

THE EQUAL PROTECTION OF FREE EXERCISE: TWO APPROACHES AND THEIR HISTORY

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Abstract: Contrary to critics of the Supreme Court's current equal protection approach to religious liberty, this Article contends that, from the very first federal free exercise cases, the Equal Protection and Free Exercise Clauses have been mutually intertwined. The seeds of an equal protection analysis of free exercise were, indeed, planted before the Fourteenth Amendment within the constitutional jurisprudence of several states. Furthermore, this Article argues, equal protection approaches should not be uniformly disparaged. Rather, the drawbacks that commentators have observed result largely from the Supreme Court's application of an inadequate version of equal protection. By ignoring the lessons that the Fourteenth Amendment taught about the nature of group classification and instead emphasizing the individual, the current approach downplays free exercise claims. Considering this tendency within the context of contemporary theories of group rights and antidiscrimination law, the Article concludes that the now-neglected, alternative strand of an equal protection approach to free exercise should be revived.

INTRODUCTION

In the legal imagination, the phrase "equal protection of the laws" conjures visions of lengthy battles over civil rights,¹ claims about

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¹ See, e.g., *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ. of Topeka (Brown I)*, 347 U.S. 483 (1954); see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 344-442 (2004) (discussing the *Brown* decisions within the context of the civil rights movement).

women's capacity to attend previously all-male military academies,² and assertions of gay and lesbian individuals' right to be free from discrimination.³ What it does not automatically evoke is a religious practitioner's demand for an exception from anti-drug laws to ingest peyote in a Native American ritual.⁴ This Article suggests that it is precisely such a claim for the free exercise of religion that falls within the core of what equal protection of the laws has meant historically. Furthermore, considering free exercise challenges in terms of at least one historically grounded version of equal protection would lead courts to value the religious person's practice as emanating from a set of communally shared pursuits—ones connected with a group bound together not according to natural characteristics, but rather through religious worship.

Recent religion clause jurisprudence has placed a priority upon equality—whether rejecting only those laws targeted against, rather than those burdening, the practices of minority religions or upholding the evenhanded distribution of public funds to religious and non-religious providers.⁵ This tendency has come under intense criticism from those who view principles of equality as either insufficiently protective of religious liberty or permitting erosion of the “wall of separation” between church and state.⁶ As this Article argues, approaching the Free Exercise Clause from the vantage point of equality—or, more specifically, equal protection—is neither new nor entirely susceptible to those critiques that have been articulated.⁷ Instead, at the state level, the concept of equal protection initially emanated out of an attempt to ensure free exercise. With ratification of the Fourteenth Amendment, at least one version of equal protection reasoning demonstrated itself similarly favorable to religious liberty on the federal level.

This Article contends that objections against the use of equal protection in the free exercise context result from two sets of divisions within equal protection analysis itself. The first involves the distinction between formal and substantive notions of equality. Whereas a formal vision of religious equality would protect free exercise solely against facial or intentional discrimination, a substantive conception would assess whether individuals within a particular sect experienced a

² See *United States v. Virginia*, 518 U.S. 515 (1996).

³ See *Romer v. Evans*, 517 U.S. 620 (1996).

⁴ See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

⁵ See *infra* notes 27–30, 309–25, and accompanying text.

⁶ See *infra* notes 36–39 and accompanying text.

⁷ This Article attempts to defend an equality approach to the Free Exercise Clause but remains agnostic with respect to the Establishment Clause.

greater burden than those in other groups when engaging in religious practices. The second division concerns the relationship between the individual and the group. Certain equality-based methods consider the particular claimant in isolation, whereas others evaluate the individual's request for accommodation within the context of the practices of the religious collectivity to which he or she belongs. Although substantive equality is not inevitably tied to placing a priority upon groups, those courts and cases more attentive to the relation between individual and group have tended to eschew a formal approach. Often the significance of a particular religious ritual may not be apparent to the outside observer. Examining the role and function of a practice within a particular group may allow spectators to translate the activity into an analogous practice from a more familiar religious context. For example, a comparison with the Catholic use of sacramental wine might be useful in analyzing the claim that devotional use of the substance hoasca should be exempted from the prohibition of the Controlled Substances Act.⁸ The negotiation between formal and substantive treatments of the equality of free exercise emerged first in the states; only with the arrival of a federal jurisprudence of equal protection, however, was the relationship between individual and group in the pursuit of free exercise claims fully developed.

The seeds of an equal protection analysis of free exercise were planted even before the Fourteenth Amendment.⁹ Indeed, it was in discussions of religious liberty rather than race that the language of equal protection first wended its way into use in the several states. Various state constitutions referred to the equal protection of individuals within different religious denominations and to the equal privileges and immunities or equal civil rights that they should enjoy.¹⁰ The phrase "equal protection" did not initially designate full equality of rights. As Professor Philip Hamburger has argued, equal protection in some contexts imported "an equality only of the protection provided by civil law for natural liberty," whereas equal civil rights, or equal privileges and immunities, "was a standard so rigorous it prevented civil laws from allocating either protection or privileges on the basis of religious differences."¹¹ At the same time, however, the state cases adjudicated in

⁸ See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, No. 04-1084 (U.S. Feb. 21, 2006) (analyzing such a claim under the Religious Freedom Restoration Act).

⁹ See *infra* notes 80-164 and accompanying text.

¹⁰ See *infra* notes 80-107 and accompanying text.

¹¹ Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 Sup. Ct. Rev. 295, 299.

terms of the constitutional religion clauses, whether the equal protection or equal civil rights versions, demonstrate the development of a sense that two different conceptions of discrimination might be at play.¹² The disparity between the two can be illustrated in terms of the operation of Sunday closing laws. The question often arose as to whether these statutes, when applied to those who observed Saturday as the Sabbath, generated a burden upon religious practice. Although many, including Justice Field when he sat upon the California Supreme Court, believed that it did not, some articulated a vision of discrimination against free exercise that would recognize as a burden the economic problems arising out of forcing Jews and other Saturday Sabbarians to close their establishments two days a week rather than one.¹³

Some states also developed a fairly far-reaching understanding of what the protection of free exercise meant, grounding prosecutions of those who disrupted religious services in the notion that this kind of state enforcement was necessary to fully protect the practice of religious liberty.¹⁴ This construction may have been encouraged by the absence of something like an establishment clause in many of the state constitutions. Without a prohibition against state establishment of religion, the states were obliged to make a greater effort to ensure that each religious group was able to pursue its own variety of worship. The protection of free exercise thus took on some of the aspects in the states that Establishment Clause jurisprudence possesses on the federal level.

On the federal level, equal protection and free exercise have been mutually intertwined from the first free exercise cases, as demonstrated most vividly by Justice Field's decision in *Ho Ah Kow v. Nanan*,¹⁵ issued in 1879, only a few months after the Supreme Court decided the first of the Mormon cases, *Reynolds v. United States*.¹⁶ In *Ho Ah Kow*, an equal protection case involving a Chinese prisoner's challenge to a San Francisco ordinance that required inmates to cut their hair, Justice Field reasoned that the law created a discriminatory burden upon the free exercise rights of the "special class" involved, composed of Chinese-American individuals who wore a queue, or braid, as part of their religious practice.¹⁷ This version of equal protection en-

¹² See *infra* notes 108-39 and accompanying text.

¹³ See *infra* notes 108-39 and accompanying text.

¹⁴ See *infra* notes 140-64 and accompanying text.

¹⁵ 12 F. Cas. 252 (C.C.D. Cal. 1879).

¹⁶ 98 U.S. 145 (1878) (upholding a conviction of polygamy against a free exercise challenge by a Mormon petitioner).

¹⁷ See *infra* notes 176-91 and accompanying text.

tailed consideration of substantive rather than formal equality and relied on the plaintiff's status as a member of a group constituted not simply by nationality or race but rather by shared religious commitments. The ratification of the Equal Protection Clause of the Fourteenth Amendment spawned a new awareness of the possibility that certain kinds of legislative classifications might signal an effort to discriminate against members of a particular group, such as racial minorities. By extension, the courts developed at least one strand of doctrine that displayed an increased sensitivity to the ways in which laws that appeared acceptable on their face might burden the religious practices of individuals within a certain collectivity.¹⁸

At the same time, however, another version of equal protection also took hold, one insisting that the accommodation of free exercise would turn each individual into "a law unto himself" and sever the bonds forcing society to cohere.¹⁹ Exemplified by cases affirming the constitutionality of prohibitions against the polygamous practices of some Mormons, such as *Reynolds* itself, this understanding of equal protection emphasized the applicability of general laws.²⁰ It is this second, reduced version of the equal protection of free exercise that has assumed its place within current Supreme Court jurisprudence. *Employment Division, Department of Human Resources of Oregon v. Smith* provided the clearest expression of this tendency, when Justice Scalia emphasized the presumptive validity of "neutral laws of general applicability" regardless of their capacity to burden religious practice.²¹

The drawbacks in an equal protection approach that critics of the Supreme Court's recent religion clause cases have observed thus do not stem from employing an equal protection logic in the free exercise context. Rather, the problems they identify emerge from applying an inadequate version of equal protection and ignoring the lessons that the Fourteenth Amendment taught about the nature of group classification.²² Instead of heeding those precedents, the Court has resorted to a set of nineteenth-century notions—the reverence for neutral laws of general applicability expressed in *Reynolds*, and the concept of color-blindness

¹⁸ See *infra* notes 165–95 and accompanying text.

¹⁹ See *Reynolds*, 98 U.S. at 167.

²⁰ See *infra* notes 170–75 and accompanying text.

²¹ *Smith*, 494 U.S. at 885; see also *infra* notes 300–02 and accompanying text.

²² Professor Peter Westen has argued that equality claims are "empty" because they are largely predicated on prior assertions of rights. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982). My argument draws on this insight in positing that two different kinds of equal protection approaches have characterized analyses under the religion clauses.

extracted from Justice Harlan's dissent in *Plessy v. Ferguson*.²³ Emphasizing individualism and a "cultural" approach to groups that denies constitutional protection for racial and religious rights by assimilating protected and unprotected classes, this new jurisprudence has sent the Court's understanding of both race and religion backwards. In Part I, the Article addresses the incompleteness of extant approaches, examining scholarship on religion and equality as well as the resources provided by political and critical theory.²⁴ Taken together, this material illuminates an approach to conceiving of the relationship between individual and group in the pursuit of free exercise claims as well as the perils of adopting a "cultural" approach to racial and religious groups. Part II explores the history of equal protection in the state constitutions and in free exercise decisions under them.²⁵ Part III then turns to the federal constitutional context and traces the significance of two different strands of equal protection's influence on free exercise jurisprudence.²⁶

I. EQUAL PROTECTION AND THE RELATIONSHIP BETWEEN INDIVIDUAL AND GROUP

This Part first examines current accounts of the relationship between equal protection and free exercise. It then elaborates on how political theory, international and comparative law, and recent critiques of antidiscrimination law can contribute to understanding the nature of free exercise claims. Combining the approaches of political theory, scholarship on U.S. constitutional law, and work on antidiscrimination law permits an assessment of the blind spots that each entails. While political theory may provide an account of the importance of groups situated between the state and the individual, many thinkers appear unwilling to differentiate between religious groups and other cultural or ethnic collectivities. By contrast, within American constitutional law, religion occupies a discrete and privileged place, conceived, on account of constitutional structure, as largely separate from race and ethnicity. Finally, for related disciplinary reasons, American antidiscrimination law generally neglects the field of religious liberty while providing insights that could valuably be applied to it.

²³ See *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting); *Reynolds*, 98 U.S. at 166-67.

²⁴ See *infra* notes 27-79 and accompanying text.

²⁵ See *infra* notes 80-164 and accompanying text.

²⁶ See *infra* notes 165-325 and accompanying text.

As this Part contends, examining free exercise claims in terms of the relationship between the individual and a religious collectivity allows more insight into the meaning of particular religious practices. Such insight may lead courts towards a substantive rather than formal account of the equal protection of free exercise. At the same time, although it may be tempting to assimilate claims for freedom of religious practice with those for cultural rights, the former may be detrimentally eroded by association with the latter. In this respect, arguments about the undesirability of understanding racial difference in terms of cultural difference may apply equally to the conflation of religion with culture.

A. Religion and Equal Protection

From courtrooms to law schools, interest has recently focused on equality in the arena of religious liberty.²⁷ The kind of equality invoked by scholars and courts is cognate with the idea of neutrality, as discussed in Part III, Section D, but the two should not be too easily

²⁷ Professor Steve Shiffrin has recently observed that

[c]ontemporary Supreme Court interpretations suggest that the religion clauses are primarily rooted in the value of equality. For example, in interpreting the Free Exercise Clause, the United States Supreme Court has argued that in the absence of *discrimination* against religion or in the presence of *other* constitutional values, it is not unconstitutional for a statute to inadvertently burden religion. Similarly, equality values have played a strong role in the Court's Establishment Clause jurisprudence.

Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 11–12 (2004) (emphasis added). Scholars like Professor Lawrence Sager also contend that religion clause jurisprudence should concentrate on equality rather than liberty, and on protection rather than privilege. See Lawrence G. Sager, *The Free Exercise of Culture: Some Doubts and Distinctions*, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 165, 165–75 (Richard A. Schweder et al. eds., 2002); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1282–83 (1994) (articulating an “equal regard” approach to religious exemptions that emphasizes protecting religious minorities rather than privileging individual worshippers). As Sager elaborates, “privilege flows from the perception of virtue or conceptual precedence; protection flows from the perception of vulnerability to discrimination. The privileging of religion over other important human commitments is normatively indefensible and practically unworkable” Sager, *supra*, at 172. One could trace religion scholars’ engagement with equality back to the work of Professor Philip Kurland, who attempted to reconcile the religion clauses through an appeal to equal protection. See PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 17–18 (1961) (arguing that the religion clauses of the constitution must be “read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, *i.e.*, they must be read to mean that religion may not be used as a basis for classification for purposes of governmental action . . .”).

conflated. Whereas speaking in terms of neutrality suggests a formal approach to equality, and gives a free hand to private decision-making, emphasizing equality itself at least leaves open the possibility of adopting a substantive approach towards the impediments faced by various religious groups.²⁸ At the same time, the vision of equality that some commentators endorse remains distinct from one based upon the heritage of the Equal Protection Clause.²⁹ This circumstance generally leads commentators towards an individualistic account of equality that does not sufficiently consider the relationship between individual and group in the context of religious practice.³⁰

Even those who advocate a substantive rather than formal vision of equality in the area of free exercise—recommending that laws burdening religious practice as well as those specifically targeted against it be invalidated under the Free Exercise Clause—do not associate this stance with the protection of groups rather than individuals, or with that of the individual in relation to the group.³¹ The long shadow cast

²⁸ See Shiffrin, *supra* note 27, at 11 n.1 ("The emphasis on equality is closely associated with, but not identical to, a 'neutrality' approach to the Establishment Clause. Formal—not substantive—equality is the principal (but not exclusive) value of that approach. Neutrality is a doctrinal approach, then; formal equality is the primary value that it serves." (citation omitted)); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 712 (2005) ("[N]eutrality requires government evenhandedness toward private competition and choice. Equality, by contrast, concerns not private choice, but social status. With regard to religion, equality focuses its attention on minority sects, protecting them against discrimination, while neutrality focuses on private decision making.").

²⁹ See Eisgruber & Sager, *supra* note 27, at 1297–1301 (distinguishing their proposal for treating religious liberty claims with "equal regard" from an "equal protection" approach).

³⁰ But see *id.* at 1248 (explaining that "[t]he predominance of groups in religious practice is important to the understanding of both privilege and protection"); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7, 41–42 (acknowledging the importance of the religious community in assertions of free exercise and explaining that "[m]any find in our current law, including constitutional law, an over-emphasis on individualism and autonomy and a corresponding insufficient recognition of and support for community and connection. Given the well recognized communal dimension in most religions, the Free Exercise Clause is the preeminent exception: the value of community and connection are given explicit constitutional protection").

³¹ See generally Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819 (1998) (arguing in favor of free exercise exemptions from a historical perspective but omitting the role of groups). By contrast, Professor Richard Schragger has valuably focused upon the role of institutions intermediate between the individual and the federal government in formulating a new understanding of how religious liberty should be protected. See generally Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004). Although this Article disagrees to a certain extent with Professor Schragger's conclusions, because it contends that attention to the relationship between individual and group in the free exercise context does not necessarily lead to viewing local governments as the level at which relations be-

by Professor Owen Fiss's 1976 Article, *Groups and the Equal Protection Clause*, has, by contrast, solidified the association between an insistence on the substantive protection of equality and the acknowledgement of particular groups in the equal protection context.³² As Professor Fiss contended, the crucial inquiry for courts adjudicating equal protection claims is whether a "state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group."³³ As applied to religious liberty, this understanding of equal protection might suggest that laws burdening minority religions should be subjected to special scrutiny.³⁴

At the same time, however, Professor Fiss's notion of the group—requiring that it be specifically "a social group," that that social group "has been in a position of perpetual subordination," and that "the political power of the group is severely circumscribed"—may not best describe religious collectivities, the status of which often shifts over periods of time and disparate localities.³⁵

In whichever terms they are discussed, approaches to the religion clauses grounded in equality have not remained unopposed. Those justices objecting to the logic of current Free Exercise and Establishment Clause jurisprudence have protested that the doctrines derived from equal protection are inadequate to address the problems of religious liberty.³⁶ Scholars have also diagnosed a variety of drawbacks to

tween church and state should be worked out, it similarly locates the site of free exercise in a space claimed exclusively neither by the individual nor by the federal government. *See id.* at 1811.

³² *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107 (1976).

³³ *Id.* at 157.

³⁴ This approach might bear some resemblance to Professor Thomas Berg's suggestion that the protection of minority religions should be the Court's paramount goal in both the Free Exercise and Establishment Clause contexts. *See generally* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 *WASH. U. L.Q.* 919 (2004).

³⁵ *See* Fiss, *supra* note 32, at 154–55.

