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HEADS, SECULARISTS WIN; TAILS, BELIEVERS LOSE—RETURNING ONLY FREE EXERCISE TO THE POLITICAL PROCESS

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Military officials attempting to censor chaplains' sermons;[1] these same officials insisting that the children of service personnel be cared for in a religiously-sterile environment;[2] Jewish officers forbidden to wear yarmulkes while in uniform;[3] Christian landlords forced to accept tenants the landlords believe to be engaged in sinful conduct;[4] Catholic lawyers threatened with professional discipline if they decline to represent young girls seeking abortions;[5] religiously-affiliated hospitals threatened with judicially-imposed access to their facilities for the performance of abortions;[6] each of these actions contributes to a sense of alienation by citizens who believe that true freedom is threatened by the growing power of the state, and its indifference to claims of superior duties to God.[7] Each is the product of government officials seeking a "good" that they define as superior to the good of respecting religious beliefs. Within this weighing of goods is a distorted claim of neutrality toward religion that ignores the incommensurate nature of the competing goods. Lived reality

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1. *See* Rigdon v. Perry, 962 F. Supp. 150 (D.D.C. 1997) (overturning order precluding military chaplains from encouraging members of their congregation to urge Congress to override the presidential veto of the Partial-Birth Abortion Bill).

2. *See* Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) (overturning military regulations prohibiting on-base family child care providers from engaging in religious practices during day care).

3. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (military regulation forbidding the wearing of head covering indoors held constitutional due to military's claim of necessity). Congress responded by enacting 10 U.S.C. § 774 permitting the wearing of "neat and conservative" religious apparel while in uniform. These events are critically evaluated in Samuel J. Levine, *Rethinking the Supreme Court's Hands-off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997).

4. *See* Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989), *but see* Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (holding that landlord's refusal to rent to unmarried, cohabiting couple was protected by the Free Exercise protections in the Minnesota Constitution).

5. *See* Tenn. Bd. of Professional Responsibility, Formal Op. 96-F-140 (1996).

6. *See* Valley Hosp. Ass'n v. MAT-SU Coalition for Choice, 948 P.2d 963, 971 n.18 (Alaska 1997).

7. *See* Symposium, *The End of Democracy, The Judicial Usurpation of Politics*, 67 FIRST THINGS 18 (Nov. 1996); JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICIA (1991); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE (1995).

teaches that religious objections differ from objections grounded in claims of convenience, cost, or even self-concept.[8]

This distorted understanding of neutrality achieved its ultimate legal standing when the United States Supreme Court rendered its ruling in *Employment Division v. Smith*, declaring 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.'"[9] Responding to wide-spread disapproval of this ruling, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[10] RFRA affirmed the unique nature of claims grounded in religious beliefs, and required that laws substantially burdening religious practices be justified as serving a compelling state interest through the least restrictive means.[11] The United States Supreme Court responded by declaring RFRA unconstitutional as to state and local laws in *Boerne v. Flores*.[12] This result does little to reconcile those citizens who have begun to wonder whether "we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime."[13]

This article describes three recent refusals by government officials to accommodate religious believers by applying explicit exemptions to general obligations. These refusals are a product of the Court's failure to clearly identify the circumstances where accommodation of religious beliefs remains constitutionally required by the Free Exercise Clause, and where such accommodations violate the Establishment Clause. In examining these three cases, I argue that some accommodations of religious beliefs remain constitu-

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8. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992). Compare this understanding of the human person with that described by Pope John Paul, II, THE GOSPEL OF LIFE (Evangelium Vitae) (1995) at para. 74.

> To refuse to take part in committing an injustice is not only a moral duty, it is also a basic human right. Were this not so, the human person would be forced to perform an action intrinsically incompatible with human dignity, and in this way human freedom itself, the authentic meaning and purpose of which is found in its orientation to the true and the good, would be radically compromised. What is at stake therefore is an essential right which, precisely as such, should be acknowledged and protected by civil law.

Id.

9. 494 U.S. 872 (*quoting* United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

10. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

11. *See* 42 U.S.C. § 2000bb-3.

12. 117 S. Ct. 2157 (1997).

13. Symposium, *The End of Democracy, The Judicial Usurpation of Politics*, 67 FIRST THINGS 18, 19 (Nov. 1996). *See also* JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

tionally required and that such accommodations do not violate the Establishment Clause.

Absent an adequate understanding of the post-*Smith* duty of accommodation, government officials will continue to exclude religious believers from generally available benefits,[14] and reject reasonable requests for exemptions from generally-applicable law.[15] Having limited judicial protection of religious beliefs in *Smith*, the Court's rejection of RFRA in *Boerne* may be misinterpreted as establishing the proposition that political protections of religious practices are constitutionally suspect. While the limitations of federalism may have left the Court no alternative to striking down RFRA in *Boerne*, the Court's refusal to reevaluate or clarify *Smith* sends the signal to all government officials that protection of religious practices is disfavored and will be tolerated only when, and if, the courts say so. This is not the law embodied in the First Amendment, and it is not the law found in the Court's own jurisprudence.[16] But it will be the law officials govern their conduct by, absent a clear statement from the Court that accommodation of religious beliefs is sometimes required, and usually permissible.

I. THE CURRENT CONSTITUTIONAL SITUATION

In *Boerne*, RFRA[17] was declared unconstitutional as an intrusion into the states' retained power to regulate the conduct of their citizens,[18] and the Court's authority to interpret the Constitution.[19] While acknowledging that RFRA was

14. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995) (state university unconstitutionally refused funding to student newspaper promoting religious perspective for fear that funding would violate the Establishment Clause); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395-97 (1993) (attempting to avoid violating the Establishment Clause school unconstitutionally refused use of building to religious group for evening presentation).

15. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 708 (1986).

16. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

17. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

18. "This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Boerne*, 117 S. Ct. at 2171.

19. *See id.* at 2172.

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

passed in response to Congressional perception that the Court had reduced protection of the free exercise of religion,[20] Justice Kennedy, joined by Justices Rehnquist, Stevens, Thomas, and Ginsburg, analyzed the case primarily as presenting a question concerning the limits of Congressional power, rather than the limits of the secular state.[21]

Justice Scalia joined in much of their analysis but also addressed the question of religious liberty. He defended the Court's interpretation of the Free Exercise Clause in *Smith* as consistent with the original understanding of the First Amendment.[22] In *Smith*, the Court interpreted the Free Exercise Clause as permitting religiously-neutral laws of general applicability that have the incidental effect of burdening religious beliefs and practices.[23]

Justices O'Connor, Souter, and Breyer dissented in *Boerne*, arguing that without briefing, argument, and full consideration of the *Smith* standard for review of free exercise claims, the constitutionality of RFRA could not be determined.[24] "If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause."[25]

When viewed in isolation, both *Smith* and *Boerne* appear to be the products of a judicially conservative court, deeply respectful of the political will of the people and the structural protections inherent in federalism. Writing for the majority in *Smith*, Justice Scalia observes:

> 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

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Id. at 2172.

20. "Congress enacted RFRA in direct response to the Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)." *Id.* at 2160.

21. *See id.* at 2162-72.

22. *See id.* at 2172 (Scalia, J., concurring).

