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Equality and the Free Exercise of Religion

Bret Boyce
University of Detroit Mercy School of Law

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BRET BOYCE*

* Associate Professor, University of Detroit Mercy School of Law. B.A. Yale University, J.D. Northwestern University, Ph. D. Brown University. The Author wishes to thank Ronald J. Krotoszynski, Jr. for his very helpful and thoughtful comments on this Article.

I. INTRODUCTION

Ever since the mid-twentieth century, when the Supreme Court first began vigorously to enforce the Religion Clauses of the First Amendment,[1] the Religion Clauses have been a source of continuing controversy. No issue has been more contentious than religious exemptions from generally applicable laws. In recent decades, the Court's jurisprudence has undergone dramatic changes.

In the 1960s and 1970s especially, the Court took an activist approach to the enforcement of both Religion Clauses.[2] On the free exercise side, at least in theory, the Court applied strict scrutiny to neutral, generally applicable laws that incidentally burdened religious practices.[3] Unless the law, as applied to the religious adherent claiming a burden, was "the least restrictive means of achieving some compelling state interest,"[4] an exemption would be constitutionally required. Under such an approach, small minority religions stood to gain at the expense of more powerful religious groups (which were less likely to be burdened by general legislation) as well as nonbelievers. The effect of constitutionally compelled exemptions, as Steven Gey pointed out, was to subordinate the state's goals to those of the exempted religious adherent, to shift social burdens from adherents to nonadherents, and to require the state to subsidize religiously motivated behavior.[5] Yet paradoxically, on the establishment side, the Court held that government sponsorship or support of private religious activity is prohibited,[6] especially limiting the most powerful religious groups, which would otherwise be best positioned to seek government sponsorship.

The Court itself did not shrink from observing that there was a basic inconsistency in an expansive approach to both Religion Clauses.[7] This led to considerable confusion in the case law, and in practice, the Court never consistently applied its compelled exemptions doctrine with the degree of vigor that its

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[1] The First Amendment's Religion Clauses state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Subsequent case law has made these principles applicable to all branches of the federal and state governments. The Religious Test Clause, which states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," *id.* art. VI, § 3, was an important limited precursor of the more general principle set forth in the Establishment Clause.

[2] *See* Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 452 (2000).

[3] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

[4] Thomas v. Review Bd., 450 U.S. 707, 708 (1981).

[5] *See* Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 180 (1990).

[6] *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("Neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

[7] *See* Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) (observing that either one of the Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other").

formulation seemed to require. But the basic tendency of the Court's doctrine (if not its practice) in this period, as Kathleen Sullivan suggests, was to treat religious organizations "as distinctively powerful forms of private association" functioning as virtual "quasi-governments" enjoying "alternative jurisdiction" alongside that of the state.[8]

In 1990, after a period of substantial doctrinal disarray, the Court sharply reversed course and began to adopt a posture of deference to legislative outcomes.[9] On the free exercise side, in *Employment Division v. Smith*,[10] the Court held that judicially mandated religious exemptions from generally applicable legislation are normally inappropriate, although legislative exemptions are permissible. On the other hand, on the establishment side, the Court has increasingly repudiated the view that the government may not express religious preferences.[11] This approach, as Sullivan argues, "in effect treats religion as an ordinary interest group in politics,"[12] potentially subject to the adverse impact of generally applicable legislation, but also free to compete with other interest groups for symbolic or material support from the state. As the Court itself candidly recognized, the effect of the new approach was to empower the strongest religious groups (or those best positioned to join strong political coalitions) to enact legislative exemptions and benefit programs that would serve their own interests.[13]

Smith was denounced by a wide range of religious organizations, prompting Congress to respond by enacting the Religious Freedom Restoration Act of 1993 (RFRA).[14] RFRA expressly repudiates *Smith* and purports to restore the compelling interest test. In *City of Boerne v. Flores*,[15] the Supreme Court struck down the application of RFRA to the states on the ground that it exceeded Congress's remedial power under Section 5 of the Fourteenth Amendment; however, more recently, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[16] the Court upheld the

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[8] Sullivan, *supra* note 2, at 453-54.

[9] *See id.* at 461-65. Sullivan argues that the Court's decision invalidating the Religious Freedom Restoration Act in *City of Boerne v. Flores*, 521 U.S. 507 (1997) may be viewed as an exception to this general posture of deference. *See id.* at 464, 466 n.36. But even *Boerne* was premised on respect for majoritarian outcomes at the state level, in an area where (according to the Court) the state, not Congress, had legislative authority. *Boerne*, 521 U.S. 507.

[10] Employment Div. v. Smith, 494 U.S. 872 (1990), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

[11] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 684 n.3 (2005) ("[W]e have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.").

[12] Sullivan, *supra* note 2, at 461.

[13] *See, e.g.*, *Smith*, 494 U.S. at 890 (conceding that the Court's approach of "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in").

[14] 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

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

[16] Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

application of RFRA to the federal government. Congress responded to the invalidation of RFRA as applied to state legislation by enacting a second statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[17] restoring the compelling interest test to a narrower range of legislation, this time relying on its Article I commerce and spending powers, rather than (as in RFRA) its Fourteenth Amendment enforcement powers. The Court has upheld the provisions of RLUIPA applicable to state prison regulations against a facial Establishment Clause challenge.[18]

The Court's Religion Clause jurisprudence has provoked a wide variety of critical responses. The central focus of discussion is the articulation of neutral principles that might guide constitutional decision making in this area. Some have categorically denied that such neutral principles can ever be found.[19] Others, taking an eclectic approach, insist that multiple values must be taken into account in evaluating claims of religious freedom, but deny that there is any overarching principle that can reliably be applied to resolve conflicts among such values.[20] Either one of these positions leads, at best, to an intuitive or "ad hoc or prudential or pragmatic or contextual"[21] approach to decision making. But short of the conclusion that judicial review in this area should be abandoned altogether,[22] they cannot form the basis of a principled normative critique.

In contrast, those who have attempted to articulate neutral, unifying principles that might explain and guide the constitutional jurisprudence of religion fall broadly into two camps. One group favors "substantive neutrality," as Douglas Laycock has called it.[23] This approach focuses on equality of *effect*, viewed from the subjective perspective of the person regulated, rather than objective equality of treatment. These scholars take as their starting point the premise that religious claims are *unique* and thus, constitutionally entitled to special treatment. "Substantive neutrality" would require the government to influence private religious choice as

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[17] 42 U.S.C. § 2000cc (2006).

[18] *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).

[19] *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 16 (1995) (arguing that no "adequate general theory of religious freedom" is possible and that the search for neutrality in this field must necessarily prove "illusory").

[20] *See, e.g.*, 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 6 (2006) (arguing that in Religion Clause jurisprudence, "multiple values are at stake involv[ing] difficult trade-offs that are not resolvable by any higher metric that gives much practical assistance").

[21] SMITH, *supra* note 19, at 58; *cf.* GREENAWALT, *supra* note 20, at 6-7 (describing his approach as based on "practical reason" and "contextual evaluation" rather than "abstract principles"); *see also* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 255-56 (2008) (praising Justice O'Connor's "contextual" approach to the Establishment Clause for its use of "[w]ise practical reason").

[22] *See* SMITH, *supra* note 19, at 125-27 (discussing possibility of abandoning judicial review).

[23] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) [hereinafter Laycock, *Neutrality*].

little as possible. Whatever their differences on matters of detail, proponents of this approach, such as Laycock, Michael McConnell, and Thomas Berg, all agree in treating religious voluntarism as a paramount constitutional value.[24] They broadly favor the compelling interest test, or something close to it.

The other main approach to religious liberty takes as its starting point the principle of equal *treatment* rather than equal effect. Therefore, it would reject the compelling interest test, insofar as it mandates special treatment of particular religions, or of religion generally as opposed to nonreligion. An early proponent of this approach was Philip Kurland, who advocates a version of formal neutrality under which the government is flatly prohibited from engaging in religious classifications.[25] In more recent years, Christopher Eisgruber and Lawrence Sager have elaborated an approach that treats religion as "constitutionally *distinctive*" (like race and gender) but not "constitutionally *unique*."[26] Their approach, which they call "Equal Liberty," has three components: (1) antidiscrimination ("no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects"); (2) neutrality (aside from antidiscrimination, there is "no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities"); and (3) liberty (broad "rights of free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow religious practices to flourish").[27] The attractiveness of Eisgruber and Sager's approach is that it allows for broad protection of freedom of conscience but rejects the notion that religiously-motivated conscientious acts should be privileged over conscientious acts not rooted in religion.

This Article defends the principle of equal treatment in the exemptions context. It is broadly sympathetic to Eisgruber and Sager's approach to free exercise,[28] but

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[24] *See, e.g.*, *id.* ("[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 38 (2000) [hereinafter McConnell, *Singling Out Religion*] (arguing that the function of the Religion Clauses is "to minimize government power over religious decisions, whether to benefit or inhibit religion, or control and transform religion"); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 703-04 (1997) (arguing that the government should "minimize the effect it has on the voluntary, independent religious decisions of the people").

[25] *See* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (arguing that the government may never use religious classifications "either to confer a benefit or to impose a burden"); *see also* Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373, 402 (concluding that "there is little reason to believe that the Court will, though it should, adopt Kurland's approach").

[26] *See* Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1274 (2007) [hereinafter Eisgruber & Sager, *Chips Off Our Block*].

[27] CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52-53 (2007) [hereinafter EISGRUBER & SAGER, RELIGIOUS FREEDOM].

[28] As this Article focuses on free exercise, a general consideration of establishment issues is beyond its scope. It therefore does not undertake to defend Eisgruber and Sager's approach in the establishment context. Arguably, there is a basic asymmetry between the Free Exercise

differs from their approach on the resolution of particular questions. Eisgruber and Sager are right to advocate equal treatment of "roughly comparable secularly grounded interests and religiously grounded interests, or . . . interests grounded in mainstream beliefs and those that derive from minority beliefs."[29] The difficulty arises in determining precisely which interests are "roughly comparable." Such determinations can easily devolve into the sort of weighing of subjective burdens that equal treatment seeks to avoid.

Because of the difficult policy choices involved, legislatures will typically bear initial responsibility to ensure that generally applicable legislation, and any exemptions from it, comply with the principles of equal treatment. When legislatures deviate from those principles, for example by providing for discriminatory exemptions, what is the proper remedy in the courts? Should they strike down the discriminatory exemption, or seek to broaden it so that it is no longer discriminatory? Eisgruber and Sager tend to favor the latter course. Sometimes this is relatively unproblematic. Often, however, it will require the courts to resolve difficult policy issues. In such cases, the best course will be to strike down the exemption and allow the legislature to craft a new one that is nondiscriminatory.

Two examples may help to clarify this point. During the Vietnam War, federal law permitted conscientious objectors to avoid military service provided that their objection to war was grounded in their "religious training and belief." The statute defined "religious training and belief" to mean an individual's belief regarding duties to a "Supreme Being," and specifically excluded from coverage "philosophical views or a merely personal moral code."[30] Faced with the clear intent of Congress to discriminate in favor of traditional religious manifestations of conscience against nontraditional or nonreligious manifestations, the Court simply disregarded that clear intent and extended the exemption to persons who did not believe in a Supreme Being.[31] Eisgruber and Sager approve of this result,[32] and it must be regarded as relatively unproblematic. The Court had two alternatives. It could construe the exemption as Congress no doubt intended, and strike it down as unconstitutional. Or, it could broaden the exemption in a relatively straightforward way, by simply

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and Establishment Clauses. While the Free Exercise Clause reads primarily as a guarantee of individual rights, the Establishment Clause reads as a structural and institutional prohibition (albeit one which also gives rise to individual rights). The Free Exercise Clause forbids the government to discriminate among its citizens based on their beliefs (whether based in religion or not), while the Establishment Clause prohibits the government from promoting particular religious beliefs (but not particular beliefs not based in religion). Eisgruber and Sager's equality-based approach to establishment questions relies on an endorsement test similar to Justice O'Connor's (although they do not necessarily embrace her conclusions in particular cases). *See id*. at 122-24, 134. However, O'Connor's endorsement test has been widely criticized as subjective and indeterminate. *See, e.g.*, Gey, *supra* note 5, at 111-19; Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499 (2002); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266 (1987).

[29] EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 102.

[30] United States v. Seeger, 380 U.S. 163, 165 (1965) (quoting the Military Selective Service Act, 50 U.S.C. app. § 456(j) (1958)).

[31] *See id*. at 175-88.

[32] *See* EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 114.

refusing to impute to Congress the discriminatory meaning that Congress no doubt did intend. It chose the latter course and saved the exemption by broadening its scope in a relatively straightforward way.

Often, however, it may not be clear how a discriminatory exemption should be broadened so as to save it. For example, the federal government currently provides an exemption from the Controlled Substances Act for the use of peyote "by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion."[33] The statute, on its face, discriminates both on the basis of ethnicity and religion. In *Centro Espírita Beneficente*, the Supreme Court, applying RFRA's compelling interest test, cited the existence of this exemption as evidence that the government did not have a compelling interest in banning the religious use of another hallucinogen, dimethyltryptamine (DMT).[34] Eisgruber and Sager defend this result, based not on RFRA (which they regard as unconstitutional), but based on the Constitution itself. They argue that once Congress recognized an exemption for the sacramental use of peyote by members of Native American religions, Equal Liberty required a similar exemption for the sacramental use of DMT.[35] But there may be significant differences between different drugs and the ways in which they are used by different groups. In the face of these differences, what is the proper neutral remedy? Extend the peyote exemption to controlled nonreligious uses? Decriminalize peyote altogether? Extend the exemption to religious use of other hallucinogens? To controlled nonreligious use, or all use of hallucinogens? To other prohibited drugs (e.g., marijuana), and if so, which ones? Any such decision inevitably embroils the courts in difficult policy choices, involving difficult determinations about the specific dangers of particular substances, and the potential for invidious discrimination among different religious and nonreligious groups. When faced with a clearly discriminatory exemption and no completely unproblematic way to broaden it, the best course may be either to strike it down, or to invalidate the underlying rule or statute from which the exemption was granted. A valuable consequence of this approach will be to discipline the legislature by forcing it to frame and justify any exemption in a neutral manner that respects the constitutional command of equal treatment.

Part I of this Article begins with a brief overview of Supreme Court case law on free exercise exemptions, which provides a background for modern historical and normative debates. Part II examines the original understanding of the Religion Clauses, which proponents of "substantive neutrality" claim supports their position. This Part rejects that claim, concluding that the limited evidence of the original understanding of the First Amendment and the Fourteenth Amendment (under which current doctrine makes the First Amendment's guarantees applicable to the states) does not provide a firm basis for resolving modern debates over exemptions, but is at least as consistent with an approach rooted in equality of treatment as it is with competing approaches. The debate among these approaches can only be resolved by addressing the fundamental normative questions. Part III explores those questions, examining the reasons for rejecting a regime of special dispensations from the rule of

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[33] 42 U.S.C. § 1996a(b)(1) (2006).

[34] *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 433-34 (2006).

[35] *See* EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 267.

law for religious individuals and institutions, and instead embracing equal treatment under the Constitution; it discusses the roles of courts and legislatures in accomplishing this constitutional goal. Part IV discusses the implementation of an equal treatment norm in the context of some especially salient current controversies, including organizational autonomy of religious institutions, claims of exemption for the sacramental use of drugs, and exemptions in the prison context.

II. EXEMPTIONS AND THE SUPREME COURT

The Supreme Court's jurisprudence of exemptions for religiously motivated conduct has not been fully consistent. The Court now generally rejects the notion that such exemptions are constitutionally compelled, confining to their facts (but not expressly overruling) a small number of cases to the contrary. In even greater disarray are cases addressing the extent to which legislative exemptions, though not compelled, are nonetheless constitutionally permitted. Some decisions suggest that legislative measures singling out religious conduct for unique exemptions are permitted, while others indicate that the Constitution mandates equal treatment of religious and nonreligious conduct.

A. Constitutionally Mandated Judicial Exemptions

In addressing claims of religious exemption from generally applicable laws, the Court has adopted an approach of formal equality, with a very small number of notable exceptions between 1963 and 1989. In 1878, in its first major Religion Clause decision, *Reynolds v. United States*,[36] the Court rejected a Mormon man's claim that he was entitled to an exemption from a bigamy statute on the ground that he believed that polygamy was his religious duty. The Court held that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[37] To permit religious exemptions from otherwise valid and generally applicable laws, the Court held, would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[38] The Court continued to adhere to this approach well into the twentieth century.[39]

However, in 1963 the Court departed sharply from this approach. In *Sherbert v. Verner*,[40] the Court reversed a state court decision upholding the denial of unemployment benefits to a Seventh-Day Adventist who refused to accept Saturday

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[36] Reynolds v. United States, 98 U.S. 145 (1878).

[37] *Id.* at 166.

[38] *Id.* at 167.

[39] *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing law as applied to Orthodox Jew); Cleveland v. United States, 329 U.S. 14 (1946) (upholding conviction of Fundamentalist Latter Day Saints adherents for transporting plural wives across state lines); Prince v. Massachusetts, 321 U.S. 158 (1944) (rejecting Jehovah's Witness' claim of religious exemption from child-labor law).

[40] Sherbert v. Verner, 374 U.S. 398 (1963).

work on religious grounds. Without formally overruling *Reynolds*,[41] the *Sherbert* Court effectively repudiated its basic approach, holding that a generally applicable law that imposes "any incidental burden on the free exercise of . . . religion" must be justified by a "compelling state interest."[42] Under this standard, generally applicable laws that have a disparate religious impact, unlike laws that have a disparate racial or gender impact, trigger strict scrutiny even absent any showing of discriminatory intent.

