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Permissible Accommodation or Impermissible Endorsement? A Proposed Approach to Religious Exemptions and the Establishment Clause

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[1] Senior Vice Provost for Scholarship and Macon Chair in Law, Mercer University; Professor Emeritus of Law, Cornell University. I am grateful to the other contributors to this Symposium for their thought-provoking questions when I presented an early version of this Article at the November 2017 Symposium event. Special thanks to Chris Lund for organizing the 2017 SEALS Conference discussion group that provided the foundation for the Symposium and to Jordan Shewmaker, the outgoing Editor-in-Chief, for his leadership in making the Symposium event such a positive experience for everyone. Above all, my great appreciation to Jack Sammons and Rosalind Simson for their detailed comments on a later draft.

INTRODUCTION

As anyone at all interested in the Supreme Court, freedom of religion, freedom of speech, gay and lesbian rights, or even just wedding cakes could not help but be aware, the Supreme Court handed down its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[2] in June 2018. The case arose out of the type of request that ordinarily would be expected to be the prelude to happy memories, not litigation: Would Jack Phillips, the owner of Masterpiece Cakeshop, be able and willing to do a custom wedding cake for a reception that a couple was planning to celebrate their upcoming marriage? For Phillips, though, this was anything but an ordinary request because the couple making it, Charlie Craig and David Mullins, were both men. As Phillips explained when he refused the couple's request, he deeply believes, as a devout Christian, that same-sex marriage is wrong and that he should not be engaged in an activity – designing and making a wedding cake – that God would see as affirming the value of such marriages.[3]

Pursuant to Colorado's Anti-Discrimination Act, which bars places of public accommodation from discriminating on various grounds including sexual orientation, Craig and Mullins filed a discrimination complaint with the Colorado Civil Rights Division. After investigating and finding probable cause that Phillips had violated the Act, the Division referred the case to the Colorado Civil Rights Commission. The Commission sent the case to an Administrative Law Judge for a hearing. The ALJ ruled for Craig and Mullins, and the Commission affirmed on appeal and ordered Phillips to treat same-sex and opposite-sex couples no differently as customers. Before both the ALJ and the Commission, Phillips had unsuccessfully argued that his refusal to make the cake did not violate the Act and that, even if it did, the Free Exercise Clause of the federal Constitution[4] and its counterpart in the Colorado Constitution mandate that he be granted an exemption from the Act. With no greater success, he also had argued that an order requiring him to comply with the couple's request would violate the protection against compelled speech afforded by the Free Speech Clauses of the federal and Colorado Constitutions.

After the Colorado Court of Appeals affirmed the Commission's order and the Colorado Supreme Court denied discretionary review, the U.S. Supreme Court

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[2] 138 S. Ct. 1719 (2018). The description that follows of the parties, events, and legal proceedings in Colorado is based on *id.* at 1724–27.

[3] At the time – July 2012 – that Craig and Mullins sought to order the cake from Phillips, Colorado did not allow same-sex marriage, and the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), establishing a constitutional right to same-sex marriage, was still almost three years away. Craig and Mullins were planning to get married in Massachusetts and have the reception after returning to Colorado. Massachusetts, the first state to legalize same-sex marriage, had legalized it in 2003. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Constitution guarantees a right to same-sex marriage).

[4] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ."). In *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment makes the First Amendment's Free Exercise Clause applicable to state and local government.

granted certiorari and, almost six months after hearing oral argument, handed down a remarkably anticlimactic decision. It set aside the Commission's order without reaching the federal constitutional exemption claims that I and many other Court-watchers across the political spectrum had been under the impression lay at the heart of the case.[5] Writing for a 7-2 majority, Justice Kennedy did rest on a free exercise ground, but not one having anything in particular to do with exemption claims. He maintained that the order directed at Phillips could not stand because it was fatally tainted by evidence of hostility on the Commission's part toward Phillips's religious beliefs. According to Justice Kennedy, Phillips was "entitled to the neutral and respectful consideration of his claims in all the circumstances of the case," but that consideration "was compromised here."[6] Instead, the Commission treated the case in a way that "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[7]

I have no problem whatsoever with the neutrality principle Justice Kennedy invoked. He cited the Free Exercise Clause for authority, and he could have pointed to the Due Process Clause's guarantee of an impartial tribunal as well.[8] I am not entirely persuaded, however, that the evidence of religious hostility on the Commission's part was sufficient under the Supreme Court's precedents to justify holding that Colorado failed to adjudicate Phillips's rights with the requisite neutrality.[9]

Perhaps I am not giving the Court's stated ground for decision the credence it deserves. If so, that is probably because the Court's resting on that ground—one so peripheral to the parties' written and oral arguments and one so much less consequential than the grounds avoided – seems to me to reflect above all an eagerness on the part of some of the Justices to dispose as unobtrusively and innocuously as possible of a hard case that they ultimately (if not initially) were sorry the Court had agreed to hear.[10] In any event, in keeping with this Symposium's focus

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[5] A newspaper account the next day succinctly captured the limited significance of the case as decided. "The breadth of the court's majority" – everyone except Justices Ginsburg and Sotomayor – "was a testament to the narrowness of the court's reasoning." Adam Liptak, *Justices Favor Baker in Case on Gay Rights*, N.Y. TIMES, June 5, 2018, at A1.

[6] *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

[7] *Id.* at 1731.

[8] *See, e.g., In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

[9] In dissent, Justice Ginsburg argued that the evidence of hostility on the Commission's part was much less probative than the Court maintained. *Masterpiece Cakeshop*, 138 S. Ct. at 1749–51 (Ginsburg, J., joined by Sotomayor, J., dissenting). In addition, after posing what seems to be a very relevant question – "What prejudice infected the determinations of the adjudicators in the case before and after the Commission?" – she called attention to the Court's silence on the matter. *Id.* at 1751.

[10] To put it less delicately, the opinion seems to be crying out, "Let's get out of here!" Writing shortly after *Masterpiece Cakeshop* was handed down, Adam Liptak, *The New York Times*'s lead reporter on the Supreme Court and surely one of the most frequent and perceptive observers of oral arguments at the Court, recalled:

> When the Colorado case was argued in December, Justice Kennedy seemed frustrated with the main choices available to him and hinted that he was looking for an off ramp. His questions

on religious exemptions, I leave for another day any further discussion of the Court's chosen ground for decision.

Although the free exercise exemption claim that the Court in *Masterpiece Cakeshop* avoided deciding certainly comes within the scope of this Symposium, I will forgo discussion of that issue as well. The Court in 1990 in *Employment Division v. Smith*[11] dramatically narrowed the range of free exercise exemption claims to be given serious judicial scrutiny. Unless and until the Supreme Court decides to overrule its decision in *Smith*, free exercise claims for exemptions from generally applicable laws stand little chance of success even if they pit sincere, deeply felt religious claims like Phillips's against state interests far less important than Colorado's nondiscrimination interest in *Masterpiece Cakeshop*.[12] In the more than twenty-five years since *Smith* was decided, the Court has not shown any obvious inclination to rethink its decision in *Smith*. Moreover, in his opinion for the Court in *Masterpiece Cakeshop,* Justice Kennedy – at the time, the only remaining Justice

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suggested that his vote had not been among the four that had been needed to add the case to the court's docket.

