Notre Dame Law Review

Volume 83 | Issue 2 Article 7

1-1-2008

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Recommended Citation

Nicholas J. Nelson, *A Textual Approach to Harmonizing Sherbert and Smith on Free Exercise Accommodations*, 83 Notre Dame L. Rev. 801 (2008).
Available at: http://scholarship.law.nd.edu/ndlr/vol83/iss2/7

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NOTES

A TEXTUAL APPROACH TO HARMONIZING *SHERBERT* AND *SMITH* ON FREE EXERCISE ACCOMMODATIONS

*Nicholas J. Nelson**

INTRODUCTION

The American experiment is permeated by the desire of Americans for freedom of religion. This desire is most famously enshrined in the Free Exercise Clause of the First Amendment of the Constitution, which disables Congress from enacting laws that "prohibit[ ] the free exercise" of religion.[1] But every freedom must have limits, or it will consume the very government and civilization that seek to safeguard it. Our laws vary in nature from the profound ("thou shalt not kill") to the seemingly trivial ("yield to pedestrians in crosswalk"), but in many cases, allowing people—any people—not to obey them would be catastrophic.

What, then, should be done when the commands of a citizen's religion conflict with those of the law? How are we to decide when, if ever, the Free Exercise Clause requires an exemption from such a law? In a nutshell, this is the question of religious accommodations—whether and when Americans have the right to engage in religious behavior, even if that behavior violates an otherwise applicable law. On one side of this debate is the extraordinary and essential American value of religious freedom; on the other is the manifest and urgent social need for at least some laws that everyone must obey. This Note chronicles and critiques where twentieth century free exercise jurisprudence has taken us, and offers a suggestion, rooted in the text of the First Amendment and judicial restraint, for where we should go.

* Candidate for Juris Doctor, Notre Dame Law School, 2008. My thanks to Professor Paul Horwitz, and especially to my family.

1 U.S. CONST. amend. I.

The Supreme Court began its modern free exercise jurisprudence with a test that, in theory, recognized the importance of protecting religious exercise from government interference, but in practice did little to protect free exercise and much to promote judicial meddling in religious affairs. Part I of this Note examines the compelling interest test of *Sherbert v. Verner*,[2] and explains how this test required courts to evaluate the merits of the religious practices presented to them, thus undermining the very values it sought to protect. What is needed, Part I reveals, is some proxy standard by which courts can determine when an accommodation is unworkable without directly evaluating the beliefs of the religious adherents who seek one. From the wreckage of *Sherbert*, Part I picks out three desirable features of such a test: (1) substantive protection for religious exercise, (2) clarity, and (3) limits that do not depend on judicial evaluation of the merits of religious practice.

The jurisprudential response to the problems of the *Sherbert* test was dramatic: in *Employment Division v. Smith*,[3] the Supreme Court abandoned most substantive protection for religious beliefs in favor of a nondiscrimination principle. Part II examines *Smith* and explains how it functions only slightly better than *Sherbert*, but at great cost in religious freedom and constitutional consistency. It then turns to other free exercise tests proposed in the academic literature and examines their respective strengths and shortcomings.

The accommodations dilemma, however, is much older than either *Sherbert* or *Smith*; every generation of Americans since at least the Framers has been aware of it. In fact, the text of the Constitution itself reveals a proxy test for whether an accommodation is tolerable—a test capable of synthesizing into a single jurisprudential standard both the substantive religious protection of *Sherbert* and the equally important bounds on that protection emphasized by *Smith*. Part III explains how the Constitution's requirement that Congress "make no law" prohibiting free exercise suggests an eminently workable rule for free exercise accommodations: they should be required only for religious practices that existed in this country before the making of a contrary law.

I. *SHERBERT V. VERNER*: SUBSTANCE WITHOUT LIMITS

Throughout American history, state and federal constitutions have protected freedom of religion. There are profound reasons for

2 374 U.S. 398 (1963).

3 494 U.S. 872 (1990).

this,[4] not least of which is the fact that many Americans implicitly or explicitly understand freedom of conscience as a substantive limitation on the terms of their civic responsibilities.[5] But Americans have also always been acutely aware of the chief problem presented by religious freedom: "[w]hat if, under claim of conscience, a religious adherent asserts a right to do some terrible thing?"[6] Would anyone want to

4 *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314–26 (1996) (cataloging and discussing various reasons for religious liberty).

5 *See, e.g.*, James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *in* 8 THE PAPERS OF JAMES MADISON 298, 298–99 (Robert A. Rutland et al. eds., 1973) ("[R]eligious obligations are precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour 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 Society do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. . . . [Therefore] still less can it be subject to that of the Legislative Body."); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 173 (1992) [hereinafter McConnell, *Crossroads*] (saying that religious liberty is "based on the view that the relations between God and Man are outside the authority of the state"); Stephen L. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 305 ("[I]n matters of religion no consent was given to be governed by the mechanisms of the new Constitution; in the area of religion there was no consent to majority rule."). There is hot debate over whether the "rights of conscience" defended by Madison and others include only religious beliefs, or extend also to any or all religiously motivated conduct. *See generally, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 947–48 (1992) (opposing exemptions); Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 841–46 (1998) [hereinafter McConnell, *Freedom or Protection*] (promoting exemptions); Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 64–74 (2004) (promoting); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 389–94 (1996) (noting many early expectations of exemptions, but claiming that "[t]o read the guarantee of liberty of conscience too dogmatically is to ignore the fluidity of the term in the eighteenth century"). This Note does not enter the historical debate, but instead attempts to offer textual and logical reasons why some protection of religious conduct is desirable, and what the scope of that protection should be.

6 McConnell, *Freedom or Protection*, *supra* note 5, at 824–25 (noting that this objection to religious freedom is asserted "in some form, in virtually every tract against liberty of conscience" from the founding era); *see also* Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 567 (1998) ("Lurking beneath the surface of many appellate opinions is the fear that a well-defined free exercise right, recognized by the courts as applicable by individuals against the gov-

live in a society where the state refused to protect even its citizens' most precious interests against invasion or destruction by religious adherents? Only slightly less seriously, would government be worthwhile if its every beneficial program was hobbled by a thousand piecemeal religious exemptions?

There is only one possible way both to address this concern and to salvage some protection for religious conduct from government regulation: find a device that can limit free exercise protection to a socially acceptable range of religious conduct, and thus permit regulation of unacceptable conduct.[7] To this end, most of the early state free exercise clauses included provisions that exempted from protection religious conduct violative of the peace and safety of the state. New York's constitution, for example, guaranteed religious freedom provided that "the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."[8] These "*contra pacem* clauses"[9] carved out a public interest—peace and safety—that the state could safeguard by regulation even of otherwise protected religious belief or conduct.[10]

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ernment, might prove to be a fatal loophole in the social contract."); Walsh, *supra* note 5, at 38 ("In a multicultural society, unregulated free exercise threatens anarchy.").

7 *See* Pepper, *supra* note 5, at 332 ("Absolute freedom cannot be tolerated, even in the name of religion, even if the text of the free exercise clause has no qualifiers, and even if consent to be governed has not been given.").

8 N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2623, 2636–37 (Francis Newton Thorpe ed., 1909) (hereinafter FEDERAL AND STATE CONSTITUTIONS). New Hampshire conditioned its grant of freedom to worship on worshippers' not disturbing the public peace or the worship of others. N.H. CONST. of 1784, art. V, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS 2453, 2454. Georgia left an exception for anything "repugnant to the peace and safety of the State." GA. CONST. of 1777, art. LVI, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 777, 784. Interestingly, the twentieth century International Covenant on Civil and Political Rights took a similar approach. International Covenant on Civil and Political Rights, Art. 18(3), *opened for signature* Mar. 23, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171, 178 ("Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.").

9 *See* Hamburger, *supra* note 5, at 918.

10 *See* McConnell, *Freedom or Protection*, *supra* note 5, at 831 ("[T]he American constitutional framers had solved the institutional problem that prevented Locke from providing effectual protection for free exercise. Each such provision affirms the rights of conscience or free exercise of religion subject to the fundamental peacekeeping functions of the state. . . . [T]hey entrust the boundary-keeping func-

One might have expected, then, that when the Framers of the Bill of Rights set out to protect religious freedom from the newly created federal government, they would have included a similar limit on the substance of the free exercise right they were creating. But no such provision is apparent in the First Amendment to the Federal Constitution, which states flatly that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[11] Given the necessity of some limiting principle if religious accommodations are to be required, two possible conclusions follow from this omission: either some other mechanism must bound the set of protected religious conduct, or else the First Amendment does not require any accommodations for religion from incidental regulatory burdens at all. In the twentieth century the Supreme Court tried both of these options successively. This Part deals with the first.

A. *"Compelling State Interest"*

At least from the time it incorporated free exercise into Fourteenth Amendment due process in 1940, the Court considered religious conduct to be entitled to some protection from government regulation, while recognizing that this freedom could not be absolute.[12] But for many years it was largely content to chart the bounda-

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tion to an institution of government other than the legislature."). Professor Hamburger argues that a violation of any law the legislature chose to make would have been understood by the framers of these documents as a violation of the public peace and safety, so that no religious exemptions would ever be required. Hamburger, *supra* note 5, at 918 ("[E]ighteenth-century lawyers made clear that 'every breach of law is against the peace . . . .'") (quoting The Queen v. Lane, (1704) 6 Mod. 128, 128, 87 Eng. Rep. 884, 885 (Q.B.)). But he also recognizes that the founding generation assumed there would be some substantive limit on the legislature's power to make laws regulating religion. *Id.* at 938–39. Under his approach, these limits on the sphere of civil authority, rather than the *contra pacem* clauses themselves, would operate to forbid regulation of at least some religious matters and permit regulations in furtherance of some limited set of government interests.

11 U.S. CONST. amend. I. In fact, Professor Pepper points out that the Constitution's relatively unrestricted protection of free exercise "is clear within the text of the first amendment itself. Assembly for redress of grievances . . . is only protected if it is 'peaceable.' No similar limit is placed upon exercise of religion." Pepper, *supra* note 5, at 300. *But see* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455–66 (1990) (suggesting that the federal Free Exercise Clause should be understood as importing the *contra pacem* limitations of similar provisions in state constitutions).

12 *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (["Free exercise] embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.")

ries of free exercise on a case-by-case basis, without articulating any generalized rule for determining when religious conduct is protected.[13] The Court finally attempted to articulate such a rule in *Sherbert v. Verner*, when it declared that government could burden religious practice only in furtherance of a "'compelling state interest'"[14]—the same standard already required for infringement upon other activities protected by the First Amendment.[15] Functionally, the *Sherbert* rule was very similar to the ancient *contra pacem* clauses—it attempted to reserve a zone of essential government authority that cannot be overridden by a guarantee of religious freedom.[16]

What precisely qualifies as a "compelling state interest," however, was and is notoriously unclear, especially because the standard appears lower in free exercise cases than in other constitutional contexts. This was demonstrated in *Sherbert*, where the plaintiff was a Seventh-Day Adventist whose religious principles forbade Saturday

13 *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (approving, in dicta and without elaboration, state regulation of religious practices "in violation of important social duties or subversive of good order"); Jones v. Opelika, 316 U.S. 584, 593–94 (1942) (declaring that "the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows" but making no effort to explain in more detail when and how such conduct could or could not be regulated), *vacated per curiam*, 319 U.S. 103 (1943); *Cantwell*, 310 U.S. at 303–04 (reiterating belief/conduct dichotomy).

14 Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

15 *Button*, 371 U.S. at 438–39.

