
EXPERIMENTING WITH RELIGIOUS LIBERTY: THE QUASI-
CONSTITUTIONAL STATUS OF RELIGIOUS EXEMPTIONS

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INTRODUCTION

This article deals with an episode of constitutional development in which the voice of the people, rather than that of the Supreme Court, has been dominant. The constitutional value at issue is religion—its free exercise and its establishment. The Court has taken a step back in developing this constitutional value. Under Establishment Clause jurisprudence, despite fairly extensive doctrinal development, the Supreme Court has recently refrained from hearing some cases that it might have heard in the past, under the rubric of nonjusticiability.² Much more dramatically, the Court limited the substantive reach of the Free Exercise Clause in 1990, in *Employment Division v. Smith*,³ leaving religious believers to seek relief elsewhere from laws deemed offensive to religious values.

This article is not primarily about those actions, and lack of action, by the Court. Instead, my focus is on the reaction to the Court's withdrawal. Since the reaction to *Smith* has been more developed, in terms of promoting religious exemptions to neutral, generally applicable laws, I will devote my attention here to *Smith* and its aftermath. I

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² See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (taxpayer challengers to tuition tax credit lack standing); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007) (no standing to challenge Executive Branch faith-based initiative).

³ *Emp't Div., Dep't. of Human Res. of Or. v. Smith (Smith II)*, 494 U.S. 872 (1990).

will discuss the Establishment Clause only in passing, to provide a fuller constitutional setting of religion in American life.

Parts I, II, and III of the article are mostly descriptive: discussing the withdrawal of the Court in *Smith*, the reactions thereto, and some of the current debates and issues. I see the *Smith* decision not so much as a change in constitutional doctrine, but as a pragmatic admission by the Justices that, given the reality of diverse and rapidly changing religious commitments and demands in America, they simply were unable to forge a workable constitutional approach to the issue of religious exemptions.⁴

For much the same reasons that the Court could not resolve the religion issue, the reactions to *Smith*, including federal legislation, state legislation, state constitutional amendments, state court litigation under state constitution Free Exercise provisions, and general political debate, have also, so far, failed to produce a national consensus on the proper role and scope of religious exemptions from generally applicable laws.⁵ But that may be changing. A temporary equilibrium could be reached.

We see in the current issues and controversies around religious exemptions, particularly those arising under the recently upheld⁶ Pa-

⁴ This view is not so different from that of Donald Beschle, who sees *Smith* as a judicial reaction to the expansion of the definition of religion that in turn rendered strict scrutiny protections of religious practice “wildly impractical.” Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of “Religion”?*, 39 HASTINGS CONST. L.Q. 357 (2012).

⁵ One line of development I have omitted that might also fit here is the requirement of reasonable religious employment accommodation under Title VII of the Civil Rights Act of 1964. See generally Kiran Preet Dhillon, *Covering Turbans and Beards: Title VII’s Role in Legitimizing Religious Discrimination Against Sikhs*, 21 S. CAL. INTERDISC. L.J. 213 (2011). Undoubtedly the issues the courts are struggling with in that context are similar to those discussed in this article. See Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. REV. L. & SOC. CHANGE, 103, 138-41 (2012) (discussing and critiquing the reasoning of *Smith* in the context of Title VII analysis). I leave them out because, aside from their large, separate scope, they generally represent accommodations required of private parties rather than exemptions by government and thus are not usually of constitutional dimension. It is true that our society does sometimes enshrine constitutional values by statute in the employment context, as is true of race discrimination, for example. But, as the value of procedural due process illustrates, we do not always do so. Whether and to what extent Title VII cases come to exemplify the quasi-constitutional value that is being debated around *Smith* should be explored separately.

⁶ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

tient Protection and Affordable Care Act (ACA),⁷ a society trying to resolve the tension between properly protecting religious conscience on the one hand, and the needs of a religiously diverse and increasingly secularly-oriented culture on the other. Of course, a religious person might say that my description constitutes a secular analysis of what the religion controversy is really about. Such a person might insist that the problem is an increasingly expansive secular government intruding on the religious sphere.

Part IV of the article is evaluative, asking what is the meaning of *Smith* and the resulting popular debate over religious exemptions? Many participants in this controversy believe they are debating a constitutional issue;⁸ they do not see themselves as merely engaging in the promotion of political preferences. Therefore, the various reactions to *Smith* are a form of popular constitutional development, which I call in the title of this article, *experimenting with religious liberty*. That popular engagement raises questions about the proper contours of constitutional interpretation. America does not usually develop its constitutional norms entirely, or even largely, outside the courts, especially when the courts had previously been very much involved in a constitutional field. Courts are often seen as countermajoritarian entities in the service of constitutional protections of minorities. But how is that to happen when the public is so dominant in the unfolding of constitutional meaning? In other words, how can religion be properly protected from majoritarian oppression when it is the public that is working out the protections? There are similarities here, and important differences, both to theories of popular constitutionalism and to the historical developments of other constitutional values, such as free speech, gun rights, and economic liberty.

Part V is predictive. Out of the ferment that is occurring over religious exemptions, what constitutional, or quasi-constitutional, norm is likely to emerge? The role of religion in American public life is being debated in a no-holds-barred fashion, at a very fundamental level. In recent years, America has become both more assertively religious—and specifically more assertively Christian—and more assertively

⁷ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

⁸ This would be the case with the law professors involved in the debates discussed in Part III *infra*, such as Richard Garnett, Douglas Laycock, and others.

secular.⁹ This causes us to ask Ronald Dworkin's foundational question: are we going to be a basically religious nation or a basically secular nation?¹⁰ Religious exemptions are one way America is trying to answer that question.

The final section—Part VI—is my attempt to try to alter this debate. I will sketch out, at least preliminarily, an alternative framework that might lessen the divisiveness of the debate over religious exemptions. I ask a question quite different from Dworkin's question: why do we assume that there are different realms of belief and nonbelief, when many believers and nonbelievers share fundamental commitments with regard to the meaning of life and the nature of reality? The supernatural aspect of religion—an important aspect to be sure, but not the only characteristic of religion—has been allowed to dominate discourse in the field of religious exemptions. Persons traditionally regarded as believers and nonbelievers tend to differ over the existence of a certain kind of God and of the nature of the supernatural. But in a universe in which subatomic particles seem to know we are looking at them and seem to share a connection with fellow particles at impossible distances, who can say just what the supernatural is? The reality of the supernatural is not a proper basis for distinguishing those who are religious from those who are not. Once that insight is accepted, the divisiveness of the controversy over religious exemptions might be lessened.

I. THE SUPREME COURT WITHDRAWS IN *Employment Division v. Smith*¹¹

Smith was an unemployment compensation case that became a general test of the constitutionality of the criminalization of conduct that is religiously motivated.¹² Two drug and alcohol abuse rehabilitation counselors were discharged after they ingested a small quantity of peyote during a religious ceremony.¹³ They applied for, and were denied, unemployment compensation benefits by the Employment Divi-

⁹ See, for example, the op-ed written by David Niose, author of *Nonbeliever Nation: The Rise of Secular Americans*, in the PITTSBURGH POST-GAZETTE on July 15, 2012: *Rise of the Secularists*. The subtitle of the op-ed was, "They're fighting back against the overbearing influence of religious conservatives." *Id.* at B-1. This is an example of both the growing assertion of religion and the growing assertion of secularism.

¹⁰ RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 56 (2006).

¹¹ 494 U.S. 872 (1990).

¹² *Id.* at 874.

¹³ *Id.*

sion of the Oregon Department of Human Resources on the ground that they had been discharged for work-related misconduct.¹⁴ The Oregon Court of Appeals reversed, and the Oregon Supreme Court affirmed, holding that denying unemployment compensation benefits because of religiously motivated conduct would violate the Free Exercise Clause of the federal Constitution under *Sherbert v. Verner* and *Thomas v. Review Board*.¹⁵

In the first round, *Smith I*, the United States Supreme Court vacated this judgment on the ground that the illegality of the employees' conduct—a factor the Oregon Supreme Court had not considered relevant to the Free Exercise claim since, under State law, the misconduct provision was unrelated to the enforcement of the State's drug laws¹⁶—was relevant to the federal constitutional analysis.¹⁷ Justice Stevens's majority opinion did not actually decide whether a person could be denied unemployment benefits for engaging in criminal conduct.¹⁸ The opinion merely noted that the conduct that gave rise to termination of employment in *Sherbert* and *Thomas* had been "perfectly legal" and that the results in those cases, and the result as well in *Hobbie v. Unemployment Appeal Commission of Florida*,¹⁹ "might well have been different if the employees had been discharged for engaging in criminal conduct."²⁰ Despite formally leaving the matter open, there was not much doubt that Justice Stevens thought that the commission of criminal conduct would usually justify denial of unemployment compensation despite sincere religious motivation.²¹

¹⁴ *Id.*

¹⁵ *Smith v. Emp't Div., Dep't. of Human Res.*, 721 P.2d 445, 449-51 (Or. 1986) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd.*, 450 U.S. 707 (1981)).

¹⁶ *Id.* at 450-51. This was held as a matter of state law rather than as an aspect of Free Exercise analysis. The state court cited only state sources to suggest that the unemployment compensation system was not enforcing, and was not supposed to enforce, the state's criminal law.

¹⁷ *Emp't Div., Dept. of Human Res. of Oregon v. Smith (Smith I)*, 485 U.S. 660 (1988).

¹⁸ *See id.*

¹⁹ 480 U.S. 136 (1987).

²⁰ *Smith I*, 485 U.S. at 671. The claimants in *Sherbert*, *Thomas*, and *Hobbie* had been denied unemployment compensation benefits, which was held to be a violation of the Free Exercise Clause.

²¹ *Id.* (citing *Reynolds v. United States*, 98 U.S. 145 (1879)) ("We have held that bigamy may be forbidden, even when the practice is dictated by sincere religious convictions. If a bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a mar-

On remand, the Oregon Supreme Court held that the religiously motivated use of peyote was prohibited by Oregon law, but that this criminal prohibition was itself a violation of the federal Constitution's Free Exercise Clause.²² It was this judgment about the effect of the Free Exercise Clause that the Supreme Court reviewed in *Smith II*.²³ In this circuitous fashion, a case about unemployment compensation benefits in which no criminal law enforcement had taken place, or been threatened, became a case about the constitutional status of religious exemptions from criminal laws.²⁴

Justice Scalia's majority opinion in *Smith II* became one of the most controversial decisions in recent Supreme Court history, not because he upheld a criminal prohibition against a claim of religious exemption—most asserted religious exemptions claims had previously failed in the Supreme Court²⁵—but because he held, in effect, that the Free Exercise Clause does not apply at all when criminal prohibitions not aimed at religious practice forbid what religion obliges or obliges what religion forbids.²⁶

Justice Scalia distinguished among three kinds of claims that might be brought under the Free Exercise Clause.²⁷ The core meaning of the constitutional value is the “right to believe and profess whatever religious doctrine one desires.”²⁸ Beyond the profession of belief, Justice Scalia conceded that “the performance of (or abstention from) physical acts” would also be protected by the Free Exercise Clause if prohibited only when religiously motivated or on account of the particular religious belief that they display.²⁹

The third type of religious exemption claim, which Justice Scalia characterized as “one large step further,” is aimed at a criminal law concededly not directed against religious practice and concededly valid as applied to those not religiously motivated to violate it.³⁰ He

riage counselor who was discharged because he or she entered into a bigamous relationship.”).

²² *Smith II*, 494 U.S. 872, 875 (1990).

²³ *Id.* at 874.

²⁴ *Id.*

²⁵ *See id.* at 904-13 (Blackmun, J., dissenting).

²⁶ *See id.* at 878-79 (majority opinion).

²⁷ *See id.* at 877-78.

²⁸ *Id.* at 877.

²⁹ *Id.*

³⁰ *Id.* at 878.

called such a criminal prohibition “a generally applicable law.”³¹ Justice Scalia denied that the text of the Free Exercise provision—“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”³²—“must be given that meaning.”³³ This was an odd formulation, since it is probably never true that any text *must* be given any particular meaning.

What was odder still is that Justice Scalia determined whether the Free Exercise Clause protected religious claimants from the demands of neutral, generally applicable laws based not on the public meaning of the words of the Free Exercise Clause at the time of their adoption—Justice Scalia’s usual vaunted textualism approach—but on prior case law: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”³⁴

Marci Hamilton has criticized the prevailing view that *Smith* represented “a dramatic, unjustified departure from previous free exercise cases.”³⁵ She may be right that the decision was not unjustified, but, despite Justice Scalia’s claim, *Smith II* was a dramatic departure from prior case law in two senses. First, as Justice Scalia conceded, there had in fact been cases in which religiously motivated persons were excused from compliance with generally applicable laws—most notably *Wisconsin v. Yoder*, which invalidated a compulsory school attendance law as applied to a religious group.³⁶ These cases were distinguished by Justice Scalia as involving not Free Exercise alone, but Free Exercise combined with some other right—the rights of parents in *Yoder*, for example—in what Justice Scalia called a “hybrid situation.”³⁷

This distinction was accurate, but its significance was not obvious. Did it mean that the Free Exercise Clause had been irrelevant in *Yoder*? That could hardly be the case since parental whim would certainly not justify avoiding a compulsory school attendance law. Obviously the parent had to have been relying on a constitutionally protected value.

³¹ *Id.*

³² *Id.* at 877.

³³ *Id.* at 878.

³⁴ *Id.* at 878-79. Justice Scalia offered a historical defense of *Smith* in his concurrence in *Boerne*. See *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Scalia, J., concurring in part).

³⁵ Marci Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 *CARDOZO L. REV.* 1671, 1671 (2011).

³⁶ 406 U.S. 205 (1972).

³⁷ *Smith II*, 494 U.S. at 882.

But if free exercise of religion was thus at issue in *Yoder*, there is no general rule that a Free Exercise claim can never overcome a neutral, generally applicable law.

The other sense in which *Smith II* represented a departure from prior case law was its failure to require any showing by the State of a heightened interest to justify the rejection of a religious liberty claim.³⁸ This omission of government justification was a critical departure. For example, in *United States v. Lee*, which Justice Scalia invoked as justifying the result in *Smith II*, Chief Justice Burger held for the Court that a religious objection to the collection and payment of Social Security taxes did not justify the imposition of a constitutionally mandated religious exemption.³⁹ To that extent, *Lee* was consistent with *Smith II*.⁴⁰

But, in reaching that outcome, Chief Justice Burger stated the rule of religious exemption as follows:

The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.⁴¹

Whatever the meaning and strength of this test, Justice Scalia did not apply it in *Smith II*.⁴² After *Smith II*, the government would need no special justification at all to overcome a sincere religious objection to a neutral, generally applicable law.⁴³

Justice Scalia justified this outcome by pointing out that, although the Court had been purporting to apply a compelling interest test in Free Exercise cases, outside the unemployment compensation context, “we have always found the test satisfied” and in some recent cases had not been applying the test at all.⁴⁴ Nor could the test really be applied.

³⁸ *Id.* at 894-95 (O’Connor, J., concurring).

³⁹ *United States v. Lee*, 455 U.S. 252, 261 (1982).

⁴⁰ *Smith II*, 494 U.S. at 880.

⁴¹ *Lee*, 455 U.S. at 257 (citations omitted).

⁴² *See Smith II*, 494 U.S. at 884-85 (stating that the *Sherbert* test, applied in *Lee*, is inapplicable to the situation in *Smith II*).

⁴³ Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAS*, 55 S.D. L. REV. 466, 470 (2010) [hereinafter Lund, *State RFRAS*] (“Smith changed all that. It said that burdens on religion no longer needed any justification, as long as the laws in question were neutral and generally applicable. . . . After Smith, the government has the right to treat religious people unreasonably.”).

⁴⁴ *Smith II*, 494 U.S. at 883.

To require a compelling government interest every time a generally applicable law, especially a general criminal law prohibition, came into conflict with religious conscience would invite the religious believer “to become a law unto himself.”⁴⁵ And if the test really means what it says, and what it has meant in other constitutional contexts, “many laws will not meet the test.”⁴⁶ Such a situation would be “courting anarchy”⁴⁷ in any society, but this is especially so in our society, given our enormous religious diversity and deep commitment to religious liberty.

What is oddest of all about this result is that, having concluded that the most searching constitutional test cannot be used to protect sincere claims of religious conscience, Justice Scalia did not apply a lesser test or any test at all.⁴⁸ Despite the presence of the Free Exercise Clause in the Constitution, which Justice Scalia admitted could textually justify the application of strict scrutiny to claims of religious liberty against neutral, generally applicable laws, Justice Scalia granted to the religious believer no protection whatsoever.⁴⁹

The outcome in *Smith II* seems to be a strange devolution—like the 1939 pop standard, *All or Nothing At All*.⁵⁰ Just because religious liberty cannot be granted full constitutional protection—for what were pragmatic reasons really—would it not be better to grant it some lesser level of protection rather than none at all? Even if government officials had to justify intrusions on religious liberty merely by giving good reasons, religious liberty would remain an interest “on the table” during the passage of laws. In negotiations over public policy, such required consultation provisions are not unusual and are usually considered important.⁵¹ That would seem the least the Court should do for religious liberty, which is, after all, a constitutionally protected value.⁵²

Why Justice Scalia did not choose this route cannot, of course, be answered with any certainty. It may be that for a formalist like Justice Scalia, all-or-nothing-at-all is the best policy. If the Court could not

⁴⁵ *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

⁴⁶ *Id.* at 888.

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.* at 879.

⁵⁰ FRANK SINATRA WITH HARRY JAMES AND HIS ORCHESTRA, *All or Nothing At All, on ALL OR NOTHING AT ALL* (Columbia 1943).

⁵¹ *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁵² *Smith II*, 494 U.S. at 888.

grant full protected status to the religious believer in the context of criminal law, any lesser standard would invite judicial arbitrariness—something Justice Scalia has vociferously opposed and which he warned against at the end of the *Smith II* opinion.⁵³

But another consideration is suggested by the conclusion of Justice Scalia's opinion.⁵⁴ No obvious judicial remedy for the sincere believers in *Smith II* could be crafted with anything like the principled consistency that the nondiscrimination-among-religious-beliefs would require. The political process, however, was another matter. Justice Scalia wrote that “[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.”⁵⁵ He invited that political process to reconsider the issue of religious accommodations, at least in regard to the peyote use exemptions that some States had already enacted, and perhaps even more generally to give consideration to the enactment of other particular religious exemptions.⁵⁶

By referring to the context as one involving a value enshrined in the Bill of Rights, and then inviting democratic forces to adjust the protection of this value, Justice Scalia was acknowledging the tension that this article seeks to explore.⁵⁷ The consequence of *Smith II* has been precisely an enormous cultural/political engagement with religious exemptions, and with the role of religion generally in public life, of the kind, but surely exceeding the scope, that Justice Scalia foresaw and called for. That ferment amounts to a popular experiment with religious liberty. And the context is quasi-constitutional for much the same reason that Justice Scalia considered the “value” involved to be of constitutional dimension.

The tension that this popular engagement raises is that in a constitutional system, we do not usually leave such adjustments to the political branches and more broadly to politics. We do not usually experiment with constitutional rights. Perhaps religion is inherently different and there was no choice, as Justice Scalia seems to have felt. But, if that is the case, it is worth considering what it is that makes religion so different. Frankly I would have thought that any system in

⁵³ *Id.* at 890 (warning against a system “in which judges weigh the social importance of all laws against the centrality of religious beliefs”).

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *Id.*

which there is a presumptive right in every citizen to own a working gun is much more likely to court anarchy than one in which religious believers can go to court to ask for religious exemptions. But of course, when the gun issue arose, Justice Scalia did not hesitate to protect the right.⁵⁸

Smith was a 5-1-3 decision, with Justice O'Connor concurring in the judgment that peyote use may be criminally prohibited by the State against sincere religious objection, joined in part by Justices Brennan, Marshall, and Blackmun, who did not concur in the judgment.⁵⁹ What united the four was their commitment to some kind of heightened judicial scrutiny in cases in which laws and regulations threaten religious conscience.⁶⁰ Justice O'Connor described that level of scrutiny as requiring "a compelling state interest and . . . means narrowly tailored to achieve that interest" whenever the government substantially burdened religiously motivated conduct.⁶¹ Justice O'Connor acknowledged that in most of the Free Exercise cases decided under that standard, the religious claimants had failed to win the exemption, but observed that one does not "judge the vitality of a constitutional doctrine by looking to the won-loss record of the plaintiffs who happen to come before us."⁶²

Nor did Justice O'Connor deny that failure would likely greet future claimants.⁶³ Justice O'Connor seemed most committed to what I earlier referred to as keeping religious interests on the table: "the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim."⁶⁴ Justice O'Connor also admitted that heightened scrutiny does not apply when the government itself is acting rather than regulating others and in special contexts that might require unusual deference to governmental interests, such as the military and prison regulations.⁶⁵ Justice Scalia had

⁵⁸ See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵⁹ *Smith II*, 494 U.S. at 891 (O'Connor, J., concurring); *id.* at 907 (Blackmun, J., dissenting).

⁶⁰ *Id.* at 909 (Blackmun, J., dissenting).

⁶¹ *Id.* at 894 (O'Connor, J., concurring).