Liptak, *supra* note 5. Of course, if effecting a dignified escape indeed was the driving force of the Court's opinion in *Masterpiece Cakeshop*, it was hardly the first time—and undoubtedly will not be the last—that the Court has written an opinion designed above all to extricate itself from having to decide the hard issues in a case. For a classic in that regard, see *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (per curiam) (holding by a 5-4 margin that the case should be dismissed as moot, and not reaching the merits of the petitioner's equal protection challenge to a public law school's use of affirmative action in its admissions process).

[11] 494 U.S. 872 (1990), discussed *infra* text accompanying notes 28–33, 47.

[12] In his petition for a writ of certiorari, Phillips did not argue that *Smith* should be overruled. Instead, as he did in his arguments to the ALJ, the Commission, and the Colorado Court of Appeals, he maintained that his claim fit within each of two narrow categories of free exercise claims that the Court in *Smith* had expressly recognized as calling for rigorous judicial review. Petition for Writ of Certiorari at 25–30, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111). For present purposes, suffice it to say that I find Phillips's attempt to shoehorn his claim into one of those categories no more persuasive than the Colorado tribunals found it.

Phillips's federal constitutional free speech claim, which this Article does not attempt to address, almost certainly raised a much more substantial question under the Court's compelled speech precedents than his federal constitutional free exercise claim raised under *Smith*. In a concurring opinion, Justices Thomas and Gorsuch made clear that they saw Phillips's compelled speech claim as a strong one, even though they stopped short of saying that the Court would have been justified in relying on it as a ground for decision. *Masterpiece Cakeshop,* 138 S. Ct. at 1740–48 (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment). Moreover, the potency under the Court's precedents of Phillips's compelled speech claim seemingly became even clearer a few weeks after *Masterpiece Cakeshop* with the Court's receptivity to the compelled speech claim in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). On the lively debate that transpired among free speech lawyers and scholars on Phillips's free speech claim, see Adam Liptak, *Where to Draw Line on Free Speech? Wedding Cake Case Vexes Lawyers*, N.Y. TIMES, Nov. 7, 2017, at A11.

from the 5-4 majority in *Smith*[13] – appeared to reaffirm the basic holding in *Smith* without explicitly citing the case.[14]

Featuring, however, a clash of interests so emblematic of today's culture wars,[15] *Masterpiece Cakeshop* does offer an almost ideal point of departure (and occasional return) for discussing the limits that the Establishment Clause[16] places on state and federal legislatures and courts when they create religious exemptions and there is no federal constitutional compulsion on them to do so. Suppose, for example, that after losing in the Colorado Court of Appeals and failing to convince the Colorado Supreme Court to hear the case, Phillips had decided not to seek review in the U.S. Supreme Court. Rather, he decided to focus his energies on the Colorado legislature and, with the help of some friends in high places, managed to persuade the legislature to enact a religious exemption of the sort that he unsuccessfully had sought in the courts. Should that exemption survive an Establishment Clause challenge?

Suppose instead that, after the Colorado Court of Appeals affirmed the Commission's order against Phillips, the Colorado Supreme Court had agreed to hear the case and ultimately reversed on the ground that the Colorado Constitution's free exercise guarantee required that Phillips be granted an exemption from the Anti-Discrimination Act. Should the U.S. Supreme Court agree to review that decision and reverse on federal Establishment Clause grounds?[17]

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[13] In fact, when the Court decided *Masterpiece Cakeshop*, Justice Kennedy was the only remaining Justice from the *Smith* Court altogether. Less than a month later, when Justice Kennedy announced that he would be retiring effective July 31, 2018, *see* Michael D. Shear, *Trump Set to Tilt Court as Kennedy Retires*, N.Y. TIMES June 28, 2018, at A1, it became clear that the Court would begin its 2018-19 Term with none of the Justices who sat in *Smith*.

In referring in the above text to the "5-4 majority in *Smith*," I am referring to the narrow majority for *Smith*'s broad reinterpretation of free exercise constraints. In *Smith* the Court actually voted 6-3 to deny the claim by the two respondents, Smith and Black, for a free exercise exemption from the Oregon law at issue in the case. However, one of the six who voted to deny the claim – Justice O'Connor – concurred only in the judgment and joined the dissenters in repudiating the Court's dramatic departure from the preexisting approach to free exercise constraints.

[14] *See Masterpiece Cakeshop*, 138 S. Ct. at 1723–24 ("The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws.").

[15] The commentary on *Masterpiece Cakeshop* soon after oral argument in the Supreme Court – a time when *Masterpiece Cakeshop* seemed all but certain to yield a much more controversial set of opinions by the Justices than it ultimately did – leaves little doubt of the high voltage of that clash of interests. *See, e.g.*, David Brooks, Op-Ed., *How Not to Advance Gay Marriage*, N.Y. TIMES, Dec. 5, 2017, at A27; Ross Douthat, Op-Ed., *The Baker and the Empire*, N.Y. TIMES, Dec. 10, 2017, at SR9; Andrew Sullivan, *The Case for the Baker in the Gay-Wedding Culture War*, N.Y. MAG. DAILY INTELLIGENCER (Dec. 8, 2017, 7:38 A.M.), http://nymag.com/daily/intelligencer/2017/12/andrew-sullivan-let-him-have-his-cake.html [https://perma.cc/UBL6-RSJZ].

[16] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion…."). In *Everson v. Board of Education*, 330 U.S. 1, 8 (1947), the Supreme Court held that the Establishment Clause applies to state and local government by virtue of the Fourteenth Amendment's Due Process Clause.

[17] Questions similar to the two I have just posed in the text arise when Congress creates religious exemptions to federal statutes and when federal courts create religious exemptions in the course of applying either of the two Acts of Congress that charge courts with carving out religious exemptions when a balancing of individual and governmental interests calls for it. The two Acts and three Supreme Court

In this Article, I propose an approach for deciding when the First Amendment's Establishment Clause prohibits a legislature or court from carving out a religious exemption. With space limitations in mind, I focus on articulating my approach, not on critiquing possible alternatives.[18] In Part I, I lay the groundwork for my proposal by providing an overview of the Establishment and Free Exercise Clauses and the relationship between them. Drawing on important insights offered by Justice O'Connor, I propose in Part II a first step for the approach. In doing so, I take as a given that the endorsement test championed by Justice O'Connor continues to command majority support on the Supreme Court – a proposition that I defended at length in an article not long ago.[19] In Part III, I spell out the remaining three steps of my proposed approach and briefly explain the basic framework that the approach puts into place. After commenting in Part IV on two Supreme Court decisions that have special significance for the viability of the approach, I turn in Parts V, VI, and VII to the issues that arise in making two determinations that lie at the heart of the approach: whether the burden on religious liberty lifted by an exemption is substantial, and whether denying an exemption is necessary to serve a compelling state interest. In those Parts, I suggest answers to various questions raised by the proposed approach, such as: What, if any, benchmarks exist to lend objectivity and consistency to judges' making those two key determinations? From whose perspective should the substantiality of a burden be judged? How do possible ripple

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decisions interpreting and applying them are discussed *infra* notes 48–60, 63–86 and accompanying text. With regard specifically to the possible Establishment Clause problems raised by one of those decisions, *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014), see *infra* note 86.