23. *See Smith*, 494 U.S. at 872. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The Fourteenth Amendment has been interpreted as requiring that the states observe this protection also. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). *See generally* RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.6-.8 (2d ed. 1992).

24. *See Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting). *See id.* at 2185 (Souter, J., dissenting).

25. *Id.* at 2176 (O'Connor, J., dissenting).

> law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[26]

In *Boerne*, Justice Scalia reiterates his position that political protections are to be preferred over judicial protections:

> Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice? Unfortunately, however, that abstract proposition must ultimately be reduced to concrete cases. The issue presented in *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether (as the dissent apparently believes) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.[27]

The irony of judicially vetoing RFRA, an act that passed both houses of Congress with only three negative votes,[28] on the basis that "the people" and "their elected representatives" should control the contours of religious liberty could not have escaped Justice Scalia. To a social conservative, such rhetoric about the Court's deep respect for the will of the people is only credible because it is authored by Justice Scalia, a man whose voting record evidences his opposition to what some scholars have characterized as "the judicial usurpation of politics."[29]

Even accepting Justice Scalia's laudable intentions to return to the people fundamental questions about the ordering of our lives together, and his vision of limited federal intervention in the political affairs of each state, *Smith's* disregard of the text of the Constitution, and *Boerne's* rejection of the unified national attempt to correct this disregard, give rise to three distinct harms to religious liberty. First, *Boerne* suggests that any comprehensive effort at the federal level to protect religious believers from undue burdening of their beliefs is doomed to failure.[30] This leaves religious believers to the fragmentary

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26. 494 U.S. at 890.

27. *See Boerne*, 117 S. Ct. at 2176 (Scalia, J., concurring).

28. *See* 139 CONG. REC. S14471 (daily ed. Oct. 27, 1993); 139 CONG. REC. H2363 (daily ed. May 11, 1993).

29. *See* Symposium, *The End of Democracy, The Judicial Usurpation of Politics*, 67 FIRST THINGS 18 (Nov. 1996).

30. For a more optimistic view of the possibilities of federal legislation in this area, see Thomas C. Berg, *Religious Freedom after* Boerne, 2 NEXUS 91 (1997) (suggesting that the federal spending and commerce powers could be used to provide some statutory protection against burdening of religious beliefs).

process of reclaiming their liberty state by state, and federal statute by federal statute.[31] Second, as Scalia concedes in *Smith*, members of small religious sects are likely to suffer significantly more burdens on their beliefs because of nonparticipation or underrepresentation in the political process.[32] Finally, and perhaps of greatest concern, efforts to obtain political accommodations for religious believers will be substantially impeded by the current confusion in the jurisprudence surrounding the Establishment Clause.[33]

While political accommodations of religious beliefs remain both constitutionally and pragmatically possible,[34] many government officials assume that *Smith* signaled the abolition of Free Exercise as a limiting principle

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31. Time, energy, and resources previously available for worship, ministry, or social justice initiatives must now be diverted to monitoring state and federal legislation to insure that exemptions are sought when an otherwise desirable law will burden particular religious practices. State RFRAs must be pursued, as well as litigation seeking more expansive protections from state constitutional provisions. In short, *Smith* and its progeny *Boerne* seem made to order for adamant separatists or secularists who recognize the value of "divide and conquer."

32. As Justice Scalia regretfully noted in *Smith*, attempts to obtain legislative accommodations of minority religions have little chance of political success. This is due in part to the mere absence of numbers. Small sects often do not have the political muscle or acumen to gain the ear of their elected representatives. Even when they gain the attention of their lawmakers the religious practices they seek to protect may seem too foolish, strange, or even frightening to appeal to the general citizenry. Under such circumstances, it will be difficult for elected representatives to justify an exemption from a generally desirable law to the folks back home.

Separate from the political limitations inherent in being a member of a small group in a democracy, is the theological problem posed by requiring active intervention in the political process in order to protect the right to serve God according to the believer's understanding of the divine will. Many small religious groups eschew political activities as contrary to living a Godly life. Surely this does not justify indifference on the part of the larger political community, yet this result is reasonably predictable without the protections inherent in a more vigorous interpretation of the Free Exercise Clause.

33. Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J. concurring); and in need of "[s]ubstantial revision," County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (Kennedy, J. concurring in part and dissenting in part).

34. This is true, even for beliefs held by only a small group of believers. In response to the *Smith* opinion, officials at the Occupational Health and Safety Administration (OSHA) announced there would no longer be a religious exemption to the requirement that hard hats be worn on construction sites. *No Exemption From Hard Hat Wear Based on High-Court Decision, OSHA Says*, 20 O.S.H. REP. (BNA) 1018 (Nov. 14, 1990) (discussing OSHA Notice CPL 2, which requires construction workers to wear helmets, effectively barring turban-wearing Sikhs from employment). Only sustained efforts by members of various religious communities averted this precipitous action. *See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. at 122-23 (1992) (testimony of Rep. Solarz) (underscoring that the OSHA initially reacted to *Smith* by rescinding an exemption for Old Order Amish and Sikhs from the hard hat rule, a response that was averted only by a sustained outcry from the religious community).

on any government actions, other than those motivated by religious animus.[35] Under this assumption the Establishment Clause becomes the sole constitutional measure related to religion. This leads to the conclusion that accommodating religious beliefs is not constitutionally required, and may be constitutionally forbidden.[36] So long as this factor of intimidation remains, the political dialogue concerning the proper accommodation of religious beliefs that Justice Scalia envisions will never exist. Instead, officials' evaluations of political options will remain skewed against accommodation, and the trivialization of religious beliefs will continue to plague this nation.[37]

II. MANDATORY ACCOMMODATIONS AFTER *SMITH*

In early 1992 Professor Michael McConnell summarized the state of the law on accommodating religious beliefs:

> The principal recent case interpreting the Free Exercise Clause is *Employment Division v. Smith*, in which the Court held that "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." The opinion suggests certain exceptions to the rule, which on their face appear to be potentially expansive, but it seems probable that these exceptions were mentioned for the purpose of distinguishing disfavored precedents and will not survive to do serious work.[38]

The "potentially expansive" exceptions in *Smith*[39] referred to by Professor McConnell include cases where the law is specifically directed at a religious

35. *See Lukumi*, 508 U.S. at 520.

36. "Much governmental discrimination against religion is motivated by mistaken or exaggerated interpretations of the Establishment Clause or the principle of separation between church and state." Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 at n. 23 (1997). *See, e.g.*, *Rosenberger*, 515 U.S. at 819 (1995) (state university unconstitutionally refused funding to student newspaper promoting religious perspective for fear that funding would violate the Establishment Clause); *Lamb's Chapel*, 508 U.S. at 395-97 (1993) (attempting to avoid violating the Establishment Clause school unconstitutionally refused use of building to religious group for evening presentation).

