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> The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.
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> —*Employment Division v. Smith* (1990)

I. INTRODUCTION: DEVIANCE AND NORMALITY IN FREE EXERCISE DOCTRINE

The Supreme Court's controversial abandonment of the religious exemption doctrine in *Employment Division v. Smith*[1] is by now well-known. For nearly thirty years, it was thought that government violated the Free Exercise Clause[2] when it enforced against believers laws that incidentally burdened their religious practices, unless such laws were shown to protect a compelling interest in the least restrictive manner.[3] In other words, in the absence of a compelling interest, people were constitutionally "exempt" from complying with government action that interfered with the practice of their religion, even when the interference was simply incidental to the achievement of an otherwise legitimate government goal. In 1990, however, the Court abandoned the exemption doctrine, holding in *Smith* that the Free Exercise Clause prohibits intentional government burdens on religion, but not incidental ones.[4] In a majority opinion authored by Justice Scalia, the Court indicated that

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

2. U.S. CONST. amend. I.

3. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963) [hereinafter *Unemployment Compensation Cases*]. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

4. 494 U.S. at 872.

The majority indicated two exceptions to this rule, when the burdensome law contains a procedure for "individualized assessment" of the circumstances of individuals burdened by the law's general requirements, *id.* at 884 (discussing the *Unemployment Compensation Cases*), and when the burdensome law infringes upon a "hybrid right"—that is, a right protected by more than one constitutional provision. *Id.* at 881 (discussing *Yoder*, 406 U.S. at 205).

I argue elsewhere in this Article that the "individualized assessment" exception is best understood as a form of general applicability analysis. *See infra* Part IV.C. The "hybrid rights" exception adds nothing to current constitutional doctrine. If government action burdening religious practices does not trigger strict scrutiny under free exercise doctrine, it is hard to see why the fact that it would trigger such scrutiny under the doctrine of another constitutional provision adds anything to the free exercise claim. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). Similarly, if strict scrutiny is already triggered by another constitutional provision, nothing is added to this other claim by the Free Exercise Clause.

The hybrid rights exception to *Smith* would make a difference only if a right were protected

while legislatures and other government actors are free to fashion religious exemptions from general laws if they so choose, such exemptions are not required as a matter of constitutional right, and thus cannot be mandated by the judiciary.[5]

Subsequent decisions suggest that *Smith* continues to enjoy the support of a majority of the Court. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court held that strict scrutiny is called for when religiously burdensome government action is not religiously neutral or generally applicable.[6] Nevertheless, the Court cited with approval *Smith*'s rejection of the exemption doctrine in all other situations.[7] In *City of Boerne v. Flores*, a six-person majority likewise reaffirmed

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by two constitutional provisions, either of which by itself would trigger only rational basis scrutiny, but which combined achieve a critical constitutional mass which calls for heightened scrutiny. *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); *see also* Mark V. Tushnet, *Hybrid Rights-Reply* (visited Sept. 23, 1997) <religionlaw@listserv.ucla.edu> (discussing and rejecting the argument that the penumbral rights analysis of Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965), is an instance of hybrid rights analysis). Although one court appears to have applied the hybrid rights exception in this manner, *see* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 707-11 (9th Cir. 1999), most courts have not, *see* 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).

5. *See Smith*, 494 U.S. at 890.

Notwithstanding their endorsement in *Smith*, permissive accommodations defined in sectarian or religious terms may be suspect under the Establishment Clause unless they compensate for some unique constitutional or legal disability suffered by religion. *See infra* Part III.B. *Compare* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) (upholding against Establishment Clause challenge exemption of nonprofit activities of religious institutions from antidiscrimination requirements of Title VII), *and* Zorach v. Clawson, 343 U.S. 306 (1952) (upholding a public school released-time program of religious instruction), *with* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (holding that drawing boundaries of school district to coincide with membership in orthodox Jewish sect violated Establishment Clause), Texas Monthly v. Bullock, 489 U.S. 1 (1989) (same with respect to sales tax exemption available only to religious magazines), *and* Estate of Thornton v. Calder, 472 U.S. 703 (1985) (same with respect to a statute mandating that employees be excused from working on their Sabbath). *See generally* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring) (arguing that the Religious Freedom Restoration Act ("RFRA") violates Establishment Clause by providing exemptions only for burdens on religious practice); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (arguing that constitutional protection is not granted to religion for its unique value, but instead because it is uniquely vulnerable to discrimination); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998) (arguing that current legal theory has supplied no persuasive justification for religious exemptions, and that contemporary legal culture will likely prevent the emergence of any such justifications).

6. 508 U.S. 520, 546 (1993).

7. *See id.* at 531.

Smith when it struck down the Religious Freedom Restoration Act as beyond Congress's power under Section 5 of the Fourteenth Amendment.[8]

Smith does not suffer from a shortage of critics.[9] To date, however, no one has

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8. 521 U.S. 507, 512-16 (1997).

Intended to reinstate the exemption doctrine as a rule of decision in free exercise cases, RFRA prohibited the enforcement of federal and state laws against believers whose religious practices were substantially burdened by such laws, unless government could show that enforcement was the least restrictive means of implementing a compelling interest. *See* 42 U.S.C. §§ 2000bb(b), 2000bb-1 (1994). Since the governmental entity before the Court was a city and Section 5 deals only with Congress's power to enforce the Fourteenth Amendment against the states and their subdivisions, *Boerne* did not formally invalidate RFRA as applied against federal government entities. Language in the opinion, however, suggests that the Court might view RFRA's limitations on federal government action infirm on separation of powers grounds. *See Boerne*, 521 U.S. at 535-36 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

Numerous commentators have argued that RFRA is unconstitutional 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 (1996); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. 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).

The lower courts are split. *Compare* Waguespack v. Rodriguez, 220 B.R. 31, 36-37 (Bankr. W.D. La. 1998), United States v. Sandia, 6 F. Supp. 2d 1278 (D.N.M. 1997), *and In re* Gates Community Chapel, 212 B.R. 220, 225-26 (Bankr. W.D.N.Y. 1997), *with* Young v. Crystal Evangelical Free Church, 141 F.3d 854, 856 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 43 (1998), Morehouse v. United States, No. CIV.A.3:97-CV-0330-D, 1998 WL 320268, at *3 & n.6 (N.D. Tex. June 8, 1998), Hodge v. Fitzgerald, 220 B.R. 386, 393-401 (Bankr. D. Idaho 1998), *and* Steckler v. United States, No. CIV.A.96-1054, 1998 WL 28235, at *2 (W.D. La. Jan. 26, 1998). A number of courts have assumed without holding that RFRA applies to federal claims. *See, e.g.*, Alamo v. Clay, 137 F.3d 1366, 1368 (D.C. Cir. 1998); Tinsley v. Department of Justice, No. 97-5014, 1997 WL 529068, *1 (D.C. Cir. July 31, 1997); United States v. Grant, 117 F.3d 788, 792 n.6 (5th Cir. 1997); Packard v. United States, 7 F. Supp. 2d 143, 146-47 (D. Conn. 1998); *see also* 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, 810 (1998) ("RFRA as applied to the federal government . . . does not threaten the Court's *Marbury* function in the manner suggested by RFRA as applied to the states.").

As this Article went to press, the House of Representatives overwhelmingly passed the Religious Liberty Protection Act of 1999 ("RLPA"), which generally would require application of the compelling interest test against government action that affects foreign, interstate, and Indian commerce or that is part of a federally funded program or activity. *See* H.R. 1691, 106th Cong., 1st Sess. § 2 (1999). RLPA also would prohibit religious discrimination in the administration of land use regulations, *see id.* § 3, and would amend RFRA to clarify that it is applicable to federal government action. *See id.* § 7.

9. For representative examples of the voluminous academic criticism of *Smith*, see James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Steven D.

challenged the rhetorical lynch pin of the opinion—namely, its contention that abandonment of the exemption doctrine restored free exercise jurisprudence to constitutional normality. This Article takes up that challenge: whatever one thinks of *Smith*, it should not be permitted to masquerade as normal constitutional law.

The doctrine of free exercise articulated in *Smith*, applied in *Lukumi*, and confirmed in *Boerne*—what I will refer to hereafter as the "*Smith* doctrine"—consists of three rules:

(1) *The Rational Basis Rule.* Religiously neutral and generally applicable government action that incidentally burdens religious exercise is subject to minimal judicial scrutiny under the Free Exercise Clause.[10]

(2) *The Permissive Accommodation Rule.* Although judges lack authority to mandate religious exemptions from burdensome legislation that is religiously neutral and generally applicable, Congress and state legislatures are free to enact such exemptions if they wish.[11]

(3) *The Strict Scrutiny Exception.* Strict scrutiny of religiously burdensome government action is called for only if the action is not religiously neutral or generally applicable.[12]

Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991). A handful of commentators defend the result in *Smith*, though not its reasoning. *See* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) [hereinafter Marshall, *Free Exercise Revisionism*]; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123; Mark V. Tushnet, *The Rhetoric of Free Exercise*, 1993 BYU L. REV. 117; Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

10. *See Lukumi*, 508 U.S. at 531; Employment Div. v. Smith, 494 U.S. 872, 877-80, 882, 884-85 (1990).

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> 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.

Smith, 494 U.S. at 890 (dictum); *accord* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) ("[T]he 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.").

12. *See Lukumi*, 508 U.S. at 531-32, 533, 546; *Smith*, 494 U.S. at 877-78 ("It would be

One of the touchstones of the *Smith* doctrine is the allegedly deviant character of religious exemptions in comparison to doctrines developed under other individual rights clauses of the Constitution. *Smith* itself distinguished use of the compelling interest test in equal protection and speech cases from its use in free exercise cases, emphasizing the exemption doctrine's anomalous consequence of excusing religious believers from complying with a validly enacted law possessed of a legitimate legislative purpose.[13] *Smith* pointed out that the exemption doctrine permitted a believer to frustrate "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct," and thus allowed a believer to become "a law unto himself" in violation of "both constitutional tradition and common sense."[14] *Boerne* confirmed that the Court continues to believe that the exemption doctrine's "constitutional right to ignore neutral laws of general applicability" had produced an "anomaly in the law."[15]

The exemption doctrine *is* aberrational. The text of the Free Exercise Clause does not require that believers be excused from complying with laws that burden their religious practices,[16] and most commentators have concluded that there is no originalist justification for the exemption doctrine.[17] For most of its history, the

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true . . . that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban [physical] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.").

13. *Smith*, 494 U.S. at 886.

14. *Id.* at 885 (citations and footnote omitted).

15. City of Boerne v. Flores, 521 U.S. 507, 513 (1997).

16. *See Smith*, 494 U.S. at 876-78; Eisgruber & Sager, *supra* note 5, at 1270-72; *see also* Marshall, *Free Exercise Revisionism*, *supra* note 9, at 325 (arguing that the text of the First Amendment "is consistent with protecting religion from discrimination; it does not compel discrimination in favor of religion"); West, *supra* note 9, at 621-22 ("It is not enough . . . to say that the Constitution gives religion special protection. . . . What is at issue, rather, is how much protection the Constitution gives religion and, specifically, whether it guarantees a right on the part of religious individuals and groups to religion-based exemptions.").

17. *See, e.g.*, MICHAEL J. MALBIN, RELIGION AND POLITICS (1978); STEVEN D. SMITH, FOREORDAINED FAILURE chs. 2-4 (1995); Bradley, *supra* note 9, at 261-306; Phillip Hamburger, *A Constitutional Right of Religious Exemptions: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Kurt Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1110-18 (1994); West, *supra* note 9, at 623-33. As Justice Scalia noted in *Boerne*, even so strong a supporter of exemptions as Professor McConnell was able to conclude only that judicially mandated exemptions were not unknown to the framers. 521 U.S. at 537-38 (Scalia, J., concurring) (discussing Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990)). Even McConnell's modest conclusion was attacked as methodologically unsound. *See* Tushnet, *supra* note 9, at 124-27.

Professor Lash has argued that the understanding of the Free Exercise Clause at the time that the Fourteenth Amendment was ratified included the exemption doctrine. Lash, *supra*. Lash argues that many congressional supporters of the Fourteenth Amendment were aware of the incidental burdens that antebellum slavery laws had imposed on religious practices. *Id.* at 1133-37. Laws prohibiting the expression of abolitionist sentiment incidentally burdened religious liberty to the extent that one's opposition to slavery was a matter of religious faith,

Supreme Court has refused to recognize a free exercise right to exemptions.[18] Even when the doctrine was supposedly in force, the Court denied most claims for exemptions.[19]

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as it was for many abolitionists. *See id.* at 1137. Laws prohibiting slaves from being taught to read prevented them from studying the Bible, and laws restricting the times and places when slaves could meet made it difficult for them to participate in Christian worship. *See id.* at 1135. Lash also notes that a slight majority of the states provided religious exemptions from the military draft. *See id.* at 1141-45. Lash suggests that when these supporters described religious exercise to be a "privilege or immunity of citizenship" to be protected by the Fourteenth Amendment, they understood this protection to include the right to be excused from complying with at least some religiously burdensome general laws, such as laws regulating slavery and the universal military draft. *Id.* at 1147-56.

Lash's argument is not persuasive in the context of the contemporary controversy over exemptions. Abolitionists opposed slavery because they believed it to be an evil practice, not because the laws which regulated it incidentally burdened religious practices. By contrast, the legitimacy of contemporary laws that incidentally burden religious practices is rarely in dispute. The abolitionist argument that laws supporting slavery incidentally burdened the religious exercise of slaves and Southern abolitionists must be understood as a tactic employed to support the strategic opposition to slavery in general. As to religious exemptions from the military draft, it is enough to note that nearly as many states did *not* provide for exemptions as did.