Thus, although the legislature intended to provide no relief for those who were unavailable for work for personal reasons, the Court held that an exception was required where those reasons were religious. No exception was required for those whose identical behavior was motivated by non-religious reasons (however compelling), such as a mother who was unable to work on Saturday because of child care responsibilities.[43] In *Thomas v. Review Board*,[44] another unemployment case involving a Jehovah's Witness who refused a transfer to a department involved in weapons production, the Court confirmed that acts of conscience rooted in philosophical beliefs would not be accorded the same constitutional protection as those rooted in personal religious beliefs. "Only beliefs rooted in religion," the Court held, "are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[45]

The high-water mark of this regime of special exemptions for religion came in *Wisconsin v. Yoder*,[46] where the Court held that the Old Order Amish were entitled to an exemption from a state law requiring children to attend high school until the age of sixteen. The Court made clear that the Amish were entitled to an exemption only because their claim was rooted in religious belief; if it had been based instead on "philosophical and personal rather than religious [beliefs]," for example adherence to the philosophy of Thoreau, they would not have been entitled to relief.[47]

Nevertheless, despite the Court's sweeping proclamation of strict scrutiny and constitutionally compelled exemptions for religion, in practice, *Sherbert* and *Yoder* were virtually confined to their facts. The only other cases in which the Court found that a religious exemption was required involved the same sort of unemployment compensation claims as *Sherbert* and *Thomas*.[48] In other contexts, the Court always managed to find a reason to deny claims for exemption. The Court denied such claims, for example, on the ground that the burden imposed on religion was

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[41] The Court distinguished the *Reynolds* line of cases on the dubious ground that they invariably involved laws regulating conduct that "posed some substantial threat to public safety, peace or order." *Id.* at 403.

[42] *Id.*

[43] *See id.* at 402 n.4; *id.* at 416 n.3 (Stewart, J., concurring); *id.* at 419 (Harlan, J., dissenting).

[44] Thomas v. Review Bd., 450 U.S. 707 (1981).

[45] *Id.* at 713.

[46] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[47] *Id.* at 216.

[48] *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

insubstantial,[49] or that the government interest at stake was compelling;[50] in other specific contexts, such as prisons,[51] the military,[52] or internal government operations,[53] the Court simply ruled that the compelling interest test did not apply at all. If the strict scrutiny test announced in *Sherbert* had been applied consistently, it would have required extensive and far-reaching exemptions across the legal landscape. But in practice, it never was applied consistently. While in other contexts the compelling interest test is usually fatal, in the context of religion, as Eisgruber and Sager have quipped, it was "strict in theory but feeble in fact."[54]

In 1990, the Supreme Court put an end to its half-hearted flirtation with constitutionally compelled exemptions. In *Employment Division v. Smith*,[55] the Court rejected a claim of exemption by Native Americans for the religious use of peyote. Reasserting the principle first announced in *Reynolds*, Justice Scalia declared that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[56] The Court observed that it was "a constitutional anomaly" to apply the compelling interest test to generally applicable laws that are neutral with respect to religion: Strict scrutiny does not apply to laws that are neutral with respect to race or speech.[57] The Court had never really applied the compelling interest test with any stringency outside the unemployment compensation context, nor could it have.[58]

> [I]f "compelling interest" really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting

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[49] *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 304-05 (1985) (holding that compliance with minimum wage laws did not burden religious freedom of employees because they were free to return the money to their employer).

[50] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (finding "overriding [government] interest in eradicating racial discrimination in education"); United States v. Lee, 455 U.S. 252, 257-58 (1982) (holding that uniform collection of Social Security tax furthered "overriding government interest").

[51] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (rejecting claims of Muslim inmates).

[52] *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting claim of airman to wear yarmulke in violation of military dress code), *superseded by statute*, Act of Dec. 4, 1987, § 508(a)(2), Pub. L. No. 100-180, 101 Stat. 1086 (allowing the wearing of religious apparel unless it interferes with performance of duties or the Secretary determines it is not neat and conservative) (codified at 10 U.S.C. § 744 (2006)).

[53] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988) (rejecting challenge to government road in Indian burial ground); Bowen v. Roy, 476 U.S. 693, 699 (1986) (finding no exemption to use of Social Security numbers).

[54] EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 43.

[55] Employment Div. v. Smith, 494 U.S. 872 (1990).

[56] *Id*. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[57] *Id*. at 886 & n.3.

[58] *See id*. at 883-84.

> anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs . . . . Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[59]

If the "compelling interest" test were to be applied consistently, there was almost no limit to the sorts of claims of exemption that courts would have to consider.[60]

Although the *Smith* Court therefore rejected the notion of constitutionally compelled judicial exemptions from neutral laws of general applicability, it did not overrule any prior decisions, nor did it rule out the idea of accommodation altogether. The *Sherbert* line of cases dealing with unemployment compensation were distinguished on the ground that they involved a statutory scheme that created a mechanism for individualized exemptions.[61] *Yoder* was distinguished on the ground that it involved a hybrid claim resting not merely on free exercise, but also on "the right of parents . . . to direct the education of their children."[62] The Court's primary examples of such hybrid claims, however, were cases in which Religion Clause claims were conjoined with claims arising under the other protections of the First Amendment, such as the freedom of speech, the press, and association.[63] Most notably, the Court suggested that even neutral and generally applicable laws might receive special scrutiny if they infringed the freedom of expressive association of religious organizations.[64] The Court also cited with approval a line of cases prohibiting the government from interfering "in controversies over religious authority or dogma."[65]

Apart from these limited exceptions, however, the Court suggested that the business of crafting exemptions to generally applicable laws should be left to the legislatures, not the courts. As the Court observed with apparent approval:

> [A] number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say

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[59] *Id*. at 888 (citations omitted).

[60] *See id*. at 888-89.

[61] *See id*. at 884.

[62] *Id*. at 881.

[63] *Id*. at 881-82.

[64] *See id*. at 882 (citing Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)).

[65] *Id*. at 877 (citing Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445, 452 (1969); Kedroff v. St. Nichols Cathedral, 344 U.S. 94, 95-119 (1952); Servian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-25 (1976)).

> that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.[66]

The Court conceded that the consequence of "leaving accommodation to the political process" would be that minority religious practices would be left "at a relative disadvantage."[67] But it insisted that deference to democratic outcomes was preferable to "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[68]

B. Constitutionally Permitted Legislative Exemptions

The current state of the law regarding legislative exemptions is more confused. In *Walz v. Tax Commission*,[69] the Court upheld against an Establishment Clause challenge a state property tax exemption for "all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[70] The Court indicated that certain forms of government accommodation may be permissible even though they are not constitutionally mandated[71] and drew a distinction between direct subsidies, whereby the government "transfer[s] part of its revenue to churches," and exemptions, whereby the government "simply abstains from demanding that the church support the state."[72]

Justice Harlan, concurring in the result, and Justice Douglas, dissenting, did not agree with the majority that tax exemptions differ meaningfully from direct subsidies as an economic matter.[73] Justice Harlan, nevertheless, voted to uphold the tax exemption on the ground that it was defined broadly enough to include religious and nonreligious groups on nondiscriminatory terms. In his view, exemptions directed only at religious groups ("religious gerrymanders") would be unconstitutional, but not neutral exemptions directed at all "groups that pursue cultural, moral, or spiritual improvement," regardless of their religious commitments or lack thereof.[74] "In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."[75]

In subsequent decisions, the Court appeared to waver regarding the constitutionality of exemptions directed solely at religion. In *Corporation of the*

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[66] *Id*. at 890 (citation omitted).

[67] *Id.*

[68] *Id*.

[69] Waltz v. Tax Comm'n, 397 U.S. 664 (1970).

[70] *Id*. at 673.

[71] *See id*. at 672-74.

[72] *Id*. at 675.

[73] *See id*. at 699 (Harlan, J., concurring); *id*. at 704 (Douglas, J., dissenting).

[74] *Id*. at 696-97 (Harlan, J., concurring).

[75] *Id*. at 696.

Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,[76] the Court upheld the exemption of religious organizations from the prohibition in Title VII of the Civil Rights Act of 1964 against employment discrimination on the basis of religion. The Court upheld this exemption even in the context of a religious organization's secular nonprofit activities. The case involved the firing of a building engineer who had worked at a church-owned gymnasium open to the public because he was not a member of the church. The Court held this exemption served the "secular legislative purpose" of "alleviat[ing] significant government[] interference with the ability of religious organizations to define and carry out their religious missions."[77] Where the government "acts with the proper purpose of lifting a regulation that burdens the exercise of religion," the Court ruled, there is "no reason to require that the exemption comes packaged with benefits to secular entities."[78]

Two years later, however, the Court struck down an exemption directed solely at religion. In *Texas Monthly, Inc. v. Bullock*,[79] the Court struck down a state tax exemption directed solely at religious periodicals, holding that it was not required by the Free Exercise Clause and violated the Establishment Clause. However, the case produced no single majority opinion. Justice Brennan, joined by Justices Marshall and Stevens, relied heavily on the reasoning of Justice Harlan's opinion in *Walz*.[80] In Justice Brennan's view, the state sales tax exemption was unconstitutional because it was directed narrowly at religious organizations only and lacked a valid neutral secular purpose.[81] Justice Blackmun, joined by Justice O'Connor, likewise agreed that the scope of the exemption was too narrow, amounting to "preferential support for the communication of religious messages."[82] In Justice Blackmun's view, a religion-neutral exemption for "the sale not only of religious literature . . . but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong" would have passed constitutional muster.[83] Justice White concurred solely on the ground that the exemption violated the Press Clause as a form of content-based discrimination.[84] In a scathing dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, excoriated Justices Brennan and Blackmun's "judicial demolition project."[85] Justice Scalia insisted that legislative

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[76] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[77] *Id*. at 335.

[78] *Id*. at 338.

[79] Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[80] *See id*. at 13, 17 (quoting with approval Justice Harlan's opinion in *Walz*).

[81] *See id*. at 14-15.

[82] *Id*. at 28 (Blackmun, J., concurring).

[83] *Id*. at 27-28.

[84] *See id*. at 25-26 (White, J., concurring).

[85] *Id*. at 29 (Scalia, J., dissenting).

accommodations of religion are never unconstitutional merely because they single out religion alone for special benefits.[86]

The most recent Supreme Court decisions on legislative accommodations arose in the aftermath of the decision in *Smith*, which for the most part ruled out judicial accommodations but endorsed legislative accommodations. *Smith* elicited expressions of outrage in many quarters, and a nearly unanimous Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), with the express purpose of overturning *Smith*, "restor[ing] the compelling interest test as set forth in [*Sherbert* and *Yoder*, and] guarantee[ing] its application in all cases where free exercise of religion is substantially burdened."[87] However, in *City of Boerne v. Flores*,[88] the Supreme Court held RFRA invalid as applied to state and local governments on the ground that it exceeded Congress's remedial power under Section 5 of the Fourteenth Amendment.

The Court has nevertheless continued to apply RFRA to the federal government, mandating an exemption for the religious use of hallucinogens in *Gonzales v. O Centro Espírita Benifecente União do Vegetal*.[89] Many states have also passed legislation modeled on the federal RFRA, known as "state RFRAs" or "little RFRAs," and even in the absence of such legislation, a number of state courts have declined to follow *Smith* in interpreting their state constitutions.[90] Furthermore, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act[91] (RLUIPA), restoring the compelling interest test in the context of state and local land use and prison regulations. Unlike RFRA, which lacked an express constitutional basis for its application to the states, RLUIPA rested on the Commerce and Spending Clauses, and in *Cutter v. Wilkinson*,[92] the Supreme Court upheld it as applied to prisons against an Establishment Clause challenge.

III. THE DEBATE OVER ORIGINAL UNDERSTANDING

Proponents of special exemptions to accommodate religiously motivated conduct often seek to justify their approach by claiming that it is warranted by the original understanding of the Constitution.[93] Such claims prove to be singularly unpersuasive. Even if one embraces originalism as an approach to constitutional

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[86] *See id*. at 39-40.

[87] 42 U.S.C. § 2000bb(b)(1) (2006).

[88] City of Boerne v. Flores, 521 U.S. 507 (1997).

[89] Gonzales v. O Centro Espírita Benifecente União do Vegetal, 546 U.S. 418 (2006).

[90] *See* 1 WILLIAM W. BASSETT ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 2:52 (2007) (tabulating statutes and cases).

[91] 42 U.S.C. §2000cc (2006).

[92] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[93] *See, e.g*., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410, 1414, 1420 (1990) [hereinafter McConnell, *Origins*]; Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99, 102 (1990) (denouncing *Smith* on the grounds that it was "inconsistent with the original intent").

interpretation (and there are sound reasons for rejecting it),[94] the available evidence of the original understanding of both the First Amendment and the Fourteenth Amendment (through which the First Amendment is said to be incorporated against the states) does not provide strong support for the accommodationist position.

A. The First Amendment

Michael McConnell, in an influential article, argues that the original understanding supports the doctrine of constitutionally compelled free exercise exemptions announced in *Sherbert*, and thus casts doubt on the abandonment of that doctrine in *Smith*.[95] McConnell concedes, however, that "the historical evidence is limited and [at] some points mixed,"[96] and his conclusion is hesitant. He argues that there is "no substantial evidence" that legislative exemptions were regarded as constitutionally impermissible, but concedes that "[i]t is more difficult to claim . . . that the framers and ratifiers specifically understood or expected" that the Free Exercise Clause authorized judicially created exemptions from general laws.[97] At most, he claims only that constitutionally compelled exemptions "were within the contemplation of the framers and ratifiers as a possible interpretation."[98] Even this tentative conclusion has been widely criticized as overdrawn.[99] Most notably, Philip Hamburger argues that McConnell's own evidence does not support his claim that the right of free exercise was understood to include a general right of religious exemption from general laws, and that the eighteenth-century evidence more generally indicates that "a constitutional right of . . . exemption was not even an issue in serious contention among the vast majority of Americans."[100]

1. The Framers and Ratifiers

Any attempt to recover the original understanding of the Religion Clauses is seriously hampered by the fact that records of the discussions by the framers and

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[94] The original understanding is certainly entitled to respect to the extent that it reflects the considered views of people who thought deeply about constitutional issues, and because it forms a starting-point for our constitutional jurisprudence; yet there are strong theoretical and practical reasons for rejecting the claim that it can or should be the touchstone of modern constitutional interpretation. *See, e.g.*, Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 925-67 (1998).

[95] *See* McConnell, *Origins*, *supra* note 93, at 1410, 1414, 1420.

[96] *Id.* at 1511.

[97] *Id*. at 1511-12.

[98] *Id*. at 1415.

[99] *See, e.g.*, Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 124 ("McConnell's article employs the best sort of "law office history," a rhetorical form designed to give historical evidence favorable to an advocate's position the most weight it can bear, while at the same time explaining away apparently unfavorable evidence."); Gerard V. Bradley, *Beguilded: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 265 (1991) ("McConnell dramatically overstates the strength of his evidence.").

[100] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917-32, 948 (1992) [hereinafter Hamburger, *Religious Exemption*].

ratifiers are extremely sparse and unedifying. The surviving records of the proceedings in the First Congress preserve the language of Madison's original proposal and the text of alternatives considered on the floor of the House and Senate and in various committees, but there is very little discussion of the meaning of or the reasons behind the various proposed texts.[101] Moreover, as McConnell notes, the "ratification debates in the state legislatures were unilluminating."[102]

The two most important changes in the free exercise language, McConnell observes, "took place after the recorded debate."[103] Thus, it is difficult to evaluate their significance. First, in place of Madison's initial draft providing that religious liberty may not be "infringed," Congress ultimately substituted the verb "prohibiting" in the final version. Because a wider class of actions might be said to infringe religious liberty than to prohibit it, arguably this change narrowed the scope of constitutional protection of religious freedom. But McConnell rejects this view, speculating instead that the change was purely stylistic, not substantive; in his view, the framers found the verb "prohibiting" "less awkward or more euphonious"[104] than "abridging." The second "key change" involved the substitution of "free exercise" for Madison's original phrase "the full and equal rights of conscience."[105] McConnell admits that this change may also be "without substantive meaning," as the two terms were often "used interchangeably."[106] Ultimately, however, he argues that this change was significant, because it made clear that the clause protected conduct, encompassed religion in its corporate aspect, and excluded secular claims of conscience from similar protection.[107] To his credit, McConnell recognizes the possibility of alternative interpretations. However, his conclusion that the first change was essentially meaningless but that the second was highly significant is ultimately not grounded in the framers' own statements about their meaning (because none have been preserved), but in speculation. Naturally, such speculation tends to reflect McConnell's own policy preferences.[108]

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[101] *See* THE COMPLETE BILL OF RIGHTS 1-11, 53-62 (Neil H. Cogan ed. 1997); *see also* McConnell, *Origins*, *supra* note 93, at 1481 ("The recorded debates in the House over these proposals cast little light on the meaning of the free exercise clause.").

[102] McConnell, *Origins*, *supra* note 93, at 1485.

[103] *Id*. at 1481.

[104] *Id*. at 1486.

[105] *Id.* at 1488.

[106] *Id*.

[107] *Id*. at 1488-1500.

[108] 1 ANNALS OF CONG. 434-35 (Joseph Gales ed. 1834) (Madison's proposed limitation on the states, "No State shall violate the equal rights of conscience," was cast in terms of pure equal treatment.); *see* Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappppreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1251-54 (2008) (pointing out that McConnell ignores Madison's proposal for parallel limitations on state infringements of the right to conscience and argues, because Madison viewed the state governments as potentially a greater threat to religious liberty than the federal government, it would be bizarre to construe his proposed amendments as limiting the latter more than the former).

2. State Constitutions

Because the records of the framing and ratification are so sparse and unenlightening, those seeking the original meaning of free exercise have had to examine a broader array of materials, such as philosophical and religious writings, and political and legal discussions. In McConnell's view, the early "state constitutions provide the most direct evidence of the original understanding," because, he argues, "it is reasonable to infer that those who drafted and adopted" the First Amendment understood "free exercise" to mean "what it had meant in their states."[109] Yet most of these state constitutional guarantees of religious freedom were framed in significantly narrower terms than the First Amendment. McConnell notes that, of the twelve states with constitutional protections for religious freedom (Connecticut had none), "two states confined their protections to Christians and five other states confined their protections to theists."[110] Eight of these twelve states expressly limited the protection of religious conduct "to acts of 'worship.'"[111] Nine also limited such protections "to actions that were 'peaceable'" or did not "disturb the 'peace' or 'safety' of the state,"[112] and varying numbers of states in this group also declined to protect acts of "licentiousness or immorality," acts that would disturb others or their religious practices, or acts contrary to social "happiness" or "good order."[113] If such provisions are indeed "the most direct evidence" of the original understanding of the Free Exercise Clause, they may suggest that its scope is very narrow indeed.

Moreover, as Steven Smith points out, the fact that most state constitutions contained a provision protecting "free exercise" or "freedom of conscience" does not prove that there was a consensus as to what those verbal formulae meant.[114] These state constitutional guarantees coexisted alongside statutory provisions such as blasphemy laws, religious tests for public office, and Sabbath observance laws, and many evidently saw no inconsistency.[115] As Smith observes, many late eighteenth-century Americans, informed by centuries of Christian teaching, supported restrictions on particular forms of religiously inspired belief or conduct on the grounds that they regarded deviant religious expression "not as the product of conscience but rather as a form of 'sinning *against* conscience.'"[116]

The crux of McConnell's argument regarding these early state constitutional guarantees is that while they did not protect religiously motivated actions that

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[109] McConnell, *Origins*, *supra* note 93, at 1456; *see also* 1 GREENAWALT, *supra* note 20, at 17 ("The most significant legal guide to what the Free Exercise Clause might have meant is the content of state constitutions adopted after the outbreak of the Revolutionary War and before the Bill of Rights was adopted.")