37. *See* STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

38. Michael McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 696 (1992).

39. *See Smith*, 494 U.S. at 872. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The Fourteenth Amendment has been interpreted as requiring that the states observe this protection also. *See Cantwell*, 310 U.S. at 296. *See generally* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 21.6-.8 (2d ed. 1992).

practice,[40] or the conduct is protected by the Free Exercise Clause and some other constitutional provision,[41] or the law contains individualized exemptions which are not extended to cases of religious hardship.[42]

In 1993, the Court established that *Smith* did not render the Free Exercise Clause totally impotent by its ruling in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah.*[43] In *Lukumi* the Court struck down city ordinances prohibiting animal sacrifice. Noting that laws may be facially neutral, yet aimed at "covert suppression of particular religious beliefs,"[44] the Court looked beyond the text of the ordinances to determine the "effect of [the] law in its real operation."[45] Because the ordinances permitted almost every other form of animal slaughter, the ordinances appeared to be targeting the ritual sacrifice of animals by the Santeria. Such targeting subjected the ordinances to strict scrutiny. The city was unable to establish that the laws were narrowly tailored to serve compelling state interests, thus the ordinances were held unconstitutional.[46]

After *Lukumi*, under the Free Exercise Clause there appear to be four circumstances in which a law creating incidental burdens on religious beliefs will be subject to strict scrutiny. First, if the law is not generally applicable, and burdens religious beliefs, the courts will require the state to show that the law serves a compelling state interest. While dicta by the Court has occasionally equated this with a showing that the law was the product of religious animus,[47] lower courts have adhered to the original requirement of general applicability as articulated in *Smith.*[48] Second, a law burdening multiple fundamental rights, including free exercise rights, will give rise to a "hybrid"

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40. *See Smith*, 494 U.S. at 877-78.

41. *See Smith*, 494 U.S. at 879-880.

42. *See Bowen*, 476 U.S. at 708. *See also Lukumi*, 508 U.S. 520; Sherbert v. Verner, 374 U.S. 398 (1963); *Smith*, 494 U.S. at 881 (1990). *Cf.* Kissinger v. Bd. of Trustees of Ohio State Univ., College of Veterinary Medicine, 5 F.3d 177 (6th Cir. 1993) (free exercise clause not violated by university curriculum that was generally applicable to all students, was not aimed at particular religious practices, and did not contain system of particularized exemptions).

43. See *Lukumi*, 508 U.S. 520.

44. *Id.* at 534.

45. *Id.* at 535.

46. *See id.*

47. *See Lukumi*, 508 U.S. at 2226-27; *Boerne*, 117 S. Ct. at 2171.

48. "Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 1600 (*quoting* United States v. Lee, 455 U.S. at 263 n.3.) Lower courts applying the general neutrality test include Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) (Army may not prohibit on-base family child care providers from engaging in religious practices during day care); and Rader v. Johnston, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996) (state university could not refuse to grant exemption to freshman seeking to live off-campus in a religious group house where such exemptions were granted to one-third of all freshmen).

claim of unconstitutionality, triggering strict scrutiny. Third, laws containing systems of individualized exemptions cannot be enforced so as to exclude any exemption for "religious hardship," without a showing of compelling state interest. Finally, facially neutral laws may operate in such a manner that their operation gives rise to an inference that the law targets a particular religious act or belief. If the inference arises, the state must show that the law serves a compelling state interest. Each of these possibilities forms the basis for a claim of mandatory accommodation of religious beliefs.

The easiest and most obvious example of how these exceptions might create a claim of mandatory accommodation is the case where the law is not generally applicable. By its design, a law may evidence that its purpose is not defeated by excluding some members of the community from a duty of compliance. In such cases, the courts do little violence to the law's ultimate purpose by also excluding those whose religious beliefs would be substantially burdened by conforming with the law's requirements.

Accommodation of religious beliefs may also be constitutionally required when the law provides a system of individualized exemptions. Typically government officials are given discretion in determining who must comply with such laws. This grant of discretion evidences lawmakers' sensitivity to the situational limits of general rules. Circumstances do matter—both as to the desirability of requiring compliance as well as to the probability of achieving the particular good sought by the legislation. Officials who decline to accommodate religious beliefs under such a system fail to recognize the unique harm suffered by a person forced to violate his or her understanding of their duties to God. This harm often outweighs the small contribution such person's conformity with the law would make to the outcome the law seeks to achieve.

The third circumstance where accommodation may be constitutionally mandatory is where a hybrid claim is presented. While the Court has yet to develop this concept, at a minimum it would seem to encompass cases where the burdens imposed on any one fundamental right are not sufficient to trigger judicial intervention, but the aggregate burden is sufficient to require some form of judicial relief. In *Smith*, Justice Scalia specifically mentioned the protection afforded hybrid claims arising from combined burdens on the free exercise of religion and freedom of speech or press, as well as burdens imposed on associational interests.[49]

The final basis for invoking strict scrutiny under the Free Exercise Clause seems less likely to form the foundation of claims of accommodation. If laws are motivated by religious animus, or if the effect gives rise to an inference of

49. *See Smith* at 1601-02.

religious targeting, the remedy is invalidation of the law, rather than accommodation of believers.[50] The Court's decision in *Lukumi* is an example of this.

III. RECENT FAILURES TO ACCOMMODATE

The fact that government officials have not carefully considered these bases for claims of mandatory accommodation is evidenced in the initial treatment of three recent matters. In *Rader v. Johnston*, a religiously-motivated student requested an exemption from a university requirement that freshmen live in university-sponsored housing. His request indicated that he wanted to live in a Christian housing facility adjacent to the campus, where all residents committed to live chastely and in accordance with their common religious beliefs, forswearing the use of profanity and alcohol.[51] This environment provided a sharp contrast to university housing where condoms were readily available in vending machines in the bathrooms, and substantial evidence indicated that alcohol was regularly consumed.[52]

Although the university permitted over one-third of all freshmen students to live off campus,[53] the religiously-motivated student's application was denied. The student sued, arguing that the university requirement that he live on campus violated his free exercise of religion. Based upon the university's practice of granting exemptions for a wide variety of reasons, the court held that the requirement was not generally applicable,[54] and that the school had instituted a system of individualized exemptions.[55] Therefore, the university was required to show that denying an exemption to the student advanced a compelling state interest. The university failed to make such a showing, and the policy was declared invalid as it applied to the plaintiff.[56]

The second example of public officials refusing to accommodate religious beliefs is contained in a Tennessee ethics opinion. In Formal Opinion 96-F-140, the Tennessee Board of Professional Responsibility responded to an inquiry by a Catholic lawyer concerning the duty to accept court appointments

50. Whether all members of the Court would agree that laws should be invalidated based only upon enactment due to religious animus, where no adverse effect is shown, is open to question. *See* Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (Scalia, J. dissenting) (questioning whether laws enacted on the basis of a desire to benefit religion should be invalidated on the basis of motivation alone).

51. *See* Rader v. Johnston, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996) (holding state university could not refuse to grant exemption to freshman seeking to live off-campus in a religious group house where such exemptions were granted to one-third of all freshmen).

52. *See id.* at 1545-46.

53. *See id* at 1547 n.14.

54. *See id.* at 1553.

55. *See id.* at 1551-53.

