Brigham Young University Law School
BYU Law Digital Commons

Faculty Scholarship

1-1-2005

The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States

Frederick Mark Gedicks
BYU Law, gedicksf@law.byu.edu

Follow this and additional works at: https://digitalcommons.law.byu.edu/faculty_scholarship

Part of the First Amendment Commons, and the Religion Law Commons

Recommended Citation
Frederick Mark Gedicks, ??? ??????????? ????? ?? ????? ??????????? ?? ??? ??????? ?? ???????? ?? ?????? ?? ??? ?????? ??????, 19 Emory Int'l L. Rev. 1187 (2005).

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

THE PERMISSIBLE SCOPE OF LEGAL LIMITATIONS ON THE FREEDOM OF RELIGION OR BELIEF IN THE UNITED STATES

Frederick Mark Gedicks[*]

To speak of the "permissible scope" of "legal limitations" on religious liberty is to use the syntax in which religious liberty guarantees are written in Europe. Such guarantees usually state a general definition of the freedom of religion, and then set forth a variety of circumstances under which the government may properly limit that liberty.[1] The American law of limitations on freedom of religion is not easily stated in this grammar, because freedom of religion in the United States is less a liberty right than an equality right. Since the Supreme Court's 1990 decision in *Employment Division v. Smith*,[2] the U.S. Constitution has been understood to protect against government action that *intentionally* burdens religious liberty, but not against action that *incidentally* burdens religious liberty.[3] In other words, government action that purposely targets religious activity for a regulatory burden is constitutionally invalid, whereas government action that burdens religious activity along with similarly

---

* Guy Anderson Chair & Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; gedicksf@lawgate.byu.edu. The author is grateful to Kristen Kemerer, Kim Pearson, and (especially) Lee Andelin for their research assistance.

[1] *See, e.g.*, COSTITUZIONE [Constitution] art. 19 (Italy) ("Everyone has the right to profess freely his or her own religious faith in any form whatsoever, individual or institutional, to proselytize such faith, and to engage in its worship practices in private or public, so long as this does not involve rituals contrary to public morality.") (author's translation), *reprinted in* CODICE DEL DIRITTO ECCLESIASTICO 9 (Giuffrè ed., 3d ed. 1993); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, §§ 1-2, 213 U.N.T.S. 221, *amended by* Protocol No. 11, Nov. 1, 1998, *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf (last visited Oct. 24, 2004).

> 1. Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Id.

[2] *See* 494 U.S. 872 (1990).

[3] *Id.*

situated secular activity as the consequence of the government's pursuit of a legitimate regulatory goal is presumptively valid. Articulated in terms of "limitations," the law in the United States is that religious activity generally may be limited for any reason other than anti-religious animus. Although this appears to leave freedom of religion fully exposed to government insensitivity or indifference to incidental burdens that its actions may impose on religion, the equality-shaped contours of constitutional doctrine in the United States buffers religious beliefs and practices from such burdens by enabling believers in many circumstances to claim the same protection as that afforded by government to the beliefs and practices of those committed to secular ideologies and moralities.

I. SOURCES OF LAW ESTABLISHING AND LIMITING THE MANIFESTATION OF RELIGIOUS BELIEF

A. *International Law*

International human rights law has played virtually no role in the construction of doctrine relating to religious freedom in the United States. Supreme Court majority opinions rarely cite international human rights documents as authority for holdings bearing on the existence or scope of individual constitutional rights.[4] As one American scholar has put it, lawyers, judges, and scholars in the United States normally limit themselves to "debating the meaning and significance of our Constitution, our history, and

[4] Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 4 (1995). For example, only two Supreme Court majorities have cited the Universal Declaration of Human Rights since its passage in 1948, with neither giving it more than a cursory mention. *See* Zemel v. Rusk, 381 U.S. 1, 14 n.13 (1965) (noting that the Universal Declaration was quoted in the legislative history of the statute under review); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963) (noting the Declaration as one of numerous authorities recognizing the "drastic consequences of statelessness"); *see also* Roper v. Simmons, 125 S.Ct. 1183, 1199–1200 (2005) (citing UN Convention of the Rights of the Child and legal norms in other countries in support of holding that constitutionally invalidates capital punishment for juveniles); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (citing European Court of Human Rights decision that criminal prohibitions on homosexual sodomy violate the European Convention on Human Rights); Thompson v. Oklahoma, 487 U.S. 815, 831 n.34 (1988) (four-person majority opinion) (noting the International Covenant on Civil and Political Rights as part of international opposition to the execution of juveniles). In recent years, citations to the Universal Declaration have been mostly confined to dissenting opinions in death penalty cases. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari); Stanford v. Kentucky, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting); Burger v. Kemp, 483 U.S. 776, 824 n.5 (1987) (Powell, J., dissenting).

our precedents."[5] Although the United States was prominent in the early effort to universalize fundamental human rights,[6] its current influence in the international rights movement has waned as it has increasingly sought exemptions from or has simply refused to ratify major covenants and conventions designed to protect or to expand the protection of fundamental human rights.[7]

B. Constitutional Law

Religious freedom in the United States is textually rooted in the Establishment and Free Exercise Clauses (often referred to collectively as the "Religion Clauses") of the First Amendment to the U.S. Constitution.[8] Although the substantive content of the rights protected by the Religion Clauses remains highly contested, the Court's recent doctrine suggests that, at the least, the Clauses render presumptively invalid laws that single out a

---

[5] Steven D. Smith, *Intramural Dialogue and The Malaise of Religious Freedom*, 35 VAND. J. TRANSNAT'L L. 359, 359 (2002) (book review); *see also* Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 544 (2002) ("As a general matter, the United States does not look to international law for enforceable legal norms as frequently as do some other countries.").

[6] *See, e.g.*, JOHN ALLPHIN MOORE, JR. & JERRY PUBANTZ, TO CREATE A NEW WORLD?: AMERICAN PRESIDENTS AND THE UNITED NATIONS (1999) (assessing the considerable role played by U.S. presidents in creating the United Nations and supporting its human rights initiatives). Former U.S. First Lady Eleanor Roosevelt has been called "the most influential member of the U.N.'s Commission on Human Rights" for her work on the Universal Declaration of Human Rights. *See* Franklin and Eleanor Roosevelt Inst., *Universal Declaration of Human Rights*, *at* http://www.udhr.org/history/frbioer.htm (last revised Aug. 5, 1998).

[7] W. Kent Davis, *Answering Justice Ginsburg's Charge that the Constitution is "Skimpy" in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law*, 39 S. TEX. L. REV. 951, 975–76 (1998); *see also* Wood & Scharffs, *supra* note 5, at 535 (noting "resentment toward the Bush administration for unilateral stances on issues like global warming and missile defense . . ."); Benjamin R. Barber, *A Failure of Democracy, Not Capitalism*, N.Y. TIMES, July 29, 2002, at A19 (arguing that the U.S. determination to protect its own sovereignty by refusing to recognize international human rights initiatives promotes global political instability).

[8] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."). Although they originally only restricted the federal government, the Religion Clauses and most of the other provisions of the Bill of Rights have since been extended to the states. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause).

The U.S. Constitution also contains a prohibition on religious tests for federal office or employment. *See* U.S. CONST. art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). Although the Religious Test Clause has not been applied against the States, there is no doubt that religious tests for state offices or employment violate the Establishment Clause. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (declining to apply the Religious Test Clause against the states, but holding that a requirement that one affirm belief in God as a condition to acting as a notary public violates the Establishment Clause).

particular religion or religion generally for special burdens.[9] A number of other clauses of the Constitution also include religious freedom under the umbrella of broader rights protections. For example, the Supreme Court has repeatedly held that the protections of the Speech Clause of the First Amendment, which prohibits government action abridging the freedoms of expression and association,[10] extend to religious speech and association.[11] Many of the Court's early decisions under the Speech Clause involved religious speech, particularly by Jehovah's Witnesses.[12]

Similarly, the Equal Protection Clause of the Fourteenth Amendment provides constitutional protection against religious discrimination.[13] Suspicion of government action that discriminates against particular religious denominations is rooted in the very origins of modern equal protection doctrine.[14] Contemporary decisions continue to group religious traits with

---

[9] *See* Larson v. Valente, 456 U.S. 228, 246, 260 (1982) (finding statute that subjected only certain minority religions to fund-raising registration and reporting requirements to be suspect denominational preference under the Establishment Clause which must be "closely fitted" to furthering a "compelling governmental interest"); *see also* McDaniel v. Paty, 435 U.S. 618, 638 (1978) (Brennan, J., concurring in the judgment) (stating that the Establishment Clause prohibits government from using religion "as a basis of classification for the imposition of duties, penalties, privileges or benefits"). With respect to the Free Exercise Clause, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.").

[10] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."). Although, like the Religion Clauses, the Speech and Press Clauses initially restricted only the federal government, their prohibitions were also eventually applied against the states. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[11] *See, e.g*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector, 515 U.S. 819 (1995); Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

[12] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940).

[13] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Although the Fourteenth Amendment originally bound only the states, it was applied to federal government action in 1954. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[14] *See, e.g.*, Niemotko v. Maryland, 340 U.S. 268, 271 (1951) (holding that denial of Jehovah's Witnesses' application to use city park because of government distaste for Witnesses' beliefs violated the right to equal protection of the laws and the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments); United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that a "presumption of constitutionality" should not attach to "statutes directed at particular religio[ns]"); American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92 (1900) (suggesting that tax exemptions drawn on the basis of "color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers" are "purely arbitrary, oppressive or capricious" and deny "the equal protection of the laws to the less favored classes").

racial ones as examples of inherently "suspect" or "arbitrary" bases of classification which are presumptively unconstitutional,[15] although the Court has never actually invalidated any government action on the ground that it classifies on the basis of a generic or general "religion," as distinct from a classification based on a particular religion or religious denomination.[16]

C. Codes and Statutes

The two most important federal statutes protecting religious freedom are the Religious Freedom Restoration Act of 1993 ("RFRA")[17] and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[18] RFRA attempted to "restore" the law of religious exemptions that was in place prior to *Employment Division v. Smith*,[19] by imposing on federal and state governments the requirement of showing that any burden which they impose on religious activity is necessary to a compelling government regulatory interest, even when the burden is unintentional or incidental.[20] RFRA was declared unconstitutional as applied to state government action in *City of Boerne v. Flores*.[21] Although language in *Boerne* suggested that RFRA might be unconstitutional as applied to federal as well as state government action,[22]

---

[15] *E.g.*, United States v. Armstrong, 517 U.S. 456, 464–65 (1996); Miller v. Johnson, 515 U.S. 900, 911 (1995); Burlington N.R.R. Co. v. Ford, 504 U.S. 648, 651 (1992); Wade v. United States, 504 U.S. 181, 186 (1992); McCleskey v. Kemp, 481 U.S. 279, 291 n.8 (1987); Friedman v. Rogers, 440 U.S. 1, 17 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); Oyler v. Boles, 368 U.S. 448, 456 (1962).

[16] *See* Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 142 (2000).

[17] RFRA is codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

[18] RLUIPA is codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

[19] 494 U.S. at 872.

[20] 42 U.S.C. § 2000bb-1(b). *Compare* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 830–35 (1989), *and* Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987), *and* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981), *and* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (each holding that government's refusal to grant unemployment insurance benefits to claimant who lost job for refusing to work in violation of religious beliefs must be justified by a compelling interest), *with* Wisconsin v. Yoder, 406 U.S. 205, 213–16 (1972) (state's refusal to exempt Amish children from compulsory schooling law must be justified by a compelling interest).

[21] 521 U.S. 507, 536 (1997).

[22] *Id.* at 535–36. The Court in *Boerne* noted:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177, 2 L.Ed. 60. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was

appellate courts that have considered the issue have upheld application of the statute against federal action.[23]

Enacted in the wake of *Boerne*'s invalidation of RFRA, RLUIPA reinstated the compelling interest test for government action that burdens religious land uses and the religious practices of incarcerated persons in connection with a program or activity that receives federal funds or that affects interstate commerce.[24] RLUIPA also invalidates all government action that burdens religious land uses and religious practices of prisoners, when comparable secular land uses and secular prisoner practices are not subject to such burdens.[25] Federal appellate courts[26] and district courts[27] are divided on the

---

> designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id.

Numerous commentators have argued that RFRA is infirm on separation of powers grounds as applied to federal government action. *See, e.g.*, Joanne C. Brant, *Taking the Supreme Court at Its Word: the Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 NYU L. REV. 437, 469–73 (1994); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 119–25, 132–39 (1996); Marci A. Hamilton, City of Boerne v. Flores: *A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 718–21 (1998); Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 14–19 (1998). *But see* Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1923–32 (2001) (arguing that the application of RFRA to federal government action is merely a precommitment by Congress to forbear from exercising its delegated powers to the fullest possible extent, and thus entails no exercise of congressional power at all).

[23] *See, e.g.*, O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1219–1220 (9th Cir. 2002) (citing Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1120 (9th Cir. 2000); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831–32 (9th Cir. 1999)); United States v. Hardman, 297 F.3d 1116, 1126 (10th Cir. 2002) (citing Kikumura v. Hurley, 242 F.3d 950, 959–60 (10th Cir. 2001)); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831–32 (9th Cir. 1999); Young v. Crystal Evangelical Free Church, 141 F.3d 854, 859–62 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); *see also* Magarian, *supra* note 22, at 1916 ("Most federal courts confronted with RFRA claims simply have assumed the Act remains valid as to federal law."). Although the federal courts have held that RFRA is constitutional as applied to federal government action, most federal RFRA claims have been denied on the merits. *See id.* at 1962–63 nn.266-67 (reporting that as of 2001, thirteen appellate and eighteen trial courts had denied federal RFRA claims on the merits, as against two appellate and six trial courts that had upheld them); *see also* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575 (1998) (documenting a similar pattern in federal and state RFRA claims prior to *Boerne*).

[24] 42 U.S.C. § 2000cc(a) (2000).

[25] *Id.* § 2000cc(b).

[26] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235–43 (11th Cir. 2004), *cert. denied* 125 S. Ct. 1295 (2005) (upholding RLUIPA as a valid exercise of Congress' § 5 power under the Fourteenth Amendment and as against First Amendment and Tenth Amendment challenges); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (upholding RLUIPA as a valid exercise of congressional power under the Spending Clause, as against Tenth Amendment and Establishment Clause challenges); Mayweathers v. Newland, 314

constitutionality of the statute, but the Supreme Court recently upheld a portion of the statute.[28]

The constitutions and statutes of some states are also significant sources for the protection of religious exercise. The courts of some states have interpreted their own state constitutional provision protecting the free exercise of religion to mandate application of the pre-*Smith* compelling interest test to state laws that incidentally burden religious activity,[29] and one state amended its constitution to require application of the compelling interest test to such laws.[30] A number of states have enacted statutes providing for similar protections.[31] Under the Supremacy Clause of the U.S. Constitution,[32] however, federal law

---

F.3d 1062, 1070 (9th Cir. 2002) (upholding RLUIPA as valid exercise of congressional power under the Spending Clause, as against Establishment Clause, Tenth Amendment, Eleventh Amendment, and separation of powers challenges). For careful analyses of the constitutionality of RLUIPA, see Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002); Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1 (2001); *see generally* Magarian, *supra* note 22.

[27] *Compare* Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 846–50 (S.D. Ohio 2002) (upholding RLUIPA as valid exercise of congressional power under the Spending Clause, as against Establishment Clause, Tenth Amendment, and Eleventh Amendment challenges), *and* Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857, 868–76 (E.D. Penn. 2002) (upholding RLUIPA as valid exercise of congressional power under the Commerce Clause and § 5 of the Fourteenth Amendment), *with* Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016, 1034 (E.D. Wis. 2003) (holding that RLUIPA violates the Establishment Clause), *and* Madison v. Riter, 240 F. Supp.2d. 566, 582 (W.D. Va. 2003) (same).

[28] *See* Cutter v. Wilkinson, 125 S. Ct. 2113 (2005).

[29] *See, e.g.*, Attorney Gen. v. Desilets, 636 N.E.2d 233, 237–38 (Mass. 1994); People v. DeJonge, 501 N.W.2d 127, 135 (Mich. 1993); State v. Hershberger, 462 N.W.2d 393, 397–98 (Minn. 1990); Humphrey v. Lane, 728 N.E.2d 1039, 1045–46 (Ohio 2000); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992); State v. Miller, 549 N.W.2d 235, 241 (Wis. 1996).

[30] ALA. CONST. of 1901, amend. 622 (1999), *available at* http://www.legislature.state.al.us/CodeOfAlabama/Constitution/1901/CA-170364.htm (last visited Oct. 24, 2004).

[31] *See, e.g.*, Arizona, ARIZ. REV. STAT. ANN. § 41-1493 to 1493.01 (West 2000); Connecticut, CONN. GEN. STAT. ANN. § 52-571b (West Supp. 2004); Florida, FLA. STAT. ANN. § 761.01-761.05 (West Supp. 2004); Idaho, IDAHO CODE §§ 73-401 to 403 (Michie 2001); Illinois, 775 ILL. COMP. STAT. ANN. § 5/1-103 (West 2001); New Mexico, N.M. STAT. ANN. § 28-22-1 to -5 (Michie 2003); Oklahoma, 51 OKLA. STAT. ANN. tit. 51, 251 to -58 (West Supp. 2003); Rhode Island, R.I. GEN. LAWS § 42-80.1 to -.3 (1998); South Carolina, S.C. CODE ANN. § 1-13-10 to -30 (Law. Co-op. 1999); Texas, TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to -.012 (Vernon Supp. 2004).

[32] U.S. CONST. art. VI, cl. 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . ., under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

preempts contrary state constitutional or statutory law,[33] so these state constitutions and statutes provide no protection against incidental burdens on religious exercise imposed by federal government action.

Finally, federal and state laws often include protection for religious activity as part of a larger statutory or regulatory initiative aimed at a widespread and largely secular problem. For example, the federal Civil Rights Act of 1964 generally includes religion among the prohibited bases of discrimination in employment,[34] public education,[35] and public accommodations;[36] the Fair Housing Act includes religion among the prohibited bases of discrimination in housing;[37] and federal tax laws exempt qualified religious organizations from the obligation to pay income tax as part of a general statutory exemption of nonprofit corporations and groups.[38] Federal laws also often provide exemptions for religious organizations or individuals from generally applicable laws that burden religious exercise. For example, the Civil Rights Act exempts qualified religious employers from its general prohibition on religious discrimination when religious affiliation is a "bona fide occupational qualification" for an employment position,[39] and federal bankruptcy laws exempt religious tithes from the so-called "preference" period during which gifts or disproportionate creditor payments are voidable.[40]

---

[33] *See infra* Part I.E. (discussing priority of federal law to state law in the United States).

[34] 42 U.S.C § 2000e-2 (2000) (providing that it is an "unlawful employment practice" for employers, employment agencies, labor unions, and employment training programs to discriminate on the basis of "race, color, religion, sex, or national origin" in hiring, terminating, promoting, admitting as members, or otherwise dealing with employees or applicants).

[35] *Id.* § 2000c-5 (authorizing the U.S. Attorney General to bring suit against public schools that deny admission "by reason of race, color, religion, sex or national origin").

[36] *Id.* § 2000a(a) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."); *id.* § 2000a-1 (providing that "[a]ll persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin . . ." which may otherwise be required by state law).

[37] *Id.* § 3604 (prohibiting discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the sale or rental of housing units and in activities related thereto); *id.* § 3605 (prohibiting discrimination on the basis of "race, color, religion, sex, handicap, familial status, or national origin" by any business providing "real estate-related transactions" services); *id.* § 3605(b) (same with respect to provision of and access to real estate brokerage services and membership in real estate brokerage associations).

[38] *See* I.R.C. § 501(c)(3)(d) (2000).

[39] 42 U.S.C. § 2000e-2(e) (2000).

[40] 11 U.S.C. § 548(a)(2) (2000).

D. *Other Sources of Law*

In the U.S. system, with its sparse constitutional text and a common law tradition inherited from England, judicial decisions are the primary source of law relating to permissible limitations on religious activity.[41] Administrative regulations and guidelines also play an important role, especially those issued by agencies charged with enforcement of anti-discrimination laws.[42]

Finally, the President may exercise a certain degree of control over the various Cabinet departments and much of the federal bureaucracy without consulting Congress. Presidential directives, proclamations, and other such acts, known as "executive orders," have the force and effect of law when they are founded upon constitutional or federal statutory authority.[43] For example, on his own authority as chief executive of the United States, President Bush has ordered all federal executive departments and agencies to comply with the so-called "charitable choice" provisions, which generally permit religious social service agencies and other religious groups to compete for federal social welfare grants without sacrificing their religious identity.[44] Executive orders are thus an important source of law in cases involving burdens on religious liberty imposed by federal departments, agencies, and other executive actors.

E. *Priority of Laws*

At the apex of the hierarchy of laws in the United States sits the federal Constitution, followed by federal statutes, and then regulations promulgated under the authority of such statutes. Executive orders are difficult to place in this hierarchy. Obviously, executive orders are subordinate to federal statutes passed by Congress (and, therefore, to administrative regulations lawfully promulgated thereunder) when such orders involve matters whose regulation is within an enumerated power of Congress. When an executive order involves an area of executive authority as to which Congress has no power, however, the order has a status second only to the Constitution itself.

---

[41] *See* discussion *infra* Part I.E.

[42] *See, e.g.*, Equal Employment Opportunity Commission, 29 C.F.R. §§ 1605.1-1605.3, app. A (2002) (establishing guidelines for religious accommodation by employers).

[43] DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 862 (2002); *see also* discussion *infra* Part I.E. (discussing the place of executive orders in the hierarchy of laws in the United States).

[44] *See* Exec. Order No. 13,279, 67 Fed. Reg. 77141 (Dec. 12, 2002).

The difficulty is that it is not always clear how the Constitution has allocated authority over a particular area, and institutional and political considerations will often prevent judicial resolution of conflicts over whether a particular branch is properly exercising constitutional authority. The result can be a kind of separation-of-powers "limbo," in which both Congress and the President make competing claims to authority over a particular matter without ever moving to judicial resolution of such claims.[45]

Another complication for the American hierarchy of laws is presented by the common law. The conception of the common law as a unified body of law with an existence and content independent of the judges who "make" it arose during the development of the common law as a check on royal power in early modern England.[46] Unlike the medievalists, however, who were generally

---

[45] An excellent example of this phenomenon is the question to which federal branch the Constitution allocates the power to commit the federal armed forces to combat. Although the Constitution delegates to Congress the powers to provide for the national defense, to declare war, and to organize a federal militia, *see* U.S. CONST. art. I, § 8, cls. 1, 11 & 16, it also designates the President as the "Commander in Chief of the Army and Navy of the United States," and of such portion of the state militia as might be called into federal service. *Id.* art. II, § 2, cl. 1; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-6, at 662–63 (3d ed. 2000) [hereinafter TRIBE 2000] ("[A]lthough the Constitution expressly assigns to Congress the power to '*declare* war,' and expressly designates the President as Commander in Chief to direct the armed forces during war, the Constitution neither enumerates nor vests in either branch the overarching power to '*make war*.'").

Toward the end of the controversial American military involvement in Vietnam, Congress enacted over President Nixon's veto the War Powers Resolution of 1973, Pub. L. 93–148, 87 Stat. 555, which purported to place various limits on the President's ability to commit the federal armed forces to combat without congressional consent. TRIBE 2000, *supra*, §§ 4-6, at 667–68. Subsequent presidents have denied the power of Congress to limit the President's power in this manner while nevertheless generally complying with the spirit of the Act's provisions, and no Congress has seen fit to challenge in court or otherwise presidential action in this area. *Cf. id.* § 4-6, at 668 (noting that no President has ever agreed to abide by the War Powers Resolution, and that Congress has never taken any steps to enforce it). Similar tensions between the President and Congress are evident in the detention cases arising out of the Iraq War. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (holding that Congress' "resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons'"); Pub. L. 107–40, 115 Stat. 224 (2001) (authorizing the President to detain enemy combatants for the duration of the present conflict, but providing that due process requires that the detainee be provided some opportunity to contest before a neutral decisionmaker the factual predicate for his detention); Rasul v. Bush, 124 S. Ct. 2686 (2004) (holding that the federal courts have statutory habeas corpus jurisdiction to review detentions of aliens held by the President at Guantanamo Bay, Cuba). Consequently, the question who has the ultimate authority to "make war" under the Constitution remains unresolved. *See* TRIBE 2000, *supra*, §§ 4-6, at 667–68

[46] GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 4 (1986) ("Against the spreading ideology of political absolutism and rationalism, Common Law theory reasserted the medieval idea that law is not something made either by king, Parliament, or judges, but rather is the expression of a deeper reality which is merely discovered and publicly declared by them.").

committed to a universal "natural" law accessible by reason and instinct, the early modern common lawyers who succeeded them understood the independence of the common law as the consequence of its identification with "historically evidenced national custom."[47] Moreover, the early common lawyers understood reason and custom to stand within the common law rather than outside of it; reason and custom, in other words, were not thought of as external means of deriving the common law, but rather *were* the common law.[48] Common law judges, then, did not "make" the common law with their decisions, but merely gave it expression, and common law decisions were "not exercises of power but merely reports of discoveries of an *already existing* prescriptive order."[49] It was this view of the common law as "general"—that is, conceptually unified and existentially independent of judges—that governed its use by federal judges prior to *Erie*.[50]

Common law is not fully present in the federal hierarchy, because in 1938 the Supreme Court formally abrogated so-called "general" common law

---

[47] *Id.*; *see also id.* at 45 (the classical common law was "a form of social order manifested in the practice and common life of the nation."); NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 130 (1990) ("Certainly the late medieval lawyer turned to established practice. . . . Yet, in addition, the medieval lawyer habitually turned to the more fundamental authority of reason as a determinant in disposing of ordinary cases.").