16 *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1117 (1990) [hereinafter McConnell, *Revisionism*] (characterizing *contra pacem* clauses as "an early equivalent of the 'compelling interest' test"); McConnell, *Freedom or Protection*, *supra* note 5, at 832 ("Translated into modern constitutional doctrine, this history [of *contra pacem* clauses and the like] supports the view that impositions on religious conscience may be enforced only if they serve the fundamental interests of the state."); *see also* Allan Ides, *The Text of the Free Exercise Clause as a Measure of* Employment Division v. Smith *and the Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 148 (1994) (suggesting that "the word free does not connote absolute license, but implicitly includes the basic standards of a civil society such as public safety and health, in other words . . . free exercise of religion means freedom of religion within the standards of a civil society" and that "[o]ne can readily see how the compelling state interest test could be used as a measure of those standards"). But perhaps the "*contra pacem*" moniker is inapt in the federal context. The First Amendment was and is, of course, applicable to the federal government, and the phrase "*contra pacem*" seems focused on permitting police-power regulations of the sort that Congress was never meant to enact. *See* United States v. Morrison, 529 U.S. 598, 618–19 (2000) (quoting United States v. Lopez, 514 U.S. 549, 566, 596–97 & n.6 (1995) (Thomas, J., concurring)). In many respects, however, "compelling state interest" appears to be a more federalism-friendly way of saying the same thing.

work.[17] The issue was whether she could receive unemployment benefits after turning down an offered job that would have required her to work Saturdays, in the face of a statute denying benefits to anyone who rejected suitable work.[18] The Court held that there was no compelling state interest in denying benefits to Sherbert, but did so without providing a clear framework from which the outcome of other free exercise cases could be determined.[19]

Nor was a discernible pattern quick to emerge in subsequent free exercise cases. In the years following *Sherbert*, the Court held that various governments had no compelling interest in requiring Amish parents to send their fifteen- and sixteen-year-old children to school,[20] denying unemployment benefits to employees who refused on religious grounds to work in munitions factories,[21] or preventing the sacramental use of a hallucinogenic tea by members of a small South American religion.[22] In contrast, the Court found that the federal government *was* permitted to collect Social Security taxes from employers over their religious objections[23] and to deny tax-exempt status to charities that practiced racial discrimination for religious reasons.[24]

B. *Difficulties with Sherbert*

The *Sherbert* test suffered from several infirmities. Many commentators have noted that its version of the compelling interest test was a very weak one[25]—probably because anything more would have

17 *Sherbert*, 374 U.S. at 399–400.

18 *Id.* at 400–01.

19 *Id.* at 407–09; *see also* Frazee v. Ill. Dep't. of Employment Sec., 489 U.S. 829 (1989) (dealing with an attempt by Illinois to deny unemployment benefits to a Sunday Sabbatarian on the same basis); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 142–46 (1987) (concerning a Florida Saturday Sabbatarian).

20 *See* Wisconsin v. Yoder, 406 U.S. 205, 221–29 (1972).

21 *See* Thomas v. Review Bd., 450 U.S. 707, 718–19 (1981).

22 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 438–39 (2006) (applying the statutory compelling interest standard of the Religious Freedom Restoration Act of 1993).

23 *See* United States v. Lee, 455 U.S. 252, 260–61 (1982).

24 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983).

25 Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 579 (2003) ("[T]he Supreme Court had settled on applying a watered-down version of strict scrutiny in the area of free exercise."); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (characterizing *Sherbert* scrutiny as "strict in theory, but ever-so-gentle in fact"); McConnell, *Crossroads*, *supra* note 5, at 128 ("The doctrine was supportive, but its enforcement was half-hearted or worse."); Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise*

required accommodations for so large a range of religious conduct as to debilitate many aspects of government.[26] Others have observed that, apparently in response to this concern, the Court significantly relaxed the compelling interest test, with the result that whether a religious accommodation was required in a given case was largely a matter of unfettered judicial discretion.[27] But the result of *this*—and perhaps the chief evil of the *Sherbert* test—has gone largely unnoted: by requiring courts to pass on whether religious practices brought before them were consistent with the state's interests, it invited government scrutiny of the merits of religious claims and thus undercut its own, and the First Amendment's, purpose.

1. "Compelling State Interest" or "Extremely Harmful Religion"?

Various commentators and judges have tried to formulate a succinct statement of the values behind the Religion Clauses. These proffered values include ensuring the separation of church and state,

Clause, 27 WM. & MARY L. REV. 985, 994 (1985) ("If one looks to the Court's results rather than to its rhetoric . . . one sees that the actual scrutiny is often far from strict."); Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Use After* Boerne, 68 GEO. WASH. L. REV. 861, 867 (2000) ("The test is therefore rarely applied with vigor, frequently resulting in the least searching constitutional review possible."); Walsh, *supra* note 5, at 56 ("[T]he 1960s *Sherbert* test languished through three decades of increasingly reluctant enforcement that ultimately degenerated into pure lip service in federal courts.").

26 *See* Employment Div. v. Smith, 494 U.S. 872, 888–89 (1990).

27 *See* Pepper, *supra* note 5, at 310 ("A balancing test is inherently imprecise and subject to manipulation and distortion depending on the levels of generality chosen to be balanced."); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1494 (1999) ("Both the strict scrutiny test's literal terms and the case law that has emerged under it in religious freedom cases are so vague that they don't meaningfully constrain a judge's range of options, leaving almost unlimited room for judges' own moral and practical judgments about the propriety of granting an exemption."). Allowing excessive judicial discretion also arguably risks inequitably inconsistent treatment of like cases, or plunging courts into a process of decisionmaking at the edge of or even beyond their institutional competence. This risk is even greater in the free exercise context, because the variety of religious activity is exponentially greater than other conduct protected by Fourteenth Amendment strict scrutiny. There are only so many ways in which one can speak, or vote, or exercise most other rights, and thus the number of circumstances in which those activities can implicate compelling government interests is at least plausibly manageable. By contrast, the bounds of religious conduct are virtually coterminous with the bounds of all possible human conduct. *See infra* notes 85–90 and accompanying text. If the judiciary was truly capable of accurately and reliably identifying the nature and strength of all the government interests implicated by every possible instance of religious conduct, one would be tempted to doubt the Framers' wisdom in entrusting policy decisions to any other branch of government.

"guarantee[ing] a pluralistic republic,"[28] protecting citizens from "coercion" in matters of religion,[29] keeping government from "prefer[ring]" any religion or nonreligion,[30] and allowing the creation of a "free market" of religious beliefs, with which the government should interfere only to protect its efficient functioning.[31] Others have concluded that there is no such set of coherent values, and that the Clause must simply be taken at face value.[32]

Regardless of which (if any) of these statements is correct, it seems impossible to ascribe any meaning at all to the First Amendment without admitting that, for whatever reason, our constitutional scheme does not consider the government an appropriate judge of the merits of religious practices or of the truth or falsity of their underlying religious beliefs. If such judgments were possible and appropriate, there would be little reason to protect the free exercise, or prohibit government establishment, of religion. Indeed, from the earliest times down to the present, the Court's major free exercise cases have consistently maintained that the Constitution entirely exempts religious belief from government interference.[33] But the compelling interest test of *Sherbert* squarely violated this principle, which lies at the very core of the constitutional clause it was intended to implement. To permit a government regulation of a religious practice under *Sherbert*, a court was required to find that the religious practice in question, if left unregulated, would imperil a compelling government interest.[34] But that is tantamount to asking the reviewing court to decide on the truth or falsity of the plaintiff's belief that her conduct is morally or spiritually correct.

"Religious" conduct is often, and perhaps almost always, conduct that a plaintiff believes is mandated by some code of law or order of existence, the importance of which transcends that of the state.[35]

28 McConnell, *Crossroads*, *supra* note 5, at 168–69.

29 Lee v. Weisman, 505 U.S. 577, 592–97 (1992).

30 Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 357 (1996).

31 Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 703–07 (1997); Laycock, *supra* note 4, at 319–20.

32 *See generally* Berg, *supra* note 31 (summarizing and rejecting this contention).

33 *E.g.*, Employment Div. v. Smith, 494 U.S. 872, 877 (1990); Sherbert v. Verner, 374 U.S. 398, 402–03 (1963); United States v. Reynolds, 98 U.S. 145, 166 (1878); *see also* sources cited *supra* notes 12–13.

34 Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

35 *Cf.* Madison, *supra* note 5, at 299 ("Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former."); McConnell,

Were this not the case—were religious duties unimportant enough to Americans that it was broadly acceptable to compromise or forego such duties in order to escape secular legal liability—religious accommodations probably would not be necessary. But if a religious-adherent plaintiff is right, and his religious duty really is mandated by a higher law or order of things, it would be exceedingly strange for the state to have any interest in attempting to force its citizens to disobey this higher law, or put themselves at odds with that higher order. Thus, it is only by implicitly judging false a plaintiff's belief that his religious conduct is supernaturally necessary that a court can find that such conduct threatens a "compelling state interest."

Indeed, at times the role of religious arbiter that *Sherbert* thrusts upon the courts is breathtakingly and troublingly clear. In *Sherbert* itself, the Court stated that "[t]his is not a case in which an employee's religious convictions serve to make him a nonproductive member of society."[36] Justice Harlan, in dissent, sounded the alarm as to the Court's inability to "make a value judgment in each case as to whether a particular individual's religious convictions prevent him from being 'productive.'"[37] He added, "I can think of no more inappropriate function for this Court to perform."[38] The reason for the impropri-

Crossroads, *supra* note 5, at 172–73 ("The essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole."). This has been recognized not just in modern America and at the Founding, but throughout human history as well. *See* THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 59 (William P. Baumgarth & Richard J. Regan trans. & eds., 1988) ("[E]very human law has just so much of the nature of law as it is derived from the law of nature. But if, in any point, it deflects from the law of nature, it is no longer a law but a perversion of law."); SOPHOCLES, ANTIGONE, *reprinted in* THE THEBAN PLAYS OF SOPHOCLES 1, 20 (David R. Slavitt trans. 2007) ("[The king's] edict was clear/ and strong, but not enough to suspend the unwritten,/ unfailing laws of the gods who live forever/ and whose rule, revealed to us so long ago,; is not for here and now but, like the gods,/ forever. How could I face them?"). Many inquiries have of course been made into what qualifies as "religion" for purposes of statutory or constitutional exemptions. See, e.g., United States v. Seeger, 380 U.S. 163, 171–85 (1965) (grappling with the meaning of a reference to "a Supreme Being" in Vietnam-era conscientious objection provisions); *see generally* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984) (proposing that courts determine whether something is religion by comparing it with paradigm instances of religious exercise or belief). This Note does not address that question. Suffice it to say that, whatever the set of religious conduct might include, a very substantial proportion of it will inevitably be motivated by the religious *belief* that such conduct is somehow required for proper living.

36 *Sherbert*, 374 U.S. at 410.

37 *Id.* at 420 n.2 (Harlan, J., dissenting).

38 *Id.* Under many of the original state constitutions and the *contra pacem* clauses, the story would have been different. Because those charters explicitly permitted the

ety, although left unspoken by Justice Harlan, is rather clear. The religious adherents to whom the Court would have denied exemptions based on their "nonproductivity" would likely have held religious beliefs embodying different standards of productiveness, or even denying that productivity is a worthy social goal. The Court's assertion of a compelling state interest to the contrary required it to judge, implicitly but unmistakably, that such religious beliefs are false.

