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Smith in Theory and Practice

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ABSTRACT

Employment Division v. Smith *controversially held that general laws that were neutral toward religion would no longer be presumptively invalid, regardless of how much they incidentally burdened religious practices. That decision sparked a debate that continues today, twenty years later. This symposium Essay explores the argument that subsequent courts have in fact been less constrained by the principal rule of* Smith *than advocates on both sides of the controversy usually assume. Lower courts administering real world disputes often find they have all the room they need to grant relief from general laws, given exceptions written into the decision itself and other mechanisms for circumventing its main rule. While this brief piece does not attempt to prove the empirical claim that* Smith *has had a limited real-world impact, it gives reasons to think that it might be accurate. Moreover, it tests a similar argument with respect to scholarship, suggesting that even theorists who are sympathetic to* Smith *nevertheless are more willing to agree to exemptions in particular scenarios than is commonly realized, although important differences of degree and kind still separate them from opponents of the decision and from each other. The Conclusion offers one reason to celebrate this Essay's depiction of how* Smith *actually operates, assuming it is correct: Raising awareness of its flexibility in the real world could lower the stakes of the ongoing national conflict over the proper place of religion in American public life.*

* Associate Professor of Law, Brooklyn Law School. This Essay elaborates on oral comments delivered at a Symposium at Cardozo Law School marking the twentieth anniversary of *Employment Division v. Smith*. I thank Marci Hamilton for organizing a terrific conversation. For helpful comments on an earlier draft, I am grateful to Micah Schwartzman.

INTRODUCTION

Employment Division v. Smith[1] caused a kerfuffle at the time it was delivered and it remains controversial today. Many people feel that the Court undermined religious freedom when it ruled that laws that were neutral toward religion and generally applicable would no longer draw a presumption of invalidity, however much they incidentally burdened religious observance.[2] Others resolutely defend the *Smith* rule.[3] That ongoing tension makes symposia like this one interesting and important, even twenty years later.

Yet the controversy is actually more limited than many non-specialists recognize. For one thing, most observers agree that religious practitioners sometimes should be eligible for special relief from general laws. Even members of the *Smith* majority conceded that legislative and administrative accommodation would be broadly permissible. Moreover, there is a surprising degree of agreement that courts themselves should be able to administer such exemptions.[4] The most intense fight today is over the narrower matter of whether judges' decisions regarding exemptions from general laws for religious observance should have constitutional status.

I have a view on that question,[5] but my agenda here is different. I will explore two arguments in this Essay. First, when lower courts get down to the pragmatics and politics of individual cases in the real world, many judges find they have all the room they need to carve out needed exemptions for religious practitioners despite the principal rule of *Smith*—including exemptions that have constitutional status.[6] Second, and perhaps more surprising, even theorists who defend the *Smith* rule are willing to support exemptions in certain cases, despite their opposition in principle. Under the non-ideal conditions of actually-existing scenarios, in other words, both judges and scholars depart from the *Smith* neutrality rule to a greater degree than is

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1 494 U.S. 872 (1990).

2 *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

3 *See* MARCI HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

4 Eugene Volokh, for instance, supports both RFRA, a statute that requires judges to administer exemption cases, and the constitutional rule of *Smith*. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

5 Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699 (2005).

6 One expert questioned this assertion after my oral remarks at the live Symposium. I will say more about it in Part I.

commonly assumed in debates over the decision. Because a chief attraction of the *Smith* rule is precisely its law-like character—its consistency, its ability to constrain judges, and its fidelity to rule-of-law values—this observation may drain the decision of some of its appeal. On the other hand, it may also lower the stakes of debates surrounding it in a helpful way.

Of course, there are important differences of both degree and kind between theorists, even in the real world. And courts that still apply the presumption of constitutionality to laws of general applicability do so in different ways. But the divides that separate opponents and proponents of *Smith* are less yawning than many suppose, at least in operation.

Part I will show how judges, particularly those sitting on lower courts, in fact do extend relief from general laws for religious practices. Part II will then make the case that prominent academic defenders of the *Smith* neutrality approach are willing to compromise in specific situations. In the Conclusion, I suggest that paying attention to the actual adjudication of religious freedom disputes could ease the tension between traditionalists and secularists in the ongoing battle over the place of religion in American public life.