⁶² *Id.* at 897.

⁶³ See *id.* at 899.

⁶⁴ *Id.*

⁶⁵ See *id.* at 900 (discussing, for example, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), in which government internal activity affecting religious practice was not evaluated pursuant to heightened scrutiny).

argued in the *Smith II* opinion that these instances of the failure to apply heightened scrutiny undermined that test altogether.⁶⁶

In dissent, Justice Blackmun, joined by Justices Brennan and Marshall, disagreed with Justice O'Connor only on what should have been the outcome in *Smith II* itself, which Justice O'Connor herself considered to be a "close" case.⁶⁷ Justice Blackmun noted that the issue was not the interest of the state in prohibiting dangerous drugs, but the interest in refusing a narrow religious exemption.⁶⁸ That interest the dissenters found insufficiently compelling under the facts to justify refusing the exemption, especially given the centrality of religious use of peyote to the group at issue.⁶⁹

It is questionable whether Justice O'Connor, and even Justice Blackmun, were really using the strict scrutiny analysis they purported to be using. The gap between traditional strict scrutiny, and their uses of it in *Smith*, was the basis for Justice Scalia's warning that "watering [strict scrutiny] down here would subvert its rigor in the other fields where it is applied"⁷⁰ In the reactions to *Smith II*, this question of the proper level of review would loom large as a practical matter. Those who objected to *Smith II* would have to decide whether religious exemptions would routinely be required or only rarely so.

Before moving on to those reactions to the two *Smith* opinions, however, let me describe the constitutional landscape as those cases left it—referring from now on just to the amalgamation of *Smith*. When *Smith* was decided, there was already an established tradition of nonapplication, or modified application, of neutral, generally applicable laws to religious institutions, whether in the ministerial exception cases or in church property disputes.⁷¹ *Smith* expressly preserved some of this case law—the church autonomy cases⁷²—and two different schools of thought emerged about the relationship of these cases to the future of the Free Exercise Clause. In one view, *Smith* removed the justification for any special treatment for religious institutions. In the other, the church institutional context was unaffected by anything held

⁶⁶ See *id.* at 882-84 (majority opinion).

⁶⁷ *Id.* at 905 (O'Connor, J., concurring).

⁶⁸ See *id.* at 909-10 (Blackmun, J., dissenting).

⁶⁹ See *id.* at 910-21.

⁷⁰ *Id.* at 888 (majority opinion).

⁷¹ See generally Christopher Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

⁷² *Smith II*, 494 U.S. at 877. See Lund, *supra* note 71, at 59.

in *Smith*. The unanimous opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*⁷³ would decide that question in favor of the latter interpretation.

Smith did not say anything much about the future of hybrid rights.⁷⁴ This has turned out to be more of a mixed bag. Religious associational rights did not fare well in *Christian Legal Society v. Martinez*,⁷⁵ but religious speech was fully protected in *Snyder v. Phelps*.⁷⁶ Of course, neither of those cases treated the issues involved as hybrid rights.⁷⁷ In each case, religious liberty was subsumed into other constitutional rights, thereby losing its autonomous status.⁷⁸

Smith also did not explain what constituted a neutral treatment of religion.⁷⁹ Future cases here would also diverge. Discrimination against religion was clearly present in *Lukumi Babalu*,⁸⁰ in which the Court would strike down a ban on the ritual slaughter of animals. But in *Locke v. Davey*,⁸¹ the Court allowed what looked like a discrimination against religion to stand.

Nor did *Smith* change anything in regard to the Establishment Clause.⁸² While that subject is beyond my scope in this article, I will say that there is a strange symmetry between what was held in *Smith* and what would later be held in a series of cases denying standing to challenge alleged government endorsements of religion.⁸³ If *Smith* can be viewed as an anti-religion case in which religious believers have lost the protection of the Free Exercise Clause when the government imposes duties or obligations that violate their religious consciences, the Establishment Clause standing cases can be viewed as pro-religion cases in which nonbelievers or minority believers have lost the protection of the Establishment Clause when challenging government support of religion.

⁷³ 132 S. Ct. 694 (2012).

⁷⁴ See generally *Smith II*, 494 U.S. 872.

⁷⁵ 130 S. Ct. 2971 (2010).

⁷⁶ 131 S. Ct. 1207 (2011).

⁷⁷ *Id.*; see also *Martinez*, 130 S. Ct. 2971.

⁷⁸ See *Snyder*, 131 S. Ct. 1207; see also *Martinez*, 130 S. Ct. 2971.

⁷⁹ See generally *Smith II*, 494 U.S. 872.

⁸⁰ *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

⁸¹ 540 U.S. 712 (2004).

⁸² See *Smith II*, 494 U.S. at 867-78.

⁸³ In recent years, the Supreme Court has restricted taxpayer standing. See *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); see also *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436 (2011). The Supreme Court has also restricted parental standing. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

Although the *Smith* holding was substantive, thus actually constituting an interpretation of the constitutional value at issue—while the Establishment Clause cases are about justiciability, and thus not technically about the meaning of the constitutional value at all—the effect of both lines of cases is the same. In both, society continues a vigorous debate about the proper role of religion in the public square—a debate in which one would expect the Supreme Court to play a role, but in which the Justices have stepped back, allowing popular forces to determine the constitutional balance.

Granted, this symmetry between Establishment Clause and Free Exercise Clause cases is not complete. There are still some basic Establishment Clause claims that can be brought. But, then, the final word about standing has perhaps not yet been said.

We are now ready to consider the reactions to *Smith*. As suggested above, Justice Scalia invited a political response to the Court's narrow interpretation of the Free Exercise Clause. That response took three years, but it certainly came. And when it did, it exceeded anything Justice Scalia could have expected or wanted.

II. THE REACTIONS TO *SMITH*

When Donald Beschle writes that “[w]hile the academic response to *Smith* was mixed, reaction in the political world was sharply negative,”⁸⁴ he is certainly correct, but even his formulation may understate the political hostility to the *Smith* decision. Here is how one respected law and religion textbook describes the political reaction: “The ACLU and Americans United joined the American Center for Law and Justice and the Christian Legal Society, the American Jewish Congress joined the National Association of Evangelicals, and Republicans joined Democrats in enacting legislation, the Religious Freedom Restoration Act of 1993 (RFRA)”⁸⁵ RFRA ultimately passed “with nearly unanimous bipartisan support.”⁸⁶

⁸⁴ Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of “Religion”?*, 39 HASTINGS CONST. L.Q. 357, 364 (2012).

⁸⁵ MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 186 (3d ed. 2011).

⁸⁶ Michael Paisner, *Boerne Supremacy Congressional Responses to City of Boerne v. Flores and the Scope of Congress’s Article I Powers*, 105 COLUM. L. REV. 537, 539 (2005). See 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993) (reporting the Senate vote as 97-3); 139 CONG. REC. H2363 (daily ed. May 11, 1993) (reporting the House vote as unanimous).

There are two important points about this early reaction to *Smith* for purposes of this article. First, there were, even at the start, ideological fissures within the broad coalition that enacted RFRA. That is why the statute was not enacted right away, but instead only three years after *Smith* was announced.⁸⁷ RFRA got caught up in the abortion wars.⁸⁸ The U.S. Conference of Catholic Bishops feared that RFRA might somehow allow pregnant women to argue that abortion restrictions violated their religious rights.⁸⁹ The opposition of the Bishops caused President George H. W. Bush to threaten a veto of an early version of RFRA unless the subject of abortion was exempted from the coverage of the statute.⁹⁰ This demand would not be met for obvious political reasons, and so RFRA would not pass until President Bill Clinton indicated a willingness to sign a later version of the statute that did not contain any references to abortion.⁹¹ Years later, parallel demands for exemption from the coverage of State versions of RFRA would complicate efforts to enact state versions.⁹² So, from the start, efforts to respond to *Smith* led to fundamental political struggles.

The other important aspect of the enactment of RFRA was the nature of the opposition to *Smith*. Clearly, Justice Scalia expected that new legislation might be passed to deal with the issues raised in the *Smith* case.⁹³ But what Justice Scalia had in mind was a limited legislative response, presumably at the state level, that would recognize religious exemptions to criminal laws governing use of peyote, or even religious exemptions for other illegal drugs that might be central to religious worship in other religious traditions.⁹⁴

But that limited response was not the aim of the RFRA coalition.⁹⁵ RFRA was intended to “restore”—hence the title of the statute—a standard of heightened scrutiny for all claims of religious exemption from

⁸⁷ 139 CONG. REC. S14,470 (daily ed. Oct. 27, 1993); 139 CONG. REC. H2363 (daily ed. May 11, 1993).

⁸⁸ See generally Brian Bolduc, *The Church and the RFRA*, NAT'L REV. ONLINE (Feb. 17, 2012), <http://www.nationalreview.com/articles/291310/church-and-rfra-brian-bolduc>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Marci A. Hamilton, *The New Wave of Extreme State Religious Freedom Restoration Act (RFRA) Legislation: Why It's Dangerous*, FINDLAW.COM (Oct. 14, 2010), <http://write.news.findlaw.com/hamilton/20101014.html>.

⁹³ See *Smith II*, 494 U.S. 872, 890 (1990).

⁹⁴ *Id.*

⁹⁵ Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 88-89 (1995).

the demands of neutral, generally applicable law.⁹⁶ The way this was put in RFRA's Purpose section was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened . . ."⁹⁷ That purpose was operationalized in the statute by the prohibition that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."⁹⁸ Another section of the statute indicated that it applied to "all Federal and State law," which was amended after the decision in *City of Boerne v. Flores*⁹⁹ invalidated RFRA insofar as it applied to state and local law.¹⁰⁰

RFRA raised a number of questions. The major issue in terms of the constitutionality of RFRA itself was whether Congress could in effect reverse an interpretation of the Constitution by the Supreme Court through Congress's enforcement power under Section 5 of the Fourteenth Amendment. The Court held in *Boerne*, effectively unanimous on this point, that it could not. I will return to the issue of Congressional authority below, in Section 3.

Just as significant for purposes of this article is the question, what exactly did RFRA restore? Not only had the Court not always applied heightened scrutiny in cases of substantial burdens on the exercise of religion—the Court had not done so in cases of internal government activity,¹⁰¹ for example—but the Justices did not agree on how exacting the heightened scrutiny standard actually was—as indicated by the disagreement between Justice O'Connor's concurrence and Justice Blackmun's dissent in *Smith* itself.¹⁰² Did Congress mean to take a position on the kind of heightened scrutiny the courts should apply? The ques-

⁹⁶ 42 U.S.C. § 2000bb(b)(1) (2013).

⁹⁷ *Id.*

⁹⁸ 42 U.S.C. § 2000bb-1 (2013).

⁹⁹ 521 U.S. 507 (1997).

¹⁰⁰ Pub. L. No. 106-274, § 7(b) (2000).

¹⁰¹ See *Bower v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to Conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

¹⁰² *Smith II*, 494 U.S. 872, 891-921 (1990) (O'Connor, J., concurring).

tion of the meaning of heightened scrutiny would recur in coming debates over religious exemptions.¹⁰³

Because RFRA was written to apply to federal, state, and local law, its passage forestalled for a time large-scale efforts at the state level to overturn or limit the effect of *Smith*.¹⁰⁴ Those efforts would begin in earnest once the Supreme Court in *Boerne* overturned RFRA as it applied beyond the federal government to state and local law.¹⁰⁵

The various opinions in *Boerne* amounted to a recapitulation of arguments about the result in *Smith*, specifically the result insofar as *Smith* had held that religious objections to neutral, generally applicable laws should not be evaluated under a heightened scrutiny standard.¹⁰⁶ Justice Kennedy's six-Justice majority opinion reaffirmed that rule from *Smith* and held that RFRA exceeded Congress's power to enforce the Fourteenth Amendment, since the statute amounted to a disagreement with the Court's substantive interpretation of the First Amendment rather than a prophylactic measure to prevent violations of the Constitution as the Court had interpreted it.¹⁰⁷ Justice O'Connor in dissent expressly agreed that if the rule in *Smith* had been a correct interpretation of the Free Exercise Clause, she would have joined the majority in repudiating RFRA.¹⁰⁸ Justice Souter in dissent would not have decided whether *Smith* should be affirmed or overturned without "plenary reexamination" of the soundness of *Smith*.¹⁰⁹ Justice Breyer in dissent agreed that there should be reargument on the question of whether *Smith* had been correctly decided, but, alone among the Justices, was willing to entertain the possibility that even if *Smith* had been decided correctly, RFRA might still be constitutional.¹¹⁰

In a repudiation of any of the theories of constitutional interpretation that challenge judicial supremacy and uniqueness—the sort of theories I will discuss in Part IV of this article below—not a single Justice suggested in *Boerne* that if such overwhelming majorities in Congress, tantamount to unanimity, rejected *Smith*, this should count as serious, independent evidence that the Court was wrong in its interpre-

¹⁰³ See *infra* notes 185-209 and accompanying text.

¹⁰⁴ See Hamilton, *supra* note 92.

¹⁰⁵ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁰⁶ See generally *id.*

¹⁰⁷ *Id.* at 533-36.

¹⁰⁸ *Id.* at 545 (O'Connor, J., dissenting).

¹⁰⁹ *Id.* at 565-66 (Souter, J., dissenting).

¹¹⁰ *Id.* at 566 (Breyer, J., dissenting).

tation of the Constitution. No Justice seemed to care that the American people, through their representatives, apparently took a different view of the meaning of the Free Exercise Clause. Every Justice refused, in the words of Michael Farris, “to give strong consideration to the message it receive[d] from the elected representatives of the people.”¹¹¹

Only one Justice in *Boerne*—Stevens—indicated that, by legislating a presumed exemption for religiously motivated objections—and only religiously motivated objections—to neutral laws, RFRA violated the Establishment Clause.¹¹² Adverting to the facts of the case, in which a building permit had been denied to enlarge a church, Justice Stevens stated his objection that “[i]f the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption for the city ordinances that forbid an enlargement of the structure.”¹¹³ Of course, the objection raised by Justice Stevens—the permissibility of specifically religious exemptions—would have to be faced under any of the other attempts to reinstate heightened scrutiny for challenges to neutral laws brought on religious grounds.

Although Justice Kennedy’s opinion in *Boerne* did not comment upon the effectiveness of RFRA with regard to federal law, there was obviously no dearth of Congressional authority to apply RFRA as a general limitation on the reach of federal law.¹¹⁴ Without any extended analysis distinguishing *Boerne* as a federalism case in which Congress had lacked authority to reach state and local laws once the enforcement authority of Section 5 of the Fourteenth Amendment had proven inadequate, the Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*¹¹⁵ simply applied RFRA to the case of a religious sect seeking injunctive relief against federal enforcement efforts blocking use of a sacred tea containing a hallucinogenic ingredient controlled under federal law. Chief Justice Roberts’s unanimous opinion upheld the grant of a preliminary injunction because the government had “not carried the burden expressly placed on it by Congress”¹¹⁶

¹¹¹ Michael P. Farris, *Facing Facts: Only a Constitutional Amendment Can Guarantee Religious Freedom for All*, 21 CARDOZO L. REV. 689, 700 (1999).

¹¹² *Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring).

¹¹³ *Id.* at 537.

¹¹⁴ Farris, *supra* note 111, at 691.

¹¹⁵ 546 U.S. 418 (2006).

¹¹⁶ *Id.* at 423.

After *Boerne*, efforts to promote religion-based exemptions to neutral, generally applicable laws fragmented into a number of different avenues: experiments. In the remainder of this part, I will outline the basic channels in which these efforts moved. These experiments may be divided into five basic undertakings: future federal constitutional litigation; litigation against the federal government under RFRA; federal statutory regulation of state and local burdens on religious practice; state legislative efforts to enact religious exemptions, either statutory or as state constitutional amendments; and state judicial interpretations of state constitutional provisions parallel to the Free Exercise Clause.¹¹⁷ This list leaves out the pure political struggles over religious liberty that are currently so heated. I will take up that topic in Part III.

1. *Federal Constitutional Litigation on Behalf of Claimed Religious Exemptions*

As mentioned above, after *Smith*, there were still a variety of ways in which a religious believer might raise a challenge to the application of laws that were said to substantially burden religious practice. In the first place, *Smith* required that laws be neutral and generally applicable before heightened scrutiny review was eliminated.¹¹⁸ In *Smith* itself, this was not an issue because the criminal law in that case was an across-the-board prohibition against the use of an illegal drug.¹¹⁹

Laws specifically aimed at regulating religious practices would not be considered neutral and would raise serious constitutional issues, including issues pursuant to the Free Exercise Clause. In *Lukumi Babalu*, Justice Kennedy reiterated that a law that restricted a practice because of its religious motivation would not be considered neutral and would violate the Free Exercise Clause unless it satisfied the compelling state interest test.¹²⁰ The law at issue in *Lukumi Babalu* was held to have as its object the suppression of animal ritual sacrifice practiced by a particular religious sect and was therefore held unconstitutional.¹²¹

¹¹⁷ Despite earnest calls by a few, there has not been much movement in support for a federal religious freedom constitutional amendment. Of course, that remains a future option. See Farris, *supra* note 111, at 691, 704-06; J. Jeffrey Patterson, *The Long Road Toward Restoration of Religious Freedom: Congressional Options in Light of City of Boerne v. Flores*, 87 Ky. L.J. 253, 271-76 (1999).

¹¹⁸ *Smith II*, 494 U.S. 872, 884-89 (1990).

¹¹⁹ *Id.* at 874.

¹²⁰ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1992).

¹²¹ *Id.* at 524, 534.

Neutrality, however, is not a self-defining concept, and most cases in which laws refer to religion are not as clearly unconstitutional as was the law in *Lukumi Babalu*.¹²² In *Locke v. Davey*, there was undeniably a discrimination against religion in the sense that a state scholarship program would fund, on behalf of eligible students, the pursuit of any postsecondary degree except one in “devotional theology.”¹²³ The Ninth Circuit had held that this difference in treatment for only “a major in theology that is taught from a religious perspective”¹²⁴ was not neutral, triggering strict scrutiny that the state’s Establishment Clause concerns did not satisfy.¹²⁵ But Chief Justice Rehnquist held that there was no discrimination because applied religious study does not have a secular equivalent and is “akin to a religious calling as well as an academic pursuit.”¹²⁶ Therefore, the state scholarship program exception did not discriminate against religion.¹²⁷

The meaning of neutrality promises to be a significant issue in the future. For example, in a portion of the lawsuits currently challenging the requirement of employer coverage of contraceptive services under the ACA, plaintiffs are arguing that since the employer mandate exempts some institutions—churches, for example—its failure to exempt all religious institutions renders the mandate non-neutral for purposes of *Smith*.¹²⁸ Because RFRA will probably apply to these challenges, this issue of non-neutrality may not be reached since the Free Exercise standard in the case of non-neutral requirements is the same as RFRA’s standard. Courts, therefore, may see no need to reach the constitutional issue. Nevertheless, this example demonstrates that neutrality may not always be present, once governments begin to grant religious exemptions.

Neutrality challenges may also arise pursuant to some state RFRA exclusions. Christopher Lund has charted recent state RFRA developments.¹²⁹ He notes that States have adopted “idiosyncratic coverage ex-

¹²² See *id.* at 534-35 (discussing how the ordinance specifically targeted the Santeria).

¹²³ *Locke v. Davey*, 540 U.S. 712, 715 (2004).

¹²⁴ *Davey v. Locke*, 299 F.3d 748, 753 (9th Cir. 2002), *rev’d*, 540 U.S. 712 (2004).

¹²⁵ *Id.* at 760.

¹²⁶ *Locke*, 540 U.S. at 721.

¹²⁷ *Id.* at 725.

¹²⁸ Liz O’Connor, *Religious Freedom Issues at Heart of HHS Lawsuits, Legal Scholars Say*, CATH. NEWS SERV. (May 29, 2012), <http://www.catholicnews.com/data/stories/cns/1202212.htm>.

¹²⁹ See generally Lund, *State RFRAS*, *supra* note 43.

clusions.”¹³⁰ A number of States treat inmate claims differently, but other exclusions, such as drug- or motor vehicle-related claims, do not present any kind of coherent pattern.¹³¹ While Lund argues that “[t]here seems to be little constitutional problem with these coverage exclusions[,]”¹³² it is not clear that a state is acting neutrally with regard to a religious exemption request that it excludes from its RFRA when other religious claims are accommodated. Lund may be right, but the matter will undoubtedly be litigated in an attempt to invoke non-*Smith* Free Exercise protections.

A similar issue arose prior to *Smith* in *Olsen v. Drug Enforcement Administration*¹³³ in an opinion by then-Circuit Judge Ginsburg, in which members of the Ethiopian Zion Coptic Church claimed that the failure to grant a religious exemption for the sacramental use of marijuana in light of the peyote exemption granted to the Native American Church, constituted a violation of Equal Protection and Establishment Clause principles.¹³⁴ The court rejected that claim.¹³⁵ But one can easily foresee an argument challenging the decision of a State with a generally applicable religious exemption statute to exclude some religious claims from the reach of that statute as a non-neutral decision.