This untenable judicial role is on even greater rhetorical display in the enthusiastic terms the Court has used to describe the religious practices at issue in cases where it has struck down laws regulating them. *Wisconsin v. Yoder*[39] is a prime example. There, in holding that Wisconsin had no compelling interest in requiring the Amish to violate their religious principles by sending their fifteen- and sixteen-year-old children to formal schools, Chief Justice Burger relied heavily on his glowing description of the Amish way of life. He characterized the compulsory education law as interfering with the Amish "devotion to a life in harmony with nature and the soil,"[40] and described the interests of the Amish—in contrast to the interests of the state—as being in "a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."[41] Because the Amish way of life raised "productive and very law-abiding members of society"[42] despite its incompatibility with the Wisconsin law, the Court reasoned, there could be no compelling reason for the state to invade it.[43]

The *Yoder* Court was even rather explicit about its function as a stamp of government approval or disapproval of specific religious beliefs. The Court directly tied its requirement of an accommodation for the Amish conduct to its unwillingness to find "that today's majority [in society] is 'right' and the Amish and others like them are

legislature to regulate to preserve the peace and safety of the state, religious objections notwithstanding, they also assigned the courts the unavoidable task of deciding which religious practices actually did threaten that peace and safety. But, as noted *supra* text accompanying note 11, the First Amendment includes no such language.

39 406 U.S. 205 (1972).

40 *Id.* at 210.

41 *Id.* at 211.

42 *Id.* at 222. This characterization is actually rather tautological, because in that very case the Amish were seeking to be excused from obeying the law. Evidently Chief Justice Burger meant that the Amish consistently obeyed all of the most important laws—but to make that assertion would of course have been to decide the key issue in the case.

43 *See id.* at 221–34.

'wrong'" about the proper way to prepare children for life.[44] The Court even hinted that it would not be so kind to religious views it found less appealing: "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life."[45] More generally, and perhaps most alarmingly, it stated that if religious conduct interfered with the "rights or interests of others" it would not be so unwilling to "condemn[ ]" it for being "different."[46]

And the Court delivered on this promise in later cases. One example is *United States v. Lee.*[47] There, the Court investigated and found wanting a different belief of the Amish: their conviction that a family should care for its own elderly, to the exclusion of participating in any communal system such as Social Security.[48] In upholding an Amish employer's obligation to pay Social Security taxes, the Court found the Social Security system to "serve[ ] the public interest" such that the government interest in funding it was "apparent."[49] While unremarkable as a statement of modern American policy, this finding was essentially a declaration of the falsity of the religious belief on which Lee's refusal of payment was founded. If proper living does indeed require nonparticipation in any social security system—as Lee's faith apparently told him—then the state could hardly have a "compelling interest" in forcing its citizens to contribute to the American system to the extent that it does. Thankfully, the *Lee* Court refrained from explicitly engaging in a detailed, *Yoder*-style examination of the Amish belief in question here—finding that the practices based on it threatened a compelling state interest would have required a much less flattering description than was given in *Yoder.* Nevertheless, as a logical matter the message was clear: the Court had rejected Lee's religious beliefs, to the extent of finding a "compelling state interest" in forcing him to act contrary to his religion.

This effect of the compelling interest test was exacerbated by the later addition of a narrow tailoring requirement. Although the early cases were not clear about how closely related to the compelling interest a law burdening a religious practice was required to be, later the Court emphasized that only the least restrictive means necessary to

44 *Id.* at 223–24.

45 *Id.* at 235.

46 *Id.* at 224.

47 455 U.S. 252 (1982).

48 *Id.* at 257.

49 *Id.* at 258.

further the interest would suffice.[50] Thus, religious exemptions were required whenever the exempted religious practices, standing alone, did endanger any compelling state interest.[51] This sounds like a lot of protection for religion, but even under this standard the Court regularly upheld government regulations that burdened religious practices.[52] Under a narrow tailoring requirement, such holdings imply even greater disapprobation of the relevant religious conduct—they require a court to find that the conduct, and its accompanying religious beliefs, are so wrongheaded that they single-handedly imperil compelling state interests.

Of course, "[a]ll free exercise claims involve government decisions that are fraught with religious significance, at least from the point of view of the religious minority."[53] The First Amendment cannot be read to prevent government from ever acting in a manner inconsistent with any of its citizens' religious beliefs; to do so would be to completely disable the government. Congress and the state legislatures will often have to implicitly reject some citizens' religious beliefs in deciding what laws to enact, so some government consideration of religious questions, and rejection of religious principles, is inevitable and must be constitutional. But there is a world of difference—both for religious minorities and the courts—between government decisions affecting free exercise *in spite of* the government's inability to pass judgment on religious beliefs, and decisions affecting free exercise *as a result of* judicial approval or disapproval of the affected prac-

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50 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 109 ("It is not the government's broad interest in enforcing a particular law that is weighed against a free exercise claim, but rather the government's narrow interest in refusing to make a free exercise exemption."). This narrow-tailoring standard was also eventually codified in the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488–89 (codified at 42 U.S.C. § 2000bb-1 (2000)), and the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 3, 114 Stat. 803, 803 (codified at 42 U.S.C. § 2000cc (2000)).

51 *E.g.*, Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 421 (2006) (rejecting as inadequate under the least-restrictive-means requirement the government's argument that "if I make an exception for you, I'll have to make one for everybody, so no exceptions"); *Yoder*, 406 U.S. at 221–27 (explaining that Wisconsin's legitimate interests in creating responsible and self-sufficient citizens, which justified its compulsory education laws, were met independently by specific practices of Old Order Amish so as to excuse them from school attendance based on their religious objections).

52 *See supra* notes 19–24 and accompanying text.

53 McConnell, *Revisionism*, *supra* note 16, at 1134.

tices and beliefs.[54] The whole point of any accommodations scheme—and thus of the Free Exercise Clause, if it requires such a scheme—is to recognize that the legislative process will often be unduly harsh to religious minorities, and to attempt to soften those effects. Making the availability of an accommodation turn on the judiciary's own thinly veiled evaluation of a religious practice risks defeating this purpose.[55]

If *Sherbert* is what the Constitution requires, then, the Free Exercise Clause has the curious effect of disabling Congress (and now the states) from regulating religious conduct only when the judicial branch approves, or does not disapprove, of the religious beliefs motivating that conduct. Despite its attempted weighting of the scales in favor of religion, the compelling interest test thus results in greater government involvement in evaluating religious beliefs than would exist if there were no constitutional protection for religious conduct at all. Under any sensible reading of the First Amendment, this cannot be the proper role of the judiciary with respect to religion.

2. Learning the Lessons of *Sherbert*

The basic problem inherent in the free exercise guarantee is easy to sum up: we want free exercise, but not too much—if any accommodations are to be required, some means of limiting the scope of the

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54 Other commentators have expressed the related, but somewhat less serious, concern that requiring courts to decide what qualifies as "religion," and whether a plaintiff sincerely holds a religious belief, might undermine the guarantee of free exercise. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 310–11 (1991); Stone, *supra* note 25, at 988. Although this danger is real, it also seems inevitable if the Religion Clauses are to be given any meaning.

55 *See* Hamburger, *supra* note 5, at 932 (noting that the Founder's desire to liberate religion from government intervention would have applied to judicial as well as legislative refusals of exemptions). Professor Marshall goes even further, arguing that *any* judicially administered system of exemptions is useless, since a government body will still be deciding which religious practices are allowed and which are not. Marshall, *supra* note 54, at 326–27 ("[T]he inviolability of religious belief . . . is not preserved by constitutional exemptions that nevertheless require claimants to vindicate their religious beliefs in court. The religious believer still submits to secular authority, and a secular authority still rules on the religious claim."). This makes sense only if one refuses to compromise on an ideal of absolute and utter religious freedom. If the goal is instead to protect religion within certain bounds—as it must be, *see supra* text accompanying notes 6–10—then the task instead becomes marking and policing those bounds in a manner that is fair to both government and religion. In that case, offering a religious claimant the chance to participate in proceedings where his claim will be decided based on religion-neutral proxy principles such as the one proposed in this Note seems an ideal solution.

requirement is absolutely necessary to avoid complete chaos.[56] *Sherbert* attempted to provide this means, but its compelling interest test was unworkable and required excessive judicial meddling in religious affairs. The lesson of *Sherbert*, then, would seem to be that if courts are to guard some sphere of religious conduct from legislative incursion, they must have a standard for doing so that (1) permits the legislature to act to prevent serious harms, by setting limits on the range of religious conduct constitutionally exempted from regulation; and (2) makes it reasonably clear on which side of the exemptions line a given religious practice will fall; but (3) does so without requiring the courts to directly decide which harms are serious enough to fall into each category.

These three criteria are intimately interconnected. A religiously diverse society simply could not survive without limits on free exercise, and so a standard that in practice does not impose any meaningful limits—either through facial overcircumscription of legislative authority or through vagueness—will have to be interpreted along pragmatic rather than doctrinal lines. But the result of such pragmatism will almost inevitably be the courts' giving free rein, explicitly or implicitly, to their own notions of right conduct and proper religious belief.[57] This was the result of the *Sherbert* standard, and must be avoided by any proposed replacement. The next Part evaluates various alternatives to *Sherbert* in light of these three criteria.

II. ALTERNATIVE FREE EXERCISE STANDARDS IN LIGHT OF THE LESSONS OF *SHERBERT*

One of the main lessons of *Sherbert* is that, although bounds on the range of conduct protected by the Free Exercise Clause are absolutely essential, it would be inconsistent with the most basic First Amendment values to permit courts to set those bounds based on their own opinions of which religious practices really are dangerous. This necessitates a search for some kind of alternative benchmark that is both appropriate for judicial determination and a suitable proxy for whether a religious belief threatens core elements of our society. In *Employment Division v. Smith* the Supreme Court adopted a nondiscrimination principle, permitting legislatures to regulate or prohibit

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56 *See supra* notes 6–10 and accompanying text.

57 *See* Goldman v. Weinberger, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring) (noting that, under a flexible free exercise accommodations standard, "inevitably the decisionmaker's evaluation of the character and the sincerity of the requestor's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision").

religious conduct so long as they impose identical burdens on all non-religious conduct of the same type. This sets up the absence of secular exceptions to a law as a potential proxy for whether religious exemptions would be intolerably dangerous. This Part explains why this *Smith* proxy is either unhelpful, forcing courts to return to a *Sherbert*-type inquiry into the merits of a religious practice, or else excessively harsh.

The academic literature has articulated many alternative proxy standards. Although some would be significant improvements over either *Sherbert* or *Smith,* each also presents its own problems. Many share *Smith*'s flaw of vagueness, or are so generous as to require an exemption in almost every case—both of which lead by necessity to judicial evaluation of the religious claims, and the availability of exemptions turning on a court's assessment of the "harmfulness" of the practice at issue. All are in considerable tension with the text of the First Amendment.

A. Employment Division v. Smith

1. Nondiscrimination as a Proxy for Free Exercise Boundaries

Pride of place must of course go to the alternative free exercise standard actually adopted by the Supreme Court. In *Smith,* the Court finally abandoned the *Sherbert* compelling interest test as the default rule governing religious accommodations. In its place the Court articulated a new boundary for the set of constitutionally protected religious conduct: such conduct, it said, may be regulated by "neutral, generally applicable law[s],"[58] but not by ones that discriminated against religion.[59] In other words, the First Amendment's command that "Congress shall make no law . . . prohibiting the free exercise" of religion[60] means simply that Congress may not prohibit "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[61] The Court gave bans on the casting of religious statues or on bowing down to a

58 Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

59 *See* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement,* 3 U. PA. J. CONST. L. 850, 880 (2001) ("*Smith* and *Lukumi* have transformed the Free Exercise Clause from a liberty rule, under which religiously motivated conduct was protected—at least in theory—against any substantial governmental burden, to an equality rule, under which religious practice is entitled to a kind of most-favored-nation status.").

