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Free Exercise Revisionism and the Smith Decision

Michael W. McConnell

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For decades, the Free Exercise Clause of the First Amendment was largely uncontroversial. The great debates over the relation of religion to government in our pluralistic republic—over school prayer, aid to parochial schools, publicly sponsored religious symbols, and religiously inspired legislation—almost without exception were issues of establishment. Government support for religion, not government interference with religion, was the issue.

Not that there was any shortage of free exercise cases or closely divided Supreme Court decisions. And not that there was any dearth of academic critics of the Court's doctrine.[1] But free exercise doctrine in the courts was stable, the noisy pressure groups from the ACLU to the religious right were in basic agreement, and most academic commentators were content to work out the implications of the doctrine rather than to challenge it at its roots.

There was, however, a peculiar quality to the consensus, which may or may not have contributed to its stability: the free exercise doctrine was more talk than substance. In its language, it was

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[1] Philip Kurland is the dean of the critics. See Philip B. Kurland, *Religion and the Law* (Aldine, 1962); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill L Rev 3 (1978). Walter Berns and Michael Malbin are the leading critics on originalist grounds. See Walter Berns, *The First Amendment and the Future of American Democracy* (Basic, 1976); Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (American Enterprise Institute, 1978). More recently, Mark Tushnet and William Marshall have produced the most penetrating analytical critiques of free exercise exemptions from generally applicable laws. See Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 S Ct Rev 373; Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 Georgetown L J 1691 (1988); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W Res L Rev 357 (1989-90); and William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn L Rev 545 (1983).

highly protective of religious liberty. The government could not make or enforce any law or policy that burdened the exercise of a sincere religious belief unless it was the least restrictive means of attaining a particularly important ("compelling") secular objective. In practice, however, the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. The Court generally found either that the free exercise right was not burdened or that the government interest was compelling. In fact, after the last major free exercise victory in 1972,[2] the Court rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent. This did not mean that the compelling interest test was dead, however. There were many more applications of the doctrine in the state and lower federal courts, and legislatures and executive bodies frequently conformed their decisions to its dictates. But at the Supreme Court level, the free exercise compelling interest test was a Potemkin doctrine.

With last April's Supreme Court decision in *Employment Division v Smith*,[3] all that has changed. By a 5-4 vote (Justice O'Connor concurring on different grounds), the Supreme Court abandoned the compelling interest test, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' "[4] In other words, "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[5] The Court acknowledged that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[6] Calling this the "unavoidable consequence of democratic government," the Court stated that it "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[7]

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[2] *Wisconsin v Yoder*, 406 US 205 (1972).

[3] 110 S Ct 1595 (1990).

[4] Id at 1600, quoting *United States v Lee*, 455 US 252, 263 n 3 (1982) (Stevens concurring).

[5] 110 S Ct at 1600.

[6] Id at 1606.

[7] Id.

The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades. Already it has stimulated a petition for rehearing joined by an unusually broad-based coalition of religious and civil liberties groups from right to left and over a hundred constitutional law scholars, among them myself, which proved futile,[8] as well as a drive for legislative correction, which is presently under consideration in Congress.[9] Free exercise is no longer wanting for controversy.

The *Smith* decision has pushed to the forefront the central issue of interpretation of the Free Exercise Clause. Should it be given a narrow interpretation, under which it would prohibit only deliberate discrimination against religion? Or should it be given a broad interpretation, under which it would provide maximum freedom for religious practice consistent with demands of public order?

There are many ways in which to criticize the *Smith* decision. Here, I wish to focus on two: the opinion's use of legal sources—text, history, and precedent—and its theoretical argument. Problems of the first sort are of lesser interest, for they might have been overcome (or at least mitigated) by writing the opinion in a different way. Problems of the second sort are more fundamental and suggest that *Smith* is contrary to the deep logic of the First Amendment. Before turning to the sources and argument, however, we must take a look at the *Smith* case itself.

I. THE *SMITH* LITIGATION

Like many important cases, *Smith* was an unlikely vehicle for reconsideration of fundamental doctrine. The case arose when two employees at a drug rehabilitation clinic, Alfred Smith and Galen Black, applied for unemployment compensation after they had been fired for ingesting peyote for sacramental purposes at a ceremony of the Native American Church. The Employment Division of the Oregon Department of Human Resources denied their claim on the ground they had been dismissed for work-related "misconduct," but the state appellate and supreme courts reversed on the ground that the state may not constitutionally treat the exercise of religious practices as "misconduct" warranting a denial of otherwise available benefits. This holding appeared to be an unexcep-

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[8] The Supreme Court denied the petition for rehearing, 110 S Ct 2605 (June 4, 1990).

[9] Religious Freedom Restoration Act of 1990, HR 5377, 101st Cong, 2d Sess, in 136 Cong Rec H5695 (July 26, 1990).

tional application of settled precedent from the United States Supreme Court.[10]

On certiorari, however, the Supreme Court vacated the judgment and remanded to the Oregon court to decide whether the religious use of peyote is lawful in the state, reasoning that if a practice can be punished under the criminal law it may also be the basis for the lesser penalty of denial of unemployment benefits.[11] This disposition was odder than it might appear, since the Oregon Supreme Court had already held that the criminality of peyote use is "immaterial" to eligibility for unemployment benefits as a matter of state law.[12] Under Oregon law, being fired for the use of peyote was like being fired for not working on Saturday: both are work-related derelictions which, if religiously motivated, could not be treated as misconduct under the First Amendment.

On remand, the Oregon Supreme Court reiterated that the criminality of the sacramental use of peyote is irrelevant under both state and federal law, and reaffirmed its decision. The court went on to say that Oregon drug law "makes no exception for the sacramental use."[13] And although Oregon apparently does not now enforce the law against sacramental peyote use, the court concluded that enforcement, should it ever occur, would violate the Free Exercise Clause.[14]

The United States Supreme Court again granted certiorari, this time to decide whether a criminal law against peyote use is constitutional. *Smith* thus involved a question that was entirely hypothetical and, according to the highest court of Oregon, irrelevant to the outcome as a matter of state law. Looking ahead to the result, it remains a mystery why Smith and Black were not entitled to unemployment benefits even assuming the Supreme Court was correct on the merits. Granted, the state *could*, consistent with the Free Exercise Clause, deny benefits for any activity that violates the criminal law. But according to the Oregon Supreme Court's

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[10] The unemployment compensation cases are discussed below. See text at notes 56-66.

[11] *Employment Division v Smith* (*Smith I*), 485 US 660, 670 (1988). Justice Stevens wrote the majority opinion. Curiously, in *Idaho Department of Employment v Smith*, 434 US 100, 104 (1977) (Stevens dissenting in part), in which the Court reversed a state court decision holding that a denial of unemployment benefits violates the Equal Protection Clause, Stevens took the position that when a state supreme court grants its citizens "more protection than the Federal Constitution requires, I do not believe that error is a sufficient justification for the exercise of this Court's discretionary jurisdiction." One can only speculate as to why Justice Stevens took a different view in the Oregon *Smith* case.

[12] *Smith v Employment Division*, 301 Or 209, 721 P2d 445, 449-50 (1986).

[13] *Smith v Employment Division*, 307 Or 68, 763 P2d 146, 148 (1988).

[14] 763 P2d at 148.

construction of state law, Oregon had not availed itself of that opportunity. Until it does, there would seem to be no basis in state or federal law for denying benefits to Smith and Black.[15] And if that is true, then the entire discussion of free exercise exemptions was beyond the Court's jurisdiction.

The briefs and arguments in the Supreme Court focused entirely on whether the state has a sufficiently compelling interest in controlling drug use to overcome the free exercise rights of Native American Church members. This may be considered a close question. Drug laws are undoubtedly important, and it is intuitively plausible that even closely cabined exemptions would seriously erode enforcement of the law. Justice O'Connor concurred in the result on this ground.[16] On the other hand, peyotism is an ancient religious practice and peyote use does not, according to the weight of expert opinion, cause any of the problems associated with drug abuse. Moreover, the drug is unpleasant to use and not part of drug trafficking. In fact, twenty-three states specifically exempt the religious use of peyote from their drug laws, the federal government not only exempts peyote but licenses its production and importation, and Oregon itself apparently does not enforce its law with regard to peyote use.[17] This suggests that the government's interest was not strong. Had the case been decided either way on this ground, it would have had little doctrinal importance.

The most important thing to know about the briefs in *Smith* is what they did not contain: neither of the parties asked the Court to reconsider its free exercise doctrine. The State expressly conceded the compelling interest test in its brief and the parties did not discuss the doctrinal issue at oral argument.[18] The Court's disposition thus stands in marked contrast to its usual practice of requesting additional briefing and reargument in cases in which it decides to reconsider established precedent.[19] Justice Stevens, a member of the *Smith* majority, has in other contexts criticized the Court for ordering reargument on issues not raised by the parties. "As I have said before, 'the adversary process functions most effec-

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[15] The Supreme Court did not overrule the unemployment compensation cases on which the Oregon court had relied, see *Smith*, 110 S Ct at 1602-03, so the federal constitutional basis for the lower court's holding remained intact but for the criminality of peyote use.

[16] Id at 1613-15 (O'Connor concurring).

[17] See id at 1617, 1618 n 5 (Blackmun dissenting), and sources cited therein.

[18] Id; Brief for Respondent at 11-12.

[19] See, for example, *Patterson v McLean Credit Union*, 485 US 617 (1988); *San Antonio Metropolitan Transit Authority v Garcia*, 469 US 528 (1985).

tively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.' "[20] It is presumably even more inappropriate for the Court to decide the case on a basis other than the issues presented *without* asking for briefing or argument.

The most important decision interpreting the Free Exercise Clause in recent history, then, was rendered in a case in which the question presented was entirely hypothetical, irrelevant to the disposition of the case as a matter of state law, and neither briefed nor argued by the parties.

II. The Opinion's Use of Legal Sources

A. Text

The *Smith* opinion begins, quite properly, with a consideration of the constitutional text: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[21] The opinion notes, also quite properly, that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."[22] The conclusion that the clause protects conduct as well as speech or belief would seem to follow from its very words: "exercise" means conduct.[23] The point is corroborated by extensive evidence from the period of the Founding[24] and is important because the Supreme Court originally held the opposite, in reliance on a misleading statement by Thomas Jefferson.[25]

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[20] *Patterson*, 485 US at 623 (Stevens dissenting), quoting *New Jersey v TLO*, 468 US 1214, 1216 (1984) (Stevens dissenting from order directing reargument).

[21] US Const, Amend I, quoted in 110 S Ct at 1599 (emphasis omitted).

[22] 110 S Ct at 1599.

[23] The American edition of Samuel Johnson's *A Dictionary of the English Language*, published in Philadelphia in 1805, used the following terms to define "exercise": "Labour of the body," "Use; actual application of any thing," "Task; that which one is appointed to perform," and "Act of divine worship whether publick or private." Noah Webster's *A Dictionary of the English Language*, published in New Haven in 1807, defined "exercise" as "practice [or] employment." James Buchanan's 1757 *Linguae Britannicae Vera Pronunciatio*, published in London, gave the definition "To use or practice."

[24] See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1451-52, 1488-90 (1990).

[25] *Reynolds v United States*, 98 US 145, 164 (1879). Jefferson had written that "the legislative powers of government reach actions only, and not opinions. . . . [M]an . . . has no natural right in opposition to his social duties." *Letter from Thomas Jefferson to a Commit-*

Having repudiated the belief-conduct distinction, the Court went on to note that the language of the Free Exercise Clause does not conclusively resolve whether the provision requires exemptions from generally applicable laws. The opinion is careful not to overstate its point. It merely holds that "[a]s a textual matter, we do not think the words *must* be given that meaning."[26] Moreover, "[i]t is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[27] The Court does not deny that the broader reading, which would require exemptions, is likewise a "permissible" reading. Indeed, the Court does not even deny that it is the *more obvious and literal* meaning. It is sufficient, according to the Court, that the words are not ironclad. Having determined that the words are not dispositive, the opinion then turns to the Court's precedents and the text plays no further role in the decision.

