avoid benefits in ways that their secular counterparts are unlikely to desire. Allowing a Seventh-day Adventist school's basketball team to participate in a basketball tournament with the understanding that they will lose any game by default that is scheduled on Saturday, their Sabbath, for example, is unlikely to provoke a long list of teams from secular schools insisting on similar treatment.[25] Under *Smith,* free exercise rights may be ignored even when there is no real equity issue to speak of because the kind of accommodation religious objectors seek would not be sought after by anyone else. Requests for religious accommodations can be denied even when they would be perceived by others as valueless or disadvantageous to their interests.

Second, there is a concern about relative advantages in the marketplace of ideas. Freedom from regulatory interference empowers belief-based institutions and associations. It may facilitate their ability to communicate their message. If nothing else, it substantially reduces their costs of operation. A religious institution that is exempt from various burdensome regulations, for example, has obvious advantages over secular expressive institutions that are subject to such constraints.[26] Thus, the privileging of religious organizations through

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[24] *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) (arguing that the privileging of religion is problematic because there is no persuasive justification for respecting religious convictions more than secular beliefs—although courts may intervene to insure that minority faiths are treated with "equal regard" and receive the same benefits provided majoritarian groups); West, *supra* note 21, at 613–23 (contending that none of the arguments asserted to justify religious exemptions are persuasive in part because there is nothing distinctive about religion that justifies privileging its practice).

This article bypasses this debate and presupposes, as the text of the First Amendment states explicitly, that religion should receive distinctive treatment for constitutional purposes. *See supra* note 16 and accompanying text. This article addresses the very different problem of attempting to determine how that distinctive treatment might be appropriately implemented.

[25] *See* Montgomery v. Bd. of Educ., 71 P.3d 94 (Or. Ct. App. 2003).

[26] *See False Messiahs*, *supra* note 19, at 136; Alan Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 247–51 (1999) [hereinafter *Religion Clauses*]; Marshall, *supra* note 7, at 321–23; West, *supra* note 21, at 601 ("[E]xemptions to certain persons because of their religion or to certain churches may give those religions or churches an unfair advantage over other religions, secular ideologies, churches, nonprofit organizations, or businesses with which they compete for members and money.").

exemptions can distort the marketplace of ideas in favor of religious messages.

Third, exempting religious individuals and institutions from burdensome regulations reinforces religious commitments. In some circumstances, these accommodations may even serve as a positive inducement for individuals to adopt religious beliefs or participate in religious activities.[27] There are numerous examples. Perhaps the most obvious is the statutory exemption from military service for members of pacifist faiths.[28] Freedom from conscription is a sufficiently valuable benefit that it may influence religious decisions. Similarly, exemptions from civil rights laws that permit religious organizations to discriminate on the basis of religion in hiring may have both belief and behavioral consequences. If the failure of an employee to observe the tenets of an employer's faith, or an employee's expressions of doubt about the validity of those beliefs, will result in the loss of a person's job, this consequence is likely to influence the employee's thoughts and conduct.[29]

Fourth, privileging religious individuals and institutions by exempting them from general laws may impose direct harm on third parties or the general public. The discrimination example described above applies here as well. Losing one's job because of one's faith, or lack thereof, is a concrete harm that follows directly from the exemption of religious employers from civil rights laws prohibiting employment discrimination on the basis of religion.[30] Other illustrations

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[27] For examples of positive inducements created by accommodations, see Berg, *supra* note 5, at 45–51 and Loewy, *supra* note 9, at 115–16. These concerns about surplus material benefits resulting from exemptions have led some commentators who strongly support constitutionally mandated accommodations to suggest that exemptions should be denied in cases where the granting of an accommodation would make religious individuals "better off relative to others than they would be in the absence of the government program to which they object." McConnell, *supra* note 4, at 1145–46. As this article will make clear, I do not believe the denial of the exemption is the only possible solution to this problem.

[28] Military Selective Service Act, 50 U.S.C.S. App. § 456(j) (2000) (exempting from conscription any persons "who, by reason of their religious training and belief, [are] conscientiously opposed to participation in war in any form"); *See* Welsh v. United States, 398 U.S. 333, 342–44 (1970) (interpreting conscientious objector provision broadly to include ethical creeds that play a similar role in the individual's life as religion plays in the life of a believer); United States v. Seeger, 380 U.S. 163, 176 (1965) (offering interpretation of conscientious objector provision subsequently accepted and applied in *Welsh*).

[29] Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring); Alan Brownstein, *Constitutional Questions About Charitable Choice*, *in* WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 219, 235–37 (Derek Davis & Barry Hankins eds., 1999); Alan E. Brownstein, *Evaluating School Vouchers Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 909–10 (1999).

[30] *See supra* note 29. *See also* HAMILTON, *supra* note 7, at 189–99; Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1085–91 (1996).

are more dramatic. Exempting religious parents from the obligation to provide conventional medical care to their children, for example, places the health and lives of children at risk. Arguably, religion is unreasonably privileged when its practice is permitted to cause harm to others.[31]

Fifth, and finally, if exemptions from burdensome regulations are materially beneficial to religious individuals and institutions, a legal regime mandating such accommodations will confront serious practical problems. The greater the value of the exemption in material terms, the more likely it is that some people will assert a sham claim of religious practice or conviction to obtain it. Given the diversity of religious beliefs in our society and the reluctance of courts to challenge the alleged religious nature of beliefs or behavior, privileging religion creates incentives to manipulate the system through false free exercise claims.[32]

2. The Problem of Balancing

The balancing problem also has multiple dimensions to it. Several of these concerns apply to all constitutional balancing tests. They are not limited to the balancing of free exercise rights against state interests. The most common criticism is obvious. Balancing tests, it is argued, involve the weighing and comparing of incommensurable interests.[33] They require courts to find common denominators that do not exist. This contention is easily applied to attempts to protect free exercise rights. There is no way for a court to meaningfully balance an individual's freedom to practice his faith against the state's interest in enforcing a particular law. How can the burden an individual experiences in being forced to violate a religious obligation, such as the requirement not to shave, or to wear religious garb, be measured and

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[31] *See, e.g.*, HAMILTON, *supra* note 7, at 31–39; Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 116–18 (2000). *See generally* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 622 (2000) (explaining that courts are less likely to defer to religious actors and exempt their practices from regulation when they "perceive third parties to be at risk of harm").

[32] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 721 (2005); Sherbert v. Verner, 374 U.S. 398, 407 (1963); West, *supra* note 21, at 603–04. *See also* Berg, *supra* note 5, at 41–43 (noting that in evaluating claims for religious accommodation "[t]he threat of cumulative exemptions comes not only from other sincere religious objectors, but from other persons who could feign the same objection to get the benefits of exemption").

[33] *See generally* Aleinikoff, *supra* note 14, at 972–76; Richard H. Fallon, *The Supreme Court, 1996 Term: Foreword—Implementing the Constitution*, 111 HARV. L. REV. 54, 79–81 (1997); Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992).

compared to the cost to the government of accepting exemptions to its grooming and dress requirements for state employees, military personnel, or inmates in prisons? It is as if, to use Justice Scalia's famous statement about the balancing test employed in Dormant Commerce Clause cases, the courts must decide "whether a particular line is longer than a particular rock is heavy."[34]

A corollary concern is that balancing decisions are intrinsically subjective and value-based. Again, this problem applies to balancing tests in general, and free exercise cases in particular. Since there is no objective way to weigh the individual's interest in exercising a right against the state's interest in uniform enforcement of particular regulations, the application of this kind of a standard invites judges to base their judgments on nothing more than their own values. Indeed, there really is not any alternative way for judges to resolve these disputes other than to base their decisions on their personal predilections.[35] These subjective choices lack constitutional legitimacy.[36] They also impose continuing costs on society because of their lack of uniformity and predictability.

Despite the generic nature of the balancing problem, there is some sense in which it is magnified or particularly acute when religious liberty is at issue. Subjectivity may raise special questions of partiality and favoritism here that are less likely to arise in Dormant Commerce Clause cases, for example. There is greater reason to be concerned that federal judges may fail to understand, or will be unsympathetic to, the unconventional practices of a minority faith than that they will be predisposed against the laws of a particular state.[37] More important, there is a sense that religion is uniquely an all or nothing proposition as to which compromises are all but impossible. There is greater flexibility in reviewing restrictions on the exercise of other rights. Thus, when balancing tests are used to

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[34] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[35] *See generally* Aleinikoff, *supra* note 14, at 985–86; Fallon, *supra* note 33, at 142–50.

[36] Aleinikoff, *supra* note 14, at 972–83, 986 (explaining that when courts engage in balancing "[a]t work . . . is some undisclosed scale of social value, one not obviously derived from the Constitution"); Steinberg, *supra* note 4, at 296–302; West, *supra* note 21, at 606–07.

[37] This concern is bluntly expressed by Mark Tushnet in his comment that "the pattern [of cases] is that sometimes Christians win but non-Christians never do." Mark Tushnet, *Of Church and State and the Supreme Court*, 1989 SUP. CT. REV. 373, 381. Other commentators have recognized the same potential for implicit bias against minority faiths. *See, e.g.*, Thomas L. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 967–72 (2004); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE. W. RES. L. REV. 357, 379–80 (1990); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711 (1986).

adjudicate other constitutional guarantees, such as the balancing test employed to review content-neutral speech regulations, courts may consider the availability of alternative avenues of communication in reaching their decision.[38] Religious obligations are more circumscribed in their requirements and less susceptible to such partial accommodations. They must be performed precisely and literally.

3. The Problem of Definition

Intrinsic to the enforcement of any constitutional guarantee is the ability of courts to determine what falls within its scope. Protecting freedom of speech, freedom of the press, or freedom of assembly requires some working definition of what it means to exercise the right. The same is true for the religion clauses. Defining the exercise of religion, however, has proven to be particularly difficult.

The courts have never formally defined what constitutes a religion for constitutional purposes; although, there is case law that discusses the issue.[39] Numerous commentators have struggled with the question.[40] Notwithstanding their efforts, it is fair to say that no attempt to define religion has won sufficiently wide support to be accepted as providing the answer to this problem.

This article is not going to resolve this difficult question. I included it in the list of problems that needed to be addressed in developing free exercise doctrine only because it is an issue that so obviously requires a solution that the failure to note its existence would seem to be an odd omission. It should be noted, however, that the problem of defining religion is not only an unanswered quandary for the purposes of this article, it is also a problem for the more

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[38] *See* Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 118–21 (1999). *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (discussing the availability of alternative channels for communication in determining the constitutionality of speech regulation); Frisby v. Schultz, 487 U.S. 474, 481 (1988) (applying the same test used in *Ward*).

[39] *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965) (discussing definition of "religion" in context of conscientious objection to military service); Africa v. Pennsylvania, 662 F.2d 1025 (3rd Cir. 1981) (attempting to determine whether certain ideas constitute a religion in order to evaluate free exercise claim); Howard v. United States, 864 F. Supp. 1019 (D. Colo. 1994) (discussing what constitutes "religion" for First Amendment purposes); Steinberg, *supra* note 4, at 286–90 (describing cases addressing the question of what is religious conduct).

[40] *See, e.g.*, BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION 46–75 (1997); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1988).

truncated understanding of the Free Exercise Clause adopted in *Smith.* A rule that prohibits discrimination against religious practices has to have some basis for distinguishing between religious practice and non-religious activities. Thus, for example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,*[41] a series of ordinances outlawing the killing of an animal in a "public or private ritual or ceremony" was struck down as an unconstitutional "religious gerrymander" directed at suppressing the Santeria religion, an Afro-Cuban faith that practices animal sacrifice in many of its rites.[42] Presumably, a challenge brought against these ordinances by a non-religious association engaged in ceremonial animal sacrifices, say a college fraternity that sacrificed animals as part of its hazing rituals, would not have presented a viable free exercise claim. But to distinguish between these two cases, the Court would have to have some basis for concluding that the Santeria practices were "religious" while the fraternity ritual was not. Thus, even under the doctrine enunciated in *Smith,* the courts cannot avoid the problem of defining religion. Accordingly, the lack of an acceptable definition is an issue for any doctrinal model of the Free Exercise Clause, but it is not one that requires acceptance of the *Smith* approach as opposed to other more complex frameworks.[43]

In addition to the lack of an accepted definition of religion, there is no clear understanding of what constitutes the *exercise* of religion. Since religion permeates the life of devout individuals and influences so many of their decisions, it is difficult to delineate what involves the "exercise" of religion and distinguishes it from activities that are influenced by religious beliefs or membership in a religious community, but are not covered by the First Amendment.[44] Courts

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[41] 508 U.S. 520 (1993).

[42] *Id.* at 535 (quoting the City of Hialeah's Ordinance 87–71).

[43] Defining religion is also a problem for courts applying the Establishment Clause. *See, e.g.,* Alvarado v. San Jose, 94 F.3d 1223, 1227 (9th Cir. 1996) (discussing whether maintenance of Azteca statue was a violation of the Establishment Clause); Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684, 689 (11th Cir. 1987) (determining whether school textbooks alleged to promote "secular humanism" violate the Establishment Clause); Malnak v. Yogi, 592 F.2d 197, 199 (3d Cir. 1979) (holding that a class in Transcendental Meditation was religious in nature and offering it in public schools violated the Establishment Clause).

[44] The connection between religious belief and conduct may often be attenuated. For example, Jewish law does not directly prohibit eating meat, but many Jewish vegetarians are certainly influenced by their religious beliefs in their decision not to eat meat. *See* RABBI JOSEPH TELUSHKIN, JEWISH WISDOM 449–53 (1994). For a thoughtful inquiry into whether it is possible to identify and protect the exercise of religion in light of the very individualized understanding of religious belief and practice in contemporary American culture, see WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005). *See also* EVANS, *supra* note 40, at 98–120 (discussing how "religion" should be defined for constitutional purposes).

have considered various limiting principles, including providing constitutional protection only to practices and activities that are central to a religion[45] or to obligatory conduct required by one's faith.[46] Both parameters are problematic. The centrality inquiry requires courts to reach conclusions about the importance of religious precepts, a task for which they lack expertise and authority.[47] The focus on religious obligations has generated more support in the case law,[48] but it fails to protect conventionally religious, but nonetheless supernumerary, conduct, including prayer and worship, that can not easily be excluded from the class of religious exercise. Obviously, not knowing what constitutes the exercise of religion is a problem for a broader and more nuanced free exercise jurisprudence because it opens the door to free exercise claims based on some tangential or attenuated connection to religious beliefs.[49] But again, this issue is simply beyond the scope of this article.

II. DEVELOPING FREE EXERCISE DOCTRINE

A. Avoiding Surplus Privileging of Religion

If the free exercise of religion is going to be taken seriously as a constitutional matter, the problem of privilege must be addressed. While that will not be an easy issue to consider, it can be broken down and analyzed methodically. More important, there are ways to think about protecting the exercise of religion that substantially mitigate this concern in many circumstances.

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[45] *See, e.g.*, Tenafly Eruv Ass'n v. Tenafly, 309 F.3d 144, 170 n.31 (3d Cir. 2002) (describing, but declining to follow, cases that focus on the centrality of religious practices); Wisconsin v. Yoder, 406 U.S. 205, 209–13, 216–19 (1971) (repeatedly emphasizing the importance and centrality of the Amish beliefs in living apart from the modern world in evaluating their free exercise claim).

[46] *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Ca., 493 U.S. 378, 391–92 (1990); Sutton v. Rasheed, 323 F.3d 236, 254–56 (3d Cir. 2003) (concluding that even religiously mandated practices need not be accommodated in the prison context if alternative means of practicing an inmate's faith are available); St. Bartholomew's Church v. New York, 914 F.2d 348, 355 (2d Cir. 1990) (rejecting church's claim that land use law preventing it from using its property for commercial purposes to earn income burdened free exercise rights).

[47] Employment Div. v. Smith, 494 U.S. 872, 887 (1990) (arguing that "centrality" is an inappropriate factor for consideration because of its inherently subjective nature and because "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'").

[48] *See supra* note 46.

[49] This is not as much of a problem under the *Smith* approach. Presumably a viable free exercise claim would arise even if the government's regulation was directed at conduct only indirectly related to religious beliefs or practices if the discriminatory regulation only applied to conduct that was related, directly or otherwise, to religious beliefs.

Part of the problem here is that by protecting an individual's right to exercise his religion, or a religious institution's right to operate its activities free from state interference, we also allow that individual or institution to escape burdens or receive benefits that have significant secular value. Allowing a religious pacifist to avoid conscription protects his right not to engage in conduct (combat) that his religion prohibits. But it also exempts him from a serious burden that non-religious individuals would hope to avoid for purely secular reasons (escaping the disruption, hardship, and risk of injury or death intrinsic to military service in time of war). Why should religious citizens in particular be allowed to avoid this dangerous civic obligation? Similarly, if public employers exempt religious employees from having to work on their Sabbath, whether it is Saturday or Sunday, this accommodation not only permits the religious employees to observe the Sabbath as their religion dictates, but it also provides them a significant secular benefit. Weekend days off are prized by employees for various reasons, not the least of which is that they may be the only days when an entire family will be able to spend time together. Why should religious employees be given greater eligibility to receive this desirable benefit—the opportunity to have weekend days off to spend with their family?

A similar analysis applies to exemptions for religious institutions. To cite one simple example, in *Catholic Charities of Sacramento, Inc. v. Superior Court*,[50] Catholic Charities challenged the application of the Women's Contraceptive Equity Act (WCEA) to its operations on free exercise grounds. WCEA required employers providing their employees health insurance plans, including prescription drug benefits, to include medically prescribed contraceptives within the plan's coverage. If the federal or state constitution mandated an exemption for religious organizations, such as Catholic Charities, that could not comply with this law without violating the religious principles to which they adhered, these organizations would avoid an expense all other employers must bear. The cost of the insurance coverage Catholic Charities would avoid might not amount to a great deal of money in this particular case, but any cost savings constitutes a benefit of secular value.

It is worth reiterating that the doctrinal issue in these examples is not the foundational question of why a religious pacifist should receive different treatment than a secular pacifist. That question goes to whether the exercise of religion deserves distinctive constitutional

[50] 85 P.3d 67 (2004).

protection at all. The analysis here presupposes the legitimacy of protecting religious liberty. The problem is how free exercise doctrine should take into account the reality that the granting of exemptions and accommodations not only protects the right to exercise religion, but also confers secular benefits on religious individuals—above and beyond the freedom to practice their faith.

One way to mitigate this concern about privileging religious persons and organizations is to clarify precisely what it is that a constitutionally mandated exemption should provide to the religious objector and what the state may legitimately require of him, notwithstanding its commitment to protect the exercise of his faith. More specifically, a mandatory free exercise exemption may prohibit the state from requiring the religious individual to violate the tenets of his faith, but it would not prevent the state from taking appropriate action to limit any surplus secular benefit that might accrue to the religious individual as a result of such an accommodation. In the context of religious exemptions from military service, for example, this kind of an arrangement is commonplace. Conscientious objectors are required to perform alternative service, either serving as medics in the military or in nonmilitary community service programs.[51] Thus, religious pacifists need not violate the commandments of their faith, and the secular benefit of being free from compulsory military service is significantly reduced by the requirement that they must take several years out of their lives to perform some kind of community service.

The idea that religious pacifists should do something to make up for the burden they are escaping has a long historical pedigree. Initially, it appears to have been more of a request or recommendation than a requirement.[52] Over time, however, it became a formal legal obligation.

Is such an obligation consistent with the goal of protecting religious liberty against state interference? In one sense, it seems to conflict with the idea that individuals have a right to follow the dictates of their faith. The conscientious objector is exempted from a law that would force him to violate his religion's precepts. But the exemption is conditioned on him giving something of value to the state in re-

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[51] Military Selective Service Act, 50 U.S.C.S. App. § 456(j) (2000) (granting approved conscientious objectors alternatives such as noncombatant services in the military or "such civilian work contributing to the maintenance of the national health, safety, or interest").

[52] *See* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 110–11 (2d ed. 2006) (describing early history of religious exemptions from military service).

turn—two years of community service. There seems to be a price attached to the exercise of his free exercise rights.

As a general matter, that argument must be mistaken. The right to practice one's religion is still protected. What is being taken into account is the obligation of citizens to share social costs that must be borne by the community at large. The religious pacifist has no principled objection to fairly sharing the costs of government. His faith prohibits him from participating in one function of government, not from contributing the value of that participation to some other governmental goal. There is secular value in being exempt from military service. Conscription imposes significant costs on the draftee that the conscientious objector avoids. Requiring the performance of alternative service may be more accurately characterized as the disgorgement of that undeserved secular benefit than as a price to be paid for the right to practice one's faith.

To clarify this analysis, an analogy might be drawn between free exercise exemptions and the tort law privilege of private necessity. In the famous case of *Vincent v. Lake Erie Transportation Co.*,[53] to escape a storm, a steamship remains moored at a wharf by repeatedly replacing the mooring ropes keeping it secured at the dock—notwithstanding the damage done to the wharf as the waves smashed the ship against it during the night. In response to a suit brought by the wharf owners for damages, the steamship's owners asserted the privilege of private necessity. They argued that the ship had to stay securely moored to the wharf to avoid its destruction by the storm. The court recognized the applicability of the privilege to the facts of the case, but required the defendant to pay the damages it had caused to the plaintiff in any event.[54]

Even though the defendant was required to pay damages, the court's decision in *Vincent* did not nullify the core value of the necessity privilege. The ship's captain retained the right to make the choice to stay moored at the wharf. The purpose of the privilege, to allow the ship to avoid destruction by the storm, was achieved. The privilege was never intended to allow the party asserting it to shift the costs created by the storm entirely on to third parties. That would confer a surplus benefit on the ship, to which it was not entitled.

Admittedly, this analogy is far from perfect. The focus in *Vincent* was on compensating persons whose property was damaged through the exercise of the privilege, not on the defendant giving up the bene-

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[53] 124 N.W. 221 (Minn. 1910).

[54] *Id.* at 222.

fits he received by staying docked at the wharf. But *Vincent* does demonstrate that courts can distinguish between giving individuals a completely unfettered choice that they may exercise entirely free from the equities of the situation or the consequences of their conduct and guaranteeing individuals a choice conditioned upon equitable considerations and concerns relating to the impact of their decision on others. In both cases, the individual is given the opportunity to make a choice that would otherwise be denied to him as a matter of law. But the latter form of the privilege limits the meaning of the privilege to its essential character—the right to save one's life (or ship) by creating an exemption from the general operation of tort and property law—and nothing more.

It is in this sense that a similar analysis applies to free exercise rights. The right may allow the religious individual to avoid complying with a law that would require him to breach the commandments of his faith. But the burdens created by such laws do not necessarily disappear when such exemptions are granted. Often, they will be shifted to third parties or to the public. Thus, the granting of the exemption may provide secular benefits to religious individuals, to the relative disadvantage of their secular counterparts. The Constitution may protect the right of individuals to comply with the dictates of their faith, but it says nothing about allowing them to escape the burdens government imposes on citizens to further the public good, or providing them more than their fair share of the benefits provided by government.