60 U.S. CONST. amend. I.

61 *Smith,* 494 U.S. at 877–78.

golden calf as examples of legislation prohibited under its new approach.[62]

By its terms, *Smith* exempted from the *Sherbert* test only laws of general applicability that were neutral with respect to religion.[63] It further hinted that a law could fail to meet this criteria even without singling out religion in so many words—giving as noted the example of a prohibition on "bowing down before a golden calf,"[64] which, although it is widely recognized as religious conduct, could surely also be done in a nonreligious fashion. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[65] the Court confirmed this, unanimously striking down a city ordinance banning "animal sacrifice" as impermissibly targeting a Santería church that was about to be established in Hialeah.[66] Although it found the ordinance facially neutral, declining to hold that its outlawing of "sacrifices" was per se discrimination against religion,[67] the Court nonetheless found that it impermissibly targeted religious practice because, through an exhaustive set of exceptions, the ordinance operated to prohibit only religious conduct.[68] Further, the Court found that these exceptions were so comprehensive as to make the law grossly unsuited to achieving the government's legitimate interests in safeguarding the public health and preventing cruelty to animals, thus rendering it not of "general applicability."[69]

Since *Lukumi*, the Courts of Appeals have disagreed on how aggressively to apply *Smith*'s neutrality and general applicability requirements. The Third Circuit, for example, has interpreted the requirements expansively, requiring a religious exemption from a police department's no-beards policy when exceptions were also made

62 *Id.*

63 *Id.* at 881. *Smith* also permitted strict scrutiny for "hybrid rights" claims, where a plaintiff alleged that a government action interfered with some other constitutional right as well as free exercise. *Id.* at 857. But besides having rather suspect theoretical foundations, *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566–67 (1993) (Souter, J., concurring), this "hybrid rights" theory has proven to be of limited vitality. *See* Aden & Strang, *supra* note 25, at 575 ("[H]ybrid rights claims have overwhelmingly failed to succeed.").

64 *Smith*, 494 U.S. at 877–78.

65 508 U.S. 520.

66 *Id.* at 547.

67 *Id.* at 534 ("The ordinances . . . define 'sacrifice' in secular terms."); *see infra* note 78.

68 *See Lukumi*, 508 U.S. at 535–38.

69 *See id.* at 543–46.

for health reasons[70] and prohibiting the selective enforcement of a post-no-bills ordinance against Orthodox Jewish religious materials.[71] The Tenth Circuit, on the other hand, has held that a school district's creation of exemptions for fifth-year seniors and special education students from its prohibition of part-time school attendance did not require an additional exemption for students at religious home schools.[72]

Smith's proxy for whether religious conduct is so intolerable as to require regulation, then, is whether Congress has seen fit to impose a blanket prohibition on all secular instances of similar conduct. If so, *Smith* would not require a religious exemption either. This addresses two of the three necessary features of a free exercise test identified above: *Smith* includes a proxy tool for preserving essential legislative authority, but at the same time does not facially require judicial evaluation of religious conduct. The question, then, becomes whether its nondiscrimination proxy is clear enough to be administered without bringing an assessment of the dangerousness of a religious practice in through the back door.

Unfortunately, the subsequent Court of Appeals cases illustrate that *Smith*'s antidiscrimination principle is so vague that it serves only very poorly as a proxy for a law's true importance. Almost every law, no matter how essential, includes some limitations or exceptions, and *Smith* and its progeny include precious little guidance for determining the nature or number of exceptions necessary to require a religious exemption. As a result, a plausible case could be made that any given law requires such an exemption,[73] and if one is not to be granted in every case then the courts will be required to make ad hoc judgments about when exemptions would be truly intolerable. By forcing courts

70 *See* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366–67 (3d Cir. 1999).

71 *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167–68 (3d Cir. 2002).

72 Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 701 (10th Cir. 1998). *But see* Rader v. Johnston, 924 F. Supp. 1540, 1558 (D. Neb. 1996) (holding that exemptions for nontraditional university students and students living with their parents rendered a freshman on-campus residency requirement not generally applicable, thus requiring an exemption for a student who wished to live in religious community).

73 *See* Duncan, *supra* note 59, at 859 ("There is an infinity of hard cases that lies between an 'across-the-board criminal prohibition' and a law that 'specifically directs' a restriction only at religiously motivated behavior." (footnotes omitted)); Volokh, *supra* note 27, at 1541 (citing Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 873–75 (1991)).

into a modified version of the compelling interest test, however, this would reprise many of the more troubling aspects of *Sherbert.*

For instance, every state excuses homicide, or even finds it justified, under at least some circumstances.[74] Under the current test, this would seem to make murder laws not "generally applicable" with regard to religions mandating human sacrifice. Of course it could be argued that killing in self defense is simply not the same kind of conduct as killing to appease a bloodthirsty deity. But there is no principled way to make this distinction with respect to justified homicide, and yet not make it with respect to growing a beard for health as opposed to religious reasons,[75] or virtually any other minor secular exception that might prove necessary.[76] Under *Smith,* the constitutional objection to both murder laws and the no-beards policy, if both were enacted with secular but no religious exemptions, would be that creating exemptions only for conduct motivated by nonreligious reasons inherently discriminates against religion. Obviously the most powerful way to distinguish beards from murders in this context is that the latter are simply much more dangerous to society. But this is nothing more than a return to the *Sherbert* compelling interest test, whereby courts refuse to grant constitutional protection to religious conduct motivated by beliefs which they find to be seriously deficient.

2. Limits Without Substance: Pros and Cons of a Stricter Reading of *Smith*

If *Smith*'s broad nondiscrimination rule is to remain the law, then, the only alternatives for interpreting the Free Exercise Clause

74 *E.g.*, CAL. PENAL CODE § 197 (West 2006) (excusing many homicides committed in the heat of passion or on sudden provocation or combat, and justifying those committed while resisting a felony or "great bodily harm" to oneself or another, in attempting to make a lawful arrest, or in lawfully attempting to suppress a riot or keep the peace).

75 *Cf. Fraternal Order of Police,* 170 F.3d at 365–66 (holding that the availability of medical exemptions from a police department's no-beards policy required religious exemptions to be made as well).

76 Professor Duncan suggests that whether a law "really" discriminates against religion could turn on whether any nonreligious exemptions that are made impair the law's purpose. Duncan, *supra* note 59, at 872–80. Under his test religious exemptions would have to be made to the no-beards policy, because medical exemptions frustrate the law's purpose (ensuring a uniform police force) in just the same way as religious exemptions would. *Id.* at 872–74. But there is no clear line between this argument and the conclusion that killings "in the heat of passion" frustrate the law's purpose of avoiding homicide just as much as does human sacrifice.

are to require religious exemptions in virtually every case,[77] which would fail to address the very concerns underlying *Smith*, or to grant them only very rarely, by drastically narrowing *Smith*'s neutrality and general applicability requirements. But if granting exemptions in almost every case would be catastrophic, is there any reason not to take the latter approach and restrict the availability of accommodations to cases where a legislature has clearly—either facially or by absolutely unmistakable implication—singled out religion for unfavorable treatment?[78] If its requirements of neutrality and general applicability were to be read strictly in this way, the *Smith* approach would gain the clarity that any free exercise test so badly needs. As a textual matter, this would also be an improvement over *Sherbert*'s interpolation of the compelling interest test: as the *Smith* Court noted, nothing in the language of the First Amendment itself prevents interpreting its ban on laws "prohibiting" free exercise to extend only to laws that purport to do so more or less directly,[79] rather than laws that incidentally have that effect.[80]

But these advantages would come at a high cost: such a strict reading would mean that the proxy for whether a law is so essential as to admit of no religious accommodations is whether it manages not to explicitly single out any religious practices for unfavorable treatment. This is far too harsh toward religion. It would permit the state to regulate or altogether ban any religious practice whatsoever, so long as it is willing to impose an identical burden on some nonreligious behavior of the same type.[81] Thus, although under a strict reading of *Smith* the Free Exercise Clause would mean that the state could not ban

77 *See* Epps, *supra* note 6, at 597 (arguing that *Lukumi* "makes clear that a truly 'neutral, generally applicable law' will be quite rare," and that anti-polygamy and Sunday closing laws would not qualify).

78 The Court could easily have done just that in *Lukumi*, by holding Hialeah's ban on any "sacrifice" during a "ritual" to be facially discriminatory. *But see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (declining to do so).

79 *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

80 *See* McConnell, *Revisionism*, *supra* note 16, at 1116 (criticizing *Smith*, but recognizing that "the text of the Free Exercise Clause alone does not absolutely foreclose its result); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997) ("[T]he Court has concluded that the Free Exercise Clause must be given a nondiscrimination interpretation because under the alternative interpretation, unelected courts would assume an unwarranted degree of discretion over a broad range of governmental decisions.").

81 *Cf.* McConnell, *Freedom or Protection*, *supra* note 5, at 820 (contrasting the strict *Smith* approach with a "'freedom-protective' interpretation [that] protects a specific freedom against unnecessary governmental interference").

"receiving Communion" or "celebrating Passover," it *could* ban possessing alcoholic beverages (or any other kind of food or drink, for that matter) without exempting such religious conduct. While the Free Exercise Clause would prohibit bans on "wearing religious headgear," it would not require that a state's ban on all head coverings in government buildings (or anywhere else, for that matter) include an exception for yarmulkes, hijabs, or turbans.[82]

No other constitutional right is treated in this way.[83] The *Smith* majority noted that generally applicable laws such as tax provisions are not typically thought to be unconstitutional simply because they happen to burden other First Amendment rights, such as speech or the press, so long as they do not directly target the exercise of those rights.[84] But the Court likely has never had to consider a law "incidentally" burdening any other constitutional right as severely as many facially neutral laws could inhibit some individuals' religious practices.[85] Unlike the freedoms of speech and the press, "[r]eligious con-

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82 *See id.* at 819 ("[N]eutral, generally applicable laws are not subject to First Amendment challenge no matter how severe an impediment they may be to the exercise of religion.").

83 Frederick Mark Gedicks has forcefully argued this point in a series of articles. *See* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 82–84 (2000); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 928 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 572–73 (1998); *see also* Tuttle, *supra* note 25, at 880–904 (exploring and applying Gedicks's ideas). Although Gedicks disavows seeking free exercise exemptions, he argues for offering religion substantive constitutional protection analogous to that given to speech and the press. To this extent, his argument can be interpreted simply as a recharacterization of what qualifies as an "exercise" of religion, or "prohibition" thereof.

84 *See Smith*, 494 U.S. at 878.

85 *See, e.g.*, Gordon, *supra* note 50, at 107–09 (listing the frightening possibilities if exemptions are not required); McConnell, *Revisionism*, *supra* note 16, at 1142–43 ("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. Or that historic preservation laws could prevent churches from making theologically significant alterations to their structures. Or that prisons will not have to serve kosher or hallel food to Jewish or Moslem prisoners. Or that Jewish high school athletes may be forbidden to wear yarmulkes and thus excluded from interscholastic sports. Or that churches with a religious objection to unrepentant homosexuality will be required to retain an openly gay individual as church organist, parochial school teacher, or even a pastor. Or that public school students will be forced to attend sex education classes contrary to their faith. Or that religious sermons on issues of political significance could lead to revocation of tax exemptions. Or that Catholic doctors in public hospitals could be fired if they refuse to perform abortions. Or that Orthodox Jews could be required to cease and desist

duct is not inherently limited to communication, nor to worship, but can extend into all facets of human life."[86] This makes it virtually impossible to engage in religious practice without also committing some act—such as kneeling, fasting, wearing certain clothes or ornaments, resting on certain days, or eating or refusing to eat certain foods—which can be described in nonreligious terms and thus under a narrow *Smith* rule would be subject to regulation.[87] The *Smith* Court pointed to taxes on newspapers as an example of a constitutionally permissible "incidental" burden on freedom of the press.[88] But a strict nondiscrimination free exercise test would permit legislatures effectively to ban entire religions, or the central elements thereof, through facially neutral laws. The more appropriate free-press analogy might be to a law banning all paper manufacturing.[89] Surely such a law would be at least suspect under the First Amendment, despite not expressly discriminating against constitutionally protected activity.