56. *See id.*

representing young girls seeking judicial authorization to consent to abortions. The Board opined that the lawyer's deeply held religious beliefs about the sanctity of human life did not constitute a "compelling reason" to refuse such appointments, leaving open the possibility that a lawyer would be disciplined for declining.[57] The opinion goes on to suggest that the duty of zealous advocacy would often preclude lawyers discussing alternatives to abortion or urging these young clients to consult with their parents.[58] This opinion represents a remarkable departure from the traditional American understanding of the voluntary nature of the client-attorney relationship, prior Tennessee ethics opinions and cases, and the contemporary understanding of a limited duty to accept court appointments.[59]

The third example of accommodation being rejected is suggested by a recent Alaska case. In *Valley Hospital Ass'n, Inc. v. MAT-SU Coalition for Choice*[60] the policy of a private, non-profit hospital limiting the use of its facilities for abortions was declared unconstitutional by the Alaska Supreme Court.[61] The governing board of Valley Hospital Association ("VHA") had adopted a policy permitting abortions only when (1) one or more physicians provided documentation that the fetus has a condition incompatible with life, (2) the mother's life was threatened by continuing the pregnancy, or (3) the pregnancy resulted from rape or incest.[62] While it appears that other facilities were available for the performance of first trimester abortions, VHA was the only facility in the area at which a woman could have a second trimester elective abortion.[63]

In reaching its decision, the court determined that the right to privacy contained in the Alaska constitution provided broader protection of a woman's

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57. *See* TENN. BD. PROF'L. RESP. FORMAL OP. 96-F-140 (1996). It is important to distinguish the bar's authority to discipline lawyers for unprofessional conduct from a court's power to punish failure to obey valid court orders through a finding of contempt. The inquiry addressed in Opinion 96-F-140 raises questions about the lawyer's ethical obligations, rather than the powers of the court.

58. *See id.*

59. For an extended critique of this opinion, *see* Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointment in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997); Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469 (1998) (criticizing the Tennessee opinion as contrary to the ideal of a religiously pluralistic society); and Ernest F. Lidge, III, *The Lawyer's Moral Autonomy and Formal Opinion 140*, 33 TENN. B.J. 12, 13-14 (Jan./Feb. 1997).

60. 98 P.2d 963 (Alaska 1997).

61. *See id.*

62. *See id.* at 965.

63. *See id.* at 965 n.2. The court does not address the fact that state law does not require a certificate of need in order to operate an outpatient surgical center suitable for the performance of later abortions. Absent such a limitation, the monopoly identified by the court appears to be a product of market forces rather than legal regulation.

ability to obtain an abortion than presently afforded by federal law.[64] The court embraced a positive right to the access to public and quasi-public institutions for the performance of abortions, which could only be interfered with where a compelling state interest was advanced by the least restrictive means possible.[65]

In examining VHA's claim that it was a private actor, the court referred to the holding of an earlier Alaskan case finding that private hospitals may be quasi-public institutions for purposes of observing due process rights in credentialling decisions.[66] While incorporated as a private, non-profit corporation, ultimately the *Valley* court characterized VHA as a quasi-public institution because: 1) VHA was the only hospital in the community, due, in part, to the state's regulation of the expansion and creation of hospitals through a certificate of need program;[67] 2) VHA received construction funds, land and operating funds from governmental sources;[68] and 3) VHA's governing board was elected by a public membership.[69] As a quasi-public institution, VHA was a state actor, and thus its policies concerning abortion were subject to the same constitutional constraints imposed on a state-operated hospital.

The court rejected VHA's claim that its policy was a protected expression of "sincere moral conviction."[70] Although VHA's policy was consistent with an Alaskan statute providing that "[n]othing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section,"[71] the court held the statute "unconstitutional to the extent that it applies to VHA."[72] Absent a showing that the hospital's policy on abortions furthered a compelling state interest by the least restrictive means possible, neither the collective judgment of the hospital's governing board nor the state statute could protect the hospital

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64. *See id.* at 968.

65. *See id.* This differs significantly from even the most expansive federal interpretation of the right to privacy, which encompasses only a negative right to be free from governmental interference rather than a positive right to insuring the availability of abortion. *See, e.g.,* Harris v. McRae, 448 U.S. 297 (1980).

66. *See* Storrs v. Lutheran Hosp. & Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980).

67. *See Valley Hospital*, 948 P.2d at 965.

68. *See id.*

69. *See id.* at 971. "VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated 'general members,' annually elect the Association Board." *See id.* at 965.

70. *See id.* at 971. The hospital unsuccessfully argued that the Alaska constitution had been interpreted to encompass freedom of conscience as well as freedom of religion. Appellants' Brief at 44-46, *Valley Hospital* (No. S-7417).

71. *See* ALASKA STAT. § 18.16.010(b) (Michie 1997), *quoted in Valley Hospital*, 948 P.2d at 972 n.19.

72. *See Valley Hospital*, 948 P.2d at 972.

from demands that access be granted to VHA's facilities for the performance of abortions.

In a footnote the Court warned that this doctrine may be extended to religiously-affiliated hospitals. "Nothing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which would be a compelling state interest. Recognizing such a policy as 'compelling' could violate the Establishment Clause of the First Amendment to the United States Constitution. As this point is not raised, we do not rule on it."[73] The possibilities raised by this footnote illustrate the magnitude of the problem created by the *Smith* opinion, the Court's subsequent rejection of RFRA in *Boerne*, and the continuing confusion surrounding application of the Establishment Clause.

Several patterns emerge after considering these three matters. Each matter involved claims by private actors that the required conduct was contrary to their religious or sincere moral beliefs.[74] Each involved demands by officials that those beliefs be compromised for the benefit of others—the university attempting to insure full occupancy of its residence halls,[75] the abortionist seeking to avoid building private surgical facilities,[76] and the girl seeking to obtain an abortion without her parents' consent.[77] In each instance the governing rule permitted exempting unwilling individuals or organizations from the conduct required. Ultimately all three conflicts arose, not because of the absence of a process or rule permitting accommodation of the beliefs, but because the officials charged with administering those processes or enforcing the rules refused to apply the exemptions to cases involving religiously-based objections.

IV. ESTABLISHMENT OR ACCOMMODATION?

In two of these three matters the officials rejected accommodation of religious beliefs as violating the Establishment Clause of the U.S. Constitution. The Alaska Supreme Court did not elaborate on its tentative position that the Establishment Clause could forbid exempting religiously-affiliated hospitals from complying with the court's interpretation of the state constitution, requiring quasi-public hospitals to provide access to their facilities for the

73. *See Valley Hospital*, 948 P.2d at 971 n. 18. William Bentley Ball provides additional commentary on this case in *The Legacy of Justice Brennan*, 84 FIRST THINGS 14 (June/July 1998).

74. Arguably, lawyers and hospitals differ from students due to unique claims of public responsibility arising from the activities they have chosen to pursue.

75. *See* Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996).

76. *See Valley Hospital*, 948 P.2d 963 (Alaska 1997).

77. *See* Tenn. Bd. of Professional Responsibility, Formal Op. 96-F-140 (1996).

performance of abortions.[78] While the court acknowledged that its observation did not constitute a "ruling" imposing legal obligations of compliance on religiously-affiliated hospitals, the public expression of this tentative position pressures religiously-affiliated hospitals to grant access to their facilities for the performance of abortions contrary to the clear exemption granted by the Alaska legislature.