Finally, as Lash himself admits, abolitionists and others in the mid-nineteenth century were largely concerned with the burdens slavery laws imposed on the religious practices of Protestant Christianity, which by then had grown into the de facto national religion of the United States. *See id.* at 1122-25. *See generally* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 15-16, 17-18 (1995). As Mormon polygamists were shortly to discover, there was little doubt that unconventional religious practices were not constitutionally protected from the adverse effects of laws enforcing or preferring Protestant Christian mores. *See* Lash, *supra*, at 1125-29. *See generally* GEDICKS, *supra*, at 16-17.

Consequently, it remains doubtful that any contemplated application of the Free Exercise Clause against the States was understood to include a presumptive right to be excused from complying with any law which incidentally prohibits or burdens any religious practice.

18. When the Court first passed on the meaning of the clause in *Reynolds v. United States*, 98 U.S. 145 (1879), it held that although the clause deprived Congress of power over religious belief, it left Congress free to regulate all actions "in violation of social duties or subversive of good order," even if religiously motivated. *Id.* at 164. *Reynolds* not only controlled the disposition of free exercise claims through the end of the nineteenth century, *see, e.g.*, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 48, 49 (1890); Davis v. Beason, 133 U.S. 333, 341 (1890); Murphy v. Ramsey, 114 U.S. 15, 45 (1885), it survived well into the twentieth, *see, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion by Warren, C.J.); Cantwell v. Connecticut, 310 U.S. 296, 303-04 & n.4 (1940).

19. *Compare Unemployment Compensation Cases* (holding believers exempt from "availability for work" requirements of state unemployment compensation laws that burdened exercise of their faith), *and* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding Amish exempt from compulsory school attendance law), *with* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (denying television ministry exemption from general tax on sales of Bibles), O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying Muslim prison inmates exemption from policy which prevented them from attending worship services), Goldman v. Weinberger, 475 U.S. 503 (1986) (denying orthodox Jewish serviceman

By the Court's emphasis on the deviant character of the exemption doctrine, then, one is given to understand that abandonment of this doctrine has returned the Free Exercise Clause to constitutional normality.[20] This understanding, however, is demonstrably incorrect, even if the exemption doctrine is itself constitutionally aberrant. The *Smith* doctrine deviates in important ways from the doctrinal structure used by the Court under comparable individual rights clauses of the Constitution. The Rational Basis Rule contradicts the Court's Speech Clause doctrine governing situations virtually identical to incidental burdens on religious exercise—namely, incidental burdens on speech occurring as the result of otherwise legitimate government regulation of conduct or the time, place, or manner of expression.[21] The Permissive Accommodation Rule contradicts the Court's Equal Protection Clause doctrine governing so-called "benign" or "remedial" classifications which rely on suspect traits.[22] Finally, the Strict Scrutiny Exception relies on an understanding of "general applicability" that is at odds with earlier precedent that calls for heightened scrutiny of underinclusive legislative classifications that burden the exercise of preferred constitutional rights, even when the burden is incidental.[23] I conclude that, far from being an expression of doctrinal normality, the *Smith* doctrine makes sense only on the assumption that the right of religious free exerise is not fundamental. Notwithstanding the presence of the Free Exercise Clause in the text of the First Amendment, the *Smith* doctrine necessarily presupposes that the Free Exercise Clause does not delineate a domain of preferred liberty.[24]

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exemption from uniform regulation which prevented his wearing a yarmulke), Jensen v. Quaring, 472 U.S. 478 (1985) (affirming by equally divided Court denial of exemption from driver's license photograph requirement to person who believed photographs were "graven images" in violation of the Ten Commandments), Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (denying religious foundation exemption from federal labor regulations), Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (denying fundamentalist Christian university exemption from regulation which denies tax exemption to racially discriminatory educational institutions), *and* United States v. Lee, 455 U.S. 252 (1982) (denying Amish employer exemption from Social Security taxes). *See also* Bowen v. Roy, 476 U.S. 693 (1986) (holding native American not burdened by government's use of Social Security number previously assigned to his daughter in violation of his religious beliefs); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1985) (holding Native American worshippers not burdened by federal land use plan that would destroy their religion).

The exemption doctrine fared just as poorly in the lower courts. *See* James Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416-17 (1992). This is true even in its RFRA incarnation. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 585-97 (1998).

20. *See Smith*, 494 U.S. at 878 (arguing that incidental government burdens on religious practice are no more unconstitutional than incidental government burdens on the activities of the press).

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part V.

II. DEVIANCE AND THE RATIONAL BASIS RULE: STANDARDS OF REVIEW FOR INCIDENTAL BURDENS ON FIRST AMENDMENT RIGHTS

A. Conduct Regulation and Incidental Burdens on Speech

The Supreme Court has two doctrinal tests relating to regulation of conduct that incidentally burdens speech. The *O'Brien* test, taking its name from the case in which it was formulated, provides that government regulation of conduct which adversely affects one's ability to express herself is nevertheless constitutional if it is "within the . . . power of government," furthers an "important or substantial governmental interest," is "unrelated to the suppression of free expression," and is "no greater than is essential to the furtherance of that interest."[25] The second test provides that government regulation of the time, place, or manner of expression in public forums will be upheld only so long as it is "content-neutral," is "narrowly tailored to serve a significant government interest," and leaves open "ample alternative channels" for communicating the speaker's message.[26]

Although the Court developed these two tests in separate contexts, they deal with the same conceptual problem. As Professor Kalven pointed out, there is no such thing as "pure speech"; the act of speaking always entails conduct,[27] and all conduct is presumptively subject to government regulation.[28] The typical conduct regulation seeks to control actions that are not normally associated with expression (say, destruction of government documents), with the consequence that resulting burdens on the speaker's ability to disseminate her message appear incidental or, indeed, "accidental." By contrast, the typical time, place, or manner regulation seeks to control actions that are closely associated with the act of speaking, such as the time of day the speaker speaks (say, 12:30 P.M. but not 3:00 A.M.), where the speaker is physically located (in a city park but not in a residential neighborhood), or how the speaker's message is disseminated (by handbills but not by amplified sound), with the consequence that resulting burdens on the speaker's ability to disseminate her message appear intentional.[29]

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25. United States v. O'Brien, 391 U.S. 367, 377 (1968). Since the first element of the test is an implicit part of any constitutional challenge, *O'Brien* is really only a three-part test, requiring that conduct regulations that incidentally burden speech be content-neutral, further an important or substantial government interest, and intrude no more than necessary to further this interest. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483 n.10 (1975).

26. United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983)); *accord* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)); Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 647-51 (1981).

27. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 23-25, 27.

28. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-04 & n.4 (1940).

29. *Cf.* David S. Day, *The Hybridization of the Content-Neutral Standards of the Free*

Time, place, or manner regulations seem to be more direct restrictions on speech than conduct regulations, but only because the conduct they seek to regulate is more commonly associated with the act of speaking. In both cases the essential regulatory act is the same: government is attempting to control conduct for legitimate reasons ostensibly unrelated to the content or communicative impact of the speaker's message, with the incidental result that the speaker may be silenced or burdened in the dissemination of her message.[30] As Justice Kennedy has observed, this often results in situations in which the "regulation at issue can be described with equal accuracy as a regulation of the manner of expression, or as a regulation of conduct with an expressive component."[31]

The two tests are, in fact, doctrinally similar. *O'Brien's* requirement of a regulatory motive "unrelated to the suppression of free expression" is simply a more abstract way of stating the content-neutrality requirement of the time, place, or manner decisions.[32] Although *O'Brien* does not formally cite "ample communicative alternatives" as part of its analysis, as do the time, place, or manner decisions, this element is generally thought to be an implicit part of the test.[33] Professors Nowack

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Speech Clause, 19 ARIZ. ST. L.J. 195, 200-01 (1987) (emphasis and footnotes omitted). ("[T]he traditional distinction between the [time, place, or manner and *O'Brien*] tests originally developed from the judicial perception that the TPM regulation involves a deliberate effort by the government to restrict expression. [W]hile a TPM regulation is established for the purpose of abridging protected expression, an incidental regulation is a nonpurposeful abridgement.") (emphasis and footnotes omitted).

30. *Cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) (*Turner I*) (holding that time, place, and manner regulations and conduct regulations are both evaluated under the same standard of review as "content-neutral restrictions that impose an incidental burden on speech").

31. International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 704 (1992) (Kennedy, J., concurring in the judgment).

32. United States v. O'Brien, 391 U.S. 367, 388 (Harlan, J., concurring).

33. *Id.* at 388-89 (stating that even when a conduct regulation satisfies all of the *O'Brien* criteria, the regulation may still be struck down if it "has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate"); JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.47, at 1143 (5th ed. 1995) (including within the "least restrictive means" element of the *O'Brien* test "whether the regulation leaves open ample means for communication of the message and is not an unnecessary or gratuitous suppression of communication"); Howard M. Friedman, *Why Do You Speak That Way?—Symbolic Expression Reconsidered*, 15 HASTINGS CONST. L.Q. 587, 593 (1988) ("The issue of effective communication [under *O'Brien*] parallels the requirement for effective alternative channels of communication in the 'time, place, and manner' test applied in more general first amendment contexts involving access to streets, sidewalks, or parks for expressive purposes."); *see also* Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986) (upholding under *O'Brien* the application of a statutory closure penalty against a bookstore because "the [storeowners] remain free to sell the same materials at another location"); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (upholding under *O'Brien* the application of a ban on the posting of signs on public property against political candidates because "nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that [the candidates'] ability to communicate effectively is threatened by ever-increasing restrictions on expression").

and Rotunda explain that *O'Brien* and the time, place, or manner decisions are simply "two slightly different forms" of the same test.[34] *O'Brien* states "the general principle" that determines the constitutional permissibility of conduct regulation, whereas the time, place, and manner decisions elaborate "on this general principle by restating it in terms of a three-part test."[35] Despite apparent differences between *O'Brien* and the time, place, and manner decisions, the Court itself does not distinguish between them,[36] and lower courts understand the tests to have been merged.[37]

Formally, at least, *O'Brien* and the time, place, or manner decisions dictate intermediate scrutiny of burdens on freedom of expression,[38] what Professor Gunther once called a more meaningful rational basis test.[39] Both permit incidental burdens on speech so long as such burdens are content-neutral and alleviate a "real" harm (as opposed to a merely "conjectural" one) in a "direct and material way."[40] This

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34. NOWACK & ROTUNDA, *supra* note 33, § 16.47, at 1143.

35. *Id.*

36. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984); *see also Taxpayers for Vincent*, 466 U.S. at 804-05, 808-10 (applying *O'Brien* to a regulation of street posters, but basing analysis of the less restrictive alternative factor on time, place, or manner decisions).

37. *See, e.g.*, Pica v. Sarno, 907 F. Supp. 795, 801 (D.N.J. 1995); Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1559, 1570-71 (N.D. Cal. 1988).

38. *See Turner I*, 512 U.S. 622, 664-65 (1994); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1201 n.101 (1996) (citing *Turner I* as an example of "a more stringent form of intermediate scrutiny"). Other commentators have argued that *O'Brien* scrutiny is little better than minimal rational basis scrutiny. *See, e.g.*, Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 15, 17, 23, 41-42; Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1498-1501 (1999).

39.

> Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.

Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972); *see also* Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 30 (1980) ("Progression from the 'any conceivable goal' approach to the requirement that there be some actual evidence that the legislature intended a particular goal is commonly associated with 'intermediate' scrutiny.").

40. *Turner I*, 512 U.S. at 664 (plurality opinion). Although this analysis was contained in the plurality opinion, it was adopted by a majority on remand. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997). The Court's analysis has also been relied on by a number of the federal circuits. *See, e.g.*, Jones Intercable of San Diego, Inc. v. City of Chula Vista, 67 F.3d 846, 851-53 (9th Cir. 1995); Blount v. SEC, 61 F.3d 938, 944-48 (D.C. Cir. 1995); Action for Children's Television v. FCC, 58 F.3d 654, 665 (D.C. Cir. 1995) (en banc); US

standard is borrowed from the Court's recent commercial speech cases, which hold that legitimate restrictions on commercial speech must be in service to "real" rather than merely "conceivable" government goals,[41] and that the fit between such regulations and these goals must be substantial rather than attenuated.[42] This standard of review is less exacting than the strict scrutiny normally applied to "suspect" government regulations of speech like discrimination on the basis of content or viewpoint, since it does not require that the regulation be "necessary" to a "compelling" government interest.[43] At the same time, however, the standard is more meaningful than the rational basis tautology, under which the Court simply imagines the requisite governmental purpose based upon the apparent effect of the law in question.[44]

West, Inc. v. United States, 48 F.3d 1092, 1104-06 (9th Cir. 1994); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 199-202 (4th Cir. 1994).

41. *See, e.g.*, Edenfeld v. Fane, 507 U.S. 761, 770-71 (1993) (holding that the burden of justification for a restriction on commercial speech "is not satisfied by mere speculation or conjecture," but can be met only by a demonstration that the harm the restriction addresses is "real").

42. *See, e.g., id.* (stating that restrictions on commercial speech must further legitimate government interests "to a material degree"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993) (quoting Board of Trustees of SUNY v. Fox, 492 U.S. 469, 480 (1989)):

> [W]hile we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational-basis review. A regulation need not be "absolutely the least severe that will achieve the desired end," but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.