The *Smith* Court claimed that its nondiscrimination interpretation of the Free Exercise Clause avoided the "constitutional anomaly" of "a private right to ignore generally applicable laws."[90] But in its attempt to avoid this anomaly, the *Smith* Court appears to have created the potential for a different one: a constitutional "right" to the free exercise of religion that does not actually guarantee the freedom of any religious conduct from legislative incursion.

B. *Scholarly Proposals*

Sherbert and *Smith* are not the only free exercise standards that have been proposed. Many commentators have suggested other

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from sexual segregation of their places of worship." (citations omitted)). McConnell's examples only cover the effects that existing laws might have if their religious exemptions were dropped. Even more drastic restrictions could easily be imagined, and would also be possible under a strict nondiscrimination scheme.

86 Pepper, *supra* note 5, at 300.

87 The *Lukumi* Court's refusal to interpret even "sacrifice" and "ritual" to be inherently religious, *see supra* notes 67, 78 and accompanying text, would be particularly problematic here. Of course, many belief systems include some inherently religious acts of the will, such as prayer and adoration. But by their very nature these take place entirely in the spiritual, nonphysical realm, and thus are more like the religious belief that *Smith* leaves protected by the First Amendment. Of course, any overt actions that may be incidental to purely religious acts of the will are placed by *Smith* outside the protection of the Free Exercise Clause.

88 *Smith*, 494 U.S. at 878.

89 *See* McConnell, *Crossroads*, *supra* note 5, at 140 ("If the Constitution guaranteed the 'right to own cattle,' who would interpret it to allow the government to ban the ownership of all animals, so long as cattle are not 'singled out'?").

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

rubrics to determine when an accommodation is appropriate. Each sets up some alternative mechanism as a proxy for deciding which religious practices can safely be afforded constitutional accommodations. Each of these proxies, however, is either of questionable administrability or in significant tension with the text of the First Amendment. This subpart's brief consideration of several of the proposals will illustrate.

Many of the approaches that have been offered include accommodations criteria that are facially attractive, but on closer examination prove to be too vague or overgenerous to religion to be useful, and thus seem likely to be subsumed by an informal *Sherbert*-like analysis. McConnell has posited that since "governmental interests do not extend to protecting the members of the religious community from the consequences of their religious choices," an accommodation should always be required when a law has that effect upon a challenger.[91] Thus, he suggests that religious conviction should permit employees to consent to work for less than the minimum wage, or to allow the Amish to opt out of both paying into and receiving benefits from the Social Security program.[92] Garrett Epps's alternative is to require religious exemptions if the practice at issue actually furthers the "underlying goal" of the law with which it facially conflicts.[93] This leads him to claim that *Smith* was wrongly decided because the state's antipeyote laws challenged there were really about stopping drug *abuse*, not every instance of drug *use*—a goal that coincided with the beliefs of the Native American Church that were the basis for the free exercise claim.[94]

The obvious problem with these rubrics is that they would make the availability of an accommodation turn on very slippery inquiries: whether any third parties are "harmed" by a religious adherent's choices, or whether a given plaintiff's religious beliefs actually further what the court understands to be the "goal" of the conflicting legislation. By forcing courts to make discretionary decisions about which religious practices "really" harm others and which do not,[95] or

91 McConnell, *Revisionism*, *supra* note 16, at 1145.

92 *See id.* at 1145–46.

93 *See* Epps, *supra* note 6, at 565–601; *cf.* Duncan, *supra* note 59, at 868–69 (casting the *Smith* neutrality and general-applicability inquiries as tests for whether a statute includes exceptions for secular conduct that threatens its "purpose" in the same way as religious conduct for which no exception was made).

94 *See* Epps, *supra* note 6, at 582–83.

95 Marshall, *supra* note 54, at 314–15 (discussing McConnell, *Revisionism*, *supra* note 16, at 1145–46); *see also* Volokh, *supra* note 27, at 1515–21, 1548–50 (critiquing McConnell's proposal, albeit sympathetically).

whether a practice is compatible with a legislative goal, these standards would often function essentially as weaker versions of the *Sherbert* test.[96] It is difficult to believe that such adjudications would be any more intelligible or workable than the *Sherbert* line of cases interpreting what a "compelling government interest" is, or that they would not often quickly devolve into plain judicial approval or disapproval of religious beliefs and practices.

Another proposal of McConnell's is clear, but suffers from overgenerosity: he suggests that the judiciary should endeavor to protect minority religions to the same extent that the legislative process protects religious majorities.[97] Thus, when faced with a free exercise claim by a member of a minority faith, a court would ask whether the challenged law would exist (without a legislated religious exemption) if a political majority believed as the claimant did; if the answer is no, an accommodation would be required. Several commentators have given identical commonsense responses to this suggestion: since a majority would never vote to prohibit its own bona fide religious practices, this test would make free exercise exemptions virtually automatic.[98] This would give the test the virtue of clarity, but the anarchy that would ensue would be normatively intolerable—unless courts once again imported a sort of backdoor version of the compelling interest test.

Professor Pepper proposes a more promising approach, hinging on the theory that free exercise is a right held against the state as a collective, rather than against individuals.[99] Thus, he suggests that exemptions should be available only from laws aimed primarily at the

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96 This would be true with the exception that, in McConnell's test, protecting the religious adherent would no longer be a valid state interest.

97 McConnell, *Revisionism*, supra note 16, at 1148. McConnell suggests another rubric in the same article—namely, that an exemption is not necessary if it would leave the religious adherent better off, relative to others, than if the challenged law had not been passed at all, *id.* at 1146–47—but this seems to go more to the question of how much of a burden a law must impose in order to "prohibit" free exercise. That topic is beyond the scope of this Note.

98 *See* Epps, *supra* note 6, at 599 n.177; Marshall, *supra* note 54, at 316–17; Volokh, *supra* note 27, at 1542–44; *cf.* Pepper, *supra* note 5, at 313–14 (noting that even significant minorities are typically able to procure legislated exemptions from laws that otherwise would seriously hamper their religious observances). The inevitability of this outcome could perhaps be eliminated by varying the *intensity* with which the hypothetical majority is to hold the religious belief. But Professor Lupu observes that, in that case, there would be no principled way to decide *how* fervently the majority should hold the belief, and thus that any decision about whether it would offer a religious accommodation would largely be arbitrary. Lupu, *supra* note 25, at 775. This would simply be yet another route to the problems of *Sherbert.*

99 *See* Pepper, *supra* note 5, at 333–34.

general welfare, as opposed to securing the rights of individuals.[100] This would mean that religious conscientious objectors could not be drafted to serve in the military, but that no religious exemptions would be required from prohibitions of trespass or murder.[101]

In many cases this approach probably would work very well—only actions that inflicted significant harm upon identifiable individuals would be unprotected by the Free Exercise Clause. This would clearly reserve legislative power to prevent much truly intolerable behavior,[102] while permitting many religious practices the costs of which can be spread across the community as a whole.[103] Although it might be difficult to draw a nonarbitrary dividing line between individual and group harms in cases involving small harms to individuals and great harms to the public interest,[104] the stakes in drawing this line would be much lower on both sides than under other approaches—disobedience to the state's most essential laws would be well outside the First Amendment's protection, and so the inquiry could turn solely on the public or private nature of the remaining collective rights, rather than on judicial approval or disapproval of the religious practice at issue.

The problems with this approach, however, are twofold. First, it poses the risk of severely underprotecting religion, much as a strict reading of *Smith* would.[105] If courts were to decide all or most of the marginal cases against exemptions, many absolutely essential religious practices would be left subject to regulation. Most religious communities, for example, consider it essential to discriminate in hiring based on creed and other protected characteristics, and regularly do so.[106] But such decisions could easily be interpreted as directly harming those who were discriminated against. Parents also often make religiously motivated choices on behalf of their children—such as not sending them to high school, as in *Yoder*—that could be said to "harm" them. To avoid robbing the Free Exercise Clause of most of its potency, any attempt to make the availability of religious exemp-

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100 *Id.*

101 *Id.*

102 *Id.* at 333 ("Such a public/private dichotomy is important because it narrows the scope of religious freedom to a manageable size.").

103 *Id.* ("[T]hese . . . are general harms, and hence their effect on any individual is diluted.").

104 *Id.* at 334 ("This line may not be as clear and automatic as one would like, but it is an important line that can be drawn.").

105 *See supra* Part II.A.2.

106 *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987) (describing how the plaintiff in that case was fired from employment by a religious institution for failing to maintain good standing in the church).

tions turn on this distinction between public and private rights would have to include elaborations or exceptions that protected these central practices.

Second, as Pepper himself intimates,[107] this approach is difficult to square with the text of the First Amendment. Laws passed to safeguard private rights are nonetheless unquestionably made by Congress, and can burden religious exercise in just the same ways as laws vindicating a purely collective interest. Nothing in the language of the Free Exercise Clause suggests treating these two categories differently. The introduction of exceptions to address the problems of institutional and parental decisionmaking noted above would take this test even further from the words of the Constitution.

Pepper claims that this departure from text is necessary, because the plain wording of the Constitution itself would require intolerably broad religious freedom.[108] Professor Eugene Volokh makes a similar argument, asserting that the First Amendment provides no guidance for determining which harms are too serious to permit free exercise exemptions for the religious practices that cause them.[109] But instead of inventing a proxy test such as Pepper's, Volokh's response to this problem is to accept *Smith*'s narrowing of free exercise protection as the correct constitutional approach.[110] To provide extra protection for religious freedom, however, he suggests a statutory scheme whereby exemptions would turn on direct judicial evaluations of religious practices as they did under *Sherbert*, but the legislature would retain authority to override any exemptions it considered to be improvidently granted (or grant ones it thought improvidently withheld).[111]

Under this approach, the proxy test for whether a religious practice is intolerable thus would become whether (1) a court found it to be so (and the legislature did not explicitly disagree), or (2) after a judicial holding to the contrary, the legislature was willing to pass a statute specifically regulating only the religious practice.[112] This has the potential to provide a significant amount of protection for religion in practice. It is entirely plausible that, once relieved of the duty of making final constitutional determinations, courts would be willing to take a more benign view of religious practices than they did under

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107 *See* Pepper, *supra* note 5, at 332 ("Absolute freedom cannot be tolerated . . . even if the text of the free exercise clause has no qualifiers . . . .").

108 *Id.*

109 *See* Volokh, *supra* note 27, at 1554.

110 *See id.* at 1510–12.

111 *See id.* at 1503–05.

112 *Id.* at 1483.

Sherbert's compelling interest standard.[113] But as a theoretical matter, its apparent effect would be to superimpose *Smith*'s legislative supremacy[114] on *Sherbert*'s judicial evaluations of the merits of religious practices.[115] The problems with both of those approaches make combining them seem rather unappealing.

Volokh admits:

> If the process of deciding which exemptions should be granted 'd[id] not necessarily, contrary to the assertion in *Smith*, involve the exercise of policy discretion or balancing of interests,' or if it could be done in a 'more principled' way by judges than by the legislature, there might be reason to leave the test entirely in the courts' hands.[116]

McConnell, however, asserts an understanding of the Framers' conceptions of the Free Exercise Clause that would obviate these problems. He argues that the area reserved to state regulation by the early *contra pacem* clauses was actually much more clearly defined than the more recent federal compelling interest test, and invites the Court to read those boundaries into the First Amendment.[117] This suggests one possible solution to the free exercise puzzle: if in writing a constitution the people could specify in detail exactly when government may regulate religious conduct, then the judicial problem of finding a proxy test for evaluating the harmfulness of religious practices would be eliminated.[118] A court could simply check whether a given regulation was within the scope of the constitutional grant of power.