This is a strange and unconvincing way to deal with the text of the Constitution, or of any law. A court should not disregard the text merely because it contains some degree of ambiguity. Rather, a court should determine the reading of the text that is most probable and should give that reading presumptive weight unless there is good evidence based on extratextual sources that it is wrong.

A plausible argument available to the Court was that the verb "prohibiting" means the deliberate targeting of the prohibited activity, so that the exercise of religion is not "prohibited" if the exercise merely happens to fall within a broad class of proscribed activities. However, the more natural reading of the term is that it prevents the government from making a religious practice illegal. If a zoning ordinance limits a particular area to residential use, we would naturally say that it "prohibits" an ice cream store within the zone—even though no one on the zoning commission had any particular intention with respect to ice cream. While we cannot rule out the possibility that the term "prohibiting" might impliedly be limited to laws that prohibit the exercise of religion in a particular way—that is, in a discriminatory fashion—we should at

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tee of the Danbury Baptist Association (Jan 1820), in Andrew Adgate Liscomb, ed, 16 *The Writings of Thomas Jefferson* 281, 281-82 (Thomas Jefferson Memorial Ass'n, 1903).

[26] *Smith*, 110 S Ct at 1599 (emphasis added).

[27] Id at 1600.

least begin with the presumption that the words carry as broad a meaning as their natural usage.[28]

Further, it is significant that the provision is expressed in absolute terms. Unlike the Fourth Amendment, the First Amendment does not limit itself to prohibitions that are "unreasonable." Unlike the Fifth Amendment, the First Amendment does not authorize deprivations of liberty with due process of law. Any limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from necessity, since it is not implied by the text. And while I do not deny that there must be implied limitations, it is more faithful to the text to confine any implied limitations to those that are indisputably necessary. It is odd, given this text, to allow the limitations to swallow up so strongly worded a rule.[29]

This does not mean that the text of the Free Exercise Clause is sufficiently unambiguous that the *Smith* decision can be rejected on textual grounds alone. But it does suggest that the Court gave insufficient weight to the text. Discovery of a degree of ambiguity is not a license to move on to other sources of enlightenment. A Court that is serious about interpreting a written Constitution should be more anxious to ensure that its reading is the most persuasive from among the "permissible" readings of the clause.

B. History

Having established to its satisfaction that both the exemptions and no-exemptions readings of the Free Exercise Clause are "permissible reading[s] of the text," the Supreme Court then noted that "[o]ur decisions reveal that the latter reading is the correct one."[30] Interestingly, the Court did not pause to consider whether the historical context surrounding the adoption of the Free Exercise Clause might have a bearing on the two permissible readings

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[28] The harder question is whether government actions that inhibit but do not forbid religious exercise are covered by the clause. Elsewhere, I have argued that the historical context makes it doubtful that the term "prohibiting" was intended or understood to be strictly limited in this sense. McConnell, 103 Harv L Rev at 1486-88 (cited in note 24). Paradoxically, *Smith* appears to assume that a strict prohibition through criminal sanctions is less likely to violate the Free Exercise Clause than a denial of benefits. See 110 S Ct at 1603.

[29] See Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 Notre Dame J L, Ethics & Pub Pol 683, 688 (1990). On the other hand, my colleague, Dean Geoffrey Stone, made the excellent point in a conversation with me that if the protection accorded free exercise is close to absolute, this is an argument that the domain of the Clause should be read narrowly.

[30] 110 S Ct at 1600.

of the text. This is particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning.[31]

This is not the occasion to revisit the originalism debate. Suffice it to say that even those Justices and commentators who believe that the historical meaning is not dispositive ordinarily agree that it is a relevant consideration.[32] It is remarkable that the Court would take so important a step here without so much as referring to the history of the Free Exercise Clause.

Had the Court looked to the history of the Free Exercise Clause, it would have found some significant evidence supporting its conclusion that the clause was not expected or intended to allow judges to craft exemptions from laws of general applicability. Certainly, that was John Locke's position—and Locke was a major intellectual influence on the idea of religious toleration in colonial America.[33] It appears also to have been Jefferson's position. Indeed, Jefferson's position was in many respects more restrictive than Locke's.[34] Moreover, although couched in qualifying language that seems to point the other way, passages in the writings of such evangelical advocates of religious freedom as William Penn and John Leland can be interpreted as rejecting free exercise exemptions.[35] And the highest courts of two states, Pennsylvania and South Carolina, interpreted their state constitutional guarantees in the early nineteenth century as not requiring exemptions.[36]

On the other hand, the history would have revealed other evidence—more substantial, in my judgment—in favor of the broader exemptions position. For example, one can look to the various state constitutional provisions regarding free exercise of religion, eight of which expressly and one of which impliedly contained language that appears to be an early equivalent of the "compelling interest" test.[37] Article 61 of the Georgia Constitution of 1777 is typical: "All persons whatever shall have the free exercise of their

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[31] See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989).

[32] For a recent example, in which all nine Justices, in both the majority and dissent, relied heavily of the historical understanding of the Excessive Fines Clause of the Eighth Amendment, see *Browning-Ferris Industries v Kelco Disposal, Inc.*, 109 S Ct 2909, 2914-19 (1989); see also id at 2926-31 (O'Connor dissenting).

[33] See McConnell, 103 Harv L Rev at 1430-35, 1443-49 (cited in note 24).

[34] Id at 1451-52.

[35] Id at 1447-48.

[36] Id at 1506-11.

[37] See id at 1457 n 242.

religion; provided it be not repugnant to the peace and safety of the State."[38] It is difficult to reconcile these provisions with the narrow reading of free exercise. If the free exercise guarantees could not be read to exempt believers from "otherwise valid" laws, what could have been the purpose of the "peace and safety" proviso? These provisions were the likely model for the federal free exercise guarantee, and their evident acknowledgment of free exercise exemptions is the strongest evidence that the framers expected the First Amendment to enjoy a similarly broad interpretation.

The idea of exemptions had deep roots in early colonial charters. As early as 1665, the second Charter of Carolina, in recognition of the fact that "it may happen that some of the people and inhabitants of the said province cannot, in their private opinions, conform" to the Church of England, authorized the proprietors "to give and grant unto such person and persons . . . such indulgences and dispensations, in that behalf [as they] shall, in their discretion, think fit and reasonable."[39] "Indulgences" and "dispensations" were technical legal terms of the day, referring to the King's asserted power to exempt citizens from the enforcement of a law enacted by Parliament.[40] It is noteworthy that from the beginning it was thought that the solution to the problem of religious minorities was to grant exemptions from generally applicable laws.

The practice of the colonies and early states bore this out. Most of the colonies and states (beginning with those with strong free exercise provisions in their organic laws) exempted religious objectors from military conscription and from oath requirements expressly in order to avoid infringements of their religious conscience.[41] To be sure, the need for exemptions did not often arise. Because the vast majority of the inhabitants were Protestant Christians and the laws tended to reflect the Protestant viewpoint, clashes between conscience and law were rare. It is significant, however, that exemptions were seen as a solution to the conflict when it occurred.

We should not be too quick to assume that this practice supports the broad reading of the Free Exercise Clause, however. The exemptions in the pre-Constitutional period were made by legisla-

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[38] Ben Perley Poore, ed, 1 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 383 (GPO, 2d ed 1878) ("*Poore's*").

[39] 2 *Poore's* at 1397 (cited in note 38).

[40] See Frederick Pollack and Frederic William Maitland, 2 *The History of English Law* 389 (Cambridge, 2d ed 1899).

[41] For these and other examples, see McConnell, 103 Harv L Rev at 1466-73 (cited in note 24).

tures and therefore do not prove that religious objectors were entitled to exemptions by right. Indeed, these exemptions are fully consistent with the position in *Smith*, because *Smith* allows legislatures (although not courts) to make exemptions from laws of general applicability. This type of evidence is therefore necessarily ambiguous.

On the other hand, we must not forget that in the period before judicial review it was the legislatures that had the sole responsibility for upholding constitutional norms. If legislatures conceived of exemptions as an appropriate response to conflicts between law and conscience, there is every reason to suppose that the framers and ratifiers of the federal Constitution would expect judicially enforceable constitutional protections for religious conscience to be interpreted in much the same manner. In this, the Free Exercise Clause is no different from other constitutional provisions. To a large extent, the rights enshrined in our Constitution are simply rights that had come to be recognized under statute or common law prior to 1789. The best interpretive assumption is that only the institutional mode of protection—but not the substantive content—was changed when these rights gained constitutional status.

It is also worth mentioning that James Madison, principal author and floor leader of the First Amendment, advocated free exercise exemptions, at least in some contexts, and proposed language for the Virginia free exercise clause that was even more protective than the "peace and safety" provisos of most states.[42] To the extent that the opinions of individual framers are significant, his espousal of exemptions should carry more weight than Jefferson's opposition.

Whatever one might conclude from this history, the Supreme Court should not have rendered a major reinterpretation of the Free Exercise Clause without even glancing in its direction. Had the Court made even a cursory inquiry into the history of the clause, it would have been impossible for it to toss off the remark that the compelling interest test "contradicts both constitutional tradition and common sense."[43] At *most*, the Court could have said that there are two constitutional traditions, both with impressive pedigrees, and that persons of common sense and good will have come down on both sides of the question.

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[42] See id at 1452-55, 1462-64, 1500. Madison also would have constitutionalized the religious exemption from conscription. Id at 1500.

[43] 110 S Ct at 1603.

C. Precedent

Having dismissed the text as ambiguous and ignored the history, the Court in *Smith* purported to base its decision on precedent. But its use of precedent is troubling, bordering on the shocking. A detailed examination of both those precedents on which the Court relied and those that it distinguished is necessary to reveal the full extent of the liberties the Court took with its earlier decisions.

1. Never say never.

The *Smith* opinion states baldly: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[44] In *Wisconsin v Yoder*, however, the Court had stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[45] Indeed, the *Yoder* Court stated that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[46] In *Yoder*, the Court called a generally applicable compulsory school attendance law, as applied to Amish children above the eighth grade, "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[47] The compelling interest test has been applied numerous times since *Yoder*. The Court reiterated the compelling interest test no fewer than three times in the year preceding *Smith*, including in two unanimous opinions.[48]

Prior to *Smith*, some Justices *disagreed* with the precedents holding that the Free Exercise Clause requires exemptions from generally-applicable laws, but none denied the *existence* of those precedents. Chief Justice Rehnquist and Justice Stevens had authored several separate concurrences and dissents in previous cases taking the Court to task for doing precisely what the *Smith* opin-

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[44] Id at 1600.

[45] 406 US 205, 220 (1972).

[46] Id at 215.

[47] Id at 218.

[48] *Jimmy Swaggart Ministries v Board of Equalization*, 110 S Ct 688, 693 (1990); *Hernandez v Commissioner*, 109 S Ct 2136, 2148 (1989); *Frazee v Illinois Department of Employment Security*, 489 US 829 (1989).

ion now denies the Court had ever done.[49] Even Justice Scalia, fourteen months before writing the *Smith* opinion, stated in a dissenting opinion in an Establishment Clause case that the Court had "held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws,"[50] listing four illustrative cases, including *Yoder*.[51] Three of the five Justices in the *Smith* majority signed their names to this statement. What happened in the ensuing fourteen months to change their minds?