43. As in *O'Brien*, the Court has sometimes understood the less restrictive alternative requirement to mean only that no *equally-as-effective* alternative be available. *See, e.g.*, Bice, *supra* note 39, at 37-38 (citing Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)). Under classic strict scrutiny analysis, however, a "least restrictive alternative" requirement is usually understood to impose upon government the heavier burden of showing that alternatives would *substantially* undermine the government's protection of its compelling interest, rather than merely showing that the alternatives would be less effective to some slight degree. *See* Ely, *supra* note 25, at 1486-87. Thus, a showing of an alternative regulation that is substantially less restrictive of speech while only undermining the government's purpose to a slight degree is a "less restrictive alternative" even though not as efficient as the regulation under attack. This version of the requirement is more burdensome for the government because it requires a demonstration that the deprivation of civil liberty caused by its action does not outweigh the state's interest in avoiding a small inefficiency in carrying out its legislative purpose. *See* Bice, *supra* note 39, at 38-39.

Although the time, place, and manner decisions entail some balancing at the margin, the mere existence of a less restrictive alternative (in terms of a balance at the margin) does not automatically result in a determination of unconstitutionality, as it would under strict scrutiny.

44. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488-91 (1955); Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949); Bice, *supra* note 39, at 30; *see also* Gunther, *supra* note 39, at 33 (When engaging in meaningful rational basis review during the 1971 Term, "the Court was less willing to strain for conceivable justifications, less ready to

B. Incidental Burdens on Religious Exercise and the "Normal" Standard of Review

Neither *Smith* nor *Lukumi* expressly sets forth a standard of review under the Free Exercise Clause for incidental burdens on religion. It is evident, however, that such burdens trigger, at most, minimal scrutiny. Both *Smith* and *Lukumi* are hostile to the general notion of heightened judicial scrutiny of government action that imposes incidental burdens on religious practice, with *Smith* generally criticizing the application of strict scrutiny in such situations,[45] and *Lukumi* expressly confining it to laws lacking religious neutrality or general applicability.[46] Neither opinion set forth anything like the *O'Brien* or time, place, or manner tests, or otherwise contained any language suggesting intermediate or other heightened scrutiny falling short of the compelling interest test.[47] Lower courts and commentators have generally understood *Smith* to subject incidental burdens on religion to either minimal or no scrutiny under the Free Exercise Clause.[48]

The Rational Basis Rule obviously contradicts the Court's application of intermediate scrutiny to incidental burdens on speech and expression.[49] The more

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hypothesize imaginable facts that might underlie questionable classifications, less inclined to tolerate substantial over- and underinclusiveness in deference to legislative flexibility.").

45. Employment Div. v. Smith, 494 U.S. 872, 888 (1990) ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.") (emphasis in original).

46. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32, 546 (1993).

47. *See* Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 n.5 (10th Cir. 1998) (stating that "[t]he *Smith* opinion does not make it clear whether it is constitutionally sufficient for a law or policy to be neutral and of general applicability, or whether the law or policy will still have to satisfy some lesser standard than the compelling-interest test," such as a "reasonable-relationship test").

48. *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990) ("[W]e understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause."); Beck v. Missouri St. High Sch. Activities Ass'n, 837 F. Supp. 998 (E.D. Mo. 1993) (upholding same action under Free Exercise Clause that it struck down as lacking minimal rationality under the Equal Protection Clause), *vacated as moot*, 18 F.3d 604 (8th Cir. 1994); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 57 (1995) ("*Smith* held that general laws burdening religious practice do not implicate the Free Exercise Clause at all, and accordingly do not require any type of constitutional scrutiny."); Dorf, *supra* note 38, at 1180 ("As a matter of constitutional law, the Court has essentially abandoned judicial review of neutral laws that burden the constitutional right to free exercise of religion.") (citing *Smith*, 494 U.S. at 890); Laycock, *supra* note 9, at 10 ("The [*Smith*] Court held that Oregon can suppress a worship service, and so long as that is the incidental effect of a generally applicable law, Oregon need have no reason for refusing a religious exemption.").

Of course, even if the Free Exercise Clause does not require any scrutiny of incidental burdens on religious practices, such burdens remain subject to minimal rational basis scrutiny under the Due Process Clause.

49. *See, e.g.*, *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) ("Our

relevant issue, however, is whether this makes any difference. Prior to the Court's most recent pronouncements, it had been suggested that, in practice, *O'Brien* and the time, place, or manner decisions apply no more than minimal scrutiny.[50] Thus, the conflict of the *Smith* doctrine with Speech Clause doctrine might be more apparent than real.

The suggestion that the time, place, or manner decisions apply deferential rational basis scrutiny is simply wrong. Although the Court has applied the time, place, or manner test to protect less speech than its language might suggest, it is not unusual for the Court to invalidate laws under this test.[51] In particular, the requirement of

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free speech cases . . . recognize that neutral regulations that affect free speech values are subject to a balancing, rather than a categorical, approach."); Smolla, *supra* note 4, at 938 ("[I]ntermediate scrutiny is used in free speech cases in which 'neutral' laws nevertheless place burdens on expression. Adoption of an intermediate scrutiny standard would thus work no novel or arbitrary departure from the architecture of First Amendment doctrine, but would instead bring principles governing the freedom of religion into sensible synchronization with the principles governing freedom of speech."); *see also* Gordon, *supra* note 9, at 105-06 (suggesting that the intermediate scrutiny of *O'Brien* and the time, place, or manner decisions is properly applied to incidental burdens on religious exercise); Robert Kamenshine, *Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147, 152-54 (1987) (same).

There is no contradiction, however, between the Rational Basis Rule and Justice Scalia's understanding of the Free Speech Clause. In *Barnes v. Glen Theatre, Inc.*, Justice Scalia argued that when a

> regulation is a general law not specifically targeted at conduct, its application to such conduct does not in my view implicate the First Amendment. [V]irtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expression of the fact that the actor disagrees with the prohibition. It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested—that it be justified by an "important or substantial" government interest.

501 U.S. 560, 576 (1991) (Scalia, J., separately concurring) (citations omitted) (emphasis in original) (citing *O'Brien*). To date, no other member of the Court has joined Justice Scalia's effort to read the Free Speech Clause as narrowly as the Free Exercise Clause.

50. *See, e.g.*, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48-52 (1987) [hereinafter Stone, *Content-Neutral Restrictions*] (arguing that *O'Brien* and the time, place, or manner decisions "purport to have some bite, [but] in practice are indistinguishable" from no scrutiny or minimal scrutiny); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 n.5 (1983) [hereinafter Stone, *Content Regulation*] (arguing that the *O'Brien* Court purported to be using strict scrutiny, but actually used rational basis review); Volokh, *supra* note 38, at 1511-12, 1512 n.148 (explaining that expressive conduct doctrine applies less than strict scrutiny).

51. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (invalidating injunction prohibiting, inter alia, the exhibition of images observable to a patient in an abortion clinic and demonstrations within 300 feet of the clinic); International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (invalidating in part ordinance prohibiting the sale or distribution of literature within airports); Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating ordinance prohibiting door-to-door distribution of handbills); Schneider v. Town of Irvington, 308 U.S. 147 (1939) (invalidating ordinance

ample communicative alternatives has meant that otherwise valid regulations are struck down by the Court when they effectively prevent dissemination of the speaker's message.[52] This has been true in the lower courts as well.[53] The result is a general rule that complete prohibition of a means of communication violates the First Amendment. Moreover, the time, place, or manner decisions typically "balance at the margin," evaluating "the incremental promotion of the interest on which the government relies" in terms of "the incremental threat to free expression."[54] Thus, the less restrictive alternative prong of the time, place, or manner test generally triggers "a serious balancing of interests."[55]

Many laws which incidentally burden religious exercise, such as zoning regulations, are closer to time, place, or manner regulation than *O'Brien*-type conduct regulation. As applied to churches, synagogues, and other places of worship, for example, zoning regulations regulate the *place* at which individuals may engage in religious exercise and worship, and thus restrict religion in the same manner as parade permits and other such restrictions that regulate where speech and expression may take place. Accordingly, application of time, place, or manner scrutiny to such

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prohibiting the distribution of leaflets on any sidewalk or street).

52. *Compare* City of Ladue v. Gilleo, 512 U.S. 43 (1994) (striking down ban on home-based signs because, inter alia, similarly inexpensive, convenient, and effective communicative alternatives do not exist), Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (finding municipal ordinance prohibiting all live entertainment unconstitutional as applied to nude dancing for failure to leave open adequate communicative alternatives), *and Martin*, 319 U.S. at 145-46 (striking down a ban on door-to-door distribution of literature because of its widespread use, especially in "the poorly financed causes of little people"), *with* Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989) (holding that sound ordinance leaves open ample alternative channels because it "does not attempt to ban any particular manner or type of expression at a given place or time"), *and* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (holding that prohibition on camping on certain national park sites was a permissible time, place, or manner regulation as applied to those who wanted to sleep overnight in tent city erected on these sites to dramatize the plight of the homeless, because there existed no general barrier to communication of the speakers' message). *See also* Metromedia, Inc. v. San Diego, 453 U.S. 490, 521-40 (1981) (Brennan, J., joined by Blackmun, J., concurring in the result) (finding that an ordinance banning all outdoor advertising display signs violates First Amendment).

53. *See, e.g.*, Bery v. City of New York, 97 F.3d 689, 698 (2d Cir. 1996) (holding that city regulations prohibiting visual artists from exhibiting or selling their work at public places without a license did not leave open the alternative channels of communication necessary to survive First Amendment scrutiny), *cert. denied*, 520 U.S. 1251 (1997); Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388-90 (6th Cir. 1996) (holding that city ordinances regulating the size, number, and placement of signs did not leave open adequate channels for communication); Ameritech Corp. v. United States, 867 F. Supp. 721, 736 (N.D. Ill. 1994) (dictum) (finding that federal law prohibiting telephone companies from providing cable television directly to customers within their service areas does not leave open ample channels of communication); International Eateries of Am. v. Broward County, 726 F. Supp. 1556, 1566 (S.D. Fla. 1987) (holding that zoning ordinance prohibiting adult nightclubs within a certain distance of churches, schools, day-care facilities, or residential neighborhoods did not leave ample alternative channels of communication).

54. Ely, *supra* note 25, at 1485 n.16.

55. *Id.* at 1486.

laws is likely to give greater protection to religious exercise than it now enjoys under the *Smith* doctrine.

With respect to conduct regulation, it is true that *O'Brien* has not often ended in Supreme Court invalidation of the application of an otherwise valid law to incidentally burdened speech or expression.[56] The easy response is that deferential rational basis review *never* results—indeed, it *cannot* result—in a finding of unconstitutionality,[57] and watered down scrutiny is better than none at all. Some lower court decisions since *Smith* have accepted governmental justifications for religiously burdensome laws that would be difficult to defend as plausibly directed at "real" rather than merely "conceivable" problems, as is required by the Court's reading of *O'Brien*.[58] Similarly, many lower courts since *Smith* do not apply even the most modest least restrictive alternative analysis to incidental burdens on religion.[59]

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56. Only two Supreme Court decisions have held an ostensibly content-neutral law unconstitutional because of the incidental burdens it imposed on speech and expression. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (finding the common law tort of "malicious interference with a trade or calling" to be unconstitutional under *O'Brien* as applied to nonviolent secondary boycott); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (finding under *O'Brien* that appellants were likely to prevail on the merits of injunction based on law regulating secondary effects of nude dancing accompanied by consumption of alcohol, which law by its terms applied to establishments which do not sell liquor).

57. *See* Bice, *supra* note 39, at 8. *See generally* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972) (arguing that rational basis review in any form is pointless). Rational basis review has resulted in invalidation of government action only when the Court applies the invigorated rationality standard suggested by Professor Gunther, as in cases involving discrimination on the basis of a socially disfavored (albeit nonsuspect) trait, *see, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (discrimination based on same-sex orientation); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (discrimination based on mental disability); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (discrimination based on welfare dependency); Reed v. Reed, 404 U.S. 71 (1971) (discrimination based on female gender), or burdens on the exercise of a preferred (albeit nontextual) constitutional right, *see, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (burden on reproductive autonomy).

58. *See, e.g.*, Beck v. Missouri State High Sch. Activities Ass'n, 837 F. Supp. 998 (E.D. Mo. 1993) (upholding transfer rule that penalized athletes transferring from public to private (including religious) schools, but not those transferring from private to public schools, despite absence of any evidence that private schools had an advantage over public schools in attracting athletes, or that private schools were recruiting public school athletes), *vacated as moot*, 18 F.3d 604 (8th Cir. 1994); *see also* Rick Peoples, *Referees Spike Headdress*, PRESS-ENTERPRISE, Sept. 30, 1994, *available in* 1994 WL 5080607 (reporting that school officials would not let a female volleyball player wear a hijab during games for safety reasons).

59. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 n.5 (10th Cir. 1998) (upholding a school district's exclusion of a home-schooled student from attending classes part-time as "a reasonable means of promoting a legitimate governmental interest" without considering whether there were less restrictive means of "ensur[ing] that any student attending the public school on a part-time basis provides a concomitant source of state financial aid"); St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990) (upholding landmark preservation ordinance without examining less restrictive alternatives of achieving preservation objectives); Storm v. Town of Woodstock, 32 F. Supp. 2d 520 (N.D.N.Y. 1998) (upholding as legitimate safety and anti-crime measure

Even a tepid application of intermediate scrutiny to such situations is likely to result in occasional invalidation on such grounds.