[48] Brian Simpson, *Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 20 (William Twining ed., 1986) (describing the common law as "a body of practices observed and ideas received over time by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them . . . ," and further observing that such ideas, while constituting "customary law," are customary in a more specific sense than this term normally conveys, in that "their status is thought to be dependent upon conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning."); *see also* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1337 (2001) ("In its purest form . . ., the common law is a case-by-case judge-made law that evolves through elaboration of precedents by means of a process of accretion, driven by a logic of induction.").

[49] POSTEMA, *supra* note 46, at 16; *see also id.* at 7 ("Common Law is seen to be the *expression* or manifestation of commonly shared values and conceptions of reasonableness and the common good."); *id.* at 9 ("The office of the judge is not to make, but publicly to expound and declare, the law . . . . Judicial opinions, expounding and declaring the law, then, are not themselves law but only the 'principal and most authoritative *evidence*, that can be given, of the existence of such a custom as shall form a part of the common law.'") (quoting Blackstone).

[50] *See* ANTONIN SCALIA, *Common-Law Courts in a Civil-System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 3, 10 (1997) [hereinafter SCALIA, *Common-Law Courts*] (observing that during the late eighteenth century "the prevailing image of the common law was that of a preexisting board of rules, uniform throughout the nation (rather than different from state to state), that judges merely 'discovered' rather than created"); *e.g.*, JOHN MAXCY ZANE, THE STORY OF LAW 201 (2d ed., Liberty 1998) (1927) (noting with approval that federal courts "refuse to recognize a rule of state law where it conflicts with a general law considered to be better or more just.").

adjudication by federal judges in *Erie Railroad Co. v. Tompkins*.[51] *Erie* recognized that state courts no longer look to a unified and independent body of customary law in making common law decisions; rather, the courts of each state now develop their own common law, which may differ substantially from the common law of some or even all of the other states.[52] Accordingly, when a federal court has a case before it which requires articulation of a common law rule, the court follows and applies the common law of the applicable state jurisdiction.

State law follows a hierarchy similar to the federal one, with state constitutions at the top, followed by state statutes, state regulations promulgated pursuant to the authority of such statutes, state common law, and executive orders issued by governors. State executive orders present the same theoretical difficulties as federal executive orders. However, because state constitutions tend to be more detailed and easier to amend than the federal Constitution, separation of powers ambiguities relating to state executive orders tend to be less common and are more frequently resolved by litigation in the courts.

The classical understanding of the common law as unified and independent implied that even legislative enactments were not necessarily binding on common law judges, to the extent that such enactments contradicted or otherwise failed to reflect the immanent reason and custom of the common law.[53] "Parliament is capable of making new *regulations*," in other words, "but not *new law* . . . ."[54] Once the idea of general common law was

---

[51] 304 U.S. 64, 80 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)).

[52] *See* TRIBE 2000, *supra* note 45, § 3-23, at 470. Professor Tribe cautions that *Erie* only abrogated the idea of *general* common law adjudication by federal judges—that is, the reliance by federal judges on a customary law common to the federal government and all of the states. *Id. Erie* did not abrogate federal judicial power to make common law in so called "federal legal enclaves," such as boundary and other disputes among the states or cases involving the property rights of Native Americans, where a federal rule of decision is required to protect federal interests. *See id.* at 474–76.

[53] POSTEMA, *supra* note 46, at 25–27 (recounting the early modern view that, like judicial decisions, enacted law "become law by eventually becoming custom . . . . [S]tatutes . . . make no impact on the law until they are taken up into the practice of the courts and the community. Thus, . . . whether or not legislated legal innovations actually have the effect of altering the shape and direction of the law is something that can be determined only by seeing whether the enacted changes are incorporated into the body of Common Law, and that is a process of trial by practice and is not the direct effect of enactment.") (emphasis omitted); *see also id.* at 16 (summarizing Blackstone's position that "enacted law" threatened liberty in a way that judicial decisions did not because the former constituted an act of unconstrained power and will, whereas the latter were bounded by the "artificial reason" of the common law, which was itself "an already existing prescriptive order") (emphasis omitted).

[54] *Id.* at 26.

abandoned, however, state statutes acquired a status prior to common law in the hierarchy of laws. State courts no longer subordinate statutory to common law; to the contrary, the common law in each state is generally subject to state legislative control, and in general any common law rule may be repealed or amended by state statute unless protected by the state constitution.

Neither the abandonment of general common law adjudication by federal judges nor the formal subordination of state common law to state legislative action should mislead one into thinking that judicial decisions are relatively unimportant in the American legal hierarchy. *Marbury v. Madison*[55] initiated a long tradition of judicial supremacy in determining the meaning, scope, and applicability of federal and state laws, be they constitutional, statutory, or regulatory.[56] As a result, a federal decision interpreting the meaning of the Constitution has virtually the same status in the hierarchy of laws as the Constitution itself, and a state court decision declaring the meaning of a state statute the same status as the statute it interprets. In case of constitutional decisions, the decisions of the federal judiciary as to constitutional meaning are final,[57] as *Boerne* emphatically reaffirmed,[58] and can be altered only by the difficult and rarely successful route of constitutional amendment.[59] Even in

---

[55] *See, e.g.*, Marbury, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

[56] *Id.*

[57] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (*Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in [*Brown v. Board of Education*] is the supreme law of the land, and Art[icle] VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'") (quoting the Supremacy Clause, U.S. CONST. art. VI, cl. 2).

[58] *See* City of Boerne v. Flores, 521 U.S. 507, 556 (1997). The Court in *Boerne* noted:

> When the [Supreme] Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177, 2 L.Ed. 60. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Id; see also Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 163 (1997) (characterizing Justice Kennedy's majority opinion in *Boerne* as having adopted a "startlingly strong view of judicial supremacy" in relation to the separations of powers, and "the most judge-centered view of constitutional law since *Cooper v. Aaron*").

[59] Amendment of the Constitution requires passage by a two-thirds majority in each house of Congress and ratification by three-fourths of the states or, alternatively, action by a constitutional convention be called

case of statutes, regulations, or executive orders, where an apparent judicial error in interpretation may in theory be corrected by reenactment, repromulgation, or reissue by the applicable government actor, collective action problems, political considerations, and bureaucratic inertia will often prevent the overturning of judicial interpretations of federal and state laws with which another branch of the government disagrees.

It would not be an exaggeration, therefore, to place at the apex of both the federal and state hierarchies in the United States judicial decisions declaring the meaning of the various laws that fall under them, including the federal and state constitutions.

II. IDENTIFICATION OF THE TYPES OF MANIFESTATION OF RELIGION THAT GIVE RISE TO LEGAL ISSUES

The Supreme Court has long relied on a "belief-action" distinction to delineate those manifestations of religion that are subject to regulation from those that are insulated from it. As the Court stated in *Cantwell v. Connecticut*,[60] the Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[61] "Belief" has been held to include mere written or verbal affirmations or other manifestations of what one does (or does not) believe,[62] but has not been extended to worship, ritual, marriage practices, and other such activities that affect more directly the interests of others. Thus, believers are excused from pledging allegiance to the flag of the United States when to do so would violate their religious beliefs,[63] but believers who practice polygamy or ritual drug use in violation of the criminal law remain subject to the law notwithstanding the religious character of their actions or their religious motivation for engaging in them.[64]

---

by two-thirds of the states. U.S. CONST. art. V. Since ratification of the first ten amendments constituting the Bill of Rights in 1791, the Constitution has been successfully amended only seventeen times.

[60] 310 U.S. 296 (1940)

[61] *Id.* at 303–04; *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) (stating that under the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

[62] *E.g.*, Wooley v. Maynard, 430 U.S. 705, 713 (1977).

[63] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629–42 (1943) (holding that Speech Clause prevents public schools from requiring Jehovah's Witness students to salute flags in violation of their beliefs).

[64] *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (practitioners of peyote rites of the Native American Church held not entitled to free exercise exemption from state anti-drug laws); Reynolds v.

III. STRUCTURAL LIMITATIONS ON FREEDOM OF RELIGION

A. *Establishment Clause Separation*

The founders believed that individual liberty was most directly threatened by the national government. Accordingly, they provided structural rather than substantive limitations on that government.[65] A structural restraint describes domains within which the government may not exercise its power, whereas a right defines individual interests which the government may not violate.[66] The text of the Religion Clauses reflects this design. Instead of defining individual conduct that enjoys immunity from acts of Congress—such as, for example, "the right of the people to freedom of religious conscience[67]—or specifying procedural or relative limits on congressional acts—such as, for example, "the right of the people to freedom of religious conscience shall not be infringed, except in case of manifest danger to the state"[68]—the framers drafted the Religion Clauses to define certain religious subject matters as to which Congress was disabled from acting at all.[69]

United States, 98 U.S. 145, 166–67 (1878) (Mormon polygamist held not entitled to free exercise exemption from federal anti-bigamy law).

[65] *See* TRIBE 2000, *supra* note 45, § 1-3, at 7 ("At the outset, only a small number of explicit substantive limitations on the exercise of governmental authority were thought essential; in the main, it was believed that personal freedom could be secured more effectively by decentralization than by express command.").

[66] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2–3 (1998) ("For government to avoid violating a right is a matter of constitutional duty owed to each individual within its jurisdiction. On the other hand, for government to avoid exceeding a structural restraint is a matter of limiting its activities and laws to the scope of its powers.").

[67] *Compare* U.S. CONST. amend. V (providing that a person shall not be "compelled in any criminal case to be a witness against himself"), *and id.* amend. VI (providing that in "all criminal prosecutions," the defendant has the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence"), *with id.* amend. VII (guaranteeing the right to "trial by jury" in most common law actions).

[68] *Compare id.* amend. IV (prohibiting "unreasonable" searches and seizures, and providing that search warrants shall issue only upon a showing of "probable cause"), *and id.* amend VI (providing the right to a "speedy and public" trial in any criminal case), *with id.* amend. VIII (prohibiting imposition of "excessive" bail and fines and "cruel and unusual" punishments, in criminal cases).

[69] *Id.* amend I (prohibiting Congress from making any law "respecting an establishment of religion" or "prohibiting the free exercise" of religion); *see* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1556 (1995).

> The First Amendment is a subject-matter disability, as opposed to a procedural disability. Instead of qualifying the conduct of governmental affairs, it puts a category of laws beyond the competence of Congress. The disability is so complete that Congress is expressly forbidden to enact laws respecting an establishment of religion, or laws abridging the free exercise of religion, freedom of speech and press, and the right to petition the government.

One of the lessons of the long conflict over slavery in the United States was that the states could be as great a threat to individual liberty as the national government, and accordingly that structural restraint of the national government was insufficient to protect the rights and liberties of Americans.[70] Accordingly, the aftermath of the North's victory in the Civil War saw ratification of the Reconstruction Amendments, which prohibited the states from abridging the "privileges or immunities of citizens," depriving any person of "life, liberty, or property, without due process of law," and denying their residents the "equal protection of the laws,"[71] and granted to Congress the affirmative power to enforce these rights.[72] These clauses provided the textual basis for a dramatic expansion of constitutional rights and liberties through both judicial and congressional action. This expansion eventually included the application of most of the provisions of the Bill of Rights, including both of the Religion Clauses, against the states,[73] and the re-interpretation of the Religion Clauses and the First Amendment generally as articulating individual rights to

---

Id.; Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481–82 (1991) ("[T]he historical record is clear that when the religion language [of the First Amendment] was first adopted it was designed to restrain the federal government from interfering with the variety of state-church arrangements then in place."); *see also* Esbeck, *supra* note 64, at 14–18 (observing that the Establishment Clause was originally understood as a "dual restraint on national sovereignty" which prevented the national government from legislating with respect to established churches in the individual states and from setting up a national or other church ordained by national law); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 413, 415 (2002) (arguing that the framers understood the Establishment Clause as a "guarantor of a negative liberty right" aimed at preventing "coercion of conscience by prohibiting a range of government activities *greater* than the set of actions that directly coerce conscience").

[70] *See* TRIBE 2000, *supra* note 45, § 7-1, at 1295 (The Civil War and the Reconstruction Amendments placed the "issue of personal rights—and the necessity of their direct protection against state interference—squarely within the cognizance of the federal Constitution and the federal judiciary."); *see also* AMERICAN CONSTITUTIONAL HISTORY 128–36, 143 (Leonard W. Levy et al. eds., 1989).

[71] U.S. CONST. amend. XIV, § 1.

[72] *Id.*, § 5.

[73] Though well-entrenched, incorporation of the Establishment Clause against the states continues to draw academic criticism. *See, e.g.*, Esbeck, *supra* note 66, at 26 ("Ignoring federalism in the [Establishment] Clause was an act of sheer judicial will which is still debated by academicians today."); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1709–12 (1992) (arguing that because the Establishment Clause is a structural limitation on Congress enacted to preserve state regulatory control over religion against federal encroachment, its incorporation against the states was incoherent). *See generally* Bybee, *supra* note 69, at 1608–09 (arguing that as a structural provision designed to protect the states against Congressional interference, "the entire First Amendment [is] a poor candidate for any textually rigorous theory of incorporation"). Justice Brennan authored the classic defense of incorporation of the Establishment Clause in *Sch. Dist. v. Schempp*, 374 U.S. 203, 256 (1963) (concurring opinion). Though he agrees that the Establishment Clause was originally a structural provision, Professor Feldman has recently argued that it was designed as a protection of individual religious liberty and not as a federalist barrier protecting the religious prerogatives of the states. *See* Feldman, *supra* note 69, at 405–12.

be protected against both federal and state government, and not mere structural restraints on the federal government alone.

The structural antecedents of the Religion Clauses are evident in contemporary Establishment Clause doctrine. This doctrine presupposes that the Clause protects two values: the separation of government and religion, and government neutrality among particular religions and between religion and non-religion. Separation requires that religion and government refrain from involving themselves in the affairs of the other. In *Everson v. Board of Education*,[74] for example, the Court declared that government cannot "set up a church," or "adopt . . . teach or practice religion."[75] It also stated that "[n]either a state nor the Federal Government can . . . participate in the affairs of any religious organizations or groups and vice versa."[76] Separation seeks to ensure that government and religion each operate freely in their own separate spheres, uninhibited by regulation or interference by the other.[77]

Neutrality requires that government regulate its interactions with religious individuals and institutions so that it neither encourages nor discourages religious beliefs or practices. In *Epperson v. Arkansas*,[78] for example, the Court stated that

> government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.[79]

---

[74] 330 U.S. at 15–16.

[75] *Id.*

[76] *Id.* at 16.

[77] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1161 (2d ed. 1988) [hereinafter TRIBE 1988]; *see also* Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationist and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 292 (1999) ("[T]he most fundamental aim of church/state separation . . . is to keep these two centers of authority—God and Caesar, so to speak—within their respective spheres of competence.").

[78] 393 U.S. 97, 103–04 (1968).

[79] *Id.*; *see also Everson*, 330 U.S. at 15–16 (Neither the federal government nor any state "can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.").

Neutrality seeks to ensure that the degree of acceptance enjoyed by any particular religion is the result of the free and independent choices of its members, undistorted by government coercion or influence.[80]

Establishment Clause neutrality functions like an equality right under the Equal Protection Clause, except that the Establishment Clause generally applies to protect religious institutions as well as religious individuals from anti-religious discrimination. Consequently, laws and programs that violate the neutrality value by excluding or penalizing religious individuals or institutions can usually remedy this defect by lifting the religious penalty or including the excluded religious individuals or institutions within the disputed program. Separation, however, remains a structural limitation. Unlike most of the other provisions of the Bill of Rights, in its separationist mode the Establishment Clause functions as a structural limitation on government power, defining a set of acts in which government may not engage.[81] The constitutional problem with government action that offends Establishment Clause separation is not that an individual or institutional interest has been violated; rather, the problem is that the government has crossed a subject-matter boundary set by the Establishment Clause. Consequently, separation violations cannot be cured by removing religious discrimination or balancing the violation of a right by appeal to weighty government interests, for no matter how the law or program is reformulated or weighted, it will still represent the government's violation of an absolute limit on religious subject matters as to which the government is prohibited from dealing.

Over the last generation or so, neutrality has eclipsed separation as the dominant Establishment Clause value. Most of the disabilities formerly

---

[80] *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. . . . The government must be neutral when it comes to competition between sects."); *see also* TRIBE 1988, *supra* note 77, § 14-3, at 1160–61 ("The establishment clause . . . can be understood as designed in part to assure that the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state. Religious groups, it was believed, should prosper or perish on the intrinsic merit of their beliefs and practices."); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 587 (1968) (Religious neutrality ensures that "the capacity of religious ideas to shape our culture depends on society's free and informed response to them rather than on the failure of the state to grant them equality of treatment with competing ideas.").

[81] *See* Esbeck, *supra* note 66, at 21 ("[F]rom its inception the Establishment Clause—whatever the intended scope of its national-level restraint—had the role of a structural clause rather than a rights-based clause."); Note, *Rethinking the Incorporation of the Establishing Clause: A Federalist View supra* note 73, at 1710 ("[M]any scholars have suggested that the Establishment Clause is not a provision of individual liberty at all. Rather, it is a structural limitation upon federal power and a reservation of authority to the states.").

imposed on religious activity by Establishment Clause separation have been removed by the application of neutrality.[82] Nevertheless, there remain at least four areas where separation continues to control constitutional matters: Government may not delegate its authority to churches and other religious institutions,[83] it may not sponsor or participate in religious worship,[84] it cannot enact essentially theological precepts into law,[85] and it cannot make theological judgments or interfere in the internal governance of a church or other religious institution.[86] Most of these situations are not ones that can be dealt with coherently by neutrality; it is a conceptual impossibility, for example, for government to sponsor religious worship in a manner that does not favor one denomination or sect over another, or religion generally over secular ideologies and moralities. But even if neutrality were useful in such situations, it would run into separation as an inflexible and irreducible definition of domains that the government cannot enter, regardless of the "neutrality" of the intervention. Government activity in these areas violates the Establishment Clause no matter how it is structured, because separation is a limitation on government involvement in the prohibited domains.

---

[82] *See* Agostini v. Felton, 521 U.S. 203, 253 (1997). Under the rubric of "neutrality," Supreme Court decisions since 1981 have removed Establishment Clause obstacles to the use of public forums and the receipt of government aid by religious groups and individuals. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652–54 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203, 234–35, 236 (1997); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Zobrest v. Catalina Hills Sch. Dist., 509 U.S. 1 (1993); Mueller v. Allen, 463 U.S. 388, 402 (1983); Widmar v. Vincent, 454 U.S. 263 (1981). For an account of the foregoing developments, see Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation: Its Past and Future, in* CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 191 (Stephen V. Monsma ed., 2002).

[83] *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 709–10 (1994) (invalidating special school district drawn to coincide with boundaries of orthodox Jewish community); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (invalidating church veto power over liquor licenses granted to bars and restaurants located in the vicinity).

[84] *See* Lee v. Weisman, 505 U.S. 577, 599 (1992); Wallace v. Jaffree, 472 U.S. 38, 61 (1985); Sch. Dist. v. Schempp, 374 U.S. 203, 226–27 (1963); Engel v. Vitale, 370 U.S. 421, 436 (1962) (invalidating public school prayer).

[85] *See* Edwards v. Aguillard, 482 U.S. 578, 596–97 (1987) (invalidating mandatory teaching of creationism); Stone v. Graham, 449 U.S. 39, 41–44 (1980) (invalidating mandatory display of the Ten Commandments); Epperson v. Arkansas, 393 U.S. 97, 108–09 (1968) (invalidating prohibition on teaching evolution); People (*ex. rel.* McCollum) v. Bd. of Educ., 333 U.S. 203, 212 (1948) (prohibition of in-class sectarian religious instruction).

[86] *See* discussion *infra* Part III.B.

B. *The* Church Autonomy Cases

The *Church Autonomy Cases*[87] involve disputes within a denomination over ownership of church property or appointment to ecclesiastical office that find their way into a secular court.[88] The cases generally hold that a court may not adjudicate controversies between religious claimants when doing so would require judicial interpretation of the content or merits of a religious belief or practice.[89] Theological questions, in other words, are not justiciable by secular courts.[90] When adjudication calls for judicial interpretation of religious doctrine, the *Church Autonomy Cases* call on the court to defer to the interpretation advanced by the denomination's internal governing structure or, if no such interpretation is forthcoming, to abstain altogether from adjudicating the case.[91]

The Supreme Court has never made clear whether the theoretical justification for the rule of non-justiciability of theological disputes should be a religious group autonomy right or a lack of judicial competence,[92] which is why it cannot be wholly subsumed under the structural limitations of Establishment Clause separation.[93] The importance of establishing the theoretical foundation for the rule, however, was eclipsed by a serious

---

87 Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). *Watson* was a pre-*Erie* diversity case decided under federal common law, but its holding and rationale were constitutionalized by *Kedroff. See Kedroff*, 344 U.S. at 115–16.

88 *See Serbian Eastern Orthodox Diocese*, 426 U.S at 696; *Presbyterian Church*, 393 U.S. at 440; *Kedroff*, 344 U.S. at 94; *Gonzalez*, 280 U.S. at 1;*Watson*, 80 U.S at 679.

89 *See Serbian Eastern Orthodox Diocese*, 426 U.S. at 708–09; *Presbyterian Church*, 393 U.S. at 449; *see also* Jones v. Wolf, 443 U.S. 595, 603 (1979).

90 *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.12, at 1322 (5th ed. 1995) ("Courts can never question a church's rulings on matters of religious doctrine."); TRIBE 1988, *supra* note 77, § 14-11, at 1232 ("[L]aw in a nontheocratic state cannot measure religious truth. . . . [I]t is now settled that the resolution of religious questions can play no role in the civil adjudication of such disputes—that ecclesiastical doctrines cannot be used to measure right or wrong under civil law.").

91 *Serbian Eastern Orthodox Diocese*, 426 U.S. at 709–10; *Presbyterian Church*, 393 U.S. at 449–51; *Gonzalez*, 280 U.S. at 16; *Watson*, 80 U.S. at 727, 733.

92 A number of commentators have made the rights-based argument. *See, e.g.*, Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, WIS. L. REV. 99 (1989); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). More recently, Professor Esbeck has made the competence argument. *See* Esbeck, *supra* note 64, at 42–59 (arguing that the Establishment Clause deprives federal and state courts of subject matter jurisdiction over intra-church disputes that depend on the resolution of religious questions).

93 *See* discussion *supra* Part III.A.

qualification to the rule. In 1979, the Supreme Court held in *Jones v. Wolf*[94] that a secular court may properly adjudicate internal denominational disputes if it does so by reference to "neutral legal principles"—that is, without resort to interpreting religious doctrine or theology.[95] In that event, the court is permitted to take into account interpretations of religious doctrine rendered by the denomination's internal governing structure, but it is not required to do so.[96] Since *Employment Division v. Smith*,[97] some courts have understood "neutral, general laws" from that decision as being synonymous with "neutral legal principles" in *Jones*,[98] thereby expanding the neutral principles exception to apply to virtually any secular law that does not facially classify on the basis of religion.[99]

When read with *Smith*, the neutral principles exception of *Jones* seriously undercuts the structural limitation on government intervention that the *Church Autonomy Cases* once afforded to religious groups. After all, when neutral legal principles suggest how a denominational dispute should be decided, the independence and autonomy of the church is irrelevant, and a court may proceed to resolve the dispute in accordance with such principles even if the resolution ignores or contradicts the result indicated by the church's own

[94] 443 U.S. 595 (1979).

[95] *Id.* at 604.

[96] *Id.* at 605 (rejecting a rule of "compulsory deference").

[97] 494 U.S. 872 (1990).

[98] Jones v. Wolf, 443 U.S. 595 (1979).