Unfortunately, McConnell's proposal itself is untenable in the face of the actual language of the First Amendment. Even if it were possible thus to spell out the range of permissible government actions with "the prolixity of a legal code,"[119] Pepper argues persuasively that the Free Exercise Clause has not done so—not even by including the kind of *contra pacem* language common in the state constitutions of

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113 *Id.* at 1489–90; *cf. supra* note 25 and accompanying text (describing the weakness of post-*Sherbert* constitutional review).

114 *See supra* Part II.

115 *See supra* Part I.

116 Volokh, supra note 27, at 1554 (citations omitted).

117 McConnell, *supra* note 11, at 1464.

118 Even under the *Sherbert* test, it would not have been impossible (and still would not be in other areas of constitutional law) for the courts to draw up a detailed, a priori catalog of what qualified as a compelling state interest and what did not. A clear provision of this sort would also eliminate the need to reconcile any workable proxy test with the constitutional text. But no such catalog has been forthcoming.

119 *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (stating that the Constitution is not so written).

the time.[120] It seems extremely doubtful that such a detailed and significant limitation on congressional power should be read into the First Amendment by implication.

Nevertheless, an alternative and precise secular criterion for what regulations of religion are allowable—and a quite effective proxy for which regulations are absolutely essential—does appear in the text of the Free Exercise Clause. The next Part will elaborate.

III. The Best of Both Worlds: A First-in-Time Test

There is a potential free exercise standard that satisfies all the criteria identified above: it preserves legislative authority to prevent truly serious harms while simultaneously maintaining a clearly delimited zone of substantive constitutional protection for religious practice, all without calling for judicial evaluation of the merits of religious conduct to determine whether it is "in" or "out." Furthermore, it is apparent on the face of the First Amendment's text. A "first-in-time" test—one that determines the validity of an incidental government regulation of a religious practice by asking whether the regulation predated the existence of the religious practice in the United States—would permit universal application of our most important laws, while still providing for religious exemptions to less essential ones, all without requiring the courts themselves to decide which religious practices threaten truly important government ends.

A. *The Standard*

The First Amendment mandates that "Congress shall make no law . . . prohibiting the free exercise" of religion[121]—that is, it protects religious freedom by imposing a limitation on the legislative power. Justice Black noted that "[t]he phrase 'Congress shall make no law' is composed of plain words, easily understood. The Framers knew this."[122] Because a guarantee that no law would ever prohibit any religious exercise would be unthinkable, one would expect that those

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120 *See* Pepper, *supra* note 5, at 301–03 ("Congress settled on the language of the [free exercise] clause when other, more restrictive models were available. During the same period it was drafting the first amendment, Congress, in the 1787 Ordinance for the Government of the Northwest Territory, provided that: 'No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.' . . . Thus, although there was explicit limiting language available, Congress consciously chose to draft the free exercise clause broadly and without limits." (citation and emphasis omitted)).

121 U.S. Const. amend. I.

122 Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 874 (1960).

"plain words" would contain some limit on when exemptions are allowed.

It is this Note's thesis that the First Amendment does contain such a limit. Specifically, it purports only to limit the kinds of laws that Congress may *make*, not the kinds of laws that may be retained on the books. This suggests that our elusive proxy limitation on free exercise rights could come from the neglected[123] word "make" in the First Amendment: specifically, that whether a law violates the Free Exercise Clause should be determined by whether it operates to prohibit free exercise *at the time it is made*. If at the time of its enactment a law incidentally burdens a then-existing religious practice, a free exercise accommodation will be required for that practice. If, on the other hand, a religious practice should develop that violates a preexisting law, no constitutional accommodation will be required, although the legislature could still enact a statutory one.

Such a rule would protect a broad range of religious conduct based on chronological priority rather than judicial or legislative judgment, while leaving religious practices that develop or are imported *after* a contrary law is passed subject to incidental regulation.[124] This would drastically limit a court's capacity to grant or deny a religious accommodation based on its own opinion of the merits of the religious practice at issue. Further, since a legislature can hardly discriminate against a religious practice that does not yet exist, a first in time rule would make it much more likely that regulations that are permitted despite their deleterious effects on religion were not enacted in response to the religious practice itself.[125] Finally, using a law's chronological priority to a religious practice as a proxy for its societal importance also seems likely to more accurately identify which laws really

123 Stephen L. Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 353 & n.195 (parsing the rest of the Free Exercise Clause word by word, but omitting without comment any discussion of the words "shall" and "make").

124 This would be true unless of course a legislative exemption is enacted.

125 *Cf.* Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (disallowing prohibitions of conduct simply because it is religious). This does not address the possibility of legislative discrimination against a religious practice extant in a foreign country but not the United States. As explained above, legislative authority to prohibit at least some of the vast range of the world's religious practices is absolutely essential. Further, lack of domestic experience with a practice should weigh against constitutionalizing any evaluation of its dangerousness. For these reasons, treatment of foreign religious practices seems best left to the political processes. At any rate, the test contemplates that laws explicitly singling out religious practices for disfavor would also be struck down as violative of free exercise, without regard to when or where the religious practice began.

are so essential as not to admit of religious exceptions. If a law truly is essential it seems very unlikely that it would not have been enacted before any contrary religious practice could spring up.[126]

Best of all, as the next subpart will show, an examination of the assumptions and purposes that must lie behind the American agreement to a right of free exercise shows that it also makes eminent sense—and that it would satisfy all the criteria for a good free exercise test gleaned from the ruins of *Sherbert.*

B. *"Not a Suicide Pact": The Historical Assumptions Behind American Free Exercise*

Smith was predicated on the belief that "[a]ny society" adopting a system of religious exemptions "would be courting anarchy."[127] But it went on to recognize that the reason modern America could not afford a *Sherbert*-style exemptions system was because " 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference.' "[128] This reinforces a commonsense proposition: since social norms tend to parallel prevailing religious norms,[129] the more homogenous a nation's religious practices are, the less concern it need have for its safety in recognizing its citizens' freedom to engage in those practices.

But the infant United States was just such a religiously homogenous culture.[130] Thus, in the founding era

> the issue of exemptions did not often arise. The American colonies were peopled almost entirely by adherents of various strains of Protestant Christianity. The Protestant moral code and mode of worship was, for the most part, harmonious with the mores of the larger society. Even denominations like the Quakers, whose theology and religious practice differed sharply from the others, entertained simi-

126 This demonstrates that the set of permissible laws under a first-in-time test would not be underinclusive—i.e., would not leave out any truly important laws. It does not address whether the set would be *over*inclusive, as it surely would, since many nonessential laws are enacted and thus can be contradicted by later-coming religious practices. On this topic, see *infra* notes 158–60 and accompanying text.

127 *Smith,* 494 U.S. at 888.

128 *Id.* (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

129 *See infra* note 158 and accompanying text.

130 These historical observations are offered simply to illustrate how, given American religious history, our Constitution can both protect some religious practice from all government intrusion and at the same time avoid "courting anarchy." They are intended not primarily as evidence of the original intent or understanding of the Free Exercise Clause (for which purpose they are in any case obviously inadequate), but instead to shed light on the dynamics that, in light of our history, logically should compose the inner workings of such a guarantee.

lar beliefs about public decorum. Moreover, the governments of that era were far less intrusive than the governments of today.[131]

As a result, the Free Exercise Clause was written against a backdrop of religious practices, none of which posed any (or much of a) threat to what its writers conceived of as the proper ends of government. In this environment it would seem natural and harmless to prohibit most government interference in religious practice.

Even so, the Free Exercise Clause of course could not have represented, and cannot now represent, an absolute right to engage in whatever religious conduct one fancies. Religious dynamism is a fact of life, especially in a country that guarantees freedom of speech and the press. If the import of the Free Exercise Clause was that the laws could be circumvented by anyone willing to concoct a contrary religious doctrine, the nation would indeed have been courting anarchy and could not have survived. And even if it had been possible to distinguish between the good faith development or importation of new religious practices and mere attempts to evade the laws, in light of our subsequent religious history it is clear that even protections limited to the former would not have been viable in the long run. Since the Constitution "is not a suicide pact,"[132] it cannot validly be interpreted to permit such a thing.[133]

These facts were not lost on the earliest citizens of the United States, who obviously did not contemplate protection for any novel religious practice that might develop in or be brought to their coun-

131 McConnell, *supra* note 11, at 1465 (citations omitted). Professor Hamburger goes so far as to suggest that the Framers might have assumed that the problem of accommodations would not come up, since the government could avoid the need for them simply by remaining in its proper sphere and permitting religions to remain in theirs. *See* Hamburger, *supra* note 5, at 939 ("The assumption that religious liberty would not, or at least should not, affect civil authority over civil matters was so widely held that a general right of religious exemption rarely became the basis for serious controversy.").

132 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

133 One way of overcoming this concern would be to interpret "religion," as used in the First Amendment, to include only belief systems that the Framers themselves would have known about and identified as religions. *See* Epps, *supra* note 6, at 570 (rejecting such an approach as overly narrow); Pepper, *supra* note 123, at 355–56, 360 (advancing the possibility of allowing free exercise only to "approved" Christian beliefs or widely acknowledged religions). The propriety of ascribing to the Framers such a cramped understanding of the meaning of the word "religion" is debatable. But, at any rate, the text of the First Amendment itself, read as a whole, makes such an interpretation absurd. If the meaning of "religion" is to be circumscribed in this fashion for free exercise purposes, it must be narrowed in the same way in interpreting the Establishment Clause—with the result that the federal government would be permitted to establish any religion *except* those that the Framers knew about!

try. As noted, nearly all the original states included in their constitutional free exercise guarantees a clause providing that conduct inimical to the public peace or safety would not be protected.[134] Given the relative uniformity and manageability of the religious practices of the time, it seems likely that these *contra pacem* clauses would have been primarily directed against religious innovations rather than the then-current conduct of American citizens. Indeed, the very earliest extant free exercise case, *People v. Philips*,[135] in creating a priest-penitent evidentiary privilege on the basis of the New York Constitution's free exercise clause, appears to have identified religious practices to be imported or invented in the future as the ones beyond the protected realm:

> If a religious sect should rise up and violate the decencies of life, by practicing their religious rites, in a state of nakedness; by following incest, and a community of wives. If the Hindoo should attempt to introduce the burning of widows on the funeral piles of their deceased husbands, or the Mahometan his plurality of wives, or the Pagan his bacchanalian orgies or human sacrifices. If a fanatical sect should spring up . . . or if any attempt should be made to establish the inquisition . . . the hand of the magistrate would be rightfully raised to chastise the guilty agents.[136]

It should be no surprise, then, that the language of the First Amendment suggests a formalization of this approach. Indeed, the earliest Supreme Court cases interpreting the Free Exercise Clause appeared to reflect this thinking, even as they adopted a contrary legal rule.

In *Reynolds v. United States*,[137] the Supreme Court upheld a federal ban on bigamy in the territories against a Mormon free exercise claim on the grounds that the Constitution protects only belief, not conduct. In so doing, it focused on the historical pedigree of the regulation:

> Polygamy has always been odious among the northern and western nations of Europe . . . . [F]rom the earliest history of England polygamy has been treated as an offence against society. . . . By the statute of [James I] the penalty was death. . . . [A]fter the convention of Virginia had recommended [a free exercise guarantee] as an

134 *See supra* notes 8–10 and accompanying text.