³⁶ *See, e.g.,* Mitchell v. Helms, 530 U.S. 793, 877 (2000) (Souter, J., dissenting) ("Whether a law's benefit is sufficiently close to universally general welfare paradigms to be classified with them, as distinct from religious aid, is a function of the purpose and effect of the challenged law in all its particularity. The judgment is not reducible to the application of any formula. Evenhandedness of distribution as between religious and secular beneficiaries is a relevant factor; but not a sufficiency test of constitutionality. There is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms."); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring) ("If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, '[s]uch a

interpreting the religion clauses in terms of equality. Some posit that equal protection gives short shrift to important liberty interests³⁷ or to other values that should underlie religion clause adjudication.³⁸ Others see internal contradictions in the very application of the equality principle to the religion clauses.³⁹

On those occasions when scholars do discuss analogies between religion and equal protection and note the relationship between religion and other (suspect) classes, most relegate their analysis largely to the Establishment Clause rather than the Free Exercise Clause.⁴⁰ Even the most detailed account of the relationship between the Free Exercise and Equal Protection Clauses suggests that free exercise should

test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides." (citations omitted)).

³⁷ See Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 *NEB. L. REV.* 651, 685 (1991) (contending that "the *Smith* approach is too unprotective of religious liberty").

³⁸ See generally Shiffrin, *supra* note 27 (arguing that the Free Exercise and Establishment Clauses each rest on seven distinct values).

³⁹ See Tebbe, *supra* note 28, at 701-02 (contending that, despite the seeming advantages of substantive over formal neutrality, the former offends what the author calls "symmetry," because the religious exemptions to neutral laws of general applicability that those advocating substantive neutrality support violate substantive neutrality between religion and non-religion).

⁴⁰ There are, of course, several exceptions. See, e.g., Berg, *supra* note 34; Eisgruber & Sager, *supra* note 27, at 1282-1301 (arguing for an approach to religious liberty based upon "equal regard" and comparing this model with an "equal protection" one).

The tendency to privilege the Establishment Clause emerges in scholars' comments about how the Court considers religious groups. In the effort most explicitly devoted to elaborating a connection between the treatment of collectivities under the religion and Equal Protection Clauses, Professor Michael Mannheimer almost entirely disregards the Free Exercise Clause. See generally Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 *TEMP. L. REV.* 95 (1996). Distinguishing the two contexts, he argues, "[t]he focus of the equal citizenship approach to state religious establishments is on religion as status, not religion as belief or practice. Thus, the incorporated Establishment Clause ensures not 'the equal protection of the free exercise of religion,' but freedom from discrimination and stigmatization based on religious status." *Id.* at 128. Similarly, Professor Noah Feldman, while persuasively exploring the political equality rationale that has come to dominate the interpretation of the Establishment Clause, focuses exclusively on establishment, and does not flesh out the connection between the treatment of racial groups under equal protection analysis and that of religious communities under the religion clauses. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 *CAL. L. REV.* 673 (2002). Professor Alan Brownstein likewise claims that "the free exercise clause should primarily be understood to be an autonomy right, while the establishment clause should be strongly rooted in equal protection doctrine." Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 *OHIO ST. L.J.* 89, 94 (1990).

be seen as an individual right, and distinguished from equal protection on this basis.⁴¹ In *Keeping the Faith*, Professor Ira Lupu postulated that "[the] individualized notion of impact is what constitutes the essential difference between adjudication under the free exercise clause and equal protection clause."⁴² As he explained, basing his distinction on the individualized nature of the "burdens and sacrifices" that people arguing for free exercise-based exemptions must bear, "[f]ree exercise principles protect autonomous, individual choices, not choices dependent upon group membership."⁴³

What each of these writers neglects is the distinctive similarity between the structure of free exercise and equal protection claims. Technically, they are correct—the right to the free exercise of religion is held by individuals rather than groups, just as particular people assert violations of their equal protection rights. In bringing free exercise claims, however, just as in pursuing equal protection ones, the challenger is obliged to describe the collectivity to which she belongs, persuasively alleging its religious character and the nature of the accompanying religious beliefs. Whether or not the Court considers this religious group as the backdrop for an individual's claim may make the difference in whether it accepts the validity of her free exercise argument.

B. *Political Theory and Comparative Law Approaches*

The individual rights emphasis of much U.S. constitutional law scholarship notoriously neglects the increasing importance and recognition of collective rights worldwide, both in their practical implementation in constitutional and human rights documents and in their deployment within political theory.⁴⁴ Supplementing domestic thinking

⁴¹ Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 765 (1986).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Will Kymlicka, defending what he terms "group-differentiated rights," has attributed the decline in the role of minority rights within liberal theory partly to "the increased influence throughout the world of the American conception of an ethnicity-blind constitution," which he argues "has been shaped by unique factors (e.g., racial desegregation; the scope of immigration) which are not necessarily applicable to other countries." WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 7 (1995). His comment uncovers the potentially detrimental effects on an international front of treating U.S. constitutional law as hermetic and self-contained. See *id.*; see also Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 635 n.57 (1992) (observing that "[t]he Equal Protection Clause of the United States Constitution has generally been read to embody the individualist anti-discrimination (non-discrimination) principle. Indeed, Equal Protection jurisprudence in the United States has

about free exercise with the international and political theory perspective allows for a more thorough consideration of the significance of group rights, or that of the individual in relation to the group. At the same time, scholarship in American constitutional law can provide a method for distinguishing religious from other kinds of groups.

Political theorists addressing the question of what rights vest in collectivities, rather than in individuals, tend to maintain fairly broad conceptions of what kinds of groups should be included. Professor Vernon Van Dyke, an advocate for the protection of group as well as individual rights, urges "not that the problem of equal treatment for individuals should be ignored, but that the rule of equal treatment must be interpreted in the light of a counterpart: that ethnic communities—as well as states, nations, and 'peoples'—may also have just claims," defining such ethnic groups as distinguished by their "language, race, or religion."⁴⁵ Because he discerns no principled way of differentiating among groups affiliated on the basis of language, race, or religion, Van Dyke cannot adequately account for the Supreme Court's holding in *Wisconsin v. Yoder*, which protected the right of the Amish to remove their children from public schools after the eighth grade.⁴⁶ According to Van Dyke's analysis, "interestingly enough, the Supreme Court gave precedence to the right of the religious community. But the court acted on the basis of the First Amendment guarantee of freedom of religion, leaving the presumption untouched that nonreligious ethnic communities do not have a comparable right."⁴⁷ Approaching *Yoder* from the vantage point of a defense of liberalism's capacity to protect groups, Professor Chandran Kukathas likewise argues that the Free Exercise Clause provided an inadequate basis for the decision, which should instead have been grounded in a right to freedom of association.⁴⁸ Although fundamentally disagreeing in their conclusions, neither scholar can discern a reasoned basis for the Constitution's decision to privilege religious over other cultural practices.

had a major influence on the nature of international documents in this area"). The work of Professor Madhavi Sunder supplies one exception to this deficiency in the area of scholarship on religious liberty. See Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1421-22 (2003).

⁴⁵ Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in *THE RIGHTS OF MINORITY CULTURES* 31, 53 (Will Kymlicka ed., 1995).

⁴⁶ See generally 406 U.S. 205 (1972).

⁴⁷ Van Dyke, *supra* note 45, at 51.

⁴⁸ Chandran Kukathas, *Are There Any Cultural Rights?*, in *THE RIGHTS OF MINORITY CULTURES*, *supra* note 45, at 228, 247.

Comparative work, like Peter Danchin's *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, highlights the anomalous nature of U.S. failure to consider religious liberty in the context of the rights of minority groups.⁴⁹ As he writes, the United States' International Religious Freedom Act "creates an irrational hierarchy of human rights in U.S. foreign policy that has negative implications both domestically and internationally."⁵⁰ International agreements, such as the International Covenant on Civil and Political Rights (the "ICCPR"), tend to include provisions securing not only individual, but also group-based, religious rights.⁵¹ Article 18 of the ICCPR, like the Free Exercise Clause of the U.S. Constitution, ensures individual liberties of religious belief and practice:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁵²

Similarly, Article 26 provides individually based guarantees of equal protection and non-discrimination.⁵³ Article 27, however, addresses religious as well as other minority groups, stating, "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."⁵⁴ While thus illuminating potential relationships among religion, language, and culture, and approaching religious liberties from both individual and group perspectives, international and comparative law sources tend not to examine the respective ontologies of different types of groups or the

⁴⁹ Peter Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33 (2002).

⁵⁰ *Id.* at 103.

⁵¹ See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 18, U.N. GAOR, 21st Sess., Supp. No. 16 U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

⁵² *Id.*

⁵³ *Id.* at Art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

⁵⁴ *Id.* at Art. 27.

normative justifications for advocating group rather than, or in addition to, individual rights.

There is, however, a more nuanced, intermediate approach between the group rights emphasis of both political theory and comparative and international law scholarship, on the one hand, and U.S. constitutional law's insistence on the individual, on the other. As Professor Jacob Levy has argued, groups may be differentiated according to the kinds of rights claims that they put forth. The nature of the relevant group is, according to this model, not determined independently, but rather in connection with the right adduced.⁵⁵ Most related to free exercise is the category of rights claims he describes as those for exemptions.⁵⁶ The role of the group in these cases is that of providing meaning.⁵⁷ Often the significance of religious practices will not be immediately evident to an outside observer; rather, ritual's meaning becomes apparent through the mediation of an interpretive community. Religious practices are, to a certain extent, markers of belonging, not only to a particular faith, but within a certain collectivity, that look both outwards (towards other sectors of society) and inwards (towards worshippers who will recognize a co-religionist through shared practices). It is not inevitable that courts will adopt a substantive vision of religious equality on the basis of examining the relationship between an individual and his or her religious group, but heeding this connection may be important in terms of establishing the *convertibility* of a particular religious ritual. Whereas a demand for an exemption may seem excessive when one is not able to translate the meaning of the practice involved into a different context, the request may no longer appear inordinate when one can, in fact, see parallels between the exemption at issue and the privileges granted to majority religions.

⁵⁵ Jacob T. Levy, *Classifying Cultural Rights*, in NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 22, 23–24 (Ian Shapiro & Will Kymlicka eds., 1997).

⁵⁶ See *id.* at 25–29.

⁵⁷ *Id.* at 27 (“In cases where an exemption is demanded or granted, a practice which has a distinctive status and meaning in a minority culture is banned, regulated, or compelled because of the very different meaning it has for the majority culture. The exemption is justified as a recognition of that difference, as an attempt not to unduly burden the minority culture or religion *en route* to the law’s legitimate goals. As noted, many are defended as part of the freedom to practice and live according to one’s religion and seek their defense in the broader theory of religious freedom, but all defenses of exemptions stress the distinctive meaning which the practice has for the nondominant group.”).

C. Equal Protection Theories

Recent theories of equal protection—particularly those developed in the context of antidiscrimination law rather than the Fourteenth Amendment—supply two valuable insights. First, thirty years after Professor Fiss's article, *Groups and the Equal Protection Clause*, scholars and courts have developed a more nuanced vision of the relationship between the individual and the group in antidiscrimination law.⁵⁸ Second, debates about the relationship between race and culture, and suspicions about the attempt to associate them too intimately, can provide an important cautionary lesson for those interested in protecting the free exercise of religion.

Although Professor Fiss acknowledged that the groups he identified might cease to exist "[t]hrough the process of assimilation," and that they did not necessarily have biological roots, he emphasized that they must be entities with "an independent social identity and existence," and starkly contrasted an individually based equal protection jurisprudence with a group-based jurisprudence.⁵⁹ Current critiques of antidiscrimination law call this dichotomy into question. As Professor Richard Primus has explained, "the rights of individuals and the status of groups are intertwined rather than mutually exclusive."⁶⁰ Disparate impact law, according to Primus, possesses elements of individualism as well as an anti-hierarchical aspect connected with groups.⁶¹ The example illustrating this relationship is that of the "bottom-line defense," which the Supreme Court rejected in *Connecticut v. Teal*.⁶² Because specific individuals are harmed by the disparate impact of a certain part of the hiring process, and they are not subsequently compensated for this harm, it will not be a sufficient defense to a disparate impact claim for an employer to contend that the hiring process as a whole results in a proportional number of minority employees.⁶³

Groups themselves, when conceived as a unity, may not maintain their coherence. This becomes evident in Professor Kenji Yoshino's work entitled *Covering*, in which he argues that in the case of women, "covering"—or downplaying rather than altering or hiding an underlying identity—could take two forms, either that of forced feminization

⁵⁸ See *infra* notes 60–65 and accompanying text.

⁵⁹ Fiss, *supra* note 29, at 155, 156.

⁶⁰ Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 552 (2003).

⁶¹ *Id.* at 563.

⁶² 457 U.S. 440, 456 (1982); Primus, *supra* note 60, at 563.

⁶³ Primus, *supra* note 60, at 563.

or that of shedding the garb of womanhood.⁶⁴ Professor Madhavi Sunder has likewise begun to explore the complications of dissent within religious groups, positing that a right to such dissent should be legally ensured.⁶⁵

Thinkers on both the left and right have also tended to translate religious concerns into cultural ones.⁶⁶ Discerning to what extent this conflation represents a distortion, or to what extent religious practices can accurately be redescribed as cultural ones, should be a central task of any project concerned with elucidating the current status of religion in constitutional jurisprudence.⁶⁷ It is, furthermore, worth inquiring why a certain version of multiculturalism might be eagerly echoed by someone like Justice Scalia.

Although a legal analysis of religion's relation with culture has not occurred in most recent discussions of religious liberty, a model may be provided by Professor Richard Ford's recent article on race entitled *Beyond 'Difference': A Reluctant Critique of Legal Identity Politics*.⁶⁸ Religion is generally distinguished from race in the U.S. constitu-

⁶⁴ Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 771, 905-13 (2002) (describing the operations of the requirements of both "covering" and "reverse covering" on women). See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

⁶⁵ See Sunder, *supra* note 44, at 1465-71 (proposing legal procedures for protecting dissent within religious and cultural groups).

⁶⁶ *Compare Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 740 (1994) (Scalia, J., dissenting) ("Justice Souter's case against the statute comes down to nothing more, therefore, than his third point: the fact that all the residents of the Kiryas Joel Village School District are Satmars. But all its residents also wear unusual dress, have unusual civic customs, and have not much to do with people who are culturally different from them. (The Court recognizes that 'the Satmars prefer to live together "to facilitate individual religious observance and maintain social, cultural and religious values," but that it is not "against their religion" to interact with others.'" . . .) On what basis does Justice Souter conclude that it is the theological distinctiveness rather than the cultural distinctiveness that was the basis for New York State's decision? The normal assumption would be that it was the latter, since it was not theology but dress, language, and cultural alienation that posed the educational problem for the children." (citations omitted)), with Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1, 16-17 (1995) (discussing the *Kiryas Joel* case in terms of the question of the treatment of the subgroup within the polity). See generally Sager, *supra* note 27 (treating the relationship between the free exercise of religion and that of culture).

⁶⁷ The deep imbrication of religion with cultural practices emerges in Clifford Geertz's statement that "all cultural performances are not religious performances" but, simultaneously, that "the line between those that are [religious] and artistic, or even political, ones is often not so easy to draw in practice, for, like social forms, symbolic forms can serve multiple purposes." CLIFFORD GEERTZ, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 87, 113 (1973).

⁶⁸ Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 38 (Wendy Brown & Janet Halley eds., 2002); see also RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* (2005).

tional context because the Free Exercise Clause extends to practices whereas the Equal Protection Clause tends not to safeguard ethnically associated activities. At the same time, however, Professor Ford's general critique of the assimilation of race to ethnicity could apply as well to the conflation of religion with culture. Several of the legal examples that he invokes even possess explicit parallels within the context of religion clause jurisprudence, a circumstance that highlights the differential relation between race and religion as well as the connection of each with culture.

Ford commences with a Section 1981 case under Title VII of the Civil Rights Act and the Thirteenth Amendment in which a female employee claimed that American Airlines' policy of prohibiting certain workers from wearing corn rows discriminated against her as a black woman, asserting that this hair style "has been and continues to be part of the cultural and historical essence of Black American women."⁶⁹ Through this scenario, Ford critiques the essentialist concept of culture, which, by articulating a racial culture, would serve a fundamentally conservative agenda, result in stereotyping, and inhibit change.⁷⁰ The most compelling parallel within the arena of religion to the case Ford selects is presented by recent Rastafarian plaintiffs' allegations that employers' prohibition of dreadlocks infringed on their rights under the Free Exercise Clause.⁷¹ This connection is additionally complicated by the fact that the Rastafarians' claim could be examined either from an equal protection or free exercise perspective, as Rastafari identity comprehends both a racial and religious component.⁷² The question then arises as to whether the equal protection and free exercise claims should enjoy different statuses or whether practice should be privileged more in the religious than the racial context.⁷³

Because courts have not upheld Rastafarians' employment discrimination claims under the Free Exercise Clause,⁷⁴ a more striking

⁶⁹ Ford, *supra* note 68, at 39.

⁷⁰ *Id.* at 52-57.

⁷¹ See generally Booth v. Maryland, 207 F. Supp. 2d 394 (D. Md. 2002).

⁷² See generally Anna Marie Smith, *Rastafari as Resistance and the Ambiguities of Essentialism in the 'New Social Movements'*, in *THE MAKING OF POLITICAL IDENTITIES* 171 (Ernesto Laclau ed., 1994) (discussing Rastafari as an illustration of the essentialist approach to social movements).

⁷³ Professor Lawrence Sager has provided one answer to this question—"no." In *The Free Exercise of Culture*, he argued in favor of claims to the free exercise of culture, but only insofar as they, like those for the free exercise of religion, did not assert a special privilege but instead a right not to be discriminated against. See Sager, *supra* note 27, at 174-75.