A recent defense of the Tennessee ethics opinion also asserted that the outcome was dictated by the Establishment Clause:[79]

> Neither the judiciary, nor the Board can carve out for Catholic lawyers any broad ecclesiastical or denominational exception to requirements of general applicability for all lawyers, consistent with the Establishment Clause.
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> 1. Within one critic's article, the Board is pilloried for not providing any group exceptions to Catholic lawyers from court appointments under the Act. Given that all Tennessee lawyers are equally susceptible to the laws which govern citations for criminal contempt for violating a direct court order, there is no basis for a broad religious exception for Catholic lawyers. Just as was the case in *Greene*,[80] no broad religious exception is required. I believe the statutory and common law on criminal contempt as recited earlier, DR 2-110 and applicable local rules, are all neutral laws or regulations of general applicability, and 'an individual's religious beliefs do not excuse him from compliance [therewith] on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee).[81]
>
> a) Granting such a group-based exception on religious grounds would clearly violate the third prong of *Lemon v. Kurtzman*, and would constitute excessive governmental entanglement with religion.
>
> b) As to one critic's myopic contention that the Board has not properly accounted for the state of the law as to individuals who claim conscientious objector status, Justice Frankfurter concluded in *Minersville School District Board of Ed. v. Gobitis* that:
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> '[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general

78. *See Valley Hospital*, 948 P.2d at 971 n. 18.

79. *See* Jesse D. Joseph, *Update on Issues Involved in Board Formal Ethics Opinion 96-F-140 and Response to Criticism* (The Lawyer's Moral Autonomy versus the Lawyer's Professional Duty, Continuing Legal Education Seminar sponsored by the University of Memphis, Cecil C. Humphreys School of Law, and the St. Thomas More Catholic Lawyers Guild of West Tenn. Inc., Memphis, Tenn. (December 19, 1997)).

80. *See* United States v. Greene, 892 F.2d 453, 456 (6th Cir. 1989), *cert. denied* 495 U.S. 935 (1990)

81. Citations omitted in original.

law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizens from the discharge of political responsibilities . . . .'[82]

2) Government must not participate in the affairs of religious organizations, since government must be secular in its affairs. In *Romer v. Board of Public Works of Maryland,* Justice Blackmun stated it succinctly:

'Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity . . . .'

a) A court has a secular purpose under the First Amendment—restrictions on bailiff reading Bible and evangelizing in public areas were legitimate, and furthered the goal of upholding separation of church and state. *Kelly v. Municipal Court of Marion County.*

b) When government puts its imprimatur on a particular religion, it conveys a message of exclusion to all who do not adhere to the favored beliefs. *Lee v. Weisman.* This activity is tantamount to state establishment of religion and is repugnant to the First Amendment. According to one of our nation's founding fathers, and the primary author of the religion clauses is to protect religion from governmental interference:

'Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religions, have had a contrary operation.' Memorial and Remonstrance Against Religious Assessments (1785) reprinted in 8 Papers of James Madison 301 (W. Rachal, R. Rutland, B. Ripel & F. Teute eds. 1973).[83]

This response misconstrues each prong of the *Lemon* test, and disregards the substantial body of cases recognizing the constitutional legitimacy of accommodating religious beliefs.[84]

In *Lemon v. Kurtzman*, the United States Supreme Court articulated a three-prong test to determine if particular state actions violated the Establishment Clause. Constitutionally permissible laws 1) must have a secular purpose; 2) may not result in a primary effect that either advances or inhibits

82. Although *Minersville School Dist. Bd. of Educ. v. Gobitis* was overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *Disciplinary Council* may be relying upon the fact that this portion of the *Gobitis* decision is quoted favorably by Justice Scalia in *Smith. See Smith*, 494 U.S. at 879.

83. Jesse D. Joseph, *Update on Issues Involved in Board Formal Ethics Opinion 96-F-140 and Response to Criticism, supra* note 79 (citations omitted) responding to Teresa Stanton Collett, *Professional versus Moral Duty: Accepting Appointment in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635 (1997).

84. *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Wisconsin v. Yoder, 406 U.S. 205 (1972); Follett v. Town of McCormick, 321 U.S. 573 (1944).

religion; and 3) cannot result in an excessive entanglement between church and state.[85] While criticized at various times both by members of the Court[86] and members of the legal academy,[87] the *Lemon* test formally remains the criteria for evaluating Establishment claims. All elements of the *Lemon* test are satisfied when applied to the Alaskan statute exempting hospitals from participating in the performance of abortions, and the requested exemption of Catholic lawyers from any professional duty to accept court appointment representing young girls seeking abortions.

V. SECULAR PURPOSE

The secular purpose served by both exemptions is the removal of an obstacle to the exercise of religious convictions. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,[88] the United States Supreme Court observed, "[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[89] More recently, in *Smith*, Justice Scalia writing for the majority recognized the constitutional legitimacy of exemptions accommodating religious believers.[90] The Alaskan statute exempting hospitals from forced participation in abortions is exactly the sort of legislative accommodation for conscientious objectors that the Court anticipated in *Smith* by its statement: "A society that believes in the

85. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

86. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment); Lee v. Weisman, 505 U.S. 577, 644 (Scalia, J., joined by, inter alios, Thomas, J., dissenting) (1992); Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 429 U.S. 573, 655-657 (1989) (Kennedy, J., concurring in part and dissenting in part); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346-349 (1987) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 107-113 (1985) (Rehnquist, J., dissenting).

87. *See, e.g.*, Jesse Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 CALIF. L. REV. 5 (1987); Marshall, *"We Know It When We See It:" The Accomodation of Religion*, 1985 SUP. CT. REV. 1; Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984).

88. 483 U.S. 327 (1987).

89. *See id.* at 335.

90. *See Smith*, 494 U.S. at 890 (citations omitted).

> It is therefore not surprising that a number of states have made an exception to their drug laws for sacramental peyote use. But to say that nondiscriminatory religious-practice exemption [for sacramental peyote use] is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.

Id.

negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[91]

Similar to the Alaska statute permitting hospitals to decline to participate in abortions, the relevant provision of the Tennessee Code of Professional Responsibility recognizes lawyers' right to decline court appointments when they have compelling reasons. In considering this exemption, it is important to note that the Tennessee Code of Professional Conduct does not contain a disciplinary rule requiring acceptance of court appointments. This omission is significant since only the disciplinary rules are intended to be enforceable through professional discipline.[92]

In locating a duty to accept court appointments, the Tennessee Board looked to the ethical considerations contained in the code. These considerations do not create professional duties, but instead articulate aspirations to be pursued by lawyers.[93] Ethical Consideration 2-29 urges lawyers to accept court appointments, but recognizes the propriety of lawyers declining court-appointed representation for "compelling reasons."[94] The Tennessee Board of Professional Responsibility did not consider a lawyer's desire to conform her conduct to her religious beliefs to be a compelling reason.[95]

Yet under the Free Exercise Clause as interpreted by *Smith*, ". . . 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."[96] Opinion 96-F-140 identifies no compelling state interest served by refusing to characterize the lawyer's religious objections as a "compelling reason." Instead the Board suggests the lawyer's objection is comparable to

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91. *Id.*

92. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1980) ("The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."). *See also* Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, THE GOOD LAWYER 214, 217 (David Luban, ed. 1983).

93. "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

94. TENNESSEE CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1996).

95. *See* Tenn. Bd. of Professional Responsibility, Formal Op. 96-F-140, at 3 (1996).