The idea of alternative service, or more generically, reducing the surplus secular benefit of religious exemptions, extends far beyond conscientious objection to military service. It can apply to the other, previously discussed, exemptions as well. With regard to an accommodation that allows public employees to have a weekend day off to observe their Sabbath, more than likely, there is some monetary value that roughly approximates the value to government workers in a particular field and location of having a weekend day off. In basic terms, leaving religion out of the equation for the moment, this would represent the price one employee would demand from another to trade a weekend day off for a midweek day off. Employers might give religious workers the choice of having a weekend day off permitting them to observe their Sabbath with the understanding that their salaries would be reduced by the secular value of that day off (perhaps a reduction in salary from $1000 per week to $950 per week). Those workers required to give up a weekend day off, which they would otherwise have been entitled to under seniority rules or other work-

force policies, in order to accommodate their religious colleagues, would have their salaries supplemented by an equivalent amount (for the purposes of this hypothetical, $50).[55]

A similar analysis might apply in the *Catholic Charities* case. Catholic Charities might be exempt from the WCEA provision requiring it to add medical contraceptive coverage to its employees' health plan. It would be required, however, to contribute an amount equal to the cost of the medical contraceptive coverage either to its employees (who would not receive the benefit of the WCEA), or to the state, or to some other public purpose the state might designate. Religious organizations would not be permitted to benefit financially from the exemption they sought.[56] The constitutionally mandated accommodation they received would be limited to protecting their ability to comply with the dictates of their faith.

In theory, reducing the surplus secular benefits resulting from religious exemptions mitigates, although it will not entirely eliminate, several of the privilege problems discussed earlier. If religious individuals receiving exemptions from burdensome laws are required to accept some offsetting, alternative burden that serves important state interests, the incentive to adopt beliefs entitling one to such an exemption is correspondingly reduced. Conscientious objector status is less alluring with an alternative service requirement than without one. Similarly, a public employee is less likely to assert a sham religious basis for avoiding weekend work if the resulting accommodation results in a reduction in his salary. The equity argument is also muted to some extent. If the employee receiving a weekend day off to enable him to observe the Sabbath receives a lower salary, and the secular employee required to take on weekend

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[55] In some cases, reducing the surplus secular benefit of a religious exemption may confront the religious individual with a difficult decision. An employee receiving a low salary may find it difficult to accept even a modest reduction in his salary. In that circumstance, reducing the secular benefits of an exemption, in effect, will deter the religious individual from exercising his right to an exemption. There is no easy way to completely avoid this possible consequence. But there may be ways to circumvent or mitigate it, at least to some extent. Perhaps the employee seeking an exemption could be offered the choice of working a few extra hours without pay in lieu of receiving a reduced salary. It is probably also the case that the secular value of having a weekend day off (that is, the cost of purchasing rights to a weekend day off from a co-worker) is correspondingly lower for low-income employees.

[56] One might argue that the benefits society accrues from the work of religious institutions, and religious charities in particular, already offsets any financial benefits they might receive from an exemption similar to the one sought by *Catholic Charities* from the WCEA. *See infra* notes 101–22 and accompanying text. The point is not entirely without merit, but it raises significant issues about whether and when such offsets should be presumed. It also undermines some of the advantages of avoiding surplus secular benefits—such as limiting sham claims and mitigating inducements towards religious belief and practice.

work gets a higher salary, the degree to which the religious employee is "favored" is sharply limited.

Translating that theory into doctrine is a much more difficult proposition. An anti-privileging approach to accommodations requires the government to participate in working out the ways that the surplus secular benefits of religious exemptions may be reduced. But in many circumstances, the government is disinclined to grant the exemption in the first place. Thus, a religious public employee who is denied a weekend day off to observe the Sabbath may bring a lawsuit to challenge the state's decision not to accommodate his religious practice. In court, however, the state may not insist that the employee accept a lower salary if the accommodation is granted. Indeed, the state may never even have considered that possibility. It will simply argue that it does not have to grant any exemption at all. In response to the state's litigation position, the court adjudicating the employee's claim would have to determine whether there is some manageable way for the state to grant the accommodation and also reduce its secular value to the plaintiff.

By any account, that is an intrusive role for a court to accept and perform. It is particularly problematic because the state may have little incentive to help the court develop ways to mitigate the secular value of any proposed accommodations. The inability to come up with such an arrangement, after all, would count against the plaintiff's claim since it invokes the problem of privileging. From the state's perspective, the court's difficulty in arranging ways to limit the secular benefit accruing from an exemption simply fortifies the state's argument that no exemption should be constitutionally required in the first place.

The situation may not be so dire, however. Courts may handle these cases somewhat like they adjudicate freedom of speech cases that require them to determine whether a less restrictive alternative exists for furthering the state's legitimate interests than the challenged speech regulation. In theory, in free speech litigation, the state bears the burden of satisfying this standard of review. In practice, however, it is often the plaintiff challenging a speech regulation who has to persuade the court, at least initially, that less burdensome alternatives exist.[57] In response, the state will attempt to justify its law by demon-

[57] *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 666–70 (2004) (holding that government did not adequately refute plaintiff's contention that blocking and filtering software represented less restrictive alternatives to the restrictions on speech mandated by the Child Online Protection Act).

strating that the plaintiff's proposed alternatives are less feasible or effective than the challenged regulation.

Similarly, in free exercise cases, under an anti-privileging adjudicatory framework, the plaintiff may have to propose ways to minimize the secular benefits he would receive if the accommodation he seeks is granted. If the state challenges the sufficiency of the plaintiff's proposal (on the grounds that it does not reduce the surplus benefits enough), or argues that the plaintiff's proposal is unacceptable for administrative reasons, the court will have to evaluate the competing arguments. But this is not altogether unfamiliar terrain for courts. The primary difference from conventional constitutional litigation involving other rights is that in those cases the court focuses on the extent to which protecting a right interferes with the state's interests or imposes costs on third parties or the public. Here, however, it will focus on the extent to which protecting the right provides material benefits to the person exercising the right. The distinction is noteworthy, but it should not require courts to engage in unreasonably intrusive judicial review. In most cases, the court can evaluate the plaintiff's proposals and the state's responses without taking on the burden of coming up with privilege mitigating conditions on its own.

This leads to the next problem. How can a court determine what constitutes a sufficiently non-privileging accommodation to pass constitutional muster in order to justify its mandating the sought after exemption? Some cases will be easier than others. In *Catholic Charities*, for example, it should not be that difficult to determine the cost of adding prescription drug coverage for medical contraceptives to the employees' existing health plan. That is the secular benefit Catholic Charities would receive if it were granted an exemption from California's WCEA requirement. Under the simplest scenario, Catholic Charities could direct that additional expenditure to any of a variety of its charitable programs that serve the public good. In doing so, it would entirely eliminate any economic savings it received as a result of the exemption that it sought.[58]

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[58] If California had acted sensibly in this matter, which it did not, it would have offered this alternative in the first place. The State could have set up a supplemental insurance program for the employees of religious organizations it exempted from the coverage of the statute. The cost the State incurred for providing the insurance coverage would be roughly offset by the benefit the public received from Catholic Charities increasing its contributions to one of its charitable programs. If California adopted this approach, the State's goal of providing medical contraceptive insurance coverage would be accomplished, the religious autonomy of Catholic Charities would be respected, the State would not incur any significant costs, and Catholic Charities would not receive any economic benefit from the exemption.

In the case of the public employee who seeks a weekend day off to observe his Sabbath, it should also be possible to determine the value of a weekend day off, or at least some rough estimate of the value of that day off, compared to a day off in the middle of the week. Presumably there is some amount of money that would induce an employee to view coming to work on the weekend and receiving a weekday off instead as a fair trade. Wage supplements for weekend and holiday work are not that extraordinary and might prove helpful in determining the secular value of a weekend day off.

Admittedly, other situations would be more problematic. In the case of conscientious objectors, one might reasonably suggest that at least three years of alternative service is necessary to offset the benefit of an exemption from two years of military service. Perhaps even that is inadequate.

The idea, of course, is not to arrive at some precisely equivalent alternative. That would be impossible in many cases. The goal is to arrive at a sufficient reduction of the secular benefit accruing to religious individuals as a result of their receiving a constitutionally mandated exemption to avoid their being privileged in any significant, material way. Ideally, a doctrinal framework committed to implementing this objective might induce the parties involved, the individuals and institutions seeking an exemption, and the government initially inclined to deny the request, to work out settlements that avoid recourse to the courts. Since litigation exposes both sides to something they would prefer to avoid (a judicially mandated exemption for the state and a benefit reducing condition for the religious person), working out a mutually agreeable compromise might seem advantageous to both parties in many cases.

There are some aspects of the privileging issue that may remain problematic. Much of the concern about distorting the marketplace of ideas by exempting religious institutions from regulatory burdens that their secular counterparts must obey can probably be resolved by conditioning exemptions on the reduction of secular benefits. To the extent that any residual apprehension about the privileging of religious messages remains, however, that should be offset by the enforcement of a separate constitutional mechanism, the Establishment Clause. Clearly, current constitutional restrictions on the government's endorsement and promotion of religion benefits secular beliefs—in that, for the most part, with some obvious exceptions, they are the only kinds of ideas that government may communicate to citizens. Since government speaks frequently and loudly through a variety of public institutions, limiting government

speech to secular messages gives the marketplace of ideas something of a secular emphasis.[59] Free exercise exemptions indirectly restore a constitutional balance by freeing religious activities and institutions from state regulatory interference. True, private religious voices may be amplified by these exemptions. It is hard to argue, however, that this unreasonably privileges religion in the marketplace of ideas when the Establishment Clause restricts government from endorsing religion, while allowing state promotion of secular ideas.[60]

The Free Speech Clause of the First Amendment also operates to foreclose the privileging of religious speech. Under current doctrine, religion is considered to be a viewpoint of expression.[61] Any attempt to use the Free Exercise Clause to exempt religious expression from a content-neutral regulation of speech, for example, would run head-on into the First Amendment's prohibition against viewpoint discrimination.[62] Few cases to date even indirectly confront such a situation, but those that do strongly suggest that mandatory exemptions for religious expression from otherwise constitutional speech regulations are not acceptable.[63] Indeed, requiring such exemptions would transform a long line of cases invalidating discrimination against religious

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[59] *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 131–33, 185–86 (1992).

[60] *See generally Religion Clauses*, *supra* note 26, at 268–78; Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 330 (1991) ("This combination—'singling out' under the Establishment Clause, 'equal treatment' under the Free Exercise Clause—is a powerful instrument for the secularization of society. It is hard to see anything neutral about it.").

[61] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001) (holding that a school's exclusion of a club due to its religious beliefs is viewpoint discrimination); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995) (holding that withholding funds for a student group because of religious beliefs is viewpoint discrimination); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993).

[62] *See False Messiahs*, *supra* note 19, at 164–69.

[63] In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the Court upheld the application of content-neutral speech regulations to the distribution and sale of religious materials, notwithstanding the fact that plaintiffs considered their expressive activities to be a religious ritual. In doing so, the Court entirely ignored free exercise concerns and applied the relatively deferential standard of review required by free speech doctrine. More recently, in *Watchtower Bible and Tract Society of New York v. Stratton*, 536 U.S. 150 (2002), the Court reviewed restrictions on religious canvassers solely from a free speech perspective. *See also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (striking down legislation that exempted publishers of religious material from taxes that their secular counterparts were required to pay as a violation of the Establishment Clause); *False Messiahs*, *supra* note 19, at 129–38.

In theory, the doctrine that a law abridging so called "hybrid rights"—that is, a law burdening both free speech and free exercise rights—should receive more rigorous review than the standard of review required by either free speech or free exercise doctrine standing alone would support exemptions for religious speech from content-neutral speech regulations. But that doctrine has received limited support in the case law and is subject to serious criticism. *See infra* notes 226–66 and accompanying text.

speech on public land as impermissible viewpoint discrimination into a bizarre system that requires both equal and greater access for religious speech on public property.[64]

The remaining concern about the privileging of religion involves exemptions that permit religious individuals to engage in otherwise unlawful practices that cause harm to third parties or impose costs on the public. This issue is distinct from the surplus secular benefits that accompany religious exemptions. The concern here is not with the gain to the religious individual, but rather with the loss to third parties, or the public. Religion is privileged in the sense that protecting its exercise justifies sacrificing the interests of others. Conditioning exemptions to reduce secular benefits is irrelevant to, and cannot remedy, this problem.

Insisting that the religious individual make the person who is harmed whole, through the payment of damages, is also not a solution. In some cases, compensation is inadequate (some harms are irreparable). In others, mandatory compensation would be prohibitively expensive. In these situations, requiring the religious individual to compensate those who are harmed by granting an exemption nullifies the utility of the accommodation. Avoiding the privileging of religion (by prohibiting the harm causing conduct or requiring the payment of damages) effectively prevents the religious individual from exercising his faith. Unlike the private necessity situation—in which the defendant's material gain in accident avoidance from the exercise of the privilege rationalizes the payment of damages for harm caused to the plaintiff's property—here the entire purpose of the exemption would be undercut.

Thus, there are situations when the privileging of religion, in the aforementioned sense, simply cannot be avoided if certain exemptions are granted. This does not necessarily mean that all such exemptions must be rejected, however. In some circumstances, mandatory exemptions that risk harm to others or impose costs on the public can be

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[64] For example, in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Court held that it was unconstitutional viewpoint discrimination for a school district to deny after hours access to a religious group that planned to hold meetings that were equivalent to religious services on school property when civic groups were permitted to use school facilities for their secular expressive activities. In light of *Good News Club*, if the school district denied access to its facilities to all outside groups, and that content-neutral regulation was upheld on free speech grounds, it would be anomalous in the extreme to conclude that the Free Exercise Clause required the school to grant the religious group an exemption from this requirement. If the Court adopted such an approach, the religious group would, in essence, be able to demand equal access to public property on free speech grounds and preferential access to the same property on free exercise grounds. *See False Messiahs*, *supra* note 19, at 166–67.

justified.[65] In other situations, the harms or costs resulting from the granting of exemptions simply cannot be tolerated. For free exercise doctrine to accomplish its purpose when the exercise of religion inflicts harm or costs on others, it has to provide a framework for determining when such exemptions are warranted and when they must be denied. To consider how that question can be answered, we have to confront the problem of balancing more directly.

B. Creating a Framework for Free Exercise Balancing

1. The Unavoidability of Balancing

Any complex framework for protecting free exercise rights will involve some kind of balancing test. That it should do so is hardly a surprise. Balancing tests pervade constitutional law.[66] It makes no sense to argue that we should take free exercise rights seriously in the same way that we take freedom of speech or equal protection guarantees seriously, and insist at the same time that we cannot utilize the

[65] The privileging of religious individuals and institutions through religious exemptions that provide them surplus secular benefits is a problem that is relatively unique to the protection of free exercise rights. It has little bearing on other fundamental rights cases. When courts protect freedom of speech, for example, no one complains that speakers are receiving material benefits that are unavailable to those who choose to remain silent.

Privileging rights by protecting their exercise, even when doing so imposes some costs on others, is a much more common occurrence. Indeed, this form of privileging is intrinsic to the very idea of what it means to protect rights. Thus, the conventional benefit (or privilege) an individual receives when courts protect freedom of speech arises from the exercise of the right itself and the concomitant power to impose uncompensated burdens on third parties, not from any auxiliary material advantages that accrue to speakers, as opposed to non-speakers.

This form of privileging is typically justified by the constitutional commitment to protecting the interest in question as a right in the first place. Accordingly, its existence should not undermine the protection of free exercise rights *per se* any more than it undermines the protection of other fundamental rights. There are limits to the scope of such privileges, of course. Judicial balancing is necessary to determine the extent to which the right will be protected when it conflicts with various state interests. But that analysis presupposes that treating the right as "special," or privileged, is appropriate in some circumstances, at least to some extent. Thus, the argument suggested by some courts and commentators that the protection of free exercise rights can never justify allowing religious individuals to engage in activities that cause harm to others or to the public must be mistaken—unless the protection of free exercise rights operates entirely differently than all other constitutional rights. *See infra* notes 133–34 and accompanying text.

[66] *See generally* Frisby v. Schultz, 487 U.S. 474, 485–88 (1988) (balancing to review content-neutral speech regulations); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (balancing to review procedural due process claims); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (balancing to resolve dormant commerce clause dispute); Terry v. Ohio, 392 U.S. 1, 23 (1968) (balancing to determine reasonableness of search). For commentary describing the range of balancing in constitutional doctrine, see Aleinikoff, *supra* note 14, and Fallon, *supra* note 33, at 77–83.

kinds of tests that courts employ when they adjudicate cases involving these, and other, comparably complex rights.[67]

Taking rights seriously requires courts to carefully determine when the interests subsumed by the right can be sensibly taken off the table of democratic control. Clearly, this means the right should not always be subordinated to any state interests that conflict with its exercise. We do not take a right seriously by sacrificing it to trivial interests. Less obviously, a serious fundamental rights jurisprudence also suggests that not every burden on the right must be justified under strict scrutiny review. Broadly defined rights cannot always receive rigorous protection because doing so would unreasonably interfere with the government's ability to further the public good. No democratic society will surrender its power to pursue interests that conflict with rights so completely and irrevocably. Insistence on a rigid commitment to rigorous review risks an obvious response: the scope of the right will be limited to only those situations in which it does not conflict with any interests the society values or cares about.[68]

Current free exercise doctrine illustrates this phenomenon all too well. Today, abridgements of free exercise rights are reviewed under a form of strict scrutiny that is almost always fatal in fact. An abridgement only occurs, however, if religion or a specific religion is singled out for discriminatory treatment. So defined, free exercise rights rarely interfere with the state's ability to pursue its interests effectively.[69] Few, if any, legitimate state goals can only be achieved through religious persecution or discrimination. But such a limited definition of free exercise rights provides no protection whatsoever

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[67] The contrary implication suggested in *Smith* is simply inaccurate. *See* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 760 (1992) ("[T]he assertion [in *Smith*] that judicially manageable standards are lacking here more than in other areas of constitutional adjudication simply rings false. A wide variety of constitutional controversies—those concerning reproductive rights, equal protection, or disputes between the President and Congress, to name only a few—require complex judgments concerning the scope, weight, and reconcilability of competing interests." (footnote omitted)).

[68] *See* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 955–59 (1994) (discussing the virtue of "judicial flexibility in determining what constitutes the infringement of a right").

[69] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court applied strict scrutiny to city ordinances that constituted a religious gerrymander and were designed to suppress the practices of a particular religious group, the Santeria religion. So construed, the ordinances had virtually no chance of surviving rigorous review. Indeed, it is safe to say that any law that invokes strict scrutiny under the *Smith* regime will be summarily struck down. The problem, of course, is that in the overwhelming majority of free exercise disputes it will be impossible to prove that the intent of a challenged ordinance is blatantly anti-religious or that the resulting ordinance is so narrow as to only affect the targeted religion.

against a broad range of state action that interferes with or burdens religious practices.

An alternative, *serious* framework requires courts to respect both the right and the state interests that conflict with its exercise. Often, inevitably, this involves the use of balancing tests. There are so many examples in constitutional doctrine that prove this point that it is hard to see how it can meaningfully be challenged. Some balancing tests are explicit. Consider the review of content-neutral speech regulations. Courts use a multifactor balancing test to evaluate such speech restrictions for two reasons.[70] First, freedom of expression means little if the government can control the time, place, and manner where speech may occur at its unfettered discretion. Second, and of equal importance, requiring a narrowly tailored compelling state interest to justify every content-neutral regulation of speech sacrifices far too many legitimate and important state interests to people who want to speak as loudly as they can, as often as they can, wherever they choose to express themselves.[71]

A similar analysis applies to the review of restrictions on the speech of public employees. Here, courts consider even more factors than they do when they review content-neutral speech regulations and do so under an even more indeterminate and subjective balancing analysis.[72] Nor is freedom of speech the only area in which balancing tests are employed. Some, but not all, ballot access regulations are

[70] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 54–59 (1994) (applying balancing test to strike down an ordinance prohibiting display of signs on private property); Frisby v. Schultz, 487 U.S. 474, 482–88 (1988) (evaluating various factors in holding that an ordinance prohibiting picketing in front of private residences was facially valid).

[71] *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 72, 75–76 (1987) (arguing that allowing individuals to gather at any place and time would cause intolerable disruptions). *See also In re* Kay, 464 P.2d 142, 149 (Cal. 1970) ("Freedom of everyone to talk at once can destroy the right of anyone effectively to talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship.").

[72] In evaluating regulations that limit the speech of public employees, courts must first determine whether the employee's speech is a matter of public concern, an inquiry requiring consideration of the content, form, and context of speech at issue. If the employee's expression does involve a matter of public concern, the court will employ a balancing test to determine whether the employee's speech interests are outweighed by the state's interests in the effective functioning of its public services. The implementation of that balancing test requires the weighing of several factors including the content of the message being expressed, the time, place and manner in which the employee's expression occurs, the degree of importance of the employee's speech, the effect of the speech on the employee's ability to perform his responsibilities, and the impact of the speech on the efficiency of the government employer's operations. *See generally* Waters v. Churchill, 511 U.S. 661 (1994); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

reviewed under a balancing test.[73] Procedural due process requirements are determined by a balancing test.[74] The list goes on.[75]

On other occasions, balancing is implicit in the doctrinal framework courts utilize. It is common for courts to implicitly engage in balancing when they determine what constitutes an infringement of a right. Sometimes this form of balancing is rudimentary. For example, not every burden on the right to marry invokes strict scrutiny review. Minor burdens are upheld routinely. The government must justify only substantial burdens by a compelling state interest.[76] Obviously, the determination that only laws that substantially burden a right must be justified by compelling state concerns reflects some weighing and balancing of the competing interests.

In other circumstances, the analysis of what constitutes an infringement more directly implicates a balancing of interests. The court is not simply asked to determine whether an infringement is substantial, but also whether it is undue.[77] Determining what constitutes an undue burden goes beyond an inquiry into the magnitude of the burden on a right. It also asks whether it is in some sense excessive or inappropriate. This question can not easily be answered without considering the nature and weight of the state's interest, as well as the extent of a regulation's interference with the exercise of the right.[78]

The tailoring requirement of conventional intermediate scrutiny also can be understood as a form of balancing. When courts consider alternative ways that the state can further its interests, they take into account the increased cost or loss in effectiveness of alternative regulations, as well as the degree to which alternative regulations mitigate

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[73] *See* Brownstein, *supra* note 68, at 914–17 (describing ballot access cases).