2. Precedents distinguished.

a) Yoder. According to the Court in *Smith*, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[52] *Yoder* is explained as involving "the rights of parents to direct the religious upbringing of their children."[53] But the opinion in *Yoder* expressly stated that parents do *not* have the right to violate the compulsory education laws for nonreligious reasons.[54] Thus, according to *Yoder* parents have no right independent of the Free Exercise Clause to withhold their children from school, and according to *Smith* they have no such right under the Free Exercise Clause. How can claimants be entitled to greater relief under a "hybrid" claim than they could attain under either of the components of the hybrid? One suspects that the notion of "hybrid" claims was created for the sole purpose of distinguishing *Yoder* in this case.

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[49] See *Thomas v Review Board*, 450 US 707, 723 (1981) (Rehnquist dissenting); *Hobbie v Unemployment Appeals Comm'n*, 480 US 136, 147 (1987) (Rehnquist dissenting) (adhering to his position in *Thomas*); *United States v Lee*, 455 US 252, 263 (1982) (Stevens concurring). It is reported that Chief Justice Rehnquist publicly acknowledged at the Fourth Circuit Judicial Conference that *Smith* "represents a new departure in this line of cases." Tony Mauro, *With Remarkable Swiftness, an Era Ends*, 13 Legal Times of Wash 8, 9 (Aug 6, 1990).

[50] *Texas Monthly, Inc. v Bullock*, 109 S Ct 890, 912 (1989) (Scalia dissenting) (emphasis in original).

[51] See also *Edwards v Aguillard*, 482 US 578, 617 (1987) (Scalia dissenting) (characterizing five cases, including *Yoder*, as holding "that in some circumstances States must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations").

[52] 110 S Ct at 1601.

[53] Id at 1601 n 1, quoting *Yoder*, 406 US at 233.

[54] 406 US at 215-16.

But does it serve even that purpose? Why isn't *Smith* itself a "hybrid" case? Whatever else it might accomplish, the performance of a sacred ritual like the ingestion of peyote communicates, in a rather dramatic way, the participants' faith in the tenets of the Native American Church. Smith and Black could have made a colorable claim under the Free Speech Clause that the prohibition of peyote use interfered with their ability to communicate this message. If burning a flag is speech because it communicates a political belief,[55] ingestion of peyote is no less. And even if Smith and Black would lose on a straight free speech claim, following the logic of *Smith*'s explanation of *Yoder*, why shouldn't their claim prevail as a "hybrid" with their free exercise claim? The answer, a legal realist would tell us, is that the *Smith* Court's notion of "hybrid" claims was not intended to be taken seriously.

b) The unemployment cases. The *Smith* Court had even more difficulty distinguishing a line of cases involving unemployment compensation for unemployment caused by religious objections to available work. There have been four such cases, the most recent being a unanimous decision only a year before *Smith*.[56] These cases have generally been considered prime examples of free exercise exemptions from generally applicable laws, because workers are excused from the requirement of accepting any "suitable" employment.[57] Even though workers who decline work for other important, conscientious reasons (for example, because of ideological objections to the work or because of the need to care for a dependent) would not receive unemployment compensation,[58] workers who decline work for religious reasons must be given benefits.

The *Smith* Court began its discussion of these cases by noting that the compelling interest test had not led to the invalidation of

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[55] *Texas v Johnson*, 109 S Ct 2533 (1989).

[56] Mysteriously, the *Smith* Court said there were only three, omitting the most recent. I can offer no explanation for this omission. The four cases are *Frazee v Illinois Department of Employment Security*, 489 US 829 (1989); *Hobbie v Unemployment Appeals Commission*, 480 US 136 (1987); *Thomas v Review Board*, 450 US 707 (1981); *Sherbert v Verner*, 374 US 398 (1963).

[57] It must be noted that the unemployment compensation cases are thought problematic even by some commentators who otherwise endorse the compelling interest test, on the ground that they may place religious workers in a position superior to others. For a discussion of these issues, see Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U Chi L Rev 1, 35-38, 40-41 (1989).

[58] See *Wimberly v Labor and Industrial Relations Comm'n*, 479 US 511 (1987) (holding that worker unemployed on account of pregnancy is not entitled to unemployment compensation).

any government action "except the denial of unemployment compensation,"[59] as if that were a coherent distinction. Beyond that, the Court noted that the unemployment compensation cases involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[60] The unemployment cases thus "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[61] On its face, this is not a very persuasive distinction. Difficulty of administration can fairly constitute at least part of the governmental interest in enforcing the law without exceptions,[62] but it is hard to see why this concern should limit the universe of potential claims. Moreover, if this is the distinction, it is hard to see why the compelling interest test does not apply to many contexts other than just unemployment compensation—indeed, to the full universe of claims governed by the due process requirement of "some kind of hearing."

Under this analysis, *most* of the Supreme Court's free exercise cases resemble the unemployment compensation cases in that they involve individuated governmental assessments of the claimant's circumstances. In *United States v Lee*, for example, a procedural mechanism already existed for administering religious objections to social security taxation.[63] In *Lyng v Northwest Indian Cemetery Protective Ass'n*, the Forest Service was already required to study and consider the impact of the logging road on Native American religious practices as well as on the environment.[64] Indeed, every decision to build a road must be made on a case-by-case basis. In *O'Lone v Estate of Shabazz*, prison officials had informally accommodated the religious needs of the Muslim prisoners but stopped doing so, apparently because the officials interpreted a prison directive to disallow the accommodation.[65] These cases are typical.

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[59] 110 S Ct at 1602.

[60] Id at 1603.

[61] Id. This explanation for the unemployment compensation cases has had a checkered career in recent Supreme Court decisions. It was first propounded in a plurality opinion written by Chief Justice Burger in *Bowen v Roy*, 476 US 693, 708 (1986). It was rejected by a majority of six Justices in *Hobbie*, 480 US at 142 n 7, including two (White and Scalia) who formed part of the majority in *Smith*. It now appears to command the votes of the five Justices in the *Smith* majority.

[62] See Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw U L Rev 146, 155-58 (1986).

[63] 455 US 252, 260 (1982).

[64] 485 US 439, 442 (1988).

[65] 482 US 342, 346 (1987).

In each of them the government "ha[d] in place a system of individual exemptions."[66] The unemployment cases cannot be distinguished on this ground.

Even more strikingly, the "individual governmental assessment" distinction cannot explain the result in *Smith* itself. If *Smith* is viewed as an unemployment compensation case, the distinction is obviously spurious. If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial.

The purported distinction thus has no obvious connection to either the circumstance of *Smith* or to the Court's precedents. Like the distinction of *Yoder*, it appears to have one function only: to enable the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions.

3. Precedents relied on.

More surprising than the precedents distinguished were the precedents relied upon. The Court relied most heavily, with lengthy quotation, on *Minersville School District v Gobitis*, the first flag salute case, which allowed the criminal prosecution of school children for refusing on religious grounds to recite the Pledge of Allegiance.[67] The Court neglected to mention that, three years after *Gobitis*, it overruled the case in one of the most celebrated of all opinions under the Bill of Rights.[68] Relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v Ferguson*[69] without mentioning *Brown v Board of Education*.[70]

The second case cited by the Court, a Mormon polygamy case from 1879, was decided on the theory that the Free Exercise Clause protects only beliefs and not conduct[71]—a premise that the Court repudiated in 1940.[72] Because the *Smith* Court expressly reaffirmed that the Free Exercise Clause protects conduct as well as belief,[73] why does it cite a decision predicated on the opposite

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[66] *Smith*, 110 S Ct at 1603.

[67] 310 US 586, 595 (1940). *Gobitis* is cited twice in *Smith*, 110 S Ct at 1600.

[68] *West Virginia State Board of Education v Barnette*, 319 US 624 (1943).

[69] 163 US 537 (1896).

[70] 347 US 483 (1954). Of course, the Court *could* have pointed out that since *Barnette* was decided on free speech grounds, *Gobitis* was not technically overruled. But by the same token, since *Brown* was decided as an education case, *Plessy* was not overruled, either.

[71] *Reynolds v United States*, 98 US 145, 166-67 (1879).

[72] *Cantwell v Connecticut*, 310 US 296, 303-04 (1940).

[73] 110 S Ct at 1599.

premise? The third citation is to a concurring opinion attacking the majority's use of the compelling interest test.[74] The fourth is to *Gobitis* again. Thus, the primary affirmative precedent marshalled by the Court to support its decision consists *entirely* of overruled and minority positions.

Then follow two older cases in which the Court upheld laws against free exercise challenges, both decided prior to the formal announcement of the compelling interest test. In *Prince v Massachusetts*, the Court upheld a conviction under the child labor laws for the distribution of a religious publication by a minor in the company of her guardian.[75] Significantly, the Court in *Prince* did not so much as mention that the law in question was neutral and generally applicable. Rather, it relied on the principle that "[t]he state's authority over children's activities is broader than over like actions of adults."[76] While conceding that the law in question would be "invalid" if it were "applicable to adults or all persons generally,"[77] the *Prince* Court concluded that the possibility of "emotional excitement and psychological or physical injury" to a minor from what it called "[s]treet preaching" was sufficient to support the state law.[78]

In *Braunfeld v Brown*, the Court upheld application of a Sunday closing law to a Jewish merchant on the ground that it constituted "only an indirect burden on the exercise of religion," by which the Court meant a law that makes the religious practice more costly but not illegal.[79] The clear implication was that a "direct" interference would have been unconstitutional, a proposition contradicted in *Smith*.[80] Thus, neither *Prince* nor *Braunfeld* supports the holding of *Smith*. In fact, the rationales of the decisions point to the opposite interpretation of the Free Exercise Clause.

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[74] *United States v Lee*, 455 US 252, 263 n 3 (1982) (Stevens concurring).

[75] 321 US 158, 170 (1944).

[76] Id at 168.

[77] Id at 167.

[78] Id at 169-70. It is interesting, and a little troubling, that the *Prince* Court analyzed the general child labor law as if it were specifically directed at religious or political activity and upheld it on that ground. According to the Court, "[t]he zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face." This hints that the controversial nature of street proselytizing or political activity, and the possible adverse reaction of others, provide a sound basis for limiting the rights of youthful speakers.

[79] 366 US 599, 606 (1961).

[80] 110 S Ct at 1603 (under Court's precedents, the Free Exercise Clause has "nothing to do with an across-the-board criminal prohibition on a particular form of conduct"). There can be no more "direct" burden on free exercise than an absolute criminal prohibition.

The Court then adverted to three modern cases rejecting free exercise claims on the basis of the compelling interest test.[81] One would think these were precedents *against* the theory of *Smith*, because they unequivocally applied the very constitutional standard that *Smith* stated had "never" been applied. The Court now asserts that it only "purported" to apply the compelling interest test in those recent cases.[82]

The Court also relied on four recent decisions that did *not* employ the compelling interest test. One of these cases involved the military and another the prison system; both opinions stressed the limited reach of constitutional rights in those special, confined settings.[83] It is not auspicious for the Court to measure the constitutional rights of free civilians according to the rights of prisoners and military personnel.

The other two cases in which the Court did not apply the compelling interest test involved claimants who objected to the internal procedures of the government or to the government's use of its own land.[84] Again, it is not auspicious for the rights of individuals to be free from government interference with their religious practices to be compared to the rights of individuals to compel the government to behave in conformity to their religious principles.[85] In effect, the Court converted exceptional cases into the general rule.

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[81] *Gillette v United States*, 401 US 437, 461-62 (1971) (rejecting religious exemption from conscription on the part of a claimant who was not opposed to fighting in all wars); *United States v Lee*, 455 US 252, 261 (1982) (rejecting claim to exemption from social security taxes by Amish farmers whose religious tenets would not permit them to participate in the program); *Hernandez v Commissioner*, 109 S Ct 2136, 2148-49 (1989) (rejecting claim for income tax deductibility of certain religious payments).

[82] 110 S Ct at 1602.