[18] In keeping with that focus, I cite only sources that I found helpful in developing my approach. Anyone looking to my footnotes for a good bibliography of the literature on religious exemptions is well advised to look elsewhere.

[19] Gary J. Simson, *Religious Arguments by Citizens to Influence Public Policy: The Lessons of the Establishment Clause*, 66 MERCER L. REV. 273, 284–300 (2015) (discussing the vitality of the endorsement test prior to, and as applied in, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Court's leading Establishment Clause decision of the past decade). Nothing in the Court's opinions since I completed that article lead me to reassess my conclusion in the article that the endorsement test remains good law, though by a narrow margin. Nor do the changes in the Court's membership since that time prompt me to revise my conclusion. The late Justice Scalia's was an unequivocal opponent of the endorsement test. *See* Simson, *supra*, at 285–86, 289–91, 293. Whether Justice Gorsuch, who was appointed to Justice Scalia's seat in April 2017, is any more favorably disposed to the endorsement test remains to be seen, but the likely answer seems to be "no." *Cf.* Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., joined by Thomas, J., concurring in part) (taking a position on government funding of religion suggestive of a relaxed approach generally to the Establishment Clause problems posed by government support of religion). The impact that Justice Kennedy's retirement at the end of the Court's 2017-18 Term will have on the endorsement test's continued vitality is even more uncertain. Although Justice Kennedy initially was highly critical of the test and never explicitly disavowed his discontent with it, he studiously avoided for years casting what would have been a decisive fifth vote to overrule it. *See* Simson, *supra*, at 289-98. With Justice Kennedy's successor yet to be confirmed, it is much too early to say with any confidence how, if at all, Justice Kennedy's retirement is apt to change the Court's balance on the question of the continued vitality of the endorsement test. With regard to the various factors that tend to add uncertainty to predicting a Supreme Court nominee's likely votes on particular issues, see Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENT. 283, 290–94 (1990).

effects of exempting the claimant before the court factor into a determination whether denying the exemption is necessary to serve a compelling state interest? The Article concludes with some observations about the partnership between the Religion Clauses.

Particularly because "harm to others" shares top billing in the title for this Symposium, "Religious Exemptions and Harm to Others," I probably should explain before going further why I do not give it more attention than I do. There are two main reasons. First, I do not see harm to others as a matter of *independent* importance to the constitutionality of an exemption. My approach closely examines an exemption's impact on the government's ability to achieve the objective(s) that the law is designed to serve. To the extent that an exemption's harm to others undermines the government's ability to achieve such objective(s), my approach implicitly takes harm to others into account. If, however, an exemption's harm to others has no bearing on the government's ability to achieve the law's objective(s), I believe such harm is irrelevant to the Establishment Clause analysis, and my approach reflects that belief.

Second, whether or not an exemption causes harm to others is rarely, if ever, a distinguishing feature. Exemptions almost invariably *do* cause harm to others. Some, like the exemption sought in *Masterpiece Cakeshop*, cause harm to identifiable individuals or classes of individuals. Others, like the exemption from Sunday closing laws unsuccessfully sought in *Braunfeld v. Brown*,[20] cause more generalized types of harm to society. The important question for constitutional purposes is not whether an exemption causes harm to others or whether the harm to others takes more specific or general form. Instead, it is the extent to which such harm detracts from the government's ability to effectuate the law's objective(s), and that question is properly answered without giving special weight to the fact that harm to others, rather than some other factor, is the factor undermining the government's realization of its objective(s).

I. THE FIRST AMENDMENT'S RELIGION CLAUSES—ALONE AND IN COMBINATION

To answer the question of when religious exemptions should be found to violate the First Amendment's Establishment Clause, it is helpful to begin with the larger question of which it is a part: In acting for the purpose of furthering religious liberty, when can government go beyond the demands of the Free Exercise Clause without overstepping the bounds of the Establishment Clause? At first glance, the answer seems to be "never" under the two Establishment Clause tests that the Supreme Court and lower courts have applied most often over the past several decades.

Under the first prong of the three-prong test that the Court announced in 1971 in *Lemon v. Kurtzman*, government action must have a "secular legislative

[20] 366 U.S. 599 (1961), discussed *infra* text accompanying notes 97–104.

purpose."[21] As the Court made clear in later cases, that secular-purpose requirement can be met by a showing of simply *some* secular purpose and does not call for anything approaching a dominant or exclusive secular purpose.[22] Nonetheless, action that the government takes entirely in the name of protecting religious liberty—action epitomized by a religious exemption to a generally applicable law—appears to fail that undemanding requirement.

Under the endorsement test, which grew out of the *Lemon* test,[23] the analysis and conclusion appear to be much the same. The first of the test's two prongs requires the government to show only that its actions have *some* basis in a purpose other than endorsing religion.[24] However, the government seems hard-pressed to make that showing when, acting for the avowed and solitary purpose of protecting some persons' religious liberty, it carves out a religious exemption from a generally applicable law.

But so literal a reading, and so mechanical an application, of the two tests' purpose prongs seems incongruous. Unless courts interpret the tests as treating as valid a purpose of complying with the demands of the Free Exercise Clause, the tests place the courts in a thoroughly anomalous position: on the one hand, courts have a constitutional responsibility to decide claims of free exercise violations; on the other hand, they would have no capacity to order relief for such violations because to do so would be acting for a wholly religious purpose in violation of the Establishment Clause.

An interpretation that harmonizes the demands of the two Clauses is much more in keeping with the Clauses' placement together in the constitutional text and with the common origins[25] and ultimate objective that unite them. To be sure, the two

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[21] 403 U.S. 602, 612 (1971).

[22] *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 602–04 (1988); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam). For detailed discussion and critical analysis of 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).

[23] Although the endorsement test was not clearly articulated and adopted by a Supreme Court majority until *Allegheny County v. ACLU*, 492 U.S. 573, 592–94, 599–601 (1989), it is probably best understood as implicit in, and a subset of, the two-prong purpose-and-effect test of *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), which in 1971 became the first two prongs of the *Lemon* test. *See Lemon*, 403 U.S. at 612. In light, however, of *Agostini v. Felton*, 521 U.S. 203 (1997), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), there is good reason to question how much, if anything, remains of the *Lemon* test other than the endorsement test. *Agostini* basically collapsed the *Lemon* test's third prong – a requirement that the law under review "not foster an excessive government entanglement with religion," *Lemon*, 403 U.S. at 612-13 (internal quotation marks omitted) – into the test's effect prong. *See Agostini*, 521 U.S. at 232–34. *Zelman* followed up by essentially eliminating government financial support of religion—one of the historic "evils" that, according to the *Lemon* Court (403 U.S. at 612), "the Establishment Clause was intended to afford protection" against—as an independent Establishment Clause concern. For a critique of the Court's reasoning in *Zelman* and an analysis of its implications, see Gary J. Simson, *School Vouchers and the Constitution — Permissible, Impermissible, or Required?*, 11 CORNELL J.L. & PUB. POL'Y 553, 566–76 (2002).

[24] *See Allegheny Cnty.,* 492 U.S. at 592; Wallace v. Jaffree, 472 U.S. 38, 56 & n.42 (1985).