[74] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (explaining that an analysis of procedural due process involves weighing three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

[75] *See supra* note 66.

[76] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 38687 (1978) (explaining that not "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny" but that strict scrutiny is appropriate in cases where "[t]he statutory classification at issue . . . clearly does interfere directly and substantially with the right to marry").

[77] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 873–79 (1992) (opinion of O'Connor, Kennedy, & Souter, JJ.) (discussing the meaning and effect of an undue burden on the right to have an abortion).

[78] *See* Brownstein, *supra* note 68, at 878–92 (discussing the meaning of an undue burden).

the burden on the right. If an alternative regulation is more expensive to implement than the challenged, right-burdening statute, or is not quite as effective in achieving the state's goal, but it will substantially reduce the burden on the right, is the statute under review narrowly tailored? Answering this question in any meaningful way requires the balancing of increased cost or reduced effectiveness against a decrease in interference with the exercise of the right.[79]

Moreover, even if one rejects the argument that constitutional standards such as intermediate level scrutiny involve implicit balancing, it is still the case that these standards are subject to the same criticisms that are directed at balancing tests. The problem with balancing, according to its critics, is that it is subjective, value laden, policy driven, and usurps the legislature's prerogatives.[80] But these same criticisms, of course, have been directed at the use of intermediate level scrutiny in equal protection cases.[81] There is no completely objective way to determine whether a gender-based law, or a law disadvantaging non-marital children, is substantially connected to an important state interest. Notwithstanding those criticisms, equal protection jurisprudence does not insist that all gender classifications must either be upheld under rational basis review or struck down under strict scrutiny. If judicial subjectivity is the price to be paid for courts to take gender equality seriously, equal protection doctrine accepts that cost.

Thus, the problem with developing complex free exercise jurisprudence cannot be that it necessarily involves balancing or the application of subjective standards. Balancing and subjectivity is too much of the meat and potatoes of a typical constitutional law diet for that argument to be accepted. If balancing is an unacceptable dimension of free exercise doctrine, then there must be something unique about free exercise rights that make them a more problematic mechanism here than in other constitutional contexts.

2. *The Alleged Difficulty with Free Exercise Balancing*

As noted previously, there are several alleged problems with employing a balancing standard to protect free exercise rights. These concerns break down into two separate problem areas. The first, and

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[79] Aleinikoff, *supra* note 14, at 969–71; Fallon, *supra* note 33, at 78–79.

[80] *See supra* notes 33–36 and accompanying text.

[81] *See* Craig v. Boren, 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting) (criticizing the majority's adoption of an intermediate level scrutiny standard as unprincipled and an usurpation of legislative prerogatives).

probably most important, issue involves the difficulty in drawing distinctions between situations requiring a more rigorous or a more deferential standard of review. Arguably, free exercise doctrine will be unidimensional. There is no basis for drawing distinctions among free exercise claims. All cases will be subject to the same, largely ad hoc and indeterminate, balancing test.

The second problem focuses on the process of balancing itself, not the unitary nature or rigor of the standard of review. Here the suggestion is that there is no legitimate or principled way for courts to adjudicate free exercise claims. Religious belief systems are rigid, all or nothing, frameworks. All religious obligations must be obeyed, and they can only be satisfied through literal compliance with the tenets of one's faith. Thus, there is no religious analogy to the multiple factors courts consider in free speech balancing, such as whether there are alternative avenues of communication available to the speaker. Put simply, there will be no way to explain why, or predict whether, various government interests will be found to justify the substantial burdening of one religious practice, but not another. In free exercise cases, there simply is not any way to decide cases that will promote predictability and uniformity.[82]

Moreover, what many courts will take into account in free exercise cases, implicitly and inevitably, is something they are constitutionally prohibited from considering—the truth or value of the religion that is the source of the plaintiff's claim. All religions should be treated as if they are of equal weight by courts. But that requirement will be impossible to police given the indeterminacy of the balancing test courts will apply. The subjectivity inherent in ad hoc balancing is particularly dangerous in the free exercise context because it creates a substantial risk of favoritism toward larger and more conventional faiths. On the rights side of the scale, courts will assign greater weight to commonly understood practices of well-known Christian denominations. On the state interest side, courts will more readily recognize government interests that conflict with the practices of lesser known faiths as important or compelling. Religious partiality will be unavoidable.[83]

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[82] *See* Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 14–16, 23 (1979) (suggesting that outcomes are unpredictable due to courts' selective use of precedent to support predetermined conclusions); Marshall, *supra* note 7, at 311–12 (discussing the unpredictability of balancing tests when applied to religious freedom).

[83] *See supra* note 37.

a. Learning from the Distinctions Drawn in Other Doctrinal Areas To Identify Situations Requiring More or Less Rigorous Review

These concerns are legitimate, but they are exaggerated. Free exercise doctrine need not be so devoid of guidelines and distinctions. There are a variety of considerations courts may take into account to help differentiate cases and evaluate the competing interests that are at stake.

Consider the concern that no distinctions can be drawn in free exercise cases that justify the application of varying standards of review. If we look at the jurisprudence that has developed with regard to other constitutional guarantees, it is clear that such distinctions are commonplace. Courts often recognize core aspects of a right as well as aspects of the right that lie at the periphery of the right's protection. Core aspects of the right are assigned greater weight in adjudicating conflicts between the right and state interests. Accordingly, courts require a stronger justification for burdening them.

There are numerous examples of courts identifying key subcategories within the scope of a right that deserve careful attention. Free speech cases, for example, regularly suggest that political speech is special; laws that burden it merit particularly careful consideration.[84] At the other end of the continuum, some speech may be entirely unprotected, as is the case with true threats or obscenity.[85] Other expression is recognized to be of lesser value, although it is still protected to some extent. Often these categories of lesser protected speech are defined by indeterminate and multifactored parameters, and laws that regulate such speech are evaluated under complex standards of review. Thus, for example, publications of false facts are protected against defamation actions under doctrinal rules that consider both the status of the victim and whether the reputation injuring speech relates to a matter of public concern.[86] Vulgar or indecent lan-

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[84] *See* Roth v. United States, 354 U.S. 476, 484 (1956) ("The protection given speech . . . was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2005) ("Political speech—speech at the core of the First Amendment—is highly protected."); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 705 (2004) ("[P]olitical speech—speech intended to influence political decisions—is afforded the highest protection under the First Amendment.").

[85] *See* Miller v. California, 413 U.S. 15 (1973) (discussing obscenity); Watts v. United States, 394 U.S. 705 (1969) (discussing threats).

[86] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (holding that states may permit awards of presumed and punitive damages based on defamatory statements that are not a matter of public concern); Gertz v. Robert Welch, Inc., 418, U.S. 323, 342, 347 (1974) (distinguishing between public figures and public officials who may only recover in defamation suits "on clear and convincing proof that the defamatory falsehood was

guage is less protected when it is communicated in inappropriate locations to unconsenting or immature audiences, and its regulation may be justified by laws directed at the secondary effects it may cause.[87]

Similar distinctions are drawn in other constitutional areas. The core of equal protection doctrine is the prohibition against race discrimination.[88] Discriminatory laws classifying on other problematic grounds, such as gender, receive less rigorous review.[89] Groups defined by other characteristics, such as non-marital children, also receive less expansive protection.[90] With regard to other fundamental rights, courts will focus on protecting what is intrinsic to the nature of the right. For example, the core of the right to have an abortion, according to the Supreme Court, is the ability of a woman to make an informed, reflective, and deliberate choice about whether she wants to continue her pregnancy and bear a child.[91] Abortion regulations designed to hinder that ability are much more likely to be struck down than those that materially burden obtaining an abortion for the purpose of insuring that a woman's decision is considered and knowledgeable.[92]

Recognizing that distinctions identifying core aspects of rights are a common part of constitutional doctrine does not demonstrate conclusively that the same analysis may be used to develop free exercise jurisprudence. But, it does point us in a useful direction. Some caution, however, is necessary in pursuing this line of inquiry. What is common among rights is the existence of these kinds of distinctions,

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made with knowledge of its falsity or with reckless disregard for the truth," and private figures, as to which, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual").

[87] *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (upholding law directed at secondary effects of adult businesses under deferential review); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (applying lenient standard of review to reprimand of station broadcasting indecent speech to an audience including minors).

[88] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Strauder v. West Virginia, 100 U.S. 303 (1879). Even in prison or when engaged in for benign, remedial purposes, race discrimination is taken seriously. *See* Johnson v. California, 543 U.S. 499, 504–06 (2005); Adarand v. Pena, 515 U.S. 200, 222 (1995).

[89] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that gender classifications will be less rigorously reviewed than racial classifications and will be upheld if they "serve important governmental objectives and [are] substantially related to achievement of those objectives").

[90] *See* Clark v. Jeter, 486 U.S. 456, 461–62 (1988) (applying intermediate level scrutiny to laws that disadvantage non-marital children).

[91] Brownstein, *supra* note 68, at 885 n.58.

[92] *Id.* at 884–85.

not their rationales. The reason why political speech is recognized as being at the core of what the First Amendment protects has little to do with the reason why prohibiting racial discrimination is a core equal protection concern. Identifying what courts recognize to be the primary purpose of each of these two constitutional provisions tells us little that is directly relevant to free exercise doctrine. Determining the core purpose of free exercise rights requires an independent analysis.

b. Identifying Core Components of the Free Exercise Doctrine

Identifying some subareas of the free exercise of religion that deserve special constitutional attention is a daunting task. The best that one can offer is a regime of possible alternatives. There is no consensus on the primary purposes of free exercise rights that has the persuasive force and doctrinal utility of our constitutional commitment to protecting political speech or prohibiting racial discrimination.[93] This lack of consensus should not be seen as an insurmountable obstacle to doctrinal development, however. One need not agree with all of the specific suggestions offered in this article for the development of free exercise doctrine to accept the basic idea that doctrinal distinctions are possible and desirable. The goal of this article is to provide enough examples of possible doctrinal rules that resonate with readers to persuade them that this project is worth pursuing. Agreement as to the utility or value of any specific suggestion is of secondary importance.

Probably the most widely acknowledged foundation for protecting free exercise rights is the idea of freedom of conscience.[94] Unfortunately, in an important sense, this foundation is also ill suited as a basis for doctrinal development. I do not dispute the importance of this principle. Free exercise jurisprudence cannot avoid taking it into account. For many people, it is the most persuasive reason for advocating a rigorously enforced and expansively defined free exercise regime.

The problem with focusing on freedom of conscience alone as the core meaning of free exercise rights is that it does not assist us in drawing distinctions and creating guidelines for the adjudication of cases. All religious obligations implicate freedom of conscience, and

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[93] To gain some sense of the range of arguments offered to justify the protection of free exercise rights, see *supra* note 16.

[94] *See, e.g.*, EVANS, *supra* note 40, at 22–28; JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 39–44 (2000).

doctrinal development requires moving beyond universally applicable principles to identify distinctions within the coverage of a right. It is a truism that freedom of speech protects the right of people to communicate with each other. But identifying the core concern of the free speech doctrine as the protection of communication does not move us forward in working through free speech problems.

Again, I am not suggesting that freedom of conscience is beyond the scope of what the Free Exercise Clause protects. I simply recognize that it does not provide a core class of activities or characteristics that can be identified as requiring distinctive constitutional treatment. Moreover, it is important to remember the current state of free exercise doctrine and its history. The rhetoric of freedom of conscience has always far exceeded legal reality. Under existing doctrine, freedom of religious conscience receives virtually no constitutional protection against neutral laws of general applicability.[95] For most of our constitutional history, the Free Exercise Clause did not provide serious protection to religious practices or religiously motivated conduct.[96] Even during the relatively brief period between 1963, the date when the Supreme Court breathed some life into free exercise doctrine in *Sherbert v. Verner*, and 1990, the date when *Employment Division v. Smith* was decided, courts spent most of their time explaining why free exercise rights could not be protected in particular cases, rather than rigorously reviewing laws that interfered with religious practices.[97] Identifying some core free exercise areas that deserve serious constitutional attention, even though that will fall short of a broadly stated and rigorously protected freedom of conscience, may still provide significantly greater constitutional protection to religion than free exercise rights receive now or have received in the past.

So what are these core components of the free exercise of religion—and what kinds of laws must receive more rigorous review because they burden or interfere with them? There is some utility in thinking about freedom of speech as a place to begin our inquiry, not

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[95] *See supra* notes 1–8 and accompanying text.

[96] *See* JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE 18–31 (2004) (describing the limited role of the Free Exercise Clause in protecting religion and concluding that "[d]uring the first 150 years of its existence the Court demonstrated only a modest interest in religious liberty, and almost always did so under some rubric other than the Free-Exercise Clause").

[97] *See* FLOWERS, *supra* note 4, at 37–42 (describing how during this period the Court often "refused to explicitly apply the compelling state interest test and consistently decided [free exercise cases] in favor of the government"); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. Rev. 117, 118–23.

because the nature of free speech and free exercise rights share substantive meaning, but because speech is a pervasive aspect of life and, in that sense, its protection raises some of the same problems as free exercise rights. It is inconceivable that all acts engaged in for expressive purposes (or allegedly motivated by expressive purposes) should receive rigorous constitutional protection. The need to draw distinctions is as stark for speech as it is for religion.

If we think about freedom of speech, we see that although freedom of speech serves both instrumental and dignitary purposes, it is the former that represents the core value of the right. Political speech receives maximum protection, in theory if not in practice.[98] More importantly, most of the kinds of speech assigned lesser value and weaker protection—obscenity, true threats, false facts, vulgar or indecent expression, and commercial speech—are designated as lesser protected or unprotected speech at least in part because their regulation or suppression will not interfere with the instrumental role of speech in a democratic political system.[99]

The Free Exercise Clause seems different. Its core purpose focuses on the role of religion in the life of the individual and the family, and the way that burdens on a person's religious belief and practice violate his integrity and autonomy.[100] The instrumental value of religion is secondary at best.

While this hierarchy of free exercise values is generally accepted, it may understate the instrumental value of religion. Further, there may be circumstances when the instrumental utility of religion and the dignitary dimension of religious exercise overlap and intertwine. Those situations in which protecting religious liberty serves both instrumental and dignitary purposes may be particularly deserving of constitutional protection.

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[98] *See supra* note 84; Melville B. Nimmer, NIMMER ON FREEDOM OF SPEECH 3–5 (1984) (recognizing that while nonpolitical speech is often protected by the First Amendment, "in the balancing of interests, political speech, or speech dealing directly with the governing process, is likely to be given somewhat more weight than other forms of speech as against their respective counterspeech interests").

Indeed, a central reason why we protect political speech that has some real tendency to incite or result in unlawful behavior is that prohibiting such expression will distort democracy by shielding government from criticism. *See generally* Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

[99] Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests*, 29 U.C. DAVIS L. REV. 553, 614–15 (1996).

[100] *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990); Alan E. Brownstein, *The Right Not To Be John Garvey*, 83 CORNELL L. REV. 767, 770–74 (1998) [hereinafter *Not To Be*].

What, then, is the instrumental value of religion? Putting dignitary interests aside for the moment, what purposes does the exercise of religion further that justify providing it constitutional protection? I suggest there are four social purposes or values that are uniquely, or at least substantially, furthered by religion. First, religion serves as an independent source of values. That is, it is a source of values structurally divorced from government.[101] The argument here is hardly new. Popular sovereignty has little meaning if government determines the values of the people and molds them into the government's image of what constitutes good citizens. If government is to be of the people, by the people, and for the people, it has to, in some meaningful sense, be separate from the people.[102] Religion promotes democracy and political accountability by developing and reinforcing values against which government decisions can be measured.[103]

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[101] *See, e.g.*, Carter, *supra* note 6, at 136–37 (arguing that religious institutions can "supply a bulwark against majority tyranny," but they "can make a difference in how their adherents see the world only if they remain independent from the world"); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 161–62 (suggesting that religious groups are uniquely qualified to serve as a check on government because they are independent creators of values). *See generally* Robert M. Cover, *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

Bette Novit Evans appears to agree, although she describes the function of religion as a check on government and its function as a source of values and meaning as independent justifications for the protection of free exercise rights. EVANS, *supra* note 40, at 32–40.

[102] *Not To Be*, *supra* note 100, at 783.

[103] Bette Novit Evans states this point explicitly. "Religious institutions serve as additional means of checking the power of government . . . [T]hey provide additional points of entry into the political system and offer policy alternatives that expand the political agenda. The church-based civil rights, social justice, prolife, and pacifist movements, the Sanctuary Movement, and the Catholic Bishops' Letter on the Economy illustrate some ways independent religious institutions foster alternative conceptions of public policy and influence government toward those ends." EVANS, *supra* note 40, at 162.

Corwin Smidt offers a similar argument:

> In its public role, religion may serve as one of the voices to which political power should be responsive in the formulation of public policy. A democratic polity cannot restrict and, in fact, should welcome moral insights into debates over issues involving important ethical questions. Such moral perspectives act as a counterweight to necessary but demoralizing pragmatism. By reminding the state of its ethical obligations, religion can play an important public role in democratic life. Religion can also help protect democratic society from movement toward greater statism and potential totalitarianism. Democratic governments are based on the principle of limited government, and religion serves as a major bulwark that can challenge the authority of the state when it exceeds its rightful boundaries.

Corwin Smidt, *Religion, Social Capital and Democratic Life: Concluding Thoughts, in* RELIGION AS SOCIAL CAPITAL 211, 221 (Corwin Smidt ed., 2003) (endnote omitted).

See also STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 33–43 (1993); Nancy L. Rosenblum, *Pluralism, Integralism, and Political Theories of Religious Accommodation, in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 3, 19 (Nancy L. Rosenblum ed., 2000) ("[R]eligious groups perform classic liberal democratic functions when they enter political arenas self-defensively to insure toleration, publicize and resist oppression, protect the weak against power-

A facile response to this argument is that religion is not the only source of private values in our society. Individuals and institutions need not be religious to participate in the development of normative principles or cultural beliefs. That is true, of course. But, what distinguishes religion from other sources of values in our society, at least in a constitutional sense, is not only its focus on morality and ethics, but also its separation from government. Other sources of value development are more susceptible to government influence. Accordingly, they lack the independence of religion in establishing normative guidelines by which government may be evaluated. In this sense, a rigorously enforced Establishment Clause that maintains the separation of church and state reinforces the instrumental value of religion and supports an important justification for rigorously protecting free exercise rights in some significant circumstances.[104]

Second, and this is related to the first purpose, religion is intrinsically spiritual and focused on transcendent values.[105] It is isolated

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ful elites, curb careless and arbitrary exercises of power. They have always been vital checks on government."); Ronald F. Thiemann, *Public Religion: Bane or Blessing for Democracy?*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 73, 85 (Nancy L. Rosenblum ed., 2000) ("Because people of faith share the fundamental values of democratic societies, they remain connected to public life even as they engage in criticism; because their commitment to democracy remains penultimate, however, they can appeal to transcendent ideals to critique current practice and to elevate the understanding of democratic values themselves . . . . People of faith—pilgrim citizens and connected critics—can help churches and other communities of faith serve as 'schools of virtue' for a pluralistic democracy, places where the critical consciousness of an informed citizenry can be nurtured.").

[104] *See* Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783, 798–799 (2001–2002) (explaining that while Madison saw established religion as a threat to liberty, he recognized that religion that maintained its independence from the state would serve "as a crucial oppositional force in politics and a vital check on the tyranny of the majority").

[105] *See* Erik A. Anderson, *Group Rights, Autonomy, and the Free Exercise of Religion*, *in* GROUPS AND GROUP RIGHTS 267, 272–73 (Christine Sistare, Larry May & Leslie Francis, eds., 2001) ("[R]eligious conceptions of the good typically include some reference to a 'transcendent' or 'extrahuman' source of value, order, and meaning. For religious believers, this transcendent authority guides their endeavors toward what is truly of value, supplies norms that transcend the prerogatives of individual choice, and gives each member of the group a sense of fulfillment that stems from living in the light of a higher truth." (citation omitted)); BENJAMIN BEIT-HALLAHMI & MICHAEL ARGYLE, THE PSYCHOLOGY OF RELIGIOUS BEHAVIOUR, BELIEF & EXPERIENCE 6 (1997) (describing the core of all religions as "a system of beliefs in divine or superhuman power, and practices of worship or other rituals directed towards such a power"); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 31 (1995) ("Religious belief in the Western tradition is centered on a transcendent force or belief—that is, a force or belief that is beyond the material, phenomenal world."); Robert Wuthnow, *Can Religion Revitalize Civil Society? An Institutional Perspective*, *in* RELIGION AS SOCIAL CAPITAL 191, 207 (Corwin Smidt ed., 2003) ("[R]eligion provides opportunities for reflection about higher-order values . . . . [T]he presence of religious institutions in the society maintains possibilities for discussions about values that could not occur were these institutions to disappear.").

from material concerns in important respects.[106] As such, it is divorced from the more commonplace foundation of political accountability in our society: the material self-interest of individuals and groups. I do not mean to denigrate material self-interest as a source of personal values or as a check on government conduct. It is an intrinsic and necessary part of a democratic system. There are functions of government and alleged abuses by government, however, that cannot be evaluated effectively solely in terms of the self-interest of organized groups or political majorities.[107] The public good may require self-sacrifice and consideration for others. Religion may not be the only foundation for looking beyond one's immediate material needs and wants in our society. But it is certainly a significant source of such beliefs and commitments.[108]

Indeed, the voluntary organization of religious congregations in the United States and the construction of churches, synagogues, and other houses of worship are by their very nature counterweights to the individual's routine emphasis on material self-interest. Few members of a religious congregation make money by participating in a religious community. The reverse is much more commonly the case. Creating and sustaining a religious congregation and house of worship requires extraordinary contributions of time and resources by its members. Few participants in a religious congregation would describe their reasons for making such contributions in terms of material benefits to themselves or their families.[109]

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[106] This does not mean that religious beliefs do not influence a believer's decisions in the material temporal world. They clearly do. *See* Frederick Mark Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 427–36 (1990). But the source and focus of the belief is not material self-interest.

It is also true, of course, that there are intrinsic limits on the ability of religions to focus on the transcendent and ignore material concerns. HITCHCOCK, *supra* note 96, at 3 ("One of the inherent paradoxes of religion is that most faiths enjoin a spirit of unworldliness, urging believers to look beyond earthly possessions in their search for ultimate reality, while at the same time all religions exist in the temporal order and can only manifest themselves through material realities.").

[107] Gedicks, *supra* note 106, at 421 ("[R]eligion enters political dialogue as religion, and not as an interest group, when it seeks to provide a point of moral reference to public policy debates . . . . Religious groups do not enter these debates to protect an economic interest; rather, they seek to witness against a moral wrong by testifying to transcendent truth.").