The more important consequence of applying *O'Brien* scrutiny to incidental burdens on religion is the likelihood that courts will find a lack of adequate alternatives to burdened religious exercise more often than they have found a lack of communicative alternatives to speech burdened by conduct regulations. Professor Stone has suggested that incidental burdens on speech are struck down so infrequently because alternative means of communicating the speaker's message are almost always available.[60] By contrast, alternative means of engaging in religious worship and otherwise satisfying religious obligations are frequently *not* available when the government incidentally burdens religious exercise.[61] As a result, the determination whether the religious claimant has "ample alternative means" of practicing his or her religion may well lead to more frequent invalidation of government action when applied to incidental burdens on religious exercise than has resulted from application of this test to incidental burdens on speech and expression.[62]

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parking ordinance which effectively prevented New Age religion from using traditional gathering site); Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp. 2d 1012 (W.D. Tex. 1998) (upholding school district's policy of requiring students transferring from non-accredited schools to take proficiency exams at their own expense, thereby burdening plaintiff's free exercise rights, without considering whether the policy could have been implemented less restrictively).

60. Stone, *Content Regulation*, *supra* note 50, at 190 & n.5, 222-24. Another commentator goes even further, arguing that adequate communicative alternatives are *always* available in symbolic speech cases. *See* William E. Lee, *The Futile Search for Alternative Media in Symbolic Speech Cases*, 8 CONST. COMMENTARY 451 (1991).

61.

> [I]n adapting a free speech test to free exercise jurisprudence, a problem immediately arises—the concept of an alternative means of expression has no obvious free exercise analogue. . . . For example, the law challenged in *O'Brien* merely made it *more difficult* for O'Brien to communicate his anti-war message as effectively as he liked, whereas the law challenged in *Smith* made it *impossible* for the Native Americans to engage in a required religious ritual.

Dorf, *supra* note 38, at 1215 (emphasis in original) (footnote omitted); *accord* Eisgruber & Sager, *supra* note 5, at 1298 ("Religion does more than define the terms on which believers may satisfy their interests; it actually constitutes their interests."); Laycock, *supra* note 9, at 21 ("A lower standard of review is more defensible in symbolic speech and time-place-and-manner cases; a restriction on a particular means or place of expression is unlikely to entirely suppress a viewpoint in the way that a restriction on a particular means of worship can entirely suppress a religious faith."); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 778 (1986) ("A free exercise claimant . . . cannot be truly satisfied with alternative outlets [for expression]. The free exercise claim does not serve the instrumental purpose of reaching and persuading an audience; rather, it serves the inner-directed purpose of living in accordance with one's beliefs.").

62. *But see* Dorf, *supra* note 38, at 1246 (observing that "[e]ven when a law has the effect of rendering impossible the performance of a required religious act, we feel a strong pull toward sustaining government power"). In addition, an alternatives inquiry might enmesh the courts in a problematic inquiry into the "centrality" of a burdened practice to the claimant's religious beliefs. *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the

Even in the context of incidental burdens on speech or expression, the Court often exempts speakers from content- or viewpoint-neutral laws when it fears that such laws effectively eliminate the possibilities for communication or otherwise silence the speakers.[63] Similarly, lower courts tend to invalidate conduct regulations under *O'Brien* when such regulations are likely to foreclose completely the speaker's communication of her message.[64]

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validity of particular litigants' interpretations of those creeds.").

63. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (finding tort of intentional infliction of emotional distress without required showing of *New York Times* malice unconstitutional as applied to parodies of public figures and public officials because of potential chillling effect on political criticism); Brown v. Socialist Workers, 459 U.S. 87 (1982) (holding minority political party exempt from recipient and expenditure disclosure statute because of potential chilling effect on affiliation with party and dissemination of its unpopular ideas); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (finding municipal ordinance prohibiting all live entertainment unconstitutional as applied to nude dancing for failure to leave open adequate communicative alternatives); New York Times v. Sullivan, 376 U.S. 254 (1964) (finding tort of libel per se without required showing of malice unconstitutional as applied to criticism of government officials because of potential chilling effect on such criticism); NAACP v. Button, 371 U.S. 415 (1963) (finding regulation barring solicitation of legal business unconstitutional as applied to NAACP because of potential chilling effect on discussion and institution of expressive litigation); NAACP v. Alabama, 357 U.S. 449 (1958) (finding production order issued in connection with litigation over qualification of NAACP to do business in state unconstitutional to extent it required disclosure of members within the state, because of potential chilling effect on affiliation with NAACP); *see also* Stone, *Content-Neutral Restrictions*, *supra* note 50, at 114:

> The general presumption is that incidental restrictions do not raise a question of first amendment review. The presumption is waived, however, whenever an incidental restriction either has a highly disproportionate impact on free expression or directly penalizes expressive activity. And the latter exception is applied quite liberally whenever the challenged restriction significantly limits the opportunities for free expression.

This presumption seems not to hold true, however, in case of incidental restrictions on rights under the Press Clause. *See* Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 78 (1995) (arguing that *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), which holds that the First Amendment does not insulate newspaper from liability on theory of promissory estoppel, exhibits a "troubling . . . refusal to recognize the impact that neutral laws have on communication").

64. *See, e.g.*, Loper v. New York City Police Dep't, 802 F. Supp. 1029, 1039-41 (S.D.N.Y. 1992) (holding total ban on begging unconstitutional under both *O'Brien* and time, place, or manner decisions because it cut off "all means of allowing beggars to communicate their message of solicitation"); Abney v. United States, 451 A.2d 78, 84-85 (D.C. App. 1982) (holding ordinance prohibiting sleeping on grounds of U.S. Capitol unconstitutional under *O'Brien* as applied to veteran protesting denial of benefits because veteran's "sleeping was an integral part of and necessary to" his protest, and there was no evidence "showing alternative means available . . . for the continued exercise of his rights").

III. DEVIANCE AND THE PERMISSIVE ACCOMMODATION RULE: STANDARDS OF REVIEW FOR BENIGN USE OF SUSPECT CLASSIFYING TRAITS

A. "Benign" Racial Discrimination Under the Equal Protection Clause

The bulk of equal protection doctrine focuses directly on the classifying trait in determining whether a classification is constitutional under the Equal Protection Clause. 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 might be at least marginally advanced by distinctions based on the trait.[65] The goal of the classification need not be important, only legitimate, and the classification may be a highly inefficient means of achieving the goal—that is, it may be substantially over- or underinclusive.[66] So long as the classification bears some relationship, however attenuated, to a legitimate government goal, however unimportant, it will be upheld.

Certain bases of classification are considered suspicious because they are highly improbable means of achieving any legitimate government goal.[67] 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 government goal unrelated to race.[68] 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 "precisely tailored" to achieving it.[69] Virtually all suspect classifications are found to violate the Equal Protection Clause when subjected to strict scrutiny.[70]

Although the doctrinal hostility to racial classifications under the Equal Protection Clause is well established,[71] the standard of review for so-called "benign" or "remedial" racial classifications was only recently clarified. In contrast to invidious racial discrimination, whose premise is the inferiority of the racial class that is disadvantaged by the classification, benign or remedial racial classifications are

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65. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 175 (1980); McGowan v. Maryland, 366 U.S. 420, 425-27 (1961); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949)..

66. *See, e.g., Williamson*, 348 U.S. at 489; *Railway Express Agency*, 336 U.S. at 110.

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

68. *See* Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivational Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1051 (1978).

69. *E.g., Plyler*, 457 U.S. at 214.

70. *See* Gunther, *supra* note 39, at 8 (stating that strict scrutiny is "strict in theory, but fatal in fact").

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

premised on the government's desire to assist the racial class. After the issue first arose in *Regents of the University of California v. Bakke*,[72] 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.[73] Although in 1989 a majority of the Justices apparently held that benign racial classifications by *state* governments are subject to strict scrutiny,[74] the very next term the Court held that use of such classifications by the *federal* government triggered only intermediate scrutiny.[75] Not until 1995 did the Court unambiguously hold that benign and remedial as well as invidious racial classifications are subject to strict scrutiny regardless of the state or federal character of the government actor.[76] As in review of invidious racial classifications, the Court's application of strict scrutiny to benign racial classifications seems tantamount to an announcement that the classification is constitutionally invalid, although the Court insists that this will not always be the case.[77]

B. Invidious Religious Discrimination and Permissive Religious Accommodation Under the Religion Clauses

The Strict Scrutiny Exception requires, inter alia, that government action that is not "religiously neutral" be strictly scrutinized by the courts.[78] A law is neutral with

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72. 438 U.S. 265 (1978).

73. *See* Wygant v. Jackson 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); *Bakke*, 438 U.S. at 359 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

74. *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'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'").

75. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990).

76. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (overruling *Metro Broad.*, 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.").

77. *See Adarand*, 515 U.S. 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 classifications) (quoting 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) (plurality opinion of Brennan, J.)); *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).

78. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531

respect to religion if it does not use religion as a basis of classification—that is, if the religious character of the beliefs and practices of those to whom a law applies is irrelevant to the goals of its classification scheme.[79] The Establishment Clause generally prevents the government from singling out a particular religion for disadvantageous treatment;[80] *Lukumi* unanimously held that the Free Exercise Clause also prohibits such treatment.[81]

The constitutional implications of government action that disadvantages "religion generally"—as opposed to a particular religion—are more complicated. For many years certain interactions between government and religion were thought to be violations of the Establishment Clause,[82] particularly when financial aid was involved.[83] In this context, special protection for religion in the form of religious exemptions seemed a permissible way to balance the special restrictions imposed upon religion under the Establishment Clause.[84]

This balancing justification for religious exemptions has largely disappeared over the last twenty or so years as the Court has transformed the Establishment Clause from a structural guarantee of freedom from noncoercive government influence in

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(1993).

79. *See* PHILLIP KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 17-18 (1962).

80. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 246, 247 (1982) (finding statute which 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, 639 (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").

81. *Lukumi*, 508 U.S. at 547.

82. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980) (invalidating state-mandated posting of Ten Commandments in public schools); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating state statute which prohibited the teaching of evolution in public schools); School Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating organized prayer and Bible reading in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating use of state-authored prayer in public schools); McCollum v. Board of Educ., 333 U.S. 203 (1948) (invalidating religious instruction in public school classrooms during school day). *See generally* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995) ("[C]ompliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.").

83. *See, e.g.*, School Dist. v. Ball, 473 U.S. 373 (1985) (invalidating state-sponsored enrichment and adult-education classes at private sectarian schools), *overruled*, Agostini v. Felton, 521 U.S. 203, 235-36 (1997); Aguilar v. Felton, 473 U.S. 402 (1985) (invalidating federally sponsored assistance to educationally handicapped at private sectarian schools), *overruled*, Agostini v. Felton, 521 U.S. 203, 235-36 (1997); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

84. *See, e.g.*, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); *see also* Kent Greenawalt, Quo Vadis: *The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 340-41 ("[A]ccommodation 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.").

favor of religion, into an equality right requiring equal treatment of religious sects, and of religion and nonreligion.[85] The Court has held that so long as government satisfies this equality rule, the Establishment Clause does not require that private religious speakers be excluded from public forums,[86] that government categorically refrain from using religious symbols,[87] or that religious individuals be excluded from receiving social welfare benefits for which they otherwise qualify.[88] The Court has even approved subsidies paid directly to religious organizations when this equality rule has required it.[89]

At present, there remain only a few areas in which the Establishment Clause imposes special disabilities on religion which might provide a justification for exemptions. These include prohibitions on government encouragement of or participation in religious worship,[90] on the delegation of governmental authority to religious organizations,[91] and on laws wholly lacking a plausible secular purpose.[92]

The relaxation of special restrictions on religion has also been accompanied by increased scrutiny of permissive accommodations of religion. Although in 1987 the Court upheld a statutory exemption of nonprofit religious groups from the antidiscrimination provisions of Title VII,[93] it has more recently invalidated two state legislative exemptions defined in terms of religion.[94] Professor Lupu has suggested that the Title VII exemption is distinguishable from the other two exemptions because it is necessary "to equalize religious entities with nonreligious entities that face no comparable statutory impediment to hiring those with ideological loyalty."[95]

In short, legislative exemptions defined in terms of religion are now justifiable only in the relatively narrow range of cases in which religion suffers from special

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85. *See* Gedicks, *supra* note 5, at 568-72.

86. *See Capitol Square*, 515 U.S. at 753; Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Board of Educ. v Mergens, 496 U.S. 226 (1990) (upholding constitutionality of Equal Access Act).

87. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

88. *See* Agostini v. Felton, 521 U.S. 203, 236 (1997) (overruling School Dist. v. Ball, 473 U.S. 373 (1985), and *Aguilar*, 473 U.S. 402 (1985)); Zobrest v. Catalina Hills Sch. Dist., 509 U.S. 1, 8 (1993); Bowen v. Kendrick, 487 U.S. 589, 609 (1988); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486 (1986); Mueller v. Allen, 463 U.S. 388, 393 (1983).

89. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

90. *See* Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

91. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

92. *See* Edwards v. Aguillard, 482 U.S. 578 (1987); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968).

93. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

94. *See Kiryas Joel*, 512 U.S. at 687 (1994); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); *see also* Estate of Thornton v. Calder, 472 U.S. 703 (1985) (invalidating state statute mandating that employees be excused from working on their Sabbath).

95. Lupu, *supra* note 8, at 809.

Establishment Clause or other unique disadvantages. Since in these areas religious organizations and individuals carry special burdens not imposed on similarly situated secular organizations and individuals, it does not violate constitutional equality principles for the legislature to provide special relief to religion from other, related burdens if it so chooses.

C. Permissive Religious Accommodation and the "Normal" Standard of Review

Wholly apart from the religion clauses, religion has long been considered an illegitimate basis of government classification under the Equal Protection Clause. Suspicion of government action that discriminates against particular religious denominations is rooted in the very origins of modern equal protection doctrine.[96] Contemporary decisions continue to group religious traits with racial ones as examples of inherently "suspect" or "arbitrary" bases of classification to which the presumption of constitutionality does not attach,[97] and for good reason. As Dean Choper has pointed out, "both traits have been the strikingly similar objects of public (and private) stereotyping, stigma, subordination, and persecution."[98]

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96. *See, e.g.*, Niemotko v. Maryland, 340 U.S. 268, 272 (1950) (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, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments"); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that a "presumption of constitutionality" should not attach to "statutes directed at particular religions"); American Sugar Ref. 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").