[83] *Goldman v Weinberger*, 475 US 503, 507-08 (1986) (rejecting free exercise challenge to Air Force uniform regulations by Orthodox Jew barred from wearing a yarmulke); *O'Lone v Estate of Shabazz*, 482 US 342, 349 (1987) (holding that prison officials do not have a duty to accommodate prison work schedules to Muslim inmates' religious observances).

[84] *Bowen v Roy*, 476 US 693 (1986) (holding that a state welfare agency's use of social security numbers does not violate the Free Exercise Clause); *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439 (1988) (holding that the Free Exercise Clause does not prohibit the government from permitting timber harvesting and road construction in area of a national forest traditionally used by Indians for religious purposes).

[85] In both *Roy* and *Lyng*, the Court reasoned that the First Amendment does not "require the government *itself* to behave in ways that the individual believes will further his or her spiritual development. . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy*, 476 US at 699 (emphasis in original). See also *Lyng*, 485 US at 449. *Smith*, of course, involved whether the individual believer could conduct his affairs in accordance with his religious beliefs. To the extent *Lyng* holds that the Free Exercise Clause does not constrain the government's actions in its capacity as landowner, I disagree with its reasoning, as well as its result; but I agree that the constitutional

The Court also failed to point out that in one of these cases, *Bowen v Roy*, five Justices expressed the view that adherents to a traditional Abenaki religion under which computer-generated numbers are deemed to rob the individual's spirit of its power were entitled to an exemption from the requirement that welfare recipients provide a social security number on their application.[86] This did not become a holding of the Court because one of the five Justices supporting the result concluded that this aspect of the case had become moot.[87] But it is surely misleading for the *Smith* Court to rely on the *Bowen* Court's holding—that the claimants had no right to insist that the government not *use* a social security number already in its possession—to support a conclusion that the Free Exercise Clause does not require exemptions from generally applicable laws; a majority of the *Bowen* Court firmly stated that another claim for exemption in the same case was constitutionally compelled.

4. Was there really a compelling interest test?

Notwithstanding all that has just been said about the Court's reliance on precedent, it must be conceded that the Supreme Court before *Smith* did not really apply a genuine "compelling interest" test. Such a test would allow the government to override a religious objection only in the most extraordinary of circumstances. In an area of law where a genuine "compelling interest" test has been applied, intentional discrimination against a racial minority, no such interest has been discovered in almost half a century. Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases, and they were correct to do so.[88] The "compelling interest" standard is a misnomer.[89]

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standard for such action should be less exacting than for the government in its capacity as regulator.

[86] 476 US at 712-16 (Blackmun concurring in part); id at 724-32 (O'Connor, joined by Brennan and Marshall, concurring in part and dissenting in part); id at 733 (White dissenting).

[87] 476 US at 714 (Blackmun concurring in part).

[88] See, for example, *O'Lone v Estate of Shabazz*, 482 US 342, 354 (1987) (Brennan dissenting, joined by Marshall, Blackmun, and Stevens) (completely barring religious ceremony in prison requires government to demonstrate "important" governmental interest). If compelling "really means what it says," *Smith*, 110 S Ct at 1605, the test resembles that proposed in Virginia by the young James Madison: that free exercise be protected " 'unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered.' " Sanford H. Cobb, *The Rise of Religious Liberty in America* 492 (Macmillan, 1902). This proposal was rejected, and no state adopted so strict a standard. See McConnell, 103 Harv L Rev at 1463 (cited in note 24).

[89] This is not, however, unique to the Free Exercise Clause. In most areas of constitutional law, the Court's supposed "compelling interest test" falls far short of that. See, for

But just because the test was not so strong as "compelling" does not mean that the Court failed to apply heightened scrutiny in its previous decisions. There is no support in the precedents for the Court to replace the prior test with nothing more than the toothless rationality review that is applicable to all legislation. As explained in more detail below, a serious examination of the purported justifications for restricting religious exercise is necessary to separate objective differences from prejudice. Rather than taking the extreme step that it took, the Court should have recast the "compelling interest" test in a more realistic form.

I favor returning to the standards articulated in state constitutions at the time of the framing: repugnancy to the "peace and safety of the State."[90] Madison's formulation is also apt: that free exercise should be protected "in every case where it does not trespass on private rights or the public peace."[91] This means that we are free to practice our religions so long as we do not injure others. Modern scholars have also attempted to articulate a more accurate test. Stephen Pepper poses the issue this way: "[I]s there a real, tangible (palpable, concrete, measurable), non-speculative, non-trivial injury to a legitimate, substantial state interest."[92] Judge Richard Posner and I proposed that "[e]ffects on religious practice must be minimized, and can be justified only on the basis of a demonstrable and unavoidable relation to public purposes unrelated to the effects on religion."[93] Any of these tests would achieve the purposes of the Free Exercise Clause without rhetorical overkill.

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example, *Roberts v United States Jaycees*, 468 US 609, 621-23 (1984) ("Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women"; state's compelling interest in eradicating discrimination outweighs Jaycees' freedom of association); *City of Richmond v J.A. Croson Co.*, 488 US 469 (1989) (city failed to demonstrate a compelling governmental interest justifying a construction contract plan requiring that a percentage of work be subcontracted to "Minority Business Enterprises"). Admittedly, the free exercise cases may be the most extreme example. See, for example, Justice Stevens's concurrence in *Lee*, in which he notes that the justifications are so flimsy that the Court must not be applying the test. 455 US at 262-63 (Stevens concurring).

[90] See the discussion of state free exercise provisions in McConnell, 103 Harv L Rev at 1461-66 (cited in note 24).

[91] *Letter from James Madison to Edward Livingston* (July 10, 1822), in Gaillard Hunt, ed, 9 *The Writings of James Madision* 98, 100 (G.P. Putnam's Sons, 1901).

[92] Stephen L. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N Ky L Rev 265, 289 (1982).

[93] McConnell and Posner, 56 U Chi L Rev at 14 (cited in note 57). In another attempt, I suggested that a law with the purpose or likely effect of increasing religious uniformity by inhibiting the religious practice of the person or group challenging the law "will be permit-

III. The Theoretical Argument

Perhaps because of its purported reliance on precedent, the *Smith* opinion does not present a sustained explanation of its theoretical underpinnings. Yet the opinion rests, in the end, not on text or history or precedent, but on the majority's view, revealed in a few key sentences in the opinion, of the proper relation between law and religious conscience. It is unfortunate that Justice Scalia wrote the opinion in this way, for while the argument based on precedent is hopelessly contrived, the theoretical argument is serious and substantial, even if mistaken. It requires careful attention and deserves a thorough response.

Virtually the entire theoretical argument of the *Smith* opinion is packed into this one sentence:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[94]

The rhetoric of this sentence is certainly impolitic, leaving the Court open to the charge of abandoning its traditional role as protector of minority rights against majoritarian oppression. The "disadvantaging" of minority religions is not "unavoidable" if the courts are doing their job. Avoiding certain "consequences" of democratic government is ordinarily thought to be the very purpose of a Bill of Rights. But the argument reflected in this sentence nonetheless contains ideas that cannot be dismissed so lightly.

The Court's argument has a certain unity, but for purposes of analysis I propose to break it up into five separate but related ideas expressed in this sentence and a few other key passages in the opinion. The first idea is an implied devaluation of the impor-

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ted only if it is the least restrictive means for (a) protecting the private rights of others, or (b) ensuring that the benefits and burdens of public life are equitably shared." Michael W. McConnell, *Taking Religion Seriously*, First Things 30, 34 (May 1990). Readers troubled by the fact that I have put forward two non-identical tests should be forewarned that before I stop thinking about these things I shall probably come up with other tests.

[94] 110 S Ct at 1606.

tance of denominational neutrality under the Religion Clauses.[95] Second is the assumption that free exercise exemptions are a form of special preference for religion and that generally applicable laws written from the perspective of the majority are necessarily and by definition neutral. Third is the claim that exceptions under the Free Exercise Clause are a constitutional anomaly. Fourth is that decisions regarding free exercise exemptions are inherently subjective and therefore legislative in character; in other words, courts have no non-arbitrary way to adjudicate conflicts between religious conscience and law. Fifth, and most important, is that it is contrary to the rule of law—it would be "courting anarchy"[96]—for individual conscience to take precedence over law.

A. Denominational Neutrality

The *Smith* opinion does not specifically address how one should weigh the evils of disadvantaging religious minorities against those of arbitrary judging and lawlessness. The outcome of the case, however, implicitly suggests that denominational neutrality is of secondary importance. The opinion characterizes the doctrine of free exercise exemptions as a "luxury,"[97] suggesting that its purposes, while worthy, are distinctly subordinate. Had this proposition been raised explicitly, the Court would have found much in our constitutional history bearing on the question and might have found it more difficult to reach the balance it struck.

In *Larson v Valente*, the Court noted that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[98] This conclusion is confirmed repeatedly in both statements and constitutional enactments of the founding period. Baptist leader John Leland proposed an amendment to the Massachusetts Constitution forbidding the legislature to "establish any religion by law, [or] give any one sect a preference to another . . . ."[99] In a similar vein, Jonas Phillips, Revolutionary War patriot and founder of a synagogue in Philadelphia, informed the Constitutional Convention by petition that the Jews wished the Constitution to be framed so that "all

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[95] By "denominational neutrality" I mean neutrality among religions, but not necessarily neutrality between religion and other belief systems.

[96] 110 S Ct at 1605.

[97] Id.

[98] 456 US 228, 244 (1982).

[99] L.F. Greene, ed, *The Writings of the Late Elder John Leland* 229 (G.W. Wood, 1845).

Religious societies are on an Equal footing."[100] Rhode Island's proposed amendment to the federal Constitution asked that "no particular sect or society ought to be favored or established by law."[101]

The twelve state constitutional free exercise provisions extant in 1789 were different in many respects, but all contained language referring to denominational equality (though in two states this equality was extended only to Christian denominations). New York and South Carolina both specified that the right of free exercise was to be "without discrimination or preference,"[102] and Virginia provided that "all men are equally entitled to the free exercise of religion."[103] Other states used words like "every," "all," "no," "equal," or "equally" to make the same point.[104] This idea carried forward to the federal Constitution. Although the language did not survive to the final version, Madison's initial draft of the Free Exercise Clause provided that "the full and equal rights of conscience [shall not] be in any manner, nor on any pretext, infringed."[105] The words "full and equal" help to capture the demand for neutrality among religions that imbued the movement for free exercise protections.

Against this background, it seems the Supreme Court should have given more serious attention to the problem of "plac[ing] at a relative disadvantage those religious practices that are not widely engaged in" before concluding that this consideration is out-

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[100] *Letter from Jonas Phillips to the Federal Constitutional Convention* (Sept 7, 1787), reprinted in Morris U. Schappes, ed, *A Documentary History of the Jews in the United States 1654-1875* 68, 69 (Citadel, 1950). The petition noted that "[i]t is well known among all the Citizens of the 13 united states that the Jews have been true and faithful whigs, & during the late Contest with England they have been foremost in aiding and assisting the states with their lifes & fortunes, they have supported the cause, have bravely fought and bled for liberty which they can not Enjoy."

[101] Jonathan Elliot, 1 *The Debates in the Several States on the Adoption of the Federal Constitution* 334 (Taylor & Maury, 2d ed 1854).

[102] NY Const of 1777, Art XXXVIII, reprinted in 2 *Poore's* at 1329, 1338 (cited in note 38); SC Const of 1790, Art VIII, § 1, reprinted in id at 1628, 1632-33.

[103] Va Bill of Rights of 1776, § 16, reprinted in 2 *Poore's* at 1908-09 (cited in note 38).

[104] For numerous examples, see McConnell, 103 Harv L Rev 1456-57 & n 242 (cited in note 24).