[110] McConnell, *Origins*, *supra* note 93, at 1455.

[111] *Id.* at 1460.

[112] *Id.* at 1461.

[113] *Id.*

[114] *See* SMITH, *supra* note 19, at 39-40.

[115] *See id.* at 38-39.

[116] *Id.* at 40.

disturbed the "public peace and safety," they did protect actions that did not jeopardize peace and safety, narrowly understood.[117] Where religiously motivated actions do not jeopardize public peace and safety, narrowly understood (for example, religiously motivated refusal to comply with minimum wage laws), McConnell argues, the religious claimant is entitled to disregard generally applicable legislation.[118]

However, as Philip Hamburger points out, it is implausible and anachronistic to read these eighteenth-century provisos regarding the public peace as referring only to acts of violence: "Whereas McConnell assumes that a disturbance of the peace was simply nonpeaceful behavior, eighteenth-century lawyers made clear that 'every breach of law is against the peace.'"[119] Hamburger argues that far from authorizing constitutional religious *exemptions* from generally applicable statutes, the provisos regarding the public peace indicate the *limits* of otherwise generally applicable constitutional guarantees of religious freedom.[120]

3. Philosophical, Religious, and Political Discussions

No political philosopher had greater influence on the framers of the American Constitution and Bill of Rights than John Locke. Locke developed his views on religious freedom at a time when the memory of widespread religious warfare and persecution in Europe was still quite fresh. The maintenance of civil peace and the protection of the individual right of conscience was therefore a matter of the utmost concern. Locke, therefore, favored a policy of toleration toward dissenters that was broad for his own time. Nevertheless, he argued that the state should be permitted to favor an established Church, provided it did not compel adherence, and he excluded from the scope of toleration Catholics, Muslims, and atheists.[121] The state should confine itself to worldly matters, and the churches to spiritual ones, which would minimize conflicts between the two. But in case a conflict should occur, Locke rejected the notion of accommodation: "[T]he private judgment of any person

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[117] *See* McConnell, *Origins*, *supra* note 93, at 1464.

[118] *See id.*; *see also id.* at 1517 n.273 (citing with disapproval Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (rejecting claim of religious exemption from minimum wage laws)).

[119] Hamburger, *Religious Exemption*, *supra* note 100, at 918 (quoting Queen v. Lane, (1704) 87 Eng. Rep. 884 (Q.B.)); *see also* Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603, 1620-21 (2005) [hereinafter Hamburger, *Philadelphia*] ("[A] breach of the peace was the basic measure of the criminal jurisdiction of the royal courts and thus was also the conventional definition of a misdemeanor.").

[120] Hamburger, *Religious Exemption*, *supra* note 100, at 918-26.

[121] Locke excluded Catholics and Muslims from the ambit of toleration because, in his view, their religion required them to "deliver themselves up to the protection and service of another prince" (the pope or sultan respectively), and thus, they could not be loyal citizens. 6 JOHN LOCKE, *A Letter Concerning Toleration*, *in* THE WORKS OF JOHN LOCKE 1, 46 (Scientia Verlag Aalen 1963) (1689). He excluded atheists on the ground that "[p]romises, covenants, and oaths . . . can have no hold upon" them. *Id.* at 47. And he argued generally that toleration should not be extended to any religion that taught disobedience to the civil law or intolerance of other religions. *Id.* at 45-46.

concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation."[122]

Jefferson admired Locke's views on religion, but he embraced a position that was significantly more liberal than Locke's. He rejected state support for any established religion or religions, whether moral or material. His Virginia Statute of Religious Freedom was intended, as he put it, "to comprehend, within the mantle of it's [sic] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination."[123] As he explained in his *Notes on the State of Virginia*, the legitimate sphere of government regulation extended only to harmful acts, not thoughts:

> The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say that there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.[124]

Unlike Locke, Jefferson believed in absolute freedom of religious belief and expression. But like Locke, he rejected the notion that religious liberty entitled adherents to disregard valid neutral regulations of conduct. In his famous letter to the Danbury Baptists, he wrote that "the legislative powers of government reach actions only, and not opinions," but man "has no natural right in opposition to his social duties."[125]

Those who argue, as McConnell does, that the Framers supported a constitutional right to exemptions claim that they generally rejected the views of Locke and Jefferson on these issues. McConnell seeks to distinguish Madison's position from Jefferson's, and also argues that Baptist and other evangelical leaders such as John Leland and Isaac Backus, who were among the strongest proponents of religious freedom in eighteenth-century America, supported the idea of exemptions.[126] Yet neither Madison nor the evangelical writers provide strong support for the idea of constitutionally compelled exemptions.

McConnell makes much of the fact that Madison (like Locke and Jefferson, one might note) argued that the right to religious freedom was a natural right, prior to the

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[122] *Id.* at 43.

[123] THOMAS JEFFERSON, *Autobiography*, *in* WRITINGS 3, 40 (Merrill D. Peterson ed., The Library of America 1984) (1821) [hereinafter JEFFERSON WRITINGS].

[124] THOMAS JEFFERSON, *Notes on the State of Virginia*, *in* JEFFERSON WRITINGS, *supra* note 123, at 123, 285 (1787).

[125] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut, *in* JEFFERSON WRITINGS, *supra* note 123, at 510, 510 (1802).

[126] *See* McConnell, *Origins*, *supra* note 93, at 1437-49 (discussing views of evangelicals); *id.* at 1452-55 (discussing Madison).

claims of civil society.[127] But as McConnell concedes, this "does not prove that Madison supported free exercise exemptions"[128] any more than Locke or Jefferson. Furthermore, McConnell notes that Madison supported the inclusion of religious exemptions from conscription in the Bill of Rights.[129] Yet as Philip Hamburger has pointed out, this arguably indicates that Madison did *not* believe that free exercise included a general right of exemption, for otherwise the inclusion of an express exemption for conscription would have been redundant.[130] In his *Memorial and Remonstrance Against Religious Assessments*, Madison denounced the special exemptions for Mennonites and Quakers in the Virginia assessment bill as "extraordinary privileges" violating "equal freedom" and the "*equal* title to the free exercise of Religion."[131] McConnell concedes that this passage "provides some support for the no-exemptions view," although he argues that it is ambiguous.[132] In any case, there is little evidence to support McConnell's claim that Madison supported the notion that free exercise requires exemptions from neutral and generally applicable laws.

The same is true, by and large, of most religious dissenters in eighteenth-century America. Evangelical champions of religious freedom, such as Backus and Leland, did not in fact advocate a religious right of exemption from general legislation.[133] As Hamburger demonstrates, although there were certainly exceptions, like the Quaker women running naked through the streets of Salem, the "vast majority of dissenters" "did not advocate a right of religious exemption from civil laws."[134]

4. Legislative Exemptions

The enactment in the colonies and the newly-independent states of specific exemptions from general legislation for religious practices has also been examined for the light it may shed on the scope of the original understanding of free exercise. Exemptions were enacted to permit Quakers and others with religious scruples to

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[127] *See id.* at 1453.

[128] *Id.*

[129] *See id*. at 1454, 1500.

[130] *See* Hamburger, *Religious Exemption*, *supra* note 100, at 927. Moreover, it is significant that the debate in Congress over religious exemptions from conscription took place "*immediately* after" the adoption of the free exercise language. Krotoszynski, *supra* note 108, at 1255.

[131] JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* WRITINGS 29, 31-32 (Jack N. Rakove ed., The Library of America 1999).

[132] McConnell, *Origins*, *supra* note 93, at 1454. McConnell argues that the passage may merely reflect objections to the singling out of specific sects by name, or to the sorts of invidious exemptions that would be unnecessary in the absence of an establishment like the one proposed in Virginia. *See id.* at 1454-55.

[133] *See* Hamburger, *Religious Exemption*, *supra* note 100, at 939-46; Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 631-32 (1990).

[134] Hamburger, *Religious Exemption*, *supra* note 100, at 943-44. On the nudist Quakers, see *id*. at 940.

avoid the normal procedure for taking oaths in most states, and Maryland and North Carolina also exempted Quakers from the prohibition on wearing hats in court.[135] Rhode Island exempted Jews from its incest laws to permit levirate marriage.[136] Several states with religious establishments exempted dissenters from the payment of assessments for support of the established clergy.[137] Most significantly, the issue of exemptions from military conscription for pacifist sects like the Quakers and Mennonites provoked widespread controversy. Some states enacted such exemptions, while others refused to do so.[138]

None of these provisions for exemption prove that eighteenth-century Americans considered that they were required as a matter of fundamental right rather than legislative grace. At most they demonstrate that some thought that they were permissible. As McConnell himself recognizes, exemptions from religious assessment arguably have little bearing on modern constitutional controversies, "because the generally applicable law [was] itself religious, not secular, and would be unconstitutional under the establishment clause today."[139] The same may be said of exemptions from oath-taking. Oaths took the form of a compelled invocation of the deity, and at least in the eighteenth century, they were certainly perceived as such. Therefore the oath requirement itself was arguably a form of establishment. It is also significant that, while in many states the exemption from oath-taking was specifically limited to religious dissenters or Quakers in particular, in the federal Constitution, the option to affirm rather than swear is not limited to any particular religious sect, nor couched in religious terms at all.[140] This suggests that the framers of the federal Constitution considered a religiously neutral accommodation more appropriate than a religion-specific one.

In a survey of founding-era discussions of exemptions, Douglas Laycock argues that no one at that time regarded such exemptions as an establishment of religion, or argued that exemptions should be extended to those who were not religious.[141] But these discussions arose almost exclusively in state-law contexts, and the federal Establishment Clause did not apply to the states. Thus, it is hardly surprising that objections were not framed in the language of establishment. In fact, many states had establishments, and requests for exemption naturally came from sects that were not established. Even in states without establishments, it is not surprising that

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[135] *See* McConnell, *Origins*, *supra* note 93, at 1467-68, 1471-72.

[136] *See id*. at 1471.

[137] *See id*. at 1469-71.

[138] *See id*. at 1468-69.

[139] *Id.* at 1470.

[140] *See* U.S. CONST. art. I, § 3, cl. 6 (Senators trying impeachments shall be "on Oath or Affirmation"); *id*. art. II, § 1, cl. 8 (Presidential oath of office: "I do solemnly swear (or affirm)"); *id*. art. VI, cl. 3 (federal and state officials bound "by Oath or Affirmation" to support the Constitution); *id*. amend. IV (search warrants must be "supported by Oath or affirmation").

[141] *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1810 (2006) [hereinafter Laycock, *Original Understanding*].

objections to accommodation were phrased in terms of equality rather than on the grounds that the accommodation "established" the small minority sects accommodated. It is anachronistic to expect objections to religious exemptions to be phrased in terms of modern Establishment Clause doctrine. It is also hardly surprising that claims were not made on behalf of nonbelievers, in an era when the freedom not to believe was in its infancy, blasphemy laws were still enforced, and no one dared openly profess atheism or agnosticism.

Objections were raised to religion-specific exemptions, but they were typically phrased in the language of equality rather than disestablishment. This is especially clear in the best-documented of all founding-era controversies over religious exemption—the debates in Pennsylvania over exemptions from military conscription. It is notable that the original exemptions provided by the colonial Pennsylvania Assembly during the French and Indian War were not limited to a particular denomination, such as Quakers, or even to those with specifically religious scruples. The exemptions extended to all "who are conscientiously scrupulous of bearing arms" and "any other persons of what persuasion or denomination soever who have not first voluntarily signed [the articles of war] after due consideration."[142] In 1775, when this voluntary arrangement proved inadequate for the needs of defense under the Revolution, objections to special exemptions for Quakers took the form of demands for equal treatment. The Philadelphia Revolutionaries, rejecting special religious exemptions, petitioned that any exemption "may be equally open to all," and demanded "equal Burthen[s]" and "equal Justice."[143] As Philip Hamburger argues, the Pennsylvania debate, which was the most extensive and best-documented in Revolutionary America on the subject of religious exemptions, resulted in a rejection of the Quaker position of "freedom from law precisely on account of one's religion," and a vindication of the Revolutionary position of "equal freedom under law, regardless of religion."[144]

Debate in the First Congress on the issue of religious exemptions from military conscription is less extensive and less illuminating. As initially proposed, the provision that eventually became the Second Amendment guaranteeing the right to bear arms contained the following proviso: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."[145] Several objections to this proviso were raised in the House, and ultimately it was struck out by the Senate.[146] Unfortunately, no record of the Senate debate has been preserved, but we do have some record of debates in the House. Elbridge Gerry objected to giving the government the power to "declare who are those religiously scrupulous," which "would give an opportunity to the people in power to destroy the constitution itself."[147] Gerry wished to limit the proviso to members of "a religious *sect* scrupulous of bearing arms," apparently on the ground that a broader exemption for

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[142] Act of Nov. 25, 1755, ch. 405, 5 Pa. Laws 197.

[143] Hamburger, *Philadelphia*, *supra* note 119, at 1611, 1616; *see also id.* at 1617-21.

[144] *Id.* at 1630.

[145] 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834).

[146] *See* COMPLETE BILL OF RIGHTS, *supra* note 101, at 170-74.

[147] 1 ANNALS OF CONG., 778 (Joseph Gales ed., 1834).

individual religious conscience would result in the grant of too many exemptions.[148] Representatives Jackson and Smith objected to any exemption unless it specified that those exempted must pay a monetary "equivalent."[149] Representatives Sherman and Vining disagreed.[150] Representative Benson urged that the entire clause be struck out: "No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government."[151] Representative Scott also objected to the exemption, arguing that it was a matter for the legislature, and that "those who are of no religion" might have recourse to religious "pretexts to get excused from bearing arms."[152] Representative Boudinot argued that the exemption was necessary. "Can any dependence," he asked, "be placed in men who are conscientious in this respect? or [sic] what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?"[153]

It is difficult to know what to make of these disparate statements, especially since we have no reasons for the critical decision by the Senate to remove the exemption from the Amendment. As McConnell rightly asks, "[o]ne may wonder why," if the Free Exercise Clause was understood to compel exemptions, "objectors were not protected under the [Clause] without need for a separate provision."[154] Laycock claims that "the recorded debate contains no suggestion that legislative exemptions were in any way constitutionally suspect."[155] But as we have just seen, Elbridge Gerry claimed that a *constitutional* exemption was constitutionally suspect: it could "destroy the constitution itself."[156] Moreover, the paucity and inconsistency of the framers' statements on this subject do not permit us to say with certainty what sorts of legislative exemptions they viewed as constitutionally proper. Exemptions only for members of organized sects opposed to bearing arms, but not for individual believers, as Gerry suggested? Exemptions only for religious persons, but not for

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[148] *Id.* at 779 (emphasis added).

[149] *Id.*

[150] *See id.*

[151] *Id.* at 780.

[152] *Id.* at 796.

[153] *Id.*

[154] McConnell, *Origins*, *supra* note 93, at 1501. McConnell offers several possible answers: that "the militias are arms of the state governments, except when in actual service" (but this begs the question of why the Free Exercise Clause should not apply to them when they were in actual service); that the "judiciary's assessment of the governmental interest in conscription" might override an asserted free exercise exemption (this anachronistically assumes that the framers foresaw a compelling interest test that would not be articulated for almost two centuries); or that striking the exemptions clause would "create an inference" that no exemptions would be permitted (but Congress ultimately did strike the clause). *Id.* at 1501. The great difficulty for McConnell's theory is that, if he is correct that the Free Exercise Clause was generally understood to create a general right of exemption, it is extremely odd that no one even raised the subject in the debates over the militia exemption.

[155] Laycock, *Original Understanding*, *supra* note 141, at 1810.

[156] 1 ANNALS OF CONG., 778 (Joseph Gales ed., 1834).

those "who are of no religion," as Scott demanded? Or, equal exemptions for all who are "conscientiously scrupulous of bearing arms," as the Pennsylvania legislature had provided and the Philadelphia revolutionaries demanded?

In any case, the existence of some discriminatory exemptions in the revolutionary era does not prove that free exercise requires or permits such exemptions, any more than the fact that the Congress that enacted the Fourteenth Amendment also provided for segregated schools proves that equal protection requires or permits segregation. It may simply show that some of the framers did not appreciate the full scope of the principles they enacted, or that they were not always true to those principles. Alternatively, it may be a powerful reason to reject originalism itself (especially the cruder forms of originalism that focus on specific intent). Religious equality, rather than religious exemptions, was the focus in founding-era discussions, and the Philadelphia debates, like the wording of the Constitution's Oath or Affirmation Clauses, suggest that many saw a conflict between the two.

B. The Fourteenth Amendment

Although most scholars exploring the historical meaning of the Free Exercise Clause have focused on understandings of the clause at the time of the adoption and ratification of the First Amendment in 1789-1791, Kurt Lash focuses instead on understandings at the time of the adoption and ratification of the Fourteenth Amendment in 1866-1868.[157] Because under current doctrine the First Amendment applies to the states by virtue of its incorporation in the Fourteenth Amendment, Lash argues that, in ascertaining the meaning of the former, it may be necessary to consider the views of the framers and ratifiers of the latter.[158] In Lash's view, the Free Exercise Clause as originally enacted in 1789-1791 was understood only to prohibit laws directed at religion as such; it was most likely not understood to require exemptions from generally applicable laws.[159] In fact, Lash argues, champions of religious freedom like Madison and Jefferson would likely not have anticipated any need for exemptions, because as long as government and religion were confined to their proper separate spheres, any conflict between the two "would involve only trivial matters."[160]

However, Lash argues, by the time the Fourteenth Amendment was adopted, the general understanding of the Establishment Clause had changed dramatically, and the need for religious exemptions was widely recognized.[161] Therefore, Lash argues that the Fourteenth Amendment did not simply incorporate the First Amendment as originally understood in 1789. Rather, "the Free Exercise Clause was adopted a second time through its incorporation into the Privileges or Immunities Clause of the

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[157] Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

[158] *Id.* at 1109.

[159] *Id.* at 1111-18.

[160] *Id.* at 1117.

[161] *Id.* at 1141-46.