[25] For a brief account of the Clauses' historical roots, see *Everson v. Board of Education*, 330 U.S. 1, 8–14 (1947).

Clauses differ in their immediate focus: while the Free Exercise Clause calls for scrutiny of government interference with individuals' exercise of religious liberty, the Establishment Clause calls for scrutiny of government support of religion. Nonetheless, at the heart of both Clauses is an ultimate objective of safeguarding people's freedom from government interference in making decisions for themselves about religion (including decisions not to adhere to any religion).[26] The Establishment Clause prevents the state from making inroads on religious liberty indirectly that the Free Exercise Clause prevents the state from achieving more directly.[27]

To harmonize the two Clauses' demands, the *Lemon* and endorsement tests therefore must be understood as treating a purpose of complying with the demands of the Free Exercise Clause as secular and nonreligious. Under this thinking, as long as courts and legislatures go no further in seeking to protect religious liberty than the Free Exercise Clause requires, the Establishment Clause does not present a problem. If the Free Exercise Clause calls for carving out an exemption from a generally applicable law, a court should do so when the issue arises. In addition, unless and until a court has acted, the legislature may take the initiative and provide for such an exemption itself.

The harder question is the extent, if any, to which government may rely on the values underlying the Free Exercise Clause to justify affording greater protection to religious liberty than the Free Exercise Clause demands. At what point does government action promoting free exercise values cross the constitutional line and become, in the words of the First Amendment, a forbidden "law respecting an establishment of religion"? Though always important, that question acquired special importance in 1990 when the Supreme Court in *Employment Division v. Smith*[28] revised its interpretation of the Clause in a way that substantially narrowed the scope of the Clause's demands. So doing, the Court greatly increased the incentive for legislatures to press the boundaries of their authority to promote religious liberty and for state courts to interpret their state constitutions' free exercise clauses more expansively.

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[26] *See Wallace*, 472 U.S. at 48–55; *Abington Sch. Dist.*, 374 U.S. at 305–06 (Goldberg, J., joined by Harlan, J., concurring); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 809–12 (1978).

[27] As Justice Black explained for the Court in holding that the N.Y. Board of Regents' composition of a prayer for recitation by the state's schoolchildren violated the Establishment Clause:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. . . .

Engel v. Vitale, 370 U.S. 421, 430–31 (1962).

[28] 494 U.S. 872 (1990).

For many years prior to *Smith*, the Court's free exercise case law broadly authorized courts to carve out exemptions from generally applicable laws that substantially burden free exercise claimants' ability to practice their religion. Unless the state could show that requiring the free exercise claimant to abide by the law is necessary to serve a compelling state interest, the court would carve out the requested exemption.[29] In rejecting a free exercise claim by members of the Native American Church for an exemption from Oregon's ban on peyote use, the Court in *Smith* interpreted the Clause in a way that made judicial authority to carve out exemptions from generally applicable laws very much the exception rather than the rule. Unless a free exercise claimant could show that his or her claim seriously implicates free exercise and another constitutional right[30] or fits within some other narrow category of claims treated as special by the Court in *Smith*,[31] a court could no longer invoke the Clause as authority to exempt the claimant from the requirements of a generally applicable law.

Under the circumstances, if the government could not constitutionally give religious liberty more protection than free exercise requires, the implications for religious liberty would be bleak to say the least. However, on various occasions prior to *Smith*, the Court had stated that government could be more protective of religious liberty than the Free Exercise Clause requires,[32] and the Court in *Smith* indicated that it stood by that view. It pointed out that, as a matter of policy, various state legislatures had created religious exemptions for peyote use, and it strongly implied that if the Oregon legislature wished to follow their example, the Court would be happy to approve.[33]

II. AN APPROACH TO ESTABLISHMENT CLAUSE LIMITATIONS ON RELIGIOUS EXEMPTIONS—THE O'CONNOR FOUNDATION

The Court in *Smith*, as in prior years, offered no concrete guidance as to how far beyond the dictates of free exercise government generally may go in the name of protecting religious liberty. In the several years before *Smith*, however, one of the Justices had taken on in earnest the task of providing such guidance. Not coincidentally, that Justice was Sandra Day O'Connor—the Justice who simultaneously was taking the lead on the Court in formulating the endorsement test and articulating its theoretical foundation.[34]

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[29] *See infra* Parts VI.A & VII.A (discussing various decisions prior to *Smith*); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990).

[30] *See Smith,* 494 U.S. at 881–82 (discussing "hybrid" cases).

[31] *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 41–53 (identifying and discussing *Smith*'s "six overlapping exceptions and limitations").

[32] *See, e.g.*, Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334–35 (1987); Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

[33] *See Smith*, 494 U.S. at 890.

[34] For an early appreciation of Justice O'Connor's contributions in this regard, see Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped*

Concurring in a judgment striking down an Alabama moment-of-silence law under the Establishment Clause, Justice O'Connor maintained in 1985:

> On its face, the [Free Exercise] Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. . . . [T]he Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer" is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.[35]

In another concurring opinion two years later, Justice O'Connor applied, and further articulated, the above approach:

> The necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action *does* have the effect of advancing religion. The necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations. As I have suggested in earlier opinions, the inquiry framed by the *Lemon* test should be "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." *Wallace,* 472 U.S., at 69. . . . [T]o perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action. The determination whether the objective observer will perceive an endorsement of religion "is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch v. Donnelly* [465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring)].[36]

Potential of Justice O'Connor's Insight, 64 N.C. L. REV. 1049 (1986). Her most important opinions on the endorsement test came in *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring), and *Wallace v. Jaffree*, 472 U.S. 38, 67–84 (1985) (O'Connor, J., concurring in the judgment).

[35] *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring in the judgment) (citation omitted).

[36] *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the judgment). The Court in *Amos* rejected an Establishment Clause challenge to the scope of an exemption that Congress had given religious organizations from the federal statutory prohibition on religious discrimination in employment.

Under Justice O'Connor's approach, courts therefore should proceed as follows to determine whether government action designed to further free exercise values survives Establishment Clause scrutiny. Begin by asking whether such action takes the form of lifting a government-imposed burden on free exercise. If it does not, strike down the action for failing the purpose prong of the endorsement test, but if it does, go on to the second prong of the endorsement test and ask whether an objective observer would be likely to perceive the action as sending a message of government preference for a particular religion or religious belief or for religion over nonreligion. As discussed below, I believe Justice O'Connor's approach could usefully be clarified and expanded in some respects. Above all, however, I see it as a major step forward toward a coherent and principled approach to a difficult problem at the intersection of the First Amendment's Religion Clauses.

First and foremost, Justice O'Connor's threshold question of whether the government action takes the form of lifting a government-imposed burden on free exercise provides an appropriate and essential limiting principle. Government action that seeks to promote free exercise by lifting a government-imposed burden on free exercise has a distinctive claim to being based, at least in part, on a purpose other than endorsing religion. For that reason, it also has a distinctive claim to satisfying the purpose prong of the endorsement test, which demands only that the challenged government action be based in part on *some* nonreligious purpose.[37]

At first glance, any government action that takes the form of lifting a government-imposed burden on free exercise may appear to be an effort to favor religion over nonreligion. It relieves religious adherents not only of the special burden the law would impose on them due to their religious adherence but also of the secular burden the law imposes on everyone within the scope of the law. Absent an exemption, the religious adherents bear a heavier burden than others affected by the law; with an exemption, they bear a lesser burden than others—in fact, no burden at all.