97. *See, 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) (unanimous decision); Oyler v. Boles, 368 U.S. 448, 456 (1962); *see also Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("[Government] may not segregate people on account of their race, [as] it may not segregate on the basis of religion."); Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion by Black, J.) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

98. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 42 (1995); *see also* Greenawalt, *supra* note 84, at 349 ("[G]uarantees of religious rights are *largely* guarantees for minorities, and may be justified as an aspect of equal protection.") (emphasis in original); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 117 (1991) ("Like racial classifications, religious classifications may seem inherently distasteful . . . ."); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 371 (1999) ("The Equal Protection Clause asserts that certain traits, including religion and, I believe, religiosity, should not be bases for governmental classifications.").

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. In other words, a genuinely normal free exercise doctrine would prohibit most legislatively mandated religious exemptions along with judicially mandated ones.

Religious exemptions are a kind of benign suspect classification analogous to the benign racial classifications recently struck down by the Court: individuals are classified on the basis of religion, not to discriminate against them or otherwise to disadvantage them, but in order to extend a benefit to them—exemption of the religious class from compliance with an otherwise applicable and legitimate law.[99]

Several commentators have attempted to distinguish benign use of racial classifications from permissive religious accommodations. In contrast to private racial discrimination, it is argued, private religious discrimination has been tolerated and even encouraged by government.[100] Whereas the goal of race-based decisionmaking has been to eradicate racial difference, the goal of religious exemptions has been to preserve religious difference.[101] And even if the Equal Protection Clause requires "color blindness," it does not require "religion blindness," because the Free Exercise Clause specifies a domain of preferred liberty for religious activities that is not specified for other activities (and particularly not for racism).[102]

These arguments beg the questions at issue. It is unclear how traditional government toleration of religious exemptions distinguishes itself from the now-abandoned toleration of benign racial classifications. The fact that government long suffered and even encouraged unconstitutional behavior is no justification for perpetuating it.[103] It is equally unclear why the preservation of religious difference is

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99. *See* Abner S. Greene, Kiryas Joel *and Two Mistakes about Equality*, 96 COLUM. L. REV. 1, 67 (1996); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 162 (1997); *see also* Volokh, *supra* note 38, at 1492-93 ("Any regime of *religious* exemptions by definition prefers those whose actions are motivated by religion over those whose identical actions are motivated by equally deeply held secular beliefs.") (emphasis in original).

Indeed, in one respect religious exemptions are even more suspicious than benign racial classifications under *Adarand* and *Croson*: because religious exemptions are rarely enacted on evidence of intentional discrimination against religious individuals, they are almost never remedial. *See* Lupu, *supra* note 8, at 814; *see also* City of Boerne v. Flores, 521 U.S. 507, 518-20 (1997) (observing that legislative record for RFRA did not include findings that religiously neutral and generally applicable laws masked discriminatory intent).

100. Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing* Kiryas Joel *with* Shaw/Miller, 26 CUMB. L. REV. 365, 375-76 (1996); Jesse H. Choper, *Religion and Race under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 501, 504 (1994).

101. *See* Berg, *supra* note 100, at 377-78; Greene, *supra* note 99, at 68; Yang, *supra* note 99, at 179.

102. Berg, *supra* note 100, at 366, 377.

103. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

a more worthy goal calling for less searching judicial scrutiny than eradication or remediation of the lingering effects of slavery and invidious racial discrimination generally.

Finally, it remains unclear why the ambiguous text of the Free Exercise Clause does not mandate "religion blindness" when the equally ambiguous text of the Equal Protection Clause is deemed to require the conceptually analogous rule of "color blindness." Under the *Smith* doctrine, the domain of liberty marked by the Free Exercise Clause consists of the right to remain free of intentional government discrimination on the basis of religion,[104] just as one's rights under the Equal Protection Clause now consist principally of the right to remain free of intentional government discrimination on the basis of race, gender, and other such characteristics. If the latter right prohibits use of a suspect category like race for benign or remedial purposes, it is difficult to discern why benign or remedial use of another suspect category like religion is not likewise prohibited.

The commentators also argue questionable factual premises. In contrast to the stigma that attaches to the beneficiaries of benign racial classifications, it is argued, no religious offense is given by religious exemptions.[105] It is also argued that whereas racial preferences are a zero-sum game that penalize innocent whites for every racial minority they assist, religious exemptions do not burden innocent third parties.[106] Neither premise is without controversy. Religious exemptions often impose costs on others,[107] and it is far from clear that those with secular commitments that are morally comparable to religious belief do not resent that they are not excused along with believers from complying with burdensome laws.[108]

But even if these premises are correct, they are beside the point. Although in both *Adarand* and *Croson* the Court adverted to the likelihood that benign or remedial racial classifications stigmatize racial minorities,[109] it ultimately did not rest its

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104. Employment Div. v. Smith, 494 U.S. 872, 877-79 (1990).

105. *See* Berg, *supra* note 100, at 380; CHOPER, *supra* note 98, at 502.

106. *See* CHOPER, *supra* note 98, at 505; Greene, *supra* note 99, at 69-70.

107. *See, e.g.*, Estate of Thornton v. Calder, 472 U.S. 703, 709-10 (1985); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977); *see also* Ira C. Lupu, *Uncovering the Village of* Kiryas Joel, 96 COLUM. L. REV. 104, 115 (1996) ("Religious accommodations usually create externalities, in the sense that such accommodations permit behavior which the polity would otherwise forbid; because the underlying prohibition usually has social benefits, accommodations generate corresponding social costs."); Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514, 520 (suggesting religious exemptions and other government encouragements of religion inflict "a feeling of second-class citizenship on people who adhere either to religions other than the favored one or to no religion at all").

108. *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 144 (1990); Gedicks, *supra* note 5, at 562-63; *see also* Steinberg, *supra* note 98, at 131 n.318 ("Judicial and legislative exemptions raise the same establishment clause problem because they both confer a unique benefit on specified religions.").

109. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989), *cited with approval in* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (plurality opinion); *see also id.* at 240-41 (Thomas, J., concurring in part and concurring in the judgment).

decision in either case on a theory of racial stigma.[110] According to the Court, the principal constitutional harm of racial classifications lies in the fact that such classifications grant or deprive opportunities on the basis of a trait that is irrelevant to one's personal worth, and are thus virtually per se invalid,[111] as the commentators themselves acknowledge.[112]

Of course, there is no denying that in late twentieth-century America religious accommodation by government is simply not perceived to be as offensive or as invidious as government mandated racial preference.[113] This may be because, the *Smith* doctrine notwithstanding, American society places a higher value on religious liberty than on racial solidarity.[114] It may also be because religious discrimination is simply not viewed as the deeply rooted, widespread, and intractable problem that racial discrimination seems to be.

Nevertheless, however one distinguishes benign racial discrimination and permissive religious accommodation, both practices classify on the basis of a suspect

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110. *Cf.* Simon, *supra* note 68, at 1068-70 (arguing that racially prejudiced government actions insult, stigmatize, and demean the dignity of those toward whom the prejudice is held).

111. *See Adarand*, 515 U.S. at 229-30; *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S. at 493, 494; *id.* at 520-21 (Scalia, J., concurring in the judgment).

112. *See, e.g.*, Berg, *supra* note 100, at 369, 371 (stating that the "correctness" of the Court's racial redistricting cases turns on whether the Equal Protection Clause is largely a requirement of "color blindness," incorporating "a strong principle of race-blindness across the board"); Greene, *supra* note 99.

> On the Court's view as set forth in *Adarand* and *Croson*, people of different races should always be treated the same, and the fact that the races have not been treated equally, and that the government may at times seek to acknowledge that fact through providing benefits for the hitherto maltreated racial minorities, becomes irrelevant. . . .
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> Thus, despite a wealth of writing explaining that laws benefiting African Americans are justified although laws benefiting whites are not, the Court increasingly has stuck to a "color-blind" jurisprudence, insisting on treating all race-based laws the same.

Id. at 65 (footnote omitted).

113. *See, e.g.*, Lupu, *supra* note 107, at 115 (arguing that religious accommodations are less likely to undermine "the ethic of meritocracy and thereby to generate resentment").

114. *Cf.* Norwood v. Harrison, 413 U.S. 455, 469-70 (1973) ("[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause."); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 264 (1999):

> Except for limited remedial exceptions, no state or private institutional interest in taking race into account in civil life receives or deserves respect today. Religion and religious differences are more complicated. At least in the private sector, it is not at all problematic for people of a particular faith to gather together and establish a house of worship or school that is exclusively sectarian in operation and membership. Indeed, many of us would affirm such activities as a positive and good thing.

trait—race, religion—in order to accomplish a socially desirable result—enhancing minority opportunities by correcting for the corrosive effects of past or present racism, enhancing religious freedom by insulating religious practices from burdensome laws. Thus, the question remains whether the perception that religious discrimination is somehow less offensive or invidious justifies use of a legislative tool for alleviating burdens on religious exercise when that same tool is denied to those who wish to mitigate the undeniable and continuing effects of racial discrimination. If benign or remedial racial classifications are not justified by the United States' centuries-long institutionalization and protection of African-American slavery, and the abundant historical evidence of long, persistent, and widespread government discrimination against African-Americans and other racial and ethnic minorities, it is hard to imagine how religious exemptions are to be justified.[115] Many religious minorities have suffered serious and violent persecution in the United States, but none of them have suffered worse than African-Americans.[116] Despite its pretensions to normality, the Permissive Accommodation Rule of the *Smith* doctrine stands in stark contrast to the Court's decisions prohibiting the use of suspect racial classifications, even for benign or remedial purposes. If free exercise doctrine were truly normal, its abandonment of judicial exemptions in *Smith* would have been matched by invalidation of legislative exemptions defined in terms of religion.

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115. *See* Volokh, *supra* note 38, at 1533 ("[I]f our concern [under the Free Exercise Clause] is preventing intentional discrimination, I see no reason why the Court should adopt a stronger prophylactic rule to prevent religious discrimination than it has for race or sex discrimination, where it requires evidence of actual discriminatory intent despite the difficulty of getting such evidence."); *see also* John E. Sanchez, *Religious Affirmative Action in Employment: Fearful Symmetry*, 1991 DET. C. L. REV. 1019, 1067-68 (noting that in contrast to those asserting claims for race or gender discrimination under the Equal Protection Clause, religious claimants prior to *Smith* were not required to prove discriminatory intent).

Professor Perry argues in this Symposium that even if the Free Exercise Clause is understood to constitutionalize only an antidiscrimination norm, the clause would nevertheless prevent the government from prohibiting conduct simply because the government is "hostile" or "indifferent" to religious groups for whom the prohibited conduct is a religious practice. Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295 (2000). Acknowledging the proof problems inherent in this reading of the clause, Perry creatively argues that hostility or indifference could be proved indirectly, by means of a presumption that government-imposed burdens on religious practice are the result of hostility or indifference whenever the government refuses to exempt the religious practice from the burden even though such an exemption would not seriously compromise any important government objective. *Id.* at 303. As I have argued, however, the government violates the religious antidiscrimination norm rooted in the Equal Protection Clause when it exempts religiously motivated conduct from otherwise legitimate laws, but does not exempt comparable secularly motivated conduct, for such an exemption necessarily creates a suspect religious classification. Perry does not explain why the free exercise antidiscrimination norm should trump the equal protection antidiscrimination norm. Exemptions from burdensome conduct are consistent with the antidiscrimination norms of both the Free Exercise Clause and the Equal Protection Clause only when they exempt both religious conduct and comparable secular conduct.

116. *See* Gedicks, *supra* note 5, at 566; Lupu, *supra* note 107, at 114.

IV. DEVIANCE AND THE STRICT SCRUTINY EXCEPTION: STANDARDS OF REVIEW FOR UNDERINCLUSIVE CLASSIFICATIONS

A. The Fundamental Rights/Equal Protection Doctrine and the Problem of Legislative Underinclusion

One of the earliest problems in American constitutional jurisprudence was the legitimacy of laws that exempted particular individuals or classes of people from the burdens of a law, or focused their benefits on such individuals or classes.[117] During the nineteenth century, it was thought that the best protections against government oppression were the dual requirements that legislative majorities impose the same legal burdens on themselves that they imposed on minorities, and that legal benefits be provided to minorities on the same basis as they are to majorities.[118] Underinclusive laws—those that permitted the selective imposition of burdens on or distribution of benefits to particular individuals or classes—constituted unconstitutional "class legislation."[119] Such selectivity was permitted only when found to advance a "public interest."[120] The distinction between "private" and

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117. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESEIGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 30 (1993) (observing that according to "Madison and his allies" at Philadelphia, "the use of public power to advance the interests of one class at the expense of a competing class was to be considered the most vivid and authoritative example of illegitimate and unrepublican government"); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 256 (1997) ("Madison expressed the prevailing sentiment of the founding generation when he said that the state should be 'neutral between different parts of Society,' that 'equality ought to be the basis of every law,' and that the law should not subject some persons to 'peculiar burdens' or grant others 'peculiar exemptions.'" (quoting Letter from Madison to Jefferson (Oct. 24, 1787), *reprinted in* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785))).

118. *See* GILLMAN, *supra* note 117, at 54; Saunders, *supra* note 117, at 255 (citing Ervine's Appeal, 16 Pa. 256, 268 (1851); Bank of the State v. Cooper, 10 Tenn. (1 Yer.) 599, 606 (Spec. Ct. at Nashville 1831) (Green, J.) ("[T]he minority are safe, . . . [if] the majority, who make the law, are operated on by it equally with the others.")).