Fourteenth Amendment,"[162] and therefore, the former must now be read according to the intentions of the framers of the latter in 1866-1868.[163]

Lash's claim is highly problematic. Although during the twentieth century the Supreme Court gradually held most of the protections of the first eight amendments applicable to the states through a process of selective incorporation, there is little evidence that this approach is consistent with the original understanding.[164] During the debates over the Fourteenth Amendment, only one member of Congress, the radical Senator Jacob Howard of Michigan, claimed unequivocally that it incorporated "the first eight amendments."[165] Even Howard did not specifically refer to the Religion Clauses, although he did refer to the other clauses of the First Amendment. Furthermore, no other participants in the public debates ever discussed Senator Howard's claim; it appeared "to have sunk without leaving a trace in public discussion."[166] Other speakers in Congress merely claimed that the Privileges or Immunities Clause constitutionalized the protections of property and contract rights guaranteed by the Civil Rights Act of 1866.[167]

Apart from Jacob Howard's isolated and widely ignored remark, Lash cannot point to a single statement made during the framing or ratification of the Fourteenth Amendment specifically indicating that it was understood to incorporate the Free Exercise Clause.[168] The other statements he relies on to support his claim of incorporation all date from the periods prior or subsequent to the enactment of the amendment.[169] The prior statements are, at best, general observations about the importance of religious freedom, but can have limited probative value about the meaning of an amendment that did not yet exist and does not mention religion. The subsequent statements, mostly culled from congressional debates in the 1870's over civil rights legislation, are unreliable as a guide to original meaning because attitudes

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[162] *Id*. at 1109.

[163] *Id*. at 1156.

[164] *See* Boyce, *supra* note 94, at 974-87, 1002-20.

[165] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

[166] See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 69 (1949).

[167] *See, e.g*., CONG. GLOBE, 39th Cong., 1st Sess. 2462 (Rep. Garfield); *id*. at 2465 (Rep. Thayer); *id*. at 2467 (Rep. Boyer); *id*. at 2468 (Rep. Kelley); *id*. at 2511 (Rep. Eliot); *id*. at 2539 (Rep. Farnsworth).

[168] The only other statement Lash relies on that is roughly contemporaneous with the framing and ratification of the Fourteenth Amendment is the argument of Rep. Hart that the rebellious states should not be readmitted until they had established a republican form of government, which in his view required, among other things, that "no law should be made prohibiting the free exercise of religion." *See* Lash, *supra* note 157, at 1148 & 1156 n.192 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1629 (1866)) (Lash's footnotes mistakenly date Howard's and Hart's statements to 1865.). At most, Rep. Hart's statement reflects his understanding of the Republican Guarantee Clause, U.S. CONST. art. IV § 4, and cannot reflect his understanding of the Fourteenth Amendment, which had not yet been introduced.

[169] *See* Lash, *supra* note 157, at 1146-49.

concerning questions of civil rights had evolved very rapidly since the Fourteenth Amendment was enacted.[170]

One critical piece of post-enactment evidence, however, cuts decisively against Lash's claim that the Fourteenth Amendment was understood to incorporate the Free Exercise Clause. [171] The failed Blaine Amendment, debated in Congress in 1875-1876, contained language explicitly incorporating the First Amendment Religion Clauses against the states: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."[172] If the Fourteenth Amendment were generally understood to incorporate the Religion Clauses, it is exceedingly odd that no one objected to this clause in the Blaine Amendment as redundant on that ground. Yet, as Daniel Conkle and others have shown, "[t]he record is replete with evidence that the Blaine Amendment's application of the religion clauses to the states was not thought superfluous by either [its] supporters or . . . opponents."[173] Because the Congress that debated the Blaine Amendment contained many of the framers of the Fourteenth Amendment, the inference seems "inescapable"[174] that those framers did not understand the Fourteenth Amendment to incorporate the Religion Clauses.

Unsurprisingly, given the lack of evidentiary support, Lash devotes little discussion to the claim that the Fourteenth Amendment was understood to incorporate the Free Exercise Clause. Instead, he devotes most of his argument to the claim that the framers of the Fourteenth Amendment (unlike the original framers of the First Amendment) understood free exercise to require exemptions from generally applicable laws. Here, persuasive evidence is also lacking. Lash discusses three sorts of evidence. First, in 1860, Congress enacted generally applicable legislation outlawing polygamy in the territories, without providing an exemption for Mormons, whose religiously-motivated practices were no doubt the primary target of the law.[175] This law, as Lash recognizes, actually points strongly *against* his view,

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[170] *See, e.g.*, Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885-93, 1903-11 (1995).

[171] In his article on incorporation of the Free Exercise Clause, Lash relegates discussion of the Blaine Amendment to a footnote. *See* Lash, *supra* note 157, at 1147 & 1156 n.188. He does discuss the issue more fully in a subsequent article on incorporation of the Establishment Clause. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1145-50 (1995). Lash stresses the anti-Catholic animus motivating many of the Blaine Amendment's supporters to argue that it provides "rather weak evidence against incorporation." *Id*. at 1150. The fact remains, however, that the first sentence of the Blaine Amendment directly tracks the religion clauses of the First Amendment, explicitly incorporating it against the states, and no one objected that this language was redundant.

[172] H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875).

[173] Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1138 n.124 (1988).

[174] *Id*. at 1139. Conkle's discussion applies to the Establishment Clause, but his argument regarding the Blaine Amendment applies equally to the Free Exercise Clause. *See* DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 22-26 (2d ed. 2009).

[175] *See* Lash, *supra* note 157, at 1124-28.

because it shows that Congress believed that the First Amendment did not require Congress to provide for exemptions from generally applicable regulations of conduct, provided that they did not infringe on the rights of belief and worship.[176]

Second, abolitionists strongly criticized Southern legislation that infringed the religious rights of slaves not only directly (by regulating their religious assemblies) but also indirectly (by prohibiting, for example, antislavery speech, the assembly of blacks at night, or the act of teaching a slave to read or write).[177] But their critique of such general prohibitions on slave speech and assembly does not indicate that the abolitionists believed in constitutionally compelled religious exemptions from valid neutral laws. They did not consider such prohibitions valid neutral laws. They would certainly still have objected to a prohibition on antislavery speech that contained an exemption for sermons from the pulpit, or a prohibition on slave assembly with an exemption for religious gatherings, or a prohibition on teaching a slave to read with an exemption for Bible study. The fact that they objected to such *illegitimate* broad restrictions on *expression* in no way demonstrates that they advocated religious exemptions to *legitimate* general regulations of *conduct*.

Third, and in Lash's view "[m]ost significantly,"[178] in 1864, "[f]or the first time, the national government mandated a religious exemption from a generally applicable [federal] law," by providing immunity from conscription for conscientious objectors who agreed to perform alternative service or pay a fine.[179] Contrary to Lash's claim, this was not "something new under the sun."[180] It is unsurprising that there was no federal provision for conscientious objectors until the Civil War because no federal conscription had ever been instituted until then. But as we have seen, legislative provisions for conscientious objectors had existed for over a century in America in state and even colonial law and were widely discussed in the 1770s and 1780s.[181] The existence of such a federal provision does nothing to show that the framers of the Fourteenth Amendment entertained different views on the subject than the framers of the First Amendment.

In sum, Lash does not convincingly demonstrate that the Fourteenth Amendment was understood to incorporate the Free Exercise Clause, or that the adoption of the latter altered the meaning of the former. Moreover, if his hypothesis were correct, we would be left with a curious paradox. As enacted in 1791, the Free Exercise Clause (in Lash's view) did not require exemptions; but as incorporated against the states in 1868, it did. If so, then bizarrely, the right of free exercise does not afford

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[176] *See id*. at 1128 (arguing that the polygamy ban "provides insight into the contemporary understanding of the scope of constitutionally protected religious liberty," which rejected the "idea that the free exercise of religion might require immunity from laws passed for the public good."). As Lash observes, Rep. Pryor condemned the principle of religious exemptions as a "pernicious philosophy" with "absurd and mischievous consequences" that would "suffice for the protection of Thugism or Suttee, as well as polygamy." *Id*. at 1156 n.100 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1496 (1860)).

[177] *See id*. at 1131-37.

[178] *Id*. at 1110.

[179] *Id*. at 1145.

[180] *Id.*

[181] *See supra* notes 156, 170, and accompanying text.

the same protection against the national government as against the states. Alternatively, Lash's statements that the framers of the Fourteenth Amendment "amended" the Free Exercise Clause by "adopt[ing it] a second time"[182] may be read as a claim that the Clause is to be applied in its newly transmogrified form, by a kind of double bootstrapping, against the federal government itself. Yet this view is difficult to square with the text of the Fourteenth Amendment, which limits only the states, not the federal government.[183]

IV. RELIGIOUS LIBERTY AND EQUAL TREATMENT

There are a wide range of views on the constitutionality of religion-specific exemptions. Some maintain that such exemptions are constitutionally compelled in some circumstances and permitted in still others; but in either case, religious claims are entitled to special treatment not afforded to other sorts of claims. McConnell and Laycock each articulate different versions of this approach. Section A of this Part discusses the problems raised by their arguments. Others argue that religion-specific exemptions, while not required, may constitutionally be enacted by the legislature. Section B addresses the constitutional and institutional reasons for rejecting such arguments in favor of a requirement that the state must treat individuals equally regardless of their religious views.

In brief, the equal-treatment approach rests on the following basic principles. Equality of treatment is the central principle of our constitutional order. As Madison said in discussing religious exemptions, equality "ought to be the basis of every law."[184] To require or permit exemptions only for religious but not secular individuals profoundly violates that constitutional principle. Because the free exercise of religion necessarily entails the freedom to believe as well as disbelieve, granting exemptions only to believers also violates the core values underlying the Free Exercise Clause. A regime of religious exemptions inevitably requires government inquiry into the nature and sincerity of religious belief. A general regime of religious exemptions from every law not deemed compelling would undermine the rule of law itself, by largely removing religious individuals and institutions from its jurisdiction. The attempt to confine exemptions by the principle of "substantive neutrality," which requires that any religion-specific exemptions create no religious incentives, is incoherent. All religious exemptions create religious incentives. A regime of targeted legislative exemptions entails many of these same problems and raises the specter of divisive political jockeying among sects for preferential treatment.

A. Constitutionally Compelled Accommodation

Michael McConnell's argument for accommodation rests on a series of interrelated claims (in addition to his claims about original understanding discussed above): that the accommodationist approach is most consistent with the text of the Religion Clauses; that it best achieves the purpose of the Clauses, which is to protect

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[182] Lash, *supra* note 157, at 1156, 1109.

[183] Arguably the Supreme Court itself employed a similar bootstrapping in *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying equal protection to the federal government). But the decision cannot be defended in originalist terms, and the Court wisely did not attempt to do so.

[184] MADISON, *supra* note 131, at 31.

the individual's duties to God as an inalienable right prior to the claims of the state and of political majorities; and that failure to make special accommodation for religion would severely interfere with religious freedom.[185] As discussed below, McConnell's position is premised on the nonsequitur that because the state may not dispute the truth of religious claims, it must defer wherever possible to religiously motivated individuals.

Douglas Laycock's relatively more modest argument rests not on a presumption of truth for religious claims, but rather on "secular propositions": "that governmental attempts to suppress disapproved religious views have created vast human suffering"; that core religious beliefs "are often of extraordinary importance to the individual"; and that such beliefs—"beliefs about theology, liturgy, and church governance—are of little importance to the civil government."[186] These propositions may readily be conceded. But they do not answer the crucial questions: Why should the state accommodate claims of conscience rooted in religious but not secular considerations? And when core religious beliefs (which the state certainly may not regulate) extend beyond "theology, liturgy, and church governance" to motivate conduct that conflicts with legitimate concerns of government, which must give way?

Underlying these arguments is the issue of whether the state can or must treat religious claims not merely as distinctive, but constitutionally unique.[187] For these purposes, McConnell and Laycock both agree that it may, but they differ as to what constitutes a "religious claim." Although McConnell concedes that the opinions and speech of nonbelievers are constitutionally protected, with regard to conduct that extends beyond belief and communication, he insists that nonbelievers are not protected equally with believers.[188] In contrast, Laycock argues that the Constitution requires neutrality between believers and nonbelievers not only with respect to belief and speech, but also with respect to conduct.[189] The following discussion defends neutrality between believers and nonbelievers, but rejects the accommodationist claim that neutrality requires *unequal* treatment, and that moral commitments (or in McConnell's case, only religious commitments) entitle their holder to a constitutional presumption of immunity from compliance with the law.

1. Textualist Arguments

McConnell argues that the very text of the Constitution itself singles out religion not just for equal treatment, but for special treatment.[190] This textual singling out of

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[185] *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688-94 (1992) [hereinafter McConnell, *Update*].

[186] Douglas Laycock, *Religious Liberty As Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996) [hereinafter Laycock, *Religious Liberty*].

[187] *See* Eisgruber & Sager, *Chips Off Our Block*, *supra* note 26, at 1274.

[188] *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10-11 (1985) [hereinafter McConnell, *Accomodation*].

[189] *See* Laycock, *Religious Liberty*, *supra* note 186, at 331.

[190] *See, e.g.*, McConnell, *Singling Out Religion*, *supra* note 24, at 9 ("The very text of the Constitution 'singles out' governmental acts . . . prohibiting the exercise of religion for special protections that are not accorded to any aspect of human life.").

religion, he argues, is rooted in a concern "with the preservation of the autonomy of religious life" that entails a "substantive, not formal" protection.[191] Equal treatment of believers and nonbelievers is textually implausible, he maintains, because it "treats the Religion Clauses as specialized equal protection provisions."[192] "Paradoxically, this view would make the Religion Clauses violate the Religion Clauses, since the Religion Clauses 'single out' religion by name for special protections."[193]

Furthermore, McConnell and other advocates of special treatment of religiously motivated conduct argue that the term "exercise" of religion necessarily extends beyond expression of belief, religious association, and worship to include "all actions stemming from religious conviction."[194] On this view, if the substantive protections accorded to religious conduct did not extend beyond the protections afforded other forms of conduct (most importantly, the First Amendment's protection of expression and association), then the protections of the Free Exercise Clause would be rendered "more or less superfluous."[195]

These arguments are unpersuasive. The Free Exercise Clause does have a substantive component, which clarifies that the broad rights of expression and association protected by the Speech, Press, and Assembly Clauses also extend to the sphere of religious expression and association. The various provisions of the First Amendment should be read *in pari materia*. This interpretation does not render the Free Exercise Clause redundant because it treats that clause, in part, as specifying that the same broad protections accorded to core political speech and association shall also be accorded to religious speech and association.[196] This was hardly self-evident in the eighteenth century, when the freedom of expression was construed much more narrowly than today. While the right to "free exercise" substantively protects religious expression and association, neither the constitutional text nor history support the accommodationist claim that it protects all conduct subjectively perceived by the actor as motivated or compelled by religion.[197]

The Free Exercise Clause also contains an equality component; but, like the Equal Protection Clause of the Fourteenth Amendment, it guarantees equality of treatment, not equality of result from the subjective perspective of each affected believer. Proponents of equal treatment readily recognize that their approach to religious liberty is largely congruent to the current approach to constitutional equal

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[191] McConnell, *Update*, *supra* note 185, at 690.

[192] *Id*. at 691.

[193] *Id*.

[194] McConnell, *Origins*, *supra* note 93, at 1459.

[195] Eduardo Moisés Peñalver, *Treating Religion As Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 FORDHAM L. REV. 2241, 2250 (2006). *See generally id*. at 2241, 2249-52.

[196] *Cf*. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise As Expression*, 67 MINN. L. REV. 545 (1983).

[197] *See* Hamburger, *Religious Exemption*, *supra* note 100, at 933-46; West, *supra* note 133, at 623-33.

protection in other areas.[198] This obviously did not render the Free Exercise Clause redundant when it was enacted in the eighteenth century, almost eighty years before the Fourteenth Amendment's more general guarantee of equality.[199] Indeed, part of the enormous historical significance of the Free Exercise Clause is that it was one of the first constitutional embodiments of a principle of equality that was later broadened to other spheres.[200] Nor does it render the Free Exercise Clause redundant today, for it continues to specify that religion, like race and gender, is generally not a permissible basis for government discrimination.

Interpreting the Free Exercise Clause as a guarantee of equal liberty harmonizes that clause with the First Amendment's freedoms of speech and association and the Fourteenth Amendment's guarantees of equal protection. This is not a weakness but a strength. Under this approach, governmental classifications that expressly discriminate based on religion, like those that discriminate based on race or sex, are treated as presumptively illegitimate. However, facially neutral classifications that merely have a disparate impact on adherents of a particular religion, like those that have a disparate impact on members of a particular race or sex, should not be deemed presumptively invalid unless the government specifically intended to cause the disparate impact.[201]

2. The Claim of Priority for Religion

McConnell argues that religious liberty is premised on the priority of religious claims over secular claims.[202] He contends that the state "cannot reject in principle the possibility that a religion may be true; and if true, religious claims are of a higher

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[198] *See, e.g*., Kurland, *supra* note 25, at 5 (stating that the Religion Clauses should be "read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause"); EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 70 (observing that under their interpretation, "the religion clauses express equality norms that . . . are much like the more general norms in the Equal Protection Clause.").

[199] *Cf.* Krotoszynski, *supra* note 108, at 1214 ("At the time of the framing of the Bill of Rights, no Equal Protection Clause existed.").

[200] *Cf.* EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 70 ("It is entirely sensible to think of the religion clauses as one of the Constitution's first encounters with concerns over the equal status of members of our political community.").

[201] *See, e.g*., Washington v. Davis, 426 U.S. 229 (1976) (upholding use of civil service exam with racially disparate impact absent proof of discriminatory intent); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (discussing requirement of proof of intent); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (holding that the principles of *Washington v. Davis* and *Arlington Heights* "apply with equal force to . . . gender discrimination"); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527 (1993) (striking down an ordinance prohibiting religious ritual slaughter of animals but not non-ritual slaughter). The *Lukumi* Court expressly applied "an equal protection mode of analysis" to claims of religious discrimination, citing both *Arlington Heights* and *Feeney*. *Id.* at 540. Although Justice Kennedy's opinion for the Court thus treated the Hialeah ordinance as facially neutral, *see id*. at 534, Justice Scalia argued that it was facially discriminatory, obviating any need for inquiry into intent. *See id*. at 557-59 (Scalia, J., concurring in part).