The appearance of religious favoritism, however, is misleading. It is only part of the picture. Yes, the government's selective burden-lifting does have the effect of leaving the religious beneficiaries of that burden-lifting in a much better position than the one they would otherwise occupy and than the one occupied by those who come within the broadly applicable terms of the law. To infer from that religion-favoring effect that the government's selective burden-lifting is rooted in a purpose of favoring religion—a purpose of endorsement—is eminently reasonable, but to infer that it is rooted *entirely* in a purpose of favoring religion is not.

When the government acts to relieve individuals of a special burden that the government was responsible for placing on them and that, as a result of sincere, deeply held beliefs, they alone experience, the government action has an element of neutrality to it that other types of free-exercise-promoting government action do not. Almost invariably, the government had no way to relieve them of the religious burden without relieving them of the secular one. Under the circumstances, the

[37] *See supra* text accompanying notes 21–24.

government's burden-lifting action is only fairly understood, not as an effort simply designed to treat some people *better* because of their religion, but instead as an effort designed at least in part to avoid treating some people *worse* because of their religion. So understood, the government's burden-lifting action readily satisfies the purpose prong of the endorsement test.

If government action initiated for the purpose of promoting free exercise has no such government-burden-lifting element to it, but instead simply takes the form of incentivizing people to practice their religion or rewarding them for doing so, there is no good reason to see the religion-favoring action as based on anything other than a purpose of endorsing religion. Assume, for example, that Congress amends the tax laws to provide that, in calculating their income taxes, parents can deduct the cost of sending their child to an afterschool program only if the program is run by a religious institution and has a substantial component of religious instruction or inculcation. Such a deduction promotes free exercise values in a way that can only be sensibly explained as an effort to favor religion. It therefore fails the purpose prong of the endorsement test.

Also unable to satisfy the purpose prong are any government actions that seek to promote free exercise values by lifting burdens that private actors have placed on other people's religious liberty. A good illustration is the Connecticut statute that the Court in *Estate of Thornton v. Caldor, Inc.*[38] struck down under the Establishment Clause. That statute sought to facilitate some employees' ability to practice their religion by prohibiting employers from requiring any employees to work on their Sabbath. In a concurring opinion, Justice O'Connor underlined that the law was "not the sort of accommodation statute specifically contemplated by the Free Exercise Clause" because it "attempts to lift a burden on religious practice that is imposed by *private* employers."[39] Although a law seeking to promote free exercise values by lifting a state-imposed burden on religious liberty can fairly be understood as an effort on the part of the state to avoid disadvantaging some people because of their religion, a law seeking to promote free exercise values by lifting a privately imposed burden on religious liberty lacks any such neutrality. Connecticut could not reasonably argue that its statute was an effort to level a playing field that it had made uneven.

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[38] 472 U.S. 703 (1985). Professors Schwartzman, Schragger, and Tebbe have relied on *Thornton* as authority for the proposition that "the government may not grant religious exemptions when they impose significant burdens on non-beneficiaries." Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html [https://perma.cc/FYY9-AQVK]. They also have argued that *United States v. Lee*, 455 U.S. 252 (1982), offers similar authority. Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BALKINIZATION (Dec. 4, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html [https://perma.cc/DTN8-C7VQ]. I discuss *Lee* in detail *infra* text accompanying notes 176–85, 252–53.

[39] *Thornton*, 472 U.S. at 712 (O'Connor, J., joined by Marshall, J., concurring). Justice O'Connor maintained that the statute failed to meet the effects prong of the *Lemon* test. *Id.* at 711. The opinion of the Court, which she joined, did the same. *Id.* at 708 (majority opinion). Neither opinion discussed whether the statute satisfied the test's purpose prong, which it almost certainly did not.

Connecticut had done nothing to make Sabbath observance more cumbersome for Sabbath-observers.

The statute under review was simply an effort to insulate from private constraints one particular religious practice that the state apparently found especially worthy of protection. However sensible or laudatory that purpose may have seemed to the Connecticut legislature, it violates principles of nonendorsement in a variety of ways. Most obviously, it simultaneously puts a state stamp of approval on: Sabbath-observing religions over non-Sabbath-observing religions; Sabbath observance over other practices of Sabbath-observing religions for which employees might want employer accommodation; and employees' religious needs for employer accommodation over employees' pressing nonreligious needs for employer accommodation.[40]

III. AN APPROACH TO ESTABLISHMENT CLAUSE LIMITATIONS ON RELIGIOUS EXEMPTIONS—BUILDING ON THE O'CONNOR FOUNDATION

For purposes of identifying which government actions initiated to promote free exercise should survive Establishment Clause review, Justice O'Connor's threshold question of whether the government action takes the form of lifting a government-imposed burden on free exercise serves a valuable screening function. It screens out as violative of the endorsement test's purpose prong any government action designed to protect free exercise that does not lift a government-imposed burden on religious liberty. So doing, however, it leaves standing virtually all religious exemptions, including some that are most reasonably understood as sending a message of endorsement. As indicated in the above excerpts, Justice O'Connor provided for that possibility when she maintained that, even if government action takes the form of lifting a government-imposed burden on free exercise, it still must satisfy the effects prong of the endorsement test.

I suggest that, to decide whether an exemption has the effect of endorsing religion, a court should proceed as follows:

1. Determine whether the exemption relieves the religious adherent(s) whom it benefits of a substantial burden on religious liberty.

2. If the exemption relieves the religious adherent(s) whom it benefits of only an insubstantial burden on religious liberty, determine whether there is a rational basis for denying the exemption and requiring the exempted adherent(s) to abide by the generally applicable terms of the law.

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[40] In her opinion in *Thornton*, Justice O'Connor explicitly left room for laws lifting privately imposed burdens on religious liberty to be defended successfully in terms of purposes other than promoting free exercise values. Pointing to the protection that Title VII of the Civil Rights Act of 1964 provides against religious and other discrimination by private employers, she maintained that "a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society." *Id.* at 712 (O'Connor, J., joined by Marshall, J., concurring). However, that concession did not help, and should not have helped, salvage the Connecticut law under review in *Thornton*.

a. If so, the exemption has the effect of endorsing religion and should be struck down.

b. If not, the exemption does not have the effect of endorsing religion and should be upheld.

3. If the exemption was not created by the legislature and relieves the religious adherent(s) whom it benefits of a substantial burden on religious liberty, determine whether denying the exemption and requiring the exempted adherent(s) to abide by the generally applicable terms of the law is necessary to serve a compelling state interest.

a. If so, the exemption has the effect of endorsing religion and should be struck down.

b. If not, the exemption does not have the effect of endorsing religion and should be upheld.

4. If the exemption was created by the legislature and relieves the religious adherent(s) whom it benefits of a substantial burden on religious liberty, determine whether the legislature had a substantial basis for believing that denying the exemption and requiring the exempted adherent(s) to abide by the generally applicable terms of the law is not necessary to serve a compelling state interest.

a. If so, the exemption does not have the effect of endorsing religion and should be upheld.

b. If not, the exemption has the effect of endorsing religion and should be struck down.