[108] *See* Ram A. Cnaan, Stephanie C. Boddie, & Gaynor I. Yancey, *Bowling Alone but Serving Together: The Congregational Norm of Community Involvement*, *in* RELIGION AS SOCIAL CAPITAL 19, 29 (Corwin Smidt ed., 2003) (explaining that the "teachings of all major religions emphasize mutual responsibility, the need to assist strangers in need, and most importantly, the legitimate claim of the weak and needy upon the community").

[109] Indeed, religious individuals are disproportionately philanthropic. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1171 n.227 (1988).

Third, religion has a communal dimension to it,[110] typically grounded in a center or place of worship.[111] It is a source of community in a highly individualized society[112]—a society in which people, with continuing changes in technology, are becoming more and more isolated from direct human interaction with others. This function of religion may be taken for granted because it is such a common part of American life. If one were to imagine the city where he or she lives without a single house of worship in it—a town where no one congregates together for religious purposes or under the auspices of a religious organization—I think the resulting picture would be one with a dramatically reduced level of social interaction.

Fourth, and finally, religion is grounded in tradition.[113] It is a source of community not only in geographical terms, in that it connects us with other residents in the area where we live, but it is also the foundation of a temporal community, a connection between our contemporaries and past generations. Religion is about continuity and the passing on of beliefs and practices from the past through the liv-

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[110] *See generally* EVANS, *supra* note 40, at 121–23; ROBERT D. PUTNAM, BOWLING ALONE 66 (2000) ("Faith communities in which people worship together are arguably the single most important repository of social capital in America. 'The church is people . . . It is relationships between one person and the next.' As a rough rule of thumb, our evidence shows, nearly half of all associational memberships in America are church related, half of all personal philanthropy is religious in character, and half of all volunteering occurs in a religious context." (footnotes omitted)); Howard M. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800 (1994); John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 567, 588–99 (1990); Gedicks, *supra* note 101; Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 29, 56–58 (2004).

It is noteworthy that *Wisconsin v. Yoder*, 406 U.S. 205 (1972), one of the seminal free exercise cases in American jurisprudence that actually protects religious freedom, emphasizes the communal nature of the Amish religion. That the Court did so is hardly surprising since the Amish made this contention a cornerstone of their constitutional argument. Cover, *supra* note 101, at 29 (quoting the argument from the Amish brief in Yoder that "[t]here exists no Amish religion apart from the concept of the Amish community").

[111] *See* Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 831 (10th Cir. 1988) (McKay, J., dissenting) (recognizing that "housed worship has been historically central to religion"); BEIT-HALLAHMI & ARGYLE, *supra* note 105, at 54 (noting that "[m]ost religious behaviour consists of the meetings of groups of believers to engage in worship and related activities"—often in a house of worship, but also in the home); Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1009 (1983) (describing groups as "possible sites for religious experience. They are locations at which religion builds its edifices").

[112] *See* CNAAN, BODDIE, & GAYNER, *supra* note 108, at 25 (explaining that religious congregations are not only a place where persons find spiritual meaning, but they are also "social settings within which people of similar backgrounds and interests come together to form small groups"); PUTNAM, *supra* note 110, at 67 (describing a survey that "found that religious attendance was the most powerful predictor of the number of one's daily personal encounters").

[113] *See* BEIT-HALLAHMI & ARGYLE, *supra* note 105, at 4 (explaining that most people "regard themselves as followers of a religious tradition").

ing and on to subsequent generations.[114] In a society where generations are given names and identified with decades, or even shorter periods of time, and in which history seems to have lost its hold on our identities, there is something to be said for institutions that operate over the long term and are less likely to be swayed by the passions of the moment. Indeed, this function of religion is a particularly salient one for developing constitutional doctrine. One of the purposes of having a constitution interpreted by an independent judiciary is to provide a legal counterweight to political demands fueled by the pressure of immediate needs and fears.[115]

These instrumental values of religion in American society resonate with, and overlap, significant facets of religious life that we associate with human dignity and autonomy. We respect as a core aspect of personhood the acknowledgment of, and adherence to, a moral code.[116] The fulfillment of human potential extends beyond hedonism.[117] The search for meaning, the spiritual quest for understanding, and a relationship with the transcendent, is part of the human condition as well.[118] Thus, the role religion plays in the development of values serves both instrumental and dignitary interests. Also, human dignity inheres in our associations, in our need to interact with others.[119] Part of the way we define our identity is not simply as individuals, but as members of groups.[120] As a social mechanism that

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[114] *See id.* at 98–112 (describing the "intergenerational transmission" of religious beliefs such that "[c]ontinuity in religious identity between generations is the rule rather than the exception, and is the result of deliberate effort within the family and in formal educational settings"); Carter, *supra* note 6, at 137–38 (lauding the "important historical role [of religions] as vital transmitters of values—of meanings—from one generation to the next"); *see also* ANDERSON, *supra* note 105, at 273.

[115] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 23–28 (2d ed. 1962). In Joseph Story's words, without an independent judiciary, "public justice will be administered with a faltering and feeble hand. . . . It will decree, what best suits the opinions of the day; and it will forget, that the precepts of the law rest on eternal foundations." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 593 (1987) (1833).

[116] *See* Steven D. Smith, *What Does Religion Have To Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 932 (2005) ("[H]aving and acting on core beliefs is central to what makes us 'persons.'").

[117] *Id.* at 930–32; GARVEY, *supra* note 16, at 23–27.

[118] *See* JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY—THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 348–51 (1998) (describing how the freedom to search for religious truth is grounded on human dignity in contemporary Catholic doctrine).

[119] *See* Garet, *supra* note 111, at 1002 ("[C]ommunality is one of the characteristic structures of existence and, in that sense, of the intrinsic human good. To rob existence of communality, of the communal celebratory process which forms the substance of much of our experience, would be to deny one ethical constituent of our humanity.").

[120] This idea "that the individual self is not an asocial atom but is constituted in large measure by its social inheritance and continuing participation in a community" is the central thesis of communitarians. Carl Wellman, *Alternatives for a Theory of Group Rights*, *in* GROUPS AND GROUP RIGHTS 17, 32 (Christine Sistare, Larry May & Leslie Francis eds., 2001). One

promotes community, religion advances the personal potential of individuals as well as the public good. Finally, the raising of one's family, the transmission of values and beliefs to our children, and the connection between generations that links our grandparents to our grandchildren are components of human dignity as well.[121] Few institutions are as committed to promoting this aspect of personal life and development as organized religion.

Accordingly, we might reasonably identify the core of what the Free Exercise Clause protects as those aspects of religion that uniquely reflect both instrumental and dignitary values. Government actions that interfere with, or burden, these aspects of religious exercise would require particularly persuasive justification. More specifically, these core concerns suggest that religious institutions, particularly those committed to worship, religious education, or charitable activities should receive significant protection from regulatory interference with regard to their development and operation, notwithstanding the neutrality and general applicability of the regulatory scheme applied to them. More than individuals, religious institutions further these core virtues—the development of an independent source of values, spirituality, community, and tradition.

I do not suggest this sphere of institutional autonomy should be absolute and inviolate. No rights are absolute. The independence of religious institutions can and should be outweighed by important government interests. There is no escape from balancing. But courts can distinguish between core and tangential aspects of rights and should require stronger justifications from the state when the core of the right is abridged—just as they do routinely in free speech and equal protection cases. In free exercise cases, courts should require a higher burden of justification to sustain state regulations that substantially burden the development and operation of religious

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need not adopt the communitarian position entirely to recognize the core of truth in its assumptions.

Religious groups in particular play a critical role in the identity of believers. *See* COOKSON, *supra* note 22, at 171–72; Gedicks, *supra* note 101, at 149 ("Many individuals have developed a sense of personal identity and self worth from interactions with others in religious communities.").

[121] *See* Christine Sistare, *Groups, Selves, and the State*, *in* GROUPS AND GROUP RIGHTS 1, 4 (Christine Sistare, Larry May & Leslie Francis eds., 2001) ("For most parents, in fact, it is the transmission of values and the molding of character that are the ultimate tasks of parenting."); Garnett, *supra* note 31, at 133–34.

institutions involved in worship, religious education, and charitable undertakings.

Protecting the autonomy of religious institutions through free exercise doctrine can be grounded, to a limited extent, on existing authority. Notwithstanding the rule set out in *Employment Division v. Smith*, courts regularly protect a religious organization's discretionary authority in hiring clergy or other employees whose duties are intrinsic to the carrying out of its religious mission against the mandates of federal or state civil rights statutes.[122] Also, federal statutory law exempts religious organizations engaged in nonprofit activities from Title VII's prohibition against religious discrimination in the hiring of employees.[123] The federal Religious Land Use and Institutionalized Persons Act (RLUIPA) provides for the rigorous review of land use regulations that substantially interfere with the ability of congregations to develop land for religious uses, such as the construction of houses of worship.[124] These examples are not intended to suggest that fully developed free exercise doctrine must necessarily parallel these statutes in their scope, or with regard to the standard of review they employ. They do demonstrate, at a minimum, however, that protecting religious institutions from state regulatory interference is hardly an idea without precedent or one with which our society lacks all experience.

Moreover, some existing religious liberty statutes reflect concerns that parallel the analysis of this article in identifying state action that may warrant heightened review. The land use provisions of RLUIPA are a good example. Under a constitutional regime committed to protecting the autonomy and utility of religious institutions, land use regulations restricting the areas where houses of worship can locate should be carefully reviewed. Preventing a congregation from developing a center for religious assembly cuts to the core of the communal nature of religious practice.[125] Also, a decision refusing to allow a

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[122] Courts demonstrated a marked reluctance to allow government to interfere with employment decisions relating to clergy and other employees performing religious functions prior to the *Smith* decision, and have not altered their decisions in light of *Smith*. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Combs v. Cent. Tx. Annual Conf. of the United Methodist Church, 173 F. 3d 343 (5th Cir. 1999); EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996); Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

[123] 42 U.S.C. § 2000e-1 (2000).

[124] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

[125] *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 756 (1999) ("[A]ssembly for worship and other religious activities, and the creation of spaces in which such assembly may occur, is at the very core of religious liberty."); Guru Nanak Sikh Society v. County of Sutter, 326 F. Supp. 2d 1140, 1152–53 (E.D. Cal. 2003)

religious institution to locate in an area zoned for commercial use would seem to be a particularly problematic burden to impose on the use of land for religious exercise because it is directed at the spiritual and non-materialistic nature of religion.[126] These kinds of restrictions trap religious congregations between competing municipal goals. Because places of worship do not contribute sales tax revenue to the community, do not provide good paying jobs to employees, and will not attract shoppers to the area, they are excluded from locations where the predictable externalities associated with houses of worship —noise, traffic congestion, and the like—are least likely to be an issue.[127] Finally, prohibiting the modification of an older house of wor-

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("[P]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion." (quoting Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1226 (C.D. Ca. 2002)), *aff'd*, 456 F.3d 978 (9th Cir. 2006).

[126] *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 771 (7th Cir. 2003) (limiting access to houses of worship in commercial zones in comparison to other permitted uses because churches "do not enhance commercial activity"); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 468 (8th Cir. 1991) (excluding churches from central business district because they would displace commercial uses and undermine economic vitality of area); Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961, 978 (N.D. Ill. 2003) (attempting to justify exclusion of churches from district in which cultural and commercial facilities are permitted on grounds that non-religious uses "tend to draw more people into [the City] who will dine in the City's restaurants and visit the City's shops"); Int'l Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 880–81 (N.D. Ill. 1996) (prohibiting church from locating in commercial corridor because it will not further the goal of "attracting the purchasing public" to the area); Laycock, *supra* note 125, at 762 (suggesting that local officials oppose locating churches in business districts because they do not want property in the area taken off the tax rolls); Clay Carey, *Ministry, Millersville at Odds*, THE TENNESSEAN, June 9, 2006, at 1B (reporting opposition to church leasing building previously used as a church, pizza parlor, and video rental store because the city wants to preserve land on major artery "for taxpaying businesses"); Tess Nacelewicz, *Church Faces Zoning Hurdle—Chinese Gospel Church Seeks Variance To Allow It To Relocate to Area Set Aside for Business*, PORTLAND PRESS HERALD, March 11, 2006, at C1 (describing town councilor's concern that "the church's plan is at odds with the town's effort to expand its business tax base in the area where the church wants to locate").

[127] *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1222, 1234–35 (11th Cir. 2004) (excluding synagogue from business district because churches and synagogues, which do not hold events that are "'unrelated to [their] religious and spiritual mission or purpose' will 'contribute little synergy to retail shopping areas and disrupt the continuity of retail environments'"); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507, 516 (D.N.J. 2005) (prohibiting houses of worship in a commercial zone because the "presence of a church within this limited zone would most likely not contribute to" the town's goals of developing a downtown district with "a performing art and artistic center, supported by restaurants, cafes, bars and specialty retail stores"); City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 707 N.E.2d 53, 59 (Ill. App.Ct. 1998) (prohibiting church from locating in area zoned for commercial uses "to regenerate declining revenues and create a strong tax base"), *aff'd in part and rev'd in part*, 196 Ill.2d 1 (2001); *see generally* Collin Nash, *Prayers and Contention; Churches see Crowded Pews. Neighbors Fear Crowded Streets. Both Sides Feel Frustration as Congregations Seek To Expand*, NEWSDAY, March 26, 2006, at G06 (discussing how religious congregations may be

ship that is still used for services to further historical preservation goals ignores the transcendent purposes for which the building is used and the spiritual nature of its function. The value of the physical edifice to the larger community is assigned a higher value than the utility and spiritual relevance of the building to the congregation that uses it to exercise their faith.[128]

Other illustrations of the kind of analysis I propose lack statutory analogies. One might reasonably assume that the autonomy of religious schools should be respected by government with regard to the functions they perform in transmitting the doctrine, values, and rituals of the sponsoring faith. Adherence to ritual and belief is part of the basic fabric of family life for many religious people. Passing on religious traditions from parents to children, often through a generational chain that may extend over centuries, or even millennia, is critically important to most faiths. For many, teaching morality to their children in the context of duties to G-d, is the primary foundation for rules of good behavior. Of equal importance, for the purpose of this article, these functions relating to tradition and the development of independent values are instrumentally valuable to society.[129]

Obviously, the state's interest in insuring that children receive adequate preparation in subjects substantially related to the state's educational goals—preparation directed toward what an adult must know to be a law abiding, productive member of society and an informed citizen—is important and cannot be ignored. But state

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denied access to land in residential areas because of parking and traffic concerns, and may also be prevented from locating in commercial districts because they do not contribute to the tax base); Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After* Boerne, 68 GEO. W. L. REV. 861, 878–79 (2000) (describing how religious land uses may be caught in a bind because "neighbors' objections to the more intrusive land use—make it difficult to locate in residential zones, and the lack of income-generating activities make religious uses less desirable candidates for commercial zones").

[128] *See* Debbie Messina, *Congregation's Plans Hit Snag with City, Neighbors*, VIRGINIAN-PILOT, Dec. 21, 2005, at B1 (describing conflict between a church's attempt to construct a large, contemporary addition to expand its overcrowded building and groups contending that the proposed design violates zoning guidelines in historic district); *see, e.g.*, First Covenant Church v. Seattle, 840 P.2d 174 (Wash. 1992) (holding that church's right of free exercise was violated by ordinances that placed specific controls upon church's ability to remodel its exterior); Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (holding that city's denial of a permit that would allow church to demolish old building and construct a new one did not violate the Religious Land Use and Institutionalized Persons Act). *See generally* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401 (1991).

[129] *See* Cover, *supra* note 101, at 61–62 (arguing that religious schools must be protected from state interference because "[t]he school's central place in the paideic order connects the liberty of educational association to the jurisgenerative impulse itself").

attempts to achieve such goals through more intrusive regulatory approaches, such as curriculum regulations or teacher credentialing requirements, rather than less burdensome methods, such as the regular administration of proficiency exams, should require a serious burden of justification.[130]

As for religious charitable institutions, a case like *Catholic Charities v. Superior Court*[131] provides a fairly straightforward example of a dispute that should invoke some form of serious review. As noted previously, Catholic Charities sought an exemption from a state law, WCEA, which required it to violate the tenets of the Catholic faith by providing employees a health insurance plan that covered medically prescribed contraceptives. By insisting on compliance with WCEA's requirements, the state obviously placed a serious burden on Catholic Charities' ability to fulfill its charitable mission in a way that was consistent with the obligations of its faith.

There is no doubt that the Catholic position on medical contraception is a countermajoritarian position in today's culture. The point of protecting the ability of religious institutions to serve as a source of values is not to suggest that any religion's principles are necessarily superior to those of the government, or the majority. The point is that society benefits from the existence and checking function of independent sources of moral authority. The Catholic Church's position on medical contraceptives represents just such an alternative moral vision—whether one agrees with it or not.[132] As such, we should protect its ability to be faithful to that vision against state regulations that undermine its moral integrity—unless some sufficiently important state interest is at stake that cannot be adequately furthered through some other means.

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[130] I do not suggest that proficiency exams are always an adequate or satisfactory means to further the state's legitimate interest in furthering the secular curriculum offered at a religious school. Determining when and whether states can satisfy the serious burden of justification required of them to defend intrusive regulations controlling the operation of religious schools is a difficult question that is beyond the scope of this article. My argument is that such justifications should be required and that courts are capable of evaluating them. *See, e.g.*, New Life Baptist Church Acad. v. Town of East Longmeadow, 885 F.2d 940, 954 (1st Cir. 1989) (concluding after careful analysis that limited visits by public authorities to observe secular classes at religious schools under a policy that prohibits any observation or evaluation of religious matters do not violate the religion clauses of the First Amendment).

[131] Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004).

[132] Religious support for gay rights provides a contrasting alternative vision. The religious institutions reflecting that perspective are equally deserving of constitutional protection. *See generally* Melissa M. Wilcox, *Of Markets and Missions: The Early History of the Universal Fellowship of Metropolitan Community Churches*, 11 RELIGION & AM. CULTURE 83 (2001) (discussing the origin of the Universal Fellowship of Metropolitan Community Churches and their inclusion and advocacy for the LGBT community).

The fact that some employees of Catholic Charities are not Catholic or do not adhere to this specific religious principle should not alter the basic analysis in this case. While many religious charities employ and provide services to persons of different faiths (indeed, they may be religiously compelled to do so), they will still require that the operation of their charitable programs conform to the sponsor's religious commitments. A soup kitchen sponsored by a Jewish organization may serve meals to indigent Christians as well as Jews, but its kitchens will still conform to Jewish dietary laws. A state law requiring it to serve food that is not kosher would be a serious intrusion, not unlike the burden imposed on Catholic Charities by WCEA. Under the adjudicatory framework proposed here, that burden would have to be justified, and that justification would be subject to a more rigorous standard of review than that which is applied to individual free exercise claims.

Determining that some form of serious review would be appropriate in a case like *Catholic Charities* is only the first step in the constitutional analysis. It is equally important to explain, at least in some preliminary way, how such an analysis would proceed. Clearly, state concerns about the privileging of religious organizations by relieving them of financial costs that other employers must incur could easily be satisfied by conditioning an exemption from WCEA on Catholic Charities spending an amount equal to the cost of the contraceptive insurance coverage to serve some other public purpose. But California had other reasons for refusing to grant the exemption that Catholic Charities sought that had nothing to do with the privileging of religious institutions. If Catholic Charities did not have to comply with WCEA, the state maintained, either its employees would not receive the equitable insurance coverage guaranteed by the act, or, alternatively, the state would have to assume the cost of providing the coverage.[133]

To the California Supreme Court, this argument was conclusive. Even if the Court applied strict scrutiny to the WCEA, the Court maintained that this was a simple case. The fact that granting an exemption to Catholic Charities would result in the imposition of some burdens or costs on third parties, or the public, essentially ended the Court's inquiry and required a ruling in favor of the state.[134] The

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[133] *Catholic Charities*, 85 P.3d at 93–94; Real Parties in Interest's Answer Brief on the Merits at 30, *available at* 2002 WL 985444.

[134] *Catholic Charities*, 85 P.3d at 93 ("We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would

constitutional project of protecting religious liberty had to be a cost free enterprise. Any resulting harms to, or burdens on, third parties or the public, no matter how slight, would justify the denial of an exemption.

That approach, obviously, cannot be characterized as taking free exercise rights seriously. But arguing that the California Supreme Court's analysis in the *Catholic Charities* case was unacceptable does not explain how cases like this one—that involve a cost or harm to third parties or to the state itself if an exemption is granted—should be resolved. Subjecting the application of WCEA to Catholic Charities to some form of rigorous review because the law burdens the free exercise rights of a religious organization tells us little about how courts are to take those costs and harms into account. If harm to the public or third parties does not always require a ruling in favor of the state, how can a court correctly identify those cases in which the free exercise autonomy of religious institutions is outweighed by competing state interests? Ultimately, we are left with the problem of explaining how courts can balance the burden on the institutional autonomy of religious organizations that results from denying them an exemption with the cost or harms that result from granting an exemption to a general law. To answer that question, it is necessary to confront the nature of balancing in free exercise cases directly.

c. A Default Principle for Individual Exemptions

If the autonomy of religious institutions deserves special constitutional protection pursuant to some form of heightened scrutiny, we are still left with the question of how individual free exercise claims should be evaluated. I suggest that it is necessary for courts to engage in some kind of balancing of interests in these free exercise cases as well, although the rigor of the balancing test applied will be more modest. When the burden on religious practice or religiously motivated behavior results from the application of a neutral law of general applicability, the Court's answer under the rule of *Smith* gives us a different result. Under *Smith,* such claims receive highly deferential, rational basis review. Even substantial burdens on religious practice are construed not to abridge free exercise rights. The Free Exercise Clause simply does not apply to such disputes.

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detrimentally affect the rights of third parties.").

That answer is inadequate. The analysis in *Smith* focuses exclusively on the impropriety and impracticality of applying strict scrutiny review to every case involving a substantial, but incidental, burden on religious practice or religiously motivated conduct. There is virtually no discussion of adjudicatory alternatives. Obviously, however, a variety of less rigorous tests or standards are available. Consider just two possibilities. Content discriminatory and content-neutral regulations of speech on public property that has not been intentionally opened up for expressive purposes, what is called a nonpublic forum under current jargon, are upheld if they are reasonable.[135] Concededly, this is a very low standard of review, but not all speech regulations will survive it. A complete ban on the distribution of leaflets in a large metropolitan airport, for example, would be unreasonable.[136] The state's interests could not justify such an all encompassing ban on such an innocuous expressive activity as leafleting. Analogizing from this free speech standard, one might argue, at a minimum, that neutral laws imposing substantial burdens on the exercise of religion should be unconstitutional as applied if the application of the law to religious practices is not reasonable.