[105] Joseph Gales, ed, 1 *Annals of the Congress of the United States* 434 (Madison, June 8, 1789) (Gales and Seaton, 1834). Two printings exist of the first two volumes of the *Annals of Congress*. They contain different pagination, running heads, and back titles. The printing with the running head "History of Congress" conforms to the remaining volumes of the series, while the printing with the running head "Gales & Seaton's history of debates in Congress" is unique. This page citation is to the latter version; the corresponding reference in the other volume can be found by using the date of Madison's proposal.

weighed by other principles less firmly rooted in our constitutional scheme.[106]

Why did the majority feel it necessary to take this position? The reason, I believe, arises not from concerns about the Free Exercise Clause but from concerns about the Establishment Clause. Under the *Smith* Court's conception, courts will not be able to order exceptions from laws of general applicability—but legislatures will. Indeed, the Court declares such exemptions "desirable."[107] The problem, as the Court candidly acknowledges, is that the political branches, being political, will tend to be most solicitous of the value of familiar, popular, and socially acceptable religious faiths. Prior to *Smith*, the Free Exercise Clause functioned as a corrective for this bias, allowing the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process. The Free Exercise Clause, prior to *Smith*, was an equalizer.

There is, however, an alternative equalizer: the Establishment Clause. If the political branches enact accommodations that tend to benefit mainstream more than fringe religions, the solution could be to strike them down under the Establishment Clause. Rather than ensuring that all religious faiths receive equal solicitude, the courts can ensure that all receive equal indifference. This is the position of some secularists who take a strong position on establishment and a weak position on free exercise.[108] It is evident that the *Smith* majority prefers denominational inequality to an Establishment Clause-driven policy of indifference. Indeed, from the Court's perspective, an activist establishment jurisprudence is no less objectionable than an activist free exercise jurisprudence.

Moreover, the establishment strategy would fail, even if it were desirable. Accommodation can be accomplished by inaction just as it can by action. In other words, the legislatures can simply refrain from passing laws that burden the exercise of religion by mainstream groups, and there is nothing the Establishment Clause can do about this. In the end, the only hope for achieving denominational neutrality is a vigorous Free Exercise Clause.

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[106] 110 S Ct at 1606.

[107] Id.

[108] Justice Stevens is the closest example on the current Supreme Court. He alone has consistently voted against free exercise and for establishment claims in divided cases in recent years.

B. Special Privileges or Neutrality in the Face of Differences?

Throughout the *Smith* opinion, generally applicable laws are treated as presumptively neutral, with religious accommodations a form of special preference, akin to affirmative action. The opinion describes religious accommodations as laws that "affirmatively foster" the "value" of "religious belief."[109] In *Sherbert v Verner*, by contrast, Justice Brennan's majority opinion characterized a religious exemption as "reflect[ing] nothing more than the governmental obligation of neutrality in the face of religious differences."[110] In a sense, then, both *Smith* and *Sherbert* are about neutrality toward religion. But which has the correct understanding of neutrality?[111]

To examine this question, I will use the facts of *Stansbury v Marks*, the first recorded case raising free exercise issues after adoption of the First Amendment.[112] The case arose in the Pennsylvania courts and was decided under state law. The Reporter's summary of the holding of the case was: "A Jew may be fined for refusing to testify on his Sabbath."[113] The entire report of the case is as follows:

> In this cause (which was tried on Saturday, the 5th of April), the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The court, therefore, fined him 10*l.*; but the defendant, afterwards, waiving the benefit of his testimony, he was discharged from the fine.[114]

We can assume that, in those days of the six-day work week, the courts of Pennsylvania were routinely open for business on Saturday. The decision to operate on Saturday, we may assume, was not aimed at members of the Jewish faith, but was simply a matter of convenience. Nor was the law allowing parties to civil suits to com-

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[109] 110 S Ct at 1606.

[110] 374 US 398, 409 (1963).

[111] For more detailed discussion of these two understandings of neutrality, see McConnell, 103 Harv L Rev at 1419-20 (cited in note 24); Douglas C. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L Rev 993 (1990).

[112] 2 US 213 (1793). I use *Stansbury* for its facts; as is evident from my discussion, I think this case was wrongly decided. The case has been cited only once in a reported Supreme Court opinion, Justice Frankfurter's dissent in *West Virginia State Board of Education v Barnette*, 319 US 624, 655 (1943) (Frankfurter dissenting) (citing, inter alia, *Stansbury* for proposition that general requirement of flag salute is not first instance of requiring obedience to laws that "offend[] deep religious scruples").

[113] 2 US 213.

[114] Id.

pel witnesses to attend court proceedings, on pain of paying a fine, instituted for the purpose of restricting religious exercise. This is an example of a generally applicable, otherwise valid, law. Is it neutral toward religion?

No, it is not. The courts were closed on Sundays, the day on which the Christian majority of Pennsylvania observed the sabbath. The effect of the six-day calendar was to impose a burden on Saturday sabbath observers (mostly Jews) that is not imposed on others (mostly Christians). It is anything *but* neutral—not because the burden happened to fall disproportionately on Jews, but because the burden was attached to a practice that, among others, defines what it means to be a faithful Jew.

What would neutrality require? Surely it is not necessary to conduct court business on Sunday. Since the vast majority of Pennsylvanians were Christians and observed Sunday as the day of sabbath, that would create needless conflict and administrative costs. It would be more neutral to close on both Saturday and Sunday, the modern solution, but that has significant costs in an era of a six-day work week. And if there were other religious minorities in the Commonwealth who observed the sabbath on other days, Moslems perhaps, then this solution would not work at all. The best, least costly, and most neutral solution is to exempt Saturday sabbath observers from the obligation of testifying on Saturday. Thus, an exemption is not "affirmative fostering" of religion; it is more like *Sherbert*'s neutrality in the face of differences.

It may be objected that this example is loaded because the selection of days of rest is fraught with religious significance. The selection of Sunday as the day on which the courts would not operate was itself a religious choice, almost an establishment of the Christian religion. It might be said that an exemption is required in that case only to equalize a situation in which Christians had already been granted a benefit on account of religious practice.

But this objection presupposes that there are decisions that are *not* fraught with religious significance. And perhaps there are—but those decisions will not give rise to free exercise claims. All free exercise claims involve government decisions that are fraught with religious significance, at least from the point of view of the religious minority. In this respect, *Stansbury v Marks* cannot be distinguished from *Smith*. In *Smith*, the generally applicable law was the prohibition on the use of hallucinogenic drugs. The Native American Church uses peyote as its sacrament. Application of the anti-drug laws to the sacramental use of peyote effectively destroys the practice of the Native American Church. Is this neutral?

No, it is not. Christians and Jews use wine as part of their sacrament, and wine is not illegal. Even when wine was illegal during Prohibition, Congress exempted the sacramental use of wine from the proscription. The effect of laws prohibiting hallucinogenic drugs but not alcohol, or of allowing exemptions from one law but not the other, is to impose a burden on the practice of the Native American Church that is not imposed on Christians or Jews. It is no more neutral than operating courts on Saturday and not on Sunday.

But perhaps this overstates the case. Whether to operate courts on Saturday or Sunday is clearly a decision involving commensurables. Hallucinogenic drugs are far more dangerous than wine. The difference in treatment can be said to be based on objective differences between the effects of the two substances. But is this true? Evidence in the *Smith* case showed that ingestion of peyote by members of the Native American Church is *not* dangerous and does not lead to drug problems or substance abuse. Indeed, it is statistically and culturally associated with resistance to substance abuse.[115] The federal government and twenty-three of the states have approved the use of peyote in Native American Church ceremonies for this reason, and the federal government even licenses a facility for the production of peyote.

If this evidence is valid, then the decision to ban the sacramental use of peyote but not the sacramental use of wine is not based on any objective differences between the effects of the two substances. Rather, it is based on the fact that most ordinary Americans are familiar with the use of wine and consider Christian and Jewish sacramental use harmless and perhaps even a good thing; but the same ordinary Americans consider peyote a bizarre and threatening substance and have no respect or solicitude for the Native American Church. In short, the difference is attributable to prejudice.

The only way to tell whether the difference in treatment between peyote and wine is the result of prejudice or the result of objective differences in the substances is to examine closely the purported governmental purpose. If the purpose is important, and if the means are closely related to the purpose, then the policy is probably based on objective differences. If the purpose is weak or the means only loosely related to the purpose, then the policy is

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[115] See text at note 17.

more likely the result of prejudice. This, of course, is a rough description of the compelling interest test. That test, therefore, is not a form of "affirmative[] foster[ing]" of religion.[116] It is a way to determine whether government decisions that interfere with the religious exercise of religious minorities are in fact neutral.

It should be apparent why a mere absence of attention to religious consequences on the part of the legislature cannot prove that legislation is neutral. In a world in which some beliefs are more prominent than others, the political branches will inevitably be selectively sensitive toward religious injuries. Laws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice. If believers of all creeds are to be protected in the "full and equal rights of conscience," then selective sensitivity is not enough.[117] The courts offer a forum in which the particular infringements of small religions can be brought to the attention of the authorities and (assuming the judges perform their duties impartially) be given the same sort of hearing that more prominent religions already receive from the political process.[118]

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[116] 110 S Ct at 1606.

[117] Professor Mark Tushnet has argued that the effects of government action are unlikely to bear more heavily on minority religions: "In a pluralistic society with crosscutting group memberships, the overall distribution of benefits and burdens is likely to be reasonably fair." Tushnet, 76 Georgetown L J at 1700 (cited in note 1). As an empirical assessment, this claim seems wildly off the mark. Most legislators are unaware of the problems of minority religions, and many (though not all) minority religions are poorly positioned to defend their own interests.

[118] Professor Tushnet has also criticized the compelling interest test on the ground that it is weighted in favor of "mainstream" religious claims, largely because judges are more likely to deem such claims "sincere." Tushnet, 1989 S Ct Rev at 382-83 (cited in note 1). Indeed, Tushnet states: "[P]ut bluntly, the pattern is that sometimes Christians win but non-Christians never do." Id at 381. While I share Tushnet's pessimistic assessment of a number of Supreme Court decisions rejecting strong free exercise claims on the part of non-Christian claimants, I do not share his diagnosis. It would be more accurate to state that non-Christians never win, and Christians almost never win, either. The insensitivity about which Tushnet complains is virtually indiscriminate, suggesting not so much a preference for mainstream religions as a blindness toward nonsecular concerns.

Indeed, although the number of winning claims is so small that there can be no statistical verification, the claims of "non-mainstream" groups seem to enjoy something of an advantage in free exercise litigation, because judges are less likely to second-guess their claims about the needs of their religious practice. Judges are notoriously unwilling to accept the possibility that sects made up of otherwise ordinary Americans might entertain religious convictions that are out of the ordinary. See, for example, *Mozert v Hawkins County Board of Education*, 827 F2d 1058 (6th Cir 1987) (court unable to comprehend how exposure to certain public school curriculum could burden religious beliefs of fundamentalists). The more obviously "different" religions—like the Hare Krishnas or the Amish—are less likely to encounter this problem.

C. Constitutional Anomalies

Closely related to the preceding point is the *Smith* Court's claim that the compelling interest test in free exercise exemption cases is "a constitutional anomaly."[119] According to the Court, use of the compelling interest test in cases of racial discrimination or content-based speech regulation

> 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.[120]

Drawing on analogies from several other fields of constitutional law, including freedom of the press, disproportionate impact cases under the Equal Protection Clause, and content-neutral restrictions on speech, the Court concluded that "the only approach compatible with these precedents" is to hold that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[121]

It is far from clear what is wrong with the Free Exercise Clause being a "constitutional anomaly." Different clauses of the Constitution perform different functions and have different logical structures. It is hard to see how precedents drawn from other areas of constitutional law can have the effect of foreclosing any particular interpretation of the Free Exercise Clause. The Free Exercise Clause is framed in terms of a substantive liberty; there is no reason to expect it to have the same logic as the Equal Protection Clause. Nonetheless, if the Free Exercise Clause were the only provision of the Constitution that required exceptions from generally applicable laws, this might give cause for reexamination. But it isn't.