[99] *See, e.g.*, Sanders v. Baucum, 929 F. Supp. 1028, 1034 (N.D. Tex. 1996) (holding that laws found to be religiously neutral and generally applicable under *Smith* and *Lukumi* "can be applied to resolve even internal disputes within a church without offending the First Amendment"); Smith v. O'Connell, 986 F. Supp. 73, 79–80 (D.R.I. 1997) (implicitly equating "neutral laws of general application" under *Smith* with the "neutral-principles approach" of *Jones*); *In re* Newman, 203 B.R. 468, 475 (Bankr. D. Kan. 1996) (holding that statute invalidating debtor preferences is "a valid and neutral law of general application" whose application to tithes rested on "neutral principles of law" which did not entangle the court in religious questions); Rashedi v. Gen. Bd. of Church of Nazarene, 54 P.3d 349, 353–54 (Ariz. Ct. App. 2002) (holding that whether church was negligent in the employment and assignment of sexually abusive pastor could not be adjudicated under the "neutral principles" exception of *Jones* because judgment required was excessively subjective and thus not "neutral" within the meaning of *Smith*); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 933 & n.1 (Cal. 1996) (finding that *Jones* and *Smith* were both about judicial incompetence to adjudicate theological questions); Prince v. Firman, 584 A.2d 8, 12–13 (D.C. 1990) (holding that because a statute is constitutional under *Smith*, it constitutes a "neutral property disposition rule" that does not entangle the court in an interpretation of religious doctrine); Zummo v. Zummo, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990) (citing both *Jones* and *Smith* for the proposition that "*secular* courts must confine their analysis to the *secular* law, and leave the implications of religious law, rules, or customs to the internal tribunals of the various religious groups which recognize such rules").

governing structure.[100] This means that the *Church Autonomy Cases* provide no obstacle to a court that wishes to intervene in a denominational dispute, so long as the court can identify (as it nearly always can) a secular law whose application to the dispute would resolve it without resort to interpretation of religious doctrine. In other words, *Jones* and *Smith* largely remove the structural limitation on government intrusion on religious group autonomy represented by the *Church Autonomy Cases.*

C. State Blaine Amendments

Named after James G. Blaine, a xenophobic member of the U.S. Congress who served in the House of Representatives and the Senate from 1863 to 1881,[101] the Blaine Amendments are modeled after a federal constitutional amendment that Blaine introduced in the House in 1876.[102] This proposed amendment would have applied the Religion Clauses to the states and prohibited them from allocating state funds and other resources to "sectarian" organizations, particularly religious elementary and secondary schools,[103] and is generally thought to have been motivated by nativist fear of immigrants, especially Roman Catholics. Although Congress never passed the federal Blaine Amendment, most of the states enacted similar provisions as part of their constitutions; thirty-seven of these are still on the books.

The Blaine Amendments generally prohibit state aid to "religious" or "sectarian" institutions, using language that is usually more specific and

[100] This is precisely what the *Jones* dissenters maintained would be the consequence of rejecting compulsory deference. *See* 443 U.S. at 611–14 (Powell, J., joined by Burger, C.J., White, & Stewart, JJ., dissenting).

For a comprehensive discussion of the *Church Autonomy Cases*, see Symposium, *Church Autonomy and the Free Exercise of Religion*, 2004 BYU L. Rev. 1093; 2004 BYU L. Rev. 1633.

[101] *See* Becket Fund for Religious Liberty, *Text of the Federal Blaine Amendment, available at* http://www.blaineamendments.org/Intro/BAtext-US.html (last visited Oct. 28, 2004) [hereinafter *Blaine Amendment*]

[102] *Id.*

[103] The Blaine Amendment provided:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor[e], nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

See Blaine Amendment, *supra* note 101.

prohibitive than the federal Establishment Clause.[104] The Blaine Amendments are thus a structural limitation imposed by state constitutions on the extent to which state governments can assist private religious schools and other religious organizations, even under the auspices of a religiously neutral aid program. At one time, there was serious doubt about their constitutionality.[105] As I have indicated, laws that single out a particular religion for disadvantageous treatment are presumptively invalid under the Equal Protection, Establishment, and Free Exercise Clauses.[106] Accordingly, if "sectarian" in the Amendments is read as code for "Roman Catholic," as history suggests it was so understood in the nineteenth century,[107] then state Blaine Amendments that use this term can plausibly be characterized as engaging in denominational discrimination in violation of both Religion Clauses and the Equal Protection Clause.[108] Those Amendments that ban aid to "religious" rather than "sectarian" schools would be similarly infirm under Supreme Court statements that discrimination against generic or general "religion" is prohibited by the Equal Protection and Free Exercise Clauses. Finally, the Supreme Court has repeatedly held that

---

[104] *See, e.g.*, FLA. CONST. art. I, § 3 ("No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."); MASS. CONST. art. XVIII ("[Public moneys] shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."); NEV. CONST. art. 11, § 10 ("No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purposes."); UTAH CONST. art. X, § 9 ("Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization."); WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .").

[105] For a careful examination of equal protection, establishment, free exercise, and illicit motivation arguments which contend that the Blaine Amendments are unconstitutional, see Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003) [hereinafter Lupu & Tuttle, *Zelman's Future*]. *See also* Symposium, *Separation of Church and States*, 2 FIRST AMEND. L. REV. (2003).

[106] *See* discussion *supra* Part II.B.

[107] *See, e.g.*, Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian"*, 6 J.L. & POL. 449 (1990); *see also* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 551 (2002) (observing that President Grant's references to "demagogue," "priestcraft," and "religious sect" in his last annual message to Congress were clearly directed at the growing Roman Catholic influence on public education). Four Justices of the Supreme Court recently drew attention to the anti-Catholic connotations of "sectarian." *See* Mitchell v. Helms, 530 U.S. 793, 828–29 (2001) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., Scalia, & Kennedy, JJ.).

[108] Of course, it is not a foregone conclusion that a majority of the Court will read "sectarian" historically.

denominationally neutral prohibitions on tangible aid to religious organizations and individuals violate the Establishment Clause.[109]

The Supreme Court resolved many of these questions in *Locke v. Davey* when it held that the states may adopt state constitutional provisions that are more separationist and more restrictive of religion than the federal Establishment Clause.[110] Moreover, the continuing influence of separationist sentiment in some states is likely to result in secular conditions being imposed on receipt of state aid which many religious schools and organizations would be reluctant to accept, regardless of how broadly or narrowly *Locke*'s holding is applied by the lower courts. Thus, in addition to the more restrictive state establishment clause provisions apparently approved by *Locke*, even-handed secular conditions imposed upon secularly defined beneficiary groups in a government aid program are also likely to exclude many religious individuals, schools, and organizations from participating in such programs.[111]

IV. IDENTIFICATION OF GROUNDS THAT HAVE BEEN RECOGNIZED FOR LIMITING FREEDOM OF RELIGION OR BELIEF

Given that freedom of religion in the United States is now much more of an equality right than a liberty right,[112] it is perhaps more appropriate to identify the sole ground that does *not* justify a governmental burden on religious liberty—religious animus. Government action that targets religion or a religious group for regulatory action, while excluding secular and other religious groups that are similarly situated with respect to the regulatory purpose, violates the Equal Protection, Establishment, and Free Exercise Clauses.[113] In other words, government can limit religious liberty for any

---

[109] *See* Agostini v. Felton, 521 U.S. 203, 223–30 (1997); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 666 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 485–90 (1986).

Restrictions on "religious" schools might also violate the Equal Protection Clause as covert discrimination against Roman Catholics, since denominationally neutral Blaine Amendment prohibitions on aid to religious schools disproportionately impact the extensive Roman Catholic parochial school system, and were originally motivated by religious hostility towards Roman Catholics. *Cf.* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[110] Locke v. Davey, 540 U.S. 712 (2004).

[111] *See* Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 FIRST AMEND. L. REV. 85 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=419221 (last visited Nov. 2, 2004).

[112] *See* discussion *infra* Part VI.A.

[113] *See* discussion *supra* Part II.B.

reason other than the desire to harm a particular religion or religion generally. So long as the burden imposed by government action on religious activity is shared by secular and religious groups in the same regulatory situation, the Constitution is satisfied.

V. ANALYTICAL DESCRIPTION OF THE LAW ON LIMITATIONS OF RIGHTS

The doctrine of limitations on the right of religious liberty under the U.S. Constitution can be succinctly stated in three rules:

> (1) *The General Rule of Deferential Review.* Religiously neutral and generally applicable laws that incidentally burden religious exercise are subject to minimal judicial scrutiny under the Free Exercise Clause; laws lacking either religious neutrality or general applicability are subject to heightened judicial scrutiny.[114]
>
> (2) *Exceptions Calling for Strict Review.* Notwithstanding the General Rule, religiously neutral and generally applicable laws that incidentally burden religious exercise are subject to heightened judicial scrutiny if (a) such laws burden constitutional rights in addition to the free exercise of religion (the Hybrid Rights Exception); or (b) such laws provide for exemptions based on individual circumstances, but do not permit exemptions for religious hardship (the Individualized Assessment Exception).[115]
>
> (3) *The Rule of Permissive Accommodation.* Although under the General Rule judges lack authority to mandate religious exemptions from religiously neutral and generally applicable laws that incidentally burden religious exercise, unless one of the two Exceptions applies, Congress and the state legislatures are free to enact such exemptions by statute.[116]

[114] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32, 546 (1993); *Smith*, 494 U.S. at 877–80, 882, 884–85; *see also Boerne*, 521 U.S. at 514 ("*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.").

[115] *Smith*, 494 U.S. at 881 (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)); *id.* at 884 (discussing *Unemployment Compensation Cases*, 489 U.S. 829 (1989); 480 U.S. 136 (1987); 450 U.S. 707 (1981); 374 U.S. 398 (1963)); *see also Boerne*, 521 U.S. at 513–14 (noting that the only cases in which the Court had found a neutral, generally applicable law unconstitutional under the Free Exercise Clause were "cases in which other constitutional protections were at stake," and cases "where the State has in place a system of individual exemptions" which it refused to extend to "cases of religious hardship").

[116] *Smith*, 494 U.S. at 890 (dictum):

A. *The General Rule of Deferential Review: Religious Neutrality and General Applicability*

The meaning of religious neutrality and general applicability was the principal focus of the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[117] decided only three years after *Smith*. *Lukumi* dealt with the Santeria, a religious sect from the Carribean which includes among its religious practices the ritual sacrifice of small animals.[118] The decision struck down a series of municipal ordinances that had the purpose and effect of prohibiting Santeria sacrifices, but virtually no other kind of animal slaughter or killing.[119]

1. *Religious Neutrality and Religious Discrimination*

Lukumi held that a law lacks religious neutrality if its purpose is to restrict religious practices because they are religious.[120] A law is neutral with respect to religion, in other words, if it does not use religion as a basis of classification—that is, if the religious beliefs and practices of those to whom a law applies are irrelevant to the law's goals.[121] Such a religiously discriminatory purpose may be evident from the text of the law,[122] as well as from its effect.[123] For example, the Court noted that use of words like "sacrifice" and "ritual" in the ordinances, as well as the recital in these laws

---

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well . . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.

Id.

[117] 508 U.S. at 520.

[118] *Id.* at 524–25.

[119] *Id.* at 545–47.

[120] *Id.* at 533.

[121] *See* PHILLIP KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 17–18 (1962).

[122] *Lukumi*, 508 U.S. at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.").

[123] *Id.* at 534–35 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality . . . . Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

that they were intended to prohibit religions engaging in particular practices contrary to "public morals, peace or safety," were evidence that the text of the ordinances was not religiously neutral. As further evidence of a lack of religious neutrality, virtually the only conduct the ordinances prohibited were the worship rituals of the Santeria.[124]

Religious neutrality defines the purpose of the Free Exercise Clause as preventing religious discrimination, rather than protecting freedom of action in a domain of religious liberty. Yet, as I have indicated, constitutional doctrine already defines religious classifications as presumptively invalid bases of governmental classification under both the Establishment and Equal Protection Clauses.[125] By recharacterizing the Free Exercise Clause as a mere protection against religious discrimination, *Smith* left the Clause with nothing to do that is not already done by these other two Clauses.[126] Redundancy between the Free Exercise and Establishment Clauses can be reduced by assigning the problem of discriminatory burdens on religion to the Free Exercise Clause, and the problem of preferential assistance to or endorsement of religion to the Establishment Clause.[127] However, this still leaves the Free Exercise and Equal Protection Clauses almost entirely coextensive with each other. Indeed, the Court could easily have rested its conclusion of unconstitutionality in *Lukumi* entirely on the understanding that the ordinances created facial and as-applied sectarian religious classifications in violation of the Equal Protection Clause.[128] Were religious neutrality the only analytic touchstone under the Free Exercise Clause, one would have to conclude that *Smith* had effectively read the Clause out of the Constitution.

---

[124] *Id.* at 535–37. For example, although the ordinances purported to regulate the unnecessary and inhumane killing of animals, hunting and fishing for sport, using rabbits to train greyhound racing dogs, and kosher slaughter by severance of the carotid arteries were all exempt from the prohibitions of the ordinances. *Id.* at 535–37.

[125] *See* discussion *supra* Part II.B.

[126] *See* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 113, 115 (1991) (making this point with respect to the Establishment Clause).

[127] *See, e.g.*, *Lukumi*, 508 U.S. at 532 ("Our Establishment Clause cases . . . for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.").

[128] *Cf. id.* at 540–42 (opinion of Kennedy, J., joined by Stevens, J.) (using equal protection analysis to show that the ordinances were motivated by governmental hostility towards the Santeria); *see supra* Part II.B.

2. *General Applicability and Legislative Underinclusion*

Lukumi defined "general applicability" as an additional prohibition on religious "targeting"—that is, a prohibition against laws that pursue their secular objectives only against religious conduct.[129] *Lukumi* cited four decisions as authority for the proposition that the general applicability of legislation is a familiar requirement of First Amendment jurisprudence; these citations suggest that the Court understands a generally applicable law to be one that does not focus its burdens or benefits on a particular religious class to the exclusion of most others that are similarly situated.[130]

Lukumi explained that religious targeting and general applicability are mutually reinforcing tests: a law that religiously targets is usually not generally applicable, and vice versa.[131] Consider, for example, a police force grooming standard which purports to prohibit officers from wearing beards, in order to promote a clean-cut image and to develop *esprit de corps* among officers.[132] Assume that the police force refuses to exempt from this standard Muslim, Sikh, and other officers who wear beards for religious reasons, but that it routinely exempts any officer who wears a beard because he suffers from a skin condition, wishes to keep his face warmer during the winter, portrays

---

[129] *See, e.g., id.* at 524 ("The principle of general applicability was violated because the secular ends asserted in defense of the [challenged] laws were pursued only with respect to conduct motivated by religious beliefs."); *id.* at 543 ("Government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief . . . ."); *id.* at 545 ("Each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself'") (quoting and paraphrasing Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and in the judgment)).

[130] *See id.* at 543 (citing Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991) (holding that state doctrine of promissory estoppel sought to be applied against a newspaper reporter is "a law of general applicability" because "[it] does not target or single out the press," but "is generally applicable to . . . *all* the citizens" of the state) (emphasis added)); Univ. of Pa. v. EEOC, 493 U.S. 182, 189–91, 200–01 (1990) (finding that certain amendments to Title VII constitute generally applicable laws because they "do not carve out any special privilege" for nondisclosure of tenure files and other peer review material by colleges and universities); Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (invalidating state tax which had the effect of collecting the vast majority of its revenue from one or two newspapers, because state had "single[d] out the press" for special treatment rather than applying the tax to all the constituents of the taxing jurisdiction); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440, 449 (1969) (holding that church property disputes are justiciable under the Establishment Clause when they can be resolved by reference to "neutral principles of law, developed for use in *all* property disputes," as opposed to resolution by the particular doctrines or customs of a religious organization) (emphasis added).

[131] *Lukumi*, 508 U.S. at 531.

[132] *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (noting argument that beards worn "for religious reasons would undermine the force's morale and esprit de corps").

Santa Claus in a local Christmas play, wishes to look older and more distinguished, or, indeed, has any reason for wearing a beard other than religious conscience.[133] Even if the standard is somehow worded so as to avoid targeting religious exercise by its terms, its effect is still to prevent police officers from wearing beards *only* when they are worn for religious reasons. The standard thus lacks religious neutrality because it singles out religious conduct for a burden—a prohibition on wearing beards for religious reasons—that is not imposed on secular conduct—beards may be worn for any nonreligious reason.[134]

The standard also lacks general applicability. If one assumes that most police officers do not wear beards for religious reasons, then a grooming standard that prohibits beards only when they are worn for religious reasons does not apply to most of the police force.[135] A law lacking general applicability is called "underinclusive," because "it applies to less than the entire universe of cases that pose the problem the law seeks to solve."[136] The grooming standard is dramatically underinclusive, because it prohibits only a small portion of the conduct—wearing a beard—that purportedly undermines its image and officer-unity purposes.

Lukumi thus characterizes both religious targeting and general applicability as tests that screen for religious discrimination.[137] A broader reading of general applicability is possible, however. Consider a police grooming standard that prohibited all officer beards, except those worn for medical reasons.[138] Such a policy might be justified on the dual grounds that those who suffer severe skin irritations from shaving can only comply with the standard

---

[133] *See id.* at 360 (noting that exemptions from no-beard policy were extended to those who needed to wear beards for medical reasons).

[134] *See id.* at 365 (arguing that by exempting from no-beard policy beards worn for medical reasons but not beards worn for religious reasons, the police force unconstitutionally devalued "religious reasons for wearing beards by judging them to be of lesser import than medical reasons.").

[135] *Cf. id.* at 367 (noting that the Muslim plaintiffs differed from most other members of the force in wishing to wear beards for religious reasons).

[136] MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 212 (2002).

[137] *See* 508 U.S. at 531; *see also* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 701–02 (9th Cir. 1999), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134 (9th Cir. 2000) ("Underinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister," such as a government goal of "suppressing religious exercise.").

[138] Shaving reportedly causes severe acne and skin irritations in some men, particularly African Americans.

by sacrificing their health, and that those officers availing themselves of the exception are likely to be a relatively small percentage of the force.

Of course, those who wear beards as a matter of religious belief can make the same arguments: those who adhere to religions that require their male members to wear beards can only comply with the standard by abandoning this precept of their religion, and the number of officers wearing beards for religious reasons is likely to be a relatively small percentage of the force. From this, one can argue that the standard lacks general applicability because it is under inclusive with respect to its stated purposes—that is, it exempts some beards from the standard, thereby undermining its image and moral purposes, but refuses to exempt other beards that do not undermine these purposes to any greater extent.

This broader reading of general applicability screens for a kind of religious discrimination that the narrow reading does not. A standard that prohibits all beards except those worn for medical reasons does not appear to target only religious conduct because substantial amounts of secular conduct—beards worn for warmth, costume, or personal preference—is prohibited along with religious conduct—namely, beards worn for religious reasons. The standard nevertheless discriminates against religion. Exempting secular activity from a law but not religious activity reflects a legislative judgment that nonexempt religious activity is less important than the exempted secular activity.[139] Put another way, the exemption reflects an implicit judgment that religious exercise is a less important personal interest than maintaining a clear complexion. Yet, religious activity is a "constitutionally preferred" liberty under the express protection of the Free Exercise Clause, whereas most secular activity merely reflects interests of no special constitutional significance.[140] By exempting from the standard beards worn for medical reasons, but not beards worn for religious reasons, the grooming standard elevates the right to proper treatment of a medical condition, which is nowhere guaranteed by the U.S. Constitution, over the right to the free exercise of one's religion, which is.

---

[139] Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1541 (1999). Because he maintains that judgments about the extent to which religious activities are comparable to exempted secular activities are better made by legislatures than courts, Professor Volokh argues that laws which favor secular activities over apparently similar religious activities by exempting the former but not the latter, are "perfectly proper." *Id.* at 1540–41.

[140] Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 51; *but see* Note, *Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property*, 115 HARV. L. REV. 1713 (2002) [hereinafter Note, *Neutral Rules*] (arguing that the Supreme Court now provides greater constitutional protection to private property rights than to free exercise rights).

Some commentators have argued that this broader reading of general applicability requires strict scrutiny of any law that provides for any secular exemption, but no religious exemptions.[141] This is an over-reading of both *Smith* and *Lukumi*. Although there are hints in both opinions that the Court might be prepared to expand the meaning of general applicability in a proper case,[142] requiring that the government provide religious exemptions whenever a law allows any exemption for secular conduct would be to create an exception to the General Rule that swallows it up.[143]

A more realistic reading of *Smith* and *Lukumi* would require the government to show that exempted secular conduct has a different relationship to the purpose of the law than nonexempted religious conduct.[144] In other words, a religious exemption is required only when nonexempt religious conduct presents no greater threat to a law's purpose than already exempt secular conduct.[145] To return yet again to the police officer grooming standard,

---

[141] *See, e.g.*, 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).

[142] *See Lukumi*, 508 U.S. at 542 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."); *id.* at 543 ("The ordinances are underinclusive for those ends [of protecting public health and preventing animal cruelty]. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential."); *Smith*, 494 U.S. at 884 (distinguishing *Unemployment Compensation Cases* because, *inter alia*, they did not involve "an across-the-board criminal prohibition on a particular form of conduct.").

[143] *See* MCCONNELL ET AL., *supra* note 136, at 212 (suggesting that there is no difference between an exception to a law and a simple lack of coverage by the law); *see also* Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions From* Smith, 75 N.Y.U. L. REV. 1045, 1067 (2000) (arguing that a constitutional rule that mandated a religious exemption whenever a law allows any sort of secular exemption "clearly flies in the face of the holding in *Smith*"); Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 768 (1999) ("One can posit that a law which includes even a single secular departure, but does not match it with an equivalent accommodation departure is not generally applicable for the purposes of the Free Exercise Clause because it is underinclusive in that there is some secular conduct to which it does not apply. *Lukumi* does not, however, support such a simple decision.").

[144] Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 119 (2000) [hereinafter Gedicks, *The Normalized Free Exercise Clause*]; *see also* Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses after* Boerne, 68 GEO. WASH. L. REV. 861, 888–90 (2000) (arguing for a similar conclusion based upon the "hard-look" rational basis review of *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court invalidated denial of a special use permit for a group home for the mentally retarded by rejecting purported distinctions between the home and other permitted uses).

[145] Gedicks, *The Normalized Free Exercise Clause*, *supra* note 144, at 118–19; *accord* Sansom, *supra* note 143, at 769 (arguing that a religious exemption from a law is appropriate under the General Applicability Exception when a secular exemption permitted by the law would "undermine the purpose of the law's general proscription or mandate," and allowing a religious exemption "would not undermine that purpose any more than the secular departure already does"); *see also* Religious Land Use and Institutionalized Persons Act of

suppose that the standard prohibits all officer beards for image and unity purposes, except those worn by undercover officers. Granting an exemption to the latter does not undermine these purposes, because undercover officers by definition have concealed their association with the police force and thus do not project any image at all on behalf of the police force.[146] Similarly, because undercover officers do not interact with regular officers as part of the regular uniformed chain of command, their beards do not disrupt force unity to the same extent as beards worn by regular uniformed officers.

In sum, *Smith* and *Lukumi* suggest that a religiously neutral law does not fail the test of general applicability merely by being modestly or even substantially underinclusive; rather, the law must be so dramatically underinclusive that religious conduct is virtually the only conduct to which the law applies. The Court apparently will tolerate a substantial amount of underinclusion before finding that a law is not generally applicable, so long as the underinclusion stops short of religious targeting.[147] Whether the doctrinal hurdle represented by general applicability will be raised so far as to require heightened scrutiny of laws that exempt secular conduct but not similarly situated religious conduct, as suggested by some lower court decisions,[148] remains to be seen.

2000 ("RLUIPA"), 42 U.S.C. § 2000cc(b)(1) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.").

[146] Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366 (1999).

[147] *See Lukumi*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in the judgment):

> In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.

Id. (citations omitted); *cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072, 1073 (1992) (Stevens, J., dissenting) ("We have . . . in our takings law frequently looked to the *generality* of a regulation of property . . . . [C]ourts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy.").

[148] *See, e.g.*, Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2003) (upholding injunction against collection of exotic animal fees from Native American who owned black bears for use in religious ceremonies, because law providing for the collection of fees was exempted zoos and circuses and provided for additional discretionary waivers); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165–68 (3d Cir. 2002) (upholding injunction against enforcement of ordinance prohibiting signs on city-owned utility poles, as against Orthodox Jews who had used the poles to mark an eruv, on ground that city had not enforced the ordinance to prevent display of some name and address signs and certain symbols on the poles); *Fraternal Order of Police*, 170 F.3d at 367 (holding that police department's refusal to exempt Muslim police officers from no-beard rule when rule provided for medical exemptions is subject to strict scrutiny, because "[w]e are

B. Exceptions Calling for Strict Review: "Hybrid Rights" and Systems of Individualized Assessment

Smith articulated two exceptions to the General Rule: when a law burdens constitutional rights besides the free exercise of religion—the Hybrid Rights Exception—and when the law provides for detailed consideration of particular facts and circumstances that might excuse a person from complying with the law, but does not allow the burden the law might impose on religious beliefs to be considered as one of such facts or circumstances justifying noncompliance—the Individualized Assessment Exception.