Alternatively, in early equal protection cases involving discrimination against non-marital children, the Court held that such laws would be upheld despite the facial classification they employed—unless plaintiffs could successfully demonstrate that the state's asserted interests would not in fact be furthered by treating non-marital children differently and less favorably than other children. Thus, to successfully challenge a law singling out non-marital children for disparate treatment with regard to their eligibility for social security survivor benefits, plaintiffs would have to prove that the provisions at issue would not achieve the administrative convenience gains and cost savings the state asserted to justify its discriminatory policy.[137] This is also a very low standard of review, but it is more than the total deference associated with rational basis review. Again, by analogy, one might argue that, at a minimum, neutral laws of general applicability are unconstitutional if plaintiffs can demonstrate that the state's as-

[135] *See* Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985) (holding that the exclusion of the NAACP Legal Defense Fund and other advocacy groups from federal workplace charity drive did not violate First Amendment because the government's grounds for its decision were reasonable); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding ordinance prohibiting the posting of signs on public property that reasonably furthered city's esthetic goals).

[136] *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 683–85 (1992).

[137] Mathews v. Lucas, 427 U.S. 495 (1976).

serted interest will not be furthered by denying them the exemption that they seek.[138]

Obviously, there are more rigorous standards of review than those described above that will still fall far short of strict scrutiny. The range of possible intermediate level standards (most, if not all of which at least implicitly involve balancing) may be quite broad. But the holding of *Smith* rejects all such possibilities—even though the majority opinion never discusses any of them. If even very modest standards of review like those described above are unacceptable, it must be because the problems associated with employing any test involving balancing to adjudicate free exercise claims are completely insurmountable. The next section of this article considers that possibility.

C. Making Balancing Work

It is impossible to entirely eliminate the subjectivity and indeterminacy that is inherent in balancing tests. That concession alone does not require a rejection of balancing tests. No other area of constitutional law involving the protection of rights is held to such a draconian standard. Tests and standards involving balancing in one form or another are regularly employed as long as *some* guidance is provided and courts are not left to rely on a completely ad hoc balancing test. Accordingly, if it is possible to establish some guidelines and presumptions that mitigate the concerns inherent in balancing tests to roughly the same extent as exists in other areas of constitutional law,

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[138] The state's asserted interest in denying an exemption in some free exercise cases may be so exaggerated that plaintiffs will be able to succeed in their claims—even under a relatively lenient standard of review. However valid the state's purpose may have been in enacting a general law, that objective may not be seriously undermined by granting a limited exemption to the members of a minority faith for whom the general law creates a religious conflict. *See* Berg, *supra* note 5, at 40–41. Doubtlessly, a state law prohibiting adults from providing alcoholic beverages to minors serves an important state interest, but it is hard to see how that interest is burdened when I, and other Jewish families in my community, serve small glasses of wine to our teenage children at our Passover Seder.

In other cases, the state's contentions regarding the harms caused by an exemption are simply wrong and can be proven to be erroneous. In *People v. Woody*, 394 P.2d 813, 818 (Cal. 1964), for example, the California Supreme Court rejected several of the state's concerns as demonstrably false. The Court explained that "[t]he evidence indicates that the Indians do not in fact employ peyote in place of proper medical care; and, as the Attorney General with fair objectivity admits, 'there was no evidence to suggest that Indians who use peyote are more liable to become addicted to other narcotics than non-peyote-using Indians.' Nor does the record substantiate the state's fear of the 'indoctrination of small children'; it shows that Indian children never, and Indian teenagers rarely, use peyote. Finally, as the Attorney general likewise admits, the opinion of scientists and other experts 'is that peyote . . . works no permanent deleterious injury to the Indian.'" *Id.*

that ought to be enough to justify applying at least some modest standard of review to laws that burden religious liberty—at least it ought to be a sufficient showing to justify judicial review if we take free exercise rights seriously.

If this article can successfully explain how standards of review for free exercise doctrine can be developed that create no greater problems for adjudication than the tests employed to protect other rights, it will have come a long way toward accomplishing its objective. At a minimum, it will have rebutted the argument that free exercise rights cannot be protected against neutral laws of general applicability because doing so would involve a particularly open ended and discretionary form of balancing. Let us turn then to the problem of developing guidelines and presumptions that reduce judicial subjectivity and inform the adjudication of free exercise cases.

1. Identifying Impermissible Justifications for Burdening Rights

One way to avoid subjectivity in balancing is to identify state interests that are presumptively unacceptable as a basis for abridging a right. These interests are in some sense fundamentally inconsistent with the nature of the right. Thus, they can not justify infringing the right to any extent. The weight assigned to such disfavored anti-right interests is essentially zero.

Impermissible and problematic justifications for abridging particular rights are commonplace in the case law. Restrictions on speech cannot be justified by the goal of protecting the government against criticism of its policies or personnel.[139] Speech cannot be silenced to maintain citizen complacency or to avoid exposure to unsettling information or arguments.[140] Expression cannot be prohibited because the government does not believe that people are competent to evaluate it and fears they will be persuaded or influenced by the proscribed message.[141]

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[139] Fallon, *supra* note 33, at 91–92.

[140] Texas v. Johnson, 491 U.S. 397, 408–09 (1989) (explaining that the fact that symbolic expression, such as the burning of the American flag, is highly offensive to many people cannot justify its suppression by government); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (recognizing that speech is protected even when "it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

[141] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996) ("[A] State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it."); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 226–28 (1989) (noting that a "[s]tate's claim that it is enhancing the ability of its

Equal protection doctrine similarly recognizes unacceptable or inadequate interests that cannot sustain challenged classifications. Racial classifications cannot be justified by arguing that they are designed "to maintain White Supremacy" by preventing "the corruption of blood" and "the obliteration of racial pride."[142] Also, "the reality of private biases and the possible injury they might inflict" are not "permissible considerations" that justify race-based decisions, such as removing a child from the custody of her mother because her mother married a man of a different race.[143] The Court has repeatedly noted that gender stereotypes, and "outmoded notions of the relative capabilities of men and women," cannot sustain gender classifications, even if they are supported by statistical correlations.[144]

Similarly, certain state interests cannot justify restrictions on the right to have an abortion. "[A] state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" imposes an undue and unconstitutional burden on the right.[145] The state's interest in protecting fetal life by making it more difficult to obtain an abortion cannot justify restrictions on abortion services.

A similar analysis may be utilized in adjudicating free exercise rights. Obviously, the state cannot justify restrictions on religious practices because they defy religious orthodoxy or reflect beliefs that are not accepted by a majority of citizens.[146] Nor can regulations be justified by presuming uniformity among religions and religious institutions. There is no right way, for example, to construct a house of worship. A city cannot permit steeples, but not domes, because the

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citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism" in rejecting a ban on intra-party endorsements of candidates during primaries).

[142] Loving v. Virginia, 388 U.S. 1, 7, 11–12 (1967).

[143] Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

[144] *See* J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 135, 139 n.11 (1994) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985)); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982) (holding that excluding otherwise qualified males from attending an all female nursing school violated the equal protection clause).

[145] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992); *see* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 329 (1997) (emphasizing that states cannot enact laws that serve the purpose of hindering access to abortion services).

[146] *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (holding city ordinances that banned the ritual slaughter of animals unconstitutional); Michael J. Perry, *Religion, Politics and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407 (1986) ("[G]overnment may not take any action, impeding a religious practice (or practices), based on the view that the practice is, as religious practice, inferior along one or another dimension of value to another religious or nonreligious practice or to no practice at all.").

latter does not reflect the religious aesthetics of the community.[147] Nor can government limit the way a religious institution communicates with congregants or structures its sanctuary on the grounds that most religious organizations operate differently. A radio station used by a church to broadcast its religious messages should not be rejected as a permitted accessory use for land use regulatory purposes because most congregations communicate through computers, telephones, and newsletters rather than radio broadcasts.[148] The design of a sanctuary cannot be trivialized as interior decorating if it does not conform to traditional ideas of what the interior of a house of worship should look like.[149]

These are only a few examples. As the project of developing meaningful free exercise doctrine progresses, one would expect courts to recognize other unacceptable or inadequate justifications for regulating religious practice. The identification of such impermissible justifications for abridging free exercise rights will simplify a balancing test and make its application more objective without regard to the rigor of the standard of review that is applied. Whether we are applying a more rigorous standard to a law that regulates the operation of a house of worship or a less demanding standard to a law that burdens an individual's religious practices, there is nothing to be balanced when the state asserts an impermissible interest as its goal.[150] In all such cases, the religious freedom claim should be sustained.

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[147] *See* Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315, 1329–32 (Haw. 1998) (upholding city's refusal to allow Buddhist temple saddle shaped roof to exceed zoning height restrictions from which church spires are exempt).

[148] *See* Vacaville Seventh Day Adventist Church v. Solano County, No. Civ. S 02-0336 MCE KJM (E.D. Cal. 2004). *See also* Living Waters Bible Church, v. Town of Enfield, No. 01 CV-00450-M (D.N.H. filed Nov. 7, 2001). For a synopsis of the *Living Waters* case, see The Becket Fund for Religious Liberty, Living Waters Bible Church v. Town of Enfield, www.becketfund.org/index.php/case/62.html (last visited Sept. 25, 2006).

[149] Soc'y of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990). *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 121 (1952) (Frankfurter, J., concurring) (explaining that a house of worship such as a cathedral, "is not just a piece of real estate . . . . [It is] the seat and center of ecclesiastical authority . . . [and] the outward symbol of a religious faith"); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 958 (1995) (noting that at the time of the adoption of the Constitution "a consensus emerged that free religious worship must include the ability to erect houses of worship of the design desired").

In a similar vein, communities may discount the religious aesthetics of minority faiths with which they are unfamiliar. *See generally* Diana L. Eck, *The Multi-Religious Public Square, in* ONE NATION UNDER GOD? 3, 10 (Marjorie Garber & Rebecca L. Wolkowitz eds., 1999) (describing how supporters of a Hindu Temple were required by local zoning authorities to alter the ornate, Hindu influenced architecture they had proposed in order to conform to the city's preference for a Spanish architectural style).

[150] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993)

2. *Weighing State Interests*

In most cases, free exercise claims will not be so easily adjudicated. Typically, the interest the state asserts to justify its actions will be legitimate. Here, courts cannot escape having to balance free exercise claims against conflicting state interests. Courts need to examine and assign some value to the religious practice at issue and the state interest alleged to justify restricting the exercise of religion. Ideally, it would be most helpful if guidelines could be developed that assist courts in evaluating the interests on both sides of the constitutional scale. Practically speaking, however, it is usually easier to critically review and draw distinctions among state interests than it is to assign a certain value to a particular exercise of a right. Accordingly, it makes sense to begin the discussion on the state interest side of the analysis to determine if there are ways to assist courts in evaluating the importance of the interests a state may assert to justify the burdening of religious institutions or practices.

a. Using Legislative Accommodations To Evaluate the Weight Assigned to State Interests

Eugene Volokh, in a thoughtful and provocative article titled "A Common-Law Model for Religious Exemptions,"[151] has argued that broadly stated statutes protecting the exercise of religion, such as the short lived Religious Freedom Restoration Act, are preferable to constitutionally mandated exemptions. If an exemption is required by constitutional law, courts are the only institutional body authorized to evaluate the merits of the free exercise claim and the state's competing interests. That may be a difficult job for the judiciary to perform that exceeds its institutional competence. Determining the consequences of granting an exemption from a neutral law of general applicability may require a wider understanding of the ramifications of even limited exceptions to the law's coverage than can be presented to a judge in a court room. It may be, for example, that the adverse impact of granting an exemption is not apparent to a court for quite some time. The court could always decide to overrule its constitutional decision granting the exemption when that evidence became available to it in a subsequent lawsuit. But this constant re-

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(stating that "there can be no serious claim" that laws targeting religious practices can be justified).

[151] 46 UCLA. L. REV. 1465 (1999).

evaluation of the real world consequences of judicial decisions flies in the face of stare decisis and undermines the stability of constitutional determinations.

Grounding exemptions on a statute rather than constitutional doctrine, Volokh argues, provides a more direct role for the legislature in scrutinizing the impact of religious exemptions. If, because of its institutional limitations, a court misunderstands the consequences of mandating an exemption to a general law pursuant to a religious liberty statute and mistakenly grants an ill advised accommodation, the legislature can simply pass a new law rectifying the court's mistake and requiring uniform obedience to the original regulation.[152] We expect legislatures to monitor the effects of statutes and to modify law accordingly. Constitutional decisions are far less provisional and are less susceptible to the monitoring of their effects and the expedient revision of their holdings

Volokh's argument should not be taken lightly. But there are also ways for courts to take advantage of the legislature's ability to weigh the costs and monitor the consequences of religious exemptions to general laws—even when the courts are interpreting and applying constitutional standards. Statutory and administrative religious accommodations are hardly unique in our society. There are hundreds of formally recognized exemptions and countless other informal arrangements that relieve religious individuals and institutions from general laws and policies that burden the exercise of religion.[153] Many of these accommodations are long-standing.

As Volokh recognizes, legislatures may amend or repeal these accommodations at their discretion if the exemption proves problematic. Each legislature's decision to do so, or not to do so, may provide guidance for other political bodies confronted with similar requests for accommodation. But that is not the limit of their utility. The record and evaluation of such accommodations may be relevant to the constitutional adjudication of similar exemptions by courts. Courts can draw reasonable inferences from the fact that existing accommodations of religious practices do not cause problems[154] and are left in

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[152] *Id.* at 1474–75. For additional commentary on the relative institutional capabilities of courts and legislatures in evaluating and granting religious exemptions, see, for example, Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) and Steinberg, *supra* note 4.

[153] James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–47 (1992) (asserting that "[r]eligious exemptions . . . exist in over 2,000 statutes," and discussing several examples).

[154] *See, e.g.*, People v. Woody, 394 P.2d 813, 819 (Cal. 1964) (countering the state's claim that granting an exemption for the religious use of peyote would make it more difficult to en-

place or, conversely, that certain exemptions are routinely rejected or have been repealed after they were granted.

Given the number of religious accommodations in our society, it is not difficult to see how this kind of an analysis might be applied regularly to free exercise claims. Put simply, if several other legislatures provide religious individuals or institutions the sought after accommodation, and have done so for some significant period of time, and there is no evidence to suggest that the concerns motivating a particular state to deny the exemption have come to pass in other jurisdictions, there is good reason to doubt the importance of the state interest that is asserted to justify burdening religious practice.[155] So, for example, if virtually every state in which members of the Native American Church reside provides a statutory exemption for the sacramental use of peyote, and law enforcement officials in those states concur that the exemption has not made it more difficult to enforce narcotics laws or resulted in any noticeable increase in the recreational use of the drug, then there is nothing subjective or value laden in a judge taking that information into account in evaluating the importance of a state's reasons for refusing to provide a similar accommodation. Accordingly, if the state asserts an interest in avoiding significant increases in the use of peyote for recreational purposes as its primary

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force the state's narcotics laws by noting "[t]hat other states have excepted from the narcotic laws the use of peyote, and have not considered such exemption an impairment to enforcement, weakens the prosecution's forebodings").

Courts have used a similar analysis to protect the free exercise rights of smaller faiths that utilize peyote in religious rituals. In reviewing Texas' refusal to grant an exemption for the religious use of peyote to members of the Peyote Way Church, a small off-shoot of the statutorily exempt Native American Church, the Fifth Circuit noted in *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 201 (5th Cir. 1984), that:

> The exemption granted both by federal and Texas law to the ritual use of peyote by the Native American Church tends, as the [Peyote Way] Church suggests, to negate the existence of a compelling state interest in denying the same use to it. In the absence of evidence, we cannot simply assume that the psychedelic is so baneful that its use must be prohibited to a group of less than 200 members but poses no equal threat when used by more than 250,000 members of the Native American Church.

Ultimately, the free exercise claims of the Peyote Way Church of God were rejected as a result of the Supreme Court's subsequent decision in *Smith*. Noting that *Smith* "eviscerates judicial scrutiny" of free exercise claims against neutral laws of general applicability—even though the Court recognized that this would relatively disadvantage smaller faiths—the Fifth Circuit ruled that the Church's free exercise rights were not violated by the Texas prohibition it challenged. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991).

[155] *See* Berg, *supra* note 5, at 44 n.198 (citing Quaring v. Peterson, 728 F.2d 1121, 1126–27 (8th Cir. 1984)).

justification for denying such an exemption, the experience of other states may suggest that this interest is entitled to little weight.[156]

Courts employ this kind of an analysis in religious liberty cases today, but, after *Smith*, they can only do so under the authority of federal or state statutes or state constitutional law. Clearly, as a case like *Warsoldier v. Woodford*[157] demonstrates, strict scrutiny review permits such an inquiry. In *Woodford*, a Native American prisoner challenged the California Department of Corrections hair grooming policy, which limited a male inmate's hair to three inches in length, under the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA requires prison authorities to justify regulations that substantially burden the religious exercise of an inmate under strict scrutiny review. The prisoner argued that cutting his hair would violate the religious faith of his tribe.

As is typically the case in prison religious liberty cases, the Department of Corrections argued that the hair length requirement was necessary to maintain prison security, an obviously compelling state interest. The Ninth Circuit panel, however, was not persuaded that the hair length requirement was the least restrictive alternative available to prison authorities to further that interest, particularly at a minimum security prison. The court noted that other prison systems including the Federal Bureau of Prisons, the largest correctional system in the country, and prisons run by other states such as Oregon, Colorado, and Nevada, do not have similar hair length policies or provide religious exemptions to them.[158] It went on to argue that "the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means."[159]

A similar kind of an analysis is utilized in other areas of constitutional law under less rigorous review. In gender discrimination cases, courts look to the experiences of analogous

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[156] Of course, analogies with other jurisdictions that refuse to grant accommodations for good reasons can undermine the claim for an exemption. Exemptions for the religious use of marijuana were often rejected on the commonly recognized grounds that the demand for, and potential for abuse, of marijuana was far greater than the market for peyote. *See, e.g.*, Olsen v. DEA, 878 F.2d 1458, 1463–64 (D.C. Cir. 1989). Distinctions are also drawn between religious communities with regard to the risks created by their respective practices. *See, e.g.*, McBride v. Shawnee County Court Servs., 71 F. Supp. 2d 1098 (D. Kan. 1999) (describing how the loosely structured procedures for determining when marijuana should be smoked in the Rastafarian faith distinguishes this claim for an exemption from that of Native Americans using peyote in rituals).

[157] 418 F.3d 989 (9th Cir. 2005).

[158] *Id.* at 1000.

[159] *Id.*

institutions or other jurisdictions to determine whether the state defendant's interests can justify gender-based laws and policies under intermediate level scrutiny. In *United States v. Virginia*,[160] the Virginia Military Institute (VMI) defended its gender discriminatory admissions policies by arguing that accommodating women students would fundamentally transform the institution, and undermine its status and the quality of the education it provided. In rejecting VMI's contentions, the Court pointed to the successful gender integration of every federal military academy[161] and noted that such accommodations were accomplished notwithstanding similar predictions that the admission of women would destroy these institutions.[162] The experience of West Point and other federal military academies in accommodating women cadets, while maintaining their ability to produce top-flight citizen soldiers, provided the Court an objective basis for evaluating, and rejecting, VMI's claims.

In *Michael M. v. Superior Court of Sonoma County*,[163] California argued that its gender-based statutory rape law served the important state interest of preventing teenage pregnancies. Further, the state explained, a gender neutral provision would substantially undermine this objective. Young women would be reluctant to come forward and report the offense if they rendered themselves vulnerable to prosecution by doing so.[164] While a plurality of the Court accepted California's argument, Justice Brennan's dissenting opinion demonstrated convincingly that the state's justifications could not satisfy intermediate level scrutiny because thirty-seven states used gender-neutral laws to prosecute statutory rape. The statutes of at least eleven of those states were sufficiently similar to California's law to permit a direct analogy. There was no evidence that any of those states were experiencing the kind of enforcement problems that California claimed would result from the enactment of gender-neutral statutory rape laws.[165] If intermediate level scrutiny means anything, states should not be permitted to ignore the experience of other jurisdictions in attempting to justify gender discriminatory statutes. Nor should they be permitted to ignore the experience of other jurisdictions in attempting

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[160] 518 U.S. 515 (1996).
[161] *Id.* at 544–45.
[162] *Id.* at 551 n.19.
[163] 450 U.S. 464 (1981).
[164] *Id.* at 473–74.
[165] *Id.* at 492–93.

to justify their refusal to exempt religious practices from neutral laws of general applicability.

A related form of this analysis applies when the state itself acts in a way that undermines the credibility and weight of its interests. Typically, courts may challenge state interests here on the grounds that the state's actions are unacceptably underinclusive. The Court's equal protection cases reviewing laws that discriminate against non-citizens provide striking examples of situations in which the state's justifications for challenged laws are undercut by related provisions in its statutory scheme. In *Sugarman v. Dougall*,[166] New York attempted to justify its decision to deny non-citizens eligibility for competitive civil service jobs on the grounds that public employees engaged in "the formulation and execution of government policy" must be of "undivided loyalty."[167] Yet New York statutes permitted non-citizens to be hired to staff "the higher offices in the state executive departments," and many offices filled by election or legislative appointment.[168] The inconsistency between the state's justifications and its statutory scheme were impossible to ignore.

The Court identified a similar discrepancy in *Bernal v. Fainter*.[169] Although the *Bernal* Court struck down a Texas law prohibiting non-citizens from serving as a notary public on other grounds, the Court noted that Texas permits non-citizens to be court reporters, a position that overlaps the functions of a notary in some respects. More dramatically, the Texas Secretary of State, the state official responsible for the licensing of all notaries public, need not be a citizen.[170] In yet another example, in *Cabell v. Chavez-Salido*,[171] plaintiffs argued that a California law prohibiting non-citizens from serving as deputy probation officers violated the equal protection clause. Applying what it had described in earlier cases as a rational basis standard of review, the Court upheld the challenged law on the grounds that the state was properly insuring that important governmental functions involving the exercise of coercive police power remained in the hands of citizens.[172] Justice Blackmun, in his dissent, maintained that California's decision to exclude aliens from this position while permitting them to serve in other, higher level roles related to the criminal justice system was so

[166] 413 U.S. 634 (1973).
[167] *Id.* at 641.
[168] *Id.* at 639.
[169] 467 U.S. 216, 227 (1984).
[170] *Id.* at 222–23.
[171] 454 U.S. 432 (1982).
[172] *Id* at 447.

"haphazard as to belie the state's claim" about the purpose and effect of the discrimination.[173] California permitted aliens to serve as lawyers, trial judges, Supreme Court Justices, and as the supervisors of county probation departments. Given the state's acceptance of aliens in these various roles, it made no sense to argue that non-citizens could not be trusted to serve as deputy probation officers.[174]

Using a similar kind of analysis in a free exercise case, a court might look to other religious exemptions the state has provided in related situations, notwithstanding the alleged costs or problems associated with the accommodation. If religious practices create similar concerns, and the state exempts one practice from the requirements of a law but not the other, there are strong reasons for concluding that the state's alleged interest lacks substance. The United States Supreme Court employed this analysis in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[175] a recent Religious Freedom Restoration Act (RFRA)[176] case involving the application of the Controlled Substances Act to the religious use of *hoasca*, a sacramental tea containing a listed hallucinogen, by a small Christian spiritist sect, O Centro Espirita Beneficente Uniao do Vegetal (UDV).