The language of exemptions, exceptions, or accommodations is largely confined to free exercise cases, but other fields have their

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In any event, the question is one of relative competence. However deficient judges may be, their institutional responsibilities incline them to take seriously the claims of underrepresented groups. It is difficult to see how the position of non-mainstream religions is improved by relegating them to political remedies.

[119] 110 S Ct at 1604.

[120] Id.

[121] Id at 1604 n 3.

equivalents. For example, the concept of an "as applied" challenge to a law is a precise parallel.[122] The law remains in force as to most applications, but an exception is carved out for those to whom its application, under their particular circumstances, would be a constitutional violation. That this means that some citizens are exempt from laws applied to other citizens has never been thought illegitimate in other constitutional contexts.

In particular, and contrary to the *Smith* opinion,[123] exceptions from generally applicable laws are an established part of the protections for free speech and press under the First Amendment. Indeed, the very core of the free press clause—the freedom from prior restraints—can be seen as an exemption from a form of regulation that can be applied to virtually every other commercial business. To be sure, as the court points out, antitrust and labor laws have been applied to the press without First Amendment difficulty.[124] But that is because such laws pose no special problems for the press. As the Court put it in one press case, "[t]he regulation here in question has no relation whatever to the impartial distribution of news."[125] For the same reason, fire and safety (and a host of other) regulations can be applied to churches. But when the regulations in question *do* have a substantial impact on the press or on religion, they raise a serious claim for exemption.

In free speech cases involving regulations not specifically directed at speech (the equivalent to generally applicable laws not specifically directed at religion), the Court has reached a doctrinal conclusion similar to that in the pre-*Smith* cases. In the leading case, *United States v O'Brien*, the Court held that a regulation that has the effect of restricting speech even though the governmental interest is unrelated to the suppression of free expression can be enforced only "if it furthers an important or substantial

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[122] See, for example, *Bowen v Kendrick*, 487 US 589 (1988) (Adolescent Family Life Act held not to be a facial violation of Establishment Clause; "as applied" challenge remanded for additional fact-finding); *United States v Salerno*, 481 US 739 (1987) (pretrial detention authorized by Bail Reform Act not a facial violation of Eighth Amendment); *Brown v Socialist Workers '74 Campaign Committee*, 459 US 87 (1982) (campaign disclosure laws held to be facially valid, but invalid as applied to minor party where disclosure would likely subject contributors to harassment).

[123] The *Smith* Court asserted that "generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment." 110 S Ct at 1604 n 3 (emphasis in original) (citations omitted).

[124] *Citizen Publishing Co. v United States*, 394 US 131, 139 (1969) (antitrust); *Associated Press v NLRB*, 301 US 103 (1937) (labor). The *Smith* Court cites *Citizen Publishing* at 110 S Ct at 1600.

[125] *Associated Press*, 301 US at 133.

governmental interest" and "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[126] This approach is virtually identical to the free exercise exemptions test, once it is stripped of overblown language about "compelling" interests.[127] More recently, the Court has stated that generally applicable ("incidental") restrictions that have a highly disproportionate impact on persons engaged in First Amendment activity trigger First Amendment scrutiny.[128] This, too, is parallel to the theory rejected in *Smith*: the anti-drug law has a highly disproportionate impact on practitioners of the Native American Church because it makes their central religious activity illegal.

The *Smith* opinion also draws an analogy to "race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group,"[129] noting that such laws "do not thereby become subject to compelling-interest analysis under the Equal Protection Clause."[130] This is true, but the difference in doctrinal analysis is rooted in the nature of the underlying constitutional principles.[131]

At the risk of oversimplification, it can be said that the ideal of racial nondiscrimination is that individuals are fundamentally equal and must be treated as such; differences based on race are irrelevant and must be overcome. The ideal of free exercise of religion, by contrast, is that people of different religious convictions are different and that those differences are precious and must not be disturbed. The ideal of racial justice is assimilationist and integrationist.[132] The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform.

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[126] 391 US 367, 377 (1968).

[127] Interestingly, prior to *O'Brien* the Court had used the language of "compelling" interests in the context of regulations not directed at speech, but in *O'Brien* settled on the less extreme language of "important or substantial." Id at 377. Perhaps free exercise doctrine would have been less susceptible to the sort of attack it suffered in *Smith* if it had earlier undergone a similar rhetorical deflation. See text at note 94.

[128] *Arcara v Cloud Books, Inc.*, 478 US 697, 703-04 (1986).

[129] 110 S Ct at 1604 n 3 (emphasis in original).

[130] Id, citing *Washington v Davis*, 426 US 229 (1976).

[131] See also Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 Wm & Mary L Rev 985, 986-94 (1986) (comparing free exercise exemption with free speech and equal protection doctrine).

[132] I do not overlook the fact that there is a significant competing understanding of racial justice that is nonintegrationist and seeks to preserve and emphasize racial solidarity. But that competing understanding rejects *Washington v Davis* and thus provides no support for the *Smith* Court's portrayal of exemptions as constitutional anomalies.

A better analogy can be drawn between free exercise theory and the theory of handicap discrimination, which is quite different from race discrimination. The theory of handicap discrimination recognizes that individuals with a handicap *are* different in a way that cannot be changed but can only be accommodated. Failure to install a low-cost ramp for access to a building, for example, is a core violation of the norms of handicap discrimination theory—even though a rampless building was presumably not constructed for the purpose of exclusion. Religion is more like handicap than it is like race. A person who cannot work on Saturday is not merely disproportionately disadvantaged by a requirement that he accept "suitable" work (where "suitable" is defined in secular terms); he is excluded precisely on account of his "difference," as surely as the wheelchair-bound person is from a rampless building. By contrast, the black job applicant in *Washington v Davis* was not excluded on account of his "difference," but on account of a factor that under the ideal vision of racial justice is wholly unrelated to his "difference." If the paradigmatic instance of race discrimination is treating people who are fundamentally the same as if they were different, the paradigmatic instance of free exercise violations or handicap discrimination is treating people who are fundamentally different as if they were the same.[133]

Based on these analogies, to which others could be added,[134] the free exercise exemptions doctrine is not a constitutional anomaly.[135] It is parallel to doctrines under the free speech and press provisions, and while it is different from the doctrine of race-

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[133] It is significant that in devising standards for discrimination, Congress used an identical formulation—reasonable accommodation—when describing the obligations with respect to religion and handicap, while using language of equal treatment when describing the obligations with respect to race. See Title VII, 42 USC § 2000e (1982), for religion, and the Americans with Disabilities Act of 1990, Pub L No 101-336 § 101(3), 104 Stat 327 (1990), to be codified at 42 USC § 12111, for handicap.

[134] Other constitutional doctrines, not mentioned in *Smith*, can require exceptions from generally applicable laws. See, for example, negative Commerce Clause (see *American Trucking Ass'ns v Scheiner*, 483 US 266 (1987) (generally applicable lump-sum annual tax on trucks held to discriminate against interstate carriers)); freedom of association (see *NAACP v Alabama*, 357 US 449 (1958) (state statute requiring foreign corporations to make certain disclosures to qualify for doing business could not be applied to require NAACP to disclose membership lists)); Speech or Debate Clause (members of Congress have privileges and immunities from various laws during attendance in Congress and going to or returning from sessions).

[135] Robert Nagel has observed that a wide array of constitutional doctrines follow the compelling interest model. Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 106-108 (Berkeley, 1989). Nagel, like the *Smith* majority, is critical of this analytical approach. But unlike the Court, he sees it as all too common and not as anomalous.

neutral laws with a disproportionate impact, that difference follows from the theories underlying race discrimination and free exercise.

D. The Judicial Role

A major theme of the *Smith* opinion is that the compelling interest test forces the courts to engage in judgments that cannot be made on a nonarbitrary basis. The Court commented that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[136] It is better that minority religions will be at "a relative disadvantage," the Court said, than that judges have to "weigh the social importance of all laws against the centrality of all religious beliefs."[137]

The Court illustrated this concern with what it playfully admitted to be a "parade of horribles"—claims for free exercise exemptions from such laws as compulsory military service, health and safety regulation, compulsory vaccination laws, traffic laws, and social welfare legislation including minimum wage, child labor, and animal cruelty laws.[138] Putting aside the fact that many of the Court's "horribles" are far from horrible,[139] and that some of its "horribles" involve anti-religious discrimination and thus are unaffected by the *Smith* holding,[140] this parade is almost risible in its

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[136] 110 S Ct at 1606 n 5.

[137] Id at 1606.

[138] Id at 1605.

[139] Why should it be thought troubling that a religious community in which members work without pay out of religious convictions be exempted from the minimum wage laws? See *Tony & Susan Alamo Foundation v Secretary of Labor*, 471 US 290 (1985), cited by *Smith*, 110 S Ct at 1605. Isn't it a bit ridiculous to apply child labor laws to a girl passing out religious tracts in the company of her aunt? See *Prince v Massachusetts*, 321 US 158 (1944), cited at 110 S Ct at 1605. And why shouldn't a private university that receives no federal funds be able to forbid interracial dating among its students on religious grounds without forfeiting its tax exempt status? See *Bob Jones University v United States*, 461 US 574 (1983), cited at 110 S Ct at 1606. Far from suggesting that free exercise claims are outlandish, these examples suggest that the courts have been far too parsimonious in upholding them.

[140] *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 723 F Supp 1467 (S D Fla 1989), cited by *Smith* at 110 S Ct at 1605, involves a city ordinance that prohibits the "ritual slaughter" of animals. The city permits the slaughter of animals, no matter how cruelly, if done for any other reason, including pest control, food, or sport. This sort of law, aimed specifically at the religious practice of a small and unpopular racial and religious minority, should presumably be unconstitutional even after *Smith*. That the Supreme Court would include this case in its parade of horribles while the case is on appeal is particularly troubling on due process grounds given that the reference might well prejudice the case in the appellate court. Indeed, the appellee quoted the *Smith* dictum prominently in its brief. See id, No 90-5176, Brief of Appellee-Defendant City of Hialeah at 19, 28, 29 (11th Cir). (I

one-sidedness. For every claim that would, if granted, produce a horrible result, there is a claim that *ought* to be granted but will not be after the *Smith* decision.

Consider the fact that employment discrimination laws could force the Roman Catholic Church to hire female priests, if there are no free exercise exemptions from generally applicable laws.[141] Or that historic preservation laws could prevent churches from making theologically significant alterations to their structures.[142] Or that prisons will not have to serve kosher or hallel food to Jewish or Moslem prisoners.[143] Or that Jewish high school athletes may be forbidden to wear yarmulkes and thus excluded from interscholastic sports.[144] Or that churches with a religious objection to unrepentant homosexuality will be required to retain an openly gay individual as church organist,[145] parochial school teacher,[146] or even a pastor. Or that public school students will be forced to at-

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filed an amicus curiae brief in support of the church's position, on behalf of the Baptist Joint Committee, the Rutherford Institute, and the Christian Legal Society.)

[141] Title VII, 42 USC § 2000e (1982), contains no exception for religious bodies, although it is possible that the church might be able to prove that gender is a bona fide occupational characteristic under the statute. (It is interesting to contemplate how a secular court would approach such a question of ecclesiastical practice, since deference to the employer would be entirely out of keeping with the allocation of burdens of proof under Title VII.) In employment discrimination cases prior to *Smith*, the courts uniformly held that the Free Exercise Clause exempts religious organizations with respect to positions of religious significance. See, for example, *Rayburn v General Conference of Seventh-Day Adventists*, 772 F2d 1164, 1169 (4th Cir 1985); *McClure v Salvation Army*, 460 F2d 553, 558-59 (5th Cir 1972); *EEOC v Southwestern Baptist Theological Seminary*, 651 F2d 277, 285-86 (5th Cir 1981).