Smith also did not alter the existing case law concerning church autonomy.¹³⁶ Thus, churches engaged in property disputes or disputes over the recognition of church authority, or churches resisting state regulation concerning religious issues, could still, after *Smith*, demand to be exempt from the laws and regulations that might otherwise govern.¹³⁷

The most significant line of church autonomy/religious exemption cases to survive *Smith* turned out to be the ministerial exception unanimously reaffirmed in *Hosanna-Tabor*.¹³⁸ Chief Justice Roberts’s

¹³⁰ *Id.* at 492.

¹³¹ *Id.* at 491-93.

¹³² *Id.* at 493.

¹³³ 878 F.2d 1458 (D.C. Cir. 1989).

¹³⁴ *Id.* at 1463.

¹³⁵ *Id.*

¹³⁶ *Smith II*, 494 U.S. 872, 877 (1990).

¹³⁷ For the contexts of the church autonomy cases cited in *Smith*, see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 445-52 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952).

¹³⁸ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694 (2012).

opinion in that case addressed the argument that no ministerial exception survived *Smith*.¹³⁹ *Hosanna-Tabor* involved an employment discrimination claim against a church by a teacher the church claimed was a minister.¹⁴⁰ The EEOC and the plaintiff argued that churches were protected in the employment context to the extent desirable by general principles applicable to certain nonreligious groups, such as freedom of association, and that this approach would accord with the interpretation of the Free Exercise Clause upheld in *Smith*, since employment discrimination laws are neutral, generally applicable laws.¹⁴¹

Chief Justice Roberts rejected these arguments.¹⁴² First, both religion clauses—the Establishment Clause and the Free Exercise Clause—must have some application to the historically significant issue of the right of a religious organization to select its own leaders, free of government interference.¹⁴³ Any other holding would be “remarkable.”¹⁴⁴

As for *Smith*, religious exemptions for the individual, the subject of *Smith*, “involved government regulation of only outward physical acts.”¹⁴⁵ In contrast, government interference with ministerial relations, as in government enforcement of anti-discrimination laws in the context of ministerial selection and retention, “affect[] the faith and mission of the church itself.”¹⁴⁶ Thus, the ministerial exception was unaffected by *Smith*.¹⁴⁷

I have no idea what that distinction means, other than the untenable possibility that only one individual’s religious faith is threatened in the *Smith* context, versus the faith of a whole congregation, which is threatened by a government institutional interference. It has certainly been suggested, most notably in Patrick Garry’s book, *Wrestling With God*,¹⁴⁸ that the Free Exercise Clause protects individual religious liberty, whereas the Establishment Clause protects the institutional autonomy of religious organizations, but Chief Justice Roberts did not defend that distinction in *Hosanna-Tabor*—the opinion expressly relied

¹³⁹ See *id.* at 705-07.

¹⁴⁰ See *id.* at 701.

¹⁴¹ See *id.* at 706-07.

¹⁴² See generally *id.*

¹⁴³ See *id.* at 702.

¹⁴⁴ *Id.* at 706.

¹⁴⁵ *Id.* at 707.

¹⁴⁶ *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ See PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURTS’ TORTUOUS TREATMENT OF RELIGION* (2006).

on both religion clauses¹⁴⁹—and there is no sense of its presence in the majority opinion in *Smith*, which said nothing about the Establishment Clause.

Undoubtedly Justice Scalia agreed with the distinction between regulation of individuals and regulation of a church—he not only joined Roberts’s opinion, but also was heard to say in oral argument in *Hosanna-Tabor* that “this case has nothing to do with *Smith*.”¹⁵⁰ The question is, why? Many distinctions come to mind—after all, the lower federal courts continued to apply the ministerial exception after *Smith* was decided,¹⁵¹ so one can hardly claim that there is no coherence in distinguishing individual religious claims of conscience from institutional autonomy.

But why did the Court in *Smith* reject a claim equally as plausible as the ministerial exception—that an individual believer might have some protection from government impositions that threaten religious conscience? The answer may be the fear of anarchy, which, given the pragmatic differences between individual claims and the claims of religious institutions, was not as likely to occur in the context of the ministerial exception. To put it bluntly, any kook can raise a *Smith* claim, but it takes something like the Catholic Church to raise the ministerial exception. I do not mean to suggest that Justice Scalia in *Smith* knew that his own Catholic tradition would continue to enjoy constitutional protection. I mean only that in *Hosanna-Tabor*, Justice Scalia’s innate conservatism that venerates established institutions could assuage any fear that a religious exemption in the institutional context would get out of hand.

Despite the breadth and certainty of *Hosanna-Tabor*, there may yet be future litigation over the ministerial exception. The unanimity of the decision will preclude direct challenges to the ministerial exception doctrine, and I do not believe there will be much litigation over the related question of just who is a minister.¹⁵² But Chief Justice Rob-

¹⁴⁹ *Hosanna-Tabor*, 132 S. Ct. at 702 (“Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”).

¹⁵⁰ E-mail from Douglas Laycock, Robert E. Scott Distinguished Professor of Law, Univ. of Va. Law Sch., to Eric J. Segall, Con Law Prof List (Jan. 11, 2012, 12:55 PM), available at <http://lists.ucla.edu/pipermail/conlawprof/2012-January/039350.html>.

¹⁵¹ Mark Strasser, *Making the Anomalous Even More Anomalous: On Hosanna-Tabor, The Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL’Y & L. 1 (2012).

¹⁵² In contrast, my fellow panelists at the Elon Law Symposium, Mark Strasser and Aaron Petty, believe that the question of who is a minister will become quite important and controversial. See Mark Strasser, Presentation at the Elon Law Review Symposium:

erts had a clear idea of what kind of case the ministerial exception prohibits—challenges to the severance of a minister in alleged violation of some aspect of an anti-discrimination law.¹⁵³ The opinion reserved judgment, however, on what might be considered the most likely kind of legal challenge—one by a minister for breach of contract.¹⁵⁴ Perhaps that kind of case can still be heard.¹⁵⁵

After rejecting the government's argument in *Hosanna-Tabor* that the church's autonomy should be protected by the same freedom of association right that applies to certain other communicative organizations, Chief Justice Roberts proceeded to ignore right of association principles altogether.¹⁵⁶ Both the underlying argument and the structure of its rejection illustrate that the one category of religious rights that *Smith* expressly recognized as protected—that of hybrid rights, as in the amalgamation of Free Exercise and parental rights in *Yoder*—was actually undermined by the result in *Smith*.¹⁵⁷ Because *Smith* gave no independent traction to the right of Free Exercise in the face of neutral, generally applicable laws, the Court in *Hosanna-Tabor* analyzed the case as either a right of association case or a religious rights case. It did not occur to the Court that the right of association might be strengthened by the presence of religious liberty values or vice versa.

This has also been the pattern in recent cases in which religious believers bring what could be characterized as hybrid rights claims—the religious liberty claims are either summarily dismissed under *Smith* or simply drop out of the case.¹⁵⁸ Two recent cases in which this phe-

Hosanna-Tabor and Institutional Competence (Oct. 26, 2012) and Aaron R. Petty, Presentation at the Elon Law Review Symposium: The Mischief of *Hosanna-Tabor* (Oct. 26, 2012). Petty believes that the question of who is a minister will force the Supreme Court to confront the fraught and ultimately impossible question of what is a religion.

¹⁵³ *Hosanna-Tabor*, 132 S. Ct. at 706.

¹⁵⁴ *Id.* at 710.

¹⁵⁵ Recently a plurality of the Wisconsin Supreme Court dismissed a breach of contract claim against St. Patrick Congregation, a Roman Catholic Church in the Archdiocese of Wisconsin under the ministerial exception. *DeBruin v. St. Patrick Congregation*, 2012 WI 94, 343 Wis. 2d 83, 816 N.W.2d 878. But in August, the D.C. Court of Appeals allowed a breach of contract suit to go forward. *See Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812 (D.C. 2012). For a recent case permitting a tort action to proceed—another reserved category in *Hosanna-Tabor*, see *Bilbrey v. Myers*, 91 So. 3d 887 (Fla. Dist. Ct. App. 2012).

¹⁵⁶ *See Hosanna-Tabor*, 132 S. Ct. 694.

¹⁵⁷ *See id.*

¹⁵⁸ *See infra* notes 159-60.

nomenon can be seen are *Christian Legal Society v. Martinez*¹⁵⁹ and *Snyder v. Phelps*.¹⁶⁰

In *Christian Legal Society*, the Court upheld a law school's requirement of an all-comers policy as applied to a student religious organization.¹⁶¹ Justice Ginsburg's majority opinion analyzed the case extensively as a limited public forum case¹⁶² and concluded that the policy was reasonable and viewpoint neutral.¹⁶³ In regard to the Free Exercise claim, Justice Ginsburg was dismissive: "CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct."¹⁶⁴

This observation made no sense in terms of the *Smith* opinion. The claim by CLS was precisely the sort of hybrid right—in this case free exercise/free speech association—that entitled the parents in *Yoder* to heightened scrutiny review. Furthermore, it is telling that Justice Alito's dissent did not even mention *Smith*.¹⁶⁵ In *Christian Legal Society*, hybrid rights did not exist.

One can draw the same conclusion from *Snyder*, in which the religious claimant was successful under a non-religious rationale.¹⁶⁶ In *Snyder*, a church conducted an anti-homosexual demonstration near the funeral of a member of the military.¹⁶⁷ The father of the deceased soldier brought claims for intentional infliction of emotional distress, invasion of privacy, and civil conspiracy and won a jury verdict.¹⁶⁸ That verdict was overturned on grounds of Free Speech.¹⁶⁹ Chief Justice Roberts's majority opinion affirmed that reversal.¹⁷⁰ Although there was not any doubt that the demonstration in the case proceeded from

¹⁵⁹ 130 S. Ct. 2971 (2010).

¹⁶⁰ 131 S. Ct. 1207 (2011).

¹⁶¹ 130 S. Ct. at 2995.

¹⁶² *Id.* at 2985 ("our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights").

¹⁶³ *Id.* at 2993.

¹⁶⁴ *Id.* at 2995 n.27 (citations omitted).

¹⁶⁵ *See id.* at 3000-20.

¹⁶⁶ *See generally* *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

¹⁶⁷ *See id.* at 1213-14.

¹⁶⁸ *See id.* at 1214.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 1221.

the ministry of the church, that fact played no role whatsoever in the opinion, which would have been written in the same way had the demonstration taken place out of any other motivation.¹⁷¹ The conclusion can be drawn that when any other constitutional right is available in support of a claimed religious exemption, that other source will be litigated, probably exclusively.

2. RFRA Claims Against the Federal Government

As noted above, RFRA claims figure in the ongoing dispute over religious exemptions from provisions of the ACA.¹⁷² So, obviously RFRA will be an important potential source of protection of religious liberty in the future. What, then, are the promises and limitations of RFRA?

In *Boerne*, Justice Stevens raised doubts about the constitutionality of RFRA on the ground that it protected religious believers but not nonbelievers in violation of the Establishment Clause.¹⁷³ One might think that these constitutional doubts were assuaged by Justice Stevens's decision to join Justice Ginsburg's unanimous opinion in *Cutter v. Wilkinson*, which in 2005 upheld the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) against a similar Establishment Clause attack.¹⁷⁴

But *Cutter* upheld only the part of RLUIPA that protected the religious rights of incarcerated persons.¹⁷⁵ Since any accommodations for such persons inevitably involve the lessening of burdens on religious practice that the government itself imposed in some way, and since government control in these circumstances is extreme, RLUIPA might or might not stand as precedent for upholding RFRA. That, plus the note in *Cutter* reminding everyone that the Court had not yet

¹⁷¹ See *id.*

¹⁷² Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

¹⁷³ *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring). I am skipping over the constitutional question raised in a number of Circuits that Congress might lack legislative authority to apply RFRA even to federal law and officials. Every court that addressed that issue concluded that Congress could validly enact RFRA in the federal law context. See, e.g., *Hankins v. Lyght*, 441 F.3d 96, 105-06 (2d Cir. 2006).

¹⁷⁴ 544 U.S. 709 (2005).

¹⁷⁵ *Id.* at 713.

ruled on the application of RFRA to federal law,¹⁷⁶ might counsel restraint in relying on *Cutter*.

However, the Court did apply RFRA in *O Centro* without questioning its constitutionality and did not comment on any potential Establishment Clause limit.¹⁷⁷ That silence might mean nothing, of course. But since the lower federal courts have continued to hear RFRA challenges to federal law since *Boerne* and have not declared RFRA to be a violation of the Establishment Clause on its face, one would have to conclude that RFRA is constitutional per se.

That is not to say that a particular accommodation of religion that is held to be required by RFRA might not violate the Establishment Clause. An accommodation might so one-sidedly benefit a religious believer to the detriment of others that it violates the Establishment Clause.¹⁷⁸ But such an eventuality is unlikely because RFRA does not appear to be that specific and exacting. A court would not feel obligated to grant such unconstitutional relief under RFRA.

This easy assurance, however, leads to the question of what RFRA actually does require. It is sometimes asserted that RFRA provides to the religious believer more protection than is afforded under the First Amendment.¹⁷⁹ This is undoubtedly true in a sense. RFRA was enacted to counter the effect of *Smith*, which, after all, provided no protection against the application of neutral, generally applicable laws that burdened religious conscience. So, in that sense, RFRA goes beyond the requirements of the Free Exercise Clause.

But is there any more to RFRA than that? Does RFRA simply return the playing field to a point prior to *Smith*? That outcome would not necessarily protect religious liberty very much. As one student Note has put it, “RFRA lends itself to two possible interpretations: a

¹⁷⁶ *Id.* at 715 n.2.

¹⁷⁷ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

¹⁷⁸ *See, e.g., Thornton v. Caldor*, 472 U.S. 703 (1985) (striking down state law as violative of Establishment Clause that relieved religious believer of work obligations on the believer’s Sabbath no matter the burden on the employer or other employees).

¹⁷⁹ *See, e.g., Zackeree S. Kelin & Kimberly Younce Schooley, Dramatically Narrowing RFRA’s Definition of “Substantial Burden” in the Ninth Circuit—the Vestiges of Lyng v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al.*, 55 S.D. L. REV. 426, 451 (2010) (referring to the “gestalt” of RFRA as providing “more protection than the First Amendment generally provided”).

true compelling governmental interest test or a moderate balancing test.”¹⁸⁰

RFRA’s stated purpose is to “restore the compelling interest test as set forth in [*Sherbert* and *Yoder*]”¹⁸¹ But what exactly was that test? In *Smith*, Justice Scalia considered the stringency of the compelling interest test to be one of the reasons it could not actually be applied in religious burden cases.¹⁸² If applied according to its usage in other areas of law, “many laws will not meet the test,” which would “court[] anarchy,” if every sincere believer could invoke it.¹⁸³ On the other hand, watering it down would not do either because the test would then lose its demanding nature in areas in which that stringency is necessary.¹⁸⁴ Justice Scalia’s concerns would seem to have been justified by the only Supreme Court decision applying RFRA—*O Centro*—in which the Court seemed to be very exacting in requiring a religious exemption for sacramental use of an illegal drug.¹⁸⁵

However, there has been no anarchy. Most claims under RFRA fail, either because a court holds that there was no substantial burden on the Free Exercise of religion or because the government is held to have satisfied the compelling interest test.¹⁸⁶

Nor was this outcome necessarily unanticipated by RFRA’s framers. After all, despite the compelling state interest test, the *Sherbert* line of cases was a paper tiger—the Court never actually invalidated any government action except the denial of unemployment compensation benefits.¹⁸⁷

It is also unclear whether the exceptions to the application of the compelling interest test that occurred in the *Sherbert* line—internal government activities and specialized contexts, such as the military—were meant to be imported into RFRA as well. The Ninth Circuit, for exam-

¹⁸⁰ Nicholas Nugent, Note, *Toward a RFRA That Works*, 61 VAND. L. REV. 1027, 1053 (2008).

¹⁸¹ Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb(b) (1993).

¹⁸² *Smith II*, 494 U.S. 872, 886-89 (1990).

¹⁸³ *Id.* at 888.

¹⁸⁴ *See id.*

¹⁸⁵ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 437 (2006).

¹⁸⁶ *See infra* notes 189-203 and accompanying text.

¹⁸⁷ FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* 33-34 (2007).

ple, held en banc in 2008 in a *Lyng*-like analysis¹⁸⁸ restricting the application of RFRA in the context of federal government actions on its own land, that “government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a ‘substantial burden’ . . . on the free exercise of religion.”¹⁸⁹ The term “substantial burden” in RFRA was a “term of art” to be “defined by reference to Supreme Court precedent.”¹⁹⁰ Even a critic of that decision expects most judges to rule similarly in the absence of further statutory amendment,¹⁹¹ though others are more hopeful of future protection of religious practice.¹⁹² While internal government areas such as the military regulations were not excluded from the reach of RFRA, there may have been anticipation that the government burden would be easier to satisfy in some realms than in others.¹⁹³

Even the statutory linkage of the compelling test to both *Sherbert* and *Yoder* may be misleading, since the orders of magnitude of the government interests in the two cases were so different; *Sherbert* really just involved government money, whereas *Yoder* concerned educational opportunities for children.¹⁹⁴ *Sherbert* might have been decided the same way under a variety of middling standards or tests, but *Yoder* did require something like strict scrutiny to justify its outcome of denying children an education by exempting them from a mandatory attendance law.¹⁹⁵

Ira Lupu argued in 1999 that RFRA had done little to increase the success rate of plaintiffs in Free Exercise litigation¹⁹⁶ and noted that

¹⁸⁸ See generally *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008). See also *Smith II*, 494 U.S. 872, 900 (1990).

¹⁸⁹ *Navajo Nation*, 535 F.3d at 1063.

¹⁹⁰ *Id.*

¹⁹¹ Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 278 (2012).

¹⁹² See Michelle Kay Albert, Note, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479 (2009).

¹⁹³ See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1180-81 (2009) (describing perhaps changing views of Senator Orrin Hatch and others about the reach of the compelling state interest test in pre-Smith cases).

¹⁹⁴ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁹⁵ See generally *Yoder*, 406 U.S. 205.

¹⁹⁶ Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 570 (1999).

the government prevails in eighty-five percent of RFRA cases.¹⁹⁷ Indeed, one of the reasons that RLUIPA was enacted was that land use and institutionalized persons had not achieved success in bringing actions under RFRA.¹⁹⁸

No one can say whether this trend will continue. Chris Lund has suggested that Chief Justice Roberts's *O Centro* decision essentially endorsed the more religiously-protective approach of the Blackmun dissent in *Smith* and rejected the concurring position of Justice O'Connor that accepted as compelling the government's argument that any exceptions would threaten the drug enforcement scheme.¹⁹⁹ Lund says that *O Centro* "mocks" that position.²⁰⁰ The approach in *O Centro* would change the landscape of judicial protection from federal legislative and administrative actions that threaten religious practices.

But Lund admits that whether the courts will really follow the implications of *O Centro* is an open question.²⁰¹ Early indications are not particularly promising.²⁰²

It may be that such predictions, either way, are beside the point. RFRA creates a general umbrella under which a wide variety of claims of religious liberty against all sorts of federal government action can be raised.²⁰³ Over time, the results will probably reflect societal views of the importance of religious exemptions. For now, federal judges may be said to value stability and efficiency over religious liberty. However, if a cultural change occurs in which society reaches a new and different view of the desirability of religious exemptions, RFRA will furnish one of the forums in which that change will manifest.

¹⁹⁷ *Id.*

¹⁹⁸ See Thomas E. Cacchia, Note, *RLUIPA and Exclusionary Zoning Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases*, 80 *FORDHAM L. REV.* 1853, 1864 n.95 (2012) ("It is worth noting that prior to RLUIPA, religious land use plaintiffs were almost universally unsuccessful, in both constitutional challenges and under RFRA.")

¹⁹⁹ Lund, *State RFRAS*, *supra* note 43, at 472-73.

²⁰⁰ *Id.* at 473.

²⁰¹ *Id.* at 496.

²⁰² See Matthew Nicholson, Note, *Is O Centro a Sign of Hope for RFRA Claimants?*, 95 *VA. L. REV.* 1281 (2009). It is worth noting that in a decision in one of the dozens of lawsuits challenging the HHS contraception mandate under the ACA, a Missouri federal district judge granted a motion to dismiss on the ground that the mandate does not constitute a substantial burden on the plaintiff's exercise of religion. *O'Brien Indus. Holdings v. Dep't of Health & Human Serv.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012).

²⁰³ *Id.*

Whatever interpretive shape RFRA ultimately takes, there is no reason in theory that the goal of protection of religious liberty and the attainment of religious exemptions from the requirements of federal law will not be accomplished. RFRA provides all the tools necessary. RFRA also represents the possibility of further legislative development by statutory amendment, if that is felt to be necessary. Such a future amendment might strengthen or weaken RFRA.

3. *Federal Regulation of State and Local Burdens on the Free Exercise of Religion*

But all of the above has to do only with federal law and administration. RFRA originally had been designed as a response to *Smith* at all levels of government, including state and local governments. That design was short-circuited in *Boerne*.²⁰⁴ While no one would suggest that *Boerne* rendered RFRA irrelevant, the decision certainly did restrict the Act's importance. As Lund points out, for religious liberty to be meaningful in America, with its overlapping levels of government, there often must be protections at the federal, state, and local levels.²⁰⁵ Protection for the religious believer at only one level of government can be meaningless.