1. The Hybrid Rights "Exception"

Few people take the Hybrid Rights Exception seriously.[149] The exception would make a difference only in the situation where a personal interest was protected by two constitutional rights, either of which by itself would call for only deferential scrutiny, but which when combined somehow achieve a synergistic constitutional mass that triggers heightened scrutiny.[150] If one constitutional right is strong enough by itself to trigger heightened judicial

---

at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not"); Black Hawk v. Commonwealth, 114 F. Supp. 2d 327, 331–32 (M.D. Pa. 2000) (holding that statute giving government authority to grant exemptions from provision requiring destruction of aggressive wild animals subject to strict scrutiny); Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 886 (D. Md.1996) (holding that application of historic preservation ordinance against church is subject to strict scrutiny when ordinance provided for exemptions in case of a "major improvement of benefit to the city," "financial hardship," or circumstances that would not be in the "interests of the city" or of "a majority of persons in the community," but did not provide for religious exemptions); Rader v. Johnston, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (holding that refusal to exempt evangelical Christian from parietal rule requiring that freshman live in university housing is subject to strict scrutiny where "exceptions are granted . . . for a variety of nonreligious reasons, . . . [but] not granted for religious reasons.") (internal quotations omitted); Horen v. Commonwealth, 479 S.E.2d 553, 557 (Va. Ct. App. 1997) (holding that government intent to discriminate against religion may be inferred from state law prohibiting possession of owl feathers, which exempted "taxidermists, academics, researchers, museums, and educational institutions," but not those who possess owl feathers for bona fide religious uses). *But see* Jackson v. Dist. of Columbia, 89 F. Supp. 2d 48, 65–69 (D.D.C. 2000) (declining to apply general applicability analysis to under inclusive classifications burdening free exercise rights of incarcerated prisoners).

149 *See* Alan E. Brownstein, *Constitutional Questions about Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 119, 119–20 (2000) (calling the Hybrid Rights Exception "unintelligible"); *e.g.*, Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1339, 1341, 1342 (D. Utah 2001) (recognizing the Hybrid Rights Exception, but holding that the scrutiny level it requires is only a "more than merely reasonable" relation between the government's asserted interest and the legislation that imposes the burden on religious exercise).

150 *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 430–31 (1994); Rodney A. Smolla, *The Free Exercise of Religion after the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 930 (1998).

scrutiny, then the other right is surplusage.[151] If neither right is sufficient to trigger heightened scrutiny, it is unclear why the two of them together should trigger such scrutiny.

Accordingly, most courts that have employed the hybrid rights exception to create a religious exemption have used it only as a secondary or alternate justification for the exemption holding.[152] Although a few courts have acknowledged the possibility of hybrid rights doctrine,[153] others have rejected it outright,[154] and only one court has unambiguously relied on this exception as the sole basis for excusing a believer from complying with a religiously neutral and generally applicable law.[155]

2. *The Individualized Assessment Exception*

In order to distinguish (rather than overrule) the *Unemployment Compensation Cases* in *Smith*, the Court contended that denial of a religious exemption from a burdensome law should be strictly scrutinized when the law provides a structure or procedure for "individualized assessment" of exemption claims, but does not allow the law's burden on religion to play any part of such assessment.[156] The Individualized Assessment Exception to *Smith* is best understood as deriving from suspicion of underinclusive government action when a law grants government agents substantial discretion in determining the

---

[151] *See Lukumi*, 508 U.S. at 567 (Souter, J., concurring); *see also* Note, *Neutral Rules*, *supra* note 140, at 1723 ("Counting the number of rights implicated is not a useful measure of how burdened a party is by a neutral law; and if the Court *is* willing to evaluate the seriousness of the burden when two rights are implicated, there seems little reason not to do the same in cases involving one constitutional right.").

[152] William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242–43 (1998) ("[W]hen a court allows a hybrid to 'win' by applying strict scrutiny to the claim, it never does so as the primary basis for the decision . . . . The 'success' of hybrid claims is directly tied to the constitutional strength of the right with which free exercise is combined."); Kaplan, *supra* note 143, at 1063 ("[W]hile many courts have inferred that *Smith* creates a 'hybrid rights' exception, most apply it as an alternative theory for assessing the validity of a free exercise claim that they have already analyzed under the *Sherbert* exception, or under the *Smith* test.").

[153] *E.g.*, Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 699–700 (10th Cir. 1998); *see, e.g.*, Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995); Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1337 (D. Utah 2001).

[154] *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 240 F.2d 533, 561 (6th Cir. 2001), *aff'd on other grounds*, 536 U.S. 127 (2002); Kissinger v. Bd. of Trustees of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993).

[155] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703–04 (9th Cir. 1999), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134 (9th Cir. 2000).

[156] *Smith*, 494 U.S. at 884.

scope of the law's coverage and enforcement with respect to a fundamental right.[157]

For example, unemployment compensation programs generally excuse applicants from complying with program eligibility requirements whenever they can show "good cause."[158] In other words, unemployment compensation programs presuppose that many applicants will be excused from satisfying particular eligibility requirements for receipt of benefits, and that the widely varying reasons applicants give will be individually considered in light of the purposes and practical limitations of the programs.[159] *Smith* held that "where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[160] In short, *Smith* mandated that when the government considers individual circumstances in administering the requirements of a program, it must excuse program participants from those requirements that burden their religious practices, even though the burden is incidental.[161]

A close analogy to the Individualized Assessment Exception exists in the Supreme Court's doctrine relating to so-called "standardless licensing" of expression under the Speech Clause.[162] Under the Speech Clause, licensing and other regulatory schemes that grant government discretion to prevent speech *ex ante* (as opposed to punishing it *ex post*) are subject to significant constitutional restraints. Unless such discretion is controlled or limited by substantive standards governing the issuance of a license, it is presumptively unconstitutional as a prior restraint.[163] Limiting standards must be both

---

157 Gedicks, *The Normalized Free Exercise Clause*, *supra* note 144, at 115 n.170.

158 *Smith*, 494 U.S. at 884.

159 *See id.* ("The 'good cause' standard created a mechanism for individualized exemptions.") (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

160 *Smith*, 494 U.S. at 884. The Court did not apply this reasoning to *Smith* itself because the religiously motivated conduct at issue there was not merely inconsistent with program eligibility requirements, as in the *Unemployment Compensation Cases*, but also violated a criminal prohibition. *See id.* at 876, 884–85.

161 *Cf.* Bowen v. Roy, 476 U.S. 693, 721–22 (1986) (Stevens, J., concurring in part and concurring in the result) ("To the extent that other food stamp and welfare applicants are, in fact, offered exceptions and special assistance in response to their inability to 'provide' required information, it would seem that a religious inability should be given no less deference.").

162 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

163 *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225–27 (1990); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988); Staub v. City of Baxley, 355 U.S. 313, 321–24 (1958); Kunz v. New York, 340 U.S. 290, 293–95 (1951); Saia v. New York, 334 U.S. 558, 560–61 (1948); Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938).

content-neutral[164] and "narrow, objective, and definite";[165] broad appeals to a state's police power do not pass muster.[166] Procedurally, licensing schemes must provide that the government shoulder the burden of proving that the proposed speech is not constitutionally protected, that the government either issue the license for the speech or seek judicial review of its refusal to issue it within a specified and brief period of time, that any restraint on the expression in advance of a final judicial determination be limited to "preservation of the status quo," and that the final judicial decision on the restraint be rendered promptly.[167]

Unfettered discretion was also an alternative holding for the result in *Yick Wo v. Hopkins*,[168] in which the Court invalidated a facially neutral San Francisco laundry regulation ordinance that had been applied by the board of supervisors so as to grant a permit to operate a laundry to virtually every Caucasian applicant, and to deny a permit to every Chinese applicant. *Yick Wo* is usually included in American constitutional law casebooks to illustrate how a pattern of racial discrimination will be found to violate the Equal Protection Clause even when it takes place under a facially neutral law.[169] The ordinance in *Yick Wo* was declared unconstitutional *on its face*, however, not as it was

---

[164] *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992); *City of Lakewood*, 486 U.S. at 760.

[165] *E.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

[166] *See, e.g.*, *City of Lakewood*, 486 U.S. at 769, 772 (holding "not in the public interest" and "necessary and reasonable" to be insufficient as standards for controlling discretion); *Shuttlesworth*, 394 U.S. at 150 (same with respect to "public welfare, peace, safety, health, decency, good order, morals or convenience"); *Staub*, 355 U.S. at 321 (same with respect to "the character of the applicant, the nature of the . . . organization . . . and its effects upon the general welfare.').

[167] *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 58–59 (1965). Professor Tribe additionally lists as procedural requirements for a constitutional licensing scheme that an adversarial hearing on the application be held when possible, and that any prior restraint ordered by a court be stayed unless the government provides for immediate appellate review. *See* TRIBE 1988, *supra* note 77, §§12-39, at 1059–61.

Although *Freedman* itself entailed review of a criminally enforceable film censorship statute, its procedural protections have since been applied by the Court in other First Amendment contexts. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 547–48, 559 (1975) (use of public auditorium for performance of play including nudity); Blount v. Rizzi, 400 U.S. 410, 411–12, 415 (1971) (postal stop orders on delivery of pornographic materials); *see also Shuttlesworth*, 394 U.S. at 162–63 (Harlan, J., concurring) (arguing that the negative First Amendment consequences of standardless prior restraint of political demonstrations are more serious than those of film censorship); Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1549–50 (1970) (arguing that a "thorough comparison of film censorship and demonstration regulation" suggests that the *Freedman* factors should govern judicial review of licensing schemes for the latter as well).

[168] 118 U.S. 356 (1886).

[169] *See, e.g.*, GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 750 (13th ed. 1997); *see* WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION 1182–83 (8th ed. 1996).

applied. The Court explained that because the ordinance contained no general standards controlling the board's decisions regarding who would receive permits, it thereby gave the supervisors "complete discretion as to whom they would reward or punish."[170] Unfettered bureaucratic discretion in granting laundry permits violated the Equal Protection Clause because without standards for granting permits, the competition for permits would unavoidably end in favoritism and corruption.[171]

The standardless licensing decisions reflect the reality that government discretion is frequently exercised to disadvantage controversial or unpopular speech, just as *Yick Wo* reflects the reality that such discretion is frequently exercised to disadvantage unpopular racial minorities. As such, these decisions resonate with *Smith*'s requirement that strict scrutiny be applied to government decisions that deny religious exemptions within the context of a system providing for individualized assessment of a law's burdens on secular conduct,[172] for it is the regrettable reality in the United States that government discretion with respect to religious activities is likewise frequently exercised to disadvantage controversial or unpopular religions. It has been widely documented, for example, that local government discretion in zoning and land use decisions involving religious uses is frequently exercised to deny or otherwise to penalize uses sought by unpopular or unfamiliar minority religions, often at the same time that similar and even identical uses are approved for larger, more established religions.[173]

A discretionary government choice to benefit or to burden certain activities and not others does not normally trigger heightened scrutiny of the classification that distributes the benefit or burden, even when the classification is underinclusive, *i.e.*, even when the law does not apply to

---

[170] *See* 118 U.S. at 366–67.

[171] *See generally* HOWARD GILLMAN, THE CONSTITUTION BESEIGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 71 (1993).

[172] Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 573 (1999) ("Long prior to *Smith*, our civil liberties tradition had recognized the dangers of permitting local officials to exercise licensing authority over expressive activity without the benefit of determinate criteria. The absence of such criteria invites discriminatory treatment of groups disfavored by local decision makers.").

[173] *See, e.g.*, Amicus Brief of The Church of Jesus Christ of Latter-day Saints, App., *Discrimination against Minority Churches in Zoning Cases*, City of Boerne v. Flores, 521 U.S. 507 (1997), *available at* 1997 WL 10290; Tuttle, *supra* note 144, *passim.*

activities that are comparable to activities to which the law does apply.[174] If the Free Exercise Clause grants special protection to religious activity, however, as the Speech Clause does to expression, then it would seem that, like expression, religious activity should receive protection from the standardless exercise of government discretion by granting to religious activity at least the degree of protection which the Constitution grants to activities that are not singled out for special protection, if not more. The individualized assessment exception to the General Rule is thus an example of the broader meaning of general applicability that the Court has not yet expressly and fully embraced.

C. *The Rule of Permissive Accommodation: Anti-Establishment and Equal Protection Pitfalls*

An important dictum in the *Smith* decision makes clear the majority's opinion that Congress and the state legislatures are free to enact religious exemptions by statute despite *Smith*'s holding that the Free Exercise does not generally mandate such exemptions.[175] Such statutory exemptions are generally known as "permissive"—as distinguished from "mandatory"—constitutional accommodations of religion. Despite this apparent Supreme Court approval of Permissive Accommodations, both Establishment and Equal Protection Clause doctrines pose serious obstacles to them.

---

[174] *See* TRIBE 1988, *supra* note 77, §16-4, at 1447; *e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (observing that a legislature may legitimately believe that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies," or choose to proceed "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others" (internal citations omitted)).

[175] *See* 494 U.S. at 890 (dictum):

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby insulated from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well... But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.

Id.; accord Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) ("[W]e do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.").

1. Anti-Establishment Problems

The Supreme Court's early decisions developing Establishment Clause doctrine emphasized separation, imposing special disabilities on religion that were not imposed on secular activities. For example, religious elementary and secondary schools, which in the United States are necessarily private because of the Establishment Clause, were generally denied the benefits of government financial assistance in service to the value of church-state separation, despite the fact that public schools and private secular elementary and secondary schools were eligible for such aid.[176] Similarly, government in the United States has long been thought to be disabled from funding, endorsing, or generally participating in religious worship, though it is not prevented from funding, endorsing, or generally participating in comparable secular ceremonies, such as patriotic or political events.[177] From the perspective of these Establishment Clause holdings, special protection for religion in the form of religious exemptions under the Free Exercise Clause seemed a permissible way to balance the special disabilities imposed on religious activity under the Establishment Clause.[178]

This balancing justification for Permissive Accommodations has lost much of its force over the last generation as the Court has transformed much of Establishment Clause doctrine from the articulation of structural boundaries that disallow most government interactions with religion, into an equality right that demands that government actions be religiously neutral among religious denominations, and between religion and nonreligion.[179] Most of the former disabilities imposed on religious activity by Establishment Clause

---

[176] FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 45–52 (1995).

[177] *See generally* Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071 (2002).

[178] *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); *see also* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests"*, SUP. CT. REV. 323, 340–41 (1995):

> In general, religious beliefs and practices place demands on people that are more intense, less subject to reasons that regulate civil society, more likely to generate conflicts with the state if not accommodated, than do nonreligious beliefs and practices. Further, accommodation to those beliefs and practices may be appropriate because the Establishment Clause places particular limitations on assistance to religion that it does not extend to other beliefs and practices.

Id.

[179] *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 568–72 (1998) [hereinafter Gedicks, *An Unfirm Foundation*].

separationism have been removed;[180] at present, there are only a few areas in which the Establishment Clause imposes special disabilities on religion which would provide a justification for religious exemptions. These include prohibitions on government encouragement of or participation in religious worship,[181] on the delegation of governmental authority to religious organizations,[182] on government consideration of essentially theological questions,[183] and on the use of government authority for wholly religious purposes, *i.e.*, laws lacking a plausible secular purpose.[184] After *Locke v. Davey*,[185] one can also add here those circumstances in which religious individuals or organizations are specially burdened by a more restrictive state establishment clause or other similar state constitutional provision.[186]

---

[180] Supreme Court decisions since 1981 have removed Establishment Clause obstacles to the use of public forums by religious groups and individuals. *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). Several cases reference government use of religious symbols. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984). Other cases discuss in-kind government aid to religious schools. *See* Mitchell v. Helms, 530 U.S. 1296 (2000) (overruling Wolman v. Walter, 433 U.S. 229 (1977)); Meek v. Pittenger, 421 U.S. 349 (1975); Agostini v. Felton, 521 U.S. 203, 234–35, 236 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985), overruling in part Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) and limiting Lemon v. Kurtzman, 403 U.S. 602 (1971)); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). For reference to tax credits granted for monies spent at or on behalf of religious schools, see Mueller v. Allen, 463 U.S. 388 (1983). For reference to cash subsidies paid to or on behalf of religious groups, see Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (limiting Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

For an account of the foregoing developments, see Frederick Mark Gedicks, *Neutrality in Establishment Clause Interpretation*, *in* CHURCH-STATE RELATIONS IN CRISIS: DEBATING NEUTRALITY 191 (Stephen V. Monsma ed., 2002).

[181] *See* Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); Sch. Dist. of Abington Township Pa. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating public school prayer).

[182] Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (invalidating special school district drawn to coincide with boundaries of orthodox Jewish community); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (invalidating church veto power over liquor licenses granted to bars and restaurants located in the vicinity).

[183] Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Ch. v. Mary Elizabeth Blue Hull Mem. Ch., 393 U.S. 440 (1969).

[184] Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating mandatory teaching of creationism); Stone v. Graham, 449 U.S. 39 (1980) (invalidating mandatory display of the Ten Commandments); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating prohibition on teaching evolution); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (prohibition of in-class sectarian religious instruction).

[185] 540 U.S. 712 (2004).

[186] *See* Part III.C *supra*.

Contemporary Establishment Clause doctrine thus presents a special complication for religious exemptions.[187] Permissive Accommodations are religious accommodations imposed by the legislature rather than imposed by the judiciary. Because neutrality generally bans government action that gives special advantages to religion, and because religious exemptions are no longer required under the Free Exercise Clause, Permissive Accommodations would seem to be justifiable only in the small number of cases where they correct for or balance a special disability suffered by religion under the Establishment or otherwise. For example, the Court has upheld a statutory exemption of nonprofit religious groups from the anti-discrimination provisions of Title VII[188] "to equalize religious entities with nonreligious entities that face no comparable statutory impediment to hiring those with ideological loyalty."[189] The Democratic National Committee, in other words, can require that all of its employees be Democrats, but in the absence of an exemption from Title VII, the Roman Catholic Church cannot require that its employees be Roman Catholic. A Permissive Accommodation that exempts the church from the religious antidiscrimination provisions of federal employment laws thus restores equality between religious and political organizations, allowing the former as well as the latter to hire employees who share a commitment to the group's mission.

On the other hand, a Permissive Accommodation that does not compensate for some special disability imposed on religious activity functions much like a state subsidy or endorsement of such activity. For example, an exemption from the payment of sales taxes on the sale of Bibles and other religious books and magazines simply gives such religious publications a price advantage with respect to secular publications.[190] On the other hand, however, one might argue that so long as Permissive Accommodations are relatively narrow, they are at least balanced by the few special disabilities that continue to be imposed on religion under the Establishment Clause, even if there is not a direct

---

[187] *See* Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 806 (1998) [hereinafter Lupu, *Why Congress Was Wrong*] (arguing that judges perceive that granting religion favorable legislative treatment in the form of accommodations, as in RFRA, is "fraught with perils on both sides. Underprotecting religion presents free exercise problems; overprotecting it suggests Establishment Clause concerns. Every move raises the danger of discrimination among sects").

[188] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334–40 (1987).

[189] Lupu, *Why Congress Was Wrong*, *supra* note 187, at 809.

[190] *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 704 (1994); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989); *see also* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (invalidating state statute mandating that employees be excused from working on their Sabbath).

correspondence between a Permissive Accommodation and any particular Establishment Clause disability.

In short, legislative exemptions defined in terms of religion are now justifiable only in the relatively narrow (and narrowing) range of cases in which religion suffers from Establishment Clause or other special disadvantages. Because in these areas religious organizations and individuals carry special burdens not imposed on similarly situated secular organizations and individuals, it remains consistent with constitutional principles to allow the legislature to provide special relief to religion from other, related burdens if it so chooses.

2. *Equal Protection Problems*

In the standard model of equal protection analysis, a classification scheme is upheld under the Equal Protection Clause so long as there is a rational basis for it—that is, if there is any conceivable government goal that would be at least marginally advanced by distinctions based on the classifying trait.[191] Certain bases of classification, however, are considered suspicious because they are highly improbable means of achieving any legitimate government goal.[192] For example, classifications which disadvantage individuals based upon their race are virtually always motivated by animus towards the disadvantaged racial group rather than by any legitimate government goal. A second model of equal protection doctrine thus subjects racial and other such "suspect" classifications to strict judicial scrutiny. To withstand constitutional challenge, the goal of a suspect classification must be "compelling," not just legitimate, and the classification itself must be closely, not just conceivably, related to this compelling goal—that is, "necessary" or "closely tailored" to achieving it. Virtually all suspect classifications are found to violate the Equal Protection Clause when subjected to strict scrutiny.[193]

Although invidious racial classifications have long been presumptively unconstitutional under the Equal Protection Clause,[194] until recently it was not

---

[191] *E.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical, 348 U.S. 483 (1955); Ry. Express Agency v. New York, 336 U.S. 106 (1949).

[192] *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982).

[193] *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (observing that strict scrutiny is "'strict' in theory and fatal in fact").

[194] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1879).

clear whether the same presumption applied to so-called "benign" or "remedial" racial classifications, such as affirmative action programs. In contrast to invidious racial discrimination, whose purpose is to disadvantage a minority racial class, benign or remedial racial classifications are premised on the government's desire to assist a minority racial class. After a generation of uncertainty,[195] the Supreme Court held in 1995 that benign and remedial racial classifications by both the federal and state governments are subject to so-called "strict" judicial scrutiny,[196] meaning that such classifications will be upheld under the Equal Protection Clause only if they are "narrowly tailored to further compelling governmental interests."[197] The Court suggested, however, that applying strict scrutiny to benign or remedial uses of race by government would not necessarily end in their constitutional invalidation,[198] and it recently confirmed this suggestion by upholding under strict scrutiny race-conscious procedures for admission to a state university law school.[199]

---

[195] After the issue first arose in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), several Justices consistently maintained that benign racial classifications are subject only to intermediate scrutiny—that is, such classifications do not violate the equal protection clause if they are "substantially related" to an "important" government goal. *Id.* at 359 (Brennan, J., joined by White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part); *see also* Wygant v. Bd. of Educ., 476 U.S. 267, 301–02 (1986) (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 518–19 (1980) (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment). Although in 1989, a majority of the Justices apparently held that benign racial classifications by *state* governments are subject to strict scrutiny, see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White, & Kennedy, JJ.); *id.* at 520 (Scalia, J., concurring in the judgment) ("I agree . . . with Justice O'Conner's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'"), the very next term the Court held that use of such classifications by the federal government triggered only intermediate scrutiny, see Metro Broad., Inc. v. FCC, 497 U.S. 547, 564–65 (1990).

[196] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting*, 497 U.S. at 547) ("[W]e hold today that all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

[197] *Id.* at 227.

[198] *Id.* at 237 (disavowing that "strict scrutiny is 'strict in theory, but fatal in fact,'" and suggesting that "pervasive, systematic, and obstinate discriminatory conduct" might justify remedial racial classification) (citing Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment); United States v. Paradise, 480 U.S. 149, 167 (1987) (Brennan, J., plurality opinion)); *see also* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1045 (1979) (arguing that benign racial preferences that satisfy intermediate scrutiny should satisfy strict scrutiny as well).

[199] Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (holding that state-sponsored law school's consideration of an applicant's race as one competitive factor among many others in the admissions process was narrowly tailored to the school's compelling interest in achieving a diverse student body).

The Equal Protection Clause presents a doctrinal complication for Permissive Accommodations. As I have indicated, government classifications that disadvantage religion have long been considered illegitimate under the Equal Protection Clause.[200] Although classifications that assist religion have not been thought to raise constitutional issues outside of the Establishment Clause, the new equal protection doctrine that subjects even benign and remedial racial classifications to strict scrutiny suggests that religiously defined legislative exemptions similarly constitute a suspect classification that is presumptively invalid under the Equal Protection Clause. The Court may well find that compensating for special disabilities imposed on religion by the Establishment Clause,[201] like achievement of a diverse student body, constitutes a government interest that is sufficiently compelling to satisfy strict scrutiny under the Equal Protection Clause.[202] In light of the Court's constitutional invalidation of formulaic and otherwise rigid racial preferences when used by government in the absence of prior unconstitutional discrimination, it is questionable that the Court would uphold blanket government exemptions restricted to religious groups and individuals, at least when such exemptions are not required by the Free Exercise Clause. In the absence of a religious disability or the need to correct for religious discrimination, then, legislative exemptions for religious practices would appear to be vulnerable to invalidation under the Equal Protection Clause.