The government argued in *O Centro* that it had a compelling interest in not allowing any exceptions to the prohibitions mandated by the Act since the substances listed in Schedule I had been determined to have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision."[177] In rejecting this argument, the Court pointed to the long standing exception granted to the Native American Church from the operation of the Act for the religious use of peyote, another prohibited hallucinogen. The Court noted that peyote had been determined to raise the same risks of abuse and the same lack of utility for medical treatment as *hoasca*. Accordingly, it concluded, if an exception could be granted (and maintained for over thirty years) for the religious use of peyote "for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs."[178]

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[173] *Id.* at 461 (Blackmun, J., dissenting) (quoting *Id.* at 442 (majority opinion)).
[174] *Id.* at 460–61 (Blackmun, J., dissenting).
[175] 126 S. Ct. 1211 (2006).
[176] 42 U.S.C. §2000bb et. seq. (West 2006).
[177] *O Centro*, 126 S. Ct. at 1220 (alteration in original).
[178] *Id.* at 1222. A similar analysis might be used to argue that that there were less restrictive

Similarly, in a RFRA case, *Sasnett v. Sullivan*,[179] plaintiffs challenged a Wisconsin Department of Corrections policy prohibiting prison inmates from wearing jewelry. There was no general exception for religious jewelry. Crosses and crucifixes were subject to the ban but prisoners were permitted to have rosaries with a cross attached. The Seventh Circuit held that the state's justification could not satisfy RFRA's rigorous standard of review. The state's interest in prison security was compelling, but it was not reasonably furthered by a regulatory framework under which "[t]he state allows prisoners to have rosaries, which could be used to strangle a fellow prisoner or guard, and bans crucifixes even in correctional facilities wholly occupied by white collar prisoners who do not belong to gangs or get into fights with each other or the guards."[180]

Nor is this kind of an analysis only appropriate under the rigorous standard of review required by RFRA. The existence of such inconsistent accommodations could not survive even relatively modest scrutiny. After RFRA was struck down on federalism grounds, the *Sasnett* case was remanded back to the Seventh Circuit for further review. Notwithstanding the invalidation of RFRA, the court affirmed its earlier conclusion. Plaintiff's claim for an exemption for religious jewelry, the court explained, would still have to be upheld, even under the lenient standards of review required by *Turner v. Safley*[181] and *O'Lone v. Estate of Shabazz*,[182] "because of the feebleness of the state's safety argument."[183] The court ultimately determined it was not necessary to adopt any particular standard of review to resolve plaintiffs' claims because the disparate treatment of these two religious instruments was entirely without justification. A rule permitting an inmate to have a rosary but not a crucifix discriminated among

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alternatives available to the government to further its interests than an absolute prohibition against the use of *hoasca* tea that covered even sacramental uses. For example, Judge McConnell inquired in his court of appeals opinion "why an accommodation analogous to that extended to the Native American Church cannot be provided to other religious believers with similar needs. . . . [t]he apparent workability of the accommodation for Native American Church peyote use strongly suggests that a similar exception would adequately protect the government's interests here." O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1030 (10th Cir. 2004), *aff'd*, 126 S. Ct. 1211 (2006).

[179] 91 F.3d 1018 (7th Cir. 1996), *rev'd* 521 U.S. 1114, *on remand sub nom.* Sasnett v. Litscher, 197 F.3d 290 (7th Cir. 1999).

[180] *Id.* at 1023.

[181] 482 U.S. 78 (1987).

[182] 482 U.S. 342, 349 (1987).

[183] *Litscher*, 197 F.3d. at 292.

religious faiths, and as such, was unconstitutional under any free exercise analysis.[184]

Let me reiterate that the critical point of these cases for the purpose of this article does not depend on courts adopting a particular standard of review in free exercise cases. The important common denominator that underlies these courts' analysis, whatever standard of review is applied, is that judicial balancing in religious liberty cases can be grounded on an objective foundation—at least in some situations.

b. Using Costs That Society Accepts To Protect Other Rights To Evaluate the Weight Assigned to State Interests

In adjudicating free exercise cases, courts may also look to the jurisprudence of other rights. It is important, however, to understand the limitations inherent in this kind of reasoning. Comparisons between or among rights are rarely dispositive of a constitutional dispute.[185] Nor does looking to other rights presuppose that all rights must be treated the same way. Still, when courts regularly determine that certain state interests are not of sufficient weight to justify the abridgement of various other rights, these conclusions provide an objective reason for courts to question why the same state interests—ones that do not outweigh free speech or equal protection interests, for example —are sufficient to permit state interference with the exercise of religion.

It is not difficult to identify public and private costs that have been found insufficient to justify the abridgement of fundamental rights. Indeed, generally speaking, we protect many rights even though doing so imposes various burdens on individuals, the public at large, or the government. These burdens include administrative inconvenience or inefficiency costs, maintenance and wear and tear costs, out of pocket financial expenses and loss of revenue, and attenuated social instability and unlawful conduct costs. (The list is not intended to be completely inclusive.)

Administrative inconvenience and inefficiency problems are common costs governments incur in protecting freedom of speech. If speech is permitted on public property because the First Amendment prohibits absolute bans on expression in streets, parks, and other government owned locations, state and local governments must regulate those expressive activities. If they do not, the ensuing babel and

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[184] *Id.* at 292–93.

[185] *See* Brownstein, *supra* note 68, at 955–59.

commotion will interfere with the other uses of the property.[186] If the state does regulate the expressive activities it must allow on its property, however, it will have to develop and enforce time, place, and manner restrictions. It will have to issue permits, schedule access, and monitor compliance.[187] These are obvious administrative costs.

Protecting individuals against compelled affirmation of belief also creates administrative burdens. If a school cannot require all the students in a school classroom to recite the pledge of allegiance,[188] then it will have to notify parents of their right not to have their children participate in this exercise. There may also be logistical issues in arranging exactly how the classroom teachers deal with a student's nonparticipation. Similarly, arranging for the deletion or covering of the state motto on a license plate may involve administrative decisions and accompanying costs.[189]

Procedural due process requirements impose even greater costs on society. Increased process not only costs money, it delays government action. Necessary changes in personnel may be delayed or discouraged.[190] Commercial costs increase when creditors must satisfy process requirements before they can repossess property.[191] Equality may also be an expensive political good. Equal protection requirements may prevent government from using accurate, cost saving generalizations, such as gender classifications, because doing so reinforces antiquated stereotypes of the role of women in society. The Court has made it clear that such administrative convenience rationales cannot satisfy intermediate level scrutiny to justify gender-based laws.[192]

I do not suggest for a moment that procedural due process rights, equal protection guarantees, and free speech rights are not well worth

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[186] *See supra* note 71.

[187] *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS 111 (1999) (explaining that "maintaining open public spaces [available for expressive activities] will ordinarily entail nontrivial public expenses" such that "[t]he right to set up a soap box and enter a publicly subsidized space where listeners can gather and supporters parade imposes costs on some citizens for the benefit of others.") The Court has made it clear that permit and licensing systems that apply to expressive activities must provide adequate guidelines to limit official discretion, *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988), as well as appropriate procedural safeguards, *Freedman v. Maryland*, 380 U.S. 51 (1965).

[188] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[189] Wooley v. Maynard, 430 U.S. 705 (1977).

[190] Similarly, requiring a hearing before an individual can be dropped from the welfare rolls, as procedural due process case law requires, may result in undeserving individuals continuing to receive benefits at the taxpayers' expense. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). The expenses incurred in providing the hearing itself, of course, is another cost of procedural due process rights. *See* HOLMES & SUNSTEIN, *supra* note 187, at 26–27.

[191] David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 89–92 (2005).

[192] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

the price we pay for them. But we do pay a price. Any suggestion that free exercise rights should not be protected whenever doing so causes harm to, or imposes costs on, government or third parties—either because it is improper to protect rights in such situations or because courts have no way of determining when the resulting costs and harms justify the infringement of rights[193]—simply ignores the jurisprudence of other rights. In fact, there is a rich body of case law courts can consider today to help them determine how to balance social costs against the protection of rights.

The price society pays to protect rights is not limited to administrative expenses. Maintenance and wear and tear costs are also a common cost of freedom of speech. Suppose a group wants to hold a rally in an urban park to support more compassionate treatment of the homeless and invites homeless people to participate in the event. There will be litter and debris to clean up after the rally. Landscaping may need to be repaired or restored. Indeed, it is hard to imagine any expressive activity in a public park or street that will not result in some after the fact expenses.

Further, there are direct, out of pocket financial costs and losses of revenue to consider when expressive activities are permitted in public places. A city will have to pay a lot of money in police overtime to maintain order when the KKK wants to hold a rally in a black neighborhood, or the Nazis plan to march through the streets of a Jewish community like Skokie, Illinois.[194] When Operation Rescue or another pro-life group holds protests outside of clinics providing abortion services and pro-choice groups plan on holding counter demonstrations as well, law enforcement costs may be substantial.[195] In-

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[193] *Compare* Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1462 (D.C. Cir. 1989) ("We are unaware of any 'free exercise' precedent for compelling government accommodation of religious practices when that accommodation requires burdensome and constant official supervision and management.") *with* United States v. Varley, 2000 U.S. Dist. LEXIS 22390 (W.D. Wash. Feb. 22, 2000) (describing monitoring program pursuant to which petitioner could use marijuana for religious purposes during period of supervised release from incarceration).

[194] *See, e.g.*, Mathew Cella & Guy Taylor, *37 Arrested on Final Day of Protests*, WASH. TIMES, Apr. 23, 2002, at B01 (reporting that three days of pro-Israeli and pro-Palestinian demonstrations cost the District of Columbia five million dollars in police security expenses); Mark Ferenchik, *Demonstrations at City Hall May Soon Be Subject to Rules*, COLUMBUS DISPATCH, Oct 7, 2004, at 08C (acknowledging that Columbus incurred $127,896 in on-duty and overtime police costs by providing security for week long demonstration by group opposed to abortion and homosexuality); Matthew Marx, *Police Prepare for KKK Rally, Counter Rally on Busy Sunday*, COLUMBUS DISPATCH, Sept. 10, 1999, at 3B (explaining that the 1999 Cleveland KKK rally required twenty extra overtime police officers in addition to the regularly scheduled police officers who also worked overtime).

[195] *See, e.g.*, Michele R. Moretti, *Using Civil RICO To Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?*, 25 NEW ENG. L. REV. 1363, 1394 (1991) ("[E]xorbitant demands are being placed upon the limited resources of local govern-

deed, the Supreme Court's case law suggests that communities cannot reduce the financial costs of permitting expressive activities on public property by charging the speakers sufficient fees to offset the projected expenses a municipality will incur in maintaining order at rallies, protests, and other expressive events. The Court struck down attempts to charge speakers' fees that will vary according to the city's costs as content discriminatory in effect.[196]

Financial consequences may be indirect, but they may still turn out to be substantial. Holding political rallies downtown may make it harder for customers to shop at local businesses, reducing sales tax income. Similar consequences may result from prolonged union picketing.[197] Nor is it only the government that bears the burden of protecting rights. In the free speech context, businesses lose revenue when customers cannot get to stores and employees are late getting to the office due to the congestion created by political rallies and demonstrations.

Protecting rights other than freedom of speech can also result in indirect financial consequences for private citizens or the general public. If protecting the right to marry and to procreate requires states to allow low income individuals who are already struggling to meet their child support obligations from a previous marriage to marry again and to start a new family, the children who depend on that child support may find that the quality of their lives is at risk. Alternatively, the states welfare obligations may increase.[198] The list of examples could go on and on.

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ments who are repeatedly required to provide costly police protection at anti-abortion protest rallies."); Bella English, *Antiabortionists Go over the Edge*, BOSTON GLOBE, Mar. 15, 1993, at 15 (describing estimates that the town of Brookline spent over $200,000 on police and jail expenses responding to anti-abortion protests by Operation Rescue);.

[196] *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992).

[197] *See, e.g.*, Paul Zielbauer, *Nursing Homes Are Locking Strikers out in Connecticut*, N.Y. TIMES, March 22, 2001, at B1 (reporting that a one-week strike cost a nursing home an average of $150,000 to $200,000 in additional costs); *Transit Strike Looms as Deadline Passes*, CHI. TRIB., Dec. 20, 2005, at C17 (reporting that a strike cost Chicago as much as $400 million a day).

[198] *See* HOLMES & SUNSTEIN, *supra* note 187, at 135–36 (questioning whether "a deadbeat father's right to marry trump[s] his moral responsibilities toward his child" and whether the fact that "the community defrays the costs whenever children become public charges" justifies "restrict[ing] the freedom of those who are morally and legally obligated to provide support"). The State of Wisconsin's attempt to condition obtaining a marriage license on the payment of existing child support obligations was struck down in *Zablocki v. Redhail*, 434 U.S. 374, 408 (1978), as an abridgement of the right to marry. To the extent that a new marriage reduces the ability of recalcitrant fathers to meet their support obligation, the cost of recognizing that right will be borne by the children of prior marriages or the state. *See generally* R. Michael Rogers, *Use of the Texas Marriage License Statutes as a Child Support Collection Device Does Not*

Moreover, more than financial costs may be involved. Large, protests outside of clinics providing abortion services traumatize patients arriving for treatment, a result that may require the administration of additional medication or increase the risks associated with the procedure.[199] The constitutionalization of defamation law may leave libeled individuals without redress for the injuries done to their reputation.[200] Incitement and aggressive advocacy may not create risks of sufficiently imminent unlawful conduct and violence to satisfy *Brandenburg*, but it may increase the level of anti-social and harmful conduct

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Violate Equal Protection, 48 BAYLOR L. REV. 1153, 1159 (1996) (discussing *Zablocki*).

[199] *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 758 (1994) (noting state court finding that patients with heightened anxiety show more resistance to analgesics and require higher levels of sedation, which increases risks of surgery, and that some patients' surgery had to be rescheduled because of extreme agitation); Pro-Choice Network v. Schenck, 67 F.3d 377, 384 (2d Cir. 1995) (describing how confrontational protests cause severe distress that may lead to elevated blood pressure, hyperventilation, need for sedation, special counseling, increased risk in operating room from anxiety induced agitation, delay, and risks associated with delay); Feminist Women's Health Ctr. v. Blythe, 22 Cal. Rptr. 2d 184, 188 (Cal. Ct. App. 1993) ("This heightened level of anxiety [caused by picketing and demonstrations] has required that abortion patients receive greater amounts of medication and has lengthened the time necessary to perform abortion procedures, thereby increasing the risks to patients."); Hirsh v. City of Atlanta, 401 S.E.2d 530, 532 (Ga. 1991) (detailing how patients arrived at clinic in "a shaken state" with elevated blood pressure and pulse rate, which subjected them to additional health risks); *Hearing on Violence at Women's Health Clinics Before the S. Appropriation Subcomm. on Labor, Health & Human Services*, 103d Cong. (1995) (statement of Kate Michelman, President of National Abortion Rights Action League) (stating that increased anxiety from encounters with confrontational protesters can result in need for more sedation during surgical procedures, which increases medical risks); Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations*, 12 POPULATION & ENV'T 379, 380–81 (1991) (noting that on protest days, many patients "exhibited evidence of adrenergic 'fight-or-flight' reaction, such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention," and that if a patient becomes agitated before or during the procedure "she could easily experience serious complications of the abortion that would be extremely unlikely under other circumstances.").

[200] As Justice White explained in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring), the Court's current doctrine may cause real harm to defamed individuals. "[T]he public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. . . . Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all." *Id.* at 767–68 (footnote omitted). *See also* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1326–27 (1992) (describing how a libeled public official's jury award of $22,000 against a newspaper found to be negligent in publishing false information that damaged his reputation was overturned to prevent the press from being "excessively chilled in pursuit of truth").

that occurs over time.[201] It is difficult to deny the obvious reality that rights are often expensive political goods.

One response to these examples and others is that the rights communities incur costs to protect and serve instrumental, not dignitary goals. It is much more legitimate, one may argue, to require society to pay to protect rights that serve social goals like the effective operation of democracy (free speech) or accuracy in governmental decision-making (procedural due process) than it is to force the public to incur costs to protect dignitary rights, such as the free exercise of religion. One cannot draw a useful analogy between free exercise cases and the costs incurred in protecting other rights.

I think this argument is mistaken for three reasons. First, its basic premise is overstated. Dignitary rights also have value that justifies society incurring costs to protect them. It may be that rights serving instrumental goals are more deserving of protection and warrant greater social expenditures to guarantee them than dignitary interests. I would not reject that contention out of hand. Even if that is true, however, it does not preclude the argument that the constitutional goal of protecting dignitary rights can also justify imposing some significant costs on communities. Second, and related to the first point, some of the examples described above do involve the protection of dignitary rights. The right to marry is a dignitary right. The compelled affirmation and belief doctrine primarily serves dignitary, not instrumental goals.[202] There is a dignitary dimension to procedural due process as well as an instrumental function served by this guarantee.[203] The right to be heard has value even if it does not serve an instrumental function and persuades the decision maker to change his mind. Personal dignity is a core aspect of equal protection jurisprudence. Race and gender classifications are often problematic precisely because they are an affront to the dignity of the individual.[204] We re-

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[201] *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USE OF LANGUAGE 266–69, 273–74 (1989); John C. Knechtle, *When To Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 570 (2006) (deploring the inability of police to prevent violence incited by hate speech because under *Brandenburg* only speech that incites imminent violence can be suppressed).

[202] *See* Wooley v. Maynard, 430 U.S. 705, 714–15 (1977) (recognizing that forcing an individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . 'invades the sphere of intellect and spirit'" that the Constitution protects from official interference); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943).

[203] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) (explaining that procedural due process requirements affirm human dignity by expressing "the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one").

[204] *See* Powers v. Ohio, 499 U.S. 400, 410 (1991) (striking down race-based peremptory challenges because of the "stigma or dishonor [that] results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror"); Brown v. Bd. of Educ.,

ject administratively convenient laws employing gender classifications that reinforce antiquated gender stereotypes, for example, to protect and affirm the dignity and status of men and women, not to accomplish some ulterior objective.[205] Third, as I argued earlier, free exercise rights do further important instrumental goals.[206] Thus, at least with regard to protecting the autonomy of religious institutions, society gains instrumental benefits by protecting free exercise rights, which can be balanced against the right protecting costs such protection incurs.

To be sure, drawing analogies, when appropriate, between the costs we accept to protect other rights and the costs of granting exemptions to accommodate religious practices does not eliminate judicial subjectivity in free exercise cases. There is no exact equivalence among rights and the state interests that justify their abridgement. It should be remembered, however, that the goal here is not to entirely eliminate subjectivity in adjudicating free exercise claims. It is to provide sufficient guidelines and reference points so that the balancing that remains to be done is not completely ad hoc and involves no more judicial discretion than is generally accepted in other areas of constitutional law.

Given that caveat, there is no shortage of persuasive analogies that courts may consider. In some cases, the primary burden in granting a free exercise exemption is the same kind of administrative inconvenience that government confronts in protecting speech. If children of minority faiths attending public school have a free exercise right to be excused from school so that they may observe religious holidays of their faith, public schools will incur administrative costs in keeping track of those holidays and taking steps to mitigate the impact of the absences, such as proctoring make-up exams. Since courts routinely require the state to incur such costs in protecting speech and equality rights, even under intermediate standards of review, courts may reasonably presume that the state's interest in avoiding this kind of administrative inconvenience is an

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347 U.S. 483, 494 (1954) (denouncing racially segregated schools because of their impact on the "hearts and minds" of black children).

[205] Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (insisting that a "gender-based generalization [about the respective needs of widows and widowers] cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support"); Frontiero v. Richardson, 411 U.S. 677, 685 (1973) ("[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes.").

[206] *See supra* notes 100–15 and accompanying text.

insufficient justification for burdening rights in free exercise cases as well.

It is also easy enough to hypothesize free exercise scenarios that involve maintenance and wear and tear costs that are comparable to those resulting from protected speech activities. Instead of a political rally urging compassionate government responses to the plight of the homeless, local houses of worship might ask the city for permission to use a local park as a one time site for the distribution of food and clothing to the homeless. This religiously motivated charitable activity is not expressive in nature. Accordingly, the houses of worship would have to rely on the Free Exercise Clause rather than the Free Speech Clause if local administrators refused to allow them to use the park for their program. If local officials could not reject a permit application for a political rally projected to cause roughly similar maintenance and wear and tear costs because of freedom of speech concerns, it is hard to see why courts cannot use that same constitutional balancing analysis for guidance in reviewing an analogous free exercise claim.

Alternatively, some requests for religious exemptions may cost the government money or cause it to lose revenue. If public employees request time off to observe religious holidays, the city may have to pay other workers overtime to work as substitutes for their absent colleagues.[207] That financial cost can be analogized to various free speech examples. Alternatively, a city may not allow a house of worship to locate in an area zoned for commercial uses—because the house of worship will not bring in sales tax revenue. Again, if cases suggest that we accept costs of this nature and magnitude in protecting freedom of speech, courts should be able to take that knowledge into account in determining whether such costs justify interfering with the exercise of religion.

c. Using Costs That Society Accepts To Protect Interests Other than Rights To Evaluate the Weight Assigned to State Interests

In line with the other analogies discussed above, the interests the state and the public routinely give up to promote objectives other than the protection of rights should provide some relevant background to an analysis of whether those same interests can justify the abridge-

[207] *See, e.g.*, United States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1976) (rejecting plaintiff's religious accommodation request that he be relieved of the obligation to work on Saturday, his Sabbath, because hiring a substitute employee would require the payment of overtime wages).

ment of free exercise rights. This kind of an analysis may involve considerable judicial discretion, but it provides additional objective reference points that can reduce the subjectivity and indeterminacy of a balancing test.[208]

Land use regulations provide several useful examples. There is no doubt that locating a house of worship in a residential neighborhood can create externalities for neighbors. There may be increased traffic, noise, competition for parking on the street, and other problems. It is also obvious, however, that houses of worship are not the only land uses that result in increased traffic or noise in residential neighborhoods. When land use authorities are willing to permit an athletic club or a fraternity house in residential neighborhoods, but refuse to allow houses of worship of similar size in these areas, courts have some basis from which they can evaluate the city's claim that its interest in limiting such negative externalities should be assigned significant weight.[209] Similarly, in a community where two story homes, office

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[208] Using the request for an accommodation for the ritual use of peyote, the specific issue in *Smith* itself, as an example of how this kind of a judicial analysis could be employed by courts with regard to the risk that an accommodation might result in an increase in the unauthorized use of peyote, Catherine Cookson describes in considerable detail the range of "practitioners" who may be registered to use drugs prohibited by the Controlled Substances Act in their professional roles. She goes on to explain the controls and procedures provided in the statue to monitor and evaluate the use of controlled substances by registered practitioners to ensure that no misuse of the exemption occurs. COOKSON, *supra* note 22, at 132–33. Cookson concludes that "[t]hese controls provide 'neutral' criteria for reducing the spread of controlled drugs into uncontrolled areas of use. Theoretically they could be made applicable to, and would be effective in, controlling such spread whether the use was in a five-hundred-bed major hospital with several thousand employees, or in a religious ceremony supervised by a registered 'road man' of the Native American Church." *Id.* at 133.