119. EDWARD S. CORWIN, AMERICAN CONSTITUTIONAL HISTORY 82 (Alpheus T. Mason & Gerald Garvey eds., 1964); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 177 (1988); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 390-91 (Boston, Little, Brown, & Co. 1868) ("But a statute would not be constitutional which should prescribe a class or a party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules or impose upon them special obligations or burdens from which others in the same locality or class are exempt.").

120. GILLMAN, *supra* note 117, at 29, 49-50; NELSON, *supra* note 119, at 192-93; Saunders, *supra* note 117, at 260-61, 308; *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 88 (1872) (Field, J., dissenting) ("The grant, with exclusive privileges, of a right thus appertaining to the government [i.e., of a public character, like a toll bridge], is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary

"public" purposes proved hopelessly controversial, however, resulting in judicial abandonment of the doctrine against class legislation during the New Deal.[121]

Contemporary doctrine has reversed the old presumptions. Whereas the doctrine against class legislation entailed a presumption against underinclusiveness, permitting it only when it served a public interest, contemporary equal protection doctrine presupposes the constitutionality of underinclusive classifications, invalidating them only when they are defined by a suspect criterion or burden a "fundamental" right or interest.[122] Having already discussed the former circumstance,[123] I turn now to the latter.

1. Development of the Fundamental Rights/Equal Protection Doctrine

In contrast to the minimal and heightened scrutiny models of equal protection doctrine, the "fundamental rights" model focuses on the *conduct* burdened by a classification rather than on the classifying trait: even when the classifying trait is not suspect, strict scrutiny is called for if the classification burdens the exercise of a fundamental right or interest held by members of the class defined by the trait.[124]

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trades or callings of life, which is a right appertaining solely to the individual."); COOLEY, *supra* note 119, at 357 ("[T]here is no rule or principle known to our system under which private property can be taken from one man and transferred to another for the private use and benefit of such other person, whether by general laws or by special enactment. The purpose must be public, and must have reference to the needs of government.").

121. Saunders, *supra* note 117, at 261-62; *see* Mark C. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's* Social Statics, 88 MICH. L. REV. 1366, 1377-78, 1386 (1990).

122. *E.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.") (footnote omitted). *See generally* GILLMAN, *supra* note 117, at 54 (emphasis in original):

> Just as modern courts have had to develop a theory of *preferred freedoms* in order to identify which important liberties the government should not touch without a really good reason, nineteenth-century jurists had to develop a jurisprudence of *public purpose* that would be useful in distinguishing general from partial laws and laws that treated people differently for justifiable reasons ("reasonable" laws) from laws that treated people differently for unjustifiable reasons ("unreasonable" laws). Unlike the emphasis on "balancing" which is so much a part of contemporary constitutional jurisprudence, this nineteenth-century approach to legislative power was essentially categorical—laws either promoted public welfare or were arbitrary and unreasonable.

123. *See supra* Part III.A.

124. *See* Perry, *supra* note 77, at 1077 ("What is disfavored [under the fundamental rights/equal protection doctrine] is not the *basis* of the classification (i.e., the trait or other

Fundamental rights/equal protection doctrine has its roots in *Skinner v. Oklahoma*.[125] *Skinner* involved a constitutional challenge to a state law which provided for sterilization of "habitual criminals," defined as those who had three or more felony convictions and were imprisoned for the latest conviction.[126] However, the law did not count certain nonviolent felonies, such as embezzlement, for purposes of determining whether a criminal was "habitual" within the meaning of the law, even though state law otherwise treated nonviolent felonies as the same kind of offense as violent felonies like burglary and larceny.[127] Although the degree of violence implied or involved in the commission of a felony is not a suspect classifying trait, the Court nevertheless subjected the law to strict scrutiny because the consequence of the state's use of this nonsuspect classification was to deprive some three-time felons, but not others, of the fundamental right to conceive offspring.[128]

The Court applies this same analysis to infringements on the right to travel. In the leading case of *Shapiro v. Thompson*, the Court declared the "right to travel interstate" fundamental, even though it appears nowhere in the constitutional text.[129] The Court then applied strict scrutiny under the Equal Protection Clause to a one-year residency requirement for receipt of state welfare benefits, holding it an unconstitutional burden on the right to travel.[130]

Shapiro was broadly criticized as an effort by the Court to return to the close, substantive review of economic and social legislation that had characterized the much-maligned *Lochner* era.[131] Less than a year later the Court retreated from the

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factor in terms of which the class is defined) but its *effect* (preventing or impeding satisfaction of a fundamental interest).") (emphasis in original); *see also* Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (treating as "presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.").

125. 316 U.S. 535 (1942).

126. *Id.* at 536-37.

127. *Id.* at 537.

128. *See id.* at 535; *see also id.* at 542 ("In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different.").

In addition to "fundamental," the Court also described the right to conceive offspring as "basic to the perpetuation of a race," "one of the basic civil rights of man," and "a basic liberty." *Id.* at 536, 541.

129. 394 U.S. 618, 629-31 & n.8 (1969). Justice Harlan agreed that the right to travel interstate was fundamental, but located the right in the Due Process Clause and disputed that it was materially burdened by durational residency requirements for welfare benefits. *See id.* at 671-77 (Harlan, J., dissenting).

130. *See id.* at 633-38.

131. *See, e.g., id.* at 662 (Harlan, J., dissenting); Gary S. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 496 (1973); *see also* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 993, 996 (1979) ("The language and relatively untroubled history of the equal protection clause combined to render acceptable a species of judicial interventionism that, had it rested on the due process clause, would have been intolerable."); J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause,*

broadest implications of *Shapiro*, holding in *Dandridge v. Williams* that while an individual's right to travel was fundamental, her interest in public welfare assistance was not.[132]

The death knell for recognizing additional unenumerated constitutional rights through fundamental rights/equal protection analysis was sounded a few years later by *San Antonio School District v. Rodriguez*.[133] As in *Dandridge*, the Court declined to find that wealth classifications are per se suspect.[134] More important, the Court confined fundamental rights analysis to classifications that prevent or burden the exercise of rights "explicitly or implicitly" guaranteed by the Constitution.[135] The only unenumerated rights that the Court understood to be "implicitly" guaranteed by the Constitution—and thus properly protected by fundamental rights analysis even though not expressly enumerated—were the right to travel, the right to vote in state elections, and the right to control one's procreative decisions.[136]

Fundamental rights analysis is sometimes characterized as a Warren Court excess rejected later by less activist Courts.[137] However, the Rehnquist Court has used fundamental rights analysis to invalidate burdens on the right to travel, confirming the continued vitality of this analysis even among political conservatives.[138] There is nothing aberrational about fundamental rights analysis when it is used to protect rights and interests expressly enumerated in the constitutional text or clearly implied therefrom.[139] As Chief Justice Stone suggested more than sixty years ago, suspicious

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and the Three Faces of Constitutional Equality, 61 VA. L. REV. 945, 1017 (1975) (criticizing the Warren Court's equal protection doctrine for, inter alia, "its seemingly ad hoc elevation of fundamental rights and values").

132. 397 U.S. 471, 484-87 (1970).

133. 411 U.S. 1 (1973).

134. *See id.* at 18-28.

135. *Id.* at 33-34. Following a review of its fundamental rights/equal protection cases, the Court concluded:

> The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id.

136. *Id.* at 31-32, 33-34 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Police Dept. v. Mosley, 408 U.S. 92 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942)); *see also id.* at 34 nn.73-74 & 76 (discussing the right to privacy and the right to vote). The Court recently reaffirmed the fundamental constitutional status of the right to travel. *See* Saenz v. Roe, 119 S. Ct. 1518, 1524 (1999) ("The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.").

137. *See, e.g.*, Lupu, *supra* note 131, at 997-98.

138. *See Saenz*, 119 S. Ct. at 1530.

139. *See, e.g.*, Lupu, *supra* note 131, at 1000-01 ("[T]he entire discussion of the *Rodriguez*

governmental classifications that deserve strict judicial scrutiny include not only those that disadvantage "discrete and insular minorities," but also those that prevent or burden the exercise of rights expressly granted in the Bill of Rights or necessary to the preservation of constitutional government.[140]

2. The Fundamental Rights/Equal Protection Doctrine and Legislative Underinclusion

Fundamental rights/equal protection analysis is principally concerned with underinclusive legislative classifications. In the typical fundamental rights/equal protection case, government has created a classification scheme that has the effect of depriving some people, but not others, of a fundamental right or interest.[141] The danger inherent in underinclusive classifications recalls the nineteenth-century preoccupation with class legislation: underinclusive classifications allow majorities to relieve themselves of the burden of complying with laws that burden their own rights or interests, while leaving minorities subject to such burdens.[142] Since the heightened scrutiny called for by fundamental rights analysis demands a close fit between a compelling government goal and the challenged classification, fundamental rights analysis guards against legislative majorities preferring their own fundamental rights and interests through laws that selectively exempt majority-favored classes from legal prohibitions that impact fundamental rights or interests, or that disproportionately burden the fundamental rights and interests of disapproved minorities.[143]

"fundamental rights" claim proceeded on the articulated assumption that the fundamentality of a right depends on its coincidence with textual or structural values."); *see also* Gunther, *supra* note 39, at 24 ("The Burger Court is not likely to expand the list of [fundamental] interests and [suspect] classifications significantly. But when classifications such as race or interests such as speech are involved, tighter reins on the legislatures would remain appropriate.").

140. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that closer judicial scrutiny may be appropriate in case of legislation that "appears on its face to be within a specific prohibition of the Constitution" or which "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").

141. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980) (invalidating city ordinance prohibiting all demonstrations at a residence [other than one used as a place of employment] except "peaceful labor picketing"); *Mosley*, 408 U.S. at 92 (invalidating a city ordinance prohibiting all demonstrations except site-related "peaceful labor picketing" within 150 feet of a school in session); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (invalidating a school district ordinance denying right to vote in school bond election to residents who do not own property); *Skinner*, 316 U.S. at 535 (invalidating a state law subjecting to punitive sterilization of those convicted of three violent felonies, but not those convicted of three nonviolent felonies).

142. *See supra* text accompanying notes 117-19.

143. *See* Railway Express Agency, Inc., 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1452

Fundamental rights/equal protection analysis does not prohibit all classifications that burden fundamental rights or interests. Rather, it prohibits only those classifications in which the relationship between the exempted classes and the purpose of the law cannot be meaningfully distinguished from the relationship of classes burdened by the law to this purpose. *Skinner*, for example, held that "[w]hen the law lays an unequal hand on those *who have committed intrinsically the same quality of offense* and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[144]

Similarly, in *Police Department v. Mosley*, the Court considered a municipal ordinance that prohibited picketing within 150 feet of a school while the school was in session.[145] The purpose of the ordinance was to preserve the quiet and order necessary for a proper learning environment.[146] However, the ordinance exempted from its provisions "peaceful labor picketing" related to a bona fide labor dispute at the school.[147] The Court struck this exemption down, reasoning that the Equal Protection Clause did not permit government to punish some kinds of speech and not others when *any* sort of speech threatened the government's ostensible goal:

> Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school *unless that picketing is clearly more disruptive than the picketing Chicago already permits.* . . . "Peaceful" nonlabor picketing . . . is obviously no more disruptive than "peaceful" labor picketing.[148]

(2d ed. 1988) (noting that "there are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights"); *see also* Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (reviewing a state tax on ink and paper imposed on only the largest one or two newspapers in the state):

> When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.

144. *Skinner*, 316 U.S. at 541 (emphasis added); *see also id.* at 542 ("In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different.").

145. 408 U.S. 92 (1972).

146. *See id.* at 99.

147. *Id.* at 100.

148. *Id.* (emphasis added); *accord* Carey v. Brown, 447 U.S. 455, 465 (1980) ("[The state] can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern.").

Although *Mosley* and *Carey* were both decided under the Equal Protection Clause, content-based underinclusion can be understood to violate either the Equal Protection Clause or the Speech Clause. *See* NOWACK & ROTUNDA, *supra* note 33, § 14.40 at 941; TRIBE, *supra* note 143, § 16-9, at 1459 & n.11; Elena Kagan, *The Changing Faces of First Amendment*

Finally, *Saenz v. Roe* confirms that the Court continues to strike down classifications that burden the exercise of fundamental rights when the government cannot articulate a relevant difference between the class subject to the law and the class exempt from the law.[149] Decided just last Term, *Saenz* involved an equal protection challenge to a state statute which limited welfare benefits for newly arrived residents during their first year of residence to the benefit such residents would have

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Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 39-40; *cf. Carey*, 447 U.S. at 471 (Stewart, J., concurring) ("The opinion of the Court in this case, as did the Court's opinion in [*Mosley*], invokes the Equal Protection Clause of the Fourteenth Amendment as the basis of decision. But what was actually at stake in *Mosely*, and is at stake here, is the basic meaning of the constitutional protection of free speech.") (citation omitted). On the one hand, if content-neutral regulation defines a part of the liberty protected by the Free Speech Clause, then the ordinance in *Mosley* directly intruded upon this liberty by punishing picketing in the vicinity of schools based on whether such picketing related to a labor dispute or not. But content-based underinclusion can also be framed as an equality issue. *See* Kagan, *supra*, at 39. On the other hand, then, the Court may ask, not merely whether "[t]he government has a sufficient reason for restricting the speech affected," but rather, "whether the government has a sufficient reason for restricting the speech affected *and* not restricting other expression." *Id.* at 40 (emphasis in original); *accord* Stone, *Content Regulation*, *supra* note 50, at 203 ("The key issue [in underinclusion analysis] is not whether the restricted speech is sufficiently harmful to justify its restriction, but whether the government may constitutionally restrict *only* the speech restricted.") (emphasis added).