I. *SMITH* IN COURT

Several doctrines open up pathways for judges who wish to accommodate practitioners. Most obviously, the *Smith* Court itself created a few exceptions to its primary rule. Courts have been able to use these exceptions as workarounds.

For example, the Court continued to allow heightened scrutiny in hybridity cases, where a free exercise interest was joined by some other constitutional concern.[7] A presumption of unconstitutionality would attach in those situations, even if a neutral law of general applicability was at issue.[8] This new doctrine accounted for *Yoder*, where the Court ruled in favor of Amish parents who had free exercise and due process interests in preventing their children from attending school after the eighth grade, despite truancy laws.[9] In fact, some have suggested that the hybridity exception was created solely to distinguish *Yoder*, which

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[7] Emp't Div. v. Smith, 494 U.S. 872, 881-82 (1990).

[8] *Id.*

[9] The *Smith* Court put it this way:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children . . . .

Id. at 881 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

some members of the majority must have been unwilling to overrule.[10] Even if its initial purpose was limited in that way, the hybridity exception has done some additional work in lower courts.

Second, the Court said that in situations where government officials set up systems of individualized assessment, and then extended benefits or relief to nonreligious people, someone who was denied those benefits for religious conduct could win heightened scrutiny.[11] This exception, too, seemed designed to account for specific precedent that otherwise would have been in tension with *Smith* but that the Court appeared reluctant to overrule. In particular, the Court's unemployment benefits decisions had examined the decisions of state officials to deny benefits to religious actors on a case-by-case basis, and sometimes had resulted in relief for workers who were deemed to be unqualified for benefits because of their religious practices.[12]

The Court encouraged a third alternative when it hinted that the church autonomy decisions would stand.[13] Those rulings protected certain inner workings of religious institutions against government interference. Property disputes between breakaway parishes and the larger denomination were often found to be improper for court resolution, for instance.[14] The *Smith* Court cited those cases approvingly.[15] Some lower courts subsequently have held that the church autonomy cases remain good law, even where they appear to conflict with the neutrality rule of *Smith*, as I will explain more fully below.[16]

Finally, it is an implication of the general rule, although not exactly an exception, that where a court finds that government officials have acted with an object that is not neutral on the basis of religion, a presumption of unconstitutionality will continue to apply, perhaps even where the law appears on its face to be generally applicable. What the Court means by "nonneutral" or "not generally applicable" in this context is not entirely clear, but it has ruled against one municipality on this basis.[17]

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10 McConnell, *supra* note 2, at 1121-22.

11 *See Smith*, 494 U.S. at 884 ("[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

12 *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

13 *See Smith*, 494 U.S. at 887 (citing with general approval Presbyterian Church in *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969), and *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979)).

14 *See Jones*, 443 U.S. 595 (regarding property disputes).

15 *See Smith*, 494 U.S. at 887.

16 *See, e.g.*, Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303-04 (11th Cir. 2000).

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

Using these devices and others, lower courts now find they have significant flexibility to relieve religious actors from laws or policies that appear to be neutral and generally applicable. For example, one district court exempted Roman Catholic public school students who wished to wear rosaries in apparent violation of the school dress code.[18] School officials had banned necklaces, among other jewelry, in order to combat the spread of gang symbols.[19] Because the policy lacked a discriminatory purpose and applied equally to all students, it was neutral as to religion—any burden on religious students was incidental. Nevertheless, the court carved out an exception for the observant students. It used the hybridity rule, pointing to their free speech interest in wearing the beads in addition to their free exercise concern.[20]

The hybridity exception has the potential to be widely available because it is often possible to identify a sympathetic constitutional value to bolster free exercise. (This is true even though in actual practice it does not seem to have been used often.) In another case, for example, the Third Circuit found hybridity involving free exercise and freedom of association where the Salvation Army sued to obtain relief from a state boarding house regulation for one of its rehabilitation centers.[21] Once again, the law at issue was neutral as to religion and generally applicable as between religious and nonreligious groups.