With regard to the state of Oregon's interest in avoiding the alleged health hazards that result from the ingestion of a hallucinogenic drug by the user himself, whatever his or her motivation in using the drug may be, Cookson draws a different analogy. Noting that Oregon "permits individuals to engage in such risky activities as tobacco smoking, consuming alcohol and coffee, gun ownership, hunting, motorcycling, rodeo riding, rock climbing, spelunking, hang gliding, football, and flying ultralights," she wonders why, "[o]ne is free to undertake such dangerous activities as these and risk the consequences; however, one will be punished by the state for practicing one's religion because the state believes that the religious worship has dangerous side effects which can cause harm to the religious believer." *Id.* at 134.

A somewhat similar analysis was employed by the court in *Rader v. Johnson*, 924 F. Supp. 1540 (D. Neb. 1996). Here, plaintiff sought an exemption from the University of Nebraska-Kearney's (UNK) residence policy requiring freshman students to live on campus. In determining that the UNK's justifications for denying the exemption were insufficiently compelling, the court noted that UNK had granted exemptions to a large number of students for an extraordinarily broad range of reasons. Thus, the court concluded that UNK's "own implementation of its... rule undercuts any contention that its interest is compelling." *Id.* at 1557. Moreover, the fact that other branches of the University of Nebraska system did not enforce a similar rule further undermined the alleged importance of UNK's policy. *Id.* at 1557 n.3.

[209] *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1219–20, 1234–35 (11th Cir. 2004) (reviewing ordinance excluding houses of worship from business district in which theaters, restaurants, private clubs, lodge halls, health clubs, dance studios, music instruc-

buildings, and businesses are commonplace, courts may look skeptically at the argument that a house of worship cannot be over one story in height because of the burden the extra story would impose on the privacy interests of neighbors.

The suggested analysis here needs to be distinguished from a different kind of free exercise argument presented by a few courts and commentators. Some scholars argue that the fact that the government creates exemptions from neutral laws of general applicability for secular interests justifies the application of strict scrutiny review when the states refuse to grant comparable exemptions for religious practices.[210] This analysis builds on the language in *Smith* that distinguishes *Sherbert v. Verner*[211] and its progeny from the rule denying religious individuals any free exercise protection against neutral laws of general applicability. In cases in which the government provides individualized exemptions to its regulation to secular interests, the Court explained, the regulation can no longer be considered a neutral law of general applicability. Accordingly, the refusal to extend an exemption to religious practices comparable to exemptions granted to secular interests must be rigorously reviewed.[212]

In the best known case that adopts this position, *Fraternal Order of Police v. City of Newark*,[213] the Third Circuit applied strict scrutiny to the application of two Muslim officers for an exemption from a police department grooming standard that required officers to be clean shaven. The department had created a categorical exemption from its requirements for officers who suffered a skin condition that

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tion studios, modeling schools, and schools of athletic instruction are permitted uses); Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961, 976 (N.D. Ill. 2003) (reviewing ordinance that excludes houses of worship from zoning district in which cultural facilities, theatres, hotels, and restaurants are permitted); Love Church v. City of Evanston, 671 F. Supp. 515, 518–19 (N.D. Ill. 1987) (prohibiting churches from locating in zones where meeting halls, theaters, schools, funeral parlors, and community centers are permitted), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990); Refuge Temple Ministries v. City of Forest Park, No. 1:01-CV-0958-MHS (N.D. Ga. filed Mar. 14, 2002) (requiring a special permit for churches in area in which private clubs, lodges, theatres, and auditoriums are permitted without such a permit). For a synopsis of the *Refuge Temple* case, see The Becket Fund for Religious Liberty, Refuge Temple Ministries of Atlanta v. City of Forest Park, www.becketfund.org/index.php/case/71.html (last visited Sept. 21, 2006). *See also* Laycock, *supra* note 125 (describing survey data suggesting that houses of worship are treated less favorably in many zoning districts than a broad range of other uses including banquet halls, clubs, community centers, fraternal organizations, health clubs, and theaters).

[210] *See* 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 (2001).

[211] 374 U.S. 398 (1963).

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

[213] 170 F.3d 359 (1999).

prevented them from shaving for medical reasons. However, it refused to provide a similar exemption for the Muslim officers who claimed that they are religiously obligated to grow their beards. The court reviewed the department's decision to provide a medical exemption, but not a religious exemption, under strict scrutiny and struck it down.[214]

Unlike the *Fraternal Order of Police* court, I am not suggesting that the granting of secular exemptions increases the rigor of the standard of review courts should apply when religious exemptions are denied. Unless the government clearly discriminates against religion or specific religions, I see no reason why the state's use of formal or informal exemptions to protect secular interests should determine the standard of review to be applied in free exercise cases.[215] Looking at exemptions to general laws provided to secular interests serves a different purpose than determining the standard of review to be applied. Exemptions for secular interests are relevant because they provide objective information courts can consider in doing the constitutional balancing required in adjudicating a case—under whatever standard of review is applied. A record of granting related exemptions to secular interests provides information that will help a court to evaluate and weigh the state's reasons for denying a religious exemption—and this is a task courts will have to perform under any meaningful standard of review.

Thus, in *Fraternal Order of Police*, it would be appropriate for a court to take into account the fact the police department grants medical exemptions to its grooming policy when determining the weight to be assigned to the interests the state asserts to justify its policy. Since protecting the health of public employees is generally considered an extremely important interest, however, the existence of the medical exemption is of relatively limited use to religious plaintiffs or to the court.[216] It would only demonstrate that the state interest in maintaining its grooming policy could be outweighed by compelling compet-

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[214] *Id.* at 365–66.

[215] Unlike judges and commentators who try to use the limited exceptions described in *Smith* as the foundation for protecting free exercise rights in limited circumstances, I believe the core holding in *Smith* that the free exercise clause provides no protection against neutral laws of general applicability is mistaken and should be overruled. Free exercise rights deserve some level of protection against neutral laws of general applicability whether the state grants secular exemptions to those laws or not. *False Messiahs*, *supra* note 19, at 193–203.

[216] Courts generally have not concluded that the availability of controlled substances for medical research or treatment requires a constitutionally mandated exemption for the use of the same substance for religious purposes. *See, e.g.*, Olsen v. DEA, 878 F.2d 1458, 1463 n.4 (D.C. Cir. 1989); Vermont v. Rocheleau, 451 A.2d 1144, 1148 n.3 (Vt. 1982).

ing interests. That finding would not assist a court adjudicating a free exercise claim under some intermediate level standard of review. It would certainly not suggest that the state's interests were unimportant or superficial. Clearly, proof by plaintiffs that the state granted exemptions from its grooming policies for trivial secular interests would be more helpful to their cause. That evidence would undermine the state's claim that the uniform enforcement of its grooming policy furthered interests of significant value.

d. The Possibility of Cost Spreading

In many of the examples described above, courts are asked to balance the burden on the exercise of religion resulting from the application of a general law against some cost that the state (or the public) will incur if an exemption to the law is granted. The balancing analysis becomes more one-sided and more difficult to resolve in favor of granting an exemption if the consequence of doing so causes some significant harm to specific individuals or the members of a discrete class. These are the hardest claims for an exemption to sustain. Why should important interests of some persons who do not accept the tenets of the faith at issue be subordinated, or sacrificed, in order to enable other persons to freely practice that faith without interference? Why should we deny the protection or benefits provided by general rules of law to certain individuals solely because the enforcement of the law on their behalf happens to conflict with the religious practices of other persons? Everyone else within the coverage of a statute receives the protection or benefits to which they are entitled. Only certain individuals do not, and they alone bear the entire cost of the exemption.

One way to deal with this issue is for courts to consider the availability of cost spreading to generalize the cost of granting the exemption. Instead of a serious cost being inflicted on a relatively few individuals, a much smaller burden is distributed among a far larger class of persons—usually the general public. If the cost of granting an exemption is shifted from specific individuals to the general public, the balancing analysis in free exercise cases is more appropriately analogized to the kinds of judicial balancing that occurs when other rights are at issue, as the free speech cases described earlier demonstrate. In those cases, the courts were often willing to protect the right notwithstanding the resulting costs. Their propensity for doing so creates an objective background for reaching similar conclusions in evaluating free exercise claims.

The justification for considering cost spreading as part of the balancing process is straightforward. Constitutional guarantees, such as freedom of speech or freedom of religion, are public, political goods. The price for protecting them should be paid by the community at large. The argument here is not all that different from the argument used to defend the Fifth Amendment's mandate requiring government to pay just compensation to owners when it "takes" their private property for public use. Government should not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[217]

For an example of how cost spreading might be utilized in a free exercise case, we can go back to the *Catholic Charities* case, discussed previously.[218] Arguing that Catholic Charities' claim would be unsuccessful even under strict scrutiny review, the California Supreme Court held that the state's decision to apply the Women's Contraception Equity Act (WCEA) to Catholic charitable institutions was narrowly tailored to serve the compelling state interest of eliminating gender discrimination. Central to the Court's decision was its conclusion that "any exemption from the WCEA sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits."[219] If an exemption was granted, female employees of Catholic Charities would not receive the insurance coverage that they would otherwise be entitled to under the statute—a benefit female employees of other organizations would receive by force of law. Thus, providing an exemption to Catholic Charities would materially burden a discrete and limited class. No prior judicial decision, the Court asserted, "has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."[220]

It would not be difficult to spread this burden from those employees of Catholic Charities who wanted insurance coverage for medical contraceptives to a much broader class, however. The state could organize and fund a separate insurance pool for employees from religiously exempt organizations. Given the small number of employees in question and the relatively minor cost of the insurance coverage, the resulting burden on each California taxpayer would be de minimis. Further, since Catholic Charities could be asked to increase its contri-

[217] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[218] *See supra* notes 50–51 and accompanying text.

[219] Catholic Charities v. Superior Court, 85 P.3d 67, 93 (Cal. 2004).

[220] *Id.* at 94.

butions to other parts of its programs that served the public good,[221] and these contributions might well reduce the state's welfare expenditures in caring for those in need, the alleged financial burden on the state could turn out to be a wash. The cost of paying for supplemental insurance coverage for employees of Catholic Charities would be largely offset by Catholic Charities taking on additional responsibilities for aiding the indigent that would otherwise be the responsibility of the state.

Catholic Charities presented at least the first part of this argument, regarding public financing of insurance coverage for the employees of exempt organizations, to the California Supreme Court. The Court rejected it out of hand—indicating that no authority required "the state to subsidize private religious practices."[222] Of course, Catholic Charities was not asking the state to subsidize its religious practices. In enacting WCEA, the state was trying to further a secular public good at minimal expense by imposing the cost of doing so on private employers, including religious organizations. The kind of cost spreading suggested here does not involve the public subsidizing of religious practices.

Moreover, as we have seen, the state is often required to incur expenses in order to allow other rights such as freedom of speech to be exercised.[223] Similarly, avoiding expense and administrative inconvenience cannot justify the use of suspect classifications in equal protection cases.[224] The California Supreme Court may be correct that there are no cases that require the state to accept such costs as a consequence of protecting the free exercise of religion. But that statement is hardly self-justifying in light of the jurisprudence of other constitutional guarantees. If we are going to take free exercise rights seriously, in the same sense that we do other rights, it is not at all clear why the exercise of this right may only be protected from government interference when there are no public costs involved in doing so. Once it is understood that there is nothing presumptively unacceptable about incurring public expenses to protect rights, cost spreading becomes a useful tool for transforming the nature of the harm an exemption causes to one that the state may reasonably be obliged to accept.

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[221] *See supra* notes 55–56 and accompanying text for the discussion of how such payments eliminate the secular benefit that would result from granting an exemption and avoid the privileging of religion.

[222] *Catholic Charities*, 85 P.3d at 94.

[223] *See supra* notes 186–89, 194–97 and accompanying text.

[224] *See supra* notes 191–92 and accompanying text.

e. Institutional Channeling and Personal Inducements

As noted earlier, a commonly expressed concern about providing any kind of serious protection to free exercise rights is the contention that exemptions from general laws will induce people to practice religion or espouse a particular faith.[225] Additionally, at the institutional level, exempting religious institutions such as schools, day care centers, and recreational programs from the regulatory burden their secular counterparts must obey will allow them to provide less costly, more efficient, and more cohesive services than their secular competitors. These exemption-based advantages, it is argued, will channel individuals toward religious providers and unfairly promote religion at the expense of other private institutions.[226]

At the individual level, there are many situations when such claims would have little validity. Many religious obligations are materially problematic, no matter how spiritually meaningful they may be to the devout believer. It is hard to imagine a non-Jewish person, for example, being tempted to join Jews in spending a day fasting at worship services because Jewish colleagues receive a day off from work or school to observe Yom Kippur. Few parents of other faiths would seek to be free from laws requiring the provision of medical care to their children because exemptions from such mandates were made available to Christian Scientists. Other accommodations, however, such as conscientious objector exemptions from conscription, or allowing workers weekend days off to observe the Sabbath, have real material value. If the price for getting a Sunday off from work rather than a Wednesday is formal affiliation with a church and occasional attendance at services, some employees may be influenced by the availability of such an accommodation to change their behavior, if not their beliefs. Certainly, the attraction of joining a pacifist faith in time of war should be self-evident.

Much of the power of such accommodations to induce changes in religious behavior or affiliation would be mitigated by conditioning exemptions on the religious believer accepting obligations that reduce the secular benefit received. The utility and administrability of these kinds of requirements have been discussed previously.[227] Even if the conditions accompanying an exemption substantially reduce its secular value, however, there may still be situations in which the availability of an exemption can influence individuals to undertake

[225] *See supra* notes 27–29 and accompanying text.
[226] *See supra* notes 25–26 and accompanying text.
[227] *See supra* notes 50–59 and accompanying text.

and espouse particular religious commitments. Conscientious objector status, for example, may constitute an inducement for some persons to affiliate with pacifist faiths even if it is conditioned on the performance of alternative service.

The fact that an exemption continues to have some force as an inducement does not necessarily require that a court reject it, however. Instead, the power of an exemption to induce religious belief and practice should be part of the balancing analysis a court undertakes in adjudicating a free exercise claim. In performing that balancing analysis, courts should not only consider the extent to which an exemption motivates people to join or practice a religion; they must also recognize that the denial of an exemption will have a contrary influence on religious behavior and belief. If members of pacifist faiths know that they must either confront imprisonment if they adhere to their religious beliefs and resist conscription or violate the obligations of their faith by serving in the military, surely the burdens of that predicament would serve to discourage continued adherence to the faith or undermine new interest in the religion by non-believers, at least to some extent.[228]

f. Sham and Feigned Claims for an Exemption

One of the arguments commonly raised against constitutionally mandated religious exemptions is that some individuals will falsely claim that a law they do not wish to obey imposes a burden on their religious beliefs and practices. Accordingly, these religious imposters will insist that they need not obey the law in question. Thus, critics claim that if exemptions are mandated, beliefs a person does not really hold in a religion that does not really exist may become constitutional tools that can be used all too easily by unscrupulous persons or institutions to avoid unpleasant regulatory obligations.[229]

It is a fair point, but again the scope of the problem is certainly exaggerated. First, there are often common sense costs that will discourage many people from feigning a claim for religious exemption. It is easy for those opposed to courts granting free exercise exemptions to make up bizarre hypotheticals involving sham claims and fake religions. We can imagine a public employee insisting that he worships the San Francisco Giants baseball team, that he practices his faith by attending all their Saturday and Sunday home games, and, therefore,

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[228] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 347 (1996).

[229] *See supra* notes 31–32 and accompanying text.

that he must be exempt from weekend work assignments. But does anyone seriously believe that an employee is going to demand such an exemption from his boss? The ill will that would be directed at the employee by his colleagues and supervisors in response to the demand would discourage all but the most foolhardy from even broaching the subject. Nor have false claims of membership in recognized faiths proven to be a serious problem. The overwhelming number of potential draftees, for example, do not join pacifist faiths in an attempt to avoid conscription.[230] Put simply, there are informal constraints on false attempts to obtain religious exemptions that limit the scope of this problem.

Second, an organization that insists that it is sufficiently religious to claim free exercise exemptions for its work may well render itself ineligible for a variety of government subsidies that might otherwise be available to it. Establishment Clause restrictions on the public funding of religious institutions may cause some organizations operating under a pretense of religiosity to carefully consider their position. This is another one of the ways that a vigorously enforced Establishment Clause can provide a constitutional background that facilitates the rigorous protection of free exercise rights.[231]

Third, the conditioning of exemptions on steps that mitigate or eliminate the secular value of the exemption will make sham claims for exemptions considerably less attractive. The adherent of the San Francisco Giants faith, for example, may be much less interested in insisting on getting weekend days off if his salary is reduced to take account of the material advantages he would receive from the exemption. When religion is not materially privileged by the granting of exemptions, there should be far less incentive to game the system to obtain them.

Still, sham claims cannot be completely prevented and the possibility that they will be asserted should not be entirely discounted. It is a cost for courts to take into account in determining the availability of exemptions. Given the current number of statutory accommodations in place that might induce sham claims for exemptions, but do not

[230] During World War I and World War II, the ratio of conscientious objector exemptions to actual induction stayed low and steady. World War I saw 0.14 exemptions per 100 inductions while World War II saw 0.15 such exemptions. STEPHEN M. KOHN, JAILED FOR PEACE: THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658–1985 93 (1986). The later years of the Vietnam War saw a dramatic rise in the rate of conscientious objector exemptions to the staggering ratio of 130.72 exemptions per 100 inductions in 1972. *Id.* However, this phenomenon was *sui generis* and represented the widespread and violent unpopularity of the war by this time rather than a general rise in the use of religion to gain exemptions. *Id.* at 73–95.

[231] *See supra* notes 103–04 and accompanying text.

seem to be creating a serious problem, however, the presumptive force of this general argument should be rejected.[232] If this contention is to be taken into account in judicial balancing, the state must demonstrate that there is some reason to believe that a substantial number of false claims will be asserted if a specific exemption is granted—and that administrative authorities and the courts will not be able to adequately evaluate them.[233]

g. Substantial Compliance

A final challenge to using a balancing test to evaluate free exercise claims is the alleged uncompromising nature of religious obligations. With other rights, such as freedom of speech, for example, it is possible to talk about different ways to exercise the right. Thus, a law that restricts a particular time, place, or manner of expression may only marginally interfere with the speaker's ability to communicate his message. Other venues or means of expression may be available that allow a court to uphold a speech regulation without substantially interfering with anyone's ability to speak to their intended audience. This analysis has been formalized in the review of content-neutral speech regulations to require courts to consider the existence of alternative avenues of communication when they review a challenged restriction.[234]

When free exercise rights are at issue, however, such constitutional compromises seem less likely or even possible. One may argue that religious mandates are absolute. Nothing short of literal obedience is acceptable. Thus when free exercise claims are adjudicated, there is nothing for the court to consider on the free exercise side of the scale. Only the state's interests are susceptible to any kind of probing inquiry concerning less restrictive alternatives. The religious liberty claim is fixed and immutable. Indeed, the state is fully justified in maintaining that any attempt to work out a compromise with burdened believers would be futile since no give and take between the

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[232] GEDICKS, *supra* note 105, at 41–42 ("It has never been shown that false claims of religious belief are a serious enforcement problem, despite the Court's refusal to examine the reasonableness of particular beliefs . . . . Even in the area of tax law, where claims for exemption coincide with financial self-interest, neither the IRS nor the Court seems to have been unduly hindered by free exercise considerations.").

[233] *See* People v. Woody, 394 P.2d 813, 818–19 (Cal. 1964); Sherbert v. Verner, 374 U.S. 398, 407 (1963).

[234] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994); Frisby v. Schultz, 487 U.S. 474 (1988).

parties is possible. The only way religious liberty can be protected is if the state capitulates and grants the desired exemption.

Again, while there is some truth to this concern, the above description presents an exaggerated picture of the problem. To begin with, religious exemptions can be conditioned on the exempt individual or organization disgorging whatever secular benefit accompanies an accommodation. However literal a religious obligation may be, in most cases it will not prohibit the religious individual from providing the government something of value to offset the material advantage conferred by an exemption.

Moreover, many regulations do not directly prohibit or interfere with religious practices. Instead, they increase the cost or convenience of conduct that is an important preparatory step toward satisfying a religious obligation. Here, there may be a range of alternative ways to facilitate religious practice. To take one obvious example, there may be several different sites in a community on which a religious congregation might develop a house of worship. The group's religious beliefs may not suggest a preference for one location over another— although secular concerns regarding parking, convenience, and cost may make one option more attractive than another. This is an area where courts may properly inquire into the alternatives available to the congregation to satisfy its need for a site for communal worship.[235]

Religious mandates may also involve more flexibility than they initially appear to, or perhaps it is more accurate to say that they are susceptible to a broader range of interpretations than initially seems apparent.[236] That flexibility may make it far easier for the state to grant an exemption than would otherwise be the case. In *Mayweath-*

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[235] *See* HAMILTON, *supra* note 7, at 102–03 (arguing that it does not substantially burden the exercise of religion to deny a congregation permission to construct a house of worship on a particular site when numerous alternative locations are available to it); *see generally* Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 825–26 (10th Cir. 1988) (noting that a religious congregation has no right to build "its house of worship where it pleases").

[236] For example, Orthodox Jews are prohibited from pushing or carrying objects outside the home on the Sabbath. This mandate makes it difficult for women with small children, the elderly who rely on canes and walkers to be mobile, and others to attend Synagogue services. Rabbinic tradition, however, resolves this problem by allowing for the extension of what constitutes the home through the creation of an *eruv*, a ceremonially designated area that can encompass a large area within which most of the members of the congregation live. *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 152 (3rd Cir. 2002). The creation of an *eruv* by attaching boundary markers to utility poles has resulted in competing establishment clause and free exercise claims, *see id.*, as well as political disputes, *see* Matthai Chakko Kuruvila, *Orthodox Berkeley Synagogue Finds Way To Ease Sabbath Rules*, S.F. CHRONICLE, July 7, 2006, at A1.

ers v. Terhune,[237] for example, plaintiffs, Muslim prisoners incarcerated in California, brought a RLUIPA action against a prison policy requiring inmates to be clean-shaven and prohibiting beards of any length—on the grounds that the regulation interfered with their religious obligation to wear beards. The state based its refusal to grant the plaintiff class a religious exemption on security grounds. Prisoners could hide weapons and contraband in a beard. Further, a prisoner with a beard could quickly alter his appearance in a way that could make it easier for him to escape or more difficult to apprehend after an escape.