In Parts VI and VII, I will focus on the meaning of "substantial burden" and "necessary to a compelling state interest" as used in the above approach. For now, I would like to comment briefly on the bigger picture—the basic framework that the approach puts into place, and two assumptions that are not spelled out in the approach but that underlie and inform it.

First, the two assumptions:

1. Absent special circumstances, a reasonable observer is likely to perceive a religious exemption as sending a message of government endorsement of religion.

2. Special circumstances exist only if there is no constitutionally adequate justification for holding the exempted religious adherent(s) to the generally applicable terms of the law.

The first assumption is essentially a presumption of endorsement. A religious exemption relieves the exempted religious adherent(s) of both the religious and the secular burdens imposed by the law. As a result, it invariably leaves the exempted religious adherent(s) better off than those covered by the law, who continue to bear its secular burdens. In and of itself, the religious exemption sends a message of government endorsement of religion that a reasonable observer cannot help but notice. But that message is not irrebuttable. The second assumption states the special circumstances that can rebut and dispel the message of government endorsement of religion sent by any religious exemption. Those circumstances are ones where there is no constitutionally sufficient justification for keeping the law's burden on the exempted religious adherent(s).

The operation of the proposed approach obviously turns to a great extent on the determination of whether the burden on religion lifted by the exemption is substantial or insubstantial. If the religious burden lifted by the exemption is insubstantial, the exemption violates the Establishment Clause unless there is no rational basis for holding the exempted religious adherent(s) to the generally applicable terms of the law. In other words, the exemption falls unless not creating the exemption would be utterly senseless—thoroughly inexplicable in terms of any lawful government interest, however insignificant in importance. As a practical matter, the odds that a religious exemption will survive review under that standard are extremely low.

In calling for that standard of review when a religious exemption lifts only an insubstantial burden, the proposed approach draws on the Supreme Court's fundamental rights case law. Expressly and implicitly, the Court has applied rational basis review to decide the constitutionality of laws burdening only insubstantially the enjoyment of fundamental rights of various sorts.[41] The Court's thinking appears to be that an insubstantial burden on a fundamental right is constitutionally inconsequential and does not call for more than the very minimal level of justification required by the Due Process Clause when the state deprives individuals of a liberty or property interest of no particular constitutional importance.[42]

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[41] *See, e.g.*, Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47 (2006) (freedoms of expression and association); Burdick v. Takushi, 504 U.S. 428 (1992) (voting); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (free speech); Maher v. Roe, 432 U.S. 464 (1977) (abortion); Whalen v. Roe, 429 U.S. 589 (1977) (privacy interests of nondisclosure and personal autonomy); Sosna v. Iowa, 419 U.S. 393 (1975) (interstate travel, and access to divorce courts); Ross v. Moffitt, 417 U.S. 600 (1974) (equal process in criminal cases).

[42] *Williamson v. Lee Optical, Inc.,* 348 U.S. 483 (1955), offers a classic statement and application of the rational basis test. An Oklahoma statute essentially barred opticians from either fitting old glasses into new frames or making lenses unless they had a prescription from an ophthalmologist or an optometrist. Not long after its enactment, the statute was challenged in Oklahoma federal district court as denying due process to opticians, and the court struck down the law as not "reasonably and rationally related to the health and welfare of the people." Lee Optical, Inc. v. Williamson, 120 F. Supp. 128, 136 (W.D. Okla. 1954) (3-judge court), *rev'd*, 348 U.S. 483 (1955). Conceding that the Oklahoma statute "may exact a needless, wasteful requirement in many cases," the Supreme Court in a unanimous opinion by Justice Douglas made clear that the rational basis test is much less demanding than the lower court had assumed:

> [I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. . . . The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. . . . But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

348 U.S. at 487–88.

In keeping with that approach to insubstantial burdens on fundamental rights, the government is fully justified in holding any insubstantially burdened religious adherent(s) to the generally applicable terms of the law when it has a rational basis for doing so, which almost invariably will be the case. Extrapolating from that context to one in which the government has created an exemption in favor of any insubstantially burdened religious adherent(s), the proposed approach recognizes the validity of such an exemption when there is no rational basis for denying it. Otherwise, however, the proposed approach treats any such exemptions as religious favoritism—favoritism that crosses the line into territory forbidden by the Establishment Clause's prohibition on government endorsement of religion.

If a court determines that the burden on religion lifted by the exemption is substantial, then, under the proposed approach, the court decides the exemption's constitutionality under the Establishment Clause by a very different inquiry: Is denying the exemption and holding the exempted religious adherent(s) to the generally applicable terms of the law necessary to serve a compelling state interest? Or, to state the question in a somewhat different and perhaps more easily answered way: Does the exemption substantially detract from the government's ability to serve as well as possible a compelling state interest that the law's generally applicable terms are designed to serve? Under either formulation of the question, the exemption violates the Establishment Clause if the answer is "yes" and survives Establishment Clause review if the answer is "no." Under the proposed approach, an exemption for any religious adherent(s) who, if held to the law's generally applicable terms, would be substantially burdened religiously is hardly a sure bet to survive Establishment Clause review, but it is much more likely to do so than an exemption for any religious adherent(s) who, if held to the law's general terms, would only be insubstantially burdened.

Although the proposed approach calls for two very different standards of review for religious exemptions depending on whether the exempted person(s) would be substantially or insubstantially burdened religiously if held to the law's generally applicable terms, the two standards of review derive from a common source: the Supreme Court's fundamental rights case law. With substantial burdens at issue, the Court's case law pertaining to a variety of fundamental rights has made satisfaction of the necessary-to-a-compelling-interest test the yardstick for constitutionality.[43] In setting the bar that high, the Court obviously is using a balancing approach—balancing the constitutional harm experienced by the individual against the government's justification for inflicting such harm. With harm of exceptional gravity—serious impairment of an individual interest of the highest order—the Court regards the state's justification as adequate only if such justification

[43] *See, e.g.*, Saenz v. Roe, 526 U.S. 489 (1999) (interstate travel); Texas v. Johnson, 491 U.S. 397 (1989) (free speech); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (voting); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

is at its apogee—a state interest of the highest order that cannot be served as effectively by alternative means that impose a lesser burden on individual rights.

Under that approach to substantial burdens on fundamental rights, the government's justification for substantially burdening some people's religious liberty is constitutionally adequate—commensurate with the constitutional harm done—only if the government's imposition of that burden is necessary to serve a compelling state interest. Extrapolating from that context to one in which the government has granted an exemption to avoid imposing a substantial burden on religious liberty, the proposed approach upholds the exemption unless denying the exemption is necessary to serve a compelling state interest. To put it somewhat differently, if the exemption substantially detracts from the government's ability to serve as well as possible a compelling state interest that the law is designed to serve, the exemption cannot survive Establishment Clause review.

The fourth and final step of my proposed approach prescribes a moderate degree of judicial deference for legislatively created exemptions. Step 4 assumes that the constitutionality of an exemption that lifts a substantial burden should be decided by the same standard of review – is denying the exemption necessary to serve a compelling state interest? – regardless of whether the exemption is made by a court or legislature. However, it also instructs the court to give the legislature the benefit of the doubt and uphold a legislative exemption when the constitutionality of a legislative exemption under the applicable standard of review presents a close question.