⁷⁴ See Booth, 207 F. Supp. 2d at 397-99. Interestingly, the question of whether Rastafarians should be exempted from laws against drug dealing on the grounds that such activity is

disparity is presented by comparing a cultural rights hypothetical that Ford provides with a similar case decided under the First Amendment. Ford asks the reader to imagine:

[S]ocial group x has a number of distinctive social practices, including ritual animal sacrifice that involves slow torture of the animal for several days. This group establishes a presence in a particular town and begins, among other practices, this ritual. The town council (which does not share group x's culture) responds with an ordinance outlawing animal sacrifice. To be sure, the ordinance is directed at the group. But it does not necessarily reflect prejudice or bias against the group or its members; after all, the group is *actually doing something* that the majority of the town disapproves of and would disapprove of no matter who did it. . . . But to point this out tells us nothing about how the conflict should be resolved.⁷⁵

Although in the cultural rights context it seems less than clear that the group should prevail, the Church of the Lukumi was able to assert a successful free exercise claim based not upon the torture of any animals, but on somewhat similar facts.⁷⁶

Finally, Justice Powell's opinion in the Supreme Court's decision on affirmative action in *Regents of the University of California v. Bakke* plays a central role in Ford's analysis, displaying a coincidence of conservatism with multiculturalism akin to that generated by *Kiryas Joel Village School District v. Grumet*.⁷⁷ According to Ford, ironically, "the 'conservative victory' in *Bakke* in no small part encouraged the development and popularity of that *bête noire* of American conservatives, contemporary race-conscious multiculturalism."⁷⁸ As Ford demonstrates, Powell's opinion in *Bakke* "silently institutionalized an ethnicity model of race that emphasizes cultural difference over status hierarchy. . . . The result is that the *cultural* identity of a racial minority group is foregrounded at

protected as part of the right to the free exercise of religion has been hotly debated in the British context. See Derek O'Brien, *Rastafarianism and the Law*, New L.J., Apr. 6, 2001, at 509, 509-10. But see contra Ian Loveland, *Comment: Religious Drug Use as a Human Right?*, New L.J., Jan. 19, 2001, at 41, 41.

⁷⁵ Ford, *supra* note 68, at 70.

⁷⁶ Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523-47 (1993). Of course, in the case of the Church of the Lukumi, the ritual animal sacrifice lacked the slow torture present in Ford's hypothetical. See *id.*

⁷⁷ Ford, *supra* note 68, at 45-49.

⁷⁸ *Id.* at 47.

the expense of the history of racism."⁷⁹ *Bakke* thus encouraged minority groups to emphasize cultural difference, a tendency that may have caused racial identity increasingly to approximate religious identity.

II. EQUAL PROTECTION AND FREE EXERCISE: THE HISTORY IN THE STATES

The language of equal protection itself first arose out of the religious liberty provisions of early state constitutions. Interpretations of the clauses protecting free exercise in these state constitutions suggested two different understandings of discrimination against religious practice that would eventually lead to the substantive and formal conceptions of equality. Furthermore, the implementation of state constitutional provisions suggested a stronger conception of the government's responsibility for enforcing equality in the area of religion than the Equal Protection Clause of the U.S. Constitution was subsequently viewed as entailing with respect to race.

Whereas in the federal setting, the courts would later import the equal protection model from the context of the Fourteenth Amendment into adjudication under the Free Exercise and Establishment Clauses, in the states, the several conceptions of equal protection arose inversely out of the constitutional clauses concerning religion and, in particular, free exercise. Likewise, while the Supreme Court has seemingly used the language of equal protection in discussing religion through analogy with race, the notions of what equal protection might mean were initially developed in conjunction not with race, but rather with religion and free exercise.⁸⁰

A. "Equal Protection" and "Privileges or Immunities" Avant La Lettre

Several of the early state constitutions insisted upon the rights of free exercise without discrimination or preference, and some even explicitly used the language of equal protection in describing

⁷⁹ *Id.* at 46.

⁸⁰ Professor Hamburger elaborates the intellectual debates surrounding the language of equal protection in the state constitutions, drawing upon a rich range of contextual materials; however, he does not explore the state jurisprudence on religious liberty that I cover in this section. See generally Hamburger, *supra* note 11. Although Professor (now Judge) Michael W. McConnell also discusses the state constitutions in *The Origins and Historical Understanding of Free Exercise of Religion*, he analyzes only those cases arising under them that involved oaths, religious assessments, and military conscription. See 103 HARV. L. REV. 1409, 1455-73 (1990).

the requisite treatment of each individual's religious practice.⁸¹ Presaging the Fourteenth Amendment in yet another respect, some expressed the sense that a person's civil capacity and privileges, or privileges and immunities, should remain the same whatever his or her religious persuasion.⁸² Although few cases depended for their outcome on the constitutional clauses mandating the equal protec-

⁸¹ For the language of equal protection, see MD. CONST. of 1776, Decl. of Rights, art. XXXIII ("That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are *equally entitled to protection* in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice . . .") (emphasis added). For invocation of religious equality, see VA. CONST. of 1776, Decl. of Rights, § 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience . . ."). For the rhetoric of non-preference and non-discrimination, see, for example, ALA. CONST. of 1819, Decl. of Rights, § 7 ("[N]o preference shall ever be given by law to any religious sect, society, denomination, or mode of worship . . ."); CAL. CONST. of 1849, art. I, § 4 ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State . . ."). John K. Wilson furnishes a table delineating which states provided equal protection for religious worshippers and to what extent that protection extended outside the bounds of Protestantism or Christianity more broadly. John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & ST. 753, 768 tbl.1 (1990). The table does not, however, elaborate upon the distinctive phrasing of the various clauses. See *id.*

⁸² See, e.g., ALA. CONST. of 1819, Decl. of Rights, § 6 ("The *civil rights, privileges, or capacities* of any citizen, shall in no way be diminished, or enlarged, on account of his religious principles.") (emphasis added); N.J. CONST. of 1776, art. XIX ("[N]o Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles, [and all members of Protestant sects] shall fully and freely enjoy *every privilege and immunity*, enjoyed by others their fellow-subjects.") (emphasis added); PA. CONST. of 1776, Decl. of Rights, art. II ("Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any *civil right as a citizen*, on account of his religious sentiments or peculiar mode of religious worship.") (emphasis added); S.C. CONST. of 1778, art. XXXVIII ("[A]ll denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy *equal religious and civil privileges*.") (emphasis added); VT. CONST. of 1786, ch. I, art. III ("[N]or can any man be justly *deprived or abridged of any civil right as a citizen* on account of his religious sentiments or peculiar mode of religious worship.") (emphasis added); see also Ferriter v. Tyler, 48 Vt. 444, 465 (1876) (describing Art. III of the Vermont Constitution as being "designed . . . to secure to every subject equal civil rights, irrespective of his religious faith; so that his being a Catholic or a Protestant—his being a Calvinist or an Arminian—his being an orthodox evangelical or a free-thinker—his being a Baptist or a Universalist—an Episcopalian or a Quaker, should not make him the object of discriminating legislation or judicial judgment to his disadvantage, as compared with those of different faith and practice,—so that no law should be aimed or executed against him because he professed and practiced one form of religious belief or disbelief rather than another, within the limits of personal immunity consistent with good order and the peace of society under the government"); VA. CONST. of 1830, art. III, § 11 ("No man shall be . . . enforced, restrained, molested or burdened, in his body or goods, or otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and *the same shall in no wise affect, diminish, or enlarge their civil capacities*.") (emphasis added).

tion of individuals in disparate religious groups, Judge Chase, in his 1799 opinion for the Maryland General Court in the case of *Runkel v. Winemiller*, granting a writ of mandamus to a minister dispossessed of his congregation, emphasized that his determination rested on the idea that "the pastors, teachers and ministers, of every denomination of [C]hristians, are equally entitled to the protection of the law, and to the enjoyment of their religious and temporal rights."⁸³ The equal protection of all Christian denominations under the law meant for Judge Chase, among other things, that each should be equally bound by, and should equally benefit from, their respective contractual obligations, regardless of whether these contractual commitments were internal to church operations.⁸⁴

The question of whether an individual's civil capacity was diminished or enlarged on the basis of religion or whether he was deprived of privileges and immunities accorded to others arose most frequently in the context of assessing a witness's qualification to testify.⁸⁵ In the early seventeenth century, Sir Edward Coke established the principle in England that only Christians could serve as sworn witnesses.⁸⁶ During the late eighteenth and early nineteenth centuries, in the states, disputes persisted about precisely what religious beliefs qualified a person to testify. Some courts insisted that an oath would be insufficiently binding on anyone who did not believe in the existence of

⁸³ 4 H. & McH. 429, 450.

⁸⁴ *Id.* at 450–51. An equal protection logic also proved decisive in the Georgia Supreme Court case of *Gilham & Brown v. Wells*, 64 Ga. 192 (1879). Justice Bleckley's opinion explained that a town ordinance requiring a licensed liquor store to close whenever "any denomination of Christian people" held "divine service" was ultra vires, because, "[t]o readers of the constitution and the Code of Georgia, such a phrase as 'any denomination of Christian people,' is unfamiliar as a legal expression, and the reason is, that the state treats all religions alike." *Id.* at 195–98. A dissenting justice, although acknowledging that "Jew or Gentile, Christian or Pagan, are alike entitled to equal protection under our liberal and wise toleration of perfect freedom of religious thought, and equality of protection extended to religious worship" (emphasis added), *id.* at 200, insisted that it seemed from the record as though only Christians lived in the particular town, and, hence, that the ordinance was not discriminatory and remained valid, *id.* at 200–02.

⁸⁵ For an interesting modern counterpart presenting equal protection, free exercise, and establishment clause problems, see Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1093–1104 (2001).

⁸⁶ EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON 6b (London, J. & W.T. Clarke 19th ed. 1832) (1628).

an afterlife furnished with rewards and punishments.⁸⁷ Others held that all who believed in the existence of a God who would punish those swearing falsely could serve as witnesses.⁸⁸ In Virginia, the General Court reasoned that an individual who refused to acknowledge a future state of punishments and rewards could not be considered incompetent as a witness because to do so would be to lessen his civil capacity on the basis of religion.⁸⁹

At the same time, however, these constitutions refused to grant any absolute liberty of practice—as opposed to conscience. They emphasized that the public order and peace might be disrupted by permitting complete freedom of religious exercise. In the language of Thomas Cooley's influential treatise on *Constitutional Limitations*,

[T]he general voice has been, that persons of every religious persuasion should be made equal before the law, and that questions of religious belief and religious worship should be questions between each individual man and his Maker. Of these questions human tribunals, so long as *the public order is not disturbed*, are not to take cognizance ⁹⁰

⁸⁷ See *Atwood v. Welton*, 7 Conn. 66, 71 (1828) (holding that a Universalist, who "denie[d] all punishment after this life, and who . . . believes that men will be punished in this life for their sins, but immediately after their death, be made happy," was not a competent witness).

⁸⁸ See *Butts v. Swartwood*, 2 Cow. 431, 432 (N.Y. Sup. Ct. 1823) (holding that a Universalist was competent to testify despite not believing in the eternity of future punishment); *Blair v. Seaver*, 26 Pa. 274, 277 (1856) ("The test of competency is, whether the witness believes in the existence of a God, who will punish him if he swear falsely. . . . As an oath is a solemn appeal to the Creator of the Universe that the truth only shall be witnessed, no one is competent to take it who has not a religious sense of accountability to the Omniscent Being, who will certainly punish him if he commits perjury. But whether the punishment will be temporary or eternal, inflicted in this world or that to come, is immaterial upon the question of competency.").

⁸⁹ See *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 632, 642-44 (1846) (construing the 1776 Bill of Rights, which the first article of the 1830 Virginia Constitution incorporated); see also *Bush v. Commonwealth*, 80 Ky. 244, 249-50 (1882) (holding that the sixth section of the Kentucky Bill of Rights, which specified "[t]hat the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion," "is a declaration of an absolute equality, which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain a certain opinion in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief").

⁹⁰ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 960 (8th ed. 1927) (emphasis added).

The attempt to discern when the grant of equality before the law to all devout persons would infringe upon the state's interest in public order led ultimately to the fear the Supreme Court expressed in *Reynolds v. United States* of the religious individual who might become "a law unto himself."⁹¹ The route was not, however, inevitable from the state constitutional clauses limiting free exercise to the rationale for the decisions in the polygamy cases and the Court's emphasis on the legitimacy of general laws despite the burdens they might place upon particular religious practices. *Reynolds*, and *Employment Division, Department of Human Resources of Oregon v. Smith* in the next century, represented, rather, the conflation between restricting activities likely to harm others or generate a public disturbance and prohibiting any activity that would violate a general law, whatever the basis for that law's enactment. Although *Reynolds* might have found a justification within the state constitutional clauses specifying that religious liberty could not extend as far as the propagation of licentiousness,⁹² the more sweeping principle that it asserts—and that *Smith* followed—is not entirely in accord with the spirit of the state constitutional limitations provisions. Most of these, rather than simply invoking restrictions placed by positive law, specified particular ways in which religious practice might prove problematic for other individuals and the state in general.⁹³

The most common of the state constitutional limitations involved infringement of the rights of others,⁹⁴ disturbance of the

⁹¹ See *Reynolds v. United States*, 98 U.S. 145, 167 (1878); see also *infra* notes 166–75 and accompanying text.

⁹² See CAL. CONST. of 1849, art. I, § 4 ("[B]ut the liberty of conscience, hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state.") (emphasis added).

⁹³ Scholars today continue to debate whether *Reynolds/Smith* or, in Professor (now Judge) Michael McConnell's language, a "freedom-protective" approach, is more consistent with the language of these state constitutions. See McConnell, *supra* note 31, at 820; McConnell, *supra* note 80, at 1461–67. While Justice Scalia and Professors Philip Hamburger and Marci Hamilton support the historical accuracy of the principle articulated in *Smith*, Judge McConnell and Justice O'Connor take the other approach. See Thomas C. Berg, Commentary, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1607–08. One of the central questions, of which Judge McConnell provides a detailed analysis, involves what constituted a "disturbance of the peace" in the late eighteenth century. See McConnell, *supra* note 31, at 832–46 (arguing that both Justice Scalia's and Professor Hamburger's insistence upon an expansive meaning of disturbing the peace are unpersuasive, and that, in any event, they fit the language of only some of the state constitutions).

⁹⁴ See MD. CONST. of 1776, Decl. of Rights, art. XXXIII (restricting the freedom of practice when, "under colour of religion, any man shall disturb the good order, peace or

peace of the State,⁹⁵ and the pursuit of treason and sedition.⁹⁶ Several examples demonstrate that the ways in which these clauses were construed were not isomorphic with restrictions based simply upon general laws. In *Lindenmuller v. People*, the New York Supreme Court upheld a law prohibiting theatrical performances on Sundays.⁹⁷ Although sustaining the statute primarily as a civil regulation, the court first elaborated upon the alternative justification for Sunday laws as derived from the notion that Christianity remained, in a certain sense, part of the common law.⁹⁸ Under this reasoning, the state was justified in eliminating Sunday theater on the grounds that dramatic productions would infringe "the equal rights of others"⁹⁹—that is, Christians' ability to worship undisturbed—and that they would cause disturbance of the "public peace" in a manner

safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights") (emphasis added).

⁹⁵ See, e.g., GA. CONST. of 1777, art. LVI ("All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State . . ."); N.J. CONST. of 1776, art. XIX ("[T]here shall be no establishment of any one religious sect in this Province, in preference to another . . . but . . . all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government as hereby established, shall be capable of being elected into any office of profit or trust . . . and shall fully and freely enjoy every privilege and immunity enjoyed by others their fellow-subjects.") (emphasis added). In *Separating Church and State: Roger Williams and Religious Liberty*, Timothy Hall elaborates upon Roger Williams' response to claims that civil peace could be maintained only through an insistence on religious orthodoxy. TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 79–86 (1998). Williams endorsed a less restrictive notion of peace—one capable of comprehending conflict over religious doctrine—and instead emphasized "civility". *Id.*

⁹⁶ See N.C. CONST. of 1776, art. XXXIV ("[T]here shall be no establishment of any one religious church or denomination in this State, in preference to any other . . . but all persons shall be at liberty to exercise their own mode of worship:—*Provided*, That nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment.")

⁹⁷ 21 How. Pr. 156, 164–65, 175 (N.Y. Sup. Ct. 1861).

⁹⁸ See *id.* at 158–64. For discussion of this maxim, and its lack of substantive content, see Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27 (1998).

⁹⁹ See *Lindenmuller*, 21 How. Pr. at 157 ("Individual consciences may not be enforced; but men of every opinion and creed may be restrained from acts which interfere with christian worship, and which tend to revile religion and bring it into contempt. The belief of no man can be constrained, and the proper expression of religious belief is guaranteed to all; but this right, like every other right, must be exercised with strict regard to the equal rights of others; and when religious belief or unbelief leads to acts which interfere with the religious worship, and rights of conscience of those who represent the religion of the country, as established, not by law, but by the consent and usage of the community, and existing before the organization of the government, their acts may be restrained by legislation, even if they are not indictable at common law.").

similar to blasphemy.¹⁰⁰ Although the legislature was entitled to restrict non-religious activities on Sundays without violating the state constitutional protection of free exercise, the court's reasoning indicated that the lawmakers should keep in view the purpose of Sunday laws—including the equal rights of others and the state's interest in public peace—when passing them.¹⁰¹

In upholding the blasphemy prosecution of Abner Kneeland, who had published a declaration attacking the beliefs of Universalists—a minority religion in Massachusetts¹⁰²—and denying the existence of God, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts also justified his decision by appealing to the need to maintain the peace of society.¹⁰³ Although Kneeland argued that his statements had simply served to criticize the doctrines of Universalism and to highlight his own religious views by juxtaposition, the court determined that he had rejected God more generally.¹⁰⁴ The opinion then attempted to reconcile the state constitution's assertion of religious freedom with the blasphemy statute:

¹⁰⁰ See *id.* at 164–65 (“Upon this ground the law in question could be sustained, for the legislature are sole judges of the acts proper to be prohibited, with a view to the public peace, and as obstructing religious worship, and bringing into contempt the religious institutions of the people.”).