> Although counsel's religious and moral beliefs are clearly fervently held, EC 2-29 exhorts appointed counsel to refrain from withdrawal where the person is unable to retain counsel, except for compelling reasons. Compelling reasons as contemplated by this EC do not include such factors as "the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in the criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

Id.

96. *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

that of an attorney seeking to be excused from representation because "the defendant's cause was unpopular, or because the crime of which he was accused was distasteful."[97] Equating fulfillment of a religious duty to lack of popularity or choices based on personal taste trivializes the lawyer's objection, and exhibits either a lack of understanding or hostility to religious claims.[98] The exemption sought by the Catholic lawyer would not only be permissible under the Establishment Clause, but may be constitutionally required as a matter of the Free Exercise.

VI. NEITHER ADVANCES NOR INHIBITS RELIGION

The second prong of the *Lemon* test requires that a primary effect of the state action be neither the advancement nor inhibition of religion. The Court has not provided much guidance in interpreting this prong. After reviewing the relevant cases, Professor Michael McConnell restates this part of the test: "If the effect is to remove a significant obstacle to the exercise of a religious belief adopted independently of the government action, the accommodation is legitimate. By contrast, if the effect is to induce the person to adopt (or feign) the religious belief in order to receive the benefits of the accommodation, the government action goes beyond the range of permissible accommodation and becomes an unlawful establishment of religion."[99] It seems unlikely that secular private hospitals in Alaska will suddenly seek religious affiliations in order to protect their policies limiting access to their facilities for the performance of abortions. Nor does there appear to be a realistic threat of wholesale conversion by the Tennessee Bar to the Roman Catholic Church if Catholic lawyers are excused from appointments representing minors seeking abortions. The purpose of these exemptions is not to advance religion, but rather, to avoid inhibiting it.

A strained interpretation of *Estate of Thornton v. Caldor, Inc.*[100] might support an argument that granting an exemption in the Alaska and Tennessee matters would advance the interests of religious people over those who hold no religious beliefs. In *Estate of Thornton*, the United States Supreme Court

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97. Tenn. Bd. of Professional Responsibility, Formal Op. 96-F-140, at 3 (1996) (*citing* State v. Maddux, 571 S.W.2d 819 (Tenn. 1978)). Ironically, in *Maddux* the court reversed a contempt citation where the lawyer asserted an inability to provide adequate representation due to deeply-held personal beliefs. *See* State v. Maddux, 571 S.W.2d 819 (Tenn. 1978).

98. Professor Stephen Carter has documented the trend to trivialize religious claims in his book, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVALIZE RELIGIOUS DEVOTION. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1993).

99. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 699 (1992).

100. 472 U.S. 703 (1985).

invalidated a Connecticut statute giving employees an absolute right not to work on their chosen Sabbath on the basis that the statute directly advanced religion. By benefitting only religious employees, the state imposed undue burdens on employers and non-religious employees who would have to shoulder the load arising from accommodation.[101]

Any analogy to *Estate of Thornton* is unpersuasive. Neither the Alaska statute recognizing hospitals' right not to participate in abortions, nor the Tennessee ethical consideration recognizing the professional right to decline court appointments for compelling reasons, limit the benefits of exemption to religious organizations or believers. Both are written in religiously-neutral terms and, properly applied, would make no distinction on the basis of religion. The religiously-based distinction under the Alaska statute arises from the court's decision to override the statute, at least as to non-religiously-affiliated quasi-public hospitals.[102] It would be a constitutionally troubling outcome if courts can deny application of a religiously-neutral statute to secular entities, and then use the court-created distinction to claim that the statute violates the Establishment Clause by favoring religious interests. Neither the Alaska statute nor the Tennessee ethical consideration at issue in these matters has a primary effect of advancing religion.

In contrast, it is clear that, absent the exemptions contained in the Alaska statute and the Tennessee ethical consideration, religiously-affiliated hospitals in Alaska and Catholic lawyers in Tennessee are burdened in the exercise of their religious beliefs. It is beyond dispute that religiously-affiliated hospitals may have religiously-based objections to permitting the performance of abortions in their hospitals. For example, there are four Alaskan hospitals which are members of the Catholic Hospital Association, USA.[103] The religious requirement that these hospitals adopt policies forbidding the performance of abortions can be found in an official statement of the United States National Conference of Catholic Bishops:

> Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this

101. *See id.*
102. *See Valley Hosp.*, 948 P.2d at 963.
103. The Catholic Hospital Association maintains a membership directory on the Internet. <http://www.chausa.org/FACLDIR/FACLMAP.ASP>

> context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.[104]

The Catholic Church's position as set forth in this statement builds upon two concepts developed in moral theology: material cooperation and scandal.

In Catholic moral discourse, "material cooperation" describes one form of a person's involvement with another's wrongdoing.[105] Material cooperation with sin is conduct that contributes to another's wrongdoing, but that wrongdoing is not the object of the cooperator's will. "Whatever is badly willed by the wrongdoer is at most only an accepted side effect, foreseen but not intended, of the material cooperator's act."[106] Material cooperation with wrongdoing is permissible if three conditions exist. First, the cooperator's action must be good or morally indifferent. Second, the reason for the action must be just. Finally, that reason must be proportionate to the gravity of the other's wrongdoing, and to the closeness of the assistance given that wrongdoing by the cooperator's act.[107]

The Bishops' statement "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation," forecloses any argument that it is theologically permissible for Catholic hospitals to provide abortion services, so long as these institutions do not affirmatively initiate women's use of such services. Nor does the Bishops' statement permit hospital administrators to argue, as the district court in Alaska seemingly did, that providing facilities to doctors who perform abortions is not directly participating in abortions.[108]

The second theological concept that the Bishops refer to is scandal. The duty to avoid giving scandal requires Catholics abstain from acts that

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104. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES, para. 45 (1994).

105. *See id.* *See also*, NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Ethical and Religious Directives for Catholic Health Care Services* (1994).

106. *Id.* at 873. "Cooperation is material [as opposed to formal] when it avoids participation in the evil intention of the sinner. The material cooperator does not want the sinful action to take place, and there is ambiguity about what he actually does. His assistance may in fact contribute to the sin, but it is not of its nature or in the circumstances exclusively ordained to the commission of the sin." F.E. Klueg, *Sin, Cooperation,* in 13 NEW CATHOLIC ENCYCLOPEDIA 246 (1967). *See also* Richard P. McBrien, THE HARPER COLLINS ENCYCLOPEDIA OF CATHOLICISM 366-7 (1995).

107. *See* GERMAIN GRISEZ, *Difficult Moral Questions, in* THE WAY OF THE LORD JESUS app. 2 at 876 (1997) (quoting and discussing St. Alphonsus Liquori, *Theologia moralis* (L. Gaude', ed.)).

108. *See Valley Hospital*, 948 P.2d at 966 ("The superior court noted that nothing in the permanent injunction required anyone affiliated with the hospital 'to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so.'").

encourage others to sin.[109] The Bishops write, "Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers." By this, they remind health care providers that others often look to the conduct of Catholic institutions to determine the true commitments of the Church.[110] Association with abortion providers through allowing them the use of Catholic hospital facilities can reasonably be seen as a repudiation of the Church's teaching that abortion is objectively wrong. To legally require Catholic hospitals to allow abortions to be performed on their premises is for the government to require conduct directly contrary to the teachings of the Roman Catholic Church.