[202] *See* McConnell, *Accommodation*, *supra* note 188, at 15-16.

order than anything in statecraft."[203] Because "religious claims—if true—are prior to and of greater dignity than the claims of the state,"[204] the state may yield, at least "on issues of less than compelling importance."[205]

McConnell's conclusion does not follow from his premise. Because a true religious claim is by hypothesis "higher than anything in statecraft," no state interest, no matter how compelling, could ever trump it.[206] It is hard to see why the state should *ever* prevail under such circumstances. Moreover, because religious claims conflict, they cannot *all* be true. Confronted by the believer's assertion of a religious claim, the state is faced with a choice. It may evaluate the truth of the claim, or it may refuse to do so. But the state cannot evaluate the truth of religious claims without thereby establishing the "true" religion as the religion of the state. As McConnell seems to acknowledge, that is impermissible.

Because the state may not evaluate the truth of religious claims,[207] McConnell suggests that it should simply defer to such claims. This is a formula for chaos and paralysis. What one person's religion prohibits, another's commands. If the state simply defers to all religious claims, then its very existence and the rule of law are at an end. In the face of religious claims that racial discrimination, or slavery, or human sacrifice are required, the merely secular interests of the state must, perforce, give way. Recognizing this, McConnell seeks to limit accommodation to issues of "less than compelling importance."[208] But given the hypothesis that religious claims (if true) are absolutely prior to all state interests, it is hard to see why the line should be drawn at "compelling" state interests, rather than "substantial" or "legitimate" ones. It is precisely because the state is prohibited from evaluating the truth or falsity of religious claims that it may *not* grant religious claims of exemption from the rule of law on the ground that the religious claim "may be true."

3. Pluralism

McConnell also makes an institutional argument for a privileged constitutional status for religion based on its role in developing "mediating structures" between the state and the individual.[209] Because civil society, especially in a republic, depends in part "on the citizens' commitment to order and morality," and because those values

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[203] *Id*. at 15.

[204] *Id*.

[205] *Id*. at 15-16.

[206] *Cf*. Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification for Free Exercise Exemptions*, 47 DRAKE L. REV. 35, 41-42 (1998); William P. Marshall, *What is the Matter With Equality?: An Assessment of Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 205-07 (2000); *see also* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 73-75 (1998) (critiquing the view that allegiance to the religious sovereign justifies violent disobedience to temporal authority, such as the killing of physicians who perform abortions).

[207] *Cf*. United States v. Ballard, 322 U.S. 78, 87 (1944) (holding that the First Amendment forbids the trier of fact to evaluate the truth or falsity of religious beliefs).

[208] McConnell, *Accommodation*, *supra* note 188, at 16.

[209] *Id.* at 17.

cannot be supplied by the liberal state itself, "[p]rivate associations—families, civic groups, colleges and universities, above all, churches—supply the need" for "[a] source of public virtue outside the government."[210] "The special status of religion," according to McConnell, "derives in large part from these considerations."[211]

McConnell's pluralist argument fails for at least three reasons. First, while religion can in fact be an important source of virtue and morality, it can also be a source of hatred and intolerance. Abolitionism in the nineteenth century and the civil rights movement of the twentieth century were strongly rooted in religious values; but slaveholders and opponents of civil rights also claimed to find justification in religion. Many faiths proclaim the equality and dignity of all humanity; others teach hatred and subordination based on religion, race, gender, and sexual orientation.[212] Religious bigotry, as Madison observed, has led to the spilling of "[t]orrents of blood,"[213] which has continued into the modern era, from Northern Ireland, to Bosnia, to Israel and Palestine, to Sudan, to Iraq, and to Indonesia (to name just a few examples). It is by no means self-evident that religion is uniquely a force for "order and morality."

Second, McConnell's institutional argument would seem to privilege organized religion over individual religious belief. It presupposes a view under which religious institutions are assigned primary responsibility for defining and transmitting moral values, and thereby diminishes the role of individual conscience.[214]

Third, while religious organizations no doubt have an important role in developing social morality, secular institutions, including the family, educational, civic, and fraternal organizations also have an important role to play, as McConnell himself observes. The pluralist argument may suggest a strong constitutional protection for the rights of association in general, but does not demonstrate that religion should receive special protection in preference to all other institutions.

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[210] *Id.* at 16-17.

[211] *Id*. at 18.

[212] To cite just two examples in the area of race: According to doctrines of various racist churches in the Christian Identity movement, such as the Church of Jesus Christ-Christian, non-whites are subhuman "mud-races" without souls or a spiritual connection to God. CHESTER L. QUARLES, CHRISTIAN IDENTITY: THE ARYAN AMERICAN BLOODLINE RELIGION 68 (2004). According to the doctrine of the Nation of Islam as proclaimed by Elijah Muhammad, the white race was created by the eugenic experiments of a "big-head scientist" named "Mr. Yacub" who left Mecca for the island of Patmos with 59,999 followers to create a "bleached-out white race of devils." *See* MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 164-67 (Ballantine Books 1983) (1965).

[213] MADISON, *supra* note 131, at 34.

[214] *Cf.* Marshall, *supra* note 206, at 204 (arguing that "if the goal is promoting pluralism, protecting religious belief is overinclusive" because much religious belief is rooted in individual conscience rather than community traditions); *see also* WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 151 (2005) (arguing that the concept of religious freedom has "arguably become a force for intolerance" because it is deployed to privilege organized religion at the expense of less conventional religious views).

4. Incentives and Practical Considerations

In addition to their theoretical arguments, McConnell and Laycock also raise pragmatic concerns. The erstwhile originalist McConnell suddenly adopts a flexible and purposive approach to constitutional interpretation when he suggests that because "[t]he growth of the modern welfare-regulatory state has vastly increased the occasions for conflict between government and religion," a "recognition of the special character and needs of religion" is even more important today than it was in 1789.[215] Because he must concede that the originalist case for accommodation is "not beyond doubt," he argues that, under modern circumstances, these practical concerns render the accommodationist position "more compelling."[216] Accommodations, he claims, are necessary to protect religious minorities not just from "overt hostility," but from the "ignorance and indifference" of modern political majorities.[217]

At the same time, like all advocates of "substantive neutrality," he must recognize some limits to accommodation. The fundamental premise of "substantive neutrality" is that government must act in such a way as neither to encourage nor discourage religion. Thus, an accommodation must facilitate religion without inducing individuals to adopt or feign religious belief or practice.[218] But this is a very difficult line to tread. As Laycock recognizes, because "[i]t requires judgments about the relative significance of various encouragements and discouragements to religion," "substantive neutrality is harder to apply than formal neutrality."[219] It also "requires a baseline from which to measure encouragement and discouragement."[220] It "requires more judgment" and is thus "more subject to manipulation by advocates and . . . judges."[221] These are serious problems.

For Laycock, the "most striking example" of the inadequacy of formal neutrality is the exemption for sacramental wine under the National Prohibition Act.[222] This exemption, he notes, "undeniably classified on the basis of religion," making it "lawful to consume alcohol in religious ceremonies, but not otherwise."[223] Under formal neutrality, this exemption would be unconstitutional, but without the

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[215] McConnell, *Accommodation*, *supra* note 188, at 23-24.

[216] McConnell, *Update*, *supra* note 185, at 694.

[217] *Id*. at 693.

[218] *See* McConnell, *Accommodation*, *supra* note 188, at 35-37; Laycock, *Neutrality*, *supra* note 23, at 1001.

[219] Laycock, *Neutrality*, *supra* note 23, at 1004.

[220] *Id*. at 1005.

[221] *Id*. at 1004.

[222] *Id*. at 1000. The Eighteenth Amendment prohibited the manufacture, transportation, and sale of "intoxicating liquors" for "beverage purposes." U.S. CONST. amend XVIII, cl. 1 (repealed by U.S. CONST. amend. XXI in 1933). This was understood to permit exceptions for sacramental and medicinal purposes, which were codified in the National Prohibition Act, also known as the Volstead Act. *See* Act of Oct. 28, 1919, Pub. L. No. 66, 41 Stat. 305, *invalidated by* U.S. CONST. amend. XXI (1933).

[223] Laycock, *Neutrality*, *supra* note 23, at 1000.

exemption, it would be "a crime to celebrate the Eucharist or the Seder."[224] In contrast, under "substantive neutrality," the exemption would be constitutionally required, because without the exemption, the prohibition of alcohol "would discourage religious practice in the most coercive possible way—by criminalizing it."[225]

This example is too simple and perhaps somewhat misleading. It would certainly be possible to draft an exemption for ceremonial or celebratory use of alcohol (perhaps in limited quantities) in a religion-neutral manner that would not offend formal neutrality. Although such an exemption might not be constitutionally required under formal neutrality, it is politically unthinkable that some such exemption would not be enacted. Moreover, at least at a national or state level, the return of Prohibition is itself politically unthinkable. The centrality of wine in many Western religious practices is one aspect of its centrality in the broader Western culture. The debacle of Prohibition has shown both the injustice and futility of attempts at suppression of such a central cultural practice.

Furthermore, as Laycock concedes, "[t]o *exempt* sacramental wine is not perfectly neutral either."[226] From the perspective of formal neutrality, the issue is simply whether the exemption treats adherents of religions that make sacramental use of wine differently from nonadherents. From the perspective of substantive neutrality, the issue is whether it creates an incentive to become an adherent. Laycock airily dismisses that possibility: "It is conceivable that the prospect of a tiny nip would encourage some desperate folks to join a church that uses real wine . . . but only to a law professor or an economist."[227] This may be true of the Christian Eucharist, where typically sacramental wine is consumed (if at all) in small symbolic quantities. However, there are certainly religions past and present (Judaism, for example) in which the ceremonial consumption of wine, while moderate, amounts to more than a "tiny nip."[228] Indeed, the consumption of wine and other substances *specifically as intoxicants* is a central feature of some religions. One need only think of Livy's description of the Bacchanalia, where "wine, lascivious discourse, night, and the intercourse of the sexes . . . extinguished every sentiment of modesty" and "debaucheries of every kind began to be practised."[229]

Therefore, a general exemption to prohibition for all sacramental use of wine (regardless of the quantity used) would not be neutral from the perspective of "substantive neutrality." Otherwise it could encourage religious observance by the bibulous—perhaps a sudden neopagan revival of Dionysian religion among alcoholics—and hence would not be neutral. But an exemption for consumption of

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[224] *Id*.

[225] *Id*.

[226] *Id*. at 1003.

[227] *Id*.

[228] In Judaism, the prescribed quantity is a cup ("revi'it"—3 to 5 ounces, depending on the authority followed) on the Sabbath, and four cups at the Passover Seder, rather more than a "tiny nip."

[229] 4 TITUS LIVIUS, THE HISTORY OF ROME 1799 (William A. M'Devitte trans. 1885) [AB URBE CONDITA 39.8].

sacramental wine in tiny symbolic quantities only would not really be substantively neutral either. It accommodates mainstream Christianity but discriminates against minority faiths (Judaism, neopaganism). This is precisely the problem substantive neutrality claims to avoid. Almost any exemption solely directed at religion creates a potential incentive for religious adherence (whether genuine or feigned[230]) in order to qualify for the exemption. The central claim of "substantive neutrality"—that it is possible that a regime of exemptions for religion alone can "minimize the extent to which it either encourages or discourages religious belief or disbelief"[231]—is incoherent.

5. The Scope of Free Exercise Protection

Although McConnell and Laycock agree that religion is entitled to special exemptions from general laws, they disagree over what counts as "religion." At the level of belief, McConnell would concede that "[r]eligious liberty demands some degree of neutrality between religion and unbelief," that is, "each person must be as free to disbelieve as he is to believe."[232] At the level of conduct, however, there can be "no coherent requirement of neutrality—between religion and unbelief" because unbelief "does not in itself generate a moral code,"[233] and "absolute neutrality between religious and nonreligious moral convictions cannot be squared with the constitutional text."[234]

McConnell's argument that nonreligion does not by itself generate a moral code is correct, although it is possible to imagine moral choices that are rooted in a rejection of religious views. For example, a person who rejects belief in an afterlife might conclude for that reason that life is especially valuable and worthy of respect. However, often the ethical beliefs of the nonreligious are not specifically rooted in their rejection of religion. Nonbelievers themselves have differed over whether to characterize their views as "religious." For example, while the First Humanist Manifesto of 1933 characterized humanism as a "new religion," subsequent Manifestos dropped that characterization.[235] Whatever distinctions might be drawn today between "religion" and "conscience," the framers did not generally contemplate a separation between the two. John Adams wrote that "while

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[230] In *Braunfeld v. Brown*, Chief Justice Warren highlighted this problem, suggesting that recognizing a constitutional exemption from Sunday-closing laws for orthodox Jews on grounds of economic hardship might tempt some to maintain false claims of religious scruples, entailing a constitutionally problematic inquiry into the sincerity of religious beliefs. Braunfield v. Brown, 366 U.S. 599, 609 (1961).

[231] Laycock, *Neutrality*, *supra* note 23, at 1001.

[232] McConnell, *Accommodation*, *supra* note 188, at 10.

[233] *Id*. at 10-11; *see also* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 975 (2004) ("The difficulty with exemption claims by atheists and agnostics lies not in whether their views are religious, but in whether their conduct actually follows from the demands of those views.").

[234] McConnell, *Accommodation*, *supra* note 188, at 12.

[235] *See* Laycock, *Religious Liberty*, *supra* note 186, at 328-29.

Conscience remains there is some Religion."[236] In any case, if, as McConnell concedes, religious freedom requires that each person be as free to believe as to disbelieve, it is hard to understand why only the deep moral convictions of the believer should be entitled to special constitutional solicitude.

Laycock, on the other hand, insists that "the law should protect nontheists' deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers."[237] He argues that this is because the conscientious "moral obligations of nontheists" are "functionally equivalent to the protected moral obligations of theists."[238] Of course, those who (unlike Laycock) reject unique constitutional privileges for religion make a similar argument.[239]

Moreover, genuine equality demands more than equal treatment of religious claims on the one hand and only secular "ethical" or "moral" claims on the other. Religion is more than just ethics or morality. Not all religious obligations are rooted in purely ethical considerations; many are instead rooted more in the cultural traditions of a particular religious community. Many religious obligations, such as obligations concerning dress, grooming, diet, and even sexual conduct may be of the latter sort[240] (although sometimes even such obligations may be rooted concepts of right and wrong). Such concerns often matter as much to secular individuals as to religious individuals. To exempt religious but not secular individuals from constraints in such areas (on the ground that the secular claim is not rooted in "morality") bespeaks a profound failure of equal regard.

The debate over the scope of religious liberty has raged not just among academics but on the Supreme Court as well. For the most part, however, discussions on the Court have focused on the establishment rather than free exercise, especially since *Smith* abandoned the compelled exemptions doctrine. For at least half a century, the Supreme Court has insisted that the Religion Clauses broadly protect the freedom of conscience of all Americans, both religious and nonreligious. The Court has held that neither the federal nor state governments may "pass laws

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[236] Letter from John Adams to Thomas Jefferson (Apr. 19, 1817), *in* 2 THE ADAMS-JEFFERSON LETTERS 509 (Lester J. Capon ed. 1959). Freedom of conscience was the paramount concern in discussions of religious liberty in the founding era, and central to the original understanding of free exercise. *See* Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 891-929 (1995).

[237] Laycock, *Religious Liberty*, *supra* note 186, at 331.

[238] *Id*.

[239] *See*, *e.g*., EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 52.

[240] For example, in Judaism the prohibition of murder or rape is rooted in the view that those actions are intrinsically evil (even for Gentiles), while the traditional prohibition of cutting one's beard or having sex during menstruation are rooted in concepts of ritual purity applicable only to Jews. The Hebrew scriptural texts (and their Greek translations) typically use different terms for these two types of obligation, using *zimah* (moral wrong, in Greek *anomia*) for the former and *toevah* (ritual impurity, often translated as "abomination," in Greek *bdelygma*) for the latter. JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 100-05 (1980).

which aid one religion, aid all religions, or prefer one religion over another."[241] In its most recent pronouncement on the subject, the Court has continued to insist that the "touchstone" of constitutional analysis is that the "First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."[242]

Today, however, this view does not command unanimous assent on the Court. Justice Rehnquist insisted that the drafters of the Establishment Clause did not intend it to "require government neutrality between religion and irreligion."[243] More recently, Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justice Thomas, maintained that not only may the government favor religion over irreligion, it may favor monotheism and the belief that God takes an active concern in human affairs.[244] "[I]t is entirely clear," he wrote, "that the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[245]

The implications of such a position would be that not only could the government enact special exemptions that treat believers and nonbelievers unequally, it could even enact exemptions that discriminate among believers. It could create exemptions for traditional Christians, Muslims, and Jews while refusing to accommodate polytheists such as Hindus or atheistic faiths such as Theravada Buddhism. Not only is such a position deeply at odds with our constitutional commitment to equality, it has the potential to create enormous strife and resentment in a nation that is increasingly religiously diverse. Justice Scalia attempted to bolster his position by a misleading appeal to numbers—as if constitutional rights should be decided by a majority vote—by citing statistics that "97.7% of all believers" (evidently nonbelievers do not count) adhere to the monotheistic faiths of Christianity, Judaism, and Islam.[246]

In fact, however, recent studies have shown quite significant increases both in secularism and religious diversity among the U.S. population. A 2001 CUNY study found that some 20% of Americans declined to identify themselves as monotheists and that the "greatest increase in absolute as well as in percentage terms has been

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[241] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[242] McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (quoting Epperson v. Ark., 393 U.S. 97, 104 (1968) (emphasis omitted)).

[243] Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); *see also id.* at 98, 113.

[244] *McCreary County*, 545 U.S. at 885-900 (Scalia, J., dissenting). Justice Kennedy did not join this part of Justice Scalia's dissent, although he joined the rest of the opinion. *Id.* at 885.

[245] *Id*. at 893. Justice Scalia qualifies this position when he concedes that "the principle that the government may not favor one religion over another" is valid "where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue." *Id*. (citations omitted). But this statement, and the cases he cites to support it (involving aid to parochial schools and the criminalization of the killing of animals only in a religious but not a secular context), do not make clear where he would draw the line between permissible and impermissible forms of government discrimination among religions.