VI. ATTITUDES AND BACKGROUND THAT AFFECT INTERPRETATION OF LAWS

Three current trends exert significant influence on the interpretation and implementation of religious freedom laws in the United States: the persistence of controversies posed by judicial review of executive and congressional action, the recent revitalization of judicially enforced federalism norms, and the loss by religion of a unique social and cultural status at a time when equality rationales predominate over liberty rationales in the development of contemporary constitutional doctrine.

---

[200] *See* discussion *supra* Part II.B.

[201] *See* discussion *supra* Part VI.C.2.

[202] *See* Gedicks, *The Normalized Free Exercise Clause*, *supra* note 144, at 100 ("Although classifications that assist religion have not traditionally been thought to raise constitutional issues outside of the Establishment Clause, the new equal protection doctrine that subjects even benign racial classifications to strict scrutiny suggests that religiously defined legislative exemptions violate the Equal Protection Clause, at least when they do not compensate for an Establishment Clause or other special disability.").

A. The Persistent Question of Judicial Power

From the beginning, politicians, judges, and scholars in the United States have argued about the limits of judicial power under the Constitution. Barely a decade after the founding, Federalists and Republicans squared off in bitter conflict over the extent to which the will of the Republican electorate could be subverted by the unelected and life-tenured judges of the Federalist judiciary. As Professor Friedman has described this period, "[b]ehind every act of Federalist judges was seen a conspiracy to deprive the people of power. The Federalists, for their part, saw the judiciary as the sole bulwark against a leveling democracy."[203]

Over the years, the practice of judicial review has come in for particular criticism. Its legitimacy confirmed by Chief Justice Marshall's brilliant feat of misdirection in *Marbury v. Madison*,[204] judicial review refers to the invalidation by federal courts of federal and state legislative and executive action when found to be inconsistent with the Constitution. "The root difficulty," observed Professor Bickel, "is that judicial review is a counter-majoritarian force in our system .... [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [o]n behalf of the prevailing majority, but against it."[205]

Conceding that the "complexities and perplexities" of liberal democracy frequently frustrate popular will as constituted at any given political moment, Bickel nevertheless concluded that one cannot blink the "essential reality that judicial review is a deviant institution in the American democracy," because it entails the frustration of popular will through the intervention of unelected federal judges.[206] In American jurisprudence, then, the "countermajoritarian difficulty" has come to refer to "the problem of reconciling judicial review

---

[203] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 358 (1998) [hereinafter Friedman, *Judicial Supremacy*]; *see also* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 928–29 (1978) ("One [party] sought to resolve all issues according to the will of the people and the other sought to resolve them according to fixed principles of law.").

[204] 5 U.S. (1 Cranch) 137 (1803); *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816) (holding that federal judiciary possesses constitutional power to review the constitutionality of state court judgments).

[205] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1962).

[206] *Id.* at 18; *see also* Rosenfeld, *supra* note 48, at 1311 ("There is a long-standing tradition that conceives institutional legitimacy and political justice in terms of consent.").

with popular governance in a democratic society,"[207] and "countermajoritarian criticism" to "a challenge to the legitimacy or propriety of judicial review on the grounds that it is inconsistent with the will of the *people*, or a majority of the people, whose will, it is implied, should be sovereign in a democracy."[208]

Although countermajoritarian criticism has been around since the founding era, the countermajoritarian difficulty has been a peculiar preoccupation of the twentieth century.[209] At the beginning of the century, political progressives criticized a conservative Supreme Court for invalidating federal and state laws in the name of "freedom of contract" and other unenumerated rights.[210] By the latter part of the century, the political roles had reversed, and conservatives were attacking the Court for invalidating laws in the name of a different set of equally unenumerated rights.[211] The pendulum swung yet again in the early twenty-first century, with liberal criticism of the Court's intervention in the Presidential election of 2000, and its growing number of decisions invalidating

---

[207] Friedman, *Judicial Supremacy*, *supra* note 203, at 334–35.

[208] *Id.* at 354.

[209] *Id.* at 340, 344–46; *see also* Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1, 21–22 (2000) (observing that discussions of judicial activism are "an omnipresent component of constitutional culture in North America," and that "discussions of the 'counter-majoritarian problem' are an intrinsic component of the Western political culture," in which "[c]onstitutional scholars endlessly agonize over the limits of intervention of non-elected judges into the constitution-making processes.").

[210] *E.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); *see* Lochner v. New York, 198 U.S. 45, 57–58 (1905) (striking down state maximum-hour legislation as infringing upon the natural right of an individual to be "free in his person and in his power to contract in relation to his own labor"); Allgeyer v. Louisiana, 165 U.S. 578, 590 (1897). The Court construed the Due Process Clause of the Fourteenth Amendment as protecting

> not only the right of the citizen to be free from the mere physical restraint of his person, . . . [but also] the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id.

[211] *E.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 110–26 (1990) (cataloguing the interpretive excesses of the Warren and Burger Courts); REX E. LEE, A LAWYER LOOKS AT THE CONSTITUTION 188 (1981):

> [The privacy cases] and the abortion cases represent a resurrection of *Lochner* because they vest in the judiciary the license to roam at will through the territory of legislative policymaking. If an unmentioned constitutional right can be pieced together by judiciary out of bits and scraps that bear some resemblance to a variety of other provisions in the Constitution, then there is little limit to the extent to which judges can substitute their own judgment for that of the legislature.

Id.

federal laws in the name of unenumerated limits on congressional power and other principles of federalism not appearing in the constitutional text.[212] Among other things, both critiques emphasized the need for the unelected, life-tenured federal judiciary generally to defer to the will of democratic majorities reflected in laws enacted by Congress and the state legislatures, particularly in the absence of any clear warrant in the constitutional text for invalidating such laws.[213]

By the 1970s, "judicial activism" had become a short-hand criticism of the tendency of federal judges to interpret enumerated constitutional rights too broadly, and wholly to create unenumerated rights, as justifications for invalidating laws enacted by Congress and the state legislatures. Today's

---

[212] Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2000) (observing that the Eleventh Amendment applies to bar lawsuits by citizens against their own states, even though "by its terms the Amendment applies only to suits against a State by citizens of another State . . . ."); Bush v. Gore, 531 U.S. 98, 109 (2000) (invalidating state recount because of lack of uniform standards for hand-counting ballots, but limiting that holding "to the present circumstances . . . ."); Alden v. Maine, 527 U.S. 706, 728 (1999) (holding that the "structure of the original Constitution" prohibits Congress from subjecting the states to suits for money damages in state court if such suits would be barred by the Eleventh Amendment in federal court); Printz v. United States, 521 U.S. 898, 924 n.13 (1997) (observing that a constitutional system of "dual sovereignty is reflected in numerous constitutional provisions . . . ."); New York v. United States, 505 U.S. 144, 156–57 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself . . . . Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002) (holding that a state could not be subjected to litigation before a federal administrative agency based on principles of constitutional structure); Nat'l League of Cities v. Usery, 426 U.S. 833, 843 (1976) ("The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 29 (2004) (arguing that "because neither the States' abstract dignity" that the Court defends in its Eleventh Amendment decisions, nor the "immunity that is thought to result from it, is obviously required by or described in the relevant constitutional text, this theme has opened the Court up to perhaps its most formidable criticism").

[213] *See, e.g.*, BORK, *supra* note 211, at 8–9 (criticizing Supreme Court decisions approving racial and gender-based affirmative action, abortion rights, restrictions on the death penalty, on the ground that "under the Constitution, these are questions left for the people and their elected representatives, not for courts, to decide."); *id.* at 66 (criticizing the Court's fundamental rights/equal protection doctrine, under which the Court identifies and enforces rights "without guidance from any written law. This is indistinguishable from a power to say what the natural law is and, in addition, to assume the power to enforce the judge's version of that natural law against the people's elected representatives."); *see also* Thayer, *supra* note 210, at 150 (arguing that to avoid encroaching upon legislative and congressional power and prerogatives, federal courts exercising the power of constitutional review must not decide "the true meaning of the constitution, but [merely] whether legislation is sustainable or not.") (emphasis removed).

conservatives condemn "activist judges" rather than "judicial activism," but the intended meaning is the same.[214]

One conservative strategy for curbing what has been viewed as unconstrained constitutional adjudication by federal courts is to insist on formalism in constitutional adjudication.[215] The formalist move has taken several forms. The most well-known is that of original intent jurisprudence or "originalism," which presumes that the constitutional text contains an objective, stable, and discoverable historical meaning that can function as a fixed rule of decision in constitutional controversies.[216] Political conservatives argue that originalism is the only interpretive methodology that treats the Constitution as law, that is consistent with democratic rule, and that effectively prevents judges from grafting their personal values onto the Constitution.[217] Another manifestation of the formalist move is the conservative attack on ad hoc balancing—perhaps the signature constitutional methodology of the Warren Court—whereby intrusions upon individual rights committed by government laws or actions are "balanced" against the government's interests in enforcing such laws or taking such actions.[218] In place of balancing, conservatives seek to impose on federal judges categorical rules which, they

---

[214] *See, e.g.*, Ruth Marcus, *Booting the Bench: There's new ferocity in talk of firing activist judges*, Wash. Post, Apr. 11, 2005, at A19 (referring to judges who "have been busying themselves, as critics see it, with promoting same-sex marriage and censoring the Ten Commandments," and who "'have decided to to off on their own tangent and disobey statutes of the United States of America'") (quoting Sen. Rick Santorum (R-Pa.)).

[215] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988). As a general jurisprudential matter, "formalism" encompasses "the concept of decisionmaking according to *rule*. Formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account." *Id.*

[216] *See, e.g.*, Peter J. Smith, *The Sources of Federalism: Federalists, Anti-Federalists, and the Court's Quest for Original Meaning*, GEO. WASH. U.L. SCH. PUB. L. & LEGAL THEORY WORKING PAPER NO. 70, at 13–14, *available at* http://ssrn.com/abstract=436583 (last visited Nov. 1, 2004) ("Originalism is a theory of constitutional interpretation that assigns dispositive weight to the original understanding of the Constitution or the constitutional provision at issue. Originalism thus requires that a provision of the Constitution be interpreted as it was understood when it was drafted and ratified, not according to the different meaning that subsequent generations have ascribed to it.").

[217] *See, e.g.*, SCALIA, *Common-Law Courts*, *supra* note 50, at 49 (criticizing as antidemocratic the nonoriginalist argument that flexibility in constitutional interpretation is necessary to adapt the Constitution to societal change); *see also* Smith, *supra* note 216, at 16–18 (providing a succinct summary and review of these arguments).

[218] *See generally* Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

argue, constrain the personal ideological preferences of individual (liberal) judges.[219]

The argument for formalism ignores a multitude of problems. With respect to balancing, formalism ignores that interest-balancing avoids the injustices in individual cases to which rigid adherence to "the rules laid down" inevitably leads. Indeed, formalism in constitutional interpretation seems peculiarly ill-suited to a common law country like the United States, in which judges generally rely on the authority of history, tradition, and precedent to decide cases on the basis of practical wisdom rather than deductive logic.[220]

With respect to originalism, practical difficulties include ascertaining and applying the substantive as well as the semantic understanding of a constitutional provision in a way that operates to constrain contemporary judges.[221] Originalism also entails the difficulty, if not the impossibility, of accurately ascertaining the meaning of texts and events anchored in the distant past, of restating the original understanding in such a way that it is both true to history and relevant to contemporary issues, and of determining how to apply the original understanding to contemporary situations which the founding generation did not even imagine.[222] To the extent that countermajoritarian arguments are directed at the judiciary's articulation of unenumerated constitutional rights through, for example, expansive interpretations of the Due

---

[219] *See, e.g.*, BORK, *supra* note 211, at 143–45, 155, 262–65, 351–55; *see also* Rosenfeld, *supra* note 48, at 1313, 1334 (observing that this version of countermajoritarian argument implicitly relies on the classical liberal preference for the "rule of law" against the "rule of men," by casting formalist constitutional rules in the ostensibly principled former role, and activist judges in the allegedly arbitrary latter one).

[220] *Compare* Rosenfeld, *supra* note 48, at 1336 (arguing that the formalist account of the rule of law is undermined in the common law tradition by "the tension between the need for legal certainty and predictability and the common law's experimental and incremental approach," and by the "great latitude enjoyed by common law judges prone to blurring the distinction between law making and judicial interpretation."), *with* SCALIA, *Common-Law Courts*, *supra* note 50, at 39 (criticizing the common law mentality as recognizing no boundaries on the extent to which judges may inject their personal preferences into the process of constitutional interpretation).

[221] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 216 (1980) ("What of instances where the adopters' substantive intent was indeterminate—where even if they had adverted to a proposed application they would not have been certain how the clause should apply? Here it is plausible that—if they *had* a determinate interpretive intent—they intended to delegate to future decisionmakers the authority to apply the clause in light of the general principles underlying it.").

[222] *Id.* at 218 (arguing that an originalist must "immerse herself in the world of the adopters to try to understand constitutional concepts and values from their perspective. . . . ascertain the adopters' interpretive intent and the intended scope of the provision in question. . . . [and] 'translate' the adopters' concepts and intentions into our time and apply them to situations that the adopters did not foresee."); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 11–41 (1980) (arguing that a "clause-bound interpretivism" is impossible).

Process Clauses, such arguments ignore the long common law tradition of recognizing natural and "fundamental" rights against government, a tradition codified in state "law of the land" as well as the federal Due Process Clauses.[223] Open-textured language in the provisions like the Due Process Clauses seems to invite, if not altogether to require, judicial construction of unenumerated rights.[224]

More fundamentally, the conclusion that judicial review is "deviant" ignores the rights-based critiques of the "tyranny of the majority," which maintain that the Western political ideal is not "democracy" *simpliciter*, but "liberal" or "constitutional" democracy, that is, democratic rule limited by judicially enforced protection of human rights. In constitutional democracy, judicial examination of legislation and other majoritarian actions to ensure constitutionality is not deviant, but indispensable.

Finally, it is doubtful that even the most conscientious originalist judge can construct from such indeterminate and open-textured provisions stable and specific rules of decision that are sufficient to decide concrete cases.[225] It is

---

[223] *Compare* JOHN ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY (2003) (tracing the historical basis for the argument that the Due Process Clauses of the Fifth and Fourteenth Amendments and "law of the land" clauses of state constitutions referred to judicial recognition and enforcement of natural and fundamental rights and powers at common law) *with* SCALIA, *Common-Law Courts*, *supra* note 50, at 24 ("[I]t may or may not be a good thing to guarantee additional liberties [by means of the Due Process Clause] but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process.").

[224] U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* amend. VIII (prohibiting infliction of "cruel and unusual punishments"); *id.* amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."); *id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[225] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996) ("Many [constitutional] clauses are drafted in exceedingly abstract moral language . . . According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power."); *see also* Rosenfeld, *supra* note 48, at 1339:

> Many key constitutional provisions, such as the "due process" and the "equal protection" guarantees contained in the American Constitution are stated generally and at a high level of abstraction. This allows for a wide range of plausible interpretations, and common law trained judges, who have dealt with such constitutional provisions, have widely differed in their interpretations, making these provisions nearly as unpredictable as constantly evolving common law standards.

equally unclear that the original meaning extracted from even a relatively specific constitutional text possesses the objective character required for the bloodless resolution of constitutional controversies that formalism exalts.[226]

The pre-*Smith* religious exemption doctrine was an example of the activist Warren Court balancing methodology criticized by formalists. The exemption doctrine emerged in the 1960s, in the midst of a revolutionary expansion of constitutional liberties protected by the Speech and Press Clauses of the First Amendment, the Due Process Clause of the Fifth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[227] The doctrine empowered courts to excuse individuals from complying with a law upon their showing that the law burdened sincere religious practices, unless the government could show in its turn that mandating uniform obedience to the law was required by a compelling interest that could not be protected in any less intrusive manner. In terms of balancing methodology, the exemption doctrine presumed, at least in theory, that the right to the free exercise of religion burdened by a law nearly always outweighed the government's legitimate interests in uniform enforcement, although in practice the Court rejected most exemption claims.[228] As the *Smith* majority characterized the matter, the exemption doctrine permitted any person to obtain disposition to disobey the law, to become a "law unto himself," merely by asserting that a particular government action burdened that person's religious beliefs or practices, even though the burden was incidental rather than intentional.[229] The exemption doctrine permits, indeed, it requires, judges to weigh legislative

---

Id.; ELY, *supra* note 222, at 11–41 (arguing that the "open-textured" provisions of the Constitution make a "clause-bound" interpretivism impossible); James E. Fleming, *Fidelity, Basic Liberties, and the Specter of* Lochner, 41 WM. & MARY L. REV. 147, 153 (1999) (arguing that the Constitution sets forth "abstract moral principles" rather than "historical rules and practices").

[226] *See, e.g.*, Frederick Mark Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 VAND. L. REV. 613 (1997) (arguing on the basis of Gadamerian hermeneutics that recovery of a stable and objective original meaning is impossible in principle); *see also* Brest, *supra* note 221, at 221-22 ("There is a hermeneutic tradition . . . which holds that we can never understand the past in its own terms, free from our prejudices or preconceptions. We are hopelessly imprisoned in our own world-views; we can shed some preconceptions only to adopt others, with no reason to believe that they are the conceptions of the different society that we are trying to understand."); Smith, *supra* note 216, at 19–22 (providing a succinct summary and review of the various criticisms of originalism).

[227] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that in balancing the state's interest in denying exemptions for Sabbatarians against the claimant's interest in religious liberty, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'") (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[228] *See, e.g.*, *Thomas*, 323 U.S. at 516.

[229] *See Smith*, 494 U.S. at 885.

and regulatory interests in uniform enforcement against intrusions upon individual religious liberty resulting from enforcement: a task that properly belongs to the legislature, and not the judiciary.[230] The reach of the doctrine might have been limited by its application only to significant burdens on central religious beliefs, or by a rigorous inquiry into the sincerity of the claimant, but these would have required the Supreme Court to make theological judgments about the importance of particular religious beliefs and practices in the lives of believers, an equally unsatisfactory result.[231]

The *Smith* decision, then, can be understood as an instance of conservative reaction to the countermajoritarian difficulty.[232] As the number of political conservatives appointed to the Court mounted, support for the exemption doctrine waned. The Court repeatedly revisited the exemption doctrine during the 1980s,[233] until it finally abandoned the doctrine in *Smith* in 1990.[234] The majority opinion in *Smith* was written by Justice Scalia, an avowed opponent of both broad readings of individual rights[235] and balancing methodology,[236] and a champion of legislative prerogative.[237] So long as political conservatives hold the balance of power on the Supreme Court, the religious exemption doctrine is unlikely to return.

---

[230] *Id.* at 887.

[231] *Id.* at 890.

[232] *See, e.g.*, McConnell, *supra* note 58, at 190–91. McConnell noted that "[t]he real logic of the *Smith* decision has to do with institutional roles":

> *Smith* indicates that it is a decision about institutional arrangements more than about substantive merits. A significant portion of the Court's justification focuses on the difficulties that courts encounter in balancing interests in the fashion required by the pre-*Smith* law. The opinion suggests that only the political branches possess the requisite competence and authority to make these judgments . . . . [I]n other words, the *Smith* Court consciously decided to give less than full protection to free exercise in order to protect legislative prerogative.

Id. (quoting Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993)).

[233] *See, e.g.*, Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963) (Free Exercise Clause precludes denial of unemployment benefits to person who leaves or loses employment for reasons of religious conscience).

[234] 494 U.S. at 872.

[235] *E.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (arguing that individual constitutional rights should be articulated and applied at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

[236] *E.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 579–80 (1991) (Scalia, J., concurring) (rejecting the proposition that conduct regulations must be justified by an "important or substantial" government interest).

[237] *E.g.*, ANTONIN SCALIA, *Response*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION, *supra* note 50, at 129–33 (disputing that the Anglo-American common law tradition included judicial power to overrule or to ignore acts of Parliament or colonial or state legislatures).

Formalism may also exert a tempering influence on the development of post-*Smith* free exercise doctrine. The principal question posed to judges by the expansive interpretation of "general applicability" is whether religious conduct that is not exempted from a law would, if exempted, undermine the purposes of the law to the same extent as already exempt secular conduct.[238] This necessitates a kind of judicial balancing: although the judge does not directly balance the religious liberty interest against the state regulatory interest, he or she must still assess the strength of the government interest, as implied by the number of secular exemptions, as well as weigh the extent to which exempted secular interests resemble nonexempt religious interests.[239] Since avoidance of balancing was one of the justifications for *Smith*'s abandonment of religious exemptions and its revival of formal equality, courts may be reticent to embrace expansive constructions of general applicability in applying the General Rule.

B. *The Return of Judicially Enforced Federalism*

It is a commonplace that one of the innovative aspects of the U.S. Constitution is its strategy of protecting individual liberty by dividing national sovereignty between the national government and the states.[240] Under the so-called doctrine of "limited" or "enumerated" powers, the Constitution invests the national government with supreme governing authority pursuant to the Supremacy Clause,[241] but limits the exercise of that authority by restricting Congress to the exercise of those powers specifically "enumerated" in the Constitution as having been delegated to Congress,[242] such as the power to regulate interstate commerce.[243] The Tenth Amendment confirms that the

---

[238] *See* discussion *supra* Part VI.A.2.

[239] *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J. L. & PUB. POL'Y 627, 664 (2003) ("Judges still balance factors after *Smith* just as much as they did before it—that is evident every time a judge tries to determine whether a religious exception does as much harm to the legislature's rule as an existing secular exception.").

[240] *See, e.g.*, Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 316 (2003).

[241] U.S. CONST. art. VI, cl. 2.

[242] U.S. CONST. art. I, § 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States . . .") (emphasis added). The enumerated powers doctrine has traditionally been thought to have less force in the context of Executive powers, because the Constitution's allocation of power to the President is not by its terms limited to the powers expressly enumerated in Article II, as Congress's power is expressly limited by the powers enumerated in Article I. *See id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

[243] *Id.* art. I., § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .").

states retained all sovereign powers not enumerated in the Constitution as having been delegated to the national government or prohibited to the states.[244]

The enumerated powers doctrine was compromised virtually from the outset. The Framers included among the enumerated powers of Congress the additional power "[t]o make all Laws which shall be necessary and proper" for exercise of the other powers delegated to Congress, as well as the powers delegated to other officers and branches of the national government.[245] Another formative opinion by Chief Justice Marshall in the early nineteenth century construed this Necessary and Proper Clause broadly, as having granted to Congress the power to take any action that might reasonably be thought "helpful" or "convenient" to the exercise of one of its enumerated powers, rather than narrowly, as the power to take only such actions as would be absolutely necessary to the exercise of such a power.[246] If, in addition to its expressly enumerated powers, Congress may properly exercise all unenumerated powers that are merely useful—rather than necessary—to the exercise of the enumerated ones, then Congress's power extends in fact far beyond the boundaries set in theory by the enumerated powers doctrine.[247] The Supreme Court's federalism decisions over the centuries since ratification reflect this tension between the enumerated powers doctrine and the broad construction of the Necessary and Proper Clause, having oscillated between judicial enforcement of strict limitations on national power, on the one hand, and judicial abdication of such enforcement to the political branches, on the other.[248]

---

[244] *Id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* THE FEDERALIST No. 45 (James Madison).

[245] U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.").

[246] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[247] *See, e.g.*, Robert F. Nagel, *Judicial Power and the Restoration of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 55 (2001) ("[H]ow can the Court convincingly explain that a statute is beyond the constitutional power of Congress when the Constitution itself, making no distinction between direct and indirect consequences, expressly allows control over any activity thought to be necessary and proper for the regulation of commerce?").

[248] *See id.* at 55 (arguing that the federalism doctrine is necessarily incoherent because the Constitution requires the Court to pursue the mutually exclusive objectives of limiting congressional power pursuant to the enumerated powers theory and expanding congressional power under the Necessary and Proper Clause); *see also* Lupu, *Why Congress Was Wrong*, *supra* note 189, at 812 (observing that judicial review and the Necessary and Proper Clause "have always been in quiet tension with one another. *Marbury* declares that the [Supreme] Court has the power to determine the meaning of the Constitution as law. *McCulloch* declares that

The largest number of federalism disputes between the national government and the states have focused on the proper limits of congressional exercises of power under the Commerce Clause, and disputes over the reach of the commerce power thus provide an accurate illustration of broader federalism themes and questions through constitutional history. The first constructions of the commerce power by the Supreme Court were actually quite broad. A dictum in yet another of Chief Justice Marshall's influential decisions stated that the commerce power is both plenary and exclusive to Congress.[249]

Early Congresses made little affirmative use of this broad construction of the commerce power. Most of the early questions surrounding the commerce power involved, not the constitutionality of *congressional* action under the Commerce Clause, but rather the constitutionality of *state* laws that burdened interstate commercial activities that Congress had not seen fit to regulate.[250] Under the so-called "dormant" commerce power,[251] early decisions of the Supreme Court held that states cannot impose excessive or undue burdens on interstate commerce even when their laws do not conflict with federal law because Congress has not acted in the area.[252]

---

the Congress, not the Court, possesses enormous discretion to choose the means necessary to bring about the ends entrusted to the Congress by the Constitution.").