It matters whether underinclusive classifications that burden fundamental rights are analyzed as violations of liberty or equality, for the latter analysis is less restrictive of government options. Violations of liberty norms can be cured only by wholly repealing the challenged government action. For example, if *Mosley* is analyzed as a liberty violation, then even a comprehensive prohibition on picketing must be struck down as an unconstitutional interference with the presumptive right to use streets and sidewalks for communicative purposes. Violations of equality norms, by contrast, can sometimes be cured less drastically, by merely eliminating the underinclusive effect of such action. *See id.* at 205. If *Mosley* is analyzed as an equality violation, then the violation can be cured either by entirely repealing any regulation of expression on streets and sidewalks in the vicinity of schools, or by eliminating the exemption for site-related labor picketing—that is, by extending the prohibition to *all* expression on streets and sidewalks within 150 feet of a school in session. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 n.13 (1975) (suggesting the permissibility of a traffic regulation which required all drive-in movie theatres, as opposed to only those showing movies containing nudity, to block their screens from the view of motorists).

This option is not always available, however. While it may have been possible in the immediate aftermath of *Skinner*—which, after all, was decided only fifteen years after *Buck v. Bell*, 274 U.S. 200 (1927) (upholding state statute providing for sterilization of the mentally disabled)—curing the underinclusion of the sterilization statute by extending the sterilization penalty to *all* three-time felons is (fortunately) no longer a constitutionally viable alternative today. *See* NOWACK & ROTUNDA, *supra* note 33, § 14.27, at 797-98 (stating that sterilization statutes are now viewed as intrusions upon the fundamental right of reproductive autonomy and must satisfy strict scrutiny).

149. 119 S. Ct. 1518 (1999).

received had they remained in the state from which they had moved.[150] The Court began by expressly reaffirming both the fundamental status of the unenumerated right to travel,[151] and *Shapiro*'s holding that classifications that burden the right to travel are subject to strict scrutiny under the Equal Protection Clause.[152] It went on to hold that because there is no difference between the welfare needs of newly arrived state residents and those of established residents who qualify for full benefits, discriminating between the two in the distribution of benefits imposes an unjustified penalty on the right to travel:

> Neither the duration of respondents' [state] residence, nor the identity of their prior States of residence, has any relevance to their need for benefits. Nor do these factors bear any relationship to the State's interest in making an equitable allocation of the funds to be distributed among its needy citizens. . . . In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among *equally eligible citizens.*[153]

Legislative underinclusion does not normally present a constitutional issue; the Equal Protection Clause generally permits states to proceed "one step at a time" in addressing social problems and does not usually require that they solve all dimensions of a problem, or none at all.[154] Accordingly, in most cases one can easily articulate a plausible rational basis for an underinclusive law, simply by describing the law's effect. As one commentator has pointed out, "[t]he nature of the burdens or benefits created by a statute and the nature of the chosen class's commonality will always suggest a statutory purpose—to so burden or benefit the common trait shared by members of the identified class."[155]

In *Skinner*, for example, one can imagine that the legislature considered violent crimes more threatening to social order than nonviolent crimes, and sought to provide extra deterrence of the former by sterilizing only those who habitually committed violent crimes. Similarly, the rational basis for the law in *Mosley* was obviously to prevent disruption of public schools, except to the extent that such

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150. *Id.* at 1521.

151. *See id.* at 1526 ("The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.").

152. *See id.* at 1524 (discussing Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).

153. *Id.* (emphasis added); *see also id.* ("[The Equal Protection] Clause does not tolerate a hierachy of 45 subclasses of *similarly situated citizens* based on the location of their prior residence.") (emphasis added).

Saenz caused a bit of a stir by also holding that the right of newly arrived state residents to enjoy the same state government benefits as older residents is a privilege or immunity of federal citizenship categorically protected by the Fourteenth Amendment. *Id.*

154. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (Stone, C.J., concurring); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348-49, 371-72 (1949).

155. *Legislative Purpose, Rationality, and Equal Protection*, *supra* note 57, at 128; *see also id.* at 131 ("[I]f a burden or a benefit is placed on a group that shares a trait that can be named, at least one purpose for doing so can always be to burden or benefit those that share the trait.").

prevention required restriction of labor picketing, a form of speech closely linked to the labor union activity that has long been favored by American public policy.[156] And in *Saenz*, the State argued that a reduced benefit for newly arrived residents saves money, which it clearly does.[157]

Thus, the heightened judicial scrutiny that fundamental rights/equal protection analysis calls for when a fundamental right or interest is burdened is what makes the doctrine important. Rationalizations which merely describe the effect of a classification do not satisfy strict scrutiny. The state may favor or penalize particular classes of people by selectively imposing burdens or distributing benefits only so long as doing so does not impact the exercise of a fundamental right or the enjoyment of a fundamental interest. When government action interferes with such rights or interests, it must satisfy a higher standard of justification; a bald desire to penalize the exercise of a fundamental right or the enjoyment of a fundamental interest is not available as a justification.[158] Instead, the government must explain why conduct that undermines the ostensible purpose of a law is exempted from the law when similar conduct remains subject to the law, or why conduct is excluded from benefits which the law distributes when similar conduct is the recipient of such benefits.[159] In sum,

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156. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 466 (1980) (summarizing state's argument that federal and state law has long given special protection to labor protests).

157. *Saenz*, 119 S. Ct. at 1523.

158. *See id.* at 1527-28 (stating that classifications between newly arrived and established residents, and among newly arrived residents based on their state of origin, "may not be justified by a purpose to deter welfare applicants from migrating to California," because "such a purpose would be unequivocally impermissible"); Plyler v. Doe, 457 U.S. 202, 227 (1982) (holding that to justify discrimination with respect to an "important" interest, like access to public education, "[t]he State must do more than justify its classification with a concise explanation of an intention to discriminate"); *see also* Kagan, *supra* note 148, at 65 ("It is a staple of First Amendment jurisprudence that no government action may be taken because public officials disapprove of the message communicated. The flip side of this principle . . . is that 'the government may not exempt expression from an otherwise general restriction because it agrees with the speaker's views.'") (quoting Stone, *Content Regulation*, *supra* note 50, at 228); Tussman & tenBroek, *supra* note 154, at 373 (stating that judicial deference to legislative underinclusion should be "inoperative when the Court is dealing with human, civil or individual rights"); *id.* at 350 ("[L]egislative submission to political pressure does not constitute a fair reason for failure to extend the operation of a law to those similarly situated whom it leaves untouched.").

159. *See Saenz*, 119 S. Ct. at 1527 (stating that to justify reduced benefits for newly arrived residents as a money-saving measure, the state must explain "why it is sound fiscal policy to discriminate against those who have been citizens for less than a year."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975) ("'[U]nder the Equal Protection Clause, not to mention the First Amendment itself,' even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." (quoting Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972))); *cf.* Perry, *supra* note 77, at 1068-69 & n.235 (arguing that meaningful rationality review is "a demand for an answer—or, more accurately, as an argument that there is no satisfactory answer—to the question, 'Why *me* but no one else?'. . . If one is complaining about being excluded from a class on which a benefit is conferred the question would be 'Why them but not me?'") (emphasis in original); *accord* Tussman & tenBroek, *supra* note 154, at 370 (stating that legislative underinclusion raises

when a law infringes upon or burdens fundamental rights or interests, it may not exempt from its coverage persons or activities that are not proved to be substantially different than those persons or activities that remain subject to the law.

B. Underinclusiveness, General Applicability, and the Smith *Doctrine*

The *Smith* doctrine specifies that incidental burdens imposed by a law on religious practices are subject to rational basis scrutiny so long as the law is "generally applicable." Although *Smith* itself did not define "general applicability," an ordinary language interpretation of the term suggests that a generally applicable law is one that applies to all or nearly all of whom one would normally expect the law to apply, given its purpose.

Lukumi defined general applicability differently, however. According to *Lukumi*, general applicability is an additional prohibition on religious "targeting"—that is, a prohibition against laws that pursue their secular objectives only against religious conduct.[160] *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 all suggest that the Court understands a generally applicable law to be one that does not focus its burdens or benefits on a particular class to the exclusion of most others that are similarly situated.[161]

"the problem of justifying the exclusion from the regulation of persons and activities similarly situated but left untouched").

160. *See, e.g.*, *Lukumi*, 508 U.S. at 524 ("[T]he 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."); *see also id.* at 543 ("[G]overnment, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief...."); *id.* at 545 ("[E]ach 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 worshippers] 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 concurring in the judgment)).

161. *Lukumi*, 508 U.S. at 543 (citing Cohen v. Cowles Media Company, 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 "[i]t does not target or single out the press," but "is generally applicable to . . . *all* the citizens" of the state) (emphasis added); *see* University 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); Minneapolis Star & Tribune v. Commissioner 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 "singled out the press" for special treatment rather than applying the tax to all the constituents of the taxing jurisdiction); Presbyterian Church v. Hull 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

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.[162] Although it hints at the possibility of a broader reading of general applicability,[163] *Lukumi* generally characterizes both religious neutrality and general applicability as tests that guard against the selective imposition of burdens on religiously motivated conduct.[164]

In sum, under the *Smith* doctrine, 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 will tolerate a tremendous amount of underinclusion before finding that a law is not generally applicable, so long as the underinclusion stops short of religious targeting.[165]

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organization) (emphasis added).

162. *See Lukumi*, 508 U.S. at 531.

163. *See id.* 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 th[e] 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.").

164. *Id.* at 531, 543.

165.

> 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. at 557 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted) (emphasis in original); *cf.* Lucas v. North Carolina Coastal Council, 505 U.S. 1003, 1072, 1074 (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.") (emphasis in original); Gilles, *supra* note 63, at 70 (arguing that *Cohen* defines a "generally applicable" law in the context of burdens on speech rights of the press as a law that (1) does not "target the press,"(2) does not "target a particular message," and (3) is "aimed at nonspeech").

In *Minnesota Star*, for example, the Court considered a First Amendment challenge to a state tax on paper and ink from which the vast majority of newspapers in the state were exempt. *Minnesota Star*, 460 U.S. at 577-79. Distinguishing a prior decision, the Court observed that exemption of certain workers from the Fair Labor Standards Act did not preclude application of the Act against newspaper employees when such exemptions were merely exceptions to the general rule of coverage. *See id.* at 583 n.5 ("The exempt enterprises in *Oklahoma Press* were isolated exemptions and not the rule.") (discussing Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 192-93 (1946)); *see also* University of Pa. v. EEOC, 493 U.S. 182, 201 (1990) ("'[T]he First Amendment does not invalidate every incidental burdening of the press that may result from enforcement of civil or criminal statutes of general applicability.'") (quoting Branzburg v. Hayes, 408 U.S. 665, 682 (1972) (holding that First Amendment does not allow reporter to decline to testify under grand jury subpoena)). Similarly, although Title VII of the Civil Rights Act of 1964 exempts numerous persons and

C. Underinclusive Secular Classifications and the "Normal" Standard of Review

The *Smith* doctrine calls for heightened scrutiny of underinclusive but religiously neutral classifications that incidentally burden religious exercise only when the underinclusion is so dramatic that religious exercise is effectively singled out for differential treatment.[166] This is a substantial departure from the treatment of underinclusive classifications under fundamental rights/equal protection analysis. Under that analysis, underinclusion in a classification that burdens a fundamental right or interest is subject to heightened scrutiny, even if the classifying trait is not suspect or the burden is incidental. If the free exercise of religion is a fundamental right, then one would expect heightened scrutiny of underinclusive classifications that incidentally burden religion well before the point at which underinclusion turns into religious targeting.[167]

Ironically, *Smith* itself belies the suggestion that a law loses general applicability only when it effectively targets religious activity. 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 government assessment" of exemption claims.[168] Though it has been derided as a make-weight argument concocted only to cover the Court's embarrassment at abandoning the exemption doctrine it had just affirmed a year earlier,[169] the individualized assessment exception to *Smith* is better understood as deriving from suspicion of underinclusive government action when a law grants government agents substantial discretion in determining the scope of the law's coverage and enforcement with respect to a fundamental right.[170]

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entities from complying with its provisions, the Court considers it to be a generally applicable law. *See University of Pa.*, 493 U.S. at 200. The Court presumably came to this conclusion because those not exempted from Title VII are sufficiently diverse that none can be said to have been targeted.

166. *See supra* Part IV.B.

167. *See* Richard F. Duncan, Free Exercise at the Millenium: Living with *Smith* 11 (unpublished manuscript, on file with the *Indiana Law Journal*) (suggesting that some laws that "stop short of targeting religion" may nevertheless fall "below the minimum standard of general applicability").

168. Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

169. *See, e.g.*, Eisgruber & Sager, *supra* note 5, at 1278 (noting that Justice Scalia "struggled unconvincingly" to distinguish the *Unemployment Compensation Cases*); Laycock, *supra* note 9, at 47 ("The Court's exception for the unemployment compensation cases . . . seems to be an arbitrary exception for unemployment compensation only, based on nothing but precedent, like the distinction between baseball and football in antitrust law."); Smolla, *supra* note 4, at 935 ("If the *Smith* Court's insistence that prior cases could be explained as hybrid constitutional claims appeared disingenuous, its argument that the *Sherbert* line of cases was distinguishable on the [basis of individualized exemptions] was equally lame.").