¹⁰¹ Contrast this vision of the “equal rights of others” with that expressed by the Supreme Court in *Davis v. Beason*. See *infra* note 175 and accompanying text. It is worth noting that the 1777 New York Constitution did not contain the phrase “equal rights of others,” although such language was present in other early state constitutions. The New York Constitution simply specified that “the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.” N.Y. CONST. of 1777, art. XXXVIII.

¹⁰² Religious establishment persisted in Massachusetts until quite late, and was abandoned only in 1832, with the eleventh amendment to the constitution, which specified, among other things, that “all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.” JACOB C. MEYER, *CHURCH AND STATE IN MASSACHUSETTS FROM 1740 TO 1833*, at 218–20, 243 (1930). Although the official state religion was the Congregational Church prior to disestablishment, a schism between Unitarians and Trinitarians had long prevented the church from presenting a unified front. *Id.* at 160–83. The Universalists, who refused to accept the idea of eternal punishment in the afterlife and were not part of the established church, had fought for religious freedom from early in the history of the commonwealth. *Id.* at 121–23. It is, therefore, somewhat ironic that Kneeland's prosecution for blasphemy was based upon his pronouncements against the Universalists.

¹⁰³ *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 220–21, 242 (1838). For materials on the *Kneeland* case, see generally *BLASPHEMY IN MASSACHUSETTS: FREEDOM OF CONSCIENCE AND THE ABNER KNEELAND CASE: A DOCUMENTARY RECORD* (Leonard W. Levy ed., 1973).

¹⁰⁴ *Kneeland*, 37 Mass. (20 Pick.) at 209, 213–18.

[U]nderstanding the statute . . . as we do, and as we have already explained it, that it is not intended to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace, it is not repugnant to, but entirely consistent with, [the religious liberty article] of the Declaration of Rights.¹⁰⁵

In order to remain within the parameters of the state constitution, Justice Shaw construed the blasphemy statute as applying only to statements made with the intent to harm or give offense to others:

I have come to the conclusion, that [the statute] was not intended to punish a denial of the existence of God; but only such denial when made in a manner calculated to give just offence to others, and with a bad intent. With this interpretation the statute is in harmony with the constitution.¹⁰⁶

Both *Lindenmuller* and *Kneeland* indicate that preserving the peace of the state through, in particular, maintaining respect for other individuals' "equal rights," underlay certain of the limitations placed upon free exercise in the states.¹⁰⁷

The vision of the equal protection of free exercise articulated by these state constitutions and the decisions under them thus remained constrained by certain limitations. What they did, however, accomplish was to make equal protection approaches to free exercise rhetorically accessible before this way of thinking was available on the federal level.

B. Two Versions of "Discrimination"

Disparities among the state constitutional religion clauses and their interpretations also brought to the fore several different understandings of "discrimination" itself, and the harm that it occasions. The principal distinction lay between, first, considering any unequal burden placed upon different religious denominations to be discriminatory,

¹⁰⁵ *Id.* at 221. The applicable constitutional provision asserted that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship." MASS. CONST. of 1780, pt. 1, art. 2.

¹⁰⁶ *Kneeland*, 37 Mass. (20 Pick.) at 242-43.

¹⁰⁷ This is consistent with Judge McConnell's articulation of the principles underlying the early state constitutions and his assertion that, "[w]here the rights of others are not involved, . . . the free exercise right prevails." McConnell, *supra* note 80, at 1464.

and, second, deeming discriminatory only those laws specifically aimed at discouraging a particular religious practice. These two categories presage the eventual development of formal and substantive approaches to equality. The differences are most clearly instantiated in the state courts' treatment of Sunday laws and exemptions from their applicability.¹⁰⁸

Although most judicial decisions upheld the validity of laws barring Sunday employment against free exercise challenges,¹⁰⁹ largely on the ground that they were authorized by the state police power, the reasoning in the 1858 California case, *Ex parte Neuman*,¹¹⁰ which was overruled by *Ex parte Andrews*,¹¹¹ suggests an alternative logic. In *Ex parte Neuman*, the California Supreme Court sustained a Jewish clothing seller's state constitutional challenge under habeas corpus to a law "for the better observance of the Sabbath" under which he was convicted.¹¹² The three opinions in the case articulate several of the major available positions on Sunday laws. Chief Justice Terry opined

¹⁰⁸ For a comprehensive survey and discussion of Sunday laws in the nineteenth century, see Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675 (2000). Baptist minister John Leland also contended that Sunday laws violated equal protection, and claimed in an 1815 pamphlet that "[g]overnment should be so formed as to administer equal protection to all the citizens within its limits. It is not only supposable, but fact, that within our government, there are Jews, Turks, and Christians of various peculiarities, as well as those who believe in no revealed religion. Local situation has placed them together—their interests and fears are common. All of them have life, rights and property to be secured—they associate for mutual defence, and from what is called government; for the support of which each one pays his equal part. In this case, ought not government to be a nursing father to all of them?" Carl Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1519.

¹⁰⁹ See, e.g., *Ex parte Koser*, 60 Cal. 177, 197 (1882) (en banc) (McKee, J., concurring) (affirming the validity of a law penalizing the act of keeping certain businesses open on Sundays on the ground that "every citizen of the State is left free to his intellectual convictions and emotional fervors upon subjects of the *unknown* and *unknowable*. All are equal in the laws, in positions under the law, and in the administration of the Government. No legal distinction or discrimination can be made between them. But, thus protected, all are subject to the municipal institutions established by the State. And in establishing a day of rest as one of those institutions, the State has the right to determine what day ought to be set apart for that purpose, and how it ought to be observed by the people"); *Ex parte Andrews*, 18 Cal. 678, 685 (1861) (upholding the validity of a Sunday law as a "civil regulation" and determining that "[t]he mere fact that this regulation takes effect upon a day which has been appropriated as a day of rest by the sanctions of a particular church, no more destroys the power of the Legislature to command abstinence from labor on that day, than the fact that if the Legislature appointed certain public business to be done on Saturday or Sunday—this would have been 'discriminating' against the sects, according religious sanctity to those days"); *Lindemuller*, 21 How. Pr. at 164–65, 175.

¹¹⁰ 9 Cal. 502 (1858), *overruled in part by Ex parte Andrews*, 18 Cal. 678 (1861).

¹¹¹ 18 Cal. at 678.

¹¹² 9 Cal. at 504–10.

that the law did, in fact, discriminate against religious denominations that did not observe the Christian Sabbath.¹¹³ Although also resisting the statute on constitutional grounds, Justice Burnett reasoned that it created an impermissible establishment of religion, which violated the rights of Christians as well as Jews, because under it, the Christian is "compel[led] . . . to do that which he has the right to omit if he pleases."¹¹⁴ Finally, Justice Field, then a member of the California Supreme Court, in dissent, insisted that the law remained a valid civil regulation, justifiable on the secular basis of the human need for "periodical cessations from labor," which simply happened to coincide with the Christian Sabbath.¹¹⁵

For Chief Justice Terry, the Sunday law recognized the sanctity of the Christian Sabbath, but not that of other religions, including Judaism, and, therefore, was discriminatory.¹¹⁶ As he explained:

In a community composed of persons of various religious denominations, having different days of worship, each considering his own as sacred from secular employment, all being *equally* considered and *protected* under the Constitution, a law is passed which in *effect* recognizes the sacred character of one of these days, by compelling all others to abstain from secular employment, which is precisely one of the modes in which its observance is manifested and required by the creed of that sect to which it belongs as a Sabbath. Is not this a discrimination in favor of the one? Does it require more than an appeal to one's common sense to decide that this is a preference? . . . We think not . . .¹¹⁷

In this case, the mere recognition of Sunday as a weekly holiday constituted discrimination against non-Christian sects, without the additional requirement that these groups be specially burdened by enforced observance. Under this account, it would make little difference if the other religious groups were Saturday Sabbatarians or instead refrained from celebrating any day of rest.

The significance of the additional burden potentially placed upon those who observe a different Sabbath by the obligation to rest on Sun-

¹¹³ *Id.*

¹¹⁴ *Id.* at 513-14.

¹¹⁵ *Id.* at 519-20.

¹¹⁶ *Id.* at 506.

¹¹⁷ *Ex parte Newman*, 9 Cal. at 506 (emphasis added).

days emerged only with Justice Sharpstein's dissent in *Ex parte Koser*.¹¹⁸ In his opinion, Justice Sharpstein discussed the inconvenience and economic constraints experienced by those who were forced to maintain not only the Sabbath designated by their own religion but also to take off on Sunday.¹¹⁹ Noting that the California Constitution guarantees protection "in the exercise and enjoyment of religious worship without discrimination or preference," he elaborated that:

[A] law which does not bear equally upon all classes of people is not without discrimination or preference. . . . It is no answer to this objection [about losing two days of the week rather than one] to say that the law ignores religion altogether, because the Legislature has no right under the Constitution to ignore religion when passing laws which must seriously affect those who profess it in some one of its various forms. If it is only necessary that the people of this State should rest one day in seven, and wholly immaterial on what day of the week they rest, those whose religion requires them to rest on a day other than that designated in the Sunday law, should have been excepted from its operation in order to avoid discrimination or preference which the Constitution forbids.¹²⁰

Although this argument was not resonant with the logic of the majority, Justice Sharpstein's dissent in *Ex parte Koser* finally articulated the notion that Sunday laws might place an additional burden on those sects observing the Sabbath on a different day.

Justice Field's dissent in *Ex parte Newman*, the reasoning of which was ultimately adopted by the California Supreme Court in *Ex parte Andrews*, provides an anticipatory response to Justice Sharpstein's opinion in *Koser* as well as countering that of Chief Justice Terry in *Ex parte Newman* itself.¹²¹ Rather than rejecting the logic of burdening—a position that would have been inconsistent with his subsequent statements in *Ho Ah Kow*,¹²²—Justice Field instead insisted that the law did not, in fact, burden the actual religious practice of those who celebrated another Sabbath, but only inconvenienced them by requiring

¹¹⁸ See 60 Cal. 177, 207–15 (1882) (Sharpstein, J., dissenting).

¹¹⁹ *Id.* at 208–09.

¹²⁰ *Id.* at 209.

¹²¹ See *Ex parte Newman*, 9 Cal. at 518–29.

¹²² See *infra* notes 176–91 and accompanying text.

them to refrain from working on another day.¹²³ As Justice Field maintained:

The law treats of business matters, not religious duties. In fixing a day of rest, it establishes only a rule of civil conduct. In limiting its command to secular pursuits, it necessarily leaves religious profession and worship free. It is absurd to say that the sale of clothing, or other goods, on Sunday, is an act of religion or worship; and it follows that the inhibition of such sale does not interfere with either.¹²⁴

For Justice Field, the mere fact that Saturday Sabbatarians might be economically inconvenienced by the necessity of closing shop on Sunday did not rise to the level of a burden on religious practice.¹²⁵ One might here contrast such Sunday laws with a regulation forbidding shop owners from closing their stores on Saturdays or at least directly penalizing the choice not to remain open that day. Nor did Field's subsequent opinions while a Supreme Court Justice suggest a significant change in his stance.¹²⁶

The various positions articulated in *Ex parte Newman*, *Ex parte Andrews*, and *Ex parte Koser* assisted in developing the sense of what might constitute an impermissibly discriminatory burden on a particular religious practice. Whereas Justice Sharpstein reasoned that Sunday closing laws burdened Saturday Sabbatarians by disadvantaging them economically,¹²⁷ Justice Field insisted that burdens arose only from laws that affected specifically religious exercise.¹²⁸ For Justice Field, Sunday laws were acceptable neutral laws of general applicability precisely because they did not place a restriction on any sect's free exercise—as they might have had an individual claimed a religious obligation to work on Sundays.¹²⁹ In later jurisprudence, Justice Field's understanding of the contours of a burden on religion, which required some direct impact on the individual's actual religious practice, came to dominate.¹³⁰ Indeed, it began to seem more appropriate to consider the

¹²³ *Ex parte Newman*, 9 Cal. at 519.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *Davis v. Beason*, 133 U.S. 333, 341–42 (1890) (“To call [Mormons'] advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind.”).

¹²⁷ See *supra* notes 118–20 and accompanying text.

¹²⁸ See *supra* notes 121–25 and accompanying text.

¹²⁹ See *supra* notes 121–25 and accompanying text.

¹³⁰ See *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (maintaining, in the context of a free exercise challenge to a Sunday law that, “[t]o strike down, without the most critical

validity of Sunday laws in terms of the establishment of religion rather than in terms of the burdens placed upon free exercise.¹³¹ The early state deliberations, however, helped jurists begin to contemplate what constituted burdening religious practice and to evaluate its constitutionality.

The states likewise demonstrated a lack of consensus as to whether it would be better to protect certain minority religions through specific constitutional or legislative provisions aimed at assisting them or simply by extending non-preferential treatment more broadly.¹³² Several problems plagued the attempt to give particularized accommodation to minority religions through granting exemptions. First, there were practical impediments. The enumeration of certain sects sometimes left others without recourse.¹³³ Likewise, the possibility that religious groups that were initially marginalized might eventually become dominant forces within a state rendered it undesirable to enshrine a privilege for a specific sect within the constitution.

Second, jurisprudential concerns often intervened. Not all of the state courts considered exemptions consistent with their constitutions. Those unaccustomed to viewing as discriminatory an unequal burden placed upon one group's religious practice might assess an attempt to

scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature").

¹³¹ See *McGowan v. Maryland*, 366 U.S. 420, 430-53 (1961) (analyzing the validity of a Maryland Sunday law in the context of an Establishment Clause challenge and upholding the statute).

¹³² For example, the Maryland Constitution specified that "the people called Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation, in the manner that Quakers have been heretofore allowed to affirm; and to be of the same avail as an oath, in all such cases, as the affirmation of Quakers hath been allowed and accepted within this State, instead of an oath." MD. CONST. of 1776, Decl. of Rights, art. XXXVI. A constitutional amendment in 1795 extended additional protections to the same groups, granting individuals within them the ability to substitute an affirmation for an oath of office. MD. CONST. of 1776, art. III (amended 1795). The enumeration of particular sects in this exception proved important in the case of *Shane v. Clarke*, in which the court granted a new trial because one juror had not taken an oath, and was not a "quaker, menonist, or dunker." 3 H. & McH. 101, 101 (Md. 1792). An alternative approach to the one that the Maryland Constitution adopted would have been to permit anyone with a religious objection to substitute an affirmation for the oath.

¹³³ For example, in early Massachusetts, although the Baptists and the Quakers were exempted from some of the requirements of religious establishment, the "Separates," who were dissidents from the colony's Congregational church, were not. See MEYER, *supra* note 102, at 33.

eliminate it as itself violating the principle of equality.¹³⁴ Thus in *City of Shreveport v. Levy*, the Louisiana Supreme Court invalidated a Sunday ordinance that provided an exception for those who observed the Sabbath on Saturday.¹³⁵ In doing so, the court explained, "[b]efore the constitution Jews and Gentiles are equal; by the law they must be treated alike, and the ordinance of a City Council which gives to one sect a privilege which it denies to another, violates both the constitution and the law, and is therefore null and void."¹³⁶ Although Shreveport's enactment was composed in general terms, the record demonstrated that the city possessed a significantly sized Jewish community that did business on Sundays, and the court interpreted the ordinance as aimed at assisting that group.¹³⁷ A concern that the court did not voice, but could have, is that the law protected only Saturday Sabbatarians, not those who might worship on alternate days.

Significantly, the *Shreveport* decision occurred under the Louisiana state Constitution of 1868, imposed during Reconstruction.¹³⁸ This document contained a number of equal rights provisions that were eliminated with the retrenchment of Reconstruction and the implementation of a new state constitution in 1879.¹³⁹ The emphasis—or, one might even suggest, overemphasis—on equality in the *Shreveport* case thus potentially reflected a new kind of relation between claims to religious liberty and those against racially-based discrimination. Whereas most of the state constitutions, and decisions under them, employed an equal protection approach derived initially from the free exercise context, the outcome in *Shreveport*, like some of the Supreme Court's religious liberty cases following the Fourteenth Amendment, may have been indebted partly to developments in race-based equal protection adjudication.

C. State Enforcement of Free Exercise

Finally, questions about the appropriate scope of the states' actions in ensuring nondiscriminatory treatment of various religious groups

¹³⁴ See King, *supra* note 108, at 704–06.

¹³⁵ 26 La. Ann. 671, 671–72 (1874).

¹³⁶ *Id.* at 672.

¹³⁷ See *id.* at 671–72.

¹³⁸ See LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 8–9 (1991).

¹³⁹ *Id.* at 8–10.

surfaced frequently.¹⁴⁰ The primary battleground involved the extent to which states should concern themselves with religious discrimination against, or harms to, a particular religious individual or group caused by another private person, whether through disruption of religious services, uttering blasphemous statements, or operating a business on Sundays. Debates about whether the government's attempts to protect religious liberty should extend to regulating such private conduct were also connected with concerns about delineating the spheres of private and public with respect to religion. Religious practice—and the demand for toleration—has always raised questions about the extent to which religion can be relegated to the private arena. As Professor Morton Horwitz remarked, even in the seventeenth century, natural rights theories and the corresponding assertion of a private sphere provided a "basis for arguing for religious toleration" and for "setting limits on state power" over "religious conscience."¹⁴¹ Today, critics question the extent to which religious communities organized through the "private" mechanisms of property ownership, family relations, and education—such as those of the Satmar Hasidim—should be deemed immune from intervention by the state.¹⁴²

In the early states, however, there remained considerable ambiguity over the degree to which religious worship could be deemed purely private. The South Carolina Constitution not only articulated the criteria that Protestant sects needed to meet to be recognized as part of the state's established church, but also included as one of the requirements that "God is publicly to be worshipped."¹⁴³ This demand was connected

¹⁴⁰ In *Equality and Diversity*, Professor Hamburger suggests that, "in the absence of some constitutional or other positive law providing a legal right to equal protection, Americans did not consider the 'right' of equal protection legally enforceable." Hamburger, *supra* note 11, at 378. The cases discussed in this Section may suggest one way in which the equality of free exercise was considered enforceable by the states.