249 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 196–97 (1824). In *Gibbons*, the Court held that the commerce power,

> like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government . . . .

Id.; *see also* TRIBE 2000, *supra* note 45, § 5-4, at 808 (reading *Gibbons* as having argued that "congressional power to regulate 'commercial intercourse' extended to all commercial activity having any interstate component or impact—however indirect . . . This power would be plenary: absolute within its sphere, subject only to the Constitution's affirmative prohibitions on the exercise of federal authority.").

250 *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 133, 355 (4th ed. 2000).

251 *See* TRIBE 2000, *supra* note 45, § 2-8, at 203, 1030. The dormant commerce power is Congress's power under the Commerce Clause to protect interstate commerce from burdensome state regulation by wholly or partially prohibiting state regulation of interstate commerce. An especially strong description of the dormant commerce power was set forth by Justice Johnson in *Gibbons*, 22 U.S. at 227. In a concurring opinion, Justice Johnson stated, "since the power to prescribe the limits to [the commerce power] necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon." *Id.*

252 *See, e.g.*, Wilson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) (holding that state law authorizing construction of bridge across navigable stream did not violate the Commerce Clause because the

It was not until the widespread industrialization of the American economy in the late nineteenth and early twentieth centuries, with its accompanying social dislocations,[253] that Congress began regularly to assert its affirmative power to regulate interstate commerce.[254] The question of how to protect the sovereign prerogatives of the states against aggressive congressional assertions of this power took on additional urgency with the abolishment in 1913 of state legislative appointment of senators in favor of their popular election.[255] In a development that paralleled its elaboration of substantive rights under the Due Process Clause to counter progressive social welfare legislation, the Supreme Court during this period developed a theory of "dual federalism" that sought to restrict the encroachment of the national government on the reserved powers of the states by positing separate spheres of sovereignty for each of the national government and the states, and assigning regulatory power over various private activities wholly to one sphere or the other.[256]

With respect to the Commerce Clause, the Court sought to confine the reach of the commerce power under dual federalism by restricting the definition of "commerce" to the interstate marketing of finished goods. Under this approach, manufacturing, mining, agriculture, and other production

law was not "repugnant to the [congressional] power to regulate commerce in its dormant state, or . . . in conflict with any [federal] law passed on the subject."); *Gibbons*, 22 U.S. at 209–11 (arguing that the commerce power is exclusive to Congress, but that the states may regulate commerce incidentally pursuant to the exercise of their reserved powers, such as the taxing and police powers, so long as these do not excessively burden interstate commerce or conflict with affirmative congressional regulation of such commerce); *see also* Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851) (holding that Congress's commerce power is exclusive and occupies the field when the objects of the power "are in their nature national, or admit only of one uniform system, or plan of regulation," but further providing that the states may regulate commerce concurrently with the national government under their reserved powers where the objects of state regulation are essentially local).

[253] AMERICAN CONSTITUTIONAL HISTORY, *supra* note 70, at 175 (observing that one of the common denominators of public policy during the Progressive era was the "belief that the time had come to deal with some of the more chaotic and unjust aspects of a mature industrial society" and to "bring public policy (and the nation's political and governing institutions) into closer accord with new social and economic realities").

[254] *See* BREST ET AL., *supra* note 250, at 356–57.

[255] U.S. CONST. amend. XVII, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .").

[256] TRIBE 2000, *supra* note 45, § 5-11, at 862 (defining "dual federalism" as a theory of federalism under which each of the national and state governments was thought to occupy an "independent, inviolable, and fully co-equal sphere[]" with neither government having the power to intrude upon the sphere occupied by the other); AMERICAN CONSTITUTIONAL HISTORY, *supra* note 70, at 235 (noting that dual federalism "postulated the existence of rigid constitutional boundaries separating appropriate federal activities from those reserved exclusively to the states").

activities were placed beyond the reach of Congress's commerce power.[257] Although the products, ore, and crops produced by these activities usually required tools, supplies, and materials that were purchased in interstate markets, that were often bound for interstate markets, or that were a significant component of the national economy, the Court deemed such activities a merely "indirect" influence on interstate commerce that was consequently beyond Congress's power to regulate under dual federalism.[258]

This period also saw references to the Tenth Amendment as an independent check on the exercise of enumerated congressional powers. By its terms, the Tenth Amendment merely confirms the enumerated powers doctrine—that is, it emphasizes that all powers not delegated to the national government by the Constitution are retained by the states.[259] The Amendment has been read, however, as an expression of a broader understanding of state sovereignty under the Constitution, pursuant to which the states do not merely possess the residuum of powers not delegated to the national government, but also the power affirmatively to resist encroachments on state sovereignty and prerogatives by the national government's exercise of its enumerated powers.[260] During its dual federalism period, the Court suggested the second, broader construction under which the Tenth Amendment implies that the states possess an independent check on the otherwise proper exercise of

[257] *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 301–04 (1936) (holding that the commerce power does not extend to mining and other production, but only to trade in the ore and goods thereby produced); United States v. E.C. Knight Co., 156 U.S. 1, 14–15 (1895) (holding that the commerce power does not extend to the manufacture of goods, but only to trade in such goods following their manufacture).

[258] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (holding that Congress may not use the commerce power to regulate indirectly activities that it lacks the power to regulate directly); Bailey v. Drexel Furniture Co., 259 U.S. 20, 39–40 (1922) (invalidating use of taxing power to regulate the use of child labor, as an attempt to regulate indirectly that which Congress lacked the power to regulate directly).

[259] *See, e.g.*, United States v. Darby, 312 U.S. 100, 124 (1941) ("The [Tenth] amendment states but a truism that all is retained which has not been surrendered."); *see also* TRIBE 2000, *supra* note 45, § 5-11, at 860 (observing that the Court generally treated the Tenth Amendment, "not as expressing an independent constraint on federal power, but simply as stating the corollary to the proposition that federal power is indeed limited.").

[260] *E.g.*, Fry v. United States, 421 U.S. 542, 547–48 n.7 (1975) ("The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."); *see* Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI., 158, 160–61 (2001) ("A particularly robust scheme of state sovereignty" would authorize federal courts "to invalidate a federal statute that was unsupported by any power constitutionally granted to the national government or that was supported by some such power but nonetheless violated a state sovereignty constraint."); *see also* Nagel, *supra* note 247, at 56 (observing that the founders "went so far as to envision the possibility of armed encounters between the national army and state militias") (citing THE FEDERALIST No. 46 (James Madison)).

congressional powers.[261] Under this construction, for example, the Tenth Amendment is evidence of an implied limit on Congress's exercise of the commerce power, even in cases in which such exercise falls well within the recognized boundaries of the commerce power or some other enumerated congressional power.[262]

Like the Court's use of the Due Process Clause to invalid state social welfare legislation for encroachment on unenumerated substantive rights, its narrow construction of the Commerce Clause and its suggestion of independent limits on congressional power under the Tenth Amendment decisions generated strong and persistent criticism from Congress, which viewed the Court in all these contexts has having usurped state and congressional prerogatives in the guise of interpreting the Constitution. This criticism reached its height during the Great Depression in the 1930s, as the Court repeatedly struck down as beyond Congress's commerce power federal statutory programs designed to stimulate production and employment and otherwise to alleviate the desperate economic circumstances in which the United States found itself during these times.[263] Under tremendous political pressure,[264] the Court finally abandoned its formalistic Commerce Clause and nascent Tenth Amendment jurisprudence in 1937, together with the dual federalism theory which underwrote them.[265]

From 1937 to 1995, the Court effectively abdicated judicial review of congressional exercises of the commerce power, leaving the task of policing

---

[261] *See e.g.*, Coyle v. Oklahoma, 221 U.S. 559 (1911).

[262] *See* TRIBE 2000, *supra* note 45, § 5-11, at 861; *see also* Nat'l League of Cities v. Usery, 426 U.S. 833, 845 (1976) ("We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[263] *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (Bituminous Coal Conservation Act); A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935) (FTC Code of Fair Competition for Live Poultry Industry for New York City); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (National Industrial Recovery Act); *see* AMERICAN CONSTITUTIONAL HISTORY, *supra* note 70, at 232–33.

[264] *See* AMERICAN CONSTITUTIONAL HISTORY, *supra* note 70, at 241 (describing President Roosevelt's "Court-packing" plan).

[265] *E.g.*, Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (upholding federal tax incentive for creation of state unemployment compensation funds against Tenth Amendment challenge); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 22, 31 (1937) (defining "interstate commerce" as interstate traffic, transactions, transportation, and communication, and "affecting [interstate] commerce" as being in the flow of commerce among the states or "burdening or obstructing [interstate] commerce" or such flow, and upholding power of Congress to regulate labor relations under the Commerce Clause because strikes and industrial strife exert a serious effect on interstate commerce); *see* TRIBE 2000, *supra* note 45, § 5-11, at 862–63; AMERICAN CONSTITUTIONAL HISTORY, *supra* note 70, at 233, 235.

the boundaries of the Commerce Clause and safeguarding the prerogatives of the states entirely to the political process.[266] The Court repeatedly held that Congress could regulate (a) any use of the channels of interstate commerce, such as interstate highways, navigable rivers, and telephone and other electronic communications lines;[267] (b) any instrumentality of interstate commerce, such as a corporation that uses the channels of interstate commerce, and any person or thing that moves in interstate commerce;[268] and, most controversially, (c) any activity whose cumulative effects might conceivably affect interstate commerce.[269] The Court so routinely deferred to congressional findings that a federal law substantially affected interstate commerce that the Court largely ceased to find facts at all in this regard, relying instead on conclusory and unsupported assertions of such an effect.[270] Given the dramatic breadth of the commerce power under these "tests," it is hardly surprising that during this period the Court failed to find a single congressional act unconstitutional under the Commerce Clause.[271]

The "substantial effects" test was particularly expansive. Because of the national breadth and interdependence of commercial markets in the mid-twentieth century,[272] the power to regulate any activity with a conceivable effect on interstate commerce, as provided by the substantial effects test, is the power to regulate virtually any activity in the United States. The substantial effects test, together with the historically broad reading of the Necessary and Proper Clause, effectively converted the commerce power into an all-purpose

---

[266] *See generally* JESSE CHOPER, THE SUPREME COURT AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

[267] *E.g.*, United States v. Darby, 312 U.S. 100 (1941) (holding that the commerce power encompasses the interstate shipment of goods, as well as the regulation of wholly intrastate activities, such as the manufacture of goods for interstate shipment, whose relationship to interstate commerce is sufficiently close that Congress must regulate them in order to effectively regulate interstate commerce).

[268] *E.g.*, Daniel v. Paul, 395 U.S. 298 (1969) (applying federal desegregation laws to private recreation area because it served interstate travelers with food that had moved in interstate commerce).

[269] *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress may penalize under the commerce power the cultivation of small amounts of wheat for personal consumption by a farmer receiving payments for non-cultivation of wheat, on ground that similar cultivation by every farmer receiving non-cultivation payments would depress demand for wheat in interstate commercial markets, and thus could conceivably effect a substantial influence on interstate commerce).

[270] *E.g.*, United States v. Lopez, 514 U.S. 549, 562 (1995) (observing that neither the Gun-Free School Zones Act nor its legislative history contained congressional findings on the extent to which gun possession in the vicinity of a school impacted interstate commerce).

[271] *See* AMERICAN CONSTITUTIONAL HISTORY, *supra* note 70, at 242–43.

[272] *See id.* at 244–45.

federal police power that enabled Congress to regulate even noncommercial activities under the Commerce Clause.[273]

The last decade has seen the revival of efforts by the Court to articulate judicially administrable limits on the commerce power, and to re-enlist the Tenth Amendment and federalism generally as additional limits on that power.[274] Although the Court has left untouched Congress's broad presumptive power to regulate the channels and instrumentalities of interstate commerce and all persons and things that move in interstate commerce,[275] it has substantially reduced the reach of the substantial effects test. The Court now insists that Congress set forth specific legislative findings that demonstrate that the activity that Congress seeks to regulate pursuant to its commerce power constitutes "economic activity" that exerts a direct and substantial effect on interstate commerce.[276] Even when Congress can

---

[273] *E.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding federal statutory prohibition on segregation in family owned restaurant because of the cumulative affect on commerce of the procurement of supplies from out-of-state by this and similar segregated restaurants, and of the artificial constriction of African American customer demand imposed by such segregation); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding federal statutory prohibition on segregation in public accommodations on ground that segregation has a disruptive affect on interstate travel by African Americans); *see Lopez*, 514 U.S. at 564 (observing that in defending an expansive view of the commerce power the dissent denied that contemporary Commerce Clause doctrine authorized a "general federal police power," but was "unable to identify any activity that the States may regulate but Congress may not."); *see* AMERICAN CONSTITUTIONAL HISTORY, *supra* note 70, at 235 (noting that during this period "three seemed to be no constitutional limitation upon the authority of Congress to regulate interstate commerce and to tax and spend on behalf of the general welfare, even where these federal efforts intruded deeply into areas of social and economic life traditionally left to the states"); *id.* at 243–44:

> Once the distinctions between interstate movement and production and between "direct" and "indirect" effects upon interstate commerce are rejected, the number of links in the chain of cause and effect becomes irrelevant. Federal power would reach to the local machine shop that repaired the chain saws that cut the trees that yielded the pulp wood that yielded the pulp that made the paper bought by the publisher to print the newspaper that circulated in interstate commerce. The size of the particular establishment or transaction also became irrelevant, for the cumulative effect of many small local activities might have a major impact upon interstate commerce.

Id.

[274] *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312–13 (1997) (noting the "[r]esurrection of judicial review in federalism cases" and its applicability to "questions concerning state sovereignty and the proper balance between the national and state governments."); *see also* Garnett, *supra* note 207, at 18–39 (providing a succinct summary and review of these developments).

[275] *See, e.g.*, *Lopez*, 514 U.S. at 558.

[276] United States v. Morrison, 529 U.S. 598, 613 (2000). In *Morrison*, the Court held that congressional creation of private right of action for sexual assault fell outside the commerce power because

> [g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic

demonstrate such a direct effect, however, the Court will nevertheless find the action beyond the commerce power if it is not economic and additionally encroaches upon areas whose regulation has traditionally been left to the states.[277] Finally, the Court has stated that a substantial effect on interstate commerce may not be demonstrated by cumulating instances and occurrences of non-economic activity which Congress seeks to regulate.[278] The substantial effects test, in other words, may be now employed only to measure the constitutionality of commerce power regulations of economic activity.

In tandem with its re-imposition of judicially enforceable limits on Congress's commerce power, the Court has also reinvigorated Tenth Amendment jurisprudence. In 1976, the Court struck down the imposition of federal wage and hour regulations on municipal employees, observing that the constitutional policy declared by the Tenth Amendment prohibits Congress from exercising power "in a fashion that would impair the States' 'ability to function effectively in a federal system.'"[279] After a brief interlude in which it appeared to have abandoned the notion of independent structural limits on federal power,[280] the Court turned to the Tenth Amendment yet again, holding in successive cases that the federalist structure of the Constitution, whose

---

> activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Id.; *Lopez*, 514 U.S. at 561 (holding that law prohibiting possession of handguns in the vicinity of a school falls outside of the commerce power because it is a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," and is not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."); *id.* at 563 (holding that specific congressional findings are necessary for a court to "evaluate the legislative judgment that the activity in question substantially affected interstate commerce even though no such substantial effect was visible to the naked eye . . . ."); *see also id.* at 565–66 ("We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process.").

[277] *Morrison*, 529 U.S. at 615 (expressing concern that expansive constructions of the commerce power would "completely obliterate the Constitution's distinction between national and local authority" permitting Congress to legislate in "areas of traditional state regulation," such as "marriage, divorce, and childrearing . . . ."); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (concluding that when congressional actions "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress" by the Commerce Clause).

[278] *Morrison*, 529 U.S. at 615 (rejecting the use of "but-for" causation to establish that a regulated activity substantially affects interstate commerce, on ground that such a weak causal theory provides no effective limits on the commerce power); *Lopez*, 514 U.S. at 567 (rejecting use of a "view of causation" that "pile[s] inference upon inference" to show a substantial effect on interstate commerce).

[279] *Nat'l League of Cities*, 426 U.S. at 852 (quoting Fry v. United States, 421 U.S. 542, 547).

[280] *Garcia*, 469 U.S. at 528 (overruling *Nat'l League of Cities*).

overriding importance is declared by the Tenth Amendment,[281] precludes Congress from imposing upon the states laws or regulations that interfere with their fundamental governing and law-making powers, even when Congress has acted within the bounds of an enumerated congressional power.[282]

The revival of federalism has influenced Religion Clause doctrine in at least two respects. First, it coincided with the move to neutrality in Religion Clause doctrine. The demise of the exemption doctrine under the Free Exercise Clause and the retreat from separationism under the Establishment Clause have together permitted "more variation, experimentation, and accommodation" of religious interests by cities and states,[283] one can hardly ignore the possibility, if not the likelihood, that the Court's concern for federalism was at least one significant influence on Religion Clause doctrine during the last generation.

Second, although *Smith* purports to approve religious exemptions when enacted by Congress or the state legislatures, congressionally mandated exemptions may violate the Court's new federalism doctrines. Federal legislation that is protective of religious free exercise frequently interferes with state powers and prerogatives. This was one of the motivations for the Court's determination that RFRA was an "incongruent" and "disproportionate" response to the infrequent occurrence of overt religious discrimination in the United States.[284] RLUIPA represents a similarly substantial intrusion on state power. Both land-use and incarceration of state-law violators have long been

281 In *New York v. United States*, 505 U.S. 144, 156–57 (1992), the Court noted:

> The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

Id.

282 Printz v. United States, 521 U.S. 898 (1997) (holding that the enumerated powers doctrine and the federalist structure of the Constitution preclude Congress from compelling state officers to enforce federal laws); New York v. United States, 505 U.S. 144 (1992) (holding that the federalist structure of the Constitution, which presupposes that Congress's enumerated powers shall be used to act upon individuals rather than upon the states, precludes Congress from compelling state legislatures to enact, to enforce, or to administer federal regulatory programs); *see also* Adler, *supra* note 260, at 163–64 (synthesizing *New York* and *Printz* as supporting the general principle that Congress may not enact federal statutes that coerce state legislative and executive officers into the performance of affirmative duties).

283 Garnett, *supra* note 212, at 24.

284 *See* City of Boerne v. Flores, 521 U.S. 507, 509 (1997).

thought the proper subject of the state police power,[285] and the regulation of prisons that detain those who have been convicted of violating state law is also one of those quintessential sovereign state functions of which the Court has been particularly solicitous under its revitalized Tenth Amendment doctrine.[286] Congress also relied on the substantial effects test under the Commerce Clause as one basis of its assertion of power to prohibit incidental burdens on religious exercise in land-use and prison contexts, though religious worship is clearly not economic activity, and many of the effects on interstate commerce stemming from governmental burdens on religious exercise appear to be less "direct" than the Court purports to require. The Court's concern for federalism, therefore, may well influence it to strike portions of RLUIPA as either beyond Congress's power under the Commerce Clause, or as an excessive intrusion upon traditional and quintessential state functions under the Tenth Amendment.[287]

3. *Equality and the Erosion of Traditional Religion*

There is little doubt that formal equality is the the dominant value in Religion Clause jurisprudence[288] and in American constitutional law generally. I have already discussed how formal equality has overtaken other values that formerly governed the Establishment and Equal Protection Clauses. Similar trends are also evident in the Speech Clause.

At the same time, the United States has seen significant alterations in the nature and influence of religion. For many years, sociologists and religious studies scholars argued that Americans would inevitably abandon religious belief in the face of epistemological challenges by history, philosophy, science, and other secular disciplines.[289] Though secular forces have indeed

---

[285] *See* Hamilton, *supra* note 240, at 335 (observing that "[l]and use law has always been a creature of state and local law." This principal has been recognized by the Supreme Court).

[286] *Id.* at 341 ("A state's sovereignty is particularly implicated where the issue is enforcement of its own criminal laws and the execution of the relevant punishment.").

[287] *See* Part III.C *supra.*

[288] For accounts of the move to equality, see Dan Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002); *see also* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 66–72 (2002).

[289] *See, e.g.*, William H. Swatos, Jr. & Kevin J. Christiano, *Secularization Theory: The Course of a Concept*, 60 SOC. OF RELIGION 209, 214 (1999) (defining "secularization theory," as the claim that, "in the face of scientific rationality, religion's influence on all aspects of life—from personal habits to social institutions—is in dramatic decline").

undermined many claims of the traditional theistic religions,[290] the "secularization hypothesis" itself proved to be false,[291] and researchers in the United States have largely abandoned it.[292]

Religious pluralism has proven far more potent than secularization in its effects on religious belief. The last half of the twentieth century saw an explosion of diversity in American religious beliefs and practices. This expansion of religious difference in the United States has been fueled by growth in a dramatically diverse range of denominations, sects, and religious communities, including new and break-off fundamentalist and evangelical denominations; so-called "Christian alternative" churches like Christian Science and the Jehovah's Witnesses; traditional African-American churches and non-indigenous African religions like the Santeria, Rastafarianism, and Voudou; eastern immigrant religions like Islam, Buddhism, the Bahai, the Sikhs, and Hinduism; new religions like Scientology and Eckankar; and so-called "New Age" spirituality.[293] As Professor Conkle has observed, "the diversity of the American religious experience is ever more extraordinary, and the diversity of thought within the traditional faiths is ever more pronounced."[294]

The pressure of radical religious pluralism is eroding the claims of the traditional denominations to ultimate or absolute truth.[295] Contemporary

---

[290] *See, e.g.*, Magarian, *supra* note 22, at 1985 ("The last two centuries have brought developments in philosophy and the natural sciences that have scattered Americans' spiritual and conscientious commitments far beyond the range of traditional, theistic beliefs.").

[291] Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 161, 192 (2003); David N. Gellner, *Studying Secularism, Practising Secularism. Anthropological Imperatives Personal Values and Professional Evaluations*, 9 SOC. ANTHROPOLOGY 337, 337 (2001).

[292] *See, e.g.*, *id.* at 160; Peter L. Berger, *Reflections on the Sociology of Religion Today*, 62 SOC. OF RELIGION 443, 444 (2001).

[293] French, *supra* note 291, at 142–43.

[294] Conkle, *supra* note 288, at 30.

[295] Swatos & Christiano, *supra* note 289, at 221:

> [E]ver-increasing pluralism does undermine the element of absolute certainty that has been claimed by at least some religions . . . competing in a marketplace-like setting, the harder it becomes to assert that any one religion contains all truth and that others must be all wrong. While it is certainly possible to make "better" or "worse" type comparisons, all-or-nothing rigidity simply does not hold up.

Id.; *see, e.g.*, Berger, *supra* note 292, at 449 ("Modernity pluralizes the lifeworlds of individuals and consequently undermines all taken-for-granted certainties.") (emphasis omitted); *see also* BARBARA HARGROVE, THE SOCIOLOGY OF RELIGION CLASSICAL AND CONTEMPORARY APPROACHES 126–27 (1979)

religious practice in the United States seems to be evolving away from its traditional focus on the means of salvation and an account of how the world is, was, and will be, towards a means of coping "with the vicissitudes of contemporary life."[296] Many Americans, for example, now "shop" for churches like they do for consumer goods, choosing one because of the personal preferences and needs that it meets, rather than the truth-claims that it makes.[297]

A related and growing phenomenon is so-called "grocery-cart religion," in which an individual assembles her own personal collection of beliefs and practices, picking and choosing from among diverse and even incompatible denominations and traditions.[298] This erosion of denominational and

---

(observing that ecumenicism was one of the first responses of Christianity to post-Christian religious pluralism).

[296] Lupu & Tuttle, *supra* note 288, at 67; *see also* HARGROVE, *supra* note 288, at 128. Hargrove noted:

> The church of historic religion held and dispensed the "means of grace" through which the individual might attain salvation and without which that salvation was in jeopardy. The sect of early modern religion had the power to certify one's status as a member of the elect and exercised the power of moral sanctions over its members. In modern religion, however, the individual is the focus and the exerciser of power. Salvation is likely to be defined in terms of "self-actualization" and religion treated as a useful tool in achieving that end.

Id.

[297] French, *supra* note 291, at 164:

> Shopping for a new church, temple, or religious affiliation is now commonplace. In the United States, a family that moves to a new town commonly shops around for the church or other religious institution that suits them best. A person might be raised Catholic, not participate in any organized religion for several years, spend a few months in a Zen monastery, and then join the local Baptist church when she settles down and marries. After ten years, when her family is relocated to another part of the country, it is by no means unusual for the family to join a different religious group once they have visited various institutions in the new town.

Id.; *see also id.* at 165 (relating the experience of a couple who reported that they "'shopped for a church like they would shop for a car, looking for something comfortable and practical.'").