Attempts to create such protection through Congressional action, however, have confronted, and continue to confront, difficult issues of constitutional federalism. The need to create a federal remedy arose from the recognition that, while some states and local governments would, and had, acted to create their own legislative protections for religious practice in light of *Smith's* retreat, other states and local governments would not. In addition, even where state and local legislation was adopted, the interpretation of such legislation would be likely to vary greatly without the involvement of the federal courts and ultimately the Supreme Court to ensure a consistent interpretation. Only some form of federal legislation could accomplish that.

The problem was that *Boerne* had cut off the most obvious source of Congressional power to bind the states and local governments—the enforcement language in Section 5 of the Fourteenth Amendment.²⁰⁶ Without delving too deeply into constitutional federalism issues be-

²⁰⁴ See *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also *supra* note 100 and accompanying text.

²⁰⁵ Lund, *State RFRAS*, *supra* note 43, at 467.

²⁰⁶ *Boerne*, 521 U.S. at 529-36.

yond the scope of this article, let me point out some of the structural issues that faced the RFRA coalition after *Boerne* struck down the application of RFRA to state and local government action.²⁰⁷

Section 5 of the Fourteenth Amendment, and the parallel enforcement provisions of the Thirteenth and Fifteenth Amendments, are not the only ways for Congress to bind state and local governments. Congress can generally do that under its Article I powers.²⁰⁸ What Congress cannot do, however, under most of its Article I powers, is create causes of action against the states, especially for money damages.²⁰⁹ Those causes of action are barred by the Eleventh Amendment.²¹⁰

By way of illustration, consider the Commerce Clause. Under the Commerce Clause, Congress can require that states and local governments pay their employees minimum wage.²¹¹ That federal requirement is itself valid and binding. Pursuant to that federal requirement, Congress can authorize a cause of action by the employee of a local government to recover past wages; but Congress cannot authorize a cause of action for past wages against a state.²¹² This limitation is softened, however, because, under what is known as the fiction of *Ex Parte Young*, a suit for injunctive relief against the responsible State Administrator can force the payment of the proper wage by the state going forward.²¹³

In the context of protecting religious liberty, Congress did not have to worry too much about causes of action for damages. Even under the Eleventh Amendment, an individual can utilize a valid federal obligation as a defense against an action by a state.²¹⁴ Often, that

²⁰⁷ *Id.* at 508.

²⁰⁸ U.S. CONST. art. I, § 8.

²⁰⁹ U.S. CONST. amend. XI.

²¹⁰ *Id.*

²¹¹ *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

²¹² This is because, unlike state governments, county and municipal governments do not enjoy Eleventh Amendment immunity. *See Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977). *See also Vicki C. Jackson, Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 692 (2000) (illustrating difference in back pay remedies for state versus local government employees).

²¹³ 209 U.S. 123 (1908).

²¹⁴ The Eleventh Amendment bars suits against the State in federal court and even bars Congress from authorizing suits against states in state courts. *See Alden v. Maine*, 527 U.S. 706 (1999). But the Amendment has no application to a federal defense against a state's proceeding against an individual in state court. *See Vicki C. Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988)

will be the situation when a religious exemption is sought. The state will be seeking to enforce state law against the religious believer. That is why RFRA provided specifically for a “defense to persons whose religious exercise is substantially burdened by government.”²¹⁵ Also, the relief sought under RFRA would often apply, as it did in *Boerne*,²¹⁶ against a local government, in which case the Eleventh Amendment prohibition would not apply.

So, Congress did not really need Section 5 of the Fourteenth Amendment to avoid the Eleventh Amendment state immunity in the context of protecting religious liberty. Therefore, if Congress could find other sources of authority, Congress could still bind the states and local governments.

The problem with Congress requiring the states and local governments to provide religious exemptions was that, other than the reach of the Constitution itself, there is no federal power that reaches all that states and local governments do. In other words, the states and local governments may never violate substantive constitutional rights. But if RFRA does not enforce constitutional rights, as *Boerne* held it does not,²¹⁷ then Congress lacks any other authority that would bind the states and local governments in everything they do.

Congress’s first attempt to respond to *Boerne*—the Religious Liberty Protection Act (RLPA)—ended in legislative deadlock in 1998 and 1999.²¹⁸ RLPA was another attempt to reach all or most state and local governmental actions, but this time relying on Congress’s authority under the Commerce and Spending Clauses.²¹⁹ That effort foundered because of constitutional questions—whether Congress had actually identified sources of authority that would support the reach of the

(“Cohens [v. Virginia, 19 U.S. 264 (1821)] rested on the view that assertion of a federal defense to a state prosecution was not a ‘suit’ . . .”).

²¹⁵ Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb(b)(2) (1993).

²¹⁶ See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²¹⁷ *Id.* at 532.

²¹⁸ See Mark Spykerman, *When God and Costco Battle for a City’s Soul: Can the Religious Land Use and Institutionalized Persons Act Fairly Adjudicate Both Sides in Land Use Disputes?*, 18 WASH. U. J.L. & POL’Y 291, 299-300 (2005).

²¹⁹ Gary R. Rom, Note, *RLUIPA and Prisoner’s Rights: Vindicating Liberty of Conscience For the Condemned By Targeting a State’s Bottom Line*, 44 VAL. U. L. REV. 283, 289 n.30 (2009) (“RLPA was essentially the same as RFRA, but Congress used its authority under the Spending and Commerce Clauses as opposed to its Section Five power.”).

bill²²⁰—and also because of growing concerns about religious liberty itself. Douglas Laycock describes the changed legislative atmosphere in 1999 compared to the days of near-unanimous support for RFRA in 1993:

The most important thing that happened was a series of lawsuits against small landlords who refused to rent apartments to unmarried opposite-sex couples. The couples alleged marital-status discrimination; the landlords defended on the basis of religious liberty. In the two highest profile cases, a California landlord lost in the state supreme court; an Alaska landlord won, at least temporarily, in the Ninth Circuit. Everyone understood that if religious landlords had a defense to marital-status discrimination, they would also have a defense to sexual-orientation discrimination.

This litigation galvanized the gay rights movement. Gay groups organized the entire civil rights movement to oppose RLPA as drafted. They wanted a global exception for any civil rights claim. The bill's supporters would not agree.²²¹

I will return to this theme of the growing controversy over the protection of religious liberty in Part III.

The response to the legislative failure of RLPA was RLUIPA.²²² Limiting the areas of religious protections to land use laws, such as zoning, and institutionalized persons, such as prisoners and patients at mental hospitals, lessened the fear of unreasonable claims of religious liberty, tied the Act more closely to Congressional authority, and identified areas in which the evidence of unconstitutional governmental conduct, even under *Smith*, was strongest.²²³

RLUIPA, much like RFRA before it, applies the compelling interest/least restrictive means test to state or local government impositions of substantial burdens on religious exercise by institutionalized persons,²²⁴ and to land use regulations that impose substantial burdens on

²²⁰ See Jennifer Dorton, Note, *The Religious Protection Act: The Validity of Using Congress Commerce and Spending Powers to Protect Religion*, 48 CLEV. ST. L. REV. 389 (2000).

²²¹ Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 412-13 (2011) [hereinafter Laycock, *Free Exercise of Religion*].

²²² Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195, 205-06 (2008).

²²³ See Roman P. Stozer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 943 (2001).

²²⁴ See Protection of Religious Exercise in Land Use and by Institutionalized Persons (PLUIPA), 42 U.S.C. § 2000cc-1 (2000).

religious exercise.²²⁵ It seems clear that the Act per se is constitutional.²²⁶ The Supreme Court upheld the institutionalized persons section against an Establishment Clause challenge in *Cutter* (though Justice Thomas did indicate doubts about Congress's authority to enact it under the Commerce and Spending Clauses),²²⁷ and lower courts have applied the land use provisions without constitutional hesitation.²²⁸

It is difficult to say precisely what effect RLUIPA has had, however.²²⁹ In the context of prisoners' rights, RLUIPA was enacted with broad left-right ideological support in the face of reports "of heavy-handed treatment of prisoners' religious claims."²³⁰ After twenty years of RFRA application to federal prisons and, more recently, RLUIPA, "prison officials often allow inmates to read scriptures, attend services, eat religious foods, and participate in fasts."²³¹ Certainly the religious rights of the institutionalized are today respected to a greater degree than before 1993. On the other hand, courts have been sensitive to the monetary impact of RLUIPA claims.²³² Indeed, it has been argued that the costs of prison compliance with RLUIPA are so great as to possibly violate the Establishment Clause because of the effect on third parties.²³³

²²⁵ *Id.* § 2000cc(a)(1). There are also protections in the Act that prohibit discriminatory land use regulations or exclusion of religious uses, but these provisions apparently have not been much utilized. See Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 815 (2006).

²²⁶ *But see* Evan M. Shapiro, Comment, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255, 1256 (2001) (arguing that the land use provisions of the Act exceed Congress's Commerce Clause authority).

²²⁷ *Cutter v. Wilkinson*, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring).

²²⁸ See generally Jason Z. Pesick, Note, *RLUIPA: What's the Use*, 17 MICH. J. RACE & L. 359 (2012).

²²⁹ See, e.g., Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provisions on Local Governments*, 39 FORDHAM URB. L.J. 1221, 1240 (2012) ("Although some have claimed that RLUIPA has seriously compromised the ability of local governments to administer local land use regulations in a manner that fairly balances the needs of both religious and secular interests, those claims are not supported by any empirical data.").

²³⁰ Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 854 (2012).

²³¹ Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1432 (2011).

²³² See, e.g., *Baranowski v. Hart*, 486 F.3d 112, 125-26 (5th Cir. 2007) (rejecting First Amendment and RLUIPA claims for kosher diet on grounds that there were insufficient funds for these and other religiously based-diets).

²³³ See generally Taylor G. Stout, Note, *The Costs of Religious Accommodation in Prisons*, 96 VA. L. REV. 1201 (2010).

In terms of land use regulations, the difficulty of evaluating the effects of RLUIPA are twofold. First, courts have interpreted the Act narrowly, both in terms of what is a religious exercise and what is a substantial burden.²³⁴ Second, it is not clear that the land use regulations at issue in most RLUIPA cases are generally applicable as that term is used in *Smith*. Instead, land use decisions often permit the sort of individualized assessment that *Smith* attributed to unemployment compensation decisions in which strict scrutiny might remain appropriate.²³⁵ RLUIPA itself specifically applies to government decision-making that permit individualized assessments as one of its jurisdictional bases.²³⁶ But insofar as that is the case, RLUIPA might not actually represent a change from what the Free Exercise standard would require anyway.

In any event, RLUIPA is certainly too narrow by itself to represent an answer to the issue of the proper limits and extent of religious exemptions in American public policy. The lesson of RLUIPA is that while Congress can legislate a generalized standard of protection of religious practice for purposes of federal law, it cannot do so with regard to state and local law. For that, the states themselves must act. To differing extents, the states have done so.

4. State RFRA Provisions

Christopher Lund's 2010 article on State RFRA is a helpful starting point to see how State RFRA statutes have, or have not, filled the gap that federal legislation and the Constitution have left in the effort to promote religious exemptions.²³⁷ Lund's article describes a variety of legislative and popular efforts.²³⁸ The state RFRA movement has reflected the changing national debate about religion in general and religious exemptions in particular.

Connecticut was the first state to enact any form of state RFRA, and it did so in the same year—1993—as the enactment of the federal

²³⁴ See Pesick, *supra* note 228, at 385-86.

²³⁵ See, e.g., David Owens & Adam Brueggemann, *A Survey of Experience with Zoning Variances*, UNC SCH. OF GOV'T, Feb. 2004, at 5, available at <http://sogpubs.unc.edu/electronicversions/pdfs/zonvar.pdf> (referring to the authority to grant exceptions to zoning regulations under variances as “[a] near universal feature of zoning” in the United States).

²³⁶ 42 U.S.C. § 2000cc(a)(2) (2000).

²³⁷ See generally Lund, *State RFRA*, *supra* note 43.

²³⁸ See generally *id.*

Act.²³⁹ After that enactment, no other state enacted a RFRA until after *Boerne's* invalidation of the federal RFRA as it applied to states and local governments. Undoubtedly the enactment effort ceased at the state level because of the reliance by persons concerned about religious exemptions on the federal RFRA. As long as the federal Act was viewed as fully applicable to all levels of government, no State enactments were felt to be needed.

The effect of *Boerne* was to demonstrate the need for state RFRAs. In the two years after *Boerne*, 1998-2000, ten states passed RFRAs: Florida, Illinois, Rhode Island, Alabama (which amended its state constitution), Arizona, South Carolina, Texas, Idaho, New Mexico, and Oklahoma.²⁴⁰ In the years after 2000, another six states passed their versions of RFRA: Pennsylvania, Missouri, Virginia, Utah, Tennessee, and, most recently, Louisiana, in 2010.²⁴¹

At the same time, efforts to enact state RFRAs also failed in a number of states—in some of which the efforts later prevailed—most importantly in terms of numbers, in New York and in California, which still do not have state RFRAs.²⁴² However, these numbers are misleading because, as will be seen in the next section, some of those non-enacting states have interpreted their state constitutions to provide greater protection for religious liberty than *Smith* would afford under the Free Exercise Clause.²⁴³ All in all, Lund estimates that around thirty states go beyond *Smith* in one way or another.²⁴⁴

The structure of state RFRAs is basically the same as that of the federal Act, with a few important differences. The state acts all are triggered by some type of threshold showing of a burden on religious exercise either by the state or local governments.²⁴⁵ In most instances,

²³⁹ See *id.* at 485.

²⁴⁰ See *id.* at 477 (showing states in a chart).

²⁴¹ LA. REV. STAT. ANN. § 13:5230 (2010).

²⁴² See Lund, *State RFRAs*, *supra* note 43, at 479.

²⁴³ See *id.* at 467.

²⁴⁴ See *id.*

²⁴⁵ See ALA. CONST. art. I § 3; ARIZ. REV. STAT. ANN. § 41-1493.03 (2013); CONN. GEN. STAT. ANN. § 52-571b (West 2013); FLA. STAT. ANN. § 761.03 (West 2013); IDAHO CODE ANN. § 73-402 (West 2013); 755 ILL. COMP. STAT. ANN. 35/10 (West 2013); LA. REV. STAT. ANN. § 13:5233 (West 2012); MO. ANN. STAT. § 1.302 (West 2013); N.M. STAT. ANN. § 28-22-3 (West 2012); OKLA. STAT. ANN. tit. 51, § 253 (West 2013); 71 PA. STAT. ANN. § 2404 (West 2013); R.I. GEN. LAWS § 42-80.1-3 (West 2012); S.C. CODE ANN. § 1-32-30 (West 2012); TENN. CODE ANN. § 4-1-407 (West 2013); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2013); UTAH CODE ANN. § 63L-5-201 (West 2012); VA. CODE ANN. § 57-2.02 (West 2012).

that burden is denominated substantial, but in some cases, a lesser triggering standard, such as a burden or even a restriction, is substituted. The state RFRA then subject the government action to some form of compelling state interest test.

Other than the difference in the triggering standard, the biggest textual differences among state RFRA concern exclusions from an act's coverage—either total exclusions or areas in which a state RFRA does not require the full application of the compelling state interest test.²⁴⁶ The federal RFRA contains no coverage exclusions.²⁴⁷ As far as federal law and practices are concerned, all actions of the federal government are potentially subject to a RFRA challenge. But that is not the case at the state level.

Aside from the issue, raised above, of whether coverage exclusions render the exclusions non-neutral for purposes of *Smith*, the exclusions represent an important change in the conceptualization of religious liberty in America. An exclusion from coverage suggests that there are some areas in which it is felt that we either cannot afford to indulge religious liberty and/or that there are some areas in which claims of religious liberty are likely to be fabricated.

Prisoner claims exclusions are a good example of both concerns. There is an obvious concern that religious accommodations in prisons will be costly, both in simple dollar amounts, since there are many prisoners who might bring claims for expensive individual treatment, and costly in terms of the safety and security of the prisons themselves.²⁴⁸ In addition, there may be a feeling that prisoners are less sincere in their claims for religious exemptions, given the general hostility with which the interests of prisoners are often received.²⁴⁹

²⁴⁶ See, e.g., OKLA. STAT. ANN. tit. 51, § 254 (West 2013); TEX. CIV. PRAC. & REM. CODE ANN. § 493.024 (West 2013) (less protective treatment for religious claims by prisoners).

²⁴⁷ 42 U.S.C. § 2000Bb-2000Bb-4 (1993).

²⁴⁸ See, e.g., *Muhammad v. Crosby*, 922 So. 2d 236 (Fla. Dist. Ct. App. 2006) (Muslim prisoner objects to being clean-shaven; the court interprets his petition for writ of mandamus as one for declaratory relief and directs lower court to assess merits of the claim under chapter 761 on the issue of the length of a beard, not its existence, because a short beard does not raise security concerns).

²⁴⁹ See, e.g., *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009) (Roman Catholic prisoner sought to have meatless meals every Friday of the year, but was denied permission because he could not “document” this as a requirement of his religion. He brought a claim under the Free Exercise and Establishment Clauses of the First Amendment, RLUIPA, and the Illinois Religious Freedom Restoration Act (IRFRA). He lost at trial,

In light of the requirements of RLUIPA, RFRA prisoner exclusions might no longer be significant as a practical matter, since RLUIPA often applies the compelling state interest test to such claims. On the other hand, Justice Ginsburg's opinion in *Cutter* seemed to suggest that RLUIPA might be applied deferentially in prisoner cases, indeed that the Establishment Clause might require that the Act be applied with due concern for the interests of other inmates and the institution itself.²⁵⁰

Of course, merely enacting RFRA does not say much about the actual level of protection of religious exemptions in these states. And the record in that regard is modest. First, and surprisingly, Lund reports that claims under these statutes "are exceedingly rare."²⁵¹ Second, when claims are brought, they are rarely successful.²⁵² Lund attributes the first phenomenon in part to ignorance and inexperience by attorneys, who as nonspecialists, fail to bring the claims or bring them in the wrong courts.²⁵³ He attributes the lack of courtroom success to the failure of judges to properly interpret RFRA language that is before them.²⁵⁴ The result is that state RFRA "have not translated into a dependable source of protection at the state level."²⁵⁵ They are "the dog that has not barked."²⁵⁶

On the other hand, perhaps judges are properly interpreting state RFRA. Perhaps the states are already protecting religious liberty through statutory or administrative means to such an extent that the resulting accommodations are felt to be fair. Therefore, when religious exemptions claims are brought, they are viewed as non-meritori-

but won on appeal); *see also* *Yasir v. Singletary*, 766 So. 2d 1197 (Fla. Dist. Ct. App. 2000) (prisoner appeals judgment in favor of the defendant in prisoner's challenge to the loss of 60 days gain time that he incurred for using his new religious name on documents before prison records were updated. The trial court found that the administrative process was not unreasonable, and he lost again on appeal.).

²⁵⁰ *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) ("Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'").

²⁵¹ Lund, *State RFRA*, *supra* note 43, at 467.

²⁵² *See id.* at 468.

²⁵³ *See id.*

²⁵⁴ *See id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 469.

ous by objective observers, including judges. Lund doubts this.²⁵⁷ Given the public controversies today about the proper level of protection of religious claims to exemptions, so do I. It is hard to believe that the states are already providing the exemptions that people are arguing so vociferously about.

It seems more likely that the failure of RFRA claims stems from a disagreement in America concerning how much accommodation there should be for religious practices. That does not necessarily mean, as Lund argues, that the judges interpreting RFRA are improperly rejecting claims.²⁵⁸ It does probably mean, however, that state RFRA have not played the full role of protecting religious exemption claims that their drafters expected and hoped for.

We will consider the growing controversies about RFRA in Part III, in the context of recent issues in the religious exemptions debate. For now, let me note that in the spring of 2012, North Dakota rejected a proposed state RFRA constitutional amendment in a contest that revealed how politically divisive religious exemptions have become.²⁵⁹ That divisiveness has been growing for some time. When Governor Pete Wilson vetoed California's RFRA in 1998, he warned against the danger that such statutes posed to a variety of important state policies, such as the payment of taxes and racial anti-discrimination laws.²⁶⁰ Whatever future role state RFRA play in the struggle over religious exemptions, the days of unanimous support for the religious dissenter exhibited in the early 1990s in light of *Smith* are clearly gone. The potential of state RFRA is now recognized by both supporters and opponents. It is just that potential for favoring religious exemptions that is rendering such statutes increasingly controversial.

5. *State Constitutional Interpretation*

The most obvious potential response at the state level to the Free Exercise approach of *Smith* is sometimes overlooked—a judicial interpretation of a parallel state constitutional provision that refuses to fol-

²⁵⁷ See *id.* at 467.

²⁵⁸ See *id.* at 468.

²⁵⁹ See Rob Boston, *Voters In North Dakota Protect Religious Liberty, While Missouri Voters Weaken It*, CHURCH & STATE, Sept. 1, 2012, at 13, available at 2012 WLNR 19146880.