¹⁴¹ Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982).

¹⁴² For a compelling analysis of the public/private distinction with respect to the Satmar Hasidim and the reluctance of both liberals and communitarians to apply the realist critique of economic relations to the internal dynamics of private cultural and religious groups, see Nomi Maya Stolzenberg, *A Tale of Two Villages (Or, Legal Realism Comes to Town)*, in NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 290, 313–20 (Ian Shapiro & Will Kymlicka eds., 1997).

¹⁴³ S.C. CONST. of 1778, art. XXXVIII. These specifications did not originate with the South Carolina Constitution of 1778, but rather dated back in large part to the Fundamental Constitutions of Carolina, authorship of which has been attributed to John Locke, although not without controversy. See Fundamental Constitutions of Carolina, §§ 94, 96, 99 (Jan. 12, 1681). See generally James Lowell Underwood, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right*, 54 S.C. L. REV. 111

with a claim for the validity of public establishment and concomitant taxation for religious purposes, but public worship was not inevitably bound up with these other appurtenances of state-sponsored religion. Indeed, in Massachusetts, at least one minister argued against establishment, while at the same time defending laws sustaining public worship on the ground that they were "absolutely necessary for the well-being of civil society."¹⁴⁴ The requirement in many of the state constitutions that religious worship not disrupt the peace of the state or interfere with the processes of government, however, furnished an outer limit on the public performance of religious acts.¹⁴⁵

While blasphemy furnished one area in which the potential harms to other individuals' religious sentiments motivated state prosecutions,¹⁴⁶ it was in the treatment of the disruption of religious services that the question of when the state should act to preserve religious liberty arose most dramatically.¹⁴⁷ In these contexts, the courts of several states, at the same time as affirming a principle of non-preference and opposing establishment, insisted that the state should still concern itself with ensuring the sanctity of worship where it did occur.¹⁴⁸ Thus religious practice, despite taking place within a seemingly "private" domain, was entitled to public protection.

In *State v. Jasper*, the North Carolina Supreme Court upheld the misdemeanor conviction of an individual who had disrupted a Baptist meeting by "laughing and talking in a loud voice, and divers indecent actions and grimaces, during the performance of divine service."¹⁴⁹ The court explained that the North Carolina Constitution's Bill of Rights insisted that "there shall be no establishment of any religious church in preference to another" and that "all persons shall be at liberty to exercise their own mode of worship."¹⁵⁰ The constitution did not establish liberty of worship as a positive law, but rather merely declared

(2002) (outlining the development from the Fundamental Constitutions to South Carolina's 1790 Constitution). On at least one point, the Fundamental Constitutions displayed a more ecumenical spirit than the 1778 document; Article 96 invited the settlement of "Jews, Heathens, and other Dissenters" by permitting "any seven or more persons agreeing in any religion" to "constitute a church or profession." See Fundamental Constitutions of Carolina, § 96 (Jan. 12, 1681) (italicization omitted). The 1790 version ultimately abandoned establishment. Underwood, *supra*, at 166-70.

¹⁴⁴ MEYER, *supra* note 102, at 98-99.

¹⁴⁵ See *supra* notes 101-05 and accompanying text.

¹⁴⁶ See *supra* notes 102-05 and accompanying text.

¹⁴⁷ See *infra* notes 149-63 and accompanying text.

¹⁴⁸ See *infra* notes 149-62 and accompanying text.

¹⁴⁹ 15 N.C. (4 Dev.) 323, 324 (1833).

¹⁵⁰ *Id.*

this liberty of worship as a preexisting natural right.¹⁵¹ The court nevertheless concluded that protecting the designated freedom from private as well as state-sponsored incursions was essential.¹⁵² Moreover, religious collectivities, as well as individuals, deserved such protection, because the clause protecting free exercise comprehended both private religious practice and "public worship in assemblies."¹⁵³ According to the court:

While therefore no church shall be established in preference to another, all churches are established for the purposes of the security of the worshippers from penalties, or from molestation in the act of worship. The guaranty of religious freedom to all the citizens, supposes each one of them to have an interest in it, and to be conscious of religious obligation; and the quiet of the body politic demands that the religion which the citizens profess, and which it is supposed they would profess even against the laws of human institution, may be safely professed, and sincerely exercised in public assemblies. . . . [T]he exercise of religious worship calls together large multitudes, whose assembly is lawful, and a duty in a religious sense, and a public duty in the sense of the Constitution, the disturbance of whom, has an immediate tendency to bitter discords, the violent commotion of neighborhoods, and a breach of the peace ¹⁵⁴

Even in the absence of any explicit legislative enactment criminalizing the disruption of religious services, the court concluded, the state constitutional guarantee of free exercise rendered the indictment valid and a necessary means of preserving religious liberty.¹⁵⁵

Although not criminalizing the conduct disruptive of religious worship, the New York Supreme Court employed a similar logic in *Wall v. Lee*.¹⁵⁶ In a homily, Lee, the pastor of a Catholic church, cast some aspersions upon a dance that had recently occurred in the community. Later, when the collection was being taken up at the end of Mass, Wall—who seems to have been a participant in the dance—

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ *Id.* at 324–25.

¹⁵⁴ *Jasper*, 15 N.C. (4 Dev.) at 324–25.

¹⁵⁵ *See id.* at 324–25.

¹⁵⁶ *See* 34 N.Y. 141, 141–46 (1865).

demanded that Lee rescind his statements about the event.¹⁵⁷ When Lee categorically refused, a quarrel ensued and the pastor attempted to force Wall physically from the premises.¹⁵⁸ Despite Lee's lack of success in evicting Wall, the latter sued the former for assault and battery and won a jury verdict in his favor.¹⁵⁹ On appeal, the court reversed because, as leader of the assembly, Lee possessed the right to remove Wall.¹⁶⁰ According to the court, "usage and custom have made it peculiarly the duty of the minister, or priest, to conduct the services of religious meetings, to preside over them, to preserve order therein, and act as the organ or spokesman of the congregation."¹⁶¹ The significance of the opinion derives, however, from the fact that the court then explained, with reference to the federal, not the state, constitution, that "[t]he guaranty . . . of the free exercise of religious opinion, and the rights of the people peaceably to assemble and petition for a redress of grievances, would be but an idle mockery if meetings convened for such purposes can be invaded and disturbed with impunity."¹⁶² The principle that the North Carolina Supreme Court articulated with respect to its state constitution was associated by its New York counterpart with enforcement of the federal constitutional guarantee of free exercise.¹⁶³

¹⁵⁷ *Id.* at 141.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 141-42.

¹⁶⁰ *Id.* at 146.

¹⁶¹ *Wall*, 34 N.Y. at 146.

¹⁶² *Id.*

¹⁶³ See *Jasper*, 15 N.C. (4 Dev.) at 324-25; *Wall*, 34 N.Y. at 146. This reference to the federal constitutional guarantee of free exercise before the First Amendment was officially incorporated against the states may not be as exceptional as it might seem. The Georgia Supreme Court, in dicta from an 1852 case, indicated a belief that the First Amendment of the United States Constitution also bound the several states:

That the power to pass any law infringing on these principles, is taken from the Federal Government, no one denies. But is it a part of the reserved rights of a State to do this? May the Legislature of a State, for example, unless restrained by its own Constitution, pass a law "respecting an establishment of religion, or prohibiting the free exercise thereof . . . ?" If so, of what avail, I ask, is the negation of these powers to the General Government? Our revolutionary sires wisely resolved that religion should be purely voluntary in this country; that it should subsist by its own omnipotence, or come to nothing. Hence, they solemnly determined that there should be no church established by law, and maintained by the secular power. Now, the doctrine is, that Congress may not exercise this power, but that each State Legislature may do so for itself. As if a National religion and State religion, a National press and State press, were quite separate and distinct from each other; and that the one might be sub-

The expansive vision of when the state should act to protect free exercise evinced by these cases may have arisen partly out of the need to preserve the meetings of religious dissidents from interruption by members of a majority faith, but they also indicate an indistinction between the public and private spheres with respect precisely to religion. For these early states, the enforcement of free exercise was not exclusively a protection of individual practice, but rather protected a collective worship in which the individual clearly possessed an important, but not dominant, role. In contrast to the image of laws procedurally protecting dissent within the context of particular religious groups that Professor Madhavi Sunder has presented, these cases display a judicial will to assist in the disciplining of a congregation through imposition of the extra weight of law.¹⁶⁴ Although, from the contemporary vantage point, this governmental intervention into the religious sphere may seem overly intrusive, it does demonstrate an attempt to affirmatively protect religious liberty and free exercise in a manner that has subsequently been eschewed not only in the religious context but also in some areas of civil rights.

III. EQUAL PROTECTION AND FREE EXERCISE: TRACING TWO FEDERAL APPROACHES

The evolution of equal protection approaches to free exercise in the federal context diverged from that in the states, but there remained some echoes: for example, the question again arose of whether a burden placed upon religious exercise constitutes discrimination against the individual claiming a right to such practice.¹⁶⁵ By contrast, the federal reluctance to enforce guarantees of either equal protection or free exercise against private parties stood in contrast to the experience of the states. At the same time, on the federal level, courts increasingly considered the individual in relation to the group in evaluating free exercise claims.

Adhering to the contention that, in general, religion clause doctrine has, on the federal level, evolved out of developments in equal protection adjudication, this Part first contends that the Equal Protection Clause of the Fourteenth Amendment produced an increased

ject to control, but the other not! Such logic, I must confess, fails to commend itself to my judgment.

Campbell v. Georgia, 11 Ga. 353, 365-66 (1852).

¹⁶⁴ See *supra* note 65 and accompanying text.

¹⁶⁵ See *supra* notes 108-39 and accompanying text.

awareness of the relationship between the individual and group within free exercise jurisprudence and that a divergence arose between religion clause cases decided with greater and lesser awareness of the collectivity behind particular religious liberty claims. It then discusses the analogies and discrepancies that arise out of the attempt to map religion clause tests onto equal protection analysis, concluding that, although the areas have generally reached a rapprochement, under the Supreme Court's current jurisprudence, the government retains less power to remedy race-based discrimination than to protect freedoms of religious practice.

A. Religion and "The Law of Social Life"

The same year that the Supreme Court issued its first opinion dealing with the Free Exercise Clause—upholding a conviction of polygamy against a religion-based challenge by a Mormon defendant in *Reynolds v. United States*—Justice Field, riding circuit in California, decided the case of *Ho Ah Kow v. Nunan* (1879).¹⁶⁶ In striking down on equal protection grounds a California statute that specified each prisoner must have "the hair of his head 'cut or clipped to an uniform length of one inch from the scalp thereof,'" ¹⁶⁷ Field based his determination in part on free exercise concerns about the burden imposed on the targeted class, Chinese men who believed that cutting of their queue would lead to eternal perdition.¹⁶⁸ One of the main differences between the two cases' analyses is that *Reynolds* focused on individuals and the specter of the man who would become a law unto himself, whereas *Ho Ah Kow* articulated a theory of protected groups.¹⁶⁹

In *Reynolds*, the Court supported its decision that Congress was authorized to pass a general law banning bigamy in the territories by

¹⁶⁶ See *Reynolds v. United States*, 98 U.S. 145, 153–68 (1878); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 253–57 (C.C.D. Cal. 1879). Justice Field issued his opinion in *Ho Ah Kow* on July 7, 1879, only months after the Court's ruling in *Reynolds*. See *Ho Ah Kow*, 12 F. Cas. at 252. As discussed in Part II.B *supra*, Justice Field's opinions on the subject of religious liberty were influential in the context of his service on the California Supreme Court as well. See *supra* notes 121–31 and accompanying text. It may not be incidental that Justice Field's father, David Dudley Field, Sr., had been a Congregationalist clergyman in Connecticut who had advocated equal treatment for other churches. See generally DAVID D. FIELD, CENTENNIAL ADDRESS (1853). To make the chronological sequence of cases more transparent, I will include the dates of cases in the text in Section III.

¹⁶⁷ *Ho Ah Kow*, 12 F. Cas. at 253.

¹⁶⁸ *Id.* at 253–54.

¹⁶⁹ Compare *id.* at 253–57 (analyzing the effect of the statute with respect to the protected group), with *Reynolds*, 98 U.S. at 167 (analyzing the effect of the statute with respect to the individual).

elaborating upon the lengthy history of such statutes in England and America and by emphasizing that a culture of multiple marriages was alien to the people of the United States.¹⁷⁰ Further determining that Reynolds—and others who shared his religious beliefs—should not be exempted from the application of Congress's law, the Court invoked both the specter of the man who would be a law unto himself and the fear that polygamy would prove infectious and disease civil society as a whole.¹⁷¹ Chief Justice White, writing for the Court, insisted that, despite the possibility of being temporarily self-contained within the Mormon community, polygamy would inevitably escape into the rest of society, a sphere over which government was entitled to legislate:

[P]olygamy . . . fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. . . . An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.¹⁷²

According to the Chief Justice's assertion, allowing Mormons to disregard general laws against bigamy would, in time, result not simply in an exception to the law but in its overturning.¹⁷³ Following similar reasoning, he indicated that if Reynolds' claim were recognized, everyone might invoke religious beliefs to avoid general laws, a situation that would lead to anarchy:

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to

¹⁷⁰ *Reynolds*, 98 U.S. at 161–66.

¹⁷¹ *Id.* at 166–67.

¹⁷² *Id.* at 166.

¹⁷³ *Id.* at 166–67.

permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.¹⁷⁴

In each *reductio ad absurdum*, the independent status of the group to which Reynolds belonged was elided. On the one hand, the Court viewed the situation from the vantage point of society as a whole and, on the other, from that of the individual alone, in both cases moving rapidly away from consideration of the targeted group.¹⁷⁵

By contrast, in *Ho Ah Kow*, Justice Field focused on the plaintiff's membership in a group, the characteristics of which would make it particularly susceptible to the legislation in question.¹⁷⁶ Proceeding, like the Court in *Reynolds*, first by examining the capacity of the relevant authority—here the county board of supervisors—to enact disciplinary or health regulations for county prisoners, Field then turned to the petitioner's equal protection challenge to the ordinance.¹⁷⁷ Finding that the requirement of cutting a prisoner's hair was not valid as a measure of discipline, as a sanitary regulation, or, in the case of a misdemeanor, as a means of identifying a prisoner in case of escape, Field held that the ordinance exceeded the board of supervisors' authority.¹⁷⁸

¹⁷⁴ *Id.*

¹⁷⁵ In reconfirming its unwillingness to permit a free exercise defense in the polygamy context, the Court, in an opinion ironically authored by Justice Field himself, went even further in *Davis v. Beason*, emphasizing that an individual's free exercise may extend as far as "exhibit[ing] his sentiments in such form of worship as he may think proper, not injurious of the equal rights of others," but that, "[h]owever free the exercise of religion may be, it must be subordinate to the criminal laws of the country . . ." 133 U.S. 333, 342-43 (1890), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996). The Court in *Davis* associated "the equal rights of others" with a particular justification for criminal laws—that of preserving the rights of others against encroachment. *See id.* In the *City of Boerne v. Flores*, Justice Scalia's concurrence insisted that historical protections for free exercise in the states were limited precisely by the scope of all criminal laws. 521 U.S. 507, 539-40 (1997). As discussed previously, phrases like "the equal rights of others" or "the public peace" cannot be interpreted as isomorphic with all criminal laws in the context of the states' religious jurisprudence. *See supra* notes 94-107 and accompanying text. It may be in *Davis*, however, that the interpretation Justice Scalia advanced was first articulated. *Compare Davis*, 133 U.S. at 342-43, *with Flores*, 521 U.S. at 539-40. The Court's language in *Davis* turns away from the states' understanding of "the equal rights of others" towards a more limited version of free exercise. *Davis*, 133 U.S. at 342-43.

¹⁷⁶ *See Ho Ah Kow*, 12 F. Cas. at 253-57.

¹⁷⁷ *See Reynolds*, 98 U.S. at 161-66; *Ho Ah Kow*, 12 F. Cas. at 253-57. Others have noted Field's reliance on free exercise considerations in his equal protection analysis. *See Comment, The Religious Rights of the Incarcerated*, 125 U. Pa. L. Rev. 812, 813 (1977) ("Although the ordinance was invalidated on equal protection grounds, Justice Field recognized the free exercise of religion dimension of the case . . ." (footnote omitted)).

¹⁷⁸ *Ho Ah Kow*, 12 F. Cas. at 253-54.

He also ruled in favor of *Ho Ah Kow* on an equal protection challenge to the law.¹⁷⁹ The terms of Field's discussion suggest that the most important consideration was not racial, but instead religious and, by extension, cultural bias.¹⁸⁰ The legislation in question adversely affected Chinese prisoners' free exercise because of their belief in the religious importance of the queue.¹⁸¹ As Field wrote, according to the complaint, "it is the custom of Chinamen to shave the hair from the front of the head and to wear the remainder of it braided into a queue . . . [and] the deprivation of the queue is regarded by them as a mark of disgrace, and is attended, according to their religious faith, with misfortune and suffering after death . . ."¹⁸² The law thus placed a special burden on the Chinese for religious reasons; the analogies that Field provided likewise demonstrated the interweaving of religious with racial and cultural discrimination.¹⁸³ He claimed that "[m]any illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them."¹⁸⁴ Among these examples he included a hypothetical law that would force Jewish prisoners to eat pork and referred to the manifold laws that had, in fact, been enacted against Catholics in England.¹⁸⁵ The "special class" to which he referred thus appears to have been a religious as well as a racial class, defined by certain cultural characteristics targeted as a means of oppressing the group more generally.¹⁸⁶ The popular association of these "cultural" traits with a particular race or religion becomes crucial in such cases; it is through the visibility of characteristic activities that targeting can occur, and because of their importance to the religion that they impose a burden upon the racial/religious class in question. Observation of these religious practices had led not to imitation, as the Court in *Reynolds* had feared,¹⁸⁷ but instead resulted in targeting. Religion thus both constituted a

¹⁷⁹ *Id.* at 255-57.