I suggest that the prescribed deference is an appropriate concession by the judiciary to the legislature's judgment on two matters in which it can fairly claim special expertise: the compellingness of the state interest and the necessity of the means-end fit. As the author of both the law and the exemption, the legislature has a special familiarity with, and understanding of, the objectives underlying the law and the extent to which the exemption may detract from the law's effectuation of those objectives. In upholding under Step 4 an exemption that presents a close question under the applicable standard of review, a court defers to the legislative judgment implicit in the legislature's creation of the exemption that holding those exempted to the generally applicable terms of the law is not necessary to serve a compelling state interest.

I underline that the prescribed degree of deference is much less than it would be if the relevant inquiry were framed in terms of whether the legislature had a rational, as opposed to substantial, basis for believing that denying the exemption is not necessary to serve a compelling state interest. Framing the inquiry in terms of a substantial basis insulates from invalidation some legislative exemptions that a court might strike down if they were court-made, but a much narrower range than if the inquiry were framed in terms of a rational basis. In my view, the substantial basis inquiry gives the legislative expertise that justifies treating legislative and judicial exemptions differently roughly the weight it deserves, no more and no less. A legislature *is* better suited than a court to decide whether a legislative exemption is apt to undermine significantly the realization of a compelling state interest, but it is

not *so much* better suited to warrant framing the relevant judicial inquiry in rational, rather than substantial, basis terms.

Lastly, I call attention to two determinations pertaining to the constitutionality of legislative exemptions that my proposed approach treats very differently than the determination that is the focus of Step 4. First, the proposed approach leaves to independent judicial determination whether a burden on free exercise lifted by a legislative exemption is substantial or insubstantial. The approach makes no attempt to build in deference to any implicit or express legislative judgment about the burden's substantiality. In my view, the question whether a lifted burden is substantial is one to which the legislature brings no more expertise than the judiciary. It focuses on impact on individuals – a matter that, in terms of relative institutional competence, appears to lie more within the domain of courts than legislatures. In any event, the judicial deference that seems very appropriate in Step 4 seems very out of place in a determination of a burden's substantiality.

Secondly, Step 2, which treats exemptions lifting insubstantial burdens no differently depending on whether they are legislatively or judicially made, prescribes no deference to the implicit legislative judgment that a legislative exemption meets the applicable standard of review. Under Step 2, that standard is whether the state has a rational basis for denying the exemption. I suggest that the legislature has no greater claim than the judiciary to special expertise in determining whether that standard is met. In addition, because so very little is required to show a rational basis, I suggest that a determination that there is no rational basis for denying an exemption is such an extreme, black-and-white judgment that there is little, if any, room for close questions on constitutionality to exist. For Step 2 to leave the determination of a legislative exemption's constitutionality to the judiciary with no intimation that some deference to the legislature may be in order therefore seems entirely warranted.

IV. A NOTE ON PRECEDENT

I propose the above approach as one that addresses in a principled and effective way a difficult problem that epitomizes what the Supreme Court has characterized as the "tension" between the Establishment and Free Exercise Clauses.[44] I believe it could be adopted without major disruption to precedent, but in light of space limitations, I make no serious attempt to prove that here. However, two Supreme Court decisions, *Employment Division v. Smith*[45] and *Cutter v. Wilkinson,*[46] bear so directly and centrally on the issue at hand that it seems only appropriate before proceeding further to comment on the extent to which they militate for or against adoption of my approach.

At first glance, it may appear that my approach and Justice Scalia's opinion for the 5-4 majority in *Smith* can only coexist in alternate universes. After all, my

[44] Locke v. Davey, 540 U.S. 712, 718 (2004).
[45] 494 U.S. 872 (1990), discussed *supra* text accompanying notes 11–14, 28–33.
[46] 544 U.S. 709 (2005).

approach assigns importance to two determinations—whether a burden on free exercise is substantial, and whether a necessary-to-a-compelling-interest standard of review is met—that lie at the heart of the pre-*Smith* free exercise balancing test that the Court in *Smith* not only greatly curtailed in range of application but even seemed unwilling to concede was ever really the Court's principal approach.[47]

The *Smith* Court's repudiation of the preexisting balancing test, however, was not an all-purpose repudiation. Rather, it was a repudiation of courts' using the test to resolve a question of Free Exercise Clause constraints. It is not inconsistent with *Smith* to use an approach that borrows key ingredients of that test to resolve a very distinctive question of Establishment Clause constraints.

Fifteen years after *Smith*, Justice Ginsburg's opinion for a unanimous Court in *Cutter* provided some basis for optimism that the Court might be receptive to an approach like mine. The Court upheld the constitutionality on its face of the portion of the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 that prohibits state-run prisons, mental hospitals, and the like from "impos[ing] a substantial burden on the religious exercise" of any institutionalized persons unless doing so is the "least restrictive means" of serving a "compelling governmental interest."[48] RLUIPA was the result of three related developments: (1) *Smith*'s dramatic narrowing of individuals' ability to seek free exercise exemptions; (2) Congress's enactment in 1993 of the Religious Freedom Restoration Act (RFRA)[49] to essentially reverse *Smith* and reinstate the preexisting approach; and (3) the Court's holding in 1997 in *City of Boerne v. Flores*[50] that RFRA is unconstitutional as applied to state and local government. According to the Court in *Boerne*, in enacting RFRA as a limitation on state and local governmental action, Congress exceeded the scope of its authority under Section Five of the Fourteenth Amendment—the source of constitutional authority upon which it had relied.[51]

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[47] In that and other ways, the opinion that the Court in *Smith* offered to justify abandoning a longstanding approach was stunningly disingenuous – perhaps most useful as an example to new judges as to what to be sure *not* to do. Some who applaud *Smith*'s sharp curtailment of courts' latitude under the Free Exercise Clause to carve out religious exemptions have gone to lengths to disassociate themselves from the Court's opinion. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308–09 (1991) ("The decision, as written, is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction.").

[48] 42 U.S.C. § 2000cc-1(a) (2018).

[49] *Id.* §§ 2000bb to bb-4.

[50] 521 U.S. 507 (1997).

[51] Section Five provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The "provisions of this article" to which it refers are primarily those stating, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* § 1. Although Congress's reliance on Section Five is not explicitly stated in the text of RFRA, it is clearly indicated in the House and Senate Reports. *See Boerne*, 521 U.S. at 516. Congress did not need to rely on its Section Five authority to enact RFRA as a limitation on *federal* governmental action.

In enacting RLUIPA, Congress used two tactics to avoid the type of lack-of-power objection that the Court found so probative in *Boerne*. It drafted a statute encompassing a much narrower range of government activities—only ones giving rise to religious land use claims or institutionalized persons' religious exercise claims—than was encompassed by RFRA. In addition, it relied on grants of congressional authority—the Commerce Clause[52] and the Taxing and Spending Clause[53]—much less controversially related to the activities covered by the Act.[54]

The standard that Congress adopted in RLUIPA for deciding individual claims, however, was identical to the one codified in RFRA, which mirrored the standard that the Supreme Court had been using before *Smith* to decide claims for free exercise exemptions.[55] The Court in *Boerne* had not addressed the question of whether Congress's reinstatement in RFRA of the pre-*Smith* standard overstepped the bounds of the Establishment Clause. Nor had the Court in the years between *Boerne* and *Cutter* had occasion to address that question in deciding a claim for a RFRA exemption from a federal law, because the Court heard no RFRA cases during those years.[56] It was not until *Cutter* that the Court ever addressed the constitutionality under the Establishment Clause of Congress's codifying the pre-*Smith* standard.