²⁶⁰ See Governor's Veto Message for Assembly Bill No. 1617 (Sept. 28, 1998), 1997-98 Reg. Sess., 8 Assembly J. 9647, 9648 (Cal. 1998), available at http://leginfo.ca.gov/pub/97-98/bill/asm/ab_1601-1650/ab_1617_vt_19980928.htm.

low *Smith* and retains some sort of heightened scrutiny for state and local government practices that interfere with religious exercise.

Every state constitution I know of has some kind of religion provision that could serve this purpose. No one doubts the legitimacy of “going beyond” federal constitutional requirements in the interpretation of state constitutions, which is a long-standing aspect of that field.²⁶¹ *Cutter* demonstrated that retaining heightened scrutiny and permitting religious exemptions could be constitutional despite the Establishment Clause.²⁶² And, as Lund points out, some states have gone ahead and interpreted their state constitutions to give greater protection to religious exercise than *Smith* does.²⁶³ In 2004, Douglas Laycock estimated that sixteen states apply a stricter standard than does *Smith* under a state constitutional provision equivalent to the Free Exercise Clause—though the rulings in three of those states predated *Smith*.²⁶⁴ So, given all of that, why have so many states bothered with the difficulty of passing state RFRAs? Why not just rely on judicial interpretation of the state constitution?

One obvious reason might be that *Smith* is persuasive and state courts interpreting their state constitutions have followed *Smith*'s interpretation. But only three states have actually followed *Smith*,²⁶⁵ so this seems an unlikely explanation.

My own state of Pennsylvania may furnish an explanation of the relative paucity of state constitutional response to *Smith*. Pennsylvania has a well-developed history and method for following, or not following, federal court interpretations of constitutional provisions that parallel those of the Pennsylvania Constitution.²⁶⁶ In addition to that tradition in general, Pennsylvania has a provision—Art. I, Section 3—that contains language that could be applied to a demand for religious

²⁶¹ See Robert F. Utter, *State Constitutional Law, The United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 27-28 (1989) (noting “increase in state courts independently interpreting their state constitutions,” many law review articles and hundreds of state court decisions going beyond the requirements of federal constitutional law).

²⁶² See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

²⁶³ See Lund, *State RFRAs*, *supra* note 43, at 467.

²⁶⁴ Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211-12 (2004).

²⁶⁵ Those states are Maryland, New Jersey, and Wyoming. See Evan J. Bergeron, *Organized RFRAFF: A Recommendation to the Louisiana Legislature on the Best Way to Accomplish a State Religious Freedom Restoration Act*, 12 LOY. J. PUB. INT. L. 133, 140 n.60 (2010).

²⁶⁶ See *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

exemption from a neutral, generally applicable law.²⁶⁷ However, because this provision had not been interpreted by the state supreme court to go beyond the requirements of the Free Exercise Clause—nor not to go beyond, for that matter—when confronted by that question, the lower state courts just assumed that federal interpretation of the Free Exercise Clause would control.²⁶⁸ When the state legislature enacted a state RFRA in 2002,²⁶⁹ there was no indication that the Pennsylvania courts would go beyond *Smith*.

The newly enacted statute now further affects Pennsylvania constitutional interpretation. Because of the enactment of a state RFRA, parties in cases about burdens on religious practice tend to raise issues pursuant to the state RFRA rather than under the state constitution simpliciter.²⁷⁰ Therefore, the question of whether Pennsylvania follows *Smith* may never be definitively resolved.²⁷¹ This is significant because the Pennsylvania statute includes a number of exclusions and, of course, can be amended to provide more exclusions from its coverage.²⁷² The more often the statute is relied upon, the less likely judges may be to impart independent significance to the state constitution in areas where the statute does not apply or applies deferentially.

Other states have different models of constitutional protections of religion and may use them to provide greater protection—or may shrink from doing so.²⁷³ But whatever the precise wording of the state constitutional provision, there is usually enough room for judicial in-

²⁶⁷ PA. CONST. art. I, § 3 (“[N]o human authority can, in any case whatever, control or interfere with the rights of conscience . . .”).

²⁶⁸ See *Meggett v. Pa. Dep’t of Corr.*, 892 A.2d 872, 879 (Pa. Commw. Ct. 2006); see also *Commonwealth v. Cottam*, 616 A.2d 988, 997 (Pa. Super. Ct. 1992).

²⁶⁹ The Religious Freedom Protection Act, 71 PA. STAT. ANN. §§ 2401-07 (West 2002).

²⁷⁰ In a recent example, a federal district judge granted a preliminary injunction in August 2012 against a Philadelphia ban on public feeding in city parks under the Pennsylvania statute rather than any constitutional ground. See Howard Friedman, *Opinion Filed Supporting Injunction Against Public Feeding in Parks*, RELIGION CLAUSE, Aug. 12, 2012, available at 2012 WLNR 17068444.

²⁷¹ On the other hand, litigation over Establishment Clause-type issues will still arise under Art. I, Section 3. See, e.g., *Freedom from Religion Found. v. Saccone*, 894 F. Supp. 2d 573 (M.D. Pa. 2012) (challenge to Year of the Bible Resolution brought under Section 1983 and Art. I, Section 3 dismissed because of legislative immunity).

²⁷² See PA. STAT. ANN. § 2406(b) (West 2002) (exempting from coverage, inter alia, drug crimes, motor vehicle law, and medical licensing).

²⁷³ See, e.g., Piero A. Tozzi, *Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence*, 48 J. CATH. LEGAL STUD. 269 (2009).

terpretation that rejects the *Smith* approach and provides some level of heightened scrutiny for claims of religious conscience.

What difference does it make whether states respond to *Smith* through state statutory enactment—including the possibility of amendments of a state constitution that would provide a higher level of scrutiny of burdens on religious practice—or whether this is done by a state’s judiciary under a general religion provision akin to the Free Exercise Clause? Eugene Volokh has written thoughtfully and creatively about the implications of different kinds of responses to *Smith*, and he concludes that a modified form of statutory response is best.²⁷⁴ I will return to his suggestion in Part V. For now, let me list the basic differences among the approaches that I have discussed in this part.

Obviously, a federal constitutional approach to religious exemptions would be the most protective, theoretically, of religious exemptions. The degree of that protection, however, would depend on the level of scrutiny that the Supreme Court and then the lower courts actually applied. *Hosanna-Tabor* shows that a federal constitutional interpretation is a clearly superior method of protecting religious practice if the Supreme Court is sufficiently committed to providing protection.²⁷⁵ On the other hand, the history of precedent prior to *Smith* strongly suggests that a weak level of protection by the Supreme Court is the worst situation for protecting religious liberty. The involvement of the Supreme Court prior to *Smith* more or less legitimated the failure of the federal Constitution to protect religious exemptions and inhibited any effort in Congress or the states to provide a greater level of protection. To that extent, and ironically, *Smith* was a boon to religious liberty since it unleashed efforts to create genuine protections for religious practice. As a practical matter, even if *Smith* is overruled, the issue of religious exemption is so difficult and varied that it is hard to imagine the Supreme Court dealing with it in a definitive way.

The next highest level of national protection of religious practice is Congressional legislation reaching the actions of government at all levels. But *Boerne* suggests that any such national legislation would

²⁷⁴ See Eugene Volokh, *A Common-Law Model For Religious Exemptions*, 46 UCLA L. REV. 1465 (1999) [hereinafter Volokh, *Common-Law Model*].

²⁷⁵ See *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012).

raise intractable federalism issues.²⁷⁶ Still, federal legislation in limited areas obviously can be helpful, as RLUIPA shows.

This leaves state action, either legislative or judicial. That distinction is itself overdrawn, since any state statute will be interpreted by the same state judiciary that would interpret a state constitutional provision. The advantage of a state constitutional interpretation requiring some level of heightened scrutiny for state and local government interferences with religious practices is that state legislatures would not be free to restrict religious exemptions for unpopular groups, such as inmates. On the other hand, it is not that much easier for a state supreme court to deal in a principled way with religious exemptions than it is for the United States Supreme Court, which is what led to the *Smith* decision in the first place. So it is just as hard to imagine a state constitutional rule that deals effectively and broadly with the issue of religious exemptions.

This part of the article has described what the situation for religious exemptions was like until relatively recently. The next part will describe the increasingly divisive debate that is now occurring around the issue of religious exemptions.

III. THE CURRENT DEBATE OVER RELIGIOUS EXEMPTIONS

The current debate over religious exemptions reflects politicization underlain by growing and deep mistrust between believers and nonbelievers and, increasingly, between liberals and conservatives, whether religious or not. Exemptions for religion have become a partisan issue in the presidential election that is going on as I write this in the summer of 2012. Religious exemptions have become a symbol in the controversy over the status of religion generally in America. I will show instances of these currents and trends, but probably the reader is already aware that the media are filled with signs of these events.

First and foremost in the current debate is the controversy over the religious exemption to the contraception requirements of the ACA.²⁷⁷ The ACA has had a contentious political history as concerns religion from its beginning. The first contested issue was abortion.

²⁷⁶ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁷⁷ The Becket Fund for Religious Liberty estimates that there are 61 cases and over 200 plaintiffs challenging the contraception mandate as of spring 2013. See *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last visited June 25, 2013).

Claims have been made that the ACA and its implementing regulations fund abortions.²⁷⁸ Most independent observers have rejected that claim, except insofar as the ACA does cover the Hyde Amendment exceptions—rape, incest, and abortions to protect the life of the mother.²⁷⁹

In contrast to the abortion issue, there never was any question that there is a mandate in the ACA and its implementing regulations requiring contraception coverage without co-pays and exempting certain religious organizations from that mandate.²⁸⁰ The problem for religious groups was always the scope of that exemption. According to Richard Garnett, as implemented originally, the exemption “cover[ed] only those entities whose purpose is ‘the inculcation of religious values’ and that hire and serve primarily people of the same religious faith. A house of worship or a seminary could meet this definition, but many religious charities, schools and hospitals would not.”²⁸¹

President Obama later offered an expansion of the exemption in which insurance companies serving objecting religious employers would have to themselves offer the contraception coverage instead of the religious employer. But it remains unclear what relief this proposed expansion would give to a religious hospital or university that self-insures, and the details of the proposed expansion have not yet been worked out. Lawsuits have been filed challenging the original religious exemption in the meantime.²⁸² Even some allies of the Obama Administration have called for further expansion of this religious exemption.

²⁷⁸ I receive political fundraising messages about this almost every day. Here is the opening of one such from Jay Sekulow, Chief Counsel of the American Center for Law and Justice on Wednesday, July 4, 2012: “The fight against ObamaCare – the pro-abortion tax increase, the abortion-pill mandate, and the abortion surcharge – is far from over.”

²⁷⁹ See *Does Barack Obama’s Health Care Bill Include \$1 Abortions?*, TAMPA BAY TIMES (Mar. 12, 2012), <http://www.politifact.com/truth-o-meter/statements/2012/mar/21/blog-posting/does-barack-obamas-health-care-bill-include-1-abor/>. This report does not cover the availability of the so-called “morning after pill” and whether such emergency contraceptives are abortion agents in any sense of the word. In any event, many such contraceptives are available without prescription and are ineligible for coverage anyway.

²⁸⁰ See *id.*; David G. Taylor, *Insurance Companies Required to Cover Preventive Care*, POLITIFACT (Sept. 1, 2011), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/519/reproductive-health-care-will-be-heart-health-care/>.

²⁸¹ Richard W. Garnett, *Understanding the HHS Lawsuits*, NOTRE DAME MAG., Summer 2012, available at <http://magazine.nd.edu/news/31400-understanding-the-hhs-law-suits/>.

²⁸² Including a lawsuit by Notre Dame. See *id.*

Of more significance to the issues raised in this article is the intensity of the rhetoric that the contraception mandate, and opposition to it, has generated. The issue has become a part of two countervailing narratives: the war on women and the war on religion.

Neither response seems justified. The Catholic Church has consistently opposed birth control for the faithful, so it is not surprising that Catholic institutions would object to offering contraception coverage in their insurance policies.²⁸³ Their objection is not aimed only at contraception for women. Nor is it a newly minted dogma aimed at frustrating the ACA.

On the other hand, as Rick Ungar pointed out on Forbes's blog,

over 50 percent of Americans already live in states that require health insurance companies to provide contraception in their policy offerings. Further, states like California, New York and North Carolina have the identical religious exemptions as have been promulgated by the Department of Health & Human Services while some states (Wisconsin, Colorado and Georgia) provide no religious exemption whatsoever. Thus, one wonders why religious organizations in these states have not previously raised a fuss.²⁸⁴

So, the requirement of contraception coverage is also not new, is not part of a war on religion, and was always subject to possible further compromise.

Notwithstanding these moderating considerations, the rhetoric on the subject of contraception has been extremely vituperative. Here are just two examples on one side, which the reader probably knows could be endlessly repeated. Sally Quinn, the well-known *Washington Post* reporter, wrote in April 2012 about "A Catholic 'war on women'" that linked Vatican criticism of The Leadership Conference of Women Re-

²⁸³ See, e.g., Robert H. Brom, *Birth Control*, CATH. ANSWERS (Aug. 10, 2004), <http://www.catholic.com/tracts/birth-control> (stating that "[c]ontraception is wrong because it's a deliberate violation of the design God built into the human race . . .").

²⁸⁴ Rick Unger, *The Truth About Contraception, Obamacare and the Church*, FORBES (Feb. 2, 2012, 2:45 PM), <http://www.forbes.com/sites/rickungar/2012/02/02/the-truth-about-contraception-obamacare-and-the-church/>. It is true that there are ways "to get around the mandate" in these states, as a critical *USA Today* editorial stated, but that might well turn out to be true of the federal mandate as well. The point is that the sort of behind-the-scenes negotiations one would expect exploded into open opposition. See *160-Plus Bishops Speak Out Against HHS Mandate*, NAT'L CATH. REG. (Feb. 7, 2012), <http://www.ncregister.com/daily-news/hhs-decision-prompts-more-opposition-from-catholics/>.

ligious, the most prominent U.S. Catholic nuns group, with the contraception debate and the pedophilia crisis:

It's no wonder so many Catholics are leaving the church. They go longing for spirituality and they get dogma. A young friend of mine raised Catholic by nuns, wanted to return to the church and decided to go Easter Sunday. In the end she couldn't go, she said, because by walking into the church she felt she would be condoning the handling of the sexual abuse scandal, health care reform, the issues of contraception, abortion rights (even in the case of the life of the mother) and gay marriage.²⁸⁵

At around the same time, the Editorial Board of the *New Jersey Star-Ledger* went one step further, claiming that Vatican criticism of American nuns was “political payback” because some of the nuns had initially accepted the Obama Administration compromise that expanded the religious exemption to contraception coverage.²⁸⁶ This last example gives a nice flavor of the attribution of political partisanship that has now become a part of the secular critique of religion.²⁸⁷

Of course, the rhetoric has escalated on the other side as well. One example on the pro-religion side is Todd Starnes' book *Dispatches from Bitter America*²⁸⁸ (the title is a play on the quote from candidate Obama in 2008, which is now itself a part of the religious/nonreligious divide²⁸⁹). Starnes is a commentator on FOX News. He said in an interview in April 2012 that the Obama Administration's “War on Christianity,” which includes the contraception mandate and much more, is aimed at turning America into a secular state, which cannot be done without undermining God in American culture:

I suspect if you look at what the [Obama] administration is doing, they want to turn us into one of these godless, European, secular states . . .

²⁸⁵ Sally Quinn, *A Catholic 'War On Women,'* WASH. POST (Apr. 24, 2012, 1:33 PM), http://www.washingtonpost.com/blogs/on-faith/post/the-vatican-vs-the-nuns-what-would-jesus-say/2012/04/24/gIQA7WzkeT_blog.html.

²⁸⁶ *Catholic Church's Crackdown on Poverty-Fighting Nuns All About Dogma*, N.J. STAR-LEDGER (Apr. 24, 2012), http://blog.nj.com/njv_editorial_page/2012/04/catholic_churchs_crackdown_on.html.

²⁸⁷ See, e.g., Kevin Sheehan & Gary Buiso, *There'll Be Hell to Pay: Dolan's Pill Pledge to O*, N.Y. POST (Mar. 4, 2012, 7:26 AM), http://www.nypost.com/p/news/local/there_ll_be_hell_to_pay_xGYaTv440rtBUwpdPGOTO.

²⁸⁸ See generally TODD STARNES, *DISPATCHES FROM BITTER AMERICA: A GUN-TOTING, CHICKEN EATING SON OF A BAPTIST'S CULTURE WAR STORIES* (2012).

²⁸⁹ Obama: “*Small Town Voters Are Bitter, Cling to Guns & God.*” YOU DECIDE POLITICS (Apr. 12, 2008, 1:05 PM), <http://www.youdecidepolitics.com/2008/04/12/obama-says-small-town-voters-are-bitter-cling-to-guns-god/> (“So it's not surprising then that they get bitter, they cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations.”).

how can you do that if you have a country that is so in tune with understanding that God is the foundation for this country?²⁹⁰

As another example, under the headline, “Catholic Bishops Call for Two Weeks of Action Against Obama,” CathNewsUSA ran this first paragraph on April 25, 2012: “Roman Catholic leaders are calling for two weeks of public protests against President Barack Obama’s policies as they intensify their argument that the administration is engaged in a war on religion.”²⁹¹

The rhetoric has become so heated that there have also been reports that some Bishops feel the campaign against the contraception mandate, including lawsuits filed in May 2012, has become too much a part of the political debate and have sought to soften the Church’s position, or at least its perceived position.²⁹²

The contraception debate is only the most recent and publicly-noted issue concerning religious exemptions. Two other recent examples—the North Dakota referendum about a state RFRA constitutional amendment and growing anti-circumcision sentiment—also show the increasing controversy around religious exemptions.

The North Dakota amendment campaign illustrated two trends. First, the demands by supporters of the RFRA amendment have increased since the original RFRA was passed in 1993. Thus, the North Dakota provision would have been triggered by a mere burden on religious liberty.²⁹³ In addition, the amendment would have extended its protection to indirect burdens, such as exclusions from access to facilities.²⁹⁴ The other trend that the campaign illustrated was increasing

²⁹⁰ Billy Hallowell, *Exclusive: Fox News’ Todd Starnes Breaks Down the Obama Admin’s ‘War on Religious Liberty,’* THE BLAZE (Apr. 9, 2012, 7:47 AM), <http://www.theblaze.com/stories/exclusive-fox-news-todd-starnes-breaks-down-the-obama-admins-war-on-religious-liberty/>.

²⁹¹ *Catholic Bishops Call For Two Weeks of Action Against Obama*, CATHNEWS USA (Apr. 25, 2012, 6:22 AM), <http://www.cathnewsusa.com/2012/04/catholic-bishops-call-for-two-weeks-of-action-against-obama/>.

²⁹² *Moderate Bishops Upset About Health Care Lawsuits*, CATHNEWS USA (May 29, 2012, 3:28 AM), <http://www.cathnewsusa.com/2012/05/moderate-bishops-angry-about-health-care-lawsuits/>.

²⁹³ See Dave Thompson, *North Dakota ‘Religious Liberty’ Measure Sparks Debate*, NPR (June 5, 2012, 2:56 AM), <http://www.npr.org/2012/06/05/154285336/n-dakota-religious-liberty-measure-sparks-debate>.

²⁹⁴ Marci A. Hamilton, *North Dakota’s Religious Freedom Restoration Act (RFRA) Signals Religious Lobbyists’ New and Disturbing Approach to Statute-based Free Exercise Rights*, JUSTIA (May 3, 2012), <http://verdict.justia.com/2012/05/03/north-dakotas-religious-freedom>.

opposition to religious exemptions. Here is my favorite illustrative quote by the accomplished polemicist Marci Hamilton:

The longer the federal RFRA was in place, the clearer it became that while the law was perhaps well-intentioned, it harbored a dark underside, for under the law, children could be abused and medically neglected simply because those who were harming them or putting them at risk were religious. Residential neighborhoods could be subjected to uses never contemplated when the owners purchased their homes; and religious actors could argue that they were not bound by just about any law governing everyone else.²⁹⁵

In terms of the anti-circumcision movement, in July 2011, a California superior court judge removed an anti-circumcision initiative from the ballot on state preemption grounds.²⁹⁶ And, in 2012, a German court was reported to have rendered an anti-circumcision decision, although the nature of the ruling is still unclear.²⁹⁷

Any ban on circumcision would be viewed as an existential threat by Jews and other believers with religious commitments to circumcision. Some of the circumcision opponents seem to question whether there is any value for a child in membership in an ongoing religious community, and these critics seem ready to invite the government to second-guess a parental decision to circumcise a child based on a standard of whether circumcision is medically necessary.²⁹⁸ Presumably, circumcision for religious purposes is never medically necessary as such.

Yet, even within this increasingly divisive debate about religious exemptions, it is fair to ask why religious authorities reacted as strongly as they did to the contraception mandate in the ACA. Why did the United States Conference of Catholic Bishops feel it necessary to proclaim a Fortnight for Freedom, with references to Christian martyrs, in

restoration-act-rfra-signals-religious-lobbyists-new-and-disturbing-approach-to-statute-based-free-exercise-rights (defining an indirect burden to include “withholding benefits, assessing penalties, or an exclusion from programs or access to facilities”).