[298] *Id.* at 165–66; *see also* Swatos & Christiano, *supra* note 289, at 222, 225:

> Religious (or, more broadly, ideological) pluralism clearly creates a marketplace of ideas wherein absolute claims for ultimacy are always at some degree of risk. This gives rise to a model of religious competition or marketplace, and in a double sense. Not only is there competition among religions themselves, but there is also the freedom on the part of buyers (people) to pick and choose among the ideological wares that different religions proffer. This has been referred to as "religion *à la carte*" and the result as *bricolage*.
>
> . . . .
>
> Pluralism is not only competition among multiple historic religious traditions, but it is also competition between historical religious approaches to doing better and other systems of doing better.

theological boundaries reflects the ever-increasing importance that individuals place on whether their religion helps them meet the demands of everyday life, rather than whether its teachings conform to an ultimate reality.[299]

When individual conscience and personal experience are the signal characteristic of religion, religion itself becomes increasingly difficult to distinguish from secular moralities and ideologies.[300] And when religion ceases to be a unique experience or commitment in a society that values equality, it also becomes impossible to justify exemptions that are restricted to believers.[301] To satisfy the demands of equality, such exemptions must be expanded to protect secular moral and political commitments that are comparable to personal religious experience.[302] Such an expansion of the reach of exemptions, however, threatens to make them unworkable by leaving too few people subject to the law.[303]

Id. (citations omitted); Lupu & Tuttle, *supra* note 288, at 67 ("[R]eligion is but one of many comparable experiences."); *see also* Berger, *supra* note 285, at 448 (Many religious people today "assert that they are not 'religious' at all, but are pursuing a quest for 'spirituality'. . . . Hervieu-Léger uses Claude Levi-Strauss' term '*bricolage*' to describe this form of religiosity—people putting together a religion of their own like children tinkering with a lego-set, picking and choosing from available religious 'material.'").

[299] Berger, *supra* note 292, at 446, 447 (noting the "declining number of people who profess traditional religious beliefs" and define and practice "their religiosity in non-traditional, individualized and institutionally loose ways."); HARGROVE, *supra* note 295, at 127–28:

> The church, for many moderns who are involved in it at all, is rather more like a service station than an institution. It provides celebrations for special events—christenings, marriages, funerals, and the like. It provides a brief and cheap education in moral values for the children. It is a good place to get together with people who share similar interests and points of view. And through short-term study groups or the like it can be a useful tool in the modern religious quest.

Id.; *see* Swatos & Christiano, *supra* note 289, at 224 ("[T]he historical religions are less likely to carry the level of isomorphism between individual experience and larger cultural context that has been the case in the past . . . .").

[300] *See* Conkle, *supra* note 288, at 14, 15 (In a "religiously neutral, autonomy-driven understanding of conscience," we "define our own consciences and determine what they require. Our consciences might include religious obligations, but then again they might not; it all depends on our particular self-definitions.").

[301] *See, e.g.*, Gedicks, *An Unfirm Foundation*, *supra* note 177, at 569–72; *see also* Feldman, *supra* note 69, at 425 ("Our secular consciousness tends to suggest that protection previously reserved for religion should be extended to other deeply held beliefs."); *see also* Lupu & Tuttle, *supra* note 288, at 68 (noting that those committed to formal equality maintain that "religious institutions are now no more distinctive or important than analogous, secular enterprises. If religion is, like therapy, a source of mental comfort and well-being, why should religious institutions be treated any differently from mental health facilities? If religion is, like art, a source of spiritual beauty and transcendence, why should religious institutions bear any different relationship to the state than museums?").

[302] *See* Conkle, *supra* note 288, at 14 ("[F]ormal neutrality has the effect of leveling religious and nonreligious claims of conscience.").

[303] *E.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."); *see*

Smith can be understood as a manifestation of the fear that religious exemptions would end in governmental paralysis. In a cultural climate in which religious practice is indistinguishable from other forms of personal activity, a doctrine that mandates exemptions for religious practices burdened by government action would inevitably expand into a doctrine that mandates exemptions for practices springing from any moral, political, and/or other comparable personal commitment.

SUMMARY AND CONCLUSIONS

The principal source of the fundamental law of religious freedom in the United States is decisions by the federal judiciary interpreting the meaning of the Religion Clauses. These are followed by RLUIPA and RFRA (which provide for religious exemptions from federal and state laws in certain circumstances) and federal anti-discrimination statutes (which prohibit religious discrimination in a variety of specific contexts), together with federal regulations promulgated under the authority of such statutes. Executive orders by the President, such as the charitable choice directives, bind the federal bureaucracy and thus are another important, albeit ambiguous, source of law. Finally, state constitutions, state statutes and state regulations remain important sources of religious freedom law when federal sources are absent or inapplicable. In contrast to most other countries, particularly those in Western Europe, international human rights law plays virtually no role in the construction of doctrine relating to religious freedom in the United States.

Articulated in terms of "limitations," the law in the United States is that religious activity generally may be limited for any reason other than anti-religious animus. Doctrinally, the general constitutional rule in the United States is that religiously neutral and generally applicable laws that incidentally burden religious actions are subject to minimal judicial scrutiny, unless such laws burden constitutional rights in addition to the free exercise of religion, or permit or exhibit a discriminatory pattern of exemptions. Although federal and state judges in the United States generally lack authority to mandate religious

Gedicks, *supra* note 177, at 106 (suggesting that the Court may have denied the Amish a social security tax exemption in *United States v. Lee* for fear that the government would be inundated with claims for the same exemption); *see also* Feldman, *supra* note 69, at 420 ("Can we argue today that religion is somehow different from other state purposes, or would we be required to respect conscience in every case and conclude that anyone who disagrees fundamentally with a government expenditure may choose to opt out of paying taxes for that purpose?").

exemptions from religiously burdensome laws, Congress and the state legislatures are free to enact such exemptions by statute, if they wish.

Structural limitations on religious freedom in the United States include a continuing constitutional and cultural commitment to the separation of church and state, which permits and sometimes even requires disadvantageous treatment of religiously motivated actions relative to actions motivated by secular moralities or ideologies. The dilution of the church autonomy doctrine, which formerly protected a group right of internal church self-government, has similarly facilitated greater regulations of churches and other religious groups.

Finally, three current political and social trends are likely to undermine development and enforcement of strong substantive protection for religious freedom in the United States. The persistence of controversies posed by judicial review of federal and state action suggests that the law of religious freedom in the United States may become increasingly subject to majoritarian norms and preferences. Similarly, the recent revitalization of judicially enforced federalism norms may weaken federal statutory protections for religious freedom by weakening the traditional role of Congress in protecting minority rights,. Finally, the radical increase in religious diversity in the United States suggests that granting unique protection to religious actions will become increasingly less practical, so long as equality rationales predominate over liberty rationales in the development of contemporary constitutional doctrine.

CASE STUDIES: THE UNITED STATES

1. USE OF CONTRABAND

Assume there is a group that is widely recognized as a traditional religious entity and that no one questions the sincerity of the believers. As a part of its religious practice, members of the group smoke opium together in their religious service, even though using opium is strictly prohibited by the criminal law. The members of the group are arrested during a religious service while smoking opium, and they are prosecuted for violation of the drug laws. The members of the group use freedom to manifest their religion as a defense at their criminal trial. How would the courts treat this defense?

There is little doubt that a religious liberty defense to religious use of opium would be rejected by both federal and state courts. Criminal anti-drug laws in the United States are always framed in secular terms and typically have a broad sweep, so they are unlikely candidates to fail the General Rule. Moreover, even supporters of the pre-*Smith* compelling interest test might view eradication of illegal drug use a sufficiently weighty government interest to justify denying an exemption from anti-drug laws even to well-established and sincere religious users.[304] For the same reason, it seems unlikely that state constitutions or statutory RFRAs would underwrite such a defense.

Because some opiates, like morphine, have legitimate medical applications as painkillers, it is likely that a U.S. law criminalizing the possession, sale, and use of "opium" would contain an exemption for such applications. That would provide an opportunity for the believers to argue under the broader understanding of general applicability that their nonexempt use of opium in traditional religious rituals does not threaten the purposes of the criminal prohibition any more than do the exempt medical uses. In response, the government might be able to distinguish the medical exemption on the basis of strict government regulation and control of opiates used for medical purposes; such controls could not be duplicated in the religious setting because of Religion Clause prohibitions on courts' making theological judgments and generally on their intervening in the internal governance of religious groups.

Although no U.S. court is likely to recognize the freedom to manifest religion as a defense to criminal liability, it is conceivable that the sincerity of

[304] *See, e.g.*, *Smith*, 494 U.S. at 906 (O'Connor, J., concurring).

the believers and the traditional status of the religion would be recognized as factors legitimately mitigating the sentence or other punishment.[305]

2. PRISONS

While serving a ten-year armed robbery sentence, a prisoner converts to the Sikh religion. The prison officials believe that the conversion is sincere. The prisoner announces that he wishes: (a) not to cut his hair, (b) to wear a turban, (c) to eat food properly prepared, and (d) to carry a ritual knife. Does the country have any rules or regulations permitting such actions? If prison regulations prohibit any of these requests, and assuming that there is some type of administrative procedure that allows the prisoner to seek a change in the policy as it applies to him, how would a competent court rule on each of the four points?

As a general matter, U.S. courts give considerable deference to the administrative decisions of prison officials. The difficulty and danger entailed in controlling convicted felons in a close environment results in a general judicial reluctance to second-guess the judgments of prison officials about what is required to maintain a safe and orderly environment for inmates, visitors, and prison employees.

Even prior to *Smith*, burdens imposed by prisons on the free exercise rights of inmates were evaluated under a considerably less stringent standard than the compelling interest.[306] After *Smith*, it is possible that such burdens continue to be evaluated under an less stringent standard than the one that the courts would normally apply—that is, courts might be more forgiving of lack of religious neutrality or general applicability under the General Rule in a prison policy than in some other context.[307] For the present, this is not an important practical

[305] *Cf.* Vue v. INS, 1995 US App LEXIS 12619, No. 93-70783 (9th Cir. Nov. 23, 1995) (holding as mitigating factor in deportation proceedings that nonresident Hmong shaman convicted of opium use and possession engaged in such use for genuine religious purposes without an intent to distribute).

[306] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (holding that prison regulations burdening inmate free exercise need only be "'reasonably related to legitimate penological interests'") (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)); *e.g.*, Martinelli v. Dugger, 817 F.2d 1499, 1506–07 (11th Cir. 1987) (holding that prison rules prohibiting long hair and beards and refusing to provide kosher diet were rationally related to "substantial" government interests in maintaining prison security, identifying escapees, and avoiding cost overruns).

[307] *See, e.g.*, Muhammad v. City of N.Y. Dept. of Corrections, 904 F. Supp. 161, 193–95 (S.D.N.Y. 1995) (holding that provision of "generic" worship services by state prison for Protestant, Catholic, Jewish, and Muslim inmates but not to Nation of Islam inmates satisfied the compelling interest test, where the prison lacked sufficient officers, space, and time to provide additional services while still maintaining internal order,

issue, because RFRA (in case of federal prisons) and RLUIPA (in case of state prisons) require application of the compelling interest in case of any burden on inmate religious practices, and not just in case of violation of the religious neutrality or general applicability aspects of the General Rule.[308] Should either law be overturned, however, the question whether the General Rule and the Individualized Assessment Exception apply less stringently to prisons would move to the forefront.

Although courts are inclined to find that burdens imposed by prisons on inmate free exercise rights satisfy the compelling interest test, application of that test occasionally results in some modest additional protection for inmate free exercise than might be expected under the General Rule. For example, prohibitions on inmates' wearing long hair, hats or other head coverings, or on carrying weapons are religiously neutral, generally applicable, and easily justified by legitimate safety, anti-smuggling, and anti-gang concerns. Refusal to customize prisoner food to accommodate religious diets is easily justified on cost and administrative convenience grounds. While the safety, anti-smuggling, and anti-gang goals of a prison prohibition on hats and head coverings will certainly be found compelling by the courts under the compelling interest test mandated by both RFRA and RLUIPA, such concerns may not be compelling while the inmate is confined to his or her cell, as opposed to circulating among the general inmate population.[309] Thus, a less

---

and where Nation of Islam inmates had access to a Nation of Islam clergyman). *See generally* Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (stating that prisons need not provide every religious sect within a prison with identical facilities, personnel, and privileges, regardless of the number of inmate adherents).

A similar attitude seems to exist with respect to analysis of religious classifications in prison policies under the Establishment and Equal Protection Clauses. *See, e.g.*, *Muhammad*, 904 F. Supp. at 197–99 (holding that provision of "generic" worship services by state prison for Protestant, Catholic, Jewish, and Muslim inmates but not to Nation of Islam inmates did not violate the Establishment or Equal Protection Clauses).

[308] The terms of both laws are virtually identical as applied to prison inmates. *Compare* RFRA, 42 U.S.C. 2000bb-1 ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering that compelling governmental interest."), *with* RLUIPA, 42 U.S.C. 2000cc-1 ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . , even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering that compelling governmental interest.").

[309] *See, e.g.*, Young v. Lane, 922 F.2d 370, 375–77 (7th Cir. 1991) (holding that prison policy of permitting inmate wearing of yarmulkes only in cells and at religious services was justified by prison's interest in controlling contraband and preventing use of head coverings as gang identifiers); *see also* Best v. Kelly, 879 F.Supp. 305, 309 (W.D.N.Y. 1995) (holding that an inmate has no free exercise right to wear his yarmulke outside of his cell).

restrictive alternative to a general ban on head coverings would be to allow inmates to wear religious head coverings while confined in their cells. Under the minimal scrutiny required by the General Rule, however, such an alternatives analysis is not required. On the other hand, the prison's interest in keeping weapons away from inmates is compelling in every part of the prison, and would justify a general prohibition on prisoner possession of any kind of knife in any part of the prison.

The outcome of the special diet request is the most difficult to predict. This is mostly a matter of cost and administrative convenience, and it is difficult to imagine that, so long as the cost of satisfying religious diet requests by inmates is not prohibitive, the prison's desire to serve all inmates the same food because it is the easiest way to feed them would rise to the level of a "compelling" interest.[310] On the other hand, a prison with a religiously diverse prison population which would require accommodation of multiple different religious diets (kosher, Muslim, Sikh, vegetarian) might plausibly argue that the cost and inconvenience of cooking and serving so many different diets threatens its ability to provide a basic healthful diet for all inmates, thereby satisfying the compelling interest test.

3. MILITARY

While serving in the army, a Jewish soldier responsible for driving trucks becomes increasingly religious and finally decides to observe Orthodox Judaism. His Rabbi supports his efforts to: (a) wear a yarmulke head covering at all times, (b) eat only kosher food, (c) be exempt from any requirements to drive vehicles on the Sabbath (except in times of war), and (d) grow a beard. Does the military in the country have any regulations on these issues? If the military does not currently permit him to observe any of these practices, assume that the army has prepared studies which conclude that such

---

The *Young* decision ignored the policy's lack of general applicability arising from the fact that prison officials permitted the wearing of baseball caps on the ground that permitting a "uniform headgear" served the prison's interest in avoiding use of head coverings to signify gang membership. 922 F.2d at 375–76. It is not clear that such a justification would have satisfied the compelling interest test if the court have found that the prison policy was substantially underinclusive and, therefore, not generally applicable.

[310] *Cf.* Beersheide v. Suthers, 286 F.3d 1179, 1185–92 (10th Cir. 2002) (holding that failure to provide orthodox Jewish inmate kosher meals violated Free Exercise Clause where provision of such meals would not have had a significant impact on prison budget and procedures); Martinelli v. Dugger, 817 F.2d 1499, 1508 (11th Cir. 1987) (holding that Greek Orthodox prisoner who claimed a religious prohibition on the eating of nonkosher meat should be permitted to eat from the pork-free serving line when available, and to choose nonpork items from the regular line at other times).

exemptions would harm military morale generally, would be expensive, would interfere with military preparedness, and would harm national security. Assuming that there is some type of administrative procedure that allows the soldier to seek a change in the policies, how would a competent court decide such questions?

The armed forces constitute another special context in which United States courts generally defer to the determinations of government officials.[311] Courts are especially leery of ordering the military to make religious accommodations when military officials believe that such accommodations would interfere with the efficient performance of military duties and missions.[312] Finally, since the armed forces in the United States are all-volunteer organizations in which no one is required to serve, members of the armed forces may be viewed by U.S. courts as having consented to or otherwise accepted military limitations on their right to religious exercise.[313]

The basic statement of military policy with respect to religious accommodations suggests that "requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline,[314] and specifically advises that accommodations for worship services, religious holy days, Sabbath observance, religious diets, and religious apparel should be extended to members of the armed forces when such accommodations do not interfere with military necessity and other military requirements.[315] Nevertheless, the actual determination whether to grant an accommodation is left to "the exercise of command discretion" by the responsible officer, and the policy specifically states none of its suggestions for accommodation is to be interpreted as requiring a specific accommodation in any individual case.[316] Air Force commands are reputed to be the most flexible in granting religious accommodations, and Marine Corps commands the least flexible.

---

[311] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 506 (1986).

[312] *See id.*

[313] *Cf.* "Accommodation of "Religious Practices Within the Military Services, Department of Defense Directive No. 1300.17, ¶3.2.5 (Feb. 3, 1988) [hereinafter Directive 1300.17] ("The Military Departments should develop a statement advising of DoD policy on individual religious practices and military requirements to applicants for commissioning, enlistment, and reenlistment.").

[314] Directive 1300.17, ¶3.1.

[315] *See id.* ¶¶ 3.2.1 to -.3 & -.6.

[316] *Id.* ¶3.2.

As with prisons, it is not clear whether pre-*Smith* decisions imposing less stringent standards for evaluating government burdens on the religious exercise of members of the armed forces apply as well to dilute the General Rule or the Individualized Assessment Exception. This is a particularly important question in the military context because the military policy that vests exemption-granting authority in the discretion of individual military commanders based on particular facts and circumstances clearly amounts to a system of individualized assessments. As such, the failure of a commander to consider religious beliefs as sufficient to justify exemption when comparable secular beliefs or considerations are deemed sufficient would require application of the compelling interest test to denials of religious accommodations under the Individualized Assessment Exception.

The U.S. military is required by statute to permit its members to wear religious apparel with their uniforms so long as the apparel is "neat and conservative" and does not interfere with the performance of military duties.[317] A yarmulke qualifies on both counts; indeed, this statute was enacted precisely to reverse the Supreme Court's holding that an Air Force commander was *not* required to permit a military psychiatrist under his command to wear a yarmulke while in uniform.[318] The wearing of a yarmulke is specifically approved in the military's basic statement of policy.[319]

It is likely that even a soldier who converts to Judaism after joining the military will be able to obtain kosher meals, and to be excused from Sabbath work. Military policy specifically encourages commanders to consider religious belief as a factor in determining whether to order separate rations for soldiers, and further authorizes them to permit individuals with special religious dietary restrictions to provide their own rations when in the field or at sea.[320] The Air Force, for example, even provides kosher field rations.[321] Military policy also encourages accommodations for observance of the Sabbath and other religious holy days, except when such accommodations "are precluded by military necessity." The Military Personnel Manual goes further,

---

[317] 10 U.S.C. '774 (2002); *accord* Directive 1300.17. ¶3.2.7. Under the Directive, "neat and conservative" items of religious apparel are "discreet, tidy, and not dissonant or showy in style, size, design, brightness, or color," and do not replace, alter, or interfere with the wearing of the prescribed military uniform. Directive 1300.17, ¶3.2.7.2 The standard, "neat and conservative," is of course inherently biased against minority religions, since both concepts depend on a majoritarian frame of cultural and political reference.

[318] *See Goldman*, 475 U.S. at 503.

[319] *See* Directive 1300.17, ¶3.2.7.3.

[320] *See* Directive 1300.17, ¶3.2.2.

[321] *See* AIR FORCE MANUAL 52–103 (noting the availability of kosher substitutes for MREs).

mandating that military personnel shall generally observe the Sabbath on Sunday, and that those whose beliefs require Sabbath observance on another day "*will* be afforded the opportunity to observe the requirements of their religious principles," unless this conflicts with "compelling military necessity."[322]

On the other hand, it is unlikely that a Jewish convert would be exempted from military regulations that prohibit beards. Military policy expressly removes "hair and grooming practices" from the provision that encourages accommodation of religious apparel.[323]

4. DISTRIBUTION OF LITERATURE

An Evangelical Christian woman decides to distribute free copies of some religious literature on the sidewalks of a large city. The city has three misdemeanor ordinances that prohibit (a) littering, (b) interfering with motor vehicle traffic, and (c) creating a public nuisance. As the woman distributes the free copies of the booklets, some people drop them on the streets, others start reading them and, without looking, walk onto streets and cause cars to stop. Some merchants come up to her and start shouting that she is creating a disturbance and interfering with customers coming into their stores. Police arrest the woman and the prosecutor charges her with three misdemeanor violations. Assuming that she would properly have been convicted of all three offenses if she had been distributing handouts advertising a shoe sale, would she have any additional protections because she was distributing religious material?

Assuming that the evangelical Christian is convicted of all of the offenses, the General Rule does not give her any additional protection; all three ordinances appear to be religiously neutral and generally applicable. It is nonetheless quite unlikely that convictions of the evangelical Christian on any of the offenses, let alone all three, would be upheld by U.S. courts. General secular principles under the Speech Clause of the First Amendment are almost certain to protect her leafleting against government punishment, even pursuant to religiously neutral and generally applicable laws.

---

[322] MILITARY PERSONNEL MANUAL 1731-010 (emphasis added.); *see also id.* 1731-20 ("Consistent with the exigencies of the service, commanding officers are encouraged to give favorable consideration of applications for leave from those who may desire to observe significant holy days with their families," including Rosh Hashanah and Yom Kippur).

[323] Directive 1300.17, ¶3.2.7.1.

In the United States, the public has special claim on public streets, sidewalks, and parks as venues for speech and expression.[324] Government may *regulate* speech in such "public forums" only by means of so-called "time, place, or manner restrictions" that (I) are content-neutral, (ii) are narrowly drawn to protect a "significant" governmental interest, and (iii) leave open "ample" alternative avenues of communication.[325] Government may *prohibit* speech in such locations only if the prohibition is narrowly drawn to protect a "compelling" governmental interest.[326]

All three ordinances are likely to be content-neutral on their face. It is doubtful, however, that the anti-litter and public nuisance ordinances would be found to protect a significant or compelling governmental interest. The Supreme Court has held that litter prevention is an insufficiently important government interest to justify either an absolute prohibition on leafleting,[327] and bans on anonymous leafleting have been invalidated despite weightier justifications than litter prevention.[328] It is likewise clear that so long as leafletters do not completely block the passage of pedestrians on a sidewalk, and only momentarily detain those to whom they distribute their literature, they may not be found guilty of creating a "public nuisance" under the Speech Clause, even if it is true that they are attracting attention away from commercial establishments or otherwise making it marginally more difficult for pedestrians to enter such establishments or use the sidewalk.[329]

---

[324] *See* Hague v. CIO, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks my rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions.").

[325] *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. Grace, 461 U.S. 171, 177 (1983); Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 647–51 (1981).

[326] *E.g.*, *Grace*, 461 U.S. at 177.

[327] Martin v. City of Struthers, 319 U.S. 141, 149 (1943); *see also.* Schneider v. State, 308 U.S. 147, 151 (1939) (city's interest in keeping "the streets clean and of good appearance" held "insufficient" to justify a municipal ordinance prohibiting the distribution of leaflets on public property).

[328] *E.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (prohibition on distribution of campaign leaflets without name and address of issuer, for purpose of preventing "fraud, false advertising, and libel," held unconstitutional burden on freedom of speech); Talley v. California, 362 U.S. 60, 65 (1960) (same with respect to general prohibition on anonymous leafleting); *see also* Watchtower Bible & Tract Soc. of N.Y v. Village of Stratton, 122 S. Ct. 2080, 2089–90 (2002) (striking down door-to-door solicitation permit designed to prevent fraud and crime and to protect residential privacy, because, *inter alia*, permit virtually eliminated anonymous and spontaneous solicitation).

[329] *E.g.* Cantwell v. Connecticut, 310 U.S. 296, 308–10 (1940).

Public nuisance statutes are generally suspect under the Speech Clause because of their notorious lack of specificity. The consequent delegation to police officers of essentially unbounded discretion to ascertain what constitutes a statutory violation creates the danger that such statutes will be enforced only against speakers of unpopular messages. *See generally* Grayned v. City of Rockford, 408 U.S. 104 (1972); Gooding v.