[142] See *First Covenant Church v City of Seattle*, 114 Wash 2d 392, 787 P2d 1352 (1990) (en banc) (government regulation of exterior of church held unconstitutional); *Society of Jesus v Boston Landmarks Comm.*, Nos 87-3168, 87-4571, 87-6586, slip op (Mass Super, Nov 2, 1989) (government regulation of the placement of church altars held unconstitutional under the Free Exercise Clause). For an excellent discussion of the constitutional issues, see Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Vill L Rev — (forthcoming 1991).

[143] Prior to *Smith*, the federal courts frequently required the prisons to make reasonable accommodations to the religious dietary needs of prisoners. See *Hunafa v Murphy*, 907 F2d 46 (7th Cir 1990) (upholding Muslim prisoner's right to receive food uncontaminated by pork and remanding for factfinding on governmental interest; the court noted that prison officials may raise the intervening *Smith* decision on remand and that this may eliminate the free exercise claim). See also *McElyea v Babbitt*, 833 F2d 196, 198 (9th Cir 1987) (per curiam); *Kahane v Carlson*, 527 F2d 492, 495 (2d Cir 1975).

[144] See *Menora v Illinois High School Ass'n*, 683 F2d 1030 (7th Cir 1982).

[145] *Walker v First Presbyterian Church*, 22 FEP Cases (BNA) 762 (Cal S Ct 1980) (holding that Free Exercise Clause bars application of local gay rights ordinance to employment of church organist).

[146] *Lewis ex rel Murphy v Buchanan*, 21 FEP Cases (BNA) 696 (D Minn 1979) (same, as applied to parochial school teacher).

tend sex education classes contrary to their faith.[147] Or that religious sermons on issues of political significance could lead to revocation of tax exemptions.[148] Or that Catholic doctors in public hospitals could be fired if they refuse to perform abortions.[149] Or that Orthodox Jews could be required to cease and desist from sexual segregation of their places of worship.[150]

If the Court wishes to consider a parade of horribles, it should parade the horribles on both sides. But while the two parades may be of the same length, they are of very different quality. The judicial system is able to reject claims that would be horrible if granted; believers are helpless to deal with infringements on religious freedom that the courts refuse to remedy.

Challenged by Justice O'Connor's rejoinder that the parade of horribles only "demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests,"[151] the Court retreated to the proposition that "the purpose of our parade . . . is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice . . . suffices to permit us to confer an exemption."[152]

The Court's evident hostility to subjective judicial second-guessing of legislative judgments is generally salutary, at least if

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[147] Prior to *Smith*, the courts generally concluded that the Free Exercise Clause requires that students be excused from sex education classes contrary to their faith. See, for example, *Smith v Ricci*, 89 NJ 514, 446 A2d 501 (1982); *Medeiros v Kiyosaki*, 52 Hawaii 436, 478 P2d 314 (1970). It is possible that these exemptions will survive *Smith* on the ground that they are "hybrid" claims involving the rights of parents to control their children's education. See text at notes 52-55.

[148] *Christian Echoes National Ministry, Inc. v United States*, 470 F2d 849 (10th Cir 1972). Compare *United States Catholic Conference v Abortion Rights Mobilization, Inc.*, 487 US 72 (1988) (lawsuit by ideological opponents of the Roman Catholic Church to force the IRS to revoke the Church's tax exempt status because of its teaching against abortion rights).

[149] Most states protect the right of medical personnel to refuse to assist in abortions, see, for example, *Kenny v Ambulatory Centre of Miami*, 400 S2d 1262 (Fla App 1981), but prior to *Smith* this would also seem to have been a constitutional right.

[150] The ordinance at issue in *Roberts v United States Jaycees*, 468 US 609 (1984), prohibited sex discrimination in any "place of public accommodation," a term that could be interpreted to include a synagogue. The Court suggested that an exemption would be required for religious associations. Id at 618. Because this involves freedom of speech and association, it is possible that it would be considered a "hybrid" and thus protected even after *Smith*.

[151] *Smith*, 110 S Ct at 1612 (O'Connor concurring).

[152] Id at 1606 n 5.

not taken to extremes. But it raises the question: Why is the Free Exercise Clause a particular target? The author of the *Smith* opinion, Justice Scalia, is reasonably consistent regarding the undesirability of judicial discretion.[153] In most areas of constitutional law, however, the majority of the Court does not hesitate to weigh the social importance of laws against their impact on constitutional rights. There is no particular reason to believe that judgments under the Free Exercise Clause are any more discretionary or prone to judicial abuse than judgments under the Commerce Clause, the Due Process Clause, or the Free Speech Clause, to take a few examples from the current catalog of compelling interest or balancing tests. Unless *Smith* is the harbinger of a wholesale retreat from judicial discretion across the range of constitutional law, there should be some explanation of why the problem in this field is more acute than it is elsewhere.

The *Smith* opinion suggests that the problem with the compelling interest test is that it requires inquiry into whether religious beliefs are "central" to the claimant's religion,[154] which is "akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' "[155] But is this true? In such cases, the court is not judging the "merits" of religious claims but solely trying to determine what they are. To be sure, the court may get it wrong, but what is the grave injury from that (other than the impact on the case itself)? The court does not purport to be resolving issues of religious interpretation for any purpose other than understanding the nature of the plaintiff's claim, and its misinterpretation carries no weight beyond the courtroom. I agree that courts must be sensitive to the impropriety of second-guessing religious doctrine, but I cannot agree that the possibility of error warrants abandonment of the enterprise.

Even so, Justice Scalia's opinion rightly calls attention to the arbitrariness of judicial balancing under the prior compelling interest test. The opinion is correct that the doctrine was poorly developed and unacceptably subjective. But the opinion proposes to solve this problem by eliminating the doctrine of free exercise exemptions rather than by contributing to the development of a more principled approach. In my judgment, the theory of the Free Exercise Clause (as opposed to its application) offers a principled

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[153] See, for example, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

[154] 110 S Ct at 1604.

[155] 110 S Ct at 1604, quoting *Lee*, 455 US at 263 n 2 (Stevens concurring).

basis for decision in cases of conflict between law and religious conscience. Judges are not forced into the sort of free-wheeling balancing of incommensurate interests that the majority feared in *Smith*. To be sure, there are hard cases, as there are under any constitutional provision. But there are also easy cases—cases that can be decided without any case-specific balancing whatsoever—and the principles constrain judicial discretion. Indeed, in most free exercise cases no "balancing" is required at all, because the relevant factors are ones of kind rather than of degree.

First, the history of the free exercise principle shows that governmental interests do not extend to protecting the members of the religious community from the consequences of their religious choices. Both the evangelical advocates of religious freedom and the Enlightenment liberals agreed that the "legitimate powers of government extend only to punish men for working ill to their neighbors."[156] The common pattern of state free exercise provisions prior to 1789 protected religious exercise only to the extent consistent with public "peace" and "safety."[157] As Madison summarized the point, free exercise should prevail "in every case where it does not trespass on private rights or the public peace."[158] Where the putative injury is internal to the religious community, the government generally has no power to intervene, with the narrow exception of injury to children.[159]

Under this standard, the unanimous decision in *Alamo Foundation v Secretary of Labor*[160] was mistaken. Minimum wage and maximum hour laws are legitimate social legislation to protect workers from exploitation by employers. But if members of the Alamo religious movement are inspired to work for the glory of God for long hours at no pay, their neighbors are not injured and the government has no legitimate power to intervene. Religions

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[156] Greene, ed, *The Writings of the Late Elder John Leland* at 118 (cited in note 99). Jefferson similarly stated that "[t]he legitimate powers of government extend to such acts only as are injurious to others." Thomas Jefferson, *Query XVII Religion*, in William Peden, ed, *Notes on the State of Virginia* 157, 159 (North Carolina, 1955).

[157] See text at notes 39, 91, and 92. See also McConnell, 103 Harv at 1461-64 (cited in note 24).

[158] Hunt, ed, 9 *The Writings of James Madison* at 100 (cited in note 91).

[159] This principle can be understood in terms of the economic concept of externalities. Where the government is preventing the imposition of negative externalities, its interest generally overrides free exercise claims, but otherwise (except in special circumstances) it does not. For an elaboration, see McConnell and Posner, 56 U Chi L Rev at 46 (cited in note 57).

[160] 471 US 290 (1985). I was the principal author of the Secretary's brief in *Alamo Foundation* but, as is apparent from the text, my position here is not the same.

often require sacrifice that outsiders may deem to be excessive. Similarly, under this standard Amish farmers should not be compelled to participate in the government-sponsored social security system when they believe that support for the aged is the exclusive responsibility of the religious community. The unanimous Supreme Court decision to the contrary, *United States v Lee*,[161] was mistaken.

Most controversially, for a religious school to prohibit interracial dating among its students is morally repugnant to most of us, but its direct effects are purely internal to the religious group; only those who choose to become part of the religious community defined by Bob Jones are governed by its rules. It might be argued that racist or other antisocial practices of religious groups affect outsiders by their influence on the climate of opinion. By forbidding interracial dating, for example, Bob Jones University might foster the belief that the white and black races are fundamentally unequal, to the injury of individuals who have neither joined nor consented to Bob Jones's policies. But this argument implies that religious conduct must be regulated because of its communicative impact. Even apart from the Free Exercise Clause, the Free Speech Clause disallows prohibition of conduct where the government's sole purpose is to prevent the spread of offensive ideas.[162] If the government cannot restrain so-minded persons from advocating racist ideas, it should not be able to restrain otherwise protected religious conduct on the ground that it will communicate racist ideas. Once again, a unanimous Supreme Court reached the opposite conclusion.[163]

A second principle that emerges from the theory of the Free Exercise Clause is that the government is not required to create exemptions that would make religious believers better off relative to others than they would be in the absence of the government program to which they object. The purpose of free exercise exemptions is to ensure that incentives to practice a religion are not adversely affected by government action. By the same token, govern-

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[161] 455 US 252 (1982).

[162] *United States v Eichman*, 110 S Ct 2404 (1990).

[163] *Bob Jones University v United States*, 461 US 574 (1983). Justice Rehnquist dissented on statutory grounds, but joined in the majority's rejection of the free exercise claim. To be sure, *Bob Jones* involved tax exemptions rather than a direct prohibition, thus introducing an unconstitutional conditions element to the analysis. *Bob Jones* is thus structurally similar to a case in which a nonprofit advocacy group is denied tax exempt status on the ground that it burns the American flag at its meetings.

ment action should not have the effect of creating incentives to practice religion.

This principle, too, allows some free exercise cases to be easily decided without the need for ad hoc balancing. An example is *Hernandez v Commissioner*, in which the Court correctly rejected a claim that denial of an income tax deduction for the expenses of a religious practice violated the free exercise of religion.[164] In the absence of an income tax, the believer would bear the full cost of his religious exercise. With an income tax and with deductibility, a portion of the cost of the religious exercise is shifted from the believer to the state. This leaves the believer better off, relative to nonbelievers, than he would be with no income tax at all.[165]

A third principle is that the claims of minority religions should receive the same consideration under the Free Exercise Clause that the claims of mainstream religions receive in the political process. This follows from the principle of denominational neutrality discussed above. To a great extent, the advocates of religious freedom at the time of the founding believed that minority religions would be adequately secured in their rights so long as they were on the "same footing" as the mainstream faiths. To achieve equal rights of conscience, the courts should frame the free exercise inquiry as follows: Is the governmental interest so important that the government would impose a burden of this magnitude on the majority in order to achieve it?