²⁹⁵ *Id.*

²⁹⁶ See *San Francisco Circumcision Ban To Be Stricken From Ballot*, CBS S.F. (July 27, 2011, 8:20 PM), <http://sanfrancisco.cbslocal.com/2011/07/27/san-francisco-circumcision-ban-to-be-stricken-from-ballot/>.

²⁹⁷ See Mark L. Movsesian, *Circumcision Controversies*, ST. JOHN’S CTR. FOR L. & RELIGION FORUM (July 10, 2012), <http://clrforum.org/2012/07/10/circumcision-controversies/>.

²⁹⁸ See, e.g., Benjamin R. Freed, *Anti-Circumcision Protestors Cut Into Supreme Court Scene*, DCIST (Mar. 27, 2013, 3:25 PM), http://dcist.com/2013/03/anti-circumcision_protesters_cut_in.php.

the primary context of the mandate?²⁹⁹ After all, nothing about the contraception mandate was final, and the Obama Administration certainly had not closed off further discussion. Nor, for all the rhetoric, does the contraception mandate come close to previous American restraints on the religious liberty of Catholics. During the Vietnam War, for example, the draft laws refused to recognize the Catholic Just War doctrine, thus leaving sincere Catholics with the choice of killing in a war deemed unjust—a powerful violation of religious conscience—or going to jail.³⁰⁰ Surely that situation represented a more direct challenge to religious conscience than the indirect association with contraception the mandate represents. Yet, the Catholic Church never rose up to challenge this denial of recognition of the Just War theory in anything like the terms with which it has reacted to the contraception mandate.

I reject a purely political answer to this question—that the Bishops, and conservative religious leaders generally, are opposed to the worldview of the Obama Administration and are looking for ways to express that opposition and, if possible, defeat it in the November 2012 election. No doubt there is some of that, which has led to further criticism of the Bishops, but I believe something deeper is going on.

When the Vietnam draft cases were being decided, religion in America enjoyed overwhelming, widespread cultural endorsement.³⁰¹ That is no longer the case, and it may be that the defensiveness that has emerged in the religious response to the Obama Administration is not aimed at the contraception mandate by itself, or even in combination with other particular controversies, such as the eligibility of Catholic adoption agencies for public funding in light of their opposition to adoption by same-sex couples. It may be that religious groups and authorities are attempting to defend a general role for religion in the culture that they sense is under attack. That is, they are asserting that religion is central to the culture, is good and is uniquely valuable.³⁰²

²⁹⁹ See *Fortnight for Freedom*, U.S. CONFERENCE OF CATH. BISHOPS, <http://www.usccb.org/issues-and-action/religious-liberty/fortnight-for-freedom/> (last visited May 15, 2013).

³⁰⁰ See *Gillette v. United States*, 401 U.S. 437, 463 (1971) (upholding the restricted religious exemption).

³⁰¹ For the degree of the change and the status of religion in the 1950s and 60s, see generally ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* (2012).

³⁰² These were essentially the sentiments of Archbishop Charles J. Chaput of Philadelphia in his address to the annual gathering of Catholic leaders hosted by the Napa

That view of religion as uniquely valuable is under attack, not just by the small minority that argues that religion is actively harmful—a Richard Dawkins, for example, who calls all religious education child abuse³⁰³—but by a much larger group, well represented in the legal academy, that argues that religion is no different from any other normative commitment that a nonreligious person might have and should therefore receive no greater protection in terms of exemptions from general law than secular moral pursuits would receive.³⁰⁴

This position—that religion is not special—need not imply that religion is bad. But it does oppose special exemptions for religious beliefs that many religious believers not only take for granted, but also assume that the Free Exercise Clause requires, *Smith* notwithstanding.

The argument that religion is not special is the position that Brian Leiter was representing when he asked provocatively, *Why Tolerate Religion?*, in which he argued that we should tolerate deeply held claims of conscience, but that religion should not be singled out as especially deserving of respect and protection.³⁰⁵ Leiter's question would be an-

Institute on July 26, 2012: “[A] growing secularism and the loss of a moral foundation suggest that ‘America is becoming a very different country.’” Michelle Bauman, *As Secularism Spreads, Archbishop Chaput Charts Path for Renewal*, CATH. NEWS AGENCY (July 27, 2012, 12:32 AM), <http://www.catholicnewsagency.com/news/as-secularism-spreads-archbishop-chaput-charts-path-for-renewal/>. Steven Smith gives the flavor of the growing threat that some religious believers feel: “Some people – some intelligent, informed people – believe there are emerging, serious threats to religious freedom.” Steven D. Smith, *Religious Freedom and Its Enemies, or Why the Smith Decision May Be a Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2042 (2011) (emphasis in original).

³⁰³ See Richard Dawkins, *Religion's Real Child Abuse*, THE RICHARD DAWKINS FOUND. (May 14, 2006, 7:00 PM), <http://richarddawkins.net/articles/118-religion-39-s-real-child-abuse>.

³⁰⁴ See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 454-55 (1994) (asserting in pertinent part that “RFRA’s compelling state interest test privileges religious believers by giving them an ill-defined and potentially sweeping right to claim exemption from generally applicable laws, while comparably serious secular commitments – such as those flowing from parental obligation, philosophical conviction, or lifelong cultural practice – receive no such legal solicitude. RFRA is thus a clear instance of the favoritism condemned by the Court’s decisions in *Thornton* and *Texas Monthly*.”).

³⁰⁵ See Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1 (2008). Leiter’s paper circulated much earlier than its publication date. See also Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2006 CATO SUPREME CT. REV. 257, 279-80 (2005-2006).

swered by religious³⁰⁶ and nonreligious³⁰⁷ defenses of the uniqueness of religious liberty. Today, the equal status position for nonreligious commitments is argued by a number of legal theorists,³⁰⁸ and the debate is ongoing.

Perhaps the fullest recent elucidation of the issue of religion's uniqueness was a November 2011 debate at Georgetown University Law Center between Michael McConnell and Noah Feldman concerning whether religious liberty is special.³⁰⁹ Feldman claimed that the presence of protections for religion in the Constitution is merely a historical contingency and challenged McConnell to justify normatively the claimed special status of religion—by which Feldman was referring generally to the debate over religious exemptions.³¹⁰ From Feldman's perspective, whatever protections religious institutions might enjoy under a case like *Hosanna-Tabor* should be enjoyed by institutions associated with other morally serious commitments, such as the Sierra Club or the Federalist Society, and if *Smith* is to be superseded by statutory protections for religion, such as RFRA, those protections should also be available to non-religious claims of conscience.³¹¹

We have now come to the present moment. We have seen in this part that the issue of religious exemptions is actually a debate about religion itself: How important is religion? How does the value of religion compare to the values of the generally applicable laws that religious believers seek exemption from? How are these values to be adjusted? And where should the presumptions lie?

The situation we are in is that the meaning of religion—both its role in our culture, as well as its definition—is in play in America today. We are engaged in a struggle over how religion should be treated.

³⁰⁶ See, e.g., E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 491 (2009). (“My thesis is that the First Amendment’s protection of religious freedom must rest preeminently on the intrinsic character and claims of religion itself. Religion requires special constitutional treatment precisely because it involves something transcendent, objective, normative, and exclusive.”).

³⁰⁷ See, e.g., Laycock, *Free Exercise of Religion*, *supra* note 221.

³⁰⁸ See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). Schwartzman presented his paper at the third Religious Legal Theory Conference at Pepperdine Law School in February 2012.

³⁰⁹ The Berkley Center, *What’s So Special About Religious Freedom? Keynote Debate*, VIMEO (Nov. 17, 2011), <http://vimeo.com/32512947>.

³¹⁰ See *id.*

³¹¹ See *id.*

That struggle is deeply political, by which I mean that it is a struggle to define the good for our society. No one can predict with confidence how this struggle will end.

But before trying to predict the outcome, let me next ask a different question: What is the meaning of this struggle? What does it mean when a constitutional Republic tries to define a constitutional value primarily without reference to the Supreme Court? In this debate, are we all interpreting the Constitution? Or are we doing something else? And if we are interpreting the Constitution, what does that imply about constitutional democracy?

IV. WHAT IS THE MEANING OF OUR STRUGGLE OVER RELIGIOUS EXEMPTIONS?

What is the meaning for constitutional democracy of the struggle over religious exemptions that I have been describing? If religious liberty is constitutionally protected, why is the Supreme Court not simply doing its job of protecting that right under the Free Exercise Clause as it protects other constitutional rights? We don't usually "experiment" in such matters. We don't pass statutes or vote in referenda. We don't protect constitutional liberty to one extent in one state and to another extent elsewhere. How do we explain the struggle over religious exemptions in a way that enforces rather than undermines the Constitution?

Let me state my conclusion upfront. There are some decisions that only the People can make. I have said that before, in the context of the Establishment Clause.³¹² I did not realize then that the Free Exercise issue of exemptions is part of the same context as is the Establishment Clause issue.

America and the Western world in general are in a transition period regarding religion, both in regard to its private meaning and its public role. In Europe, this transition is being contaminated by anti-Muslim sentiment. In America, fortunately, that problem is a marginal issue, the manic fear of Shari'ah notwithstanding.³¹³

³¹² See BRUCE LEDEWITZ, *CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM* ch. 3 (2011)

³¹³ For a contrast of the American and European approaches to religious liberty, particularly in regard to Islam, see MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* (2012). Despite instances of religious intolerance in America, the comparison is much in America's favor.

This transition is from a society completely and even unconsciously dominated by religion—and by Christianity in particular—to something else. We are grappling with Ronald Dworkin’s horrible but perhaps accurate statement of the nature of the question. Dworkin says, and many people on both sides agree with him, that the fundamental question is who we are as a nation.³¹⁴ The following is how Dworkin posed the basic issue about religion in his book *Is Democracy Possible Here?*:

*Should we be a religious nation, collectively committed to values of faith and worship, but with tolerance for religious minorities including nonbelievers? Or should we be a nation committed to thoroughly secular government but with tolerance and accommodation for people of religious faith? A religious nation that tolerates non-belief? Or a secular nation that tolerates religion?*³¹⁵

This transition is not simply from religious to secular, though that is one possible future. The transition is actually from settled consensus to open contest.³¹⁶ Pro-religion forces in our culture still dominate. But they do not dominate everywhere—not in the legal academy, for example, where anti-religious sentiment has surfaced in the last few years. And they do not dominate anywhere the way they used to.³¹⁷

The Supreme Court is simply unable to resolve a fundamental issue like this. Indeed, even calling the question of religion an “issue” understates its breadth and depth. The context is somewhat like that to which Justice Holmes alluded in his famous dissent in *Lochner v. New York*,³¹⁸ the case that ushered in judicial resistance to the burgeoning social welfare state. Right at the start of his dissent, Holmes identified the deep context of the case:

³¹⁴ See generally DWORKIN, *supra* note 10.

³¹⁵ *Id.* at 56 (emphasis added). For a recent effort to soften this harsh dualism with a more nuanced one, see generally WHOSE GOD RULES? IS THE UNITED STATES A SECULAR NATION OR A THEOLEGAL DEMOCRACY? (Nathan C. Walker & Edwin J. Greenlee eds., 2011).

³¹⁶ Paul Horwitz describes this overall contestation in the first chapter of his book entitled “Religion Under Attack, Liberalism Under Attack.” See PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 3 (2010).

³¹⁷ In fall 2012, The Pew Forum on Religion & Public Life reported that the religiously unaffiliated (“nones”) now make up 19.6% of the population in America and Protestants make up less than half, 48%. See The Pew Forum on Religion & Public Life, “Nones” on the Rise: One-in-Five Adults Have No Religious Affiliation 13 (Oct. 9, 2012), http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Unaffiliated/NonesOnTheRise-full.pdf.

³¹⁸ 198 U.S. 45 (1905) (striking down a New York statute forbidding employment in a bakery for more than 60 hours a week or 10 hours a day).

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.³¹⁹

By that reference to Spencer, Holmes was criticizing the Court majority for taking a side in the fundamental debate over the future of economic life in America. It would take the country thirty years to throw off the Court's premature attempt in *Lochner* to resolve that debate.

The recognition that the Supreme Court was not the proper arena in which to make that fundamental economic decision is what renders some conservative reaction to *National Federation*, the recent decision upholding the ACA, so absurd.³²⁰ Some of that reaction seemed to be disappointment that the Court had not repealed the New Deal. John Yoo's op-ed in the *Wall Street Journal*, in which he likened Chief Justice Roberts to Chief Justice Hughes, who, Yoo asserted, switched his vote on New Deal issues to avoid the FDR Court-packing plan, illustrates this outlandish disappointment:

After the president's plan was announced, Hughes and Justice Owen J. Roberts began to switch their positions. They would vote to uphold the National Labor Relations Act, minimum-wage and maximum-hour laws, and the rest of the New Deal.

But Hughes sacrificed fidelity to the Constitution's original meaning in order to repel an attack on the court. Like Justice Roberts, Hughes blessed the modern welfare state's expansive powers and unaccountable bureaucracies—the very foundations for ObamaCare.³²¹

³¹⁹ *Id.* at 75 (Holmes, J., dissenting).

³²⁰ See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

³²¹ John Yoo, *Chief Justice Roberts and His Apologists*, WALL ST. J. (June 29, 2012, 7:32 PM), <http://online.wsj.com/article/SB10001424052702303561504577496520011395292.html>.

Yoo still thinks that it was the Court's job to head off the 20th century social welfare state.³²² Like others who claim to worship at the altar of original meaning, he does not acknowledge that his method is not value neutral, but represents a fundamental political choice to be made by judges rather than voters.³²³ Holmes was right. Decisions that fundamental cannot be made by the Supreme Court, then or now.

It is true that every important constitutional decision takes a side in a national debate of some kind. Justice Scalia sounded just like Holmes in *Lawrence*—the case that struck down anti-sodomy criminal laws—when Scalia accused the majority of “tak[ing] sides in the culture war.”³²⁴ And the same could be said of Justice Scalia's majority gun rights opinion in *Heller*.³²⁵ The Court is always going to be resolving contentious issues.

I do not have a formula for when the Court can properly decide controversial questions versus when such a decision is beyond its proper role. But the fundamental economic arrangement of the country is one decision that is beyond its competence, and the place of religion in American life is another.

So, the tension I allude to in the title of this article about experimenting with a constitutional value is an inevitable one. Something about religious liberty is protected by the Constitution. In certain limited contexts, such as the ministerial exception or discrimination against religion, the Supreme Court is willing to say what that level of protection is. But, as to the more general question of religious exemptions, the Court is allowing a national experiment, or series of experiments, to unfold. And there is really no alternative to resolving matters in this popular way.

Having said this, I now must look more closely at what the Court has actually done in the religion field. Not everyone would accept my description that the Court has abandoned the field of religion under the Constitution.

In terms of the Establishment Clause, the Court has made it increasingly difficult, recently, for plaintiffs to challenge certain kinds of

³²² *Id.*

³²³ *Id.*

³²⁴ *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

³²⁵ *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

government actions that allegedly endorse or support religion.³²⁶ But this precedential line cannot be called a simple abandonment of the field because the Court's previous decisions requiring government neutrality toward religion have not been overruled. Those decisions still control in contexts in which standing is present, such as cases about religion in the classroom and cases in which state courts grant standing in federal constitutional litigation. More importantly, those prior cases influence the national debate over religious imagery in the public square. Because of them, governments rarely admit that they are endorsing religion and often claim, perhaps disingenuously, that they are merely advertent to historical usages or mere patriotism. The ghost of prior Supreme Court jurisprudence haunts our debates over the Pledge of Allegiance, the national motto and all the rest. That is not simple abandonment.

In terms of *Smith*, and Free Exercise in general, it is even more inaccurate to characterize the Court's action as simple abandonment. In *Smith*, the Court decided what the Free Exercise Clause means, or at least what it does not mean.³²⁷ *Smith* decided that the Free Exercise Clause does not protect religiously-based exemptions from neutral, generally applicable law.³²⁸ And when Congress expressly disagreed with that judgment, the Court in *Boerne* found Congress's disagreement unconstitutional, pursuant to a form of judicial constitutional supremacy.³²⁹

This way of looking at *Smith* and *Boerne* is the reason that Marci Hamilton stated baldly in 1998 that *The Religious Freedom Restoration Act is Unconstitutional, Period*.³³⁰ The problem with RFRA, and by extension the problem with all the efforts that are going on to promote religious exemptions, is that Congress, the states, and all of us are "[e]xpropriat[ing] the Supreme Court's Constitutional Duty to Interpret the First Amendment."³³¹ And, if the reader is of the view that this "duty" to interpret is actually shared among all these entities, then the

³²⁶ For differing treatments of the Establishment Clause justiciability cases, see Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835 (2012) and Richard Albert, *The Constitutional Politics of the Establishment Clause*, 87 CHI.-KENT L. REV. 867 (2012).

³²⁷ *Smith II*, 494 U.S. 872, 877-90 (1990).

³²⁸ *Id.* at 879.

³²⁹ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

³³⁰ Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998).

³³¹ *Id.* at 3.

criticism can be strengthened to say that all of the efforts described above are a *repudiation* of what the Court held the Free Exercise Clause meant in *Smith*. It is certainly noteworthy that so much of society is attempting to reverse a Supreme Court decision other than through amendment of the Constitution.

This criticism that we are undermining constitutional democracy cannot be brushed aside by the mere fact that the Court invited legislative action in *Smith* and accepted legislative action in *O Centro*.³³² The question of why legislatures are permitted to disagree with the Court's constitutional interpretation remains.

Nor does the obvious reality that Congress has "corrected" past Supreme Court decisions that did not protect certain rights by passing legislation to provide for those rights answer the question of why this is permissible.³³³ Is the Court supreme in the exposition of the Constitution or not?³³⁴

When Congress legislates a right that the Court has failed to protect, Congress might be of the view that the right should be protected as a matter of policy even if it lacks constitutional dimension. But in the context of religious exemptions, Congress and everyone else is second-guessing the Court's constitutional judgment itself. Liberals would not be so sanguine if Congress were of the view that the Court had misinterpreted the First Amendment in *Hill v. Colorado*³³⁵ and tried to ban bubble laws around abortion clinics. Nor would conservatives be so sanguine if Congress required corporations to seek a shareholder vote before engaging in political speech out of the view that the Court erred in *Citizens United v. F.E.C.*³³⁶ Suddenly, judicial supremacy in the interpretation of the Constitution would seem important.

Whatever one concludes about the authority of the Court in matters of constitutional interpretation, I do not think that *Smith* necessarily raises that issue, even though *Boerne* did protect the States from Congress's attempt to go beyond *Smith*.³³⁷ When Justice Scalia described religious peyote exemptions as involving a constitutional

³³² See *Smith II*, 494 U.S. 872; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

³³³ See Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715, 739-41 (1998) (citation omitted).

³³⁴ Compare *id.*, with *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

³³⁵ 530 U.S. 703 (2000).

³³⁶ *Citizens United v. F.E.C.*, 558 U.S. 310 (2010).

³³⁷ See *Smith II*, 494 U.S. 872; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

“value,” he was effectively acknowledging that the rule announced in *Smith* does not enforce the entirety of Free Exercise:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.³³⁸

Logically, Justice Scalia’s interpretation of the Free Exercise “value” should have meant that Congress could recognize the contours of the constitutional value more fully under Section 5 of the Fourteenth Amendment, which *Boerne* denied Congress could do.³³⁹ But, notwithstanding *Boerne*, the language in *Smith* about a value enshrined in the Bill of Rights remains.³⁴⁰

Smith should be thought of as a case of constitutional underenforcement.³⁴¹ As noted above, Justice Scalia argued in *Smith* that judicial enforcement of religious exemptions in a diverse society would threaten other constitutional values.³⁴² Justice Scalia thus seemed to admit that the question of religious adjustment could not be resolved by judges alone, or even primarily by judges. That political and social reality, not some purely interpretive ground, is what *Smith* was about. Given constitutional underenforcement, it becomes more defensible that society seeks its own understanding of Free Exercise.

I do not wish to be seen as understating just how radical the popular struggle over religious exemptions is as a matter of constitutional theory. The involvement of legislatures, administrators, and voters, as well as judges, in working out the meaning of religious liberty in the context of struggles over religious exemptions goes considerably beyond what is usually referred to as popular constitutionalism. In Larry

³³⁸ *Smith II*, 494 U.S. at 890 (citations omitted).

³³⁹ *See id.*; *Boerne*, 521 U.S. 507.

³⁴⁰ Michael McConnell has criticized *Boerne* on similar grounds. *See* Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 189-90 (1997).

³⁴¹ There is a rich literature about constitutional underenforcement of constitutional norms. *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) and Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

³⁴² *See Smith II*, 494 U.S. 872.