Another court used the exception for systems of individualized assessments to order relief from a general law. It addressed a complaint by Muslim officers after the Newark Police Department instituted a policy banning all facial hair.[22] The officers argued that wearing beards was a religious practice protected by the Free Exercise Clause.[23] The Department responded that the policy had not been enacted with any discriminatory purpose, but only in order to promote uniformity and discipline within the Department.[24] Nevertheless, the Third Circuit ruled for the officers. It focused on the fact that the Department had granted an exception for officers who could not shave their beards for medical reasons.[25] Concluding that the government had instituted something like a system of individualized assessments, and that it had granted relief to nonreligious claimants but not religious ones, the court applied strict scrutiny and ruled for the Muslim officers.[26]

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18 *See* Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 664 (S.D. Tex. 1997).

19 *Id.*

20 *Id.* at 671.

21 Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 197, 201 (3d Cir. 1990).

22 *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.).

23 *Id.* at 361.

24 *Id.* at 366-67.

25 *Id.* at 365-67.

26 *See id.* at 365. The court hinted that the Department acted with a discriminatory motive when it "decid[ed] that secular motivations are more important than religious motivations." *Id.*

Finally, courts have continued to protect church autonomy, even where the government interference comes in the form of a general law. One component of the church autonomy doctrine is the "ministerial exception" or "ministerial exemption," which relieves religious institutions from antidiscrimination laws when they take employment actions against clergy or potential clergy. In a recent decision, for example, the Third Circuit reaffirmed the ministerial exemption and ruled against a chaplain who claimed that the university had taken employment action against her on the basis of sex or gender.[27] None of the employment discrimination laws targeted religion as such, or were applied differently to churches. So under the main *Smith* rule, an exemption from them presumptively would not have been available. Yet the Third Circuit, like every other federal appellate court to consider the question in the years since *Smith*, applied the ministerial exemption.[28]

In sum, courts in these cases have found ways to recognize strong religious freedom claims despite *Smith*. That suggests that *Smith* as a whole, considered in all of its intricacy, may not have had as profound an impact as nonspecialists often seem to suppose. Critics of the decision can take comfort in this depiction of the decision in actual operation. And fans might be troubled.

Nothing I have said proves that *Smith* has had no impact at all on results in free exercise cases. Nor does it even prove that its impact has been small.[29] Figuring out the decision's real effect on overall adjudication of free exercise cases would require an empirical study. But it is important to keep in mind that such a study would have to

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But that language is consistent with the individualized assessments pathway to heightened review that the court highlighted. In fact, heightened scrutiny is thought to be appropriate in part because of a suspicion that government officials who enjoy discretion to make case-by-case decisions and who use that discretion to rule in favor of secular actors but not religious ones may be motivated by discrimination that is difficult to detect. *See* Emp't Div. v. Smith, 494 U.S. 872, 883 (1990) (reasoning that the unemployment board in *Sherbert* discriminated purposefully when it granted individualized exemptions on secular grounds but refused to do so on religious grounds).

27 Petruska v. Gannon Univ., 462 F.3d 294, 307 (3d Cir. 2006). In an even more recent case, now on its way to the Supreme Court, the Sixth Circuit ruled that a teacher in a religious school did not qualify for the exception because she taught primarily secular subjects. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010), *cert. granted*, No. 10-553, 2011 WL 1103380 (U.S. Mar. 28, 2011).

28 *See* Michael P. Moreland, *Religious Free Exercise and Anti-Discrimination Law*, 70 ALB. L. REV. 1417, 1418-19 (2007) ("[A] number of circuits—in fact all of the circuit courts of appeal with one slight exception . . . have upheld this exception."). Moreland subsequently discusses the fact that a vacated panel opinion in *Petruska* cast some doubt on the scope of the exemption. *Id.* at 1418-20; *see also* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1974 (2007) ("Lower courts have invariably upheld the ministerial exemption . . . .").