¹⁸⁰ *See id.* at 253-57.

¹⁸¹ *See id.*

¹⁸² *Id.* at 253.

¹⁸³ *Ho Ah Kow*, 12 F. Cas. at 255.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 255-56.

¹⁸⁶ *See id.*

¹⁸⁷ *See Reynolds*, 98 U.S. at 165-66.

means by which to oppress racial groups and was conceived by Justice Field himself as intimately connected with racial categories.¹⁸⁸

Describing the law as a result of hostility toward the Chinese, Justice Field determined from legislative history and enforcement effects that the law was intended to target this group as well as in fact placing a special burden upon it.¹⁸⁹ As Field observed in relation to the legislative history, "[t]he ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one."¹⁹⁰ He also defended inferring intent from disparate impact and discriminatory enforcement:

When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly.¹⁹¹

This approach toward general laws—looking beyond their facial characteristics—contrasts with that of *Reynolds* and *Davis*.¹⁹² Whereas the free exercise cases upheld general criminal laws unquestioningly, Field in the equal protection context insisted that the relationship between the law and the groups it affected be analyzed.¹⁹³ The approach that he employed was not entirely focused on the burdens placed upon religious practice, but rather, like *Yick Wo v. Hopkins*, a case involving a San Francisco ordinance targeted against Chinese laundries, discerned a discriminatory intent from, among other factors, the extraordinarily disproportionate impact of the law.¹⁹⁴ Although not entirely endorsing

¹⁸⁸ See *Ho Ah Kow*, 12 F. Cas. at 255–56 (Field, J.) (connecting religious groups with racial categories).

¹⁸⁹ *Id.* at 255.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* This approach to inferring intent could be compared with that elaborated by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252 (1977); see *infra* note 273 and accompanying text.

¹⁹² See *Davis*, 133 U.S. at 341–48; *Reynolds*, 98 U.S. at 161–67.

¹⁹³ See *Ho Ah Kow*, 12 F. Cas. at 255–56.

¹⁹⁴ See *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

a substantive approach to equality, *Ho Ah Kow* thus tended further in that direction than *Reynolds*.¹⁹⁵

This method re-appeared in one of the twentieth-century opinions most protective of free exercise, *Wisconsin v. Yoder* (1972).¹⁹⁶ Writing for the Court, Justice Burger determined that the state's interest in educating children past the eighth grade could not outweigh Amish parents' free exercise claim against such forced schooling. In reaching this conclusion, Justice Burger relied heavily on the status of the Amish as a distinct community possessed of a long and illustrious history.¹⁹⁷ He first accepted plaintiffs' claim that children's attendance at high school was fundamentally anathema to the Amish. Like Justice Field in *Ho Ah Kow*, Justice Burger emphasized the importance of the belief within Amish theology by connecting it with the group's assumptions about the afterlife: "[t]hey believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children."¹⁹⁸ Burger indicated—without fully demonstrating—that the

¹⁹⁵ See generally *Ho Ah Kow*, 12 F. Cas. 252. Some might argue that *Ho Ah Kow* is consistent with modern free exercise jurisprudence because it involves a situation where, as in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a locality specifically targeted a particular religious group for adverse treatment. Compare *Ho Ah Kow*, 12 F. Cas. at 253–54 (local law targeted Chinese immigrants), with *Church of the Lukumi*, 508 U.S. at 534–35 (local law targeted a religious group). At the same time, however, both *Yick Wo* and *Ho Ah Kow* contain a more searching approach to looking beyond facially neutral legislation and discerning discriminatory intent from disproportionate impacts than contemporary race and religion cases. See David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 298–99 (1998) (arguing that the intents and effects standard arising out of *Washington v. Davis* is inconsistent in certain respects with *Yick Wo*).

¹⁹⁶ 406 U.S. 205 (1972). Implicitly taking up the Court's concern in *Reynolds* with protecting the equal rights of individuals through upholding criminal laws, Professor Laura Underkuffler-Freund has suggested that

Yoder . . . raises, in a very direct way, what I believe is one of the central questions presented by the Religion Clauses: the extent to which equality, as a constitutional value, constrains our understanding of religious guarantees. . . . [T]he *Yoder* opinion deals with one aspect of this issue in particular . . . whether the granting of exemptions to religious individuals, from laws which bind all other (nonreligious or "otherly religious") individuals, violates the principle of equality of all citizens before the law.

See Laura S. Underkuffler-Freund, *Yoder and the Question of Equality*, 25 CAP. U. L. REV. 789, 789 (1996) (footnote omitted).

¹⁹⁷ See *Yoder*, 406 U.S. at 209–13, 234–36.

¹⁹⁸ *Id.* at 209; see *Ho Ah Kow*, 12 F. Cas. at 253, 255 (discussing the Chinese prisoners' belief that deprivation of the queue will bring grave consequences in the afterlife).

Amish objection to attending high school was not merely based on secular judgments, then further supported this stance by appeal to the communal nature of the belief, which he opposed to an individualistic view of free exercise akin to that feared in *Reynolds*:

Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority . . . their claims would not rest on a religious basis. . . .

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.¹⁹⁹

Again following the example of Justice Field in *Ho Ah Kow*, Burger analogized the Amish way of life with the "Talmudic diet," both of which constitute cultural practices corresponding to religious beliefs.²⁰⁰ Justice Burger also conceived the collectivity associated with these traditions as a separate entity, distinct from the larger society.²⁰¹ Demonstrating concern not for Amish children's capacity to be integrated within American society but instead for their ability to assimilate seamlessly into Amish society, Burger asserted that, "[i]n short, high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community."²⁰² According to the same logic, one of the reasons for insisting on the validity of the parents' free exercise claim is that in a fully

¹⁹⁹ *Yoder*, 406 U.S. at 215–16 (footnote omitted); see *Reynolds*, 98 U.S. at 166–67 (expressing concern that allowing polygamy in the context of free exercise would allow each individual to have his own set of laws).

²⁰⁰ *Yoder*, 406 U.S. at 216; see *Ho Ah Kow*, 12 F. Cas. at 253 (associating the Chinese cultural practice of wearing one's hair braided into a queue with the religious belief that deprivation of the queue would result in negative consequences in the afterlife).

²⁰¹ See *Yoder*, 406 U.S. at 209–13.

²⁰² See *id.* at 211–12.

mixed society, the unitary quality of the Amish community would risk being lost: "[a]s the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."²⁰³ At this point, Burger seems to have come full circle: the community in which the Amish belief was based, a collectivity that persuaded Burger that the belief was genuinely religious, is precisely what permitting free exercise in this sense sustains.²⁰⁴

In his partial dissent, Justice Douglas demonstrated the results of a different logic—one focused on the individual rather than class nature of the free exercise claim.²⁰⁵ Douglas opined that the question of whether the children—rather than the parents—intended to pursue a free exercise claim should be considered. "Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit."²⁰⁶ He further criticized Justice Burger's firm distinction between individual secular belief and religious opinion.²⁰⁷

The *Yoder* majority position leads in the Establishment Clause context to judicial approval of governmental assistance to preformed religious collectivities, considered as part of a larger set of cultural groups, as long as discrimination among these entities, or between religion and non-religion, does not occur.²⁰⁸ Justice Harlan's concurrence in *Walz v. Tax Commission of the City of New York* (1970) and its inheritance in Justice Kennedy's concurrence and Justice Scalia's dissent in *Kiryas Joel Village School District v. Grumet* (1994) demonstrate the equal protection reasoning behind this approach, one that sanitizes religion precisely by making its expression into a cultural attribute.²⁰⁹ This model of pluralism returns to the indistinction among race, religion, and culture that was visible in *Ho Ah Kow*, but, rather than diagnosing decisions about culture as surrogates for ones about race or religion, takes culture as an

²⁰³ *Id.* at 218.

²⁰⁴ *See id.* at 209–19.

²⁰⁵ *See id.* at 241–46 (Douglas, J., dissenting in part).

²⁰⁶ *Yoder*, 406 U.S. at 243 (Douglas, J., dissenting in part).

²⁰⁷ *Id.* at 247–48.

²⁰⁸ *See, e.g., Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970).

²⁰⁹ *See infra* notes 211–39 and accompanying text.

acceptable substitute for suspect classifications. Like the emphasis on groups in the free exercise area, the cultural method in the sphere of establishment aids organized religious entities. At the same time, however, it disturbs the heightened protection of religious practices under free exercise; once the Court displaces religion onto culture, the nature of the right exercised and the status of the group protected is ineluctably altered.²¹⁰

In *Waltz*, the Court upheld the New York City Tax Commission's grant of property tax exemptions to religious organizations for properties used solely for religious worship determining that it violated neither the Establishment nor the Free Exercise Clause.²¹¹ Justice Harlan's concurrence claimed that two values underlie the religion clauses—those of “neutrality” and “voluntarism.”²¹² Elaborating upon the requirement of neutrality, he asserted:

Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.²¹³

The analogy he constructed between Establishment Clause and voting rights cases is illuminating. To ensure neutrality, according to Harlan's account, one must examine upon whom the effects of legislation fall; if the set of classes affected includes more than religious ones, the law will pass the neutrality test.²¹⁴ Analyzing the relevant legislation, Harlan concluded that, by encompassing not only a variety of religious sects, but religion and non-religion alike not as different in kind but rather in degree, it passed the neutrality test:

The statute by its terms grants this exemption in furtherance of moral and intellectual diversity and would appear not to

²¹⁰ The problems with conflating religion and culture in this context resemble those that Richard Ford describes in the assimilation of race and culture. See *supra* notes 68–79 and accompanying text.

²¹¹ *Waltz*, 397 U.S. at 680.

²¹² *Id.* at 694 (Harlan, J., concurring).

²¹³ *Id.* at 696.

²¹⁴ See *id.*

omit any organization that could be reasonably thought to contribute to that goal.

... As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.²¹⁵

Eschewing a strict distinction between religion and non-religion, he appealed instead to "moral and intellectual diversity," introducing the language of culture as well.²¹⁶

The specter of a literal version of the "religious gerrymander" to which Justice Harlan alluded appeared in the circumstances leading up to *Kiryas Joel*, a case in which the Court held that an act designating the village of Kiryas Joel—a religious enclave of Satmar Hasidim—a separate school district violated the Establishment Clause.²¹⁷ The facts of this case suggest it as the Establishment Clause mirror image of *Yoder*.²¹⁸ Because of the Court's earlier decisions, the religious schools in Kiryas Joel had not been permitted to receive public funding for handicapped students.²¹⁹ These students had, therefore, been sent to neighboring school districts. Their parents, however, eventually withdrew them from these schools, citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different."²²⁰ The isolationist impulse behind these actions are quite similar to those adduced by the Amish in *Yoder*.²²¹ Justice Stevens' concurrence in *Kiryas Joel*, like Justice Douglas' partial dissent in *Yoder*, expressed dismay at the state's acceptance of a community's segregation of its children:

²¹⁵ *Id.* at 697.

²¹⁶ See *Waltz*, 397 U.S. at 696–97 (Harlan, J., concurring).

²¹⁷ *Kiryas Joel*, 512 U.S. at 690.

²¹⁸ Compare *id.* at 690–94 (discussing Satmar Hasidim parents' desire to remove their children from schools, believing attendance posed a real threat to their religious practice), with *Yoder*, 406 U.S. at 207–13 (discussing Amish parents' desire to remove their children from schools, believing attendance posed a real threat to their religious practice).

²¹⁹ *Kiryas Joel*, 512 U.S. at 692.

²²⁰ *Id.* (alteration in original) (quoting Bd. of Ed. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (1988)).

²²¹ Compare *Kiryas Joel*, 512 U.S. at 691–92 (concerning Satmar Hasidim's belief that their children would suffer when removed from their community), with *Yoder*, 406 U.S. at 209–12 (concerning Amish belief that their children would suffer when removed from their community).

[The state action] affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors. . . . By creating a school district that is specifically intended to shield children from contact with others who have 'different ways,' the State provided official support to cement the attachment of young adherents to a particular faith.²²²

In *Yoder* the Court granted the Amish community permission to isolate even its children, whereas in *Kiryas Joel*, the Court could not uphold state sponsorship of a school district constructed along religious lines.²²³

The concurrence of Justice Kennedy—who has repeatedly championed the equal protection approach to the religion clauses²²⁴—explicitly analogized political line-drawing on the basis of religion with that grounded in race and explained that the Court could not uphold either.²²⁵ As he wrote:

Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.²²⁶

²²² *Kiryas Joel*, 512 U.S. at 711 (Stevens, J., concurring); see *Yoder*, 406 U.S. at 244–46 (Douglas, J., dissenting in part).

²²³ Compare *Kiryas Joel*, 512 U.S. at 690–94, with *Yoder*, 406 U.S. at 217–18, 234.

²²⁴ See *infra* notes 306–08 and accompanying text.

²²⁵ *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring).

²²⁶ *Id.* (citation omitted); see also Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1383 n.75 (1997). Commenting on *Kiryas Joel*, Ford stated that:

[T]he parallel between the Establishment Clause and the Equal Protection Clause noted by Justice Kennedy is significant. According to this parallelism, under the Equal Protection and Establishment Clauses, the creation of a political subdivision that segregates citizens on the basis of either race or religion is constitutionally suspect. While equal protection doctrine has traditionally not been concerned with mediating the tension between recognition and creation, this tension is at the heart of the relationship between the Estab-

Despite denigrating such overt religious gerrymandering, Justice Kennedy suggested a solution that would result in the same outcome—that of permitting aid in handicapped instruction to the religious schools of the Kiryas Joel village.²²⁷ He opined that *School District of Grand Rapids v. Ball* (1985)²²⁸ and *Aguilar v. Felton* (1985)²²⁹ had been decided erroneously and should be re-examined:

A neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered. But for *Grand Rapids* and *Aguilar*, the Satmars would have had no need to seek special accommodations or their own school district. Our decisions led them to choose that unfortunate course ²³⁰

Thus Kennedy objected not to government support of separatism, but simply to the extreme case in which government would become co-extensive with a religious body.²³¹

lishment Clause and the Free Exercise Clauses governing religion. Using the terminology of this article regarding the purposes of governmental actions, we might say that the Establishment Clause ensures that government does not create religious classifications, whereas the Free Exercise Clause requires that government recognize religious groups (on the same basis as the government recognizes any other group).

Ford, *supra*, at 1383 n.75 (citation omitted)

²²⁷ *Kiryas Joel*, 512 U.S. at 731 (Kennedy, J., concurring).

²²⁸ 473 U.S. 373 (1985).

²²⁹ 473 U.S. 402 (1985).

²³⁰ *Kiryas Joel*, 512 U.S. at 731 (Kennedy, J., concurring).

²³¹ See *id.* Justice O'Connor's concurrence in the school voucher case decided in 2002, *Zelman v. Simmons-Harris*, similarly places great weight upon the manner in which aid is dispensed to religious institutions. See 536 U.S. 639, 669 (2002) (O'Connor, J., concurring). Her opinion states that courts, in examining a challenged aid scheme, should

consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid.

Id. By invoking "genuine" private choice, Justice O'Connor seems to insist on the necessity for individual, rather than institutional, decision-making about religion. See *id.* As Ira Lupu and Robert Tuttle have pointed out, however, "neither the Court's opinion nor Justice O'Connor's [in *Zelman*] provides adequate justification for the concept [of 'true private choice']." Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 944 (2003). Justice Souter's dissent likewise emphasizes the ephemeral nature of the private choice available. *Zelman*, 536 U.S. at 699-707 (Souter, J., dissenting). Professor Gary Simson adds that, "[w]ith

By adopting the cultural approach to religious difference, Justice Scalia went even further in his dissent, refusing to object to the designation of Kiryas Joel as a separate school district.²³² Disputing Justice Souter's claim that the delegation of civic authority had occurred according to religious criteria, Scalia maintained that the case involved "a group chosen according to cultural characteristics."²³³ He argued against viewing cultural characteristics as a stand-in for race or religion and advocated instead considering them independent signs of cultural groups, even when these overlapped with religious communities.²³⁴ As Scalia wrote, seeming to dismiss the idea that religion could encompass cultural aspects rather than simply theological beliefs:

On what basis does Justice Souter conclude that it is the theological distinctiveness rather than the cultural distinctiveness that was the basis for New York State's decision? The normal assumption would be that it was the latter, since it was not theology but dress, language, and cultural alienation that posed the educational problem for the children. . . .

I have little doubt that Justice Souter would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that *are* accompanied by religious belief.²³⁵

Scalia's conflation of race, religion, and culture is evident from other examples that he provides. Native Americans, as *Employment Division*,

a little ingenuity, lawmakers can devise 'neutral program[s] of private choice' that, under *Zelman*, constitutionally funnel substantial aid to religious institutions and organizations besides parochial schools." Gary J. Simson, *School Vouchers and the Constitution—Permissible, Impermissible, or Required?*, 11 CORNELL J.L. & PUB. POL'Y 553, 575 (2002). In addition, precisely because the Establishment Clause prohibits the state from intervening in the internal governance of religious entities, the state may never diversify the denominations of available religious schools. Voucher programs thus, through recognizing entrenched schools—primarily of dominant religions—make de facto distinctions between religions as well as between religion and non-religion. In such circumstances, private choice remains simply rhetorical rather than genuine.

²³² See *Kiryas Joel*, 512 U.S. at 732–34 (Scalia, J., dissenting).

²³³ *Id.* at 734.

²³⁴ See *id.* at 740–41.