Kramer's understanding, popular constitutionalism tends to emphasize the right of the people to overrule, in effect, judicial decisions with which they disagree.³⁴³ In Barry Friedman's understanding, popular constitutionalism describes a "dialogue" between the people and the Supreme Court, in which, eventually, "the Constitution comes to reflect the considered judgment of the American people."³⁴⁴

The context of religious exemptions, on the other hand, goes beyond all that and seems to reflect a free-for-all rather than an appeal or a dialogue. Our current practices have more in common with the question proposed by Mark Tushnet, whether we ought to get rid of judicial review.³⁴⁵ In the area of religion, we are in effect putting Tushnet's insights to the test. And if I am right that some fundamental national decisions can only be made in this way, with input from a variety of sources on a truly national scale not preempted by the Supreme Court, then in retrospect, *Boerne* may only mean that the Court would not allow even Congress to short-circuit a messy national process that must play out in numerous contexts. *Boerne* thus becomes more of a federalism case protecting the experiments going on in the state laboratories and less a case about judicial supremacy.

In the next part, I ask, what is going to emerge out of this free-for-all? What is the likely future of religious exemptions? And, most importantly, what is at stake, religiously, in this struggle?

V. WHAT IS THE FUTURE OF RELIGIOUS EXEMPTIONS?

In 1999, Professor Eugene Volokh suggested that a common law model for religious exemptions would work better than either the constitutional exemption model of *Sherbert* or the statutory exemption model of *Smith*.³⁴⁶ Acknowledging his debt to Guido Calabresi's neglected 1982 work, *A Common Law for the Age of Statutes*,³⁴⁷ Volokh proposed that RFRAs be rewritten to drop the heightened scrutiny standard and become, essentially, grants of jurisdiction over religious exemptions that judges would work out at their discretion, subject to

³⁴³ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 252-53 (2004).

³⁴⁴ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 367-68 (2009).

³⁴⁵ See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

³⁴⁶ Volokh, *Common-Law Model*, *supra* note 274.

³⁴⁷ *Id.* at 1477, 1477 n.30.

legislative override.³⁴⁸ The whole design, and particularly the “tough calls,” would be “governed by the political process” just as the common law system was.³⁴⁹

It was an ingenious suggestion. The basic inadequacy in it, however, was that Volokh’s solution was technical and flexible. It aimed to resolve the problem of how to manage a system of religious exemptions from generally applicable laws.

It turned out that the question of religious exemptions was not the technical one of informed judgment. Rather, the problem was more fundamental—whether the American legal system should recognize religious exemptions at all and why? Answering that question requires all of the modes of decision that Volokh wanted to supersede and some others as well: constitutional interpretation, statutory enactments, public referenda, and even just informed public debate.

The struggle over religious exemptions is one of the ways that this society engages Dworkin’s question—are we to be a religious nation or a secular one?³⁵⁰ But even Dworkin’s question does not adequately gauge the stakes involved in the debate over religious exemptions. For Dworkin assumes that in whatever direction America goes—whether toward the secular or the religious—the principle of mutual respect will govern. In particular, he assumes that a secular society, which is what he hopes we will become, will readily grant accommodation—exemptions in our context here—to the religious believer. But, as we have seen, the question of whether to do that and the question of the burden of proof, so to speak, to show that a religious exemption is needed and justified, are very much at issue. There is actually a great deal of suspicion of religion among some of the nonreligious.

I think that Professor Michael Stokes Paulsen has a better grasp of the current debate when he describes four “Stances Toward Religious Freedom.”³⁵¹ Religious freedom in Paulsen’s parlance is essentially the issue of exemptions.³⁵² The four stances, as I denominate them, are:

³⁴⁸ Compare the grant of jurisdiction to federal courts in the Labor Management Act, 29 U.S.C. § 185(a) (2013), which has been interpreted as authorizing the federal courts to develop a common law of labor-management relations, with *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

³⁴⁹ Volokh, *Common-Law Model*, *supra* note 274, at 1469.

³⁵⁰ See generally *id.*

³⁵¹ Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1164-81 (2013).

³⁵² See *id.* at 1191-93.

religious intolerance, religious tolerance out of religious conviction, religious tolerance out of secular skepticism, and secular religious intolerance.³⁵³

The crucial difference among these stances concerns their views of religious truth. In the first two categories, society judges that religious truth exists, but differs on whether the government should be authorized to enforce religious truth.³⁵⁴ The pre-liberal stance answered that question affirmatively, and minority believers were therefore persecuted.³⁵⁵ The religious tolerance stance—the liberal position and in Paulsen’s view the assumption of our constitutional founding—is that government cannot be so trusted, and so a strong presumption of religious exemption is embedded in the second stance and in the Constitution.³⁵⁶

The latter two stances assume the reverse—that religious truth does not exist but that believers believe otherwise.³⁵⁷ The third stance—tolerant secular skepticism—protects religious liberty not because religious claims are true, but because many people continue to believe them and individual autonomy is prized.³⁵⁸ The fourth stance of secular intolerance, however, is intolerant in its presumptions about religion.³⁵⁹ There is little tolerance for religious exemptions because religion is not viewed as beneficent and the norms of the state generally take precedence over the demands of religious conscience.

One can see Paulsen’s categories at work in an imagined debate over the issue of male circumcision.³⁶⁰ From the point of view of religious intolerance, the Christian State would ban male circumcision on the ground that God has determined otherwise and that Jewish or Muslim holdouts are violating God’s will for humanity. In religious tolerance premised on the truth of religion, circumcision is really not the State’s concern at all. The religious believer decides whether circumcision of a child is required. From the point of view of tolerant secular

³⁵³ See *id.* at 1164-65.

³⁵⁴ See *id.* at 1164.

³⁵⁵ See *id.* at 1166.

³⁵⁶ See *id.* at 1167.

³⁵⁷ See *id.* at 1164.

³⁵⁸ See *id.* at 1170.

³⁵⁹ See *id.* at 1178.

³⁶⁰ This is by no means merely a thought experiment. Just such a debate has been going on in a number of Internet venues, in and out of law, for the last few weeks as I write this article in the summer of 2012. I am not intentionally quoting anyone here, but most of the positions I am setting forth have been represented in those debates.

skepticism, circumcision is undoubtedly permitted, since there is no real showing of harm to the child, and the consequences of a ban on the religious communities involved would be extraordinary and would provoke resistance. But in secular religious intolerance, the standard to be applied would be the best interest of the child and the autonomy of the child. To claim religious exemption, the believer would have to show that there is essentially no harm from circumcision and no feelings of resentment later by the children affected. This standard probably could not be met and circumcision would thus be banned.

This exercise demonstrates the unrealistic premises of some thinking about religious exemptions. Actually banning circumcision would lead to a phenomenal backlash that would succeed in enacting a constitutional amendment protecting circumcision, and perhaps protecting more than circumcision. Furthermore, despite a tone of dispassion in the discussions I have read about this issue, this exercise also demonstrates just how much hostility there is against religion among some secularists. Considering the harm that some parents in other contexts do to their children, such as plastic surgery on young girls, even discussing the propriety of male circumcision suggests a bias against religion rather than a primary concern for the welfare of the child.

The situation regarding circumcision is somewhat akin to a comparison between the pedophilia controversy that has beset the Roman Catholic Church and the Penn State University sex abuse scandal, and the revelations in *The New York Times* about sexual abuse and cover-ups at an elite prep school.³⁶¹ The former has led to questions about the Church as a whole, but the latter two instances have not raised questions generally about sexual abuse in children-oriented nonprofits or led to investigations of sexual abuse at other prep schools, even though we all know that there is such abuse in these other contexts. Sexual abuse by Catholic Priests has become a weapon against the Church and not just a concern about sexual abuse of children wherever it occurs.

Of course, Paulsen's first category—religious intolerance premised on religious truth—is no longer a cultural option. The religious exemptions debate, in all its manifestations, is about the other

³⁶¹ Amos Kamil, *Prep-School Predators: The Horace Mann School's Secret History of Sexual Abuse*, N.Y. TIMES (June 6, 2012), <http://www.nytimes.com/2012/06/10/magazine/the-horace-mann-schools-secret-history-of-sexual-abuse.html?pagewanted=all>.

three possibilities. There is a flavor of Paulsen's categories in Douglas Laycock's description of the exemption debate, and his place in it:

Devout believers tend to think the religious side should win all the cases that are the least bit arguable; committed secularists tend to think the secular side should win all the cases that are the least bit arguable. I am a thoroughly secular agnostic who respects believers and bears them no ill will, and I think that both the religious and secular "sides" should win on some issues and lose on others.³⁶²

The stances do not always appear in plain modes. Religious tolerance that values religious truth does not deny that a religious exemption might be so bizarre or so dangerous that the State would have to deny it. Tolerant secular skepticism can be recognized by its willingness to allow religious exemptions while retaining in the State the ultimate authority to make this decision, always keeping in mind the possibility of insincerity by the religious believer and, increasingly, proposing "conscience" exemptions rather than purely religious ones. Tolerant secular skepticism is distinguished from secular religious intolerance primarily by the level of its presumption that religious exemptions should be granted. Eugene Volokh's proposal above is an example of such skeptical tolerance.³⁶³ The position of secular religious intolerance still lacks political power, but it is increasing in its influence. Its position would not only tend to limit religious exemptions, it would probably also interpret restrictively any conscience exemptions that were enacted. All of these differing commitments on so many issues show why the debate over religious exemptions has been so widespread, so heated, and so fundamental.

It is not possible to say which position will win out. Indeed, there probably will not be a clear winner. But it seems to me that some likely trends can be identified.

First, the demands by religious believers for exemptions will increase and this will lead to greater conflict with the larger society. I do not say this out of any hostility toward religion. To me, such an increase reflects the inevitable logic of the underlying religious commitments, and the increasing ideological gap between many religious commitments and national policy.

³⁶² Douglas Laycock, *Religious Liberty, Volume One: Overviews & History*, 89 TEX. L. REV. 949, 949-50 (2011).

³⁶³ See generally Volokh, *Common-Law Model*, *supra* note 274.

According to Paulsen, the fundamental ground of religious tolerance is the autonomy of the religious world of the believer, an autonomy that, increasingly, is not recognized by segments of the larger society.³⁶⁴ From this perspective, it is not proper to compromise on matters of religious liberty, for every such compromise further undermines the cultural position of religion. The logic of this position suggests that every case must be pressed to its fullest extent. Given the opposition between policies favored by secular society and this religious commitment, demands for religious exemptions must continually increase.³⁶⁵

Although I lack data on the matter, my impression is that these demands for exemptions are already increasing. Religious demands for exemptions are made today that were never made before, when the position of religion in the culture was much more dominant than currently. At that time of dominance, religion could see itself as in control and had no need to make the point of its autonomy. So, for example, Catholic judges came to grant divorces under liberal divorce laws, without too much fuss.³⁶⁶ Today, in contrast, some religious believers work hard to ensure religious autonomy and separation.

It is in this context that the debate over the contraception mandate of the ACA should be considered. Clearly the demands for religious exemptions from the contraception mandate are not just a reflection of anti-ACA or anti-Obama sentiment, though that may also be present. These demands reflect deep political, theological, and jurisprudential commitments. Nevertheless, the demand today for exemption is still an expansion of previous positions. Perhaps existing state requirements for religious hospitals and universities to offer contraception benefits are not absolute and therefore there is a need for a clarified federal religious exemption compared to state requirements. This could explain how religious institutions have managed to live with state requirements that look, on the surface, to be similar to the ACA mandate that is now so strongly challenged.³⁶⁷

³⁶⁴ Paulsen, *supra* note 351, at 1211.

³⁶⁵ This is obviously so with regard to something like gay marriage. But it will increasingly be the case with matters like artificial insemination. See Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J. C.R. & C.L. 47, 57-58 (2013).

³⁶⁶ Of course there was dissent, but obviously the religious concern was overwhelmingly ignored. See James E. Harpster, *The Catholic Jurist and Divorce*, 35 MARQ. L. REV. 213 (1951).

³⁶⁷ See *supra* note 284 and accompanying text.

But, before now, no one would have suggested that individual business owners should be exempt from the contraception mandate based on a religious commitment, as some Bishops are now demanding,³⁶⁸ as one prominent Catholic business group has argued,³⁶⁹ and as one federal judge has considered sufficiently plausible to grant a preliminary injunction.³⁷⁰ That is an expansion of any serious previous assertion of religious conscience.

The increasing level of demands for exemptions can be seen elsewhere as well. Not everyone who argues for religious liberty today opposed the result in 1983 in *Bob Jones University*.³⁷¹ *Bob Jones* could have been considered a radical challenge to religious liberty. The case upheld, against a Free Exercise challenge, a denial by the IRS of tax exemption because of religiously-motivated racial discrimination, when the government's compelling interest was the belief that the religious

³⁶⁸ Gary Gutting, *Do the Bishops Have a Case Against Obama*, N.Y. TIMES (May 31, 2012 9:30 PM), http://opinionator.blogs.nytimes.com/2012/05/31/do-the-bishops-have-a-case-against-obama/?_r=1.

³⁶⁹ Legatus, a Catholic organization for owners and operators of small businesses that have no necessary connection to Catholicism, filed suit against the contraception mandate on May 7, 2012. See Steven Ertelt, *Catholic Business Group Sues Obama Admin Over HHS Mandate*, LIFE NEWS.COM (May 8, 2012, 4:31 PM), <http://www.lifenews.com/2012/05/08/catholic-business-group-sues-obama-admin-over-hhs-mandate/>.

³⁷⁰ “[I]n *Newland v. Sebelius*, [881 F. Supp. 2d 1287 (D. Co. 2012)], a Colorado federal district judge relied on the Religious Freedom Restoration Act in issuing a preliminary injunction against enforcing the contraceptive coverage mandate issued under the Affordable Care Act against a small private company. The lawsuit was brought by Hercules Industries, Inc., a small manufacturing company, and its Catholic officers and directors. Plaintiffs allege that the company maintains a self-insured group health plan for its employees ‘[a]s part of fulfilling their organizational mission and Catholic beliefs and commitments.’ To further strengthen its position, the company recently added provisions to its articles of incorporation specifying that its primary purposes are to be achieved by ‘following appropriate religious, ethical or moral standards,’ and allowing its board to prioritize ‘religious, ethical or moral standards’ over profitability.” Howard Friedman, *Court Issue Preliminary Injunction in Corporation’s Challenge to ACA Contraceptive Coverage Mandate*, RELIGION CLAUSE (July 27, 2012 5:52 PM), <http://religionclause.blogspot.com/2012/07/court-issues-preliminary-injunction-in.html>. A preliminary injunction does not necessarily mean that the judge will rule in the same way on the merits, of course. The company in question is recognizably Catholic in a way few nonreligious corporations are. But there have now begun to be discussions of the religious “rights” of publically held corporations, a kind of religious application of *Citizens United*. This idea is certainly something that never would have occurred to anyone before now. See Marc O. DeGirolami, *Corporate Exercise of Religion and Other Thoughts on the RFRA Claim in the Mandate Litigation*, ST. JOHN’S CTR. FOR L. & RELIGION FORUM (Aug. 1, 2012), <http://clrforum.org/2012/08/01/corporate-exercise-of-religion-and-other-thoughts-on-the-rfra-claim-in-the-mandate-litigation/>.

³⁷¹ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

motivation at issue was basically immoral.³⁷² Any attempt to force religious institutions today to hire gays, for example, would be regarded as a direct threat to religious liberty, the *Bob Jones* case notwithstanding.

The expansion of demands extends also to the realm of religious institutional autonomy. The ministerial exception was limited in *Hosanna-Tabor* to persons reasonably viewed as ministers.³⁷³ But recently my own University, Duquesne, after first inviting the NLR to oversee an election for representation by adjunct professors,³⁷⁴ then sought a religious exemption from the NLR, which was denied.³⁷⁵ The University's argument against NLR jurisdiction was defended by Patrick J. Reilly, the president of The Cardinal Newman Society, in the vigorous tones of a defense of religious liberty.³⁷⁶

Aside from whether the NLR has jurisdiction over Duquesne University as a statutory matter, the argument that the University should not be subject to the NLR as a matter of religious liberty, takes us from government requirement of actions prohibited by religious conscience, or required religious actions prohibited by government, to the suggestion that a religious institution licensed by the State is simply beyond State regulation.

I could add other examples of the increasing demands for religious exemptions. But the details do not actually matter. I am not suggesting that these assertions of religious liberty are in any way improper. Rather, proper or not, their very scale assures that they cannot be fully acceded to. I always thought of myself as committed to religious liberty and exemptions, but I now see that the logic of a separate religious realm cannot work in a modern society. The religious

³⁷² *Id.*

³⁷³ *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Opportunity Emp't Comm'n*, 132 S. Ct. 694, 707 (2012).

³⁷⁴ See Anna Orso, *No Voluntary Recognition for Adjuncts Union at Duquesne University*, PITTSBURGH POST-GAZETTE (May 14, 2012 4:26 PM), <http://www.post-gazette.com/stories/business/news/no-voluntary-recognition-for-adjuncts-union-at-duquesne-university-635851/>.

³⁷⁵ Bill Schackner, *NLR Approved Duquesne University Union Election*, PITTSBURGH POST-GAZETTE (July 3, 2012 4:16 AM), <http://www.post-gazette.com/stories/news/education/nlr-approves-duquesne-university-union-election-640982/>.

³⁷⁶ Patrick J. Reilly, *Defending Duquesne: The University Must Fend Off Another Assault on Religious Liberty*, PITTSBURGH POST-GAZETTE (June 2, 2012, 4:21 AM), <http://www.post-gazette.com/stories/opinion/perspectives/defending-duquesne-the-university-must-fend-off-another-assault-on-religious-liberty-641287/>; see Patrick J. Reilly, *The NLR's Assault on Religious Liberty*, STUDIES IN CATH. HIGHER EDUC. (May 2011), <http://www.scribd.com/doc/55639385/The-NLR-s-Assault-on-Religious-Liberty>.

believer and the religious community cannot be left alone to decide about religious exemptions, as Paulsen seems to require.³⁷⁷

The examples discussed among law professors now include pharmacists who do not want to fill prescriptions for certain drugs,³⁷⁸ or landlords who do not wish to rent to gays,³⁷⁹ or taxi drivers who do not wish to transport people for what they consider immoral purposes.³⁸⁰ This all seems to me impossible to accommodate, especially when combined with the demand that a religious owner of a business, or even perhaps a publicly held corporation, might invoke a religious exemption. I cannot believe we are going to live in a world in which I have to show a marriage license to a clerk before the Marriott Hotel chain will rent a room to my wife and me.³⁸¹ The disruption would just be too much for the majority—even the majority of religious believers—to accept. Nor am I personally willing to engage corporate America's moral judgments about my behavior, at least not unless we expect consumers constantly to make the same exacting judgments about corporate conduct. But, as the controversy over the commitments of Chick-fil-A President Dan Cathy makes clear, with its threatened boycotts and counter-

³⁷⁷ Paulsen, *supra* note 351, at 1187.

³⁷⁸ See Kimberly D. Phillips, *Promulgating Conscience: Drafting Pharmacist Conscientious Objector Clauses that Balance a Pharmacist's Moral Right to Refuse to Dispense Medication with Non-Beneficiaries' Economic and Legal Rights*, 15 MICH. ST. U. J. MED. & L. 227, 231-33 (2011).

³⁷⁹ Douglas Laycock identified this concern above as part of the difficulty in enacting a new general religious exemption statute after the *Boerne* decision. See Laycock, *Free Exercise of Religion*, *supra* note 221, at 412.

³⁸⁰ The precursor of this example arose in 2007 at the Minneapolis airport, where it was estimated that around 5,400 passengers had been denied cab transportation by Muslim drivers who would not transport alcohol or dogs, including seeing-eye dogs. See Barbara Pinto, *Muslim Cab Drivers Refuse to Transport Alcohol, and Dogs*, ABCNEWS (Jan. 26, 2007), <http://abcnews.go.com/International/story?id=2827800&page=1#.UAMKFPXheJU>. On the other hand, there were apparently less onerous ways to accommodate the religious drivers that would not have inconvenienced taxi passengers. According to Charles Haynes, Director of the Religious Freedom Education Project, an accommodation was worked out but “public backlash against the accommodation caused the airport authority to drop it.” Charles C. Haynes, *Why Claims of Conscience Matter*, FIRST AMENDMENT CTR. (Mar. 9, 2012), <http://www.firstamendmentcenter.org/why-claims-of-conscience-matter>.

³⁸¹ I use this example because J.W. Marriott, Jr., the Chairman of Marriott International, is an active Mormon, not because he has indicated any such intentions. See J. Willard Marriott, MARRIOTT, <http://www.marriott.com/culture-and-values/j-willard-marriott.mi> (last visited June 1, 2013).

boycotts,³⁸² the extension of political differences into commercial conduct is not something to be celebrated.

The logic of the religious tolerance stance also requires that *Smith* be overruled. Returning heightened scrutiny to Free Exercise Clause analysis is the closest outcome possible to actually restricting the power of the State over the religious believer. Any merely statutory exemption fails to genuinely establish that right to autonomy.

But the logic of expansion leads to a second prediction—that *Smith* will *not* be overruled.³⁸³ Justice Scalia’s opinion in *Smith* suggested that it was religious diversity that rendered a strong Free Exercise interpretation impossible.³⁸⁴ But it is actually the escalating nature of religious exemption claims even by mainstream religious believers that is the central problem. Judges are much less likely today than in 1990 to want to involve themselves in the exemption battle as constitutional interpreters. At least under statutes and state constitutions, or other scenarios, there are other authorities that can correct judicial mistakes. I do not think that the judges now want to be the final word in this field.