Similarly, insistence by the Tennessee Board of Professional Responsibility that Catholic lawyers shirk their professional obligations when they seek to avoid appointments representing young girls seeking abortions is to burden Catholic lawyers in the exercise of their religious beliefs. Since the first century, the Roman Catholic Church has taught that procured abortion is an evil.[111] "Procured abortion is *the deliberate and direct killing, by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth.*"[112] Simply refusing to obtain or perform an abortion is not sufficient for the conscientious member of the Church. The duty to avoid evil prohibits both personal performance of evil acts and intentional cooperation with such acts.[113] Therefore the Church

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109. CATECHISM OF THE CATHOLIC CHURCH, § 2284-87.

> Scandal is an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor's tempter. He damages virtue and integrity; he may even draw his brother into spiritual death. Scandal is a grave offense if by deed or omission another is deliberately led into a grave offense.
>
> Scandal takes on a particular gravity by reason of the authority of those who cause it or the weakness of those who are scandalized . . . .

Id.

110. "Sometimes the fact that 'good' people are involved makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong. Perhaps more often the material cooperation of 'good' people leads others to cooperate formally or wrongly, even if only materially." GERMAIN GRISEZ, *Difficult Moral Questions*, *in* THE WAY OF THE LORD JESUS app. 2 at 881 (1997).

111. John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION, LEGAL AND HISTORICAL PERSPECTIVE (1970). *See also* CATECHISM OF THE CATHOLIC CHURCH, § 2271; POPE JOHN PAUL II, THE GOSPEL OF LIFE (*Evangelium Vitae*) at para. 61 (1995) ("Throughout Christianity's two thousand year history, this same doctrine has been constantly taught by the Fathers of the Church and by her Pastors and Doctors"); and Gerald Bonner, *Abortion and Early Christian Thought*, in LIFE AND LEARNING IV: PROCEEDINGS OF THE FOURTH UNIVERSITY FACULTY FOR LIFE CONFERENCE (Joseph W. Koterski, S.J. ed. 1995).

112. POPE JOHN PAUL II, THE GOSPEL OF LIFE (*Evangelium Vitae*) at para. 58 (1995) (emphasis in the original).

113. CATECHISM OF THE CATHOLIC CHURCH, § 1868, describes this prohibition:

> Sin is a personal act. Moreover, we have a responsibility for the sins committed by

teaches that a Catholic cannot "take part in a propaganda campaign in favor of such a law [legalizing procured abortions], or vote for it. Moreover, he may not collaborate in its application."[114]

Representing a girl seeking judicial authority to obtain an abortion would be collaboration in the application of the positive law permitting procured abortion. This is true, notwithstanding the legal profession's statement that a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[115] By accepting the court appointment in judicial bypass proceedings, the lawyer would be agreeing to publicly defend the act of abortion, and to make that act possible through obtaining a court order authorizing the girl to consent to the procedure. This is not permissible under Church teachings.[116]

The Board's interpretation of the Tennessee Code of Professional Responsibility makes the Catholic lawyer choose between obeying God or the state. This is forbidden by the Free Exercise Clause of the First Amendment, and inconsistent with the Tennessee Code of Professional Responsibility. The disciplinary rules do not require acceptance of court appointments. The ethical considerations urging lawyers to do so recognize the legitimacy of lawyers declining appointments where compelling reasons exist.[117] The refusal of the Board to recognize the deeply-held religious beliefs of the inquiring lawyer and accept those beliefs as a "compelling reason" to decline the appointment, unconstitutionally burdens the lawyer's ability to act in accordance with his religious beliefs.

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others when *we cooperate in them*:

—by participating directly and voluntarily in them;

—by ordering, advising, praising, or approving them;

—by not disclosing or not hindering them when we have an obligation to do so;

—by protecting evil doers.

For an extended discussion of the application of this doctrine to the practice of law, see Robert J. Muise, Note, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771 (1996); Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation With Evil*, 66 FORDHAM L. REV.1339 (1998).

114. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION para. 22 (1974). For an extended discussion of the problem of cooperation with the evil of abortion, *see* John J. Conley, S.J., *Problems of Cooperation in an Abortive Culture*, *in* LIFE AND LEARNING VI: PROCEEDINGS OF THE SIXTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 103 (Joseph W. Koterski, S.J. ed. 1997).

115. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1983).

116. *See* John J. Conley, S.J., *Problems of Cooperation in an Abortive Culture*, *in* LIFE AND LEARNING VI: PROCEEDINGS OF THE SIXTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 103 (Joseph W. Koterski, S.J. ed., 1997).

117. *See supra* notes 94-95 and accompanying text.

Exempting religiously-affiliated hospitals and religiously-motivated lawyers will not advance religion in violation of the Establishment Clause, but denying the protection of the exemptions adopted by the Alaskan Legislature and the Tennessee Bar will certainly inhibit religious practice.

VII. NO EXCESSIVE ENTANGLEMENT

The third and final prong of the *Lemon* test requires that the state action not result in excessive entanglement between church and state.[118] Disciplinary Counsel for the Tennessee Board has stated that accommodating Catholic lawyers' religious obligation to decline court appointments representing minors seeking abortions will "clearly violate" this prong, yet there is no authority for this unique application of the doctrine.[119] Cases where the courts have found excessive entanglement commonly involve either the delegation of government decisionmaking to a religious body,[120] or the need for constant interaction between church and state in order to monitor some state-funded activity administered by the church.[121] Neither of these is present in the Tennessee or Alaska matters. Excusing Catholic lawyers from serving as attorneys for girls seeking abortions is not an improper delegation of state authority, nor does it require any continuing supervision of the lawyer by the state. Recognizing the statutory right of hospitals to decline to participate in abortions is exactly that—recognition of a right. Once the judgment is made to honor the decision of the religious individual or organization, there is nothing left for the state to do.

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118. Professor Laurence Tribe identifies five Establishment Clause doctrines involving entanglement:

> Entanglement forms the basis of five first amendment doctrines: (1) In challenges to government action under the establishment clause, the action is unconstitutional if it creates excessive administrative entanglement between church and state. (2) Under the establishment clause, the action is also unconstitutional if it turns over traditionally governmental powers to religious institutions. (3) In establishment clause challenges, the challenged action is subjected to stricter scrutiny if it breeds religiously based political divisiveness. (4) In seeking a religiously based exemption from a law or regulation, a party *may* be able to prevail under the establishment clause by showing that enforcement would create excessive administrative entanglement. (5) Courts and other agencies of government may not inquire into pervasively religious issues.

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1226 (2d ed. 1998).

119. *See* Joseph, *Update on Issues*, *supra* n. 79.

120. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (holding city could not permit churches to veto issuance of liquor licenses).

121. *See* Aguilar v. Felton, 473 U.S. 402 (1985) (holding state's extensive monitoring of remedial educational programs in religiously-affiliated schools violated First Amendment).