29 In fact, it does not prove anything at all—I am adhering to the Symposium organizers' instructions to offer arguments that are punchy and provocative rather than lengthy and well-defended.

compare current free exercise outcomes to actual results in the period before 1990, not to ideal ones. And scholars already have shown that outcomes during that earlier era were, in fact, not particularly friendly to free exercise claimants, despite doctrine that was nominally advantageous.[30] I have not seen a study that compares those findings to court outcomes in the period since *Smith*, but my hunch is that its results would surprise many laypeople, if not every expert.

One interesting implication of these observations may be that the stakes of the debates concerning *Smith* should be lower than they generally are seen to be.[31] (I will draw out this implication in the Conclusion.) If people came to realize that the neutrality rule of *Smith* underdetermines outcomes to some significant degree, then conceivably the temperature of the debate could be reduced. Critics would recognize that some of what they hope to achieve is already being delivered by lower courts. And defenders would realize that *Smith*'s main rule imposes less of a rule-of-law constraint on individual judges than the text of the decision might lead a reader to believe. In other words, paying attention to *Smith* in operation might do something to calm at least one front in the so-called culture wars.[32] Judges are, in fact, driven by a range of non-doctrinal forces, including popular opinion and political dynamics. They also work to achieve justice in individual cases, and to craft rulings that will work, as a pragmatic matter. A porous decision like *Smith* allows them some room to implement these other values.

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30 *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992) (reporting on an empirical study of court outcomes in the period immediately prior to *Smith*).

> The free exercise claimant, both in the Supreme Court and the courts of appeals, rarely succeeded under the compelling interest test, despite some powerful claims. A survey of the decisions in the United States courts of appeals over the ten years preceding *Smith* reveals that, despite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test.

Id. at 1412. My argument in this short piece could fairly be characterized as nothing more than an update of Ryan's predictive claim that "[d]espite the obvious change *Smith* brought to the language of free exercise doctrine, the impact of the decision on the outcome of free exercise cases will likely be insignificant." *Id.*

31 *Cf.* Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305 (2010) (arguing that debates over constitutional interpretation have low stakes). Like Samaha, I argue that there are "low stakes, not no stakes." *Id.* at 319. Unlike him, however, I am considering a single decision, and not all of constitutional theory or adjudication.

32 *See* Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be a Greater Loss Now than it Was Then*, 32 CARDOZO L. REV. 2033 (2011).

II. *SMITH* IN SCHOLARSHIP

Some will say it is no surprise that judges are fudging the *Smith* rule—after all, they have to operate in the messy world of practical constraints, quasi-political compromises, and historical contingencies. But what about scholars? They have the conceptual freedom to construct more perfect solutions to constitutional problems. So you might expect those of them who admire *Smith* to admit fewer exceptions to its main rule than judges sometimes do. And that may, in fact, be the case. It is difficult to say with certainty; that would require systematically comparing court results with academic treatments of comparable cases. Yet here I will test the argument that even scholarship that is sympathetic to *Smith* departs from its main rule more often than many people realize, if only when it addresses actual cases in all their real-world intricacy.

One example is the equal liberty model of Eisgruber and Sager.[33] They recognize the complexity entailed in applying their approach to actual cases, and they are right to do so. Part of what makes equal liberty so compelling—it is properly regarded as one of the most persuasive accounts of religious freedom generally—is its practical wisdom, in addition to its principled vision. But there may be a tension between the second virtue and the first: Eisgruber and Sager handle actual cases in a way that sometimes may be difficult to square with their abstract theory.

Equal liberty is not identical to the primary rule of *Smith*, but it prioritizes evenhandedness over other values in a similar way. At the core of their theory is a sense that although religion deserves constitutional protection from governmental discrimination or disfavor, it does not deserve any special benefits or privileges.[34] With respect to free exercise exemptions from general laws, relief is available only in situations where religious actors have been shown special disfavor or disregard, and not where they seek liberties that secular counterparts do not enjoy.[35] If officials exempt a nonreligious practice from a general law (or if they would have done so had they considered the matter),[36]

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33 *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52-53 (2007). The following discussion draws on material in a new article, Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. (forthcoming 2011).

34 *See* EISGRUBER & SAGER, *supra* note 33.

35 *See id.* at 87-90.