135 *See* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 5–115 (photo. reprint 1974) (1813) (containing the prevailing attorney's report of the case, decided by the New York Court of General Sessions on June 14, 1813 but never officially published); *see also generally* Walsh, *supra* note 5 (discussing the case).

136 Sampson, *supra* note 135, at 113–14.

137 98 U.S. 145 (1878).

> amendment to the Constitution of the United States . . . the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, 'it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth.' From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society . . . . In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.[138]

The Court again listed human sacrifice and widow burning as practices that could not possibly be protected by the Constitution.[139]

Similarly, in *Davis v. Beason*,[140] another bigamy prosecution, the Court characterized the scope of the free exercise guarantee as excluding primarily exotic religious practices unknown to American tradition, such as polygamy and human sacrifice:

> Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to [a free exercise claim]. Probably never before in the history of this country has it been seriously contended that . . . the general consent of the Christian world in modern times . . . must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.[141]

Reynolds especially is often cited as establishing the belief/conduct dichotomy, protecting the former but not the latter, at least when important government interests are threatened.[142] But focused as they are on historical regulations and sects that might "find [their] way into this country"[143] or "spring up,"[144] the rationales of these early cases also lend themselves readily to the conclusion that the Free Exercise Clause should instead be interpreted to protect religious practices that do not violate any law that preexisted them in this country.

138 *Id.* at 164–65 (citation omitted); *see also* Pepper, *supra* note 123, at 323 (suggesting that the Court looked to history to determine whether anti-polygamy laws were "within the sphere of civil regulation").

139 *Reynolds*, 98 U.S. at 166.

140 133 U.S. 333 (1890).

141 *Id.* at 343.

142 *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 879 (1990); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Braunfeld v. Brown, 366 U.S. 599, 603–04 (1961).

143 *Davis*, 133 U.S. at 343.

144 SAMPSON, *supra* note 135, at 114 (reporting the *Philips* opinion).

The proposition, then, is a simple one: surveying their society, the Framers saw no religious practices so dangerous as to require legal prohibition. If the religious practices that existed in the United States at its founding were believed to pose a real threat to the common welfare, then the very idea of a sweeping guarantee of religious freedom would likely have seemed misguided or utopian. But religious practices themselves change over time, creating the potential for dangerously antisocial customs to develop or be imported. It would be inconceivable that any constitutional guarantee of religious freedom would take the form of a blank check to such practices. Thus, the Free Exercise Clause functions both to forestall bans on many tolerable religious practices by a misguided, indifferent, or bigoted legislature, and to prevent the anarchy that would result if any and every conceivable religious practice could claim exemption from the laws. To this end, it limits government power by providing only that "Congress shall *make* no law" prohibiting religious exercise—not that laws duly enacted would *become* unconstitutional if a religious practice arose to contradict them. According to the text of the First Amendment, the proper constitutional proxy for whether a law is so essential, or a religious practice so dangerous, that no accommodation can be granted is simply whether the legislature passed the law before the contrary religious practice was engaged in on these shores. Future practices that "sprang up" in violation of existing laws would thus have no claim to accommodations.

C. *The Logic of First-in-Time*

It might be objected that a first-in-time rule would require significant judicial discretion because it would be too difficult clearly to determine when a given plaintiff's religious practice "began" for purposes of predating laws that regulate or burden it. The difficulties in deciding whether legislation or a contrary religious practice came first, however, will likely not be as great as they might seem.

1. Determining Which Came First

A plaintiff seeking a free exercise exemption under a first-in-time test would have to prove that her religious practice existed at the enactment of, and thus was "prohibited" by, the relevant law. This breaks down into three distinct but logically connected factors: First, the plaintiff must demonstrate which law initially regulated her conduct, and when it was enacted. Second, she must prove that a religious custom similar to hers was in existence in the United States on

that date. Finally, she must establish that her own religious practice is in fact "the same," for free exercise purposes, as the preexisting one.

Ordinarily, dating the relevant law would be a simple matter—the court could simply refer to the date on the statute being challenged. The logic of a first-in-time rule, however, suggests that if a law prohibited a religious exercise at the time it developed or was imported, the same legislature should later be able to adopt different provisions prohibiting that same conduct—so long as they do not significantly increase the penalty for it. In principle, this would suggest that "making" a law, for purposes of the Free Exercise Clause, refers to imposing a new standard of conduct rather than simply enacting any statute.[145] As applied to the states, this could even mean that if Congress had enacted a prohibition on a certain kind of conduct before it became religious, a state legislature would remain free to enact parallel, accommodation-free legislation, so long as the state and federal penalties were not cumulative.[146]

After the court determines the time of enactment of the earliest law posing an equal or greater penalty for the plaintiff's conduct than does the challenged legislation, the burden would be on the plaintiff to prove that a religious practice similar to her own existed in the United States as of that date. At bottom this is simply a question of historical fact, of the kind on which courts must routinely make findings based on the available evidence. Given the relative youth of the United States, it seems likely that many such disputes will be easily

145 The criminal law test for whether two standards of conduct are actually the same is well known, and might serve well in this area. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

146 Whether this would work in reverse—whether preexisting state laws would permit Congress or other states to enact ex post bans on new religious practices—is a question that, initially at least, would perhaps have to be assessed in light of the practical circumstances of each case. Although it is tempting to argue further that state legislatures should be permitted to outlaw religious practices that exist (legally) in other states but not in their own, this would entangle the proposed constitutional doctrine in the Privileges and Immunities Clause, as well as possibly equal protection and the elusive "right to travel." See Saenz v. Roe, 526 U.S. 489, 500 (1999) ("The 'right to travel' . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."). Because the text of the First Amendment gives no clear indication either way on the matter (it originally applied only to "Congress"), the convenient route is taken here.

resolved by reference to historical records or even live eyewitness testimony.[147] If the plaintiff's proffered historical religious custom actually began after the relevant law, then no accommodation would be required.

But if the plaintiff proves that a similar religious custom predated the relevant law, there remains a final question: given the fluidity of religious beliefs and customs, how could a court determine whether a current plaintiff's religious conduct is really "the same" as the preexisting one? New religious practices continuously evolve from old ones, are borrowed from other faith traditions, and are extrapolated or interpolated from existing religious doctrine. At first blush, it appears that determining whether modern and historical religious customs are really the same would necessitate a sort of spiritual exegesis that would be much more problematic than anything required by *Sherbert* or *Smith.*

This problem could be overcome, however, by the application of two simple principles: a plaintiff seeking a religious exemption must bear the burden of describing and proving the religious conduct at issue—both the historical and modern versions—(1) in purely secular terms, and (2) at the highest possible level of specificity. If on these terms the plaintiff proves that her current religious practice is identical in all relevant secular terms to the historical one, an exemption will be in order.

It might seem strange and even somewhat antireligious to require a description of a religious duty in secular terms. Much of religion, of course, defies secular description. But since a law regulating a purely spiritual religious practice would by definition require the use of expressly religious language, it would very obviously be a prohibition on the free exercise of religion. On the other hand, if a religious practice involves action in the physical world, then any law incidentally regulating such conduct will describe it in secular terms. In order to seek a religious accommodation, then, a plaintiff must at a minimum be able to assert that her religion requires (or forbids) the secularly defined conduct forbidden (or required) by the law from

147 One possible danger is that some religious plaintiffs might hold the very antiquity of their religious practices themselves as an article of faith. In such circumstances, a court's determination of when the practice began would be just as much a validation or rejection of religious belief as an approval or disapproval of the propriety of the practice itself. But this is the sort of historical fact about which judicial judgment must necessarily override private belief if the judicial power is to have any meaning at all; otherwise an individual could judicially establish any such "fact" simply by forming a religious belief in its truth.

which she seeks an exemption.[148] If religious obligations could not be described in this way, no accommodations would even be possible, regardless of which jurisprudential standard was used.[149] Of course, a plaintiff would not be limited by the language of the statute; the broader the terms in which a religious practice can be stated and proven, the more laws it will be entitled to accommodations from.

Indeed, secular descriptions are absolutely necessary in order for a court to be able to make any meaningful comparison between old and new religious practices. A first-in-time test is not, and could not be, concerned with the theology behind a particular religious practice—if it required courts to make distinctions on that basis it would be much worse than *Sherbert*. Instead, the inquiry focuses on the antiquity of a religious practice, relative to legislation regulating it, as a proxy for the tolerability of the purely secular characteristics of the conduct it requires. For this reason, so long as *any* religious adherents were engaging in a practice at the time the first law forbidding it was passed, others who engage in the same secularly defined practice (or any subset of it) may also later claim an exemption without having to prove themselves spiritually identical to the earlier practitioners in a court of law. This means that very different spiritual traditions might include common religious practices for free exercise purposes. Both Jews and Muslims, for instance, abstain from eating pork; both Jehovah's Witnesses and Quakers may refuse to serve in the armed forces. Under a first-in-time test, each of these pairs of conduct would likely be considered identical for free exercise purposes, because their secular statements are identical. But this is the appropriate and

148 Indeed, plaintiffs have been making, and courts have been using, such statements since shortly after the First Amendment was ratified. *E.g.*, State v. Willson, 13 S.C.L. (2 McCord) 393, 393 (1823) ("I will not offer to define [the plaintiff's sect's] peculiar tenets, lest by any error, I might, unintentionally, wound their feelings upon a subject so delicate. But [I take] the brief for my statement of the cause shewn; and presum[e] it to contain the reasons why the sect of christians usually called Covenanters, refuse to serve as jurors . . . ."). Similarly, the inquiry proposed here would require proof of what the religious practice actually is, but not of a plaintiff's religious reasons for engaging in it.

149 One area of difficulty here would be the duty, espoused by many religious traditions, to avoid heretical, blasphemous, or sacrilegious ideas. *Cf.* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1062 (6th Cir. 1987) (noting that the plaintiff objected on religious grounds to the school district's use of textbooks which she claimed taught evolution, secular humanism, "futuristic supernaturalism," pacifism, magic, and "false views of death," all of which contradicted her religious beliefs). While heresy or sacrilege might sometimes be worded in a purely secular form, many religions define them primarily in spiritual terms. Religious accommodation claims of this sort would require special sensitivity from courts in determining what sort of secular definition of the proscribed conduct to require of a plaintiff.

indeed the only sensible conclusion: if there is no secular distinction between two types of religious conduct, and if the courts are not to become religious tribunals, then it could hardly be that one and not the other is entitled to a free exercise exemption.[150]

Equally important is the requirement that both the historical and the current religious practice be described in the most specific terms possible. Otherwise a clever plaintiff might attempt to paper over a discrepancy between the two by stating both at a relatively high level of generality. Thus, if one religious tradition requires the use of approximately half a gram per month of an illegal drug, a plaintiff who wishes to use ten grams per month of the same drug might describe both practices simply as monthly ingestion of the drug. An accurate determination of their differences would obviously require evidence of the amounts used, the purity of the drug, whether any special circumstances or features of the two religious ceremonies make its use safer or more dangerous, and so on. Only by demanding as detailed a secular statement of the religious conduct as is possible would a court be able to assess these facts.