²³⁵ See *id.*

Department of Human Resources of Oregon v. Smith (1990)²³⁶ demonstrated, engage in certain specific religious practices, while gypsies have been subject to a history of racial and not simply cultural discrimination.²³⁷ Merely considering the fact that most religions involve some tangible cultural practices reveals that this approach would significantly limit the Court's awareness of when oppressive legislation targeted particular religious groups—rather than simply cultures, or, in *Reynolds'* terms, "social life."²³⁸ Indeed, Scalia's distinction could limit the purview of free exercise examination to cases in which beliefs were the object of oppression or when a practice shared by more than one community was banned only with respect to a particular religious group.²³⁹

B. *Facially Discriminatory or Facially Classificatory?*

Since 1944, review of government action categorizing on the basis of race has required strict scrutiny.²⁴⁰ Some such classifications, however, have been upheld for affirmative action purposes, which is considered a compelling state interest, as long as the means employed is narrowly tailored to the end to be served. Although the Court has not insisted that the least restrictive means be used, it has required findings supporting the need for remediation.²⁴¹ In the religion context, by contrast, the Court has generally adhered to a broader distinction between discrimination and classification, applying strict scrutiny uniformly in cases of discrimination but not always in those of classification.²⁴² Indeed, the existence of the Free Exercise Clause—which provides the

²³⁶ 494 U.S. 872 (1990).

²³⁷ See *Kiryas Joel*, 512 U.S. at 741 (Scalia, J., dissenting).

²³⁸ See *id.*; *Reynolds*, 98 U.S. at 166.

²³⁹ See *Kiryas Joel*, 512 U.S. at 740–41 (Scalia, J., dissenting). These were the circumstances underlying the case involving the Church of the Lukumi. See *infra* notes 304–07 and accompanying text.

²⁴⁰ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

²⁴¹ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–92 (1989); *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring).

²⁴² Compare *McDaniel v. Paty*, 435 U.S. 618 (1978) (applying strict scrutiny to strike down a Tennessee provision disqualifying clergy from being legislators or constitutional convention delegates), with *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (holding that the Religious Land Use and Institutionalized Persons Act of 2000, which elevated the standard of review for free exercise claims arising in federal prisons, did not violate the Establishment Clause). As the Court in *Cutter* stated, "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the burden furthers a compelling governmental interest, and does so by the least restrictive means."

closest analogue to remedial purpose in the religion context—has in the past been conceived as mandating certain exceptions constructed on a religious basis.²⁴³ Even beyond the requirements of free exercise, accommodation has sometimes been upheld in cases where it does not result in an Establishment Clause violation.²⁴⁴ The choice of whether to approach equal protection or free exercise claims as matters of classification or of discrimination may accord with disparate views about the conception of equality contemplated—whether emphasizing anti-classification or anti-subordination as the normative goal—as well as the relative significance of individually and group-based harms.²⁴⁵

In *Korematsu v. United States* (1944), Justice Black, writing for the Court, determined that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”²⁴⁶ In the context of free exercise, restrictions explicitly directed against religious belief and conduct have been struck down and the Court has implemented a heightened form of scrutiny.²⁴⁷ Although the protection for religious belief has been almost absolute, the plurality’s opinion in *McDaniel v. Paty* (1978), analyzing the “status” of minister or priest as a function of conduct rather than belief, suggested that such explicit restrictions on religious practices should be subject to strict scrutiny.²⁴⁸ Facially privileging or discriminatory legislation has likewise been reviewed using a heightened standard under the Establishment Clause.²⁴⁹

One approach to evaluating apparent benefits to religion under the Establishment Clause would be to determine whether the Free Exercise Clause requires an exemption for a particular religious group or for religion as such; in this case, governmental action creat-

²⁴³ See *Yoder*, 406 U.S. 205 (holding that Amish students could not be compelled to attend public schools).

²⁴⁴ See *Cutter*, 125 S. Ct. at 2117.

²⁴⁵ See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–76 (2004).

²⁴⁶ 323 U.S. at 216.

²⁴⁷ See, e.g., *McDaniel*, 435 U.S. at 618 (using strict scrutiny to strike down a Tennessee provision disqualifying clergy from being legislators or constitutional convention delegates); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (invalidating a Maryland requirement that holders of public office declare their belief in the existence of God).

²⁴⁸ See *McDaniel*, 435 U.S. at 626–29.

²⁴⁹ See *Kiryas Joel*, 512 U.S. at 696 (stating that “the statute creating the Kiryas Joel Village School District[] departs from [the] constitutional command [of neutrality] by delegating the States discretionary authority over public schools to a group defined by its character as a religious community”).

ing an exception would not constitute a violation of the Establishment Clause. Although permitting space for the free exercise of religion represents the goal of this analysis, the Court has not in all instances insisted on its own determination of what free exercise requires or permits. The Court has, indeed, allowed both state and federal governments a greater latitude in accommodating free exercise than it has permitted in remedying racial discrimination. After *Katzenbach v. Morgan* (1966), it appeared as though the Court would give considerable deference to at least Congress's assertions of a remedial purpose under Section 5 of the Fourteenth Amendment, even if not to those of states and localities.²⁵⁰ Justice Kennedy's opinion for the majority in *City of Boerne v. Flores* (1997), however, undermined that assumption and suggested instead that Congress must, like states and localities, adhere to the Court's determination of whether remediation is required and provide detailed findings in the absence of prior adjudication by the Court.²⁵¹ Thus, while the Court has deemed remediation a compelling state interest in the context of race,²⁵² the government's burden of production in support of affirmative action programs is quite high.²⁵³ On the other hand, the government—even after *Smith*—retains substantial latitude in permitting exemptions from generally applicable laws for religious purposes.²⁵⁴

The fact that the Court's decision in a free exercise case will—like the determination in the race context that remediation is required—authorize and occasion government action to protect the free exercise rights that have been violated has, in several instances, led to the importation of an equal protection analysis into the initial free exercise determination. Although this equal protection reasoning bears many similarities to thinking under the Establishment Clause, the two are not quite the same. The opinion that most clearly

²⁵⁰ See 384 U.S. 641, 648 (1966) (granting an expansive scope to exercise of congressional power under Section 5 of the Fourteenth Amendment). Section 5 of the Fourteenth Amendment reads: "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

²⁵¹ See 521 U.S. at 530; see also *City of Richmond*, 488 U.S. at 490–92.

²⁵² *Fullilove*, 448 U.S. at 496 (referring to "a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress").

²⁵³ See *City of Boerne*, 521 U.S. at 530.

²⁵⁴ Indeed, Justice Scalia's opinion in *Smith* concludes by endorsing the idea of "leaving accommodation to the [state] political process," stating that an exemption for peyote use would be permissible and even desirable but not constitutionally mandated. 494 U.S. 872, 890 (1990); see also *Cutter*, 125 S. Ct. 2113 (asserting the same proposition at the federal level).

introduced this type of equal protection analysis into the free exercise context was Justice Stevens' concurrence in *Goldman v. Weinberger*.²⁵⁵ Justice Rehnquist's opinion for the Court, denying petitioner Orthodox Jew's free exercise challenge to the application of the Air Force's regulation against indoor headgear to his own act of wearing a yarmulke, had emphasized the need for deference to authority within the military.²⁵⁶ Speaking of the free exercise challenge as advancing an "individual autonomy" interest, and asserting that "[t]he considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission," the Court applied a reasonableness standard to the Air Force's regulation.²⁵⁷

By contrast, in his concurrence, Stevens emphasized group affiliation rather than individual compliance, stating that "[t]he interest in uniformity . . . has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths."²⁵⁸ Accepting Justice Brennan's dissent, which suggested that "turbans, saffron robes, and dreadlocks" might be excluded through "dress and grooming rules that have a *reasoned* basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance,"²⁵⁹ as the path that would be followed if Goldman were permitted to wear his yarmulke, Stevens deemed this solution too discriminatory against other religions.²⁶⁰ As he concluded:

²⁵⁵ 475 U.S. 503, 510-13 (1986) (Stevens, J., concurring). Both Justices White and Powell joined Stevens' concurrence. *Id.* at 510 (Stevens, J., concurring). Justice Blackmun, dissenting, also agreed with Stevens' equal protection rationale. *Id.* at 524-28 (Blackmun, J., dissenting).

²⁵⁶ *Id.* at 507-10 (majority opinion).

²⁵⁷ *Id.* at 507, 508, 510.

²⁵⁸ *Goldman*, 475 U.S. at 512 (Stevens, J., concurring).

²⁵⁹ *Id.* at 519 (Brennan, J., dissenting). It is interesting to note that the considerations Brennan enumerated to construct a "reasoned" basis for restrictions are quite similar to those adduced by the city in *Ho Ah Kow*—justifications that Justice Field dismissed as pretextual. Compare *id.* (listing functional utility, health and safety considerations, and the goal of a polished, professional appearance a reasoned basis for appearance restrictions), with *Ho Ah Kow*, 12 F. Cas. at 253-54 (listing sanitary and disciplinary considerations as reasoned basis for appearance restrictions). This comparison suggests that garb or coiffure to which the majority is not accustomed may, more often than not, be considered unsanitary or unprofessional, thus confirming Justice Stevens' concern that exemptions will themselves be granted in a discriminatory fashion.

²⁶⁰ *Goldman*, 475 U.S. at 512-13 (Stevens, J., concurring).

The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed." If exceptions from dress code regulations are to be granted on the basis of a multifactored test such as that proposed by Justice Brennan, inevitably the decisionmaker's evaluation of the character and the sincerity of the requester's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance"—it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.²⁶¹

Agreeing with Justice Stevens' argument, Justice Blackmun, in dissent, explicitly stated its connection with establishment and equal protection principles, explaining that the problem consists not simply in permitting the Air Force to determine what religious garb is acceptable or not, but in allowing the perceptions of the majority to dictate this determination.²⁶² In rejecting the "reasonable observer" standard, he stated:

To allow noncombat personnel to wear yarmulkes but not turbans or dreadlocks because the latter seem more obtrusive . . . would be to discriminate in favor of this country's more established, mainstream religions, the practices of which are more familiar to the average observer. . . . [F]avoritism based on how unobtrusive a practice appears to the majority could create serious problems of equal protection and religious establishment, problems the Air Force clearly has a strong interest in avoiding by drawing an objective line at visibility.²⁶³

²⁶¹ *Id.* (citation omitted).

²⁶² *Id.* at 526-27 (Blackmun, J., dissenting).

²⁶³ *Id.*

Blackmun thus incorporated into the interest the government could claim for free exercise purposes an equal protection and establishment element.²⁶⁴ Free exercise analysis therefore does not provide a determination of what burdens are excessive that remains completely prior to, and independent of, an Establishment Clause approach, but instead may already include the latter as a more or less explicit element by running through a related set of equal protection hypotheticals.

This preventative equal protection approach has not been restricted to the free exercise context but has similarly entered into cases such as *Kiryas Joel* (1994).²⁶⁵ Justice Souter, writing for the majority, claimed that "[t]he fact that this school district was created by a special and unusual Act of the legislature . . . gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups."²⁶⁶ Justice Scalia's dissent singled out this aspect of the decision for particular contumely, as he argued—in complete disregard of the logic expressed by the concurrence in *Goldman* and voiced in other cases—that importing an equal protection element into the analysis before other groups had attempted to obtain the same benefits constituted an irrational innovation:

The second and last reason the Court finds accommodation impermissible is, astoundingly, the mere risk that the State will not offer accommodation to a similar group in the future, and that neutrality will therefore not be preserved. . . .

....

The Court's demand for 'up front' assurances of a neutral system is at war with both traditional accommodation doctrine and the judicial role. . . .

What I attack is the Court's imposition of novel "up front" procedural requirements on state legislatures. Making law (and making exceptions) one case at a time, whether through adjudication or through highly particularized rulemaking or legislation, violates, *ex ante*, no principle of fairness, equal protection, or neutrality simply because it does not announce in

²⁶⁴ See *id.*

²⁶⁵ 512 U.S. at 687.

²⁶⁶ *Id.* at 702.

advance how all future cases' (and all future exceptions) will be disposed of.²⁶⁷

Souter responded to Scalia's criticism by insisting:

[U]nder the dissent's theory, if New York were to pass a law providing school buses only for children attending Christian day schools, we would be constrained to uphold the statute against Establishment Clause attack until faced by a request from a non-Christian family for equal treatment under the patently unequal law.²⁶⁸

This case demonstrates that the equal protection analysis of the treatment of similarly situated groups in the free exercise context cannot be completely assimilated to an Establishment Clause examination, but instead can be incorporated into Establishment Clause cases, as a related, but distinct inquiry.

C. Intent and Effects

Requiring that those who claim to have suffered from discrimination or from infringement of their religious liberties demonstrate, in the absence of facially discriminatory legislation, impermissible intent, rather than simply causing a disproportionate impact, leads to a more formal than substantive notion of equality.²⁶⁹ This Section demonstrates that, on the federal level, both equal protection analysis and religion clause jurisprudence have, in recent years, moved towards this formal conception of equality through endorsing an intent and effects standard.

According to Justice White's opinion for the Court in *Washington v. Davis* (1976), in which African-American respondents failed a qualifying test measuring verbal abilities administered to applicants for positions as police officers and claimed a constitutional violation based on discriminatory effects, disparate impact alone cannot invalidate a law or other official act under equal protection analysis, although it may serve as evidence of a discriminatory purpose.²⁷⁰ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), Justice Powell articulated a set of factors that could assist in determining whether such a

²⁶⁷ *Id.* at 745–48 (Scalia, J., dissenting); see *Goldman*, 475 U.S. at 512–13 (Stevens, J., concurring).

²⁶⁸ *Kiryas Joel*, 512 U.S. at 709.

²⁶⁹ See Fiss, *supra* note 32, at 141–56.

²⁷⁰ 426 U.S. 229, 238–48 (1976).

purpose existed and a burden-shifting approach.²⁷¹ Under the burden-shifting scheme, the discovery of a discriminatory motive among other motives places the burden back upon the legislative body to demonstrate the ascendancy of the nondiscriminatory motive, but once such a showing has occurred, the Court returns to a rationality review.²⁷² The factors investigated to determine purpose include: "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes. . . . [t]he specific sequence of events leading up [to] the challenged decision. . . . [d]epartures from the normal procedural sequence. . . . [s]ubstantive departures. . . . [and] legislative or administrative history."²⁷³

Any comparison between these tests in the area of race and those applied in the context of the religion clauses must consider at least two periods of modern religion clause jurisprudence, the first governed by *Lemon v. Kurtzman* (1971)²⁷⁴ and *Sherbert v. Verner* (1963)²⁷⁵ in the establishment and free exercise contexts, respectively, and the second signaled by the gradual adjustment of the *Lemon* standard, as well as the plurality opinion in *Mitchell v. Helms* (2000)²⁷⁶ and the holdings in *Zelman v. Simmons-Harris* (2002),²⁷⁷ *Smith* (1990),²⁷⁸ and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993).²⁷⁹ During the course of the alteration from the first set of standards to the second, the Court has gradually reconceived the role of purpose and effect in the religion clauses and increasingly conformed its tests to those employed under equal protection.

²⁷¹ 429 U.S. at 265–68, 270–71 n.21.

²⁷² *Id.* at 270–71 n.21 ("Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.")

²⁷³ *Id.* at 267–68 (footnote omitted) (citation omitted). Though, Justices Scalia and Thomas take exception to use of legislative history by the courts. For a discussion of Justices Scalia's and Thomas' resistance to legislative history, see Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 365 (1994).

²⁷⁴ 403 U.S. 602 (1971).

²⁷⁵ 374 U.S. 398 (1963).

²⁷⁶ 530 U.S. 793 (2000).

²⁷⁷ 536 U.S. 639 (2002).

²⁷⁸ 494 U.S. at 872.

²⁷⁹ 508 U.S. at 520.

In *Lemon*, Chief Justice Burger, writing for the Court, struck down certain types of financial aid to nonpublic schools, and held that legislation must meet three criteria to avoid running afoul of the Establishment Clause: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"²⁸⁰ Although one prong dealt with purpose and another with effect, the third part of the *Lemon* test—that prohibiting "excessive entanglement"—did not possess an equal protection parallel.²⁸¹ Furthermore, whereas a claimant in the equal protection context was required to demonstrate both legislative purpose and effect, until recently each criterion set out in *Lemon* could be used independently to invalidate a statute.²⁸²

The requirement of a secular legislative purpose was long criticized since it appeared to conflict with the permissibility of accommodation under and beyond the Free Exercise Clause.²⁸³ In a certain way, however, the analysis of secular purpose resembles the discussion of remedial purpose that is comparable to the examination of whether a purported violation of the Establishment Clause represented, in reality, a legitimate attempt to protect free exercise. Indeed, in some respects secular purpose remains an alternative path of evaluation under the Establishment Clause—one employed in the absence of facially privileging legislation. The secular purpose and accommodation of free exercise analyses would thus sit side by side as components of, on the one hand, an intent and effects inquiry, and, on the other, an examination of facially classifying government action. The question of how much deference should be accorded the government in its articulation of a secular purpose has also been contested.

In *Edwards v. Aguillard* (1987), Justice Brennan, writing for the Court, invalidated a Louisiana requirement that evolution and creation science be taught side by side, if at all, referring to the lack of a credible secular purpose: "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of

²⁸⁰ *Lemon*, 403 U.S. at 612–13 (citation omitted).

²⁸¹ See *id.*

²⁸² See *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997) (describing the separate treatment of entanglement and primary effect in previous cases). For a discussion of the factors in the *Lemon* test, see Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987).

²⁸³ For a discussion of the objections raised against the secular purpose requirement, see Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 98–102 (2002) (enumerating four critiques).

such purpose be sincere and not a sham. . . . [W]e need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute."²⁸⁴ The Court—and, in particular, Chief Justice Burger—has been much more deferential to the government's articulation of purpose, however, when examining legislation or governmental practices that, admittedly, originally derived from religious beliefs, but have persisted so long that their initial signification appears to have eroded, like a dead metaphor.²⁸⁵ It is worth noting that this invocation of a longstanding tradition would presumably be ineffectual in the context of race, as the Fourteenth Amendment stands precisely for the attempt to undo a heritage of discrimination.