On the other hand, refusing to recognize the lawyer's or hospital's right to decline involvement in abortion may result in substantial entanglement of church and state. This is most clearly evidenced by the unique direction given by the Tennessee Board of Professional Responsibility concerning the content of communications between client and lawyer. It would be unnecessary for the Board to address whether the lawyer might suggest alternatives to abortion or urge the young client to consult her parents, but for the decision that Catholic lawyers should not seek to decline appointments in these cases. Regardless of the lawyer's beliefs concerning the morality of abortion, a lawyer might reasonably question a young client's decision about the continuation of her pregnancy, or her decision to "go it alone" by refusing to consult her parents.[122] The Tennessee Board's claim that the duty of zealous representation may require the Catholic lawyer to remain silent about these issues is contrary to good sense, good lawyering, and good ethics. To follow such direction in any other context, would be grounds for professional discipline and claims of legal malpractice should the client suffer injuries that could have been avoided if the lawyer had expressed her concerns.[123] More relevant for purposes of Establishment Clause analysis, any attempts by the Board to enforce such silence would necessarily involve a sort of second guessing of professional judgments by Catholic lawyers on the basis that those judgments might be theologically based. This examination of a lawyer's judgment for hints of ecclesiastical influence is unnecessary, unseemly, and unconstitutional.[124]

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122. "Teenagers who do not tell their parents about their abortion have an increased incidence of emotional problems and feelings of guilt." Jo Ann Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 AM. FAM. PHYSICIAN 137 (1992). Additional sources are collected and discussed in Thomas R. Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639 (1996).

123. *See* Hotz v. Minyard, 403 S.E.2d 634 (S.C. 1991) (holding that malpractice claim could be asserted where lawyer knew client was relying upon inaccurate information and did nothing to prevent it); and Ziegelheim v. Apollo, 607 A.2d 1298, 1303 (N.J. 1992) ("[T]he lawyer is obligated to keep the client informed of the status of the matter for which the lawyer has been retained, and is required to advise the client on the various legal and strategic issues that arise"). *See also* RESTATEMENT THIRD OF LAW GOVERNING LAWYERS, § 151 cmt. h (Tentative Draft No. 8, 1995).

> A lawyer's advice to a client may properly include the lawyer's views concerning aspects of a proposed course of conduct that are not narrowly legal in nature. The lawyer's advice on significant non-legal aspects of a matter may be particularly appropriate when the client reasonably appears to be unaware of such considerations or their importance or when it should be apparent that the client expects more than narrow legal counsel. A lawyer is required to provide such assistance when necessary in the exercise of care to the extent stated in § 74.

Id.

124. The fourth type of entanglement could be called "regulatory entanglement." Its list

The Alaska Supreme Court's tentative position that religiously-affiliated hospitals must allow abortions to be performed in their facilities suggests even greater entanglement between church and state. It does not require much imagination to envision Sister Mary Margaret and Father Gonzales being carried away from the doors of the surgical suite by the local sheriff because they refuse to grant admission for the performance of an abortion.[125]

The Alaskan district court naively suggests that ordering hospitals to allow abortions to occur on their premises will not require any unwilling person to directly participate in the performance of an abortion. Depending upon the definition of "direct participation," this could be true. If direct participation is limited to only the abortionist who actually performs the procedure and the expectant mother who is his patient, there will be no unwilling participants. Yet doctors engaged in surgical procedures are rarely "one-man" shows. Nurses typically assist in any surgeries sufficiently complex to require they be performed in hospitals.[126] Post-operative monitoring and care are rarely done only by doctors. Insuring that hospitals comply with the access right created by the Alaskan court will require careful oversight of religiously-affiliated hospitals by government officials. It is unlikely that enforcement of this unique Alaskan right can result in anything but the sort of excessive entanglement of church and state that the Constitution's religion clauses were intended to prevent.[127]

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of entangling relationships is identical to the list under administrative entanglement arising in suits to strike down government benefits to religion; regulatory entanglement arises in suits to create religiously based exemptions to government burdens. Potentially, the regulatory entanglement doctrine permits religious bodies to use the Establishment Clause, like the Free Exercise Clause, as a shield from government intrusion. Although the Supreme Court has not yet based any holding on regulatory entanglement, it has implicitly recognized the doctrine. And several lower courts have carved out regulatory entanglement exemptions for religious organizations, especially in employment laws. *See* TRIBE, *supra* 118, at 1230.

125. *See* U.S. v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997) (Court declined to sentence elderly bishop to jail for silently praying rosary outside of abortion clinic in violation of Free Access to Clinics Enforcement Act).

126. In a letter dated October 20, 1990, related to the hospital's policy limited abortions, the physician-plaintiff in *Valley Hospital* complained of the lack of nursing assistance. "For the last year and one half, I have met with continual frustration in attempting to perform abortions [at Valley Hospital]. *The reason I was given was that there was no staff member willing to participate in second trimester abortions, and only one staff person willing to participate in first trimester abortions.*" Brief for Appellants at 7, Valley Hosp. Ass'n, Inc. v. MAT-SU Coalition for Choice, 948 P.2d 963 (Alaska 1997) (No. S-7417).

127. *See supra* note 82.

VIII. RECOGNIZING CONSTITUTIONAL ACCOMMODATIONS

Many laws and rules in American society contain sufficient latitude for most religious believers to conduct themselves in accordance with their consciences and their understanding of their duties to God. The university policy in *Rader* allowing students to seek exemptions from a university-housing requirement, the Alaskan statute exempting hospitals from participating in abortions, and the Tennessee ethical consideration recognizing the propriety of lawyers declining court appointments for compelling reasons are examples of this latitude. Yet university officials and members of the Alaska Supreme Court and the Tennessee Board of Professional Responsibility refused to extend the protection inherent in these systems of individualized exemptions to religious believers. The Alaskan court and the Tennessee Board declared themselves unwilling to apply these necessary exemptions because of fear that such accommodations would violate the Establishment Clause. As illustrated by the preceding analysis of these two matters, these fears are unwarranted, yet such concerns are pervasive among government officials.

Justice Scalia's continuing reliance upon the political process to provide appropriate exemptions for religious believers is only realistic if and when the Court makes clear to all government officials that accommodating religious beliefs is not only desirable and permissible in many instances, but constitutionally required on occasion. Striking down RFRA on the basis that it violates Congressional powers may have been the proper interpretation of Section 5 of the Fourteenth Amendment.[128] Permitting religiously-neutral generally applicable laws to stand absent violations of multiple constitutional rights, or refusal to extend a system of particularized exemptions, may simplify Free Exercise jurisprudence while leaving sufficient room for political, if not judicial, protection of religious beliefs. But in the absence of clear precedent authorizing, and in some cases, mandating accommodation of religious beliefs, the political negotiations concerning such accommodations will continue to be conducted in the ominous shadow of the Establishment Clause. This shadow invariably will bias government officials toward no accommodation. The Court rejected the opportunity in *Boerne* to illuminate the law of Free Exercise. It can only be hoped that it will not forego the next opportunity as well. For the present, evidence continues to mount that the new rules of political engagement over religious liberty are "heads, secularists win; tails, believers lose." And, in the end, all Americans will all be the poorer for the toss.

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128. I remain somewhat uncertain on this point, although I find persuasive the arguments made by Professor McConnell in *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).