170. *Cf.* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 961 (1984) (observing that among the "easy bases for invalidation" of time, place, or manner regulations under the Free Speech and Assembly Clauses is "the standardless provision for administratively granting

Unemployment compensation programs generally excuse applicants from complying with program eligibility requirements whenever they can show "good cause."[171] 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 various reasons applicants give will be individually considered.[172] *Smith* states that "where the State has in place a system of individual[ized] exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[173] In short, *Smith* mandates that when the government considers individual circumstances in administering the requirements of a program, it must excuse program participants from requirements that burden their religious practices, even though the burden is incidental.[174]

Neither religious neutrality nor the Court's definition of general applicability can account for the imposition of strict scrutiny in the *Unemployment Compensation Cases*. Unemployment eligibility requirements do not facially discriminate on the basis of religion; if they did, there is little doubt that they would be struck down under the Equal Protection Clause and both Religion Clauses.[175] Nor are they normally applied in such a way that religious applicants are the only ones denied exemptions

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exemptions").

Unfettered discretion was an alternative holding for the result in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), 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. *Id.* at 373-74. *Yick Wo* is 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. *See, e.g.*, GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 750 (13th ed. 1997); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 1182-83 (8th ed. 1996); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1396 (3d ed. 1996).The bulk of the opinion, however, is an argument that the ordinance is unconstitutional *on its face*, not as it was applied, because it specified no standards controlling the board's discretion regarding who would receive permits. *Id.* at 366-73. Unfettered bureaucratic discretion in granting laundry and other such permits was thought to violate the prohibition on class legislation, because without standards the competition for permits would unavoidably end in favoritism and corruption. *See* GILLMAN, *supra* note 117, at 71.

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

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

173. *Id.* at 884. The Court did not apply this reasoning in *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.

174. *See* 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.").

175. *See supra* text accompanying notes 65-75, 83-93.

from eligibility requirements;[176] in addition to religious motivations, there are countless secular reasons that likewise do not count as "good cause" for exemption from eligibility requirements. In other words, it is not the case that any secular reason but no religious reason will excuse one from eligibility requirements; to the contrary, those whose religious beliefs and practices are burdened by eligibility requirements generally have plenty of nonreligious company whose comparable secular beliefs and practices are similarly burdened.

Why, then, does the fact that unemployment compensation bureaucracies typically exempt, say, claimants with terminally ill children from the work availability requirement, require that courts strictly scrutinize the bureaucracies' failure also to exempt applicants with sincere religious objections from this requirement? That government chooses to burden or benefit certain activities does not normally trigger heightened scrutiny, even when the defining classification is underinclusive—that is, even when activities that seem to be similarly situated with respect to the law's goal are treated differently. As Professor Volokh has pointed out, the government's provision of exemptions for secular activities without providing exemptions for comparable religious activities merely shows "'that the legislature values the exempted secular activities more highly' than the [nonexempt] religious activities."[177]

What triggers strict scrutiny when numerous people are excused from eligibility requirements for certain secular reasons but not for similar religious reasons is not a lack of either religious neutrality or what the Court defines as general applicability, but that the free exercise of religion is a fundamental right, the protection of which is specified by the constitutional text. As I have previously discussed, heightened scrutiny of underinclusive classifications drawn on nonsuspect traits is appropriate when the classification burdens a fundamental right. In that event, the government must provide more in the way of justification than its bare desire to favor the exempted activity or penalize the nonexempted activity. As Professor Laycock has argued, a pattern of exempting secular activity but not religious activity "reflects a legislative judgment that the free exercise of religion is less important than the demands of some special interest group of no constitutional significance. But that is a judgment inconsistent with the constitutional guarantee."[178] Thus,

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176. *But see* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in part and concurring in the judgment) (stating that an exemption was required because Florida treated religious claimants less favorably than other claimants); Bowen v. Roy, 476 U.S. 693, 722 n.17 (1986) (Stevens, J., concurring in part and concurring in the result) (arguing that exemptions were required in Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963), to prevent the religious claims in those cases from being treated less favorably than other claims). Professors Eisgruber and Sager argue that this is the better explanation for the *Unemployment Compensation Cases*. Eisgruber & Sager, *supra* note 5, at 1278-81.

177. Volokh, *supra* note 38, at 1541 (quoting Laycock, *supra* note 9, at 51). 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 believes 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.

178. Laycock, *supra* note 9, at 51.

Although I disagree with Professor Perry's general suggestion for implementing the

> the Court's explanation of its unemployment compensation cases would seem to require that religion get something analogous to most-favored nation status. Religious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth. Alleged distinctions—explanations that a proposed religious use will cause more problems than some other use already approved—should be subject to strict scrutiny.[179]

This analysis need not be confined to situations in which government actors exercise administrative discretion,[180] and lower courts have applied this broad understanding of general applicabilty in wider contexts.[181]

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antidiscrimination norm of the Free Exercise Clause, *see supra* note 115, his approach works well in cases of underinclusive secular exemptions: government refusal to exempt religious conduct, when such an exemption would not undermine a law any more than already-exempt secular conduct, is strong circumstantial evidence of government hostility to religion.

179. *Id.* at 48-49; *accord Bowen*, 476 U.S. at 721-22 (Stevens, J., concurring in part and concurring in the result) ("[O]ur recent free exercise cases suggest that religious claims should not be disadvantaged in relation to other claims."); Eisgruber & Sager, *supra* note 5, at 1283 (arguing that under a principle of "equal regard," government should "treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally").

180.

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

Fraternal Order of Police v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993)); *accord* Rader v. Johnston, 924 F. Supp. 1540, 1552-53 (D. Neb. 1996) (holding a state university policy which provided categorical and individualized exemptions for secularly motivated conduct but no exemptions for religiously motivated conduct to be a selective imposition of burdens on religion).

181. For example, *Fraternal Order of Police*, 170 F.3d at 366, 367, struck down under the Free Exercise Clause a police department rule prohibiting beards as applied against Muslim officers, because a formal departmental policy of granting medical exemptions but not religious exemptions

> indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. [W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny. . . . We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not.

Id. at 366-67; *accord* Rader v. Johnston, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (holding that parietal rule requiring that freshman live in university housing is not generally applicable, where "exceptions are granted . . . for a variety of nonreligious reasons, [but] not granted for

It is important to emphasize that the application of fundamental rights/equal protection analysis to incidental free exercise burdens would not require religious conduct to be exempted from a law whenever *any* secular conduct is exempted. Religion is treated unequally only if nonexempted religious conduct is in the same relationship to the purpose of a law as exempted secular conduct. When the government can show that exempted secular conduct is substantially different in terms of the purpose of the law than nonexempted religious conduct, failing to exempt the latter does not violate equality.[182] What fundamental rights/equal protection analysis requires in the context of incidental burdens on religion is that religious conduct be exempted from a law whenever exemption of such conduct would not present a substantially greater threat to the purpose of the law than already-exempt secular conduct. Fundamental rights/equal protection analysis makes clear that any law or government action that excuses—by administrative exemption, legislative exemption, or otherwise—one or more secular activities but not *comparable* religious practices creates a classification that impermissibly burdens the fundamental right of free exercise of religion, and thus should normally be subject to strict scrutiny.

V. CONCLUSION: THE *SMITH* DOCTRINE AND THE FREE EXERCISE OF RELIGION AS A NONPREFERRED RIGHT

If the *Smith* doctrine were truly normal, there would be no Rational Basis Rule; incidental burdens imposed by government on religious practices would be subject to the same intermediate scrutiny currently applied to incidental burdens imposed by government on speech and expression.[183] If the *Smith* doctrine were truly normal, there would be no Permissive Accommodation Rule; religious classifications used by government to facilitate religious exercise would run afoul of the Equal Protection Clause in the same way that benign or remedial use of race or any other suspect classifying trait now violates the clause.[184] And if the *Smith* doctrine were truly normal, the Strict Scrutiny Exception would apply to all underinclusive government action that burdens religion, and not just to government action that is so dramatically underinclusive as to constitute religious targeting; underinclusive government action that burdens religion would be subject to strict scrutiny under the fundamental

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religious reasons," "[o]ver one third of the freshman students . . . are not required to comply with the parietal rule," and there existed a system of individualized assessment which "refused to extend exceptions to freshman . . . for religious reasons"); Horen v. Virginia, 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).

182. *See, e.g., Fraternal Order of Police*, 170 F.3d at 366 (holding that strict scrutiny of no-beard rule is triggered by medical exemption but not by exemption for undercover officers, because the former undermines the department's interest in promoting uniformity whereas the latter does not, since undercover officers are not held out to the public as police officers).

183. *See supra* Part II.

184. *See supra* Part III.

rights/equal protection doctrine, just as that doctrine mandates strict scrutiny of underinclusive government action that burdens the right to procreation, the right to travel, and other fundamental constitutional rights.[185]

But of course, it is precisely the fundamentality of the free exercise of religion, its status as a preferred constitutional right, that the *Smith* doctrine repudiates. By applying minimal or no scrutiny to incidental burdens on religious exercise under the Rational Basis Rule, the Court is not treating free exercise rights like speech rights; to the contrary, it is treating free exercise rights like "rights" to be free from price controls or income taxes or zoning restrictions.[186] The *Smith* doctrine prescribes the same level of protection that the Court gives to nonfundamental social and economic interests that do not fall within the domain of a preferred constitutional liberty, which is to say, no protection at all.

Similarly, by applying strict scrutiny only to underinclusive classifications that amount to religious targeting under the Strict Scrutiny Exception, the Court is not treating free exercise rights like privacy, speech, travel, and other fundamental rights. By failing to increase the scrutiny level for underinclusive classifications that burden the free exercise of religion, the *Smith* doctrine treats burdens on the free exercise of religion in the same manner that it treats indirect burdens on nonfundamental social and economic interests under the Constitution: as "not subject to special treatment under the Equal Protection Clause, because they are not distinguishable in any relevant way from other [police power] regulations in 'the area of economics and social welfare.'"[187]

Additionally, clearly recognizing the preferred status of religious free exercise might justify the Permissive Accommodation Rule. Protection of nonfundamental social and economic interests can never count as a compelling state interest whose protection by a suspect classification satisfies strict scrutiny. Avoiding the violation of a fundamental right, however, may well be such an interest.[188] Moreover, the Court has upheld government efforts to facilitate or subsidize the exercise of fundamental rights, even when it does so on constitutionally suspect grounds.[189] If the free exercise

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185. *See supra* Part IV.

186. *See* Laycock, *supra* note 9, at 18, 20 ("If it were true that the Court had rejected all challenges to formally neutral rules that suppress speech, that would support *Smith* by analogy. But mere formal neutrality does not put restrictions on speech beyond challenge in the way that formally neutral restrictions on religious practice now appear to be beyond challenge.").

187. Plyer v. Doe, 457 U.S. 202, 232 (1982) (Blackmun, J., concurring) (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

188. *See, e.g.*, Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conducts, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1199 (1996) ("Protecting the ability of individuals to exercise a fundamental right may be an independently compelling justification for regulating expressive activity outside medical clinics that provide abortion services."); *cf.* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995) ("[C]ompliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.").

189. *See, e.g.*, National Endowment for the Arts v. Finley, 524 U.S. 569, 587-88 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be

of religion were clearly designated as a fundamental right, the Permissive Accommodation Rule would be less constitutionally problematic. But if the free exercise of religion were a fundamental right, neither the Rational Basis Rule nor the narrow definition of general applicability under the Strict Scrutiny Exception could pass as normal constitutional doctrine.

Nothing in the First Amendment or the rest of the Constitution requires free exercise doctrine to mirror the doctrinal structure of other constitutional rights. Nevertheless, it seems intuitively correct that similar rights should be enforced to a similar extent with similar doctrine. Having determined in *Smith* that religious exemptions are doctrinally aberrant under the Constitution, the Court properly sought a return to normality. But the *Smith* doctrine is not constitutionally normal. Indeed, in comparison to the doctrinal structure of other constitutional rights, the *Smith* doctrine is at least as aberrational as the exemption doctrine it replaced, if not more so. Is it not perverse to pretend that incidental burdens on religious practices raise no constitutional issue under the Free Exercise Clause, when incidental burdens on expression are subject to heightened scrutiny under the Speech Clause? Is it not perverse to allow use of suspect religious classifications to protect believers from burdens on their religious practices, but to prohibit use of suspect racial classifications to protect minorities from the historical effects of racism? And is it not perverse to permit government to be more protective of nonpreferred rights and interests under the Equal Protection Clause than of a right that is expressly enumerated in the text of the First Amendment?

The one thing that seemed beyond question prior to *Smith* was that "the Free Exercise Clause is a guarantee of individual religious *liberty*."[190] Indeed, only three years before deciding *Smith*, the Supreme Court rejected an attempt to read liberty norms out of the Free Exercise Clause, on the ground that this would reduce the constitutional protection afforded by the Clause to the antidiscrimination protection already provided by the Equal Protection Clause.[191] Thus, the biggest perversity is the *Smith* doctrine's erasure of religious free exercise as a fundamental right. Under the *Smith* doctrine, the Free Exercise Clause is doctrinally redundant, circumscribing no special domain of preferred liberty, protecting nothing that is not also fully protected

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impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) ("'This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" (quoting *Hobbie*, 480 U.S. at 144-45.)).

190. Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335, 350 (1994) (emphasis added).

191. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987) (opinion of O'Connor, J.) (rejecting argument that Free Exercise Clause requires only that government action which burdens religion be neutral, generally applicable, and a reasonable means of implementing the government's objectives, because "'[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides.'" (quoting with approval Bowen v. Roy, 476 U.S. 693, 727 (1986))).

by another constitutional provision—which is to say, the Free Exercise Clause now protects nothing at all. One need not advocate return of the exemption doctrine to hope that the *Smith* doctrine may yet be recognized as the greater constitutional abnormality.