A practical example can be found in an early New York case, *People v Philips*.[166] The question was whether a Roman Catholic priest could be compelled to testify in court regarding a matter divulged to him in the confessional. The New York City court, presided over by DeWitt Clinton, sometime governor of New York and candidate for president of the United States, held that the free exercise provision of the New York Constitution exempted the priest from testifying. After noting that requiring testimony would annihilate the sacramental practice of penance, the court compared the matter to restrictions on Protestants.[167] Although Protestants did not practice auricular confession, and thus had no need of this particular form of accommodation, the court stated that

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[164] 109 S Ct 2136 (1989).

[165] The taxpayer in *Hernandez* also claimed that the government engaged in denominational discrimination in its treatment of tax deductions. Id at 2146. This claim, unlike the claim discussed in text, was meritorious and should not have been rejected by the Court.

[166] The case is reprinted in William Sampson, *The Catholic Question in America* 5 (Gillespy, 1813) (reprinted in 1974 by Da Capo Press).

[167] Id at 38.

"[e]very man who hears me will answer in the affirmative" that a law of the state that prevented administration of one of the Protestant sacraments would be unconstitutional.[168]

Thus, the exemption was required in order to maintain neutrality between the Protestant majority and the Catholic minority. Neutrality did not mean treating them the same way; that would have resulted in grave injustice to the Catholics. Rather, the court posed and answered the hypothetical question: Is the government's interest in compelling testimony so strong that it would interfere with a Protestant sacrament in order to achieve it? The Catholic is entitled to no less protection.

Under this principle, a court faced with a free exercise claim is not required to determine, in the abstract, how important a governmental purpose is or how central a religious practice is. The court instead must engage in the hypothetical exercise of comparing burdens. The degree of protection for religious minorities should be no less than that which our society would provide for the majority. This should be enough to decide many cases quite easily. Who can doubt that unobtrusive exceptions to military uniform regulations would be made if Christians, like Orthodox Jews, had to wear yarmulkes at all times?[169] Who can doubt that there would be exceptions to social security (or, more likely, no social security at all) if mainstream Christians were forbidden by their religion to participate?[170] Who can doubt that the United States Forest Service would find a way to avoid despoiling Christian worship sites when building logging roads?[171]

Other cases would come out the other way. A country could probably not survive if it allowed selective conscientious objection to war.[172] Nor would it allow trespass or interference with the private rights of others. A government interest is sufficient if it is so important that it is not conceivable that the government would waive it even if the religious needs of the majority so required.[173]

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[168] Id at 207.

[169] Contrast *Goldman v Weinberger*, 475 US 503 (1986).

[170] Contrast *United v Lee*, 455 US 252 (1982).

[171] Contrast *Lyng v Northwest Indian Cemetary Protective Ass'n*, 485 US 439 (1988).

[172] Compare *Gillette v United States*, 401 US 437 (1971).

[173] This is similar to David Strauss's formulation of the intent standard in equal protection cases:

> A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.

David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U Chi L Rev 935,

No doubt cases will arise in which these principles are inapplicable or incomplete, and in which the judicial task is more indeterminate. Cases involving children are particularly difficult (as they are when arising under other constitutional provisions). But these principles are sufficient to resolve the large majority of free exercise cases that have come before the Supreme Court in recent years without the need for unconstrained case-by-case balancing. In some instances, the principles suggest that the Court has been plainly wrong in denying free exercise claims. But the broader point is that the Free Exercise Clause, properly understood, does not pose the problem of subjective judicial discretion so feared by the majority in *Smith*.

E. The Rule of Law

The deepest and most important theme of the *Smith* opinion is its perception of a conflict between free exercise exemptions and the rule of law. The Court refers to exemptions as "a private right to ignore generally applicable laws."[174] Elsewhere, it states that to apply the compelling interest test rigorously "would be courting anarchy" and warns against making "each conscience . . . a law unto itself."[175] These fears are an unconscious echo of John Locke, who wrote in his *Letter Concerning Toleration* that "the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation."[176]

Viewed through the lens of legal positivism, this concern is wholly out of place in the context of a written constitution with a provision that, by hypothesis, authorizes exemptions. The Court itself concedes that there is nothing inappropriate or "anomalous" about *legislation* that makes exceptions for religious conflicts. Presumably, legislation of this sort is valid whether it is specific (like laws exempting the Native American Church from the ban on consumption of peyote) or general (like laws requiring employers to make reasonable accommodations of their employees' religious needs). Although the judicial role is broader when the legislation is general, the Court would not say that such legislation is therefore

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957 (1989). If Strauss is correct, this would suggest that the free exercise exemptions doctrine has more in common with *Washington v Davis* than indicated in the discussion above.

[174] 110 S Ct at 1604.

[175] Id at 1605-06.

[176] John Locke, *A Letter Concerning Toleration*, in Maurice Cranston, *Locke on Politics, Religion, and Education* 104, 136 (Macmillan, 1965)

improper or unconstitutional. Why, then, is it problematic for the People to enact a similar provision into constitutional law? From the perspective of legal positivism there is no difference between statutes and constitutional amendments. Both are commands of the sovereign.

If there is nothing wrong with statutory commands of the sovereign that make exceptions from generally applicable laws in cases of conflict with religious conscience, then there should be nothing wrong with constitutional commands of the same sort.[177] To Locke, the right to claim exemptions was tantamount to the right to rebellion, since there was no written constitution expressing the sovereign will in a form superior to legislation, and no institution of judicial review to mediate claims of exemption.[178] To the modern Supreme Court, the claim to exemptions is a routine matter of invoking the supreme law of the land. There is nothing lawless or anarchic about it.

From the perspective of legal positivism, free exercise exemptions do not make each conscience "a law unto itself." An arm of the government, the court, decides in each instance what the reach of the law will be. The Free Exercise Clause draws a boundary between the powers of the government and the freedom of the individual, but that boundary is defined and enforced by the government. The significance of the Free Exercise Clause is that the definition and enforcement of the boundary is entrusted to the arm of the government most likely to perform the function dispassionately and best equipped to consider the specifics of the case. The individual believer is not judge in his own case.

From a natural rights perspective, the Court's concerns about the rule of law are more substantial. According to eighteenth-cen-

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[177] To be sure, this assumes that the Free Exercise Clause was intended to authorize exemptions as a matter of positive law, which is the ultimate issue. But the Court's jurisprudential qualms about the rule of law are irrelevant to determining whether that is the correct reading of the clause, just as they would be irrelevant to an interpretation of a particular statute that appears to carve out a religious exemption.

[178] Interestingly, Locke uses the same term—the "appeal to heaven"—in the *Letter Concerning Toleration* to describe what the believer should do if the magistrate makes a command at odds with the commands of God, and in *The Second Treatise of Government* to describe what the body of the people should do if the government does not honor the social contract. Compare *Letter Concerning Toleration* at 137 (cited in note 176), with John Locke, *The Second Treatise of Government* § 242 in Peter Laslett, ed, *Two Treatises of Government* 267, 427 (Cambridge, student ed 1963) (originally published 1698). The "appeal to heaven" in the *Letter* appears to be in the literal, spiritual sense. The "appeal to heaven" in the *Second Treatise* is a reference to rebellion. The use of the same terminology accentuates the connection between conscience and rebellion in the absence of a written constitution and judicial review.

tury legal thought, freedom of religious conscience was not a product of the sovereign's will but a natural and inalienable right. The New Hampshire Constitution of 1784, for example, declared: "Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE."[179] George Washington addressed the Hebrew Congregation of Newport, Rhode Island, in these words: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."[180] The reason the rights of conscience were deemed inalienable is that they represented *duties to God* as opposed to *privileges of the individual.*[181] Thus, the Free Exercise Clause is not an expression of the will of the sovereign but a declaration that the right to practice religion is jurisdictionally beyond the scope of civil authority. This, then, *is* an anarchic idea: that duties to God, perceived in the conscience of the individual, are superior to the law of the land.[182]

That the idea may be anarchic does not mean that we should dismiss it, for there is reason to believe that this inalienable rights understanding is the genuine theory of the Religion Clauses of the First Amendment. One of the leading expositions of the thinking of the day about government and religion, James Madison's *Memorial and Remonstrance Against Religious Assessments*, makes the point in this way:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil So-

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[179] 2 *Poore's* at 1280-81 (cited in note 38).

[180] John C. Fitzpatrick, ed, 31 *The Writings of George Washington* 93-94 n 65 (GPO, 1939).

[181] See James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted as an appendix to the dissenting opinion in *Everson v Board of Education*, 330 US 1, 64 (1947) (The right of religious freedom "is unalienable also; because what is here a right towards men, is a duty towards the Creator.").

[182] More accurately, this idea is not anarchic but dyarchic. The individual is not free from law; he is subject to two potentially conflicting sources of law, spiritual and temporal. This is an important distinction, because the established tenets of a religious tradition have their own dynamic safeguards of order and good sense, superior to individual will. See F.A. Hayek, in W.W. Bartley III, ed, *The Fatal Conceit* 66, 88 (Chicago, 1988).

> ciety, do it with a saving of his allegiance to the Universal Sovereign.[183]

Note the contrast between the *Smith* opinion and Madison's *Memorial and Remonstrance*. *Smith* insists that conscience must be subordinate to civil law; Madison insists that civil law must be subordinate to conscience.

At its very core, the Free Exercise Clause, understood as Madison understood it, reflected a theological position: that God is sovereign.[184] It also reflected a political theory: that government is a subordinate association. The theological and political positions are connected. To recognize the sovereignty of God is to recognize a plurality of authorities and to impress upon government the need for humility and restraint. To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like "God" that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority. Those are propositions that few Americans, today or in 1789, could accept.

Conclusion

According to the *Smith* opinion, the argument for free exercise exemptions "contradicts both constitutional tradition and common sense."[185] Unfortunately, the Court never presents that argument so that readers might be able to judge for themselves. The argument is this: the Free Exercise Clause, by its very terms and read in the light of its historic purposes, guarantees that believers of every faith, and not just the majority, are able to practice their religion without unnecessary interference from the government. The clause is not concerned with facial neutrality or general applicability. It singles out a particular category of human activities for particular protection, a protection that is most often needed by practitioners of non-mainstream faiths who lack the ability to protect themselves in the political sphere, but may, on occasion, be needed by any person of religious convictions caught in conflict with our secular political culture.

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[183] Reprinted in *Everson*, 330 US at 64.

[184] Among the framers and ratifiers, some presumably accepted the theological position as a matter of personal faith, while others (perhaps even Madison) merely respected and deferred to the prevailing religious commitments of the people.

[185] 110 S Ct at 1603.

For this protection the *Smith* opinion substitutes a bare requirement of formal neutrality. Religious exercise is no longer to be treated as a preferred freedom; so long as it is treated no worse than commercial or other secular activity, religion can ask no more. The needs of minority religion are no longer to be legally entitled to equal consideration from the state. If practitioners of minority religions cannot protect themselves, that is the "consequence of democratic government," which they should recognize as "unavoidable."

I do not believe that constitutional principles should be chosen on the basis of our own normative judgments, divorced from constitutional text and tradition. I would prefer that *Smith* be decided on the basis of the constitutional text, history, and precedent. But if it is necessary to confront the normative question directly, I would say that a full guarantee for religious freedom is preferable to a largely redundant equal protection clause for religion, and that a genuine neutrality toward minority religions is preferable to a mere formal neutrality, which can be expected to reflect the moral and religious presuppositions of the majority. To be sure, this will increase the power and discretion of judges. But that seems a weak justification for the *Smith* opinion's reinterpretation of the Free Exercise Clause. Indeed, when the Constitution imposes limits on governmental power, interpretation of those limits in marginal cases is—to borrow some of the *Smith* Court's words—the "unavoidable consequence" of constitutionalism.