36 Eisgruber and Sager are clear that a religious exemption may be available even where the government did not, in fact, treat secular or mainstream concerns more favorably, so long as it *would have* done so, under appropriate circumstances. Equal regard can have teeth "even in the absence of ready-made comparisons" using this sort of "implicit counterfactual." *Id.* at 91-92.

then their refusal to grant equivalent relief for a sacred practice can constitute a failure of equal liberty. So Eisgruber and Sager applaud the outcome in the Newark case described above, because there the court correctly found that the government impermissibly showed greater regard for medical objections to the beard policy than religious ones.[37]

Equal liberty would grant relief wherever the main *Smith* rule would, on my reading of Eisgruber and Sager. But it is somewhat more capacious, folding in the *Smith* exception for individualized assessments and perhaps even somewhat greater protection. In situations like the one in Newark, it may be difficult to prove that the government acted with the purpose or object of disfavoring religious actors, which is the main focus of the central *Smith* rule under at least the most common interpretation. It might also be a stretch to say that some of these programs count as systems of individualized assessment.[38] Nevertheless, Eisgruber and Sager would carve out exceptions from several of them. Treating religious faith less favorably than strong secular concern can communicate a lack of equal regard, even where the government has not purposefully discriminated on the basis of religion—and potentially even where it has not instituted a system of case-by-case review as such.

An interesting example comes from the facts of *Smith* itself. Recall that *Smith* involved two men who were denied unemployment benefits because they used peyote in the context of sacred practices in violation of state drug laws.[39] Again, the Court denied their claim on the ground that neutral laws of general applicability, like the drug laws, would no longer be presumptively unconstitutional.[40] Eisgruber and Sager suggest at one point that the result in *Smith* may have been wrong, since Oregon's laws regulating alcohol contained exceptions for the sacramental use of wine in several places.[41] Because the state provided no such accommodation for sacred peyote rituals, Oregon may well have violated the principle of equal regard or equal liberty.[42] In any event, my point here is that equal liberty and the *Smith* regime share a general view that free exercise principally provides a species of equality, neutrality, or evenhandedness.

Without going any further, it is already possible to see that in real cases with real facts, Eisgruber and Sager find that equal liberty gives

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37 *Id.* at 89.

38 *See* Tebbe, *supra* note 5, at 734 n.161 (questioning the *Newark* court's finding that the police department had instituted a system of individualized assessment).

39 Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

40 *See id.* at 880-82, 888.

41 EISGRUBER & SAGER, *supra* note 33, at 92.

42 *Id.* Tellingly, you could also criticize the outcome in *Smith* based on the rule of that case itself, since the plaintiffs were initially denied unemployment benefits under a scheme of case-by-case consideration. McConnell, *supra* note 2, at 1124.

them flexibility to grant religious exemptions under factual conditions that seem to warrant them. After all, it is often possible to show that a government has granted *some* roughly comparable exemption to *some* nonreligious actor. As they themselves point out, "[e]xceptions, one might say, are pretty much the rule."[43] So a motivated equal libertarian often will be able to find an existing mainline exemption—or a counterfactual exemption that officials would have granted—and then conclude that relief from a general law ought to be granted to a religious minority. Perfect equality seldom obtains, and minority sects often can be said to have been treated worse than some other group, so long as the set of comparable laws or policies is large enough. (On the other hand, exempting Native American peyote users from Oregon's unemployment laws on the ground that Christian Eucharist celebrants are relieved from many alcohol regulations arguably leaves both groups advantaged over other people—say, those who wish to use peyote out of a deeply-held belief that the experience would further their deep commitment to developing artistic insight.)

Likewise, in other areas of religious freedom law, Eisgruber and Sager are willing to extend what appears to be special relief to religious actors from general laws. Consider the ministerial exemption, which I have already described as an important facet of the broader church autonomy doctrine. Eisgruber and Sager acknowledge the commonplace intuition that congregations should enjoy significant leeway when choosing their spiritual leaders, despite unemployment discrimination laws.[44] They therefore support the ministerial exemption, even though it seems to give religious actors certain immunity from general employment laws.[45] Now, they do try to harmonize that rule with equal liberty by pointing out that secular expressive associations also enjoy some autonomy in hiring leaders—and to support this point they rely on *Dale*, where the Court ruled that the Boy Scouts could refuse to hire gay scoutmasters in the face of a local law that prohibited discrimination on the basis of sexual orientation in employment.[46] They conclude that the ministerial exemption is compatible with equal liberty because it only affords religious groups the same sort of relief that constitutional law extends to secular expressive associations.[47]

Yet there is a difficulty with this conclusion. In fact, organizations like the Boy Scouts have less autonomy than churches and

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[43] EISGRUBER & SAGER, *supra* note 33, at 97.