[246] *Id*. at 894 (citing a Census Bureau report).

among those adults who do not subscribe to any religious identification."[247] Among Christian groups, there was enormous growth in nondenominational believers, while among non-Christian groups, Hindus, Buddhists, and adherents of Native American religions registered explosive growth.[248] Overall, the picture is not only one of increasing religious diversity but also increasing secularism, especially among the young, and an apparent decline of institutionalized religion.[249] A more recent 2008 Pew study confirms this trend towards increased religious diversity, although unlike the CUNY study, it made no specific attempt to measure the extent of monotheism.[250] It noted that although the United States remains less secular than other developed nations, the number of Americans without religious affiliation has grown significantly in recent decades, reflecting a trend toward secularization.[251]

This increasing diversity, coupled with the wide scope of the modern regulatory state, renders the sort of wide-ranging exemptions envisioned by the advocates of "substantive neutrality" increasingly problematic as a practical matter. Whereas in earlier times the much more limited range of religious beliefs and the predominantly institutional nature of religion limited the number of claims of exemption, in an increasingly diverse society, such claims under "substantive neutrality" can multiply virtually without limit. As such claims multiply, the potential for resentment and religious conflict increases. At the same time, the possibility that a regime of general exemptions will induce claimants to adopt or feign belief in order to qualify for an exemption becomes ever greater. For, to the extent religion is increasingly a purely personal, non-institutional commitment, by what standard can the courts gainsay the validity of such claims? "Substantive neutrality," which was always at odds with the rule of law, and never consistently applied or even capable of consistent application, only becomes increasingly impossible under such conditions.

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[247] BARRY KOSMIN, EGON MAYER & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 13, 10 (2001), *available at* http://www.gc.cuny.edu/faculty/research_briefs/aris.pdf. This study found that those without any religious identification grew from 8% of the population in 1990 to over 14% in 2001. *See id*. at 13. For discussions of the significance of this report in relation to Justice Scalia's statistical claims, see Steven Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV.1, 19-20, 45-46 (2007); NUSSBAUM, *supra* note 21, at 269.

[248] KOSMIN ET AL., *supra* note 247, at 12-13.

[249] *Id*. at 5-6, 14, 21.

[250] *See* PEW FORUM ON RELIGION IN PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5-6 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf. This survey found that 92% of Americans believed in "God or a universal spirit," although only 71% were "absolutely certain" in this belief. *Id.* 163-64. In the report's summary, a respondent's belief in "God or a universal spirit" is repeatedly and misleadingly equated with a belief "in God." *See, e.g.*, *id*. at 4, 5-6. The survey made no attempt to register separately the views of those (like many Hindus, Buddhists, agnostics, and others) who may believe in a universal spirit but reject belief in a single God. But it found that only 60% of all respondents believed in a "personal God." *Id*. at 164.

[251] *Id*. at 5.

B. Constitutionally Permitted Legislative Accommodation

The concerns about equal treatment that render judicial exemptions that single out religion as unconstitutional apply with equal force to legislative exemptions. In addition, for institutional reasons, legislatures are even less likely than courts to act equitably and impartially in enacting exemptions. Broad religious exemptions raise somewhat different constitutional concerns than narrow ones, but both must be regarded as impermissible. This does not mean that legislatures may not accommodate, merely that they must do so in a religion-neutral manner.

1. Institutional Competence of Courts and Legislatures

Several scholars maintain that although the Constitution does not mandate special exemptions for religion, and therefore courts may not impose them, the legislature, nevertheless, is constitutionally permitted to enact such exemptions. In *Smith*, the Supreme Court itself endorsed this view.[252] The Court did not provide an extensive theoretical justification for its position, but it did suggest that it was rooted in issues of institutional competence. The Court doubted that "the appropriate occasions for [exemptions] can be discerned by the courts" or that judges are capable of "weigh[ing] the social importance of all laws against the centrality of all religious beliefs."[253]

Some scholars who defend legislative, but not judicial, exemptions for religion have elaborated this institutional competence argument. For example, Marci Hamilton argues that "[r]eligious accommodation is a legislative, not a judicial, function"[254] because only legislatures are competent to make the complex policy determinations involved in weighing claims of individual liberty against the broader public good. Courts, in contrast, are in Hamilton's view not merely "somewhat less qualified to make determinations of the public good," rather, "they are incompetent to do so."[255] Hamilton endorses legislative exemptions directed only at religious practices, and rejects the equality-based approach of Eisgruber and Sager, on the grounds that religion is categorically different from other concerns,[256] and that an equality-based approach will insufficiently protect religious freedom.[257] As examples of permissible legislative exemptions, Hamilton cites federal and state

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[252] *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

[253] *Id*.

[254] MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 295 (2005).

[255] *Id*. at 297.

[256] *Id*. at 294 ("[A]s a matter of cultural description, religion is simply different from other deeply held convictions, because it is an illogical belief that defines an individual's entire worldview. Religion is about the search for the meaning of existence itself."). It is not clear, however, that religious beliefs are always illogical, that they always define the individual's entire worldview, or that nonreligious approaches to the search for the meaning of existence are presumptively of less constitutional concern than religious approaches.

[257] *Id*. (claiming inaccurately that Eisgruber and Sager's approach "is satisfied by a law that throws all believers in jail, because they are all treated equally.").

exemptions for the religious use of peyote, the exemption for sacramental wine during prohibition, and the exemption for the wearing of yarmulkes in the U.S. military.[258]

Similarly, William Marshall argues that judicial balancing of exemption claims will inevitably yield unpredictable and inconsistent results, because in a particular case, a court weighs the state interest against the interest of the particular claimant for exemption only, not the regulated class as a whole.[259] This inevitably "leads to underestimating the strength of the countervailing state interest," because that interest will rarely seem threatened in the face of a claim for a handful of exemptions, but will appear "'compelling' only in relation to cumulative concerns."[260] On this view, courts will tend to *overenforce* religious liberty by granting unwarranted exemptions. Marshall regards statutory exemptions as potentially less problematic,[261] although he argues that exemptions for religious conduct, but not comparable secular conduct, remains troubling.[262]

Eisgruber and Sager advance an argument that is almost the opposite of Marshall's, but they similarly conclude that legislatures, not courts, bear primary responsibility for crafting exemptions.[263] Judges, they argue, may often tend to *underenforce* religious liberty by declining to grant exemptions because they are ill-equipped to evaluate their social costs.[264] They maintain that, in such cases, it is appropriate for legislatures to bear primary responsibility for protecting constitutional rights.[265] But such legislative exemptions for religion "are permissible if and only if they are reasonable efforts to guarantee (rather than undermine or depart from) the equal distribution of liberty."[266] Such legislative exemptions ought to extend "not only to religious practices but to other, comparable activities"; if they do not, "the courts should broaden the exemption (through either constitutional review or statutory interpretation) to include religious or secular groups with equally compelling claims of conscience."[267] If courts cannot "broaden the exemption so that it applies equally," they must strike it down.[268]

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[258] *Id*. at 280-81.

[259] *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311-12 (1991)[hereinafter Marshall, *In Defense*].

[260] *Id*. at 312.

[261] *Id*. at 323-24.

[262] William Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 242-44 (1995).

[263] EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 240-57.

[264] *Id*. at 254-57.

[265] *Id*. at 255. Eisgruber and Sager seek to ground Congress's authority to enact such exemptions primarily in Section 5 of the Fourteenth Amendment. *See id*. at 253.

[266] *Id*. at 247.

[267] *Id*.

[268] *Id*.

In contrast, Ira Lupu argues that courts are institutionally better suited than legislatures to decide questions of accommodation.[269] Relegating accommodation to the political sphere, he argues, "promote[s] the concept of religion as an interest," rather than "a force for moral good."[270] It may undermine constitutional democracy by encouraging religious interests to vie for "jurisdictional concessions" that undermine the authority of the state.[271] In Lupu's view, courts, not legislatures, are the appropriate forum for the resolution of claims of exemption, because unlike legislatures, they have the obligation to decide all claims before them, and must do so in a reasoned and principled manner.[272] In contrast, legislative grants of accommodation, which "are not similarly constrained," are more likely to turn "on political favoritism and influence than on judgments of constitutional entitlement or acute religious need."[273] Structural constitutional arguments could be adduced to bolster Lupu's institutional arguments that the judiciary, not the legislature, has primary responsibility for enforcing the Religion Clauses. The very wording of those clauses imposes a disability on the legislature and suggests the suspicion that it cannot be trusted to protect religious liberty.

Many of the reasons for rejecting constitutionally compelled judicial exemptions also support the rejection of the notion that legislative exemptions directed only at religion are constitutionally permitted. Singling out religious, but not secular, conscience for privileged treatment violates the core values of the First and Fourteenth Amendments. But Lupu suggests additional institutional reasons to reject legislative accommodation directed only at religion. Courts in our political system are insulated from the will of political majorities and are expected to act in an impartial and reasoned manner, in a way that legislatures are not—that is the theory upon which our system of constitutional judicial review is built.[274] It is true that the legislature is expected to act in the public interest, but it is an exaggeration to say, as Marci Hamilton does, that "the legislature is not a majoritarian institution,"[275] and it is overly sanguine to expect, as she does, that legislators will generally act with "courage and vision" and choose "good results" over "popularity."[276]

The substantive constitutional constraints that Hamilton would impose on permissible legislative exemptions are vague and do not give rise to workable judicial principles. First, the accommodation "must be consistent with the public

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[269] Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 559 (1991).

[270] *Id*. at 597.

[271] *Id.* at 598.

[272] *See id*. at 601-04.

[273] *Id.* at 602.

[274] Courts have generally failed to act impartially in applying the "substantive neutrality" approach of *Sherbert* and *Yoder*, however, which is a strong reason for rejecting that approach. *See* Krotoszynski, *supra* note 108, at 1243-49 (discussing empirical evidence of systematic bias against nontraditional religions in judicial decisions prior to *Smith*).

[275] HAMILTON, *supra* note 254, at 283 (emphasis omitted).

[276] *Id.* at 285.

good."[277] Of course, all legislation must be consistent with the public good—that is the essence of the constitutional due process requirement that all legislation must be rationally related to a legitimate government purpose. But rational-basis scrutiny has generally been a highly deferential, even toothless, standard. But Hamilton seems to have something more exacting in mind. The legislature must not blindly grant an exemption without a genuine determination that "the larger public good is benefited," and not just the religious entity.[278] If this is to be a meaningful constraint, it will be enforceable by judicial review. But that would require a reviewing court "to make determinations of the public good," which, in Hamilton's view, they are absolutely "incompetent to do."[279]

The second constraint Hamilton would impose is that the legislative decision to grant an exemption must not be "made in the back halls of the legislative rotunda, rather in the harsh glare of public scrutiny."[280] This seems to imply a procedural constraint on legislation of the sort that has never been imposed by the courts for cogent constitutional and practical reasons. What is the constitutional authority of the courts to invalidate legislation on the ground that debate was insufficiently open and thorough? Under what circumstances could courts exercise such authority, assuming it existed? When lobbyists have "confused constitutionally ill-informed legislators who were already predisposed to follow [their] requests," as Hamilton suggests? When debate is nonexistent or perfunctory, as it often is? When no hearings are held? When hearings are held, but are stacked with proponents of the measure, as is not uncommon? Either this second constraint is merely precatory (in which case it is not really a constraint), or it requires courts to enter a thicket that they are unauthorized and ill-equipped to enter.

In contrast, Eisgruber and Sager's approach suggests real and workable constraints. To pass constitutional muster, any exemption must treat adherents of different religions, and adherents of no religion, equally. This requirement does not entirely obviate the possibility of special legislative solicitude for especially powerful religious groups, or the danger of selective sympathy and indifference to particular claims of exemption. But it does minimize any resulting unfairness by ensuring that any exemptions granted are applied equally. It will no doubt result in the broadening of the exempted class. But the constitutional permissibility of an exemption should not turn on the size of the exempted group, and to the extent the legislature is willing to grant the exemption, the legislative interest in uniform application may be minimal. In drafting exemptions, it is not difficult to comply with the constitutional command of equality. Indeed, when faced with a request for exemption, it will often be possible to accommodate religious claimants in a way that obviates the need for case-by-case determination of claims for exemption and thus, the possibility of unequal treatment. Constitutional concerns would counsel adoption of such a course wherever possible.

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[277] *Id.* at 298 (emphasis omitted).

[278] *Id.* at 300.

[279] *Id.* at 297.

[280] *Id.* at 300.

For example, under *Goldman v. Weinberger*, [281] the Constitution does not require the grant of an exemption for the wearing of yarmulkes with a military uniform. But Congress could have properly determined that wearing a yarmulke detracts from military uniformity of dress in a trivial way and does not interfere with military duties. The exemption which it enacted in the wake of *Goldman* permits "religious apparel" so long as it is "neat and conservative" and does not interfere "with the performance of the member's military duties."[282] This exemption could be rendered facially nondiscriminatory simply by deleting the word "religious." An even better solution might be to specify in a neutral manner which variations in the uniform are permitted (head coverings of a certain size, for example). Although this arguably deprives commanders of a certain degree of flexibility, it obviates serious concerns raised by a regime of case-by-case determinations as to which particular items are "neat and conservative" and consistent with military duties. Inherent in any such discretionary regime is the potential for inconsistent application and invidious distinctions among religious sects.[283]

2. Specific and General Legislative Accommodations

While all legislative exemptions for religious, but not secular, claims of conscience must be regarded as unconstitutional, general and specific exemptions raise some distinct problems. Specific targeted accommodations raise the specter of unequal treatment where the legislature, whether out of favoritism and hostility, or merely selective sympathy and indifference, singles out certain religious practices for accommodation but declines to accommodate others. However, any attempt to remedy such problems raises equally serious concerns regarding separation of powers and the establishment of religion. These problems were raised acutely by the Religious Freedom Restoration Act of 1993.

RFRA is a general legislative exemption of the most sweeping kind. It provides that the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden, as applied to that person, furthers "a compelling governmental interest" by the "least restrictive means" possible.[284] The express purpose of the statute was to overturn *Smith* and restore the compelling interest test proclaimed in *Sherbert* and *Yoder*. RFRA was enacted on the theory, seemingly endorsed by *Smith*, that while the Constitution does not compel free exercise exemptions, and thus does not authorize the courts to create them, legislatures are free to do so, and thus may authorize judicially-created exemptions that the Constitution does not compel. But the same concerns about equal treatment and institutional competence raised by judicially created exemptions remain, whether or not they are authorized by statute.

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[281] Goldman v. Weinberger, 475 U.S. 503 (1986), *superseded by statute*, Act of Dec. 4, 1987, § 508(a)(2), Pub. L. No. 100-180, 101 Stat. 1086, (codified at 10 U.S.C. § 744 (2006)).

[282] 10 U.S.C. § 774 (2006).

[283] *Compare Goldman*, 475 U.S. at 513 (Stevens, J., concurring) (noting the danger that a regime of exemptions might embroil the government in invidious distinctions by which a yarmulke is permitted as unobtrusive but a Sikh turban, a yogi's saffron robe, or a Rastafarian's dreadlocks are rejected as extreme, unusual, or faddish), *with id.* at 519 (Brennan, J., dissenting) (dismissing such concerns as a "classic parade of horribles").

[284] 42 U.S.C. § 2000bb-1 (2006).

The constitutional arguments against RFRA as a whole (and not just as applied to the states) are compelling, as several scholars argue. For example, Marci Hamilton argues that sweeping general exemptions like RFRA, which she refers to as "blind" exemptions, that is, "those that are granted because the recipient is religious and not because the larger public good is benefited by it," always violate the Establishment Clause.[285] Similarly, William Marshall argues that "the sheer breadth of the scope of the religious exemption in RFRA," with its "across-the-board protection to religion might easily be viewed as an improper endorsement" of religion and hence an Establishment Clause violation.[286] Eisgruber and Sager also argue that RFRA raises profound Establishment Clause concerns.[287] By violating the principle of religious equality, RFRA infringes both free exercise and establishment principles.[288] By instructing the courts in how to apply constitutional priniciples, it "conscripts the judiciary in a constitutional charade," which "implicates the Court in a false endorsement of religion" that violates its own jurisprudence of religious liberty.[289]

Unfortunately, in striking down RFRA as applied to the states, the Court did not adequately explore these broad concerns about separation of powers and religious liberty. To be sure, there are passages in the Court's opinion in *City of Boerne v. Flores*[290] that suggest broad concerns about religious liberty and the separation of powers. The Court held that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[291] And the Court observed that RFRA's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[292] RFRA, the Court noted, exacts "substantial costs" and set up a test not only at odds with *Smith*, but which was even broader than "the pre-*Smith* jurisprudence RFRA purported to codify."[293] Marci Hamilton could perhaps be forgiven for hailing *Boerne* as "the case that fully restored the rule of law for religious entities"[294] by "declar[ing] unequivocally that [RFRA] is unconstitutional."[295]

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[285] HAMILTON, *supra* note 254, at 9-10, 300.

[286] Marshall, *In Defense*, *supra* note 259, at 241-42. Marshall also attacks RFRA as unconstitutional on equality grounds similar to those raised by Eisgruber and Sager (although he frames the issue in terms of equal protection while they frame it in terms of equal liberty) and concludes that it also raises certain free speech concerns. *See id.* at 242-47.

[287] *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 452-73 (1994).

[288] *See id.* at 457.

[289] *Id.* at 437, 472.

[290] City of Boerne v. Flores, 521 U.S. 507 (1997).

[291] *Id.* at 519 (emphasis omitted).

[292] *Id.* at 532.

[293] *Id.* at 534-35.

[294] HAMILTON, *supra* note 254, at 203.

[295] Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 1 (1998).

As it turned out, this characterization proved overly optimistic. The *Boerne* Court's decision focused narrowly on the enforcement power of Congress under Section 5 of the Fourteenth Amendment, without extended discussion of other constitutional issues. Its statements about RFRA's broad sweep and inconsistency with the Court's own jurisprudence were made in the context of its discussion of the Section 5 federalism issue. Only Justice Stevens, in a lonely concurrence, argued that RFRA violates the Establishment Clause, because it embodies a "governmental preference for religion, as opposed to irreligion."[296] Any doubt about the RFRA's continuing validity as applied to the federal government appeared to be removed in *Centro Espírita Benificente*, where the Court unanimously upheld it in that context without any constitutional discussion.[297]

As will be discussed in the next section, the Supreme Court's most recent decisions on legislative accommodations evince a disappointing lack of sensitivity to the establishment and separation of powers issues at stake. At most, they have been content to ask whether statutes such as RFRA and RLUIPA fall within Congress's enumerated powers. They have barely considered whether such statutes usurp the role of the courts, improperly endorse religion, or violate the principle of religious equality. Careful consideration of such issues would suggest that RFRA, RLUIPA, and other such religion-specific exemption schemes are unconstitutional.