Traffic and pedestrian safety is an undoubted compelling interest that would justify prohibition if necessary to protect the public. Unlike some speech activities, however, such as a demonstration on a public street, leafleting does not present the kind of unavoidable danger which requires either prohibition of the speech or closure of the street to vehicular traffic to protect public safety. The threat to public safety is not caused by the leafleting, but rather by the negligent inattention of pedestrians receiving leaflets. Accordingly, a narrowly drawn means of protecting public safety in this circumstance would be use of police officers to ticket and otherwise to control pedestrians who are endangering their own and others' safety by violating traffic laws.[330]

Finally, the Supreme Court has been particularly solicitous of inexpensive means of communications, and has regularly held that expensive means of communicating one's message are not adequate alternatives for inexpensive means, particularly if the latter are a traditional method of communication.[331] General prohibitions on leafleting are typically invalidated on this ground.[332]

5. REGISTRATION/RECOGNITION/LEGAL PERSONALITY

Many countries have requirements for allocating certain privileges or a particular status to religious organizations (e.g., juristic personality, tax-exemption, the granting of public funds) to the satisfaction of particular

---

Wilson, 405 U.S. 518 (1972). *See also* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 938–40 (2000) (discussing standardless licensing cases).

[330] *Cf. Schneider*, 308 U.S. at 150 (suggesting that instead of prohibiting leafleting altogether, city authorities could prevent litter by punishing those who throw leaflets on the ground).

[331] E.g., *Watchtower Bible*, 122 S. Ct. at 2087 ("[B]ecause they lack significant financial resources, the ability of the [Jehovah's] Witnesses to proselytized is seriously diminished by regulations that burden their efforts to canvass door-to-door. [] In addition, the [Court's] cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas."); *Ladue*, 512 U.S. at 57 (Ban on residential yard and window signs left inadequate communicative alternatives because residential signs are "an unusually cheap and convenient form of communication, especially for persons of modest means or limited mobility."); *Martin*, 319 at 146 n.9 (Ban on door-to-door distribution of leaflets invalidated because such distribution "is essential to the poorly financed causes of little people."); *see also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 n.30 (1984) (The Court has shown "special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the Citizenry."). *But see*, *Metromedia*, 453 U.S. at 549 n.20 (upholding ban on graffiti even though graffiti is an "inexpensive means of communicating political, commercial, and frivolous messages to large numbers of people" and "some creators of graffiti have no effective alternative means of publicly expressing themselves").

[332] *Schneider*, 308 U.S. at 147–50 (distribution of leaflets on public street); *see also Watchtower Bible*, 122 S.Ct. at 2091 (door-to-door distribution of leaflets); *Martin*, 319 U.S. at 146 n.9 (same).

conditions (e.g., a minimum number of members, being "traditional," or being recognized by some body as serving a public utility).[333] *Suppose that there is some religious group that does not meet one of the criteria and they are denied the privilege or status they seek. Assuming that there is some procedural mechanism for the group to bring a claim and the group argues that the state discriminated against them on the basis of religion or belief. Assume also that the judge finds that: (a) there was discrimination on the basis of religion, and (b) the state may not discriminate unless it has done so on the basis of one of the legitimate grounds for limiting the manifestation of religion. What arguments would the state make for such discrimination and what would be the final decision of the judge?*

In general, the extent to which a religious group enjoys religious liberty in the United States does not depend on its form of organization. The United States has no special organization or registration procedures for religious groups; such groups may avail themselves of any of the various organizations methods generally provided by statute and at common law—*e.g.*, for-profit incorporation, nonprofit incorporation, corporation sole, unincorporated association—provided that such groups satisfy the necessary requirements of the form of organization they choose.

Again, one of the assumptions of this hypothetical is that denying benefits to a religious organization because of its failure to satisfy the requirements of a religiously neutral, generally applicable law could constitute religious discrimination. Under the General Rule, any such denial is by definition not discriminatory and therefore not actionable under the Free Exercise Clause. Indeed, one might argue that exempting religious organizations, but not comparable secular organizations, from the requirements of a neutral and general law constitutes government favoritism of religion that violates the Establishment Clause.

Perhaps the area of law that comes closest to the hypothetical is the revocation of a church's federal tax-exempt status for using an excessive amount of its funds to engage in partisan lobbying. The federal Internal Revenue Service has a strong policy against a nonprofit organization's use of the advantages of tax-exempt status to promote partisan political candidates or causes. Nonprofits who wish to exceed the narrow limits which the IRS places on partisan lobbying must confine their lobbying activities to a taxable, for-

[333] Conditions such as, for example, a minimum number of members, being "traditional," or being recognized by some body as serving a public utility.

profit subsidiary. Prior to *Smith*, some commentators and churches had claimed that the ability to speak out on any public issue, partisan or not, was an inherent aspect of religious group autonomy protected by the Free Exercise Clause, so that churches were constitutionally exempt from complying with IRS regulations specifying the limits, manner, and means of partisan lobbying by nonprofit organizations. After *Smith*, however, it seems clear that churches possess no special insulation from government regulation of the partisan lobbying activities of nonprofit groups. Indeed, in the 2000 presidential election, the IRS revoked the tax exempt status of a church that had used a substantial amount of its tax-exempt funds to print and distribute literature endorsing Republican Party candidates. Since the regulations are religiously neutral, generally applicable, and do not rely on a system of individualized assessments, *Smith* simply does not recognize that such a revocation can constitute religious discrimination.

An argument could be made under RFRA to the effect that the tax-exempt lobbying regulations burden religious activity and thus must satisfy the compelling interest test, but it seems likely that the IRS policy of preventing the subsidy of partisan politics by tax exempt funds would be a sufficiently compelling interest to justify application of the regulations even to religious groups who feel conscientiously obligated to endorse candidates on partisan grounds.

It is conceivable, of course, that a statute that is facially neutral with respect to religion nevertheless may have a dramatically negative disproportionate effect on a particular religion. The suspicion in such a circumstance is that the statute constitutes a religious "gerrymander"—that is, the apparently neutral statutory classifications were purposely defined precisely to create a disproportionate and negative effect on a small number of disfavored religious groups.[334] In such a circumstance, the government would have to satisfy the compelling interest test—that is, it would have to prove that the statutory classifications protect a compelling governmental interest that cannot be protected in any less intrusive or restrictive manner. Although the Supreme Court has noted the possibility that avoidance of an Establishment Clause

[334] The term "gerrymander" dates from the early nineteenth century, and was a coined to describe a bizarre, salamander-shaped congressional district drawn by the Massachusetts state legislature to ensure the election of a member of the political party lead by Governor Elbridge Gerry. 5 ENCYCL. BRITANNICA 222 (University of Chicago Press, 15th ed. 1987).

violation might satisfy the compelling interest test,[335] outside of the Establishment Clause, no decision has ever recognized a government interest sufficiently important that it justifies government discrimination against a particular religion.[336]

6. STATE SCHOOLS: RELIGIOUS GARB

Muslim and Orthodox Jewish teachers and students at a state school wish to wear headscarves as part of their religious observance. Does the state (or schools) have rules governing the wearing of such garb? If there are rules at state schools prohibiting the wearing of headcoverings, what would be the likely outcome if the teacher and student challenged the rules or practices?

The analysis is affected somewhat by the status of the believer as teacher or student, so I will consider these separately.

1. *Students*

Most public schools in the United States have some sort of dress code. The purpose of such a code is to avoid disciplinary altercations or other distractions from the educational process that might be caused by student dress or appearance. Thus, school dress codes commonly prohibit clothing that is exceptionally immodest or associated with gang violence. It would be unusual for a public school dress code to single out religious apparel for any sort of focused attention; much more likely is a code's general prohibition of an article of clothing for some legitimate disciplinary reason—say, a prohibition on "hats or head coverings of any kind" because of their frequent use to identify one with a gang—which sweeps into its coverage religious apparel like head scarves.

Once again, if the dress code is religiously neutral and general applicable, the General Rule will provide no relief to believers who are required to keep their heads covered as a matter of religious conscience. It would not be uncommon, however, for the administrators charged with enforcing dress codes to make frequent exceptions on a variety of secular grounds. For

[335] *See* Capitol Sq. Rev. & Adv. Bd. v. Pinette, 515 U.S. 753, 761–62 (1995) (observing that "compliance with the establishment clause is a state interest sufficiently compelling to justify content based restrictions on speech").

[336] The so-called "War against Terrorism" may push these limits to the extent that it has legitimated security profiling, investigations, and prosecutions based on the Muslim commitments and associations of defendants.

example, the school might exempt from the prohibition students who need to keep their heads covered for medical reasons or who wear caps bearing the logo of the school's baseball team. In that instance, a student might challenge the general applicability of the hat prohibition or, what in my opinion amounts to the same thing, might argue that it incorporates a system of individualized assessments. In either case, the student would argue that the school's interest in generally prohibiting hats could not be that important because it commonly allows exemptions from the prohibition, and could argue further that the prohibition is not generally applicable because it is underinclusive and exempts head coverings on secular grounds but not religious grounds. Moreover, to the extent that the dress code permits other manifestations of religious belief in ones' dress or appearance, such as the wearing of crucifixes and other religious jewelry or beards or hairstyles for religious reasons, students might also argue a lack of religious neutrality.

In most public school districts it is likely that religious head scarves would be accommodated despite a general policy against hats or head coverings. In school districts which lack cultural diversity, however, one cannot underestimate the possibility that school administrators might find head scarves bizarre and therefore distracting, particularly given their association with Islam in the current war environment.[337]

2. *Teachers*

The foregoing analysis is complicated when applied to classroom teachers by the fact that teachers are representatives of the state. Courts have recognized a school's legitimate interest, particularly in elementary grades, in controlling a teacher's classroom appearance and conduct in relation to religion, in order to ensure that students are not religiously coerced or otherwise mislead into believing that the school endorses a teacher's religious beliefs or practices. For example, courts have upheld restrictions on clothing,[338] expressions of faith, Bible reading, and similar kinds of religious speech and expression by teachers on this ground.

---

[337] *Cf.* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (noting evidence in the record of criticism and disparagement by teachers of students who practiced nonevangelical or non-Christian religions).

[338] *See, e.g.*, Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Oregon 1986) (upholding state prohibition on religious dress by teachers as applied to Sikh who wore turban and white clothing, on ground that statute properly sought to ensure avoidance of the appearance of sectarian influence, favoritism, or official approval in state schools); *see also* United States v. Board of Educ. Sch. Dist. Phila., 911 F.2d 882 (3d Cir. 1990) (rejecting claim that application of similar statute against Muslim who wore chadha covering all but her

On the other hand, the Court has made it clear that the government may not deny a person government employment in a way that infringes on his or her freedom of expression.[339] It would seem that a head scarf, without more, is not so unusual or distracting that it must be absolutely prohibited in even an elementary school classroom. A less restrictive alternative would seem to be agreement between the school and the teacher about how the teacher should disclose that the head scarf is a religious requirement and otherwise answer inevitable student questions. Under the General Rule, however, a meaningful alternatives analysis is not required unless a statute lacks religious neutrality or general applicability, or the Individualized Assessment Exception applies.

7. STATE SCHOOLS: PARTICIPATION IN RELIGIOUS OBSERVANCES

A student in a state school refuses to participate in a mandatory school program honoring the country's soldiers killed in war. The student asserts that on the basis of her pacifist beliefs, which are part of her religion (and which are acknowledged by the school to be sincere beliefs), she cannot participate in the ceremony. The school orders her to participate on the pain of expulsion from school. When she refuses, she is expelled. Assuming that she may bring a case for relief, how will a competent court decide her case?

It is well established under the Speech Clause that government may not force individuals to engage in affirmations which contradict their personal beliefs, including religious beliefs. For example, the Speech Clause does not permit a school to require that pacifist students participate in an school ceremony in which students pledge allegiance to the flag of the United States. Similarly, the Establishment Clause prohibits the government from requiring that a person declare his or her belief in God as a condition to becoming a notary.[340] The Free Exercise Clause does not add anything to this analysis.

There is an important distinction, however, between requiring that students simply learn information as part of the school's educational curriculum, and requiring that students affirm their belief in the truth or accuracy of such information. The Speech Clause does not require, for example, that evangelical Christians who believe in divine creation of the earth *ex nihilo* be

face while working as substitute teacher did not violate Title VII duty of employer to make reasonable religious accommodations).

[339] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[340] Torcaso v. Watkins, 367 U.S. 488 (1961); *see also supra* note 8 (discussing the Religious Test Clause).

excused from a biology class in which the students are required to learn the basics of neo-Darwinist evolution. Although parents have an absolute right to send their children to accredited private rather than public schools or, in many states, to educate their children at home rather than at any school, in most states parents do not have an unqualified right to pick and choose from among the required curriculum which classes their children will attend, and which they will not.

A key inquiry in this hypothetical would be whether the "participation" to which student objects is mere attendance at the war memorial ceremony, or extends to some act or circumstance which might imply that the student endorses or otherwise believes in the sentiments being expressed at the ceremony. The Speech Clause does not mandate exemption in the former situation,[341] but does in the latter. The Free Exercise Clause might have some relevance to participation as attendance. However, if any student is excused from attending the ceremony for a some nonreligious reason–say, because the student has had difficulty adjusting to the loss of a parent or other close relative in a war, and the memorial service is likely to trigger depression or some other serious emotional reaction–this may provide the basis under the broad reading of general applicability or under the Individualized Assessment Exception for arguing that the religious pacifist is being treated unequally by the school's recognition of a personal or a secular reason for nonattendance, but not for an apparently comparable religious reason.. At the least, the school should be required to explain why the religious reason is not in fact comparable.

8. BLOOD TRANSFUSIONS

A family of three was injured in an automobile accident. The father and daughter were severely injured and were unconscious by the time they arrived at the hospital. The mother was seriously injured, but fully conscious. At the hospital the woman announced that her religion forbids her from receiving a blood transfusion, and that she also does not want either her husband or child

[341] The Establishment Clause, however, would mandate invalidation of any memorial service that was sponsored or organized by the school and which involved a prayer. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). Collectively, these cases are known as the *School Prayer Cases*.

to receive a blood transfusion. The hospital has no reason to doubt the woman's sincerity. How would a competent court handle this case?

The Free Exercise Clause and the First Amendment generally only bind government. Because most hospitals in the United States are privately owned and operated, government action in this hypothetical is likely to present itself in the form of a court order sought by the hospital or the wife under expedited procedures ordering or enjoining blood transfusions.

Few constitutional rights in the United States are absolute. Even the pre-*Smith* compelling interest test permitted the government to intrude upon religious freedom in service to an exceptionally important state interest that could not be protected in any less restrictive manner. It is difficult to imagine a more important government interest than protecting a child from a serious threat to his or her life or health. Accordingly, most courts in the United States have authorized doctors to intervene, even against the religious objections of parents, to protect children against immediate risks of death or permanent damage to health when those risks can be alleviated or eliminated through routine medical procedures. As to the child, then, it is likely that transfusion would be ordered if failure to perform the procedure were to present a significant risk of death or serious damage to the child's health.

Although children are presumptively incapable of consenting to medical treatment,[342] adults have both the capacity and the right to refuse unwanted medical treatment.[343] As to the father in the hypothetical, assuming that he shares his wife's religious beliefs, the principle issue is whether his wife's representation of religious beliefs prohibiting transfusion constitute sufficient evidence that the father would indeed have refused consent to the procedure had he been conscious.[344] The wife's testimony that her husband would refuse blood transfusion on religious grounds if he were conscious and competent to consent would constitute strong evidence; in the absence of any contrary evidence, a court may well enjoin the procedure. Of course, in case the husband does not share his wife's religion, a court will not enjoin transfusion simply because the wife holds the procedure a violation of *her* beliefs.

---

[342] Except in the exceptional case of a minor seeking an abortion. *See, e.g.*, Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983); Bellotti v. Baird, 432 U.S. 622 (1979); Planned Parenthood Cen. Mo. V. Danforth, 428 U.S. 52 (1976).

[343] Cruzan v. Director, Mo. Dept. Health, 497 U.S. 261, 269–70, 279 (1990).

[344] *Cf. Cruzan*, 497 U.S. at 284 (upholding state statute requiring that comatose patient's preexisting wish to refuse life prolonging medical treatment in such a situation be proved by clear and convincing evidence).

9. LAND USE

A religious group owns a 150-year-old church on a valuable piece of real estate near the center of the city. The church decides to demolish the building and construct a commercial center that will provide an ongoing source of funds for the religious mission of the group. The group plans to use the projected income to build a new church in a much less expensive area of the city and to use the extra funds to finance a long standing project to provide job training for the poor. After the group finalizes its plans, the legislature enacts a new statute that prohibits the demolition of any building more than 125 years old. The church wishes to proceed with its original plan. Assume that the group's plans would have been completely legal but for the enactment of the new law and that the new law is constitutional with respect to property rights issues. Do the laws of the country provide any recourse for the religious group to continue with its original plan?

The most important initial question is whether the landmarking statute is federal or state; the hypothetical is ambiguous, referring merely to the "parliament" as the source of the statute. Both state and federal land use statutes are governed by RLUIPA[345]; a federal statute would additionally be governed by RFRA, which, as I have discussed, applies the compelling interest test to any substantial government burden on religious activity.

In many respects, RLUIPA simply codifies free exercise doctrine as set forth in *Smith* and *Lukumi*.[346] For example, RLUIPA prohibits land use regulations that treat religious groups "on less than equal terms" with nonreligious groups or that discriminate against religious groups, which tracks the general applicability and religious neutrality standards of the General Rule.[347] RLUIPA also formalizes the Individual Assessment Exception to the General Rule.[348]

In at least one important respect, however, RLUIPA goes beyond the General Rule and its Exception. Based on Spending Clause and Commerce Clause powers, RLUIPA applies the compelling interest test to burdens on

---

[345] *See* RLUIPA, 42 U.S.C. 2000cc(a)(1) (prohibiting land use regulations that impose "a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless such regulations satisfy the compelling interest test).

[346] *See* Part VI-A *supra*.

[347] *Compare* RLUIPA, 42 U.S.C. 2000cc(b)(1) & -(2), *with* Part VI-A *supra*.

[348] *Compare* RLUIPA, 42. U.S.C. 2000cc(a)(2)(c), *with* Part VI-B *supra*.

religion which occur in programs or activities that receive "Federal financial assistance" or which affect foreign, Indian, or interstate commerce.[349] This part of RLUIPA may be vulnerable to constitutional attack based on the Supreme Court's recent Commerce Clause and Tenth Amendment jurisprudence that has trimmed the traditionally expansive understanding of federal power.[350]

Assuming that the compelling interest test applies, the question would be whether the government's interest in preserving historic structures is compelling and thus sufficient to justify interference with the free exercise rights of the church even under the heightened scrutiny demanded by RFRA and RLUIPA. Religion land use cases decided under the pre-*Smith* and RFRA compelling interest standard suggest that historical preservation might indeed be a compelling interest,[351] which would leave the church in the hypothetical with little recourse against the restrictions of the landmarking statute.

10. HUMANIST ASSOCIATION

Identify briefly the circumstances, if any, in which the laws of the country provide religious organizations with exemptions from laws of general applicability in order to allow religions to manifest their beliefs. For example, are religious organizations exempted from noise ordinances and allowed to ring church bells or amplify the muezzin's calls to prayer? Are religious organizations exempt from tax requirements? After identifying some of the more important exemptions, if any, explain whether "belief" associations (such as a humanist society) are also exempted from the same laws.

The Speech Clause protects the freedom of association because of its close relation to the freedom of speech.[352] A recent decision of the Supreme Court seems to have strengthened the freedom of association, requiring that the government defer to an association's description of its mission and its

---

[349] *See* RLUIPA, 42 U.S.C. 2000cc(a)(2)(A) & -(B).

[350] *See* Part VII-B.

[351] *Cf.* Tuttle, *supra*, note 144, at 871–76 (observing that cases zoning cases decided under the Free Exercise Clause generally found that either the zoning decision imposed no burden on the free exercise of religion, or that the zoning authority had a compelling interest in avoiding secondary effects like noise and congestion that the zoning was designed to reduce or eliminate).

[352] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 430 (1958) (affirming the right to "engage in association for the advancement of beliefs and ideas").

determination what kind of membership exclusions are necessary to protect that mission.[353]

Post-*Smith* free exercise doctrine generally permits government to burden religion if it does so by laws of general applicability. In other words, after *Smith*, the Free Exercise Clause simply does not mandate constitutional exemptions. Except to the extent that exemptions are mandated by RFRA, RLUIPA, or a state RFRA, exemptions from generally applicable laws exist pursuant to Permissive Accommodations enacted by Congress or state or local legislative bodies. The various patterns of Permissive Accommodation among the fifty states and their political subdivisions are simply too numerous to summarize.

Except in a few narrow areas, religious associations do not enjoy exemptions that are not also available to similarly situated secular associations. Anti-discrimination laws, for example, generally permit religious discrimination in employment where membership in a particular church or denomination religion is a bona fide occupational qualification, as in leadership of a congregation of synagogue. As I have discussed, these kinds of exemptions merely extend to religious associations to right to discriminate in favor of applicants who are committed to the association's mission, in the same way that secular associations already exercise such discrimination.[354] Similarly, although religious organizations are generally exempt from taxation, so are most other nonprofit organizations that provide some activity or service deemed to be in the public interest.[355] To the extent that religious organizations are exempt from generally applicable laws, failure to extend similar exemptions to similarly situated secular organizations would render the exemption vulnerable to constitutional challenge under the Establishment Clause.[356]

The only exception to this pattern would be the Church Autonomy Cases which, as I have indicated, function less as an exemptions than as a jurisdictional rule that withdraws theological questions from judicial review.[357]

---

353 Boy Scouts of Am. V. Dale, 120 S.Ct. 2446 (2000).

354 *See* Part IV-A *supra*.

355 *See* Walz v. Tax Comm'n, 397 U.S. 664, 672–73 (1970) (Brennan, J., concurring).

356 *See* Texas Monthly v. Bullock, 489 U.S. 1 (1989); *see also* Village of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 702 (1994) (plurality opinion) (invalidating school district whose boundaries were drawn to coincide with orthodox Jewish community because, *inter alia*, one could not be certain that the state would accommodate every religious group that asked for such a district).

357 *See* Part IV-B *supra*.

The apparent strengthening of the freedom of association and the concomitant weakening of the principle of church autonomy suggests that this exception may be of decreasing importance, as religious organizations placed increasing reliance on the former rather than the latter for protection of autonomy.[358]

11. PROHIBITING SOLICITATIONS

Are there any laws in the country that prohibit solicitations? For example, are there laws that prohibit salespeople from knocking on the doors of people's homes and apartments in order to attempt to sell them commercial goods? Or, are there laws that prohibit people from approaching others on the street to sell commercial goods? If there are such laws, do they contain exemptions for religious activities? If the legislature were to enact such a law without an exemption for religious activities, would religious individuals or groups likely be successful in a court in obtaining an exemption from such a law?

Laws prohibiting door-to-door solicitation in the United States have long been found unconstitutional under the Speech Clause, on the ground that they constitute unjustified government interference in an inexpensive means of disseminating information and ideas that has no adequate alternative.[359] The Court has generally required that any decision not to listen to speech or expression be made by potential listeners, rather than by the government. Thus, government can enforce trespassing laws against solicitors who ignore "No Soliciting" signs posted by the residents themselves,[360] but cannot enforce a general prohibition on soliciting. The Supreme Court recently re-affirmed this principle.[361] Consequently, laws generally prohibiting solicitation are likely to be invalidated on their face under the Speech Clause irrespective of whether they are directed at religious persons or groups or contain exemptions for such persons or groups.

[358] *See* Gedicks, *A Defensible Free Exercise Doctrine*, supra note 329, at 941–44.

[359] *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943).

[360] *See Struthers*, 319 U.S. at 148 (characterizing no-soliciting signs posted by residents as a less restrictive alternative protecting residential privacy).

[361] Watchtower Bible & Tract Soc. of N.Y v. Village of Stratton, 122 S. Ct. 2080, 2089–90 (2002).

12. LABOR PRACTICES OF A RELIGIOUS ASSOCIATION

A private religious school hires a woman to teach mathematics to thirteen-year-old students. The teacher belongs to the same religious faith as those who operate the school, although the hiring policies of the school do not explicitly require teachers to be members of the faith. After receiving a very successful job performance evaluation at the completion of her second year, she announces to school officials that she no longer believes in the religious teachings of their faith and that she has become an atheist during the year. She also says that she will not say anything about her personal beliefs to the students, just as she had said nothing to them the preceding year. The school immediately fires the teacher. Does the teacher have any recourse under the laws of the country? To what extent are religious associations permitted to make employment decisions based upon the religious convictions of the worker?

Religious organizations are statutorily exempt from federal prohibitions against religious discrimination in employment. This law has been held not to violate the Establishment Clause, at least when the discrimination occurs in connection with a religious organization's nonprofit activities.[362] Additionally, under the Court's apparently revitalized doctrine of the freedom of association, such an exemption may well be constitutionally required under the Speech Clause even if not granted pursuant to a Permissive Accommodation.

[362] Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).