[44] *Id.* at 57.

[45] *Id.* at 66.

[46] *Id.* at 63, 65 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

[47] *Id.* at 66.

synagogues—in at least two ways.[48] First, their hiring decisions must bear some relationship to their message, whereas religious groups may hire and fire clergy for reasons unconnected to theology.[49] Courts' intuition here seems to be that there would be something improper about judicial interference with the relationship between clergy and congregation, putting aside any concern about the competence of judges to weigh in on questions of religious dogma. No such intuition applies to secular groups. Second, a secular interest in expressive association can be overbalanced by sufficiently weighty government objectives, whereas the ministerial exemption seems virtually absolute.[50]

Because of these differences, Eisgruber and Sager are faced with a choice: Either they can reject some aspects of the widespread support for the ministerial exemption in its current form, or they must assimilate that intuition in a way that is difficult to square with equal liberty. I believe the best reading of their book is that they choose the latter path: They incorporate the current doctrine in its entirety, concluding with reason that it reflects popular opinion and/or a fixed feature of American political traditions. But again, that choice presents a problem for equal liberty because the ministerial exemption does, in fact, accommodate religious actors in a distinct way, recognizing and protecting the relationship between clergy and congregation like no other employment arrangement. If I am right, then this is another place where even a strong equality-oriented approach allows what amount to free exercise exemptions from general laws.

This is not to say that there are no differences between scholarly sympathizers and antagonists of *Smith*, even in the real world. In fact, there are important distinctions even among supporters. For example, Marci Hamilton, another leading proponent of the principal *Smith* rule, would make fewer compromises than Eisgruber and Sager.[51] Although she too seems to acknowledge that the ministerial exemption forms an exception to her general approach, she would allow less room for it than

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[48] *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 318-19 (2d ed. 2006).

[49] Circuit courts have held that the ministerial exemption applies to employment decisions that are not required by theology or religious doctrine. *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 307 (3d Cir. 2006) ("The ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions."); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303-04 (11th Cir. 2000) ("[T]he constitutional protection of religious freedom afforded to churches in employment actions involving clergy exists even when such actions are not based on issues of church doctrine or ecclesiastical law." (characterizing the holding of Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999))).

[50] *See* MCCONNELL ET AL., *supra* note 48, at 318 (citing cases).

[51] Again, this is under my reading of Eisgruber and Sager, which might be incorrect. They in fact might have intended to take a position that is quite close to Hamilton's.

they do (under my interpretation of their work).[52] Hamilton would still allow congregations to select clergy for theological reasons, even where that would conflict with generally applicable antidiscrimination laws. But unlike virtually all of the federal circuit courts, she believes there are good reasons to stop there and refuse to immunize religious employers who claim no theological ground for the employment action at issue.[53]

So there are important distinctions among thinkers, just as there are among judges. My only point here is that when scholars get down to the details of particular scenarios or fact patterns, they are willing to compromise more often than the debate often recognizes, even when they otherwise strongly support something like the *Smith* evenhandedness approach.

CONCLUSION

One way of understanding *Smith* is as an example of value monism: The Court decided that one free exercise value, a certain type of equality or neutrality, predominated over all others and should control outcomes whenever possible.[54] Implicitly and explicitly, it devalued other principles, such as the idea that religious actors should enjoy the autonomy or liberty to observe sacred practices, free of government interference. And, in fact, the opinion has been widely understood in that way. That conception, shared by critics and defenders of the decision alike, has fueled at least some of the controversy around it.[55]

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[52] Hamilton asserts:

> Of all the arenas where religious groups are permitted to avoid the laws that apply to everyone else, the choice of clergy according to religious principles is the most appropriate. . . . But where the religious entity is not acting according to its religious beliefs, but rather contravening public policy for less admirable motives, for example, engaging in sexual harassment or creating a hostile work environment, there is strong reason to apply the law.