V. IMPLEMENTATION OF RELIGIOUS EQUALITY

The approach to free exercise advocated here has both a substantive and an equal-treatment component. Substantively, the guarantee of free exercise ensures that the right of religious belief and expression, including worship and expressive association, receives the highest degree of constitutional protection, on par with the protections extended to political belief, expression, and association. To be truly equal and meaningful, this substantive right of belief and expression must of course include the right of disbelief. The right to full freedom of belief and expression on religious topics may be thought uncontroversial today, but it was hardly so when it was first established as a constitutional right in the eighteenth century. This right has become firmly established in our own constitutional culture only as the result of a long struggle.

The one area of religious expression that remains contested is expressive association, particularly where it conflicts with norms of antidiscrimination. Almost all religions discriminate on the basis of religion in choosing their members and leaders; indeed, they could hardly do otherwise and still maintain their distinctive identity. Perhaps more controversially, many religious organizations and individuals discriminate on the basis of race, national origin, gender, or sexual orientation in choosing their clergy, employees, or those with whom they otherwise interact. In so doing, they may fall afoul of generally applicable laws prohibiting discrimination in employment, housing, and public accommodation. It is therefore necessary to examine the extent to which the right of expressive association shields religious organizations from the operation of antidiscrimination laws and to what extent the strong countervailing social interest in equality may limit that right.

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[296] *Boerne*, 521 U.S. at 537 (Stevens, J., concurring).

[297] *See* Gonzales v. Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

Outside of belief and expression, religious organizations and individuals enjoy the same substantive protections accorded to other organizations and individuals under our constitutional system. Indeed, the fact that particular types of government limitations on personal liberty (for example, restrictions on dress, diet, drug use, or marriage) might tend to restrict religious autonomy in a particular area might be a powerful reason for legislatures to tread cautiously in imposing them, and even for courts to recognize general constitutional autonomy rights in particular areas. But recognition of such rights of personal autonomy, whether merely legislative or constitutional, should always be framed in terms of strict neutrality of treatment among different religions, and between religion and its absence. For this reason, exemption schemes directed at religiously motivated conduct only, whether general, like RFRA and RLUIPA, or targeted narrowly at particular religions or religious practices, must be regarded as unconstitutional. General schemes often have additional practical and constitutional drawbacks. For example, the adjudication claims under such schemes will often require courts to resolve difficult policy questions for which they lack both expertise and appropriate standards, as recent litigation over the sacramental exemptions for illegal drug use under RFRA illustrates. It may also lead to perverse results. For example, the Supreme Court's recent extension of special protection to racist religious groups in prisons under RLUIPA not only privileges such members of such groups over their benign non-religious counterparts, but can be expected to seriously undermine safety and security. This Part explores each of these issues in turn.

A. Discrimination and the Right of Expressive Association

The right of religious organizations to choose their own members and leaders is an aspect of the right of expressive association enjoyed by all expressive groups. In *Boy Scouts of America v. Dale*,[298] the Supreme Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[299] The Court held that this right is not absolute, and may be overridden for compelling government reasons "unrelated to the suppression of ideas."[300] Thus, "public or judicial disapproval" of an organization's message will not justify government efforts to compel an organization to accept members where "acceptance would derogate from the organization's expressive message."[301] Accordingly, the Court ruled that a state's interest in

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[298] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[299] *Id.* at 648.

[300] *Id.*

[301] *Id.* at 661. To be sure, the Court's jurisprudence in this area has not been fully consistent. In *Dale*, the Court stated that an association's assertion that inclusion of a particular person would impair its message must be given "deference," yet confusingly it also suggested that an "association can [not] erect a shield against antidiscrimination laws simply by asserting that their acceptance of a member from a particular group would impair its message." *Id.* at 653. It also said that courts cannot deny the right to discriminate merely "because they disagree with those values or find them internally inconsistent." *Id.* at 651. Yet arguably, in earlier decisions the Court refused to defer to an organization's assertions about its need to discriminate, on the grounds that those assertions were inconsistent with the

protecting homosexuals from discrimination could not justify compelling the Boy Scouts to accept a homosexual scoutmaster given the organization's disapproval of homosexuality.[302]

The leading case on the expressive association rights of religious organizations, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*,[303] can be understood as being consistent with these principles. In *Amos*, the Court ruled that the statutory exemption of religious organizations from the general federal prohibition of religious discrimination in employment did not violate the Establishment Clause. Justice Brennan, concurring in the judgment, explained that the interest at stake was the religious organizations' "interest in autonomy in ordering their internal affairs": "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself."[304] For this reason, Justice Brennan argued that, "ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities," and any exemption that extends farther than this "has the effect of furthering religion in violation of the Establishment Clause."[305]

Thus understood, exemptions for religious organizations from the antidiscrimination laws are defensible under an equality-based approach, but only to the extent that such exemptions must be regarded as constitutionally compelled. That is, religious organizations have a constitutional right to discriminate based on religion (and race, gender, sexual orientation, etcetera), to the extent that their religious doctrine requires. Thus, religious organizations that discriminate on the basis of sex in the selection of their clergy (including the Roman Catholic, Orthodox Jewish, and various conservative Protestant and Muslim religious sects) enjoy a constitutional right to do so, as do religious organizations that discriminate based on race or sexual orientation. But they enjoy this right no more and no less than secular expressive associations. The statutory exemption for discrimination may therefore be upheld as constitutional, but only because, and to the extent that, it is redundant; it merely clarifies that religious organizations have the same right to discriminate as other organizations in pursuit of their expressive message.

Beyond this, religious organizations are entitled to no special exemptions from antidiscrimination laws. For example, the ministerial exemption recognized by some courts, which would immunize religious organizations from antidiscrimination laws regardless of whether their religious doctrine requires or even approved of discrimination, must be rejected as unconstitutional.[306] Moreover, to the extent that

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Court's understanding of the organization's purpose. *See* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (enforcing antidiscrimination laws against private group); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (same).

[302] *See Dale*, 530 U.S. at 654-59.

[303] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[304] *Id.* at 341-42 (Brennan, J., concurring).

[305] *Id.* at 343 (emphasis omitted in the second quote).

[306] *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007).

religious organizations or individuals enter into commercial activities such as the sale or rental of housing, or the operation of restaurants or hotels, they should enjoy no special exemption from antidiscrimination laws.[307]

Furthermore, the government has no duty to subsidize religious groups that engage in prohibited discrimination.[308] Governments typically make tax exemptions available to religious organizations, and such exemptions do not violate the principle of equal treatment if they are extended in a neutral fashion to both religious and nonreligious organizations. The guiding principle ought to be that expressed by Justice Harlan in *Walz*: "whether the circumference of the legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."[309] But the Constitution does not *require* tax exemptions for religious organizations.[310] Moreover, if the government does make an exemption available, it may condition eligibility in a neutral manner on compliance with legitimate public interests, such as antidiscrimination.

Thus, the Supreme Court upheld the revocation of tax exempt status from Bob Jones University, a religious educational institution "giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures," which implemented a strict policy of expulsion for any student who opposed or violated its view that "the Bible forbids interracial dating or marriage."[311] The Court held that, although the statutory exemption for "religious, charitable . . . or educational"[312] institutions was expressed in the disjunctive, the clear intent of the statute was to extend exemptions only to charitable organizations within the common-law understanding of that term, and uses that violate public policy are not charitable.[313] The Court rejected the University's contention that denial of the tax exemption violated its free exercise rights, even under the then-applicable compelling interest standard of *Sherbert* and *Yoder*, because the government interest in eradicating racial discrimination was compelling.[314] With the demise of the compelling interest standard in the wake of *Smith*, any neutral, generally applicable condition on charitable exemptions ought to be upheld. Religious institutions are free to engage in discrimination in furtherance of their beliefs based on race, sex, and so forth, but to the extent such discrimination violates federal or state public policy, it may be grounds for denial of subsidies or exemptions.

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[307] *Cf.* HAMILTON, *supra* note 254, at 186-88 (discussing housing discrimination by religious landlords).

[308] *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006).

[309] Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

[310] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 17-21 (1989) (Brennan, J., plurality opinion).

[311] Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983).

[312] *Id.* at 585 (quoting I.R.C. § 503(c) (1954)).

[313] *See id.* at 586-92.

[314] *Id.* at 602-04.

B. Sacramental Drug Use

Religious claims of exemption from the drug laws have been a perennial source of litigation. The sacramental use of peyote was the focus of the Supreme Court's pivotal decision in *Smith*, and in response to *Smith*, Congress enacted a new statutory exemption. In turn, that federal statutory exemption for peyote provided the basis for the Supreme Court's recent recognition of an exemption under RFRA for the hallucinogen DMT in *Centro Espírita*.

The federal regulatory exemption for peyote, in effect since 1965, exempts from the drug laws the so-called "nondrug use of peyote in bona fide religious ceremonies of the Native American Church."[315] On its face, this regulation discriminates on the basis of religion. But the Native American Church of North America, the so-called "mother church," limits membership to persons of at least one-fourth Native American descent, and the Drug Enforcement Agency has interpreted the exemption as limited to persons of Native American descent.[316] Thus, as applied, the regulation discriminates on the basis of both religion and racial ancestry. In 1991, in response to *Smith*, Congress supplemented this regulation with the American Indian Religious Freedom Amendments Act, exempting the use of peyote "by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion."[317] The Act defines "Indian" as a member of a federally recognized Indian tribe.[318] The purpose of this tribal classification was apparently to immunize the preference from strict scrutiny. Under *Morton v. Mancari*, a tribal classification "is political rather than racial in nature" and thus subject only to rational-basis review.[319] Nonetheless, tribal membership typically has a racial component. Although requirements vary, almost all tribes require some degree of Native American ancestry.[320] The Act also overturned the specific result in *Smith* by providing for the first time that the federal exemption preempts state legislation.[321]

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[315] 21 C.F.R. § 1307.31 (2008).

[316] *See* Christopher Parker, Note, *A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use*, 16 BYU J. PUB. L. 89, 94-95 (2001).

[317] 42 U.S.C. § 1996a(b)(1) (2006).

[318] 42 U.S.C. § 1996a(c)(1)-(2).

[319] Morton v. Mancari, 417 U.S. 535, 554 n.24, 555 (1974). The legislative history of the Act makes specific reference to the *Mancari* doctrine. *See* H.R. REP. NO. 103-675, at 8-9 (1994). In *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000) (striking down electoral restrictions limiting electoral franchise to Native Hawaiians), the Court distinguished but did not overrule *Mancari*.

[320] The recognition of tribal membership for descendants of former black slaves of Cherokee owners was a notable exception. The Cherokee tribe's recent revocation of the membership of these "Cherokee Freedmen" is currently under litigation. *See* Vann v. Kempthorne, 534 F.3d 741 (D.C. Cir. 2008).

[321] 42 U.S.C. § 1996a(b)(1) (providing that exempted uses "shall not be prohibited by . . . any State").

The Fifth Circuit upheld these discriminatory exemptions, rejecting the claim of a non-Indian peyotist religious group for a similar exemption.[322] This decision rested squarely on the *Mancari* doctrine, which has been read to override fundamental constitutional rights of equal protection and religious freedom guaranteed in the First and Fourteenth Amendments. Under *Mancari*, legislation singling out Native Americans for disparate treatment, which would normally trigger strict scrutiny, is upheld as long as it "can be tied rationally to the fulfillment of Congress'[s] unique obligation toward the Indians."[323] Thus, for example, the Supreme Court has held that in a murder prosecution, the state-law premeditation requirement applicable to a white defendant does not apply to an Indian defendant,[324] and that an Indian woman's claim to equal protection from sex discrimination must yield before the paramount "traditional values of patriarchy still significant in tribal life" as embodied in a tribal ordinance.[325] In other words, in the case of Native Americans, the usual guarantees of basic individual rights do not apply.

In upholding the exemption for Native American but not non-Native American peyote religions, the Fifth Circuit also stated that the Native American Church "was established in . . . 1918 as the corporate form of a centuries-old Native American peyotist religion without changing the ancient religion's practices or beliefs."[326] The implication seems to be that the historical roots of Native American peyotism entitle it to special protections that need not be extended to non-Native Americans.[327] In fact, in pre-Columbian times peyotism was not widely practiced among the original inhabitants of what is now the United States. Peyote grows only in Northern Mexico and a very small area of southernmost Texas along the Rio Grande, and peyotism spread from the tribes of Texas and Oklahoma only in the late nineteenth century as the result of the federal government's resettlement of tribes from other areas to Oklahoma.[328] Modern peyotism is not an unchanged ancient religion but rather a relatively recent pan-Indian institution that "is saturated with Christian values."[329] This does not mean that it is any less entitled to respect. But the supposed antiquity

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[322] *See* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214-17 (5th Cir. 1991); *see also* John Thomas Bannon, Jr., *The Legality of the Religious Use of Peyote by the Native American Church: A Commentary on the Free Exercise, Equal Protection, and Establishment Issues Raised by the* Peyote Way Church of God *Case*, 22 AM. INDIAN L. REV. 475 (1998) (defending this decision).

[323] *Mancari*, 417 U.S. at 555. The paternalistic theory on which *Mancari* rests, which has prevailed throughout our constitutional history, is that the Indians "are in a state of pupilage" with respect to the U.S. government, which "resembles that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *cf. Mancari*, 417 U.S. at 551 (reaffirming "guardian-ward" relationship).

[324] United States v. Antelope, 430 U.S. 641, 643-44 (1977).

[325] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978).

[326] *Peyote Way Church of God*, 922 F.2d at 1212.

[327] *Cf.* Bannon, *supra* note 322, at 506 (defending special treatment of Indian peyotism on the ground that it is a "centuries-old practice" that "predated not only the adoption of the Constitution, but also the first English settlements in America.").

[328] *See id.* at 476.

[329] *Id.* at 477.

of peyotism among Native Americans does not provide a historical, let alone constitutional, justification for extending exemptions to them alone, and not to other groups.

Naturally, the proponents of "substantive equality" such as Michael McConnell do not attempt to defend the special exemption for peyote on the ground that fundamental rights do not apply to Indians, or that older religions are entitled to exemptions that newer ones cannot claim. Instead, McConnell argues that the granting of the exemption should turn on the pleasantness and popularity of the drug, and the frequency with which it is consumed. For McConnell, exemptions are permitted only if they create no incentives that encourage or discourage religious practices. Yet he claims that a religious peyote exemption does not create this problem: it "will not create an incentive to practice peyotism (because peyote is not a desirable recreational drug)."[330] If so, one wonders why the government would bother to ban it. McConnell has also argued that the government is justified in accommodating peyotism (but not Rastafarianism), because peyote is less popular than marijuana: "the unconstrained character of [its] use and the popularity of marijuana" justifies granting exemption for the former but not the latter.[331] The unpopularity of a religious practice is apparently, in McConnell's view reason for *granting* a special exemption; yet in other circumstances, he argues that the unpopularity of a religious practice is a reason for *denying* an exemption.[332] In any case, as one of his colleagues on the bench pointed out, McConnell's position that the availability of accommodation should turn on popularity is "problematic":

> Under his view, small religious groups are free to use "sacramental drugs," as long as those "sacramental drugs" are esoteric and are not used too frequently. Once the religious group becomes too successful at attracting adherents, its chosen "sacramental drug" becomes popular with the public at large, or it decides that its sacrament must be consumed too frequently, the government's interest becomes paramount.[333]

The justification (or lack thereof) for ethnic and religious exemptions for peyote is important in evaluating the Supreme Court's recent decision in *Centro Espírita*. In that case, the Court's recognition of a federal exemption under RFRA for the religious use of the hallucinogen DMT rested largely on an analogy with the statutory and regulatory exemptions from peyote. The Court reasoned that if the government does not have a compelling interest in the uniform application of the peyote ban (as the exemptions for "hundreds of thousands of Native Americans" demonstrate), how can it have a compelling interest in the uniform enforcement of

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[330] McConnell, *Update*, *supra* note 185, at 701. Peyote is bitter-tasting and (like many drugs) can have unpleasant side effects, such as nausea.

[331] O Centro Espírita Beneficente União do Vegetal v. Ashcroft, 389 F.3d 973, 1020 (10th Cir. 2004) (en banc) (McConnell, J., concurring), *aff'd*, 546 U.S. 418 (2006).

[332] *See* McConnell, *Update*, *supra* note 185, at 707 (approving of a decision denying accommodation to "lone Buddhist prisoner" because it would be "[o]bviously . . . not practical").

[333] *O Centro Espírita Beneficiente União do Vegetal*, 389 F.3d at 984 n.6 (Murphy, J., concurring in part and dissenting in part).

the ban on DMT, taken in the form of an herbal hoasca tea by "the 130 or so American members" of an obscure Brazilian rainforest cult?[334] Yet if, as the statutory history of the peyote exemption and the case law upholding it suggest,[335] it is based on special considerations regarding Native American sovereignty and the inapplicability of normal constitutional standards rather than on any generalized weighing of judgments about harm and compelling interests, then the analogy was wholly inapposite.[336]

Ingeniously, Eisgruber and Sager argue that, despite the Court's recent decision in *Centro Espírita*, "[t]he Establishment Clause objection to RFRA's federal application[] . . . remains unresolved."[337] The puzzle for them is how Justice Stevens, who said in *Boerne* that RFRA violated the Establishment Clause, could have joined the Court's unanimous decision applying RFRA to the federal government in *Centro Espírita*.[338] They offer two answers. First, in *Centro Espírita*, the constitutional issue was not raised by either party. The religious plaintiff sought to invoke the statute, while the defendant, the federal government, was not interested in attacking its constitutionality.[339] It is true that the Court need not raise *sua sponte* constitutional issues not raised by the parties, and in the absence of a full argument, it might be prudent not to do so; yet that is precisely what the Court did in *Smith*, where it rejected the compelling interest test although neither party disputed its applicability.[340] In *Centro Espírita*, the Court was certainly aware that RFRA raises potentially serious Establishment Clause issues, for not only had Justice Stevens recognized them in *Boerne*, but the Court had addressed similar issues the previous year in *Cutter v. Wilkinson*.[341] If the Court had unresolved doubts about the constitutionality of RFRA, it is odd that it saw fit to grant certiorari in a case that was ill suited to resolving the issue, and that no Justice even bothered to mention it.

Secondly, Eisgruber and Sager argue that the result in *Centro Espírita* is consistent with equal treatment and did not depend on the RFRA compelling interest test.[342] Although Eisgruber and Sager argue that RFRA is unconstitutional, they claim that, as applied in *Centro Espírita*, "RFRA vindicates rather than contradicts the counsel of Equal Liberty."[343] It is true that the Court may have reached the same

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[334] Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 433 (2006).