The structure of the secular purpose test bears even stronger resemblances to the method of evaluating nondiscriminatory motives set forth in *Arlington Heights*.²⁸⁶ Application of the test in *Lemon* has suggested that the Court employs a similar type of burden-shifting approach when examining whether the government can convincingly adduce a secular purpose for its action.²⁸⁷ Justice Scalia's dissent in *Kiryas Joel* specifically applied the burden-shifting method derived from *Arlington Heights* to the Establishment Clause context:

To establish the unconstitutionality of a facially neutral law on the mere basis of its asserted religiously preferential (or discriminatory) effects—or at least to establish it in conformity with our precedents—Justice Souter “must be able to show the absence of a neutral, secular basis” for the law. . . .

There is of course no possible doubt of a secular basis here. . . .

Since the obvious presence of a neutral, secular basis renders the asserted preferential effect of this law inadequate to

²⁸⁴ 482 U.S. 578, 586–87, 590 (1987).

²⁸⁵ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (refusing to find a crèche in the midst of a Christmas display with other traditional decorations to be an Establishment Clause violation); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer in Nebraska in light of an unbroken history of two hundred years); *Walz*, 397 U.S. at 678 (citing “an unbroken practice of according [a tax] exemption to churches” in holding constitutional a New York statute exempting from real property tax property owned by exclusively religious associations that used the property exclusively for carrying out religious purposes). All of these opinions were written by Chief Justice Burger and shared a similar logic.

²⁸⁶ See *Arlington Heights*, 429 U.S. at 265–68.

²⁸⁷ See *Lemon*, 403 U.S. at 612–13.

invalidate it, Justice Souter is required to come forward with direct evidence that religious preference was the objective.²⁸⁸

Thus the secular purpose analysis in the religion context parallels the inquiry into legislative purpose in the area of race.

The third prong of the *Lemon* test—"excessive entanglement"²⁸⁹—has also been subjected to substantial criticism, and the question of what effects are permissible has similarly been debated. Led by Justice Thomas, the plurality in *Mitchell* suggested that *Agostini v. Felton* (1997) had modified the *Lemon* test by examining primarily the first two factors when evaluating aid to schools and demoting this controversial third element to the status of a factor in determining effect.²⁹⁰ According to Justice Souter's dissent, even in considering purpose and effect, the plurality eliminated the second consideration. As he stated, "[w]hat is more important is the view revealed in the plurality opinion, which espouses a new conception of neutrality as a practically sufficient test of constitutionality that would, if adopted by the Court, eliminate enquiry into a law's effects."²⁹¹ This critique finds substantial support in the language of Justice Thomas' decision.

Thomas first rehearsed the criteria listed in *Agostini* to determine whether government aid had the effect of enhancing religion—the requirements that "[i]t does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement"—but quickly dismissed the excessive entanglement inquiry even in this subsidiary context as irrelevant to the case at hand.²⁹² It is worth noting that defining recipients by relation to religion also seems to fit into the types of facially classificatory governmental actions discussed in Part III, Section B. Thus whether governmental indoctrination resulted would constitute the only remaining truly effects-oriented inquiry. Justice Thomas, however, reduced even this aspect to that of defining recipients by reference to religion, further collapsing that prong into the purpose prong.²⁹³ As he maintained:

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that

²⁸⁸ *Kiryas Joel*, 512 U.S. at 737–38 (Scalia, J., dissenting) (citation omitted).

²⁸⁹ *Lemon*, 403 U.S. at 613.

²⁹⁰ *Mitchell*, 530 U.S. at 807–08; see *Agostini*, 521 U.S. at 223–24.

²⁹¹ *Mitchell*, 530 U.S. at 869 (Souter, J., dissenting).

²⁹² *Id.* at 808 (plurality opinion) (quoting *Agostini*, 521 U.S. at 234).

²⁹³ *Id.* at 809–10.

is offered to a broad range of groups or persons without regard to their religion. . . . For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.²⁹⁴

Although still nominally pursuing an intent and effects inquiry, Thomas succeeded in placing disproportionate and determinative weight on the secular purpose prong.²⁹⁵ Thus the Establishment Clause doctrine largely conforms with equal protection analysis, but with the emphasis slightly shifted away from effects and onto purpose.²⁹⁶

In *Sherbert*, Justice Brennan, writing for the Court, explained that disqualifying from employment benefits a woman who had lost her job because she observed Saturday as her Sabbath imposed a substantial burden upon the woman's free exercise rights by forcing her to choose between material sustenance and religious convictions.²⁹⁷ Such a burden, the Court held, must be justified by a compelling and secular state interest. The Court further reasoned that the objective the state had articulated, that of preventing fraud, was not compelling, and, even if it were, the state would have had to demonstrate that it possessed no available alternative means of protecting its interest.²⁹⁸ This test, although recalling earlier equal protection cases like *Yick Wo v. Hopkins* (1886), which, in invalidating a permitting ordinance administered in an extremely discriminatory fashion, relied on the effects of the challenged law in arriving at its outcome, did not conform

²⁹⁴ *Id.* (citation omitted).

²⁹⁵ *See id.*

²⁹⁶ Justice Rehnquist's majority opinion in *Zelman* adds the criterion of "private choice" to the inquiries emphasized by the *Mitchell* plurality. *See Zelman*, 536 U.S. at 652. Including this further criterion represented a concession to Justice O'Connor. *See Lupu & Tuttle, supra* note 231, at 928 ("Although criteria concerning program neutrality were enough to satisfy four of the Justices in the majority, these standards do not in and of themselves make the aid indirect, so the Court's final inquiry turns out to be the dispositive one in maintaining a majority."). The individual autonomy that the phrase "private choice" suggests turns out, however, to be illusory. *See id.* at 944.

²⁹⁷ *Sherbert*, 374 U.S. at 399, 403-04.

²⁹⁸ *See id.* at 406-07.

to the purpose and effects standard for equal protection claims that would subsequently be articulated in *Washington v. Davis*.²⁹⁹ Again the doctrinal innovation arose first in the equal protection context before being introduced in the religion clause arena.

Following a period during which free exercise cases invoked strict scrutiny but did not apply it, the *Sherbert* test was finally dispensed with by *Smith*, which, insisting like *Mitchell* on a neutrality standard, held that neutral laws of general applicability did not have to be justified by a compelling interest even if they placed a burden upon free exercise.³⁰⁰ Although Justice Scalia's opinion for the majority initially dismissed Justice O'Connor's continued adherence to the compelling interest test as simply an ungrounded importation from the equal protection context,³⁰¹ he quickly elaborated the way in which his approach complied with the intent and effects inquiry under *Washington v. Davis*. As Scalia wrote:

[C]omparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause. . . . Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compel-

²⁹⁹ Compare *id.*, with *Yick Wo*, 118 U.S. at 368–74, and *Washington*, 426 U.S. at 238–45. See also *supra* notes 194–95 and accompanying text.

³⁰⁰ *Smith*, 494 U.S. at 884–89. Compare *id.* (holding the *Sherbert* test inapplicable to free exercise claims), with *Mitchell*, 530 U.S. at 809–10 (insisting on a neutrality standard). Although *Smith* did not overrule *Sherbert*, it severely limited its scope. See *Smith*, 494 U.S. at 883–84.

³⁰¹ As he stated:

The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race or before the government may regulate the content of speech is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

Smith, 494 U.S. at 885–86 (citations omitted).

ling governmental interest is the only approach compatible with these precedents.³⁰²

Notably, in *Smith*, Justice Scalia refrained from further articulating an intent and effects test for free exercise—partly perhaps because of his reluctance to delve into the quagmire of legislative history.³⁰³

The Court's decision in *Church of the Lukumi*, a case invalidating a city ordinance proscribing animal sacrifice, a practice of the Santeria religion, however, confirmed that an intent and effects analysis would be applied.³⁰⁴ Justice Kennedy's opinion employed an equal protection approach throughout.³⁰⁵ Initially asserting that the statute was facially neutral, he determined through the text of the law and accompanying city council resolutions about "certain [unnamed] religions" as well as inferences from its effects that the purpose of the ordinance was to single out religious practice for discriminatory treatment.³⁰⁶ Because the law prohibited a practice central to the Santeria religion, its effect was clearly to place a burden upon church members' free exercise.³⁰⁷ Kennedy explicitly articulated the relationship between his method and an equal protection approach only when no longer writing for the majority:

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object.³⁰⁸

³⁰² *Id.* at 886 n.3 (citations omitted).

³⁰³ See Merrill, *supra* note 273, at 365.

³⁰⁴ See *infra* notes 305–08 and accompanying text.

³⁰⁵ See *Lukumi*, 508 U.S. at 523–47.

³⁰⁶ *Id.* at 534–38.

³⁰⁷ See *id.* at 535–36.

³⁰⁸ *Id.* at 540 (alteration in original) (citations omitted).

Again, although the approach to free exercise analysis has become analogous to that under equal protection, the Court seems, as in the Establishment Clause context, to place more weight on purpose than effects.

D. *Neutrality and Color-Blindness*

The Establishment Clause and Free Exercise jurisprudence of the Court appears to be converging on a standard of neutrality—one that accepts “neutral laws of general applicability” regardless of whether they incidentally burden free exercise and advocates only the “principle of neutrality” in allocating benefits to religious groups.³⁰⁹ The majority’s assumption in *Smith* that neutral, generally applicable laws will not violate the Constitution even if they impede free exercise and the plurality’s endorsement of the principle of neutrality in *Mitchell* were both criticized by dissenters as reducing the religion clauses to a version of equal protection.³¹⁰ The problem, however, does not stem from the gradual rapprochement of the doctrines but instead from the prior evisceration of the Equal Protection Clause’s force. The dissenters’ critiques do, however, serve to illuminate the nature of this emerging standard of “neutrality”—a term that, as Justice Souter demonstrated, has regularly been imbued with new significance.³¹¹

The Free Exercise and Establishment Clause versions of the “neutrality” doctrine, as currently invoked, possess a dual inheritance—one stemming from *Reynolds*’s discussion of generally applicable laws and the other from Justice Harlan’s concurrence in *Waltz* applying neutrality as a version of equal protection.³¹² As illustrated above, *Reynolds* itself focused not on groups, but instead on the requirement that individuals conform their actions to generally applicable laws.³¹³ Justice Scalia’s opinion in *Smith* echoed the language of *Reynolds* not only in referring to “neutral law[s] of general applicability” but also in explaining, like Justice White, that permitting a religious objector to violate “generally applicable prohibitions of socially harmful conduct” would allow the individual believer

³⁰⁹ See *Mitchell*, 530 U.S. 793; *Smith*, 494 U.S. 872.

³¹⁰ See *supra* note 36 and accompanying text.

³¹¹ Justice Souter has, in several opinions, provided a lengthy discussion of the history of “neutrality,” and given an overview of three phases of its definition. See *Mitchell*, 530 U.S. at 878–85 (Souter, J., dissenting).

³¹² See *Waltz*, 397 U.S. at 696–97 (Harlan, J., concurring); *Reynolds*, 98 U.S. at 166–67.

³¹³ See *Reynolds*, 98 U.S. at 166–67.

to "become a law unto himself."³¹⁴ Although Scalia subsequently argued that neutrality and general applicability may be inextricably intertwined, he did articulate a specific signification for each phrase, associating neutrality with a facial review and general applicability with an inquiry into his equivalent of intent and effects. Thus, for Scalia:

[T]he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion . . . whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.³¹⁵

The second Justice Harlan had likewise appealed to "neutrality" in *Waltz*, stating that "[n]eutrality in its application requires an equal protection mode of analysis," and explaining that this inquiry entailed evaluating whether legislation swept broadly enough that particular classes did not appear to be targeted.³¹⁶ His version of neutrality conforms more with what Scalia calls "general applicability" than with a

³¹⁴ Compare *Smith*, 494 U.S. at 879, 885 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense." (citation omitted)), with *Reynolds*, 98 U.S. at 166–67 ("To permit [individuals exempting themselves from U.S. laws due to religion] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

³¹⁵ *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

³¹⁶ *Waltz*, 397 U.S. at 696 (Harlan, J., concurring).

facial neutrality.³¹⁷ As Justice Souter described this standard, it entails "[e]venhandedness of distribution."³¹⁸

The type of neutrality that the second Justice Harlan advocated in *Walz* suggested a new standard akin to the colorblind approach that had been propounded by the first Justice Harlan in *Plessy v. Ferguson* and would be advocated by Justice Powell in *Regents of the University of California v. Bakke* (1978).³¹⁹ Other aspects of Harlan's opinion in *Walz*

³¹⁷ Compare *id.* ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."), with *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion . . ."). It is worth remembering that the second Justice Harlan's view of the Equal Protection clause was less than expansive. See Stephen M. Dane, "Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan, 51 U. CIN. L. REV. 545, 559 (1982) ("The Supreme Court during the Warren era breathed new life into the equal protection clause. It began to apply a strict standard of review to state actions that discriminated against what the Court called 'suspect' groups or that infringed upon the exercise of 'fundamental' rights. Harlan found this process to be 'unwise' and 'troublesome.' In any situation other than one involving race, he believed, the proper standard to be applied was the traditional one of rationality of classification.").

³¹⁸ *Mitchell*, 530 U.S. at 877 (Souter, J., dissenting). According to Justice Souter, Justice O'Connor, who had only concurred in *Mitchell*, but joined the majority in *Zelman*, "apparently no longer distinguishes between this notion of evenhandedness neutrality and the free-exercise neutrality in *Everson*." *Zelman*, 536 U.S. at 696 n.6 (Souter, J., dissenting).

³¹⁹ Compare *Walz*, 397 U.S. at 696 (Harlan, J., concurring) (suggesting that any legislation must be written so broadly that any religious institution would naturally fall within its boundaries), with *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting) (affirming the purpose of the Reconstruction Amendments as removing race-based discrimination), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (stating that preferential treatment on the sole basis of race was unconstitutionally discriminatory). The partial concurrence in *Bakke* penned by Justice Brennan points to the nature of the dispute about the advisability of resuscitating the standard invoked by the first Justice Harlan but never, in fact, applied:

Against this background, claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

Id. at 327 (Brennan, J., concurring in part and dissenting in part).

In *Neutrality of the Equal Protection Clause*, K.G. Jan Pillai notes both that neutrality is an aspect of the theory of colorblindness and that the meaning of neutrality in the equal protection context has been far from clear. As Pillai writes:

similarly foreshadowed *Bakke*—providing one instance in which a religion clause alteration may have supplied the impetus for an equal protection one. In *Walz*, Harlan emphasized that legislation covering a broad range of cultural as well as religious categories should be considered neutral since it did not single out religious groups to accomplish its purposes.³²⁰ Justice Powell's insistence in *Bakke* that the interest in obtaining diversity in higher education is compelling revealed a similar logic. As he explained:

[T]he nature of the state interest that would justify consideration of race or ethnic background. . . . is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups. . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.³²¹

This emphasis on encompassing a broad range of groups was accompanied by an individualism—recalling *Reynolds*—that remained suspicious of all group classifications. As Justice Powell asserted: “[i]f it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently.”³²² *Bakke*'s reluctance to consider the division between racial majorities and minorities as anything but an historical construct likewise parallels an aspect of the neutrality approach prefigured in *Walz* but more definitively realized in recent government

Encoded in the principle of colorblindness is the concept of neutrality that mandates absolute government impartiality toward individuals and groups without regard to their race, color, ethnicity, gender or disabilities. However, neutrality still remains an amorphous concept in equal protection jurisprudence. The Court's unwillingness or inability to clearly articulate, and faithfully adhere to, the concept of neutrality has rendered the realization of the laudable ideal of a colorblind constitution problematic if not impossible.

K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L.Q. 89, 89-90 (1999).

³²⁰ See *supra* note 215 and accompanying text.

³²¹ *Bakke*, 438 U.S. at 315.

³²² *Id.* at 299.

funding cases.³²³ According to Justice Powell, "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments. . . . [T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals."³²⁴ Neutrality in the funding area has likewise broken down the sharp division between religion and non-religion and treated the distinction as a difference in degree rather than kind.³²⁵ Under the current state of the Court's reasoning, neither whiteness nor nonreligion can be considered a default. Without these backdrops, protection for particular racial or religious groups becomes eroded—the new strategy results instead in placing priority on specific individual claims or on fostering a range of cross-cutting categories that cannot be thought conformable exclusively with religion or with race.

CONCLUSION

Through the state constitutions and judicial interpretations of them, "equal protection" arose as a mode of safeguarding religious liberty, and led towards two disparate notions of discrimination. One focused more on burdens placed upon religious practitioners and the other simply disfavored laws targeted against religious individuals or groups. These diverging visions eventually solidified into the division between substantive and formal conceptions of equality. At the same time, courts' decisions under these state constitutions suggested that the government should not only refrain from harming free exercise but should also protect religious practices from private interference.

With ratification of the Fourteenth Amendment and the use of the Equal Protection Clause in relation to race, a new awareness arose of the importance of the relationship between the individual and group in claims for equality. On the federal level, developments in race-based equal protection jurisprudence thus led to changes in free

³²³ See *Mitchell*, 530 U.S. at 809–10 ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.").

³²⁴ *Bakke*, 438 U.S. at 295.

³²⁵ See *supra* note 215 and accompanying text.

exercise adjudication. Recently, however, while bringing religion clause doctrine into closer conformity with Equal Protection Clause precedent, the Court has managed to shift both sets of cases away from the focus upon groups that constituted the Fourteenth Amendment's most important innovation in understanding religious liberty. Instead the Court has removed protections from suspect classes by considering collectivities as cultural rather than racial or religious and viewing claims with less regard to the group to which the individual belonged. While this approach may have detrimental effects upon both free exercise and racial equality, it impinges more upon the latter than the former, because the Court has allowed the government greater latitude in fixing and preventing violations of religious liberty than in remedying racial inequality.