HAMILTON, *supra* note 3, at 199.

[53] *Id.* She also sees a trend among lower courts in that direction. *Id.* at 198. For a similar proposal, see Corbin, *supra* note 28.

[54] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) (using the term "neutrality" to describe the rule of *Smith*); *id.* at 562 (Souter, J., concurring in part and concurring in the judgment) ("Though *Smith* used the term 'neutrality' without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort.").

[55] Of course, saying that the *Smith* Court opted for value monism is distinct from saying that the Court opted for a clear rule rather than a standard or a balancing test. Multiple values could support a given rule. Quite possibly, *Smith* is better understood as a decision that promotes a clear rule than one that promotes a single value.

Yet if it is right that *Smith* looks much more complicated in practice than it does in theory, then one implication could be that many more values are driving outcomes in actual cases than participants in the current debate usually assume. Judges deciding free exercise exemption cases care not only about equality or neutrality, but also about individual freedom, church autonomy, popular opinion, practical workability, American history and traditions, and other factors. A polyvalent method of adjudication may best characterize *Smith*'s actual implementation, in other words.

People might evaluate this way of working in divergent ways. Some might embrace a world in which courts consider a range of values in exemption cases, saying that lots of considerations should matter.[56] Others might say that it would be better to prioritize a single principle—perhaps the type of evenhandedness that was seemingly prescribed in the *Smith* decision itself, or perhaps another. Still others will say that the polyvalent approach of the lower courts is not a method at all, but instead mere ad hockery or an unprincipled attempt to reach a *modus vivendi*.[57]

Without taking a position here on these larger questions, I want to point out just one benefit of the way that *Smith* has been put into operation—an upside that has been underemphasized in the conversation so far. Steven Smith argues in this symposium that Americans are bitterly divided between at least two conceptions of the proper place of religion in public life.[58] Partly, the Court's decisions concerning religious freedom have caused or deepened this division, insofar as the justices have taken sides, at least in the eyes of the public. Possibly, *Smith* represents one place where the Court exacerbated the conflict over religious freedom in the United States. And at least part of the intense and ongoing debate over that decision concerns whether evenhandedness really ought to predominate over liberty or autonomy in our understanding of free exercise. If all of that is right, then the descriptive arguments I have tested in this short piece could do something to lower the stakes of the debate and thereby to ease the conflict.

Something similar could be said about other areas of religious freedom law. Perhaps the messiness of the Court's decisions regarding

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[56] *See, e.g.*, 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 1-15 (2008); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004); Marc O. DeGirolami, Tragic Historicism: A Theory of Religious Liberty (2010) (unpublished J.S.D. dissertation, Columbia Univ. Sch. of Law) (on file with author).

[57] *Cf.* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1871 (2009).

[58] Smith, *supra* note 32. Others have made similar arguments. *See, e.g.*, NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH STATE PROBLEM AND WHAT TO DO ABOUT IT (2005).

free exercise and non-establishment—a complexity that is often acknowledged and sometimes ridiculed or criticized—is in fact something to celebrate and publicize. If more people understood and appreciated that, actually, courts applying the religion clauses take a wide range of considerations into account and issue decisions that strike compromises, rather than rigidly adhering to one principled view or another of the proper place of religion in American law and public life, then more citizens might find less to criticize in contemporary church-state arrangements. And even if courts are simply muddling through, and not engaging in thoughtful polyvalent analysis, they still may be crafting solutions that really do—or really could—satisfy a wider section of the citizenry, if only more attention were paid to the way that lower courts (and state courts) decide the great majority of actual cases, and less to the articulated rationales of Justices sitting in Washington.

Now, promoting national unity or public peace is only one consideration, and it may well be outweighed (or complimented) by others in the final analysis. Yet it offers a neglected reason to celebrate the way that *Smith* and other controversial religious freedom cases operate under the contingent circumstances of actual disputes.