[335] *See supra* notes 33-35, 41-42, 55-60 and accompanying text.

[336] *Cf.* Anneliese M. Wright, Note, *Dude, Which Religion Do I Have to Join to Get Some Drugs? How the Supreme Court Got It Wrong in* Gonzales v. O Centro Espírita Beneficiente União do Vegetal, 546 U.S. 418 (2006), 86 NEB. L. REV. 987, 999-1000 (2008).

[337] EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 267.

[338] *See id*. at 266.

[339] *See id*.

[340] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571-72 (1993) (Souter, J., concurring) (arguing that the Court should not have decided this issue *sua sponte* in *Smith*).

[341] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[342] *See* EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 27, at 267.

[343] *Id.*

result under RFRA as Eisgruber and Sager would have reached under Equal Liberty. But of course, the Court's rationale is quite different. Because it proceeded under RFRA, and not under constitutional principles of equal treatment, the Court would not have recognized a similar exemption for nonreligious drug use, no matter how carefully controlled or how serious its purpose.

The recognition of exemptions for the limited and controlled use of hallucinogens in religious, but not secular, contexts is inconsistent with the commitment of the Free Exercise Clause to equal treatment of all citizens regardless of their religious belief. Indeed, application of the compelling interest test has not resulted in equal treatment among religions, let alone between religion and nonreligion. While exemptions may be granted for small or marginal groups, like the peyote or hoasca cults, they have been routinely denied to many others. For example, Courts have denied claims of exemption for marijuana, a more popular and yet less powerful drug, easily finding a compelling interest, whether under the pre-*Smith* constitutional version or its statutory reincarnation in RFRA.[344] This is true whether the use took place "all day every day to give praise to God,"[345] as a Rastafarian claimant stated, or was limited only to the "Saturday evening prayer ceremony,"[346] as members of the Ethiopian Coptic Zion Church proposed. In other drug exemption cases, courts applying the compelling interest test have indulged in ludicrous dogmatic pronouncements on theological questions about which they are utterly ignorant.[347]

Arguably, the criminalization of drugs, especially "soft" drugs such as marijuana and hallucinogens, is counterproductive and even an unwarranted infringement on individual autonomy. But to the extent that such drugs are decriminalized, or that an exemption is provided for use under limited conditions, it ought to be done in a manner that does not discriminate based on religious belief or ethnicity and does not require courts to delve into the centrality and theological underpinnings of the practice. Application of the RFRA compelling interest test, in addition to discriminating in favor of religion, also necessarily involves the courts in the resolution of theological questions.

The equal treatment approach rejects religious discrimination. It may not completely eliminate the need for courts to make difficult policy determinations, albeit less difficult than those required by "substantive neutrality." Unlike the "substantive neutrality" compelling interest approach, equal treatment does not turn on the size of the group seeking exemption or the theological basis of its claims.

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[344] *See, e.g.*, United States v. Israel, 317 F.3d 768, 772 (2003) (citing Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1460-63 (D.C. Cir 1989); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982); United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984)).

[345] *Id.* at 772.

[346] Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1460 (D.C. Cir. 1989).

[347] *See, e.g.*, State v. Blake, 695 P.2d 336, 339 (Haw. Ct. App. 1985) (rejecting the claim that "the devotee who partakes of bhang partakes of the god Siva" on the astonishing ground that "Hindu Tantrism involves the worship of Sakti not Siva"). In Hindu Tantrism, the worship of Shiva is hardly inconsistent with the worship of Shakti (who is commonly regarded as Shiva's consort or female energy). Indeed, literary Tantras "are commonly written in the form of a dialogue between these two deities." JOHN DOWSON, A CLASSICAL DICTIONARY OF HINDU MYTHOLOGY AND RELIGION, GEOGRAPHY, HISTORY, AND LITERATURE 317 (1973).

C. Accommodation in the Prisons

The Supreme Court's decision in *Cutter v. Wilkinson*,[348] upholding the provision of RLUIPA relating to institutionalized persons against a facial Establishment Clause challenge, suffers from many of the same flaws as its decision in *Centro Espírita* upholding RFRA. RLUIPA, like RFRA, violates the principle of free exercise by favoring religious individuals and institutions over their nonreligious counterparts. In upholding the constitutionality of RLUIPA's institutionalized-persons provision, the Court emphasized that "it alleviates exceptional government-created burdens on private religious exercise."[349] Yet it gave short shrift to the court of appeals' conclusions below that the provision has the effect of "advanc[ing] religion generally by giving religious prisoners rights superior to those of nonreligious prisoners," and thereby "encouraging prisoners to become religious in order to enjoy greater rights."[350]

By its very nature, confinement in prison entails the denial of basic liberties. Removal of barriers to the enjoyment of rights, to the extent consistent with incarceration, is a laudable goal, but it should not be accomplished in a discriminatory manner. As Steven Goldberg points out,[351] the Court's decision has two remarkable effects. First, in the prison context, RLUIPA does not "restore" the compelling interest test; rather, it applies it for the first time. Even in the heyday of the compelling interest test, the Supreme Court never applied it in the prison context, where rational-basis scrutiny was always used instead.[352] Second, the effect of the decision is to privilege the exercise of religion (by religious inmates only) over all other First Amendment freedoms. As Goldberg notes, a statute imposing a compelling interest test on all prison restrictions on free expression would certainly be interpreted to require that the test be applied to restrictions on religious expression.[353] But in *Cutter*, the Court rejected the converse: a statute (RLUIPA) that accommodates religious entities and individuals "need not 'come packaged with benefits to secular entities.'"[354] The state may privilege religious prisoners while denying those same privileges to nonreligious prisoners.

The theory on which the enactment of the prisoner provision of RLUIPA apparently rested (to the extent it can be divined from the scattershot and one-sided congressional hearings) is that religion is a powerful engine for reform and rehabilitation that should be harnessed by the state. Chuck Colson, the reformed Watergate burglar turned Christian activist, was Congress's star witness to this

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[348] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[349] *Id.* at 720 (citing Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994)).

[350] Cutter v. Wilkinson, 349 F.3d 257, 266 (6th Cir. 2003).

[351] *See* Steven Goldberg, Cutter *and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403, 1412-15 (2006).

[352] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-53 (1987).

[353] *See* Goldberg, *supra* note 351, at 1415.

[354] *Cutter*, 544 U.S. at 724 (quoting Corp. of Presiding Bishop of Church of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987)).

effect.[355] Undoubtedly, religious (or secular) ethical systems and contemplative practices can play a powerful role in rehabilitation. But religious (and secular) ideologies often play an extremely negative role as well, hardening inmates' propensities to violence, racial hatred, and political extremism. The prisoners granted relief in *Cutter* under RLUIPA were adherents of the following faiths: "the Satanist, Wicca, and Asatru [a Norse neopagan religion, some branches of which are racist] religions, and the Church of Jesus Christ Christian [a branch of the racist Christian Identity movement]."[356] Certainly the Constitution will not countenance discrimination among religions, and to the extent some are protected, all must be. But does the Constitution countenance protection of these groups and not disciples of Thoreau, Ethical Culture, or secular humanism?

Extremist religious groups in prison, which often serve as breeding grounds for violent, racist, and even terroristic activity, pose a serious danger both within the prisons themselves and in the broader society once prisoners are released.[357] As one court observed, it is hard to fathom why a secular white supremacist's claim for racist literature should be evaluated under a rational basis standard, while a white supremacist Christian's claim should be evaluated under strict scrutiny.[358] The Supreme Court, in *Cutter*, replied weakly that courts will have no trouble recognizing "the government's countervailing compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order."[359] However, unless the government systematically engages in prohibited discrimination based on religious viewpoint, there must be some degree to which the religious racists' claims will succeed where secular racists' will not, or the compelling interest standard is meaningless.

That religious claims must receive significant preference over secular claims is precisely the holding of *Cutter*, which involved claims for "access to religious literature, . . . opportunities for group worship, . . . adhere[nce] to the dress and appearance mandates of their religions, . . . religious ceremonial items,"[360] and so forth. Special rights to receive literature, assemble with like-minded individuals, and wear special emblems or insignia can be very important to religious groups, as well as to violent or racist gangs or terrorist organizations. Inmates desiring special privileges, therefore, have every incentive to frame their demands in religious terms, which dramatically increases their chances of success. In fact, the solicitude of the courts to accommodate religion in prison has been a major factor in the rise of new religions, forcing the courts in turn to delve into the arcana of newly invented

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[355] *See Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 7 (1997) (statement of Charles W. Colson, President, Prison Fellowship Ministries).

[356] *Cutter*, 544 U.S. at 712. On racist strains of Ásatrú, see MATTIAS GARDELL, GODS OF THE BLOOD: THE PAGAN REVIVAL AND WHITE SEPARATISM (2003). On the Church of Jesus Christ-Christian and Christian Identity generally, see QUARLES, *supra* note 212.

[357] *See* HAMILTON, *supra* note 254, at 141-49.

[358] *See* Madison v. Ritter, 240 F. Supp. 2d 566, 576 (W.D. Va. 2003), *rev'd*, 355 F.3d 310 (4th Cir. 2003).

[359] *Cutter*, 544 U.S. at 723 n.11.

[360] *Id.* at 713.

theologies.[361] One of the most notable aspects of the newly privileged position of religion in the prisons, as Marci Hamilton observes, is the rise of "mass accommodation" in the form of Christian prisons, some in the form of special lower-security wings exclusively for Christian prisoners, which are administered in several states by Chuck Colson's Prison Fellowship ministries at public expense.[362]

VI. CONCLUSION

Many other examples of particular or general exemptions could be adduced beyond those discussed above. Although they cannot all be addressed here, the applicable principles should be clear. To pass constitutional muster, exemptions must treat believers and nonbelievers of whatever sect or creed alike. Under this approach, courts can sometimes salvage an unconstitutional exemption for religion in an unproblematic manner simply by eliminating the religious reference. Wherever possible, they should do so. For example, as we have seen above, the draft exemption for conscientious objection based on belief in a Supreme Being was extended to cover all conscientious objectors.[363] However, in other cases, extending the exemption will essentially invalidate the underlying rule by making compliance optional for all. Either the discriminatory exemption or the underlying rule itself must be eliminated. This choice is imposed by the principles of equality underlying both the Free Exercise and Establishment Clauses.

Faced with a choice between invalidating a discriminatory exemption or the underlying rule, courts (and legislatures) must be sensitive to the extent to which the rule infringes basic liberties such as autonomy and freedom of expression. For example, in the prison context, they must protect basic rights such as access to information, the right to assemble with others, or the right to control one's own dress and appearance, to the extent that those protections are compatible with the restrictions inherent in incarceration. What they may not do is grant protections to adherents of some or all religions that are not afforded to adherents of other religions or no religion.

In evaluating this question, the fact that a rule infringes religious autonomy or expression (like the fact that it infringes nonreligious autonomy or expression) may be an important reason for recognizing a general autonomy right. But the state may

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[361] *See* HAMILTON, *supra* note 254, at 162-65. As Hamilton notes, "the prize has to go to the Church of the New Song (CONS)," a religion invented by an inmate in 1971, that requires that its practitioners be served Harvey's Bristol Crème and steak every Friday. *Id.* at 163. CONS has been recognized as a religion in various federal circuits, including the Eighth Circuit, which therefore recently undertook to scrutinize the church's scripture (the Paratestament) to determine whether an inmate's claim regarding a Sacred Unity Feast was theologically warranted. *See* Goff v. Graves, 362 F.3d 543, 548 (8th Cir. 2004) (holding that the "hundred and forty-four thousand Revelation ministers" had not yet been "sealed" as prophesied in the Paratestament). For more recent theological pronouncements from the federal courts under RLUIPA in this vein, see *Washington v. Klem*, 497 F.3d 272, 275 (3d Cir. 2007) (granting religious exemption to accommodate demand of member of Children of the Sun Church to read at least four "Afrokentrick" books per day); Smith v. Allen, 502 F.3d 1255, 1277-80 (11th Cir. 2007) (holding that prisoner's Odinist religion did not in fact require that he be granted a small quartz crystal and pine fire for purification).

[362] HAMILTON, *supra* note 254, at 166.

[363] *See id.* at 7.

not grant such a right only to religious adherents or adherents of a particular religion. The Court's deplorable disregard of this principle in *Wisconsin v. Yoder*[364] marked the nadir of its free exercise jurisprudence. In shamelessly discriminatory terms, the Court pronounced that religious individuals had a constitutional right to flout the law that would never be extended to the nonreligious. Perhaps such a right would not even be extended to adherents of a lesser religion than the Old Order Amish, for otherwise the Court's extended paean to the pious, hard-working, law-abiding, and otherworldly self-sufficiency of that sect, which takes up more than ten pages in the *United States Reports*,[365] is entirely gratuitous. Proper resolution of the case would have required the Court to weigh the general right of parents (regardless of their religion or ideology) to direct the upbringing of their children against the interest of the state in requiring a certain level of education, and the right of the children as autonomous beings with interests potentially separate from their parents' interests.[366]

In some cases, the conflict between individual autonomy and government interests may prove difficult to resolve. For some, polygamy is such a case. Historically, polygamy has been practiced by adherents of many religions, including Judaism, Christianity, and Hinduism, although most modern adherents of those religions reject it.[367] The Qur'an, however, expressly authorizes it,[368] and it is widely accepted in modern Islam. It is also practiced by the Fundamentalist Latter-Day Saints (FLDS), perhaps the most visible polygamist group in modern America. Marci Hamilton, surveying reports of abuse of women and children by modern polygamous groups, such as the FLDS, argues that general restrictions on the practice are justified, although she concedes that such abuses are not necessarily inherent in polygamy itself.[369] Martha Nussbaum, on the other hand, argues that the nineteenth-century decision upholding the polygamy ban as applied to Mormons in *Reynolds v. United States*[370] was unjustified, because "it is difficult to see [nineteenth-century polygamous] Mormon marriage as worse than monogamous marriage as then practiced."[371] The worst possible approach, however, would be to grant an exemption only for religious, but not secular, polygamists. In addition to

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[364] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[365] *See id.* at 209-13, 216-18, 222-24.

[366] Perhaps the most appalling feature of the decision was that it essentially treated the children as little more than the property of their parents, with no independent right to autonomous development. *Cf. id.* at 244-46 (Douglas, J., dissenting) (criticizing the majority for ignoring the rights of the children).

[367] Many Old Testament patriarchs, including Abraham, David, and Solomon had more than one wife (Solomon had seven hundred), *see* 1 *Kings* 11:3, and early Christian fathers, such as St. Augustine, were unwilling to pronounce it unacceptable, *see* AUGUSTINE, ST., ON THE GOOD OF MARRIAGE ch. 15 (P.G. Walsh ed., trans., Claredone Press Oxford 2001). Hindu sources present various examples of polygyny, and even one famous mythical example of polyandry (Draupadi in the *Mahabharata*).

[368] QUR'AN 4 (Al-Nisa'):3-4 (M.A.S. Abdel Haleem trans., Oxford University Press 2004).

[369] *See* HAMILTON, *supra* note 254, at 66-77.

[370] Reynolds v. United States, 98 U.S. 145 (1878).

[371] NUSSBAUM, *supra* note 21, at 188.

discriminating against nonbelievers, such an approach would have the effect of conferring state approval on the generally sexist approach of most polygamist religions, which typically endorse polygyny but forbid polyandry and other forms of plural marriage.[372] Proper resolution of this question requires legislatures (and ultimately courts) to determine in religion-neutral (and gender-neutral) terms whether marriage, as a liberty right, extends to plural marriage, and to weigh that right against asserted countervailing compelling government interests (if any). In a society fully committed to religious equality, the fact that some religious (or secular) groups may consider plural marriage important may be a significant factor in determining whether it can or must be recognized by the state, but it cannot justify the application of different regimes of family law to members of different religious confessions.[373]

The Supreme Court's seemingly insouciant disregard for the principle of equal treatment in upholding religious exemptions in *Cutter v. Wilkinson* and *Centro Espírita* may seem cause for despair. Yet there is still room for hope. The pre-*Smith* compelling interest standard largely proved unworkable, and was therefore never applied with the rigor that its doctrinal formulation seemed to require. It would simply entail too many exemptions, and was ultimately inconsistent with the rule of law in a modern state. There is little reason to expect that the compelling interest test as resuscitated in RFRA and RLUIPA will fare significantly better.[374]

Moreover, Americans are becoming steadily more diverse in their religious and irreligious beliefs.[375] This diversity renders special exemptions for religion increasingly problematic, by continually heightening the demands placed on an exemptions regime, and the resentment among religions that it engenders. Special favoritism for religion in general is also increasingly problematic with the emergence of a significant secular sector. In the long run, if the nation is to survive as a unified legal and political community, only a reassertion of the principle of equal treatment can resolve these problems.

The confusion and disarray in modern Religion Clause jurisprudence reflects deep divisions that have persisted throughout our constitutional history. Powerful voices have supported, and continue to support, a regime of special privileges for

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[372] Nussbaum recognizes such concerns about sex equality, but they do not lead her to endorse an approach to this question that rejects discrimination based on religion. Moreover her suggestion that the state might not have a compelling interest in eradicating sex discrimination is unsupported in the case law and rests on a conflation of two constitutionally distinct sorts of compelling interest test: the state's compelling interest in *eradicating* discrimination (invoked to override other rights), and the state's compelling interest in *enacting* discriminatory laws. *See id.* at 197. Only in the latter context has sex discrimination expressly been held to a different standard than race discrimination.

[373] That is not to say that the state may not make different types of marriage contracts freely available to all on a voluntary and nondiscriminatory basis.

[374] Indeed, while upholding the "compelling interest" test in *Cutter*, the Court insisted that the accommodation should not "override other significant interests" and stressed the importance of "due deference" to the expertise of prison administrators, suggesting a standard that is much laxer than traditional strict scrutiny. *See* Cutter v. Wilkinson, 544 U.S. 709, 722-23 (2005).

[375] *See supra* notes 243-47 and accompanying text.

religion. But our best constitutional traditions have always rejected that approach. Religious liberty, as Madison said, requires that each individual be guaranteed an "*equal* title to the free exercise of religion"; it is not consistent with disparate treatment that "violates equality by subjecting some to peculiar burdens, [and] violates the same principle, by granting to others peculiar exemptions."[376] The free exercise of religion requires equal and impartial treatment of all regardless of their beliefs, not a patchwork of special privileges, favors, and exemptions.

[376] MADISON, *supra* note 131, at 31.