These arguments might be persuasive if plaintiffs' religious obligations required them to wear long beards of many inches in length. Testimony at trial from religious leaders demonstrated, however, that having a one half inch beard satisfied plaintiffs' religious obligations.[238] As the federal court adjudicating the case recognized, permitting this limited exception to the prison's grooming standards would have little bearing on security concerns. Nothing can be hidden in a one half inch beard and shaving a very short beard would not alter an inmate's appearance enough to allow him to elude capture.[239]

Indeed, sometimes the literal statement of a religious obligation is exactly what creates some flexibility in obeying it. Many Orthodox Jews, for example, interpret Jewish law literally, as prohibiting shaving with a razor. This specific constraint allows them to shave with a scissor or with an electric razor (which is more like a scissor than an actual razor in its operation).[240]

Of course, the religious interpretations described above are not universally accepted. The fact that some members of a religious group accept one interpretation of religious obligations does not allow the state to insist that other members of the same faith should be willing to follow suit. The U.S. Army, for example, does not allow military personnel, including chaplains, to wear beards. While this is not a problem for many Jews, some clergy, such as Chabad Lubavitch Rabbis, believe that all forms of shaving are prohibited. Accordingly, they cannot comply with military regulations and serve as chaplains.[241] The army's refusal to grant an exemption to Chabad Rabbis

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[237] 328 F. Supp. 2d 1086 (E.D. Cal. 2004).

[238] *Id.* at 1090–91.

[239] *Id.* at 1095.

[240] Nathaniel Popper, *Beard Ban Deters Chabad Rabbis from Becoming Chaplains in Army*, FORWARD, Aug. 26, 2005, at 1.

[241] *Id.*

cannot be justified by reference to other religious Jews who interpret *Halacha* (Jewish law) differently.[242]

The possibility that religious commitments may be sufficiently flexible to permit partial or limited compliance with state mandates or a compromise between religious plaintiffs and the state provides indirect support for a free exercise doctrine that employs some form of a balancing test. Since courts have neither the competence nor the authority to impose a compromise on religious individuals, the burden of suggesting a form of compliance with religious obligations that interferes less seriously with the state's interest will fall, necessarily, on the religious plaintiff. A standard of review that assigns some weight to the religious plaintiff's interest can only encourage consideration of such potential opportunities for compromise. Because the state's power to reject proposed solutions is not unlimited and will be subject to some level of judicial review, government actors should be more willing to consider exemptions that satisfy most, if not all, of their concerns. Correspondingly, one would expect that religious individuals would be more willing to consider and offer compromises if they knew that the state could not reject their proposals capriciously.

3. Location Matters

Rights do not receive the same level of protection in all locations. For example, the right to be free from warrantless searches is more aggressively protected in one's home than in one's car.[243] The home also plays a role in determining the scope of the right to privacy or personal autonomy. Part of the justification for striking down laws prohibiting the sale or use of contraceptives was a concern about police invading the sanctity of the marital bedroom.[244]

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[242] Indeed, under the analysis proposed in this article, it might be difficult for the army to justify its refusal to grant an exemption to Chabad Rabbis under any reasonable standard of review. There is an acknowledged shortage of Jewish chaplains in the army. *Id.* The army claims it cannot exempt chaplains from the grooming requirement because beards prevent personnel from effectively using gas masks. But bearded rabbis in the Israeli Army seem to have no difficulty in donning gas masks and a few bearded military personnel in the U.S. Army, who joined up when the army granted religious exemptions to its grooming policy, have been allowed to stay in the service. *Id.*

[243] *See* California v. Carney, 471 U.S. 386, 390–94 (1985) ("[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed . . . as recognizing a necessary difference between a search of a store, dwelling, house, or other structure . . . and a search of a ship, motor boat, wagon or automobile." (quoting Carroll v. United States, 267 U.S. 132, 153 (1925))). *See generally* David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556 (1998) (arguing against the erosion of Fourth Amendment protections in cases involving cars, their drivers, and their passengers).

[244] *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

Location is also a critical factor in determining the appropriate standard of review and the application of that standard of review in free speech cases. Speech regulations that restrict expressive activities in a street or a park (a traditional public forum) or private property are reviewed more rigorously than regulations of expressive activities in other public property that has not been deliberately opened up for discussion and debate (a nonpublic forum).[245] Further, the connection between expression and a person's home has special significance in a range of free speech cases. Possession of obscene material that may be the subject of prosecution elsewhere is protected by the First Amendment in a home library.[246] Speech emanating from the home, such as a sign in one's window or in the front yard, is assigned greater weight than speech expressed in other locations.[247] Accordingly, the state must assert a stronger interest to justify regulating such expression. Also, the state's interest in protecting the sanctuary of the home against unwanted intrusions by sexually graphic or otherwise indecent expression justifies abridgements of speech that would otherwise be impermissible.[248] Thus, in a sense, the individual's right not to listen or to be exposed to speech, as well as the individual's right to speak or read, receives special recognition in the home as opposed to other more public locations.

Location can also be taken into account in developing doctrine to protect the free exercise of religion. As is true for other rights, a family's home deserves special recognition as a location where religious practices can take place free from state interference. A state may reasonably prohibit adults from offering alcoholic beverages to minors in business settings or places of public accommodation. But a police raid on a family's Passover Seder where children might be offered wine to drink as part of the ceremony should require special justification. Of course, this does not mean that religious activities in the home are

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[245] *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678–79 (1992) (explaining that under the Court's forum analysis, "regulation of speech on government property [e.g., streets and parks] that has traditionally been available for public expression is subject to the highest scrutiny" while speech regulations limiting expression on most other public property "must survive only a much more limited review").

[246] *See* Stanley v. Georgia, 394 U.S. 557 (1969).

[247] *See* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (explaining that speech emanating from the home is special because "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means").

[248] Rowan v. United States Post Office Dep't, 397 U.S. 728, 736–38 (1970) (recognizing that while "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound," this does not mean that "a mailer's right to communicate" overrides the interests of "an unreceptive addressee" in his own home).

absolutely immune from state regulation. The level of review that laws burdening religious practice in the home should receive remains an open question. There is reason to argue, however, that it should be a more rigorous standard than one applied to laws that burden religious practice in the public square.

In addition to recognizing the special status of the home, courts should provide distinctive protection to activities that occur within a house of worship. Simply as a matter of constitutional common sense, it would be more than anomalous for courts to respect the *sanctuary* of the home,[249] while refusing to respect the sanctity of an *actual* sanctuary. Further, the case for providing heightened protection for houses of worship can be grounded on several considerations. The people involved in activities at this location will almost certainly be adherents of the same faith. It is also apparent that most of what occurs in a house of worship is imbued with religious meaning. Thus, this is a location where the exercise of religion is a paramount and pervasive concern. The idea of collective autonomy has much more meaning here than it would for a more heterogeneous association. The interest of outsiders or the government in controlling what goes on is limited and secondary in many cases. Finally, houses of worship further the instrumental functions of organized religion. They operate as the center of distinct communal activities and engage congregants in the discussion, development, and transmission of moral values. They need some level of immunity from state interference if they are going to serve as the source of independently determined values that may operate as a counterweight to government perspectives.

Conversely, religious activities outside of the home and houses of worship should receive less protection. The argument here is not that religious activities belong in the home or house of worship exclusively and should not take place in more public settings. There is no reason to presume that providing special protection to religious activities in the home or church requires as a corollary principle a rule limiting opportunities for religious activities in the public square. Certainly, no such connection exists in free speech doctrine. No one thinks the special status the courts assign to the home for free speech purposes somehow suggests that expressive activities should not be permitted anywhere else in the public square. Rather, as is true for free speech doctrine, recognizing that the home is a unique sanctuary for religious practice and observance increases the protection

[249] *Id.*; *see also* Frisby v. Schultz, 487 U.S. 474, 484 (1988).

religious exercise receives in the home; it does not diminish the protection religious conduct receives in other locations.

It may be, however, that regulations limiting the exercise of religion on publicly owned property used by government for particular purposes should be subjected to distinctively lenient scrutiny. Again, there is a strong parallel to free speech doctrine and the modest review of laws restricting speech in a nonpublic forum. While it may be reasonable to assume that what transpires in a house of worship is of distinctive spiritual significance to the members of the congregation in question, and is of less obvious importance to outsiders or the state, the opposite presumption applies to public property on which ongoing governmental operations occur.[250] Exemptions from general regulations on public property being used to serve specific public purposes are likely to interfere with government functions and may limit the utility of the property for nonbelievers.

Under this analysis, a case like *Lyng v. Northwest Indian Cemetery Protective Association*[251] might or might not come out the same way, but the Court's reasoning would be very different. *Lyng* involved an unsuccessful attempt by Native Americans to challenge the construction of a road on government land because of its impact on sacred sites they used for religious activities. In rejecting this free exercise claim, the Court discussed the problems intrinsic with giving a religious group significant control over the use government might make of public property.[252] Much of the Court's analysis, however, focused on the distinction between government prohibiting or penalizing religious practices and government rendering religious practices impractical or impossible. Only prohibitions and penalties, the Court explained, can be challenged as free exercise violations. Burdens that make it otherwise impossible to practice one's faith do not abridge free exercise rights.[253] In the majority opinion in *Lyng*, it is not only the location where free exercise rights occur that is

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[250] To a significant extent, the difference between the special status of religion in the home or house of worship and the less privileged position it receives in the public square reflects the exclusivity of the former environment and the diversity of the latter. In this sense, the public square is secularized, but as Marci Hamilton notes, "it is not anti-religious secularism. It is a secularism that invites in all religious faiths. . . . '[t]he mark of secularization [is] the fact that participants in a given discursive practice are not in a position to take for granted that their interlocutors are making the same religious assumptions they are.'" Marci A. Hamilton, *What Does "Religion" Mean in the Public Square?*, 89 MINN. L. REV. 1153, 1161 (2005) (reviewing JEFFREY STOUT, DEMOCRACY & TRADITION (2004)) (quoting STOUT, *supra*, at 97).

[251] 485 U.S. 439 (1988).

[252] *Id.* at 452–53.

[253] *Id.* at 448.

important to the Court's conclusion, but also the nature of the burden on religious liberty that is emphasized and devalued.

The decision in *Lyng* received considerable criticism because of the breadth of its reasoning and the one-sided analysis the Court employed,[254] and deservedly so. According to the Court, certain kinds of burdens on the exercise of religion—those that render religious practices impossible to perform—are placed entirely beyond the coverage of the First Amendment. Any state interest, no matter how trivial, can sustain these kinds of burdens on religious conduct—even if the state could easily further its goals through less restrictive alternatives.

The Court's concern that the free exercise claim in *Lyng* involves the way that government uses its own land provides a much more persuasive basis for resolving the case. While a focus on the location of religious practices on public property might reasonably reduce the level of scrutiny the court applies to a free exercise dispute, it should not preclude any meaningful review. As is true for speech regulations that limit expressive activities on most public property, courts may engage in a less demanding evaluation of the state's justification for its action in these cases—without deferring completely to the government's decision.[255] A sufficiently weak state interest ought not to outweigh free exercise rights even on government property.

In addition to concerns about interference with the use to which public property is put, there is another reason why free exercise claims involving religious activities on public property should be distinguished from other cases and adjudicated under a less demanding standard of review. The problem here relates to a common characteristic of religion—its exclusionary nature. While religion strengthens interpersonal bonds among the members of a congregation or religious community, it may often separate people of one faith from adherents of other religions, or nonbelievers. Much of the time, the divisions that result from congregational commitments to different beliefs are not problematic. Lutherans do not feel burdened when their Jewish neighbors attend a nearby Synagogue on

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[254] *See generally* BRIAN EDWARD BROWN, RELIGION, LAW AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND (1999); Robert S. Michaelsen, *Is the Miner's Canary Silent? Implications of the Supreme Court's Denial of American Indian Free Exercise of Religion Claims*, 6 J. L. & RELIGION 97 (1988); Robert J. Miller, *Correcting Supreme Court "Errors": American Indian Response to* Lyng v. Northwest Indian Cemetery Protective Association, 20 ENVTL. L. 1037, 1037 (1990); Joshua D. Rievman, *Judicial Scrutiny of Native American Free Exercise Rights:* Lyng *and the Decline of the* Yoder *Doctrine*, 17 B.C. ENVTL. AFF. L. REV. 169, 170–71 (1989).

[255] *See supra* notes 135–36 and accompanying text regarding the deferential standard of review applied to speech regulations in nonpublic forums.

Saturday, and Jews experience no discomfort when the Lutherans in town attend their church on Sunday. The obvious reality that the services at the Synagogue are designed for Jewish worship and the services at the Lutheran Church are grounded on Lutheran beliefs creates no friction and undermines no one's interests or status.

That equanimity toward exclusive associations dissipates quickly when religiously exclusionary programs take place on public property. One problem, of course, involves perceptions of state endorsement. Exempting the religious activities of specific faiths from general regulations that restrict the use of public property risks creating an imprimatur of state support for those religions.[256] Another issue involves opportunities for access.

Put simply, accommodating members of one religious faith by providing them special access to public property may have the effect of precluding the use of the property in question for people of other faiths.[257] Reserving the city's baseball fields for Little League games on Tuesday and Thursday afternoons, on its face at least, has a limited preclusive effect since the Little League is open to boys of all races, religions, and ethnic backgrounds. Reserving the same fields for the same days and times for the local Christian Youth League (a hypothetical group that restricts membership based on religious belief) means that non-Christians will be denied access to the fields during these periods.

This problem may arise out of a free exercise claim (although it may also be the consequence of a discretionary legislative accommodation). Assume the city in question has a policy or ordinance that provides non-profit organizations preferred or subsidized access to municipal property as long as the organizations do not discriminate on the basis of race, religion, or other listed characteristics. A religious organization that discriminates on the basis of religion is denied

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[256] *See generally* Brownstein, *supra* note 16, at 531–37; Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 Minn. L. Rev. 1885 (2001).

[257] Of course, religion is not the only belief system based activity that has exclusionary consequences. Political expressive activities on public property may limit access in certain circumstances as well. Civil rights organizations holding a rally in front of city hall need not allow racist speakers a place at the podium. But events such as political rallies are typically sporadic in nature. Further, political commitments rarely fragment conventional social activities. One would not expect to see a Democratic or Republican youth recreational league in a community, for example. Thus, the exclusionary consequences of accommodating political groups that seek access to public property are more limited and less problematic. Religion is different. Religious activities often occur on a regular basis and religion may pervade a broad range of associational activities. Thus, in practical terms, religious accommodations risk greater fragmentation than political accommodations.

the benefits of the ordinance. It sues the city under the Free Exercise Clause and seeks an exemption from the terms of the ordinance.

Litigation somewhat similar to this hypothetical[258] arose in California. In *Evans v. City of Berkeley*,[259] the Sea Scouts, a group affiliated with the Boy Scouts, were denied a rent-free berth at a city owned marina because they could not comply with city policy, which forbid the use of city funds to subsidize access to city property to groups discriminating on the basis of race, religion, or other suspect characteristics. The Scouts challenged the city's decision on freedom of speech and association grounds. Presumably, they did not assert free exercise claims because, under *Smith*, the Free Exercise Clause provides no protection against neutral laws of general applicability, such as an anti-discrimination policy.[260] The California Supreme Court recently rejected the Scouts' speech and association claims.[261]

Under the more expansive understanding of free exercise requirements suggested by this article, the courts could not avoid the free exercise issue posed by this case entirely as they can and must under the *Smith* regime. Instead of emphasizing the generality of the regulation, they would apply a more lenient standard of review to free exercise claims challenging the state's use of public property. Given the state's compelling interest in not subsidizing discriminatory conduct on public property, the ultimate result might still be the same, and the claim for a free exercise exemption denied, but the reasoning employed would have a very different focus.

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[258] A related dispute is being litigated in San Diego based on long-term leases to public park land between the city and the Boy Scouts. Plaintiffs claim the leases constitute subsidies to the Boy Scouts and provide them preferential access to public property. Since the Scouts restrict their membership on the basis of religion (atheists and agnostics can not be members), plaintiffs argue that the leases violate the Establishment Clause. San Diego and the Scouts disputed the Establishment Clause argument, of course. Further, they argued that terminating the existing leases would violate the Boy Scouts freedom of speech and freedom of association rights.

The district court ruled against the Scouts in *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d. 1259 (S.D. Cal. 2003). Rather than appeal the district court's decision, San Diego accepted it and terminated the leases with the Scouts. The Scouts, in turn, are challenging San Diego's actions.

While the San Diego litigation is not exactly on point, it is not difficult to imagine cases where leases are denied to religious organizations because they discriminate on the basis of suspect characteristics and where the organizations claim that such denials constitute a violation of their free exercise rights.

[259] 129 P.3d 394 (Cal. 2006).

[260] If the Sea Scouts could demonstrate that Berkeley's policy discriminated against religious groups, they could assert a free exercise claim. There would be little utility in doing so, however, since such a discriminatory policy would constitute prohibited viewpoint discrimination and would violate the free speech clause in any case.

[261] *See Evans*, 129 P.3d at 400–08.

4. The Misplaced Notion of Hybrid Rights

The *Smith* decision is not entirely barren of free exercise distinctions. It provides two exceptions to its general rule that limits free exercise claims to only those situations in which the state singles out religion or a specific faith for unfavorable treatment or restrictions. One exception suggests that courts may rigorously review general laws that substantially burden the exercise of religion if some other right, such as freedom of speech or association, is also burdened by the challenged law.[262] The other exception involves situations when the state acts through "individualized governmental assessment[s]" and has in place "a system of individualized exemptions" that it uses in enforcing its laws.[263]

I have explained in a previous article why the former exception dealing with so-called "hybrid rights" does not warrant distinctive treatment, and that the latter exception focusing on individualized assessments, while grounded on legitimate concerns, is too limited in its scope to accomplish much in the way of doctrinal development.[264] Ordinarily, if my only response to these exceptions was to point out their lack of utility for developing free exercise doctrine, I would not discuss them further here and would simply refer readers to my earlier work. But the problem with "hybrid rights" is not only that it makes little sense and fails to provide a persuasive basis for increasing the protection religious liberty receives. A hybrid rights analysis actually points courts in the wrong direction. Hybrid rights situations should not receive rigorous review. These are circumstances when the rigorous review of laws burdening religious exercise is uniquely inappropriate.

Put simply, a hybrid rights analysis suggests that when religious individuals exercise rights like freedom of speech, they should receive greater protection for their religiously motivated expressive activities than non-religious individuals receive. That contention flies in the face of one of the most basic foundations of American constitutional law—the principle that all citizens are equal with regard to their exercise of fundamental rights. The idea of equal rights is emphatically the controlling rule when the rights under discussion serve instrumental goals and have an obvious equality dimension to them— as is the case with voting rights, freedom of speech, and freedom of association. But a similar commitment to equality applies

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[262] *See* Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

[263] *Id.* at 884 (1990); *see supra* notes 210–12 and accompanying text.

[264] *False Messiahs*, *supra* note 19, at 187–203.

to dignitary rights as well, such as the right to marry or to have children, because equality of treatment with regard to these kinds of personal decisions is intrinsic to our conception of human dignity.[265]

Moreover, it is particularly unacceptable to privilege religion or particular faiths with regard to the exercise of rights. As noted earlier, one of the problems courts confront when they are asked to recognize free exercise exemptions from neutral laws of general applicability is that granting such accommodations may provide religious individuals material benefits that are unavailable to citizens holding different beliefs. Developing a framework to reduce or mitigate the material advantages that accrue to religious individuals when their right to practice their faith is protected is an important step in legitimizing such exemptions.[266]

The severity of this problem is magnified substantially when the benefit religious individuals receive from exemptions involves greater freedom to exercise the most fundamental rights available to citizens. Not only do these advantages implicate core values of the polity, they are also much more difficult to measure and to mitigate. It is one thing to assign some monetary value to a public employee being granted Saturday or Sunday off. It is another thing to ask courts to place a price on the freedom to be exempt from speech regulations that other citizens must obey. Thus, if a petitioner seeks a free exercise exemption from a law that burdens the exercise of another fundamental right, as well as freedom of religion, courts should presumptively reject the claim. All citizens have an equal claim to protection of their fundamental rights. If restrictions on the exercise of a right are valid when they are applied to conduct that is not religiously motivated, they should be equally valid when applied to religiously motivated exercises of the right as well.

CONCLUSION

No sensible person would suggest that developing a careful, nuanced, free exercise jurisprudence would be easy. But there is an extraordinarily large gap between something that is difficult to do and something that is impossible to do. Today, the current empty state of free exercise doctrine suggests that most jurists and scholars have thrown up their hands and concluded that nothing meaningful can be done in this area of constitutional law. It is apparent that many view

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[265] *Id.* at 187–93.

[266] *See supra* notes 50–65 and accompanying text.

religious liberty as a right that is simply not susceptible to serious constitutional protection.

This article attempts to challenge that orthodoxy by suggesting ways to begin filling the gap with doctrinal substance. Or perhaps, to state the project more accurately, it is an attempt to begin thinking about what a serious free exercise jurisprudence might look like.

Clearly, there are some unique challenges to developing a framework for adjudicating free exercise claims. Part of this article attempts to respond to these specific concerns. The problem of privileging, for example, is much less of a problem for other rights than it is for religious liberty. For the most part, we do not consider freedom of speech to privilege those who speak over those who remain silent because expression has so much importance and utility for everyone, and because we do not see a conflict between those who exercise this right and those who do not. Religion is different. Further, the protection speech receives seldom provides speakers material advantages unavailable to others. Accordingly, the development of free exercise doctrine has to respond to this distinct problem, and I have suggested ways to try to take this concern into account.

Other issues are more endemic to the protection of rights generally. The problems intrinsic to balancing rights against state interests, such as judicial subjectivity and indeterminacy of results, pervade fundamental rights doctrine. Here, analogies to free speech and equal protection case law provide something of a template for beginning an inquiry. Why, we may ask, does location matter so much for free speech purposes? And do the reasons for taking the location where speech occurs so seriously help to provide us comparable rationales for distinguishing some free exercise contexts from others?

The core of the conclusion to this article is that the article really has no conclusion. It is the beginning of an inquiry, a preliminary sketch of questions that ought to be asked. It cannot supply complete answers to the problems presented. Ultimately, it is an invitation to take free exercise rights seriously and to think about what that means. No more, no less.