In most circumstances this would not require a court to make a highly inappropriate determination of what kind of conduct a plaintiff's religious principles actually require. Instead, it would simply involve findings on what conduct the plaintiff or her coreligionists had actually engaged in. But in some cases a court will be confronted with a religious adherent's application of old religious principles to new factual situations that were not foreseen by previous members of the religion. In that context, demanding a high level of detail in inquiring whether the new practice is "the same" as the old one will require a certain level of deference to the plaintiff's interpretation. Anything less would result in judicial second-guessing of whether a religious community had developed its doctrine "correctly." Nevertheless, some level of scrutiny for basic rationality would be necessary, and in fact would not be overly troubling. The court's inquiry would turn entirely on the secular descriptions of the conduct supplied and proven by the plaintiff, and would in no way represent an attempt to actually evaluate religious doctrine. If the Free Exercise Clause were to consider both a Muslim's and a Mormon's abstentions from alcohol to be the same religious practice from a secular point of view, as it would under a first-in-time test, there would be little risk of anyone

150 *See* Volokh, *supra* note 27, at 1556 ("Exemptions . . . for a particular practice should be evenhanded as to the religious groups who engage in the practice: The government ought not be able to grant a sacramental wine exemption from Prohibition to Catholics but not Jews.").

expecting it to follow the spiritual (as opposed to the secular) continuity of a developing set of religious practices, or of anyone being confused when it did not.

Having elicited a judicially manageable statement of what the plaintiff's religious practice is, and what the preexisting religious practice was, the court would be in a position to decide whether the two are in fact the same. Generally, if the two cannot be stated in virtually identical secular terms, no accommodation will be required.

2. First-in-Time in Practice: An Example

Imagine, for instance, a Saturday Sabbatarian like Adell Sherbert, who is disqualified from receiving unemployment benefits for refusing to take an available job that requires Saturday work.[151] If she were to challenge this denial under a first-in-time test, her first duty would be to formulate and prove a secularly intelligible statement of what conduct her religious principles demand. In religious terms, she is required to "rest on the Sabbath." This is of course a religious phrase, and throughout history followers of different religions have disagreed about what precisely "rest" and "the Sabbath" are. But in proposing their alternative definitions, religious adherents almost always use language intelligible to those who have nothing in common with their faith. They cast their duties not simply as "refraining from such activities as God commands at such times as He commands it," but rather as avoiding certain specified tasks on Saturday, Sunday or some other named day.[152] Thus, if faced with a demand for a free exercise accommodation based on the duty to rest on "the Sabbath," a court would not be required to decide the theological question of whether the claimant has correctly applied her purely religious principles in deciding what constitutes "rest" (and whether it has actually been commanded at all) or when (and whether) "the Sabbath" actually occurs. Instead, the plaintiff must assert and prove that the specific conduct required by her principles, defined in secular terms—in this case, not working on Saturdays—was an ongoing religious practice as of the date of the relevant law's passage. The court would then only need to make findings on that question of historical fact.

151 *See* Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

152 This fact reveals that persons claiming a duty to obey orders directly and immediately revealed to them by God would not be entitled to first-in-time free exercise exemptions for such conduct unless those "commands" took the form of secularly-intelligible imperatives that aligned with some preexisting religious tradition. But this is eminently sensible—otherwise such individuals, if incorrect about the divine nature of their revelations, would quite literally "become a law unto [themselves]." Reynolds v. United States, 98 U.S. 145, 167 (1878).

Suppose that this hypothetical plaintiff proves that her particular faith was founded in the year 2000. In 2002, well after the relevant portions of the unemployment scheme were implemented, its adherents adopted the custom of refraining from all Saturday labor. If this religious practice truly "began" for First Amendment purposes in 2002, then no accommodation would be required under a first-in-time test. But suppose further that the plaintiff claims that since American Jews had been resting on Saturdays for decades or even centuries before the statutory scheme was enacted, she is entitled to an exemption as an observant of the same religious custom. Should she prevail?

This brings us to the second requirement of the first-in-time analysis: the definition of the old and new religious customs at the greatest possible level of specificity. Even if both religious customs can be described as "resting from labor on Saturdays," the plaintiff would have to prove that these words each had a substantially identical secularly intelligible meaning in both, or that her own practice is a subset entirely included in the older one. For instance, does "rest" require complete abstinence from work, or only limiting one's hours? Is "labor" understood to mean only physical labor, or all paid work? Does it include unpaid house or yard work? Different religious adherents might even understand "Saturday" to mean different things—many Saturday Sabbatarians rest from sundown Friday to sundown Saturday, while others might observe a midnight-to-midnight rest. If in the court's judgment the plaintiff's religious practice would require a substantial amount of conduct that the historical practice did not, no accommodation would be required.

Such determinations would obviously be fact intensive. While this is admittedly the most difficult kind of question that courts would be expected to face under a first-in-time test, it is also less grandiose, and thus less problematic, than the *Sherbert* or *Smith* inquiries. This analysis would not require a court to decide whether a challenged statute was a wise or desirable one, or even whether it discriminates against religion—there are no sweeping determinations of "compelling state interests" or "general applicability" involved. Instead, at its core it would be concerned only with objective, observable conduct that could be proved through ordinary evidentiary means. Such findings are wholly within judicial competence.

3. Fairness: Would First-in-Time Unduly Favor Older Religions?

A first-in-time reading of the First Amendment obviously would favor older religious customs—not because they are older and more familiar, but because their age and familiarity permit an accurate con-

stitutional assessment of their tolerability. For the same reason, it also takes a more lenient view of newer beliefs and practices when they mimic old ones than when they strike off into new territory. This appears to contrast with the common scholarly concern that the First Amendment not be interpreted to discriminate against new, unfamiliar, or exotic religious practices. But almost every expression of this view seems to assume that there is some workable way to save truly essential government regulations from religious exemptions—and if this is the case, then novel or unusual religious practices will almost inevitably be more susceptible to regulation, because society has not had the need or opportunity to adopt its norms to their idiosyncrasies. In this context, as mentioned above,[153] a first in time rule actually offers significant protection for novel religious practices, especially against more recent regulatory requirements.

One of the strongest supporters of free exercise protection for newer religions is Garrett Epps, who notes that "[t]here is a great deal of difference between proclaiming that America is a land where all religions can flourish and simply announcing that all religions who act like the rest of us are safe in the land of religious freedom."[154] This makes sense if one actually reads the First Amendment as a proclamation that literally all religions can flourish here, regardless of what kinds of horrific practices they include. But the courts have not construed it that way, and indeed it would be disastrous to do so.[155] Surely no one would "proclaim[ ] that America is a land" where human sacrifice or ritual slavery "can flourish."[156]

Witte more moderately asserts that "[n]either the novelty nor the idiosyncrasy of a religious belief should deprive its adherent from free exercise protection."[157] Given a very narrow reading, this is true: limits on which religious practices are constitutionally protected are necessitated by the possibility of *dangerous* religious customs, not novel ones. But the fact of the matter is that, as has been observed, our

153 *See supra* notes 124–26 and accompanying text.

154 Epps, *supra* note 6, at 573 (emphasis omitted).

155 *See supra* notes 6–7 and accompanying text.

156 *See* Epps, *supra* note 6, at 573. Epps also claims that discriminating in favor of more familiar religions is irrational because the customs of nontraditional religions are often no more dangerous than more mainstream practices. *See id.* at 579–80 (comparing use of sacramental wine to smoking peyote). But it is in fact quite rational for a legislature to approach unfamiliar customs of any kind, and particularly unfamiliar religious customs, with caution. *Cf.* Volokh, *supra* note 27, at 1534 ("[H]ostility to a particular practice, which is usually justified by the belief (right or wrong) that the practice causes harm, is a presumptively proper basis for legislative action.").

157 Witte, *supra* note 5, at 415.

society's conceptions of what is intolerably harmful have grown up alongside our traditional religious beliefs.[158] As a result, our social and political understandings of what is "dangerous" are likely to disfavor novel religious practices that radically differ from traditional ones. We thus must choose between (1) a religious accommodations regime that in practice favors traditional or similarly "innocuous" religions, (2) no accommodations at all, or (3) complete chaos.

It does seem likely that a first-in-time rule would overprotect somewhat the government's need to regulate harmful activity. Many laws and regulations are nonessential or one of several roughly equivalent means to a perceived important legislative end; if a religious custom that violated one of these laws developed or was imported after the law was enacted, a first-in-time rule would leave the practice unprotected even if it was relatively harmless. But given the great danger to society involved in giving government too *little* power to regulate, this risk seems the only reasonable outcome. Further, even if a novel religious practice does not threaten an essential societal interest in an absolute sense, creating an exemption for it might unduly hobble government programs that were set up before the religious practice even existed. If the practice had existed before the program was enacted, of course, the legislature could and should have designed its scheme to take account of the religious tradition. But requiring the existing program to be discarded, or operate less effectively, because of a later-developing religious practice would risk completely hamstringing the entire legislative effort. Of course, if a novel religious practice truly poses no threat to society despite violating a preexisting law, an exemption can and should be legislated.[159] If, on the other hand, agreement cannot be reached in the legislature about the harmlessness of a religious practice that was in violation of the law from its American inception, then there seems even less justification for constitutionalizing such a judgment.

Nevertheless, a first-in-time rule would function to protect many novel religious practices—in some cases, perhaps, even better than many of the possible alternative standards. By requiring that the assessment of a custom's dangerousness be made before it becomes a religious ceremony, it would often prevent an accommodation from

158 McConnell, *Crossroads*, *supra* note 5, at 139 ("In a democracy, the laws will reflect the beliefs and preferences of the median groups."); *see also supra* note 126 and accompanying text.

159 *Cf.* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) ("It is . . . not surprising that a number of States have made an exception to their drug laws for sacramental peyote use."). Of course, sacramental peyote use likely antedated most drug laws, but the principle is the same.

being denied based solely on legislative or judicial disapproval of the novel practice. In fact, *every* novel or idiosyncratic religious practice would be protected by a first-in-time rule, unless it was already subject to legal sanction at the time it began in this country.

In this sense, a first-in-time rule would harmonize the central insights of both *Sherbert* and *Smith.* Like *Sherbert,* it would protect religious exercise from government regulation whenever it does not pose any serious danger to society. Like *Smith,* it would reserve ample authority to the legislature to respond to novel religious practices, either by regulating or by accommodating them. Best of all, it would accomplish these ends without permitting undue government evaluation of the merits of religious claims.

Conclusion

Most if not all of the attempted and proposed standards for determining when free exercise accommodations are required are seriously flawed. Meaningful limits on the zone of protected religious conduct are absolutely essential, but *Sherbert* and its progeny attempted to impose them in the wrong way: by making the free exercise inquiry turn on whether a religious claimant's conduct threatened a "compelling state interest," *Sherbert* forced courts to evaluate the correctness of the claimant's religious belief that such conduct is good. As applied in the lower courts, *Smith* fails to articulate any meaningful limits on when accommodations are required, with the result that courts will sooner or later have to clandestinely return to the compelling interest analysis or something like it in order to salvage society's most essential laws. This is precisely the sort of government meddling in religious beliefs that the spirit of the First Amendment must prevent if it is to mean anything. Alternative scholarly proposals either share this lack of meaningful limits on accommodations or else require a strained reading of the First Amendment's text.

By contrast, a first-in-time test—determining whether a law violates the Free Exercise Clause by asking whether it has the effect of burdening a religious practice in existence in the United States at the time of its passage—would have multiple benefits. It would be compatible with substantial language in some of the earliest free exercise cases, and would preserve many if not most of the outcomes of previous free exercise cases, unifying them under a common interpretive rubric. It would firmly ground free exercise jurisprudence in the text of the First Amendment. It would vindicate our commonsense intuitions about religious freedom—citizens are free to take part in the religious traditions we are all used to or ones that are similarly innocu-

ous, but cannot get a license to break the law simply by coming up with a new religion that requires it. It would create a substantive zone of religious freedom protected from government interference, while avoiding the judicial evaluations of religion required by *Sherbert*. It would place fair, administrable boundaries on that freedom, without nearly eliminating it altogether as does *Smith*. And it would preserve the legislature's ability to make findings on and pursue the public welfare, without permitting it to trample religion underfoot in the process.