My third prediction is that, after all is said and done, the precise form in which states and the federal government protect religious liberty will not matter that much. The national debate that is unfolding is leading to some kind of at least temporary consensus that religious exemptions should be recognized to some extent. The controversy over the contraception mandate in the ACA assures that this consensus, once it emerges, will be a national one.

A lot of fighting is going on to decide how widespread such exemptions should be, what justifications are necessary to provide an exemption, who has the burden of proof, how much disruption must be tolerated by others, and so forth. But eventually these matters will all reach a rough consensus and every jurisdiction will be affected. States that do not have RFRAs will find that their judges interpret state constitutional provisions in parallel with interpretations of RFRAs in states

³⁸² See Lawrence B. Glickman, *Chick-fil-A Appreciation Day a Reminder that Boycotts Often Backfire*, BLOOMBERG (Aug. 4, 2012, 12:37 PM), <http://www.bloomberg.com/news/2012-08-03/chick-fil-a-day-a-reminder-that-boycotts-often-backfire.html>.

³⁸³ This is not much of a prediction as most observers would say the same thing. See, e.g., David B. Forhnmayr, *Employment Division v. Smith: “The Sky that Didn’t Fall,”* 32 CARDOZO L. REV. 1655, 1668 (2011) (“Contrary to many predictions, the *Smith II* majority did not crumble.”).

³⁸⁴ *Smith II*, 494 U.S. 872, 888 (1990).

that do. States with greater statutory protections will find that their judges interpret them along the lines of the national consensus, as well. I do not foresee states and the federal government differing very much on a matter of fundamental liberty.

But that consensus will not be stable in the long run. My forth, and final, prediction mirrors my first. By inexorable logic, critics of religion will increase their level of hostility as their numbers increase.³⁸⁵ The recent controversy over a restaurant that gave a discount for church bulletins is only the latest example and is a harbinger of what is to come.³⁸⁶ Eventually every pro-religion gesture in the public square will have to be resisted. For some nonbelievers, religion itself must not be presumed to be good. That is why something like male circumcision, which has been applied almost uniformly in the United States, even among secularists, could suddenly become an issue merely because religious believers favor it. My prediction here of increasing attacks on religion parallels the estimation of Laycock about the depth of current divide between the religious and the nonreligious: “For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.”³⁸⁷

And because of this inexorable, yet conflicting logic—on one side toward increasing demands for exemptions and, on the other, increasing resistance—there cannot be an ultimate resolution of the role of religion in American life. The temporary consensus of today must yield to the battlefields of tomorrow. We seem doomed to more and more discord in our public life as we seek to decide, in Dworkin’s terms, whether we are religious or secular. We are seeking to decide something that cannot be decided, but can only be fought over.

I reach this conclusion with a great deal of reluctance. But it seems to me the most likely outcome. Before closing, however, I want to suggest that this outcome is not inevitable; it is merely the most likely outcome. There are other ways to think about the religious/

³⁸⁵ Nelson Tebbe describes some instances of the rising social conflict in his recent article on nonbelievers. See Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1113-14 (2011).

³⁸⁶ See Ruth Ann Dailey, *Atheist’s Restaurant Beef Defies Belief*, PITTSBURGH POST-GAZETTE (July 9, 2012, 11:52 PM), <http://www.post-gazette.com/stories/opinion/ruth-ann-dailey/atheists-restaurant-beef-defies-belief-643874/>.

³⁸⁷ Laycock, *Free Exercise of Religion*, *supra* note 221, at 407.

nonreligious divide. In the final part of this article, I outline one such possibility.

VI. WE ARE ALL FREELY EXERCISING RELIGION

Vis-a-vis each other, we Americans have become scorpions in a bottle. We believe we are enemies to each other and must fight to the death. This situation obtains in many aspects of our public life, but the situation is worse with regard to religion than in any other field. Of course, this divisiveness is poisoning our politics generally.

There is a cure for this disease, but it is scarcely achievable. That cure is the acknowledgment of common ground among religious believers and nonbelievers. In the arena of the Establishment Clause, that search for common ground requires that religion and nonreligion be seen as separate, but that the common elements of each be recognized, as I have tried to do in a number of works.³⁸⁸ In contrast, the approach for finding common ground in the area of Free Exercise, and thus of religious exemptions, is somewhat different and requires that religion and nonreligion be considered together.

The reason for the difference in treatment is that the Religion Clauses work differently. The Establishment Clause prevents the government from establishing something traditionally recognized as religion.³⁸⁹ The Establishment Clause was aimed at preventing domination by organized religious groups. Its *bête noire* was the period of the Wars of Religion in the 16th and 17th centuries and other instances of persecution of one religious group by another. Thus, the government was not to take a position concerning which religious tradition was correct as a matter of theology.³⁹⁰

But the Free Exercise Clause is different. Debates about religion generally proceed as if the Clauses were written in the same way—as if the First Amendment banned Congress from making a law establishing religion or prohibiting the exercise of religion. Such analyses leave out the word *free*. The Free Exercise Clause protects not only the traditional practice of traditional religion, though of course it does protect

³⁸⁸ See, e.g., Bruce Ledewitz, *Seeking 'Common Ground': A Secular Statement*, 38 HASTINGS CONST. L.Q. 49 (2010).

³⁸⁹ U.S. CONST. amend. I.

³⁹⁰ See *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 894 n.4 (2005) (Scalia, J., dissenting) (Establishment Clause prohibits government from “tak[ing] sides in a theological dispute”).

that, but it also protects the *free* exercise of religion—or, to put it in another way, the Free Exercise Clause protects religion exercised in a free way.³⁹¹

In looking at Free Exercise in this way, I am not making a historical or textual argument about the interpretation of the Clause as such, although I do think the framers primarily had in mind oddballs and dissenters in regard to Free Exercise and institutions of power in regard to Establishment. I am suggesting, however, that the text of the Free Exercise Clause invites us to approach the exercise of religion in a way that opens the matter up and allows us to see each other as fellow travelers in religion.

It is not an accident that this is precisely how the Free Exercise Clause was interpreted in the Vietnam-era draft cases, particularly in *United States v. Seeger*,³⁹² *Welsh v. United States*,³⁹³ and *Gillette v. United States*.³⁹⁴ In those cases, the traditional religious believer and the seemingly nonreligious claimant were treated more or less the same for purposes of a statutory religious exemption to the draft that was considered against the backdrop of Free Exercise.³⁹⁵

Just what is this religion, then, that is being freely exercised? Douglas Laycock puts the matter well when he writes that “‘religion’ is any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists.”³⁹⁶

And what are these religious questions? Here I perhaps differ from Laycock. For him, religious questions are always “basic theological questions” that might be answered positively or negatively.³⁹⁷ The “fundamental religious question” is “[w]hat is the nature of God and what does He/She want for us?”³⁹⁸ The negative answer to this question—atheism—is religious. Therefore, atheism is protected by Free Exercise on the one hand, while the government may not establish atheism, on the other.

³⁹¹ But compare Winnifred Fallers Sullivan’s treatment of “Free Religion” in WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 138 (2005).

³⁹² 380 U.S. 163 (1965).

³⁹³ 398 U.S. 333 (1970).

³⁹⁴ 401 U.S. 437 (1971).

³⁹⁵ See generally Beschle, *supra* note 4.

³⁹⁶ Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 326 (1996) (citation omitted).

³⁹⁷ *Id.* at 330.

³⁹⁸ *Id.* at 326.

I agree with these conclusions, but I arrive at them in a different way. For me, for purposes of the Establishment Clause, “religion” includes only traditional theology. For purposes of Establishment, “religion” excludes broader questions that might transcend theology, such as whether there is meaning at all. That is why government is permitted to take a position on whether human existence is meaningful—in public school, for example. In Establishment Clause terms, government is not making a religious claim in asserting that life is meaningful. Nor is it religious establishment for the government to claim that liberty, or even capitalism, is worth defending, even to the point of death.

But, when we come to the protections of the Free Exercise Clause, the phrase “religious questions” is not limited to traditional theology. For Free Exercise, religious questions are the perennial questions of human life, which add up to the fundamental question, what is the meaning of existence? Every attempt to work out the meaning of existence is religious. Every such attempt is a Free Exercise of religion.³⁹⁹

Thus, anyone may claim a religious exemption, for we are all engaged in a religious quest. However, we do not all need religious exemptions. If the answer to the fundamental religious question is that human life is meaningless, there is no reason to act or not act according to that answer. For example, although I would prefer not to lose my life in battle, I cannot be obligated to refrain from fighting if human existence is without meaning. The monotheistic religious believer, on the other hand, might be so obligated, and so might the nontraditional religious seeker who sees the source of transcendent

³⁹⁹ As has been pointed out, this kind of analysis is unfair to traditional religion in the sense that such religion is protected by Free Exercise but limited by Establishment, whereas environmentalism, for example, is not limited by Establishment while a form of environmentalism might well be protected by Free Exercise. See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 10 (2000). This is a fair criticism, but, in the end, it just demonstrates the limits of logic. The reason Free Exercise tends to be interpreted to protect nontraditional beliefs is that such beliefs are like traditional religion in terms of their role in the life of the believer. The reason the Establishment Clause cannot be interpreted in the same broad way is that such an interpretation would essentially require a Rawlsian neutral State under the Establishment Clause. No such State has ever existed. No healthy politics could be sustained under it. As has been pointed out, this kind of analysis is unfair to traditional religion in the sense that such religion is protected by Free Exercise but limited by Establishment, whereas environmentalism, for example, is not limited by Establishment while a form of environmentalism might well be protected by Free Exercise.

obligation elsewhere than in a supernatural God.⁴⁰⁰ Again, as Laycock puts it, “[t]he nontheist’s belief in transcendent obligations—in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply—is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious.”⁴⁰¹

At the moment, both of the opposing sides in the debate about religious exemptions—the religious tolerance and secular intolerance stances—agree that I am wrong in my understanding of the nature of religion. They both insist that religion is something very different from nonreligion—in the first case, positively, and in the latter, critically.

These two sides must be confronted in their assumptions in regard to the nature of religion if America is ever to achieve peace in our public life. A full treatment of these issues is beyond my scope here—although I hope to develop these themes in a later work. For now, let me just sketch the arguments that should be brought to bear.

Religious believers like Paulsen, who insist that religion is unique and that persons who do not believe in God are not entitled to religious exemptions, are making a crucial theological error. Religion, after all, must hold a promise for every human being. When Paul confronted the pagans of Athens who worshipped an unknown God, he called them religious.⁴⁰² He then proclaimed to them that they were really worshipping the Lord of Heaven and Earth, though ignorantly.⁴⁰³ This must be the stance of any genuine believer toward nonbelievers. Nonbelievers are just not yet believers. And if the nonbelievers claim to be religious, even if only to obtain a religious exemption from a law, then they are just that much closer to the truth.

⁴⁰⁰ This is my short answer to the question asked by Mary Jean Dolan, “what criteria could a court employ to determine the validity of an individual atheist’s claim that certain conduct is demanded by his *nonbelief*?” See Mary Jean Dolan, *Cautious Contextualism: A Response to Nelson Tebbe’s Nonbelievers*, 98 VA. L. REV. IN BRIEF 32, 37 (2012) (emphasis added). There is a tension here, clearly, with not wanting to judge the coherence of the claimed consequences of a religious belief, but it is obviated by the non-fit between some beliefs about existence and any necessary connection to any conduct at all.

⁴⁰¹ Laycock, *Religious Liberty as Liberty*, *supra* note 396, at 336.

⁴⁰² *Acts* 17:22.

⁴⁰³ *Acts* 17:23-24.

Stephen Carter has criticized this culture for treating religion as a hobby, and thus trivializing it.⁴⁰⁴ For Carter, this means that the demands of a supernatural God have been excluded from public life. But what really treats religion as a hobby is approaching religion as something unique and applicable only to a subgroup. Religion is supposed to be about reality itself. In fact, it is supposed to be reality. When religious groups restrict religious exemptions to themselves, they cut themselves, and their God, off from the rest of humanity.

Paulsen argues that this limitation of exemptions to traditional believers is necessary to protect the religious believer.⁴⁰⁵ A religious exemption that anyone can apply for must be interpreted narrowly, whereas one that is restricted to traditional believers can be applied robustly.

Paulsen is right about that, but he is in error in emphasizing it. In the first place, how does Paulsen know who the genuine believer is? Dietrich Bonhoeffer wrote that God was teaching us to get along without Him.⁴⁰⁶ Maybe the nonbeliever is just a better religious student. Second, maybe God is using religious exemptions to pull nonbelievers back into the orbit of faith. From Paulsen's point of view, the goal should not be the protection of the traditional religious believer, but obeying the will of God.⁴⁰⁷ Paulsen's special pleading is not a religious stance.

On the other side, the secular hostility to religious exemptions does not rest on anything more than bias against what is perceived as religion. Do such secularists then deny the tradition of conscientious objection? Do they trust the State or the majority so much that they feel there is no need for any realm of human autonomy, or even presumed human autonomy, against the State? Ever? At the very least, such critics should promote conscience clauses for all rather than only criticizing exemptions for religion.

Of course any kind of exemption from any law runs the risk of harm to vulnerable groups. Parents may not vaccinate their children

⁴⁰⁴ Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977 (1987). Carter made a similar point in *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

⁴⁰⁵ See generally Paulsen, *supra* note 351.

⁴⁰⁶ DIETRICH BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* (Eberhard Bethge ed., Reginald H. Fuller trans., 1953).

⁴⁰⁷ See generally Paulsen, *supra* note 351.

out of unreasoning fear of the harms of vaccination, for example. But the very fact that conscience clauses exist demonstrates that the simple objection that religion should not be “above the law” is not persuasive. Such an attitude fetishizes law. There have always been exceptions.

But, even leaving conscience clauses aside and just considering religious exemptions, why should anyone accept a narrow view of what religion is? Like certain religious believers, some secularists treat religion as nothing but supernaturalism, as if religious naturalism, Reconstructionist Judaism, and even critical theology do not exist. Such persons seem not to know that many religious believers reject belief in a supernatural God.⁴⁰⁸

And anyway, even if religion is something supernatural, what does supernatural mean? On my desk right now are a series of books promoting what is obviously religion without endorsing anything one could call supernatural in the sense of something miraculous: *Being and Ambiguity*,⁴⁰⁹ *Religion and Nothingness*,⁴¹⁰ and *The Nothingness Beyond God*.⁴¹¹ Eastern religion is not always definable in the God/not God or natural/supernatural dichotomies. There is a belief in something “more” than what is ordinarily apparent, but not a demand for violations of scientific truth.

Nor does the religion/philosophy divide, which was so important in the McConnell/Feldman debate about religious exemptions,⁴¹² hold up. The new translation of Martin Heidegger’s monumental *Contributions to Philosophy* has now been published,⁴¹³ and I defy anyone to study it and tell me if the work is one of religion or philosophy.

⁴⁰⁸ Even Nelson Tebbe, in his otherwise thoughtful work on nonbelievers, defines nonbelievers exclusively in terms of the supernatural: “When I refer to nonbelievers here, I mean to include people who take negative or skeptical positions on the existence of superhuman beings and supernatural powers.” Tebbe, *supra* note 385, at 1117. But there are people who consider themselves traditionally religious and who identify strongly with their religious traditions while rejecting the supernatural. They consider that the tradition does not require the supernatural in its essence. Think of Mordecai Kaplan in Judaism, for example.

⁴⁰⁹ BROOK ZYPORIN, *BEING AND AMBIGUITY: PHILOSOPHICAL EXPERIMENTS WITH TIENTAI BUDDHISM* (2004).

⁴¹⁰ KEIJI NISHITANI, *RELIGION AND NOTHINGNESS* (1983).

⁴¹¹ ROBERT E. CARTER, *THE NOTHINGNESS BEYOND GOD: AN INTRODUCTION TO THE PHILOSOPHY OF NISHIDA KITARO* (2d ed. 1998).

⁴¹² See The Berkley Center, *supra* note 309 and accompanying text.

⁴¹³ MARTIN HEIDEGGER, *CONTRIBUTIONS TO PHILOSOPHY (OF THE EVENT)* (Richard Rojcewicz & Daniela Vallega-Neu trans., 2012).

But even if religion *is* limited to the demands of a supernatural God understood in a traditional way, why should the secularist object if a religious believer believes that God's commands are superior to the commands of the State? The secularist undoubtedly feels that some human rights are also superior to the commands of the State. Objective truth is objective truth, whether grounded in revelation or reason or art.

Healthy political life requires this recognition of common ground between religious believers and nonbelievers. That is why truly transformative political figures are always going to merge the religious and the nonreligious. Obviously, in American history this was true of both Abraham Lincoln and Martin Luther King, Jr. But if those figures are simply too religious to make the point, I can refer instead to the secular saint, Vaclav Havel. Havel, the playwright, the revolutionary and the inspirational leader of the Czech Republic, died in 2011. In a review essay, Paul Wilson wrote of Havel's vision:

It was a vision based on a democratic politics underpinned by a strong civil society and rooted in common decency, morality, and respect for the rule of law and human rights; a politics that sought to transcend racial, cultural, and religious differences by articulating a "moral minimum" that Havel believed existed at the heart of most faiths and cultures and that would provide a basis for agreement and cooperation without sacrificing the unique gifts that each person, each culture, and each "sphere of civilization" could bring to enrich modern life.⁴¹⁴

The question of Havel's religious beliefs came up repeatedly at the time of his death. Havel did not ask for last rites before he died. He considered the Dalai Lama a spiritual guru. But the inheritance of Christianity is apparent in both his most well-known work, the 1978 essay *The Power of the Powerless*,⁴¹⁵ and in his insistence on "Truth and love."⁴¹⁶ Wilson concludes that the question of Havel's beliefs is inconsequential: "Havel was a deeply spiritual man who expressed his spirituality, if that is the right word, almost entirely through his actions in the world."⁴¹⁷

⁴¹⁴ Paul Wilson, *Václav Havel (1936-2011)*, THE N.Y. REV. OF BOOKS (Feb. 9, 2012), <http://www.nybooks.com/articles/archives/2012/feb/09/vaclav-havel-1936-2011/>.

⁴¹⁵ VÁCLAV HAVEL, *THE POWER OF THE POWERLESS* (Paul Wilson trans., 1978), *available at* <http://www.vaclavhavel.cz/index.php?sec=2&id=1&PHPSESSID=6353c37f52b627bd51adde4e5299918a&setln=2#>.

⁴¹⁶ Wilson, *supra* note 414 (citation omitted).

⁴¹⁷ *Id.*

All of us non-churchgoers are going to have to be like Havel. A secular civilization is going to have to answer all the same questions that traditional religions answer. Until now, secular answers to the question of the meaning of life have centered around rationalism, materialism and humanism. Those traditions, however, have problems of their own, problems that secularists have simply ignored. Freud taught us to distrust our vaunted rationality, and now brain science tells us we think on many levels: fast and slow⁴¹⁸ and in a blink.⁴¹⁹ Materialism rests on an uncertain foundation in light of the discoveries of quantum physics. What is matter at base: particle, wave, probability? Matter reacts to our measurements, as if it were watching us watching it. Matter is impossibly entangled at a distance. On the other end of materialism, Darwinian thought tends to the tautological: we are the way we are because we had to be. This may be so, but it is not helpful to living. And as for humanism, Hiroshima and Auschwitz seem to me to recommend original sin as a starting point, rather than a celebration of the human. Secularists do not have the meaning of life wrapped up any more than does the traditional religious believer.

A perspective of common ground might lessen our tendencies to reflexive support and opposition to claims of religious exemption. For the non-churchgoer, that would mean respect for the traditional religions, which have helped so many in their quest for the meaning of existence. And it would suggest a generosity toward assertions of religious exemption. For the traditional believer, the common ground would move the issue of exemptions away from the question of exclusive truth, toward recognition of the harm that exemptions can do and the need for adjustment in the public square.

The recognition of common ground might aid us in the formulation of compromise in the area of religious exemptions.

CONCLUSION

In law school, we do not teach our students about the Constitution. We teach them about the law of the Constitution. Even in teaching students the law of the Constitution, we generally teach them about cases decided by the Supreme Court defining constitutional rights or structure. We do not teach our students about statutes that

⁴¹⁸ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

⁴¹⁹ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

help enforce the Constitution or statutes that seek to define what the Constitution means.

I hope that this article has at least shown that this approach will not teach our students what they need to know to understand the constitutional value of religion in our public life. To understand that value, students are going to have to be sensitive to legislative actions at the state and federal levels, state constitutions, gubernatorial vetoes, voter referenda, administrative actions, and, most important, debate and controversy at all levels of public discourse. The actions of the Supreme Court will be relevant as well, but by no means dominant.

This article raises a number of questions for future development. Is this kind of popular constitutionalism something unique to religion, or have we been ignoring constitutional activity like this in other areas? Insofar as religion is different and more resistant to judicial resolution, what is the state of the constitutional value of religion today? Even more important, what is the state today of our polity? Are we religious or are we secular? And what is our judgment about that very question? Can we in fact ask and answer it? Or, are we almost all—including those called secular and those called religious—both religious and not religious together, so that the question in that form finally disappears? That is my hope for the future.