In holding that RLUIPA's promotion of free exercise values by authorizing court-ordered exemptions does not overstep Establishment Clause limits, the Court in *Cutter* emphasized that RLUIPA makes exemptions available only to claimants seeking to lift a weighty burden that the government has placed on their religious liberty. "Foremost," according to the Court, RLUIPA "alleviates exceptional government-created burdens on private religious exercise."[57] In addition, the Court underlined that RLUIPA restrains courts from siding automatically with claimants who can prove weighty burdens on their religious liberty. Rather, courts must give due regard to weighty government justifications for refusing to alleviate even weighty burdens. In particular, as the Court explained, courts must not "elevate accommodation of religious observances over an institution's need to maintain order and safety,"[58] and they also must be mindful of the government's interest in avoiding "the burdens a requested accommodation may impose on nonbeneficiaries."[59] Altogether, from the Court's perspective, RLUIPA is a mandate for "measured," not

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[52] U.S. CONST. art. I, § 8, cl. 3.

[53] *Id.* cl. 1.

[54] RLUIPA invokes Congress's authority under the two clauses in 42 U.S.C. §§ 2000cc(a)(2)(A)–(B) (2018).

[55] *See id.* §§ 2000cc(a)(1), 2000cc-1(a) (RLUIPA); *id.* § 2000bb-1(a)–(b) (RFRA);, McConnell, *supra* note 29, at 1109–10 (discussing pre-*Smith* case law).

[56] When the Court in the year after *Cutter* finally decided a RFRA case, *Gonzales v. O Centro Espirita*, 546 U.S. 418 (2006), it upheld the claim for a RFRA exemption without any mention of the Establishment Clause. It did the same in its next RFRA case, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

[57] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[58] *Id.* at 722.

[59] *Id.* at 720.

one-sided, decisionmaking, and there is "no cause to believe that RLUIPA would not be applied in an appropriately balanced way."[60]

My proposed approach to Establishment Clause limitations on religious exemptions has much in common with the Court's reasoning in *Cutter*. In fact, it has enough in common that I am tempted to claim that, for all practical purposes, the Court has already signed off on it. For a couple of reasons, though, I am content to claim simply that my approach is compatible with *Cutter* and derives at least moderate support from it. First, because the Court in *Cutter* upholds rather than strikes down RLUIPA, there is some ambiguity as to whether the Court regards all of the factors it mentions as essential to upholding the law or whether it might come out the same way even if one or more of those factors were different. Second, because RLUIPA itself speaks in terms of "substantial burden," "compelling governmental interest," and "least restrictive means,"[61] it is unclear whether the Court's Establishment Clause analysis in *Cutter* speaks in the same or comparable terms because those are the terms that would be central to the Court's Establishment Clause analysis of any law that seeks to promote free exercise values. Perhaps, instead, the use of the same or comparable terms in the Court's opinion simply reflects the fact that the Court is focusing on a statute using such terms, and the Court would frame its analysis in very different terms if the law at hand spoke in terms quite unlike those in RLUIPA.

V. BENCHMARKS

Under my proposed approach, a great deal turns on whether the burden on religious liberty lifted by an exemption is "substantial." Moreover, if that burden is substantial, the exemption's fate under the Establishment Clause depends on whether denying the exemption serves a government interest that ranks as "compelling" and whether the means-end relationship between denying the exemption and a compelling government interest qualifies as "necessary." In some instances, a burden on free exercise is so obviously substantial or insubstantial that a judge can decide substantiality without giving much thought to what criteria ought to guide the decision. The same is true for judicial determinations of the compelling or uncompelling nature of a government interest and the necessary or unnecessary character of the means-end relationship. Often, however, deciding one of these matters requires more subtle judgment and needs to be approached in a less intuitive and more structured way. With the magnitude of the burden in question, the court essentially must locate the burden along a spectrum of burdens of greater and lesser magnitude, and to do so, it needs some benchmarks to help it identify, with reasonable objectivity and consistency, the point along the spectrum at which a burden becomes sufficient in magnitude to merit the characterization of "substantial." With the importance of the government interest or relationship

[60] *Id.* at 722.
[61] 42 U.S.C. § 2000cc-1(a) (2018).

between means and end in question, the court's task and the need for benchmarks are much the same.

I suggest that the most logical source for benchmarks is the Supreme Court's and lower courts' case law of federal free exercise during the era of free exercise balancing that preceded *Smith*. That suggestion may seem counterintuitive in light of the *Smith* Court's sharp change in direction from the prior case law and adoption of a different course largely devoid of judicial balancing.[62] The *Smith* Court's rejection of free exercise balancing, however, was a rejection of an approach, not of the determinations made in free exercise cases before *Smith* as to each of the factors in the balance. *Smith* by no means consigned those determinations to the junk heap, and they retain significant value today.

Chief Justice Roberts's opinion for a unanimous Court in 2006 in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[63] goes a long way toward dispelling any possible doubt on the matter. *O Centro Espirita* was the Court's first decision applying RFRA. As noted earlier,[64] RFRA, the federal statute enacted in direct response to *Smith*, includes language tracking the pre-*Smith* balancing test, and the Court in 1997 held that it could constitutionally be applied only to federal, not state and local, governmental actions. *O Centro Espirita* involved a RFRA claim by the small U.S. branch of a Brazilian-based religion that uses in its ceremonies a particular hallucinogen. The claimant sought an exemption from the federal statute barring any use of that substance. The government did not contest that the claimant was substantially burdened by the prohibition – a prerequisite under RFRA for any claimant to be granted an exemption.[65] However, the government maintained that it could show that denying the claimed exemption was necessary to serve a compelling state interest – the showing required by RFRA to justify imposing a substantial burden.[66]

In holding that the government had failed to make that required showing, the Court looked to several pre-*Smith* free exercises cases for guidance. Not surprisingly, the first two that it discussed were *Sherbert v. Verner*[67] and *Wisconsin v. Yoder*[68]— the two decisions that Congress, in its statement of purposes in RFRA, had specifically named as exemplifying the standard of review it had in mind.[69] Later in

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[62] *See supra* text accompanying notes 28–33, 47.

[63] 546 U.S. 418 (2006).

[64] *See supra* text accompanying notes 49–51, 55.

[65] "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. . . ." 42 U.S.C. § 2000bb-1(a) (2018).

[66] "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (2018).

[67] 374 U.S. 398 (1963), discussed *infra* text accompanying notes 105–08, 161–68.

[68] 406 U.S. 205 (1972), discussed *infra* text accompanying notes 109-15, 169-75. For the Court's discussion of *Sherbert* and *Yoder* in *O Centro Espirita*, see 546 U.S. at 431.

[69] "The purposes of this chapter are (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its

the opinion, however, the Court dispelled any possible misimpression that it was willing to give credence to pre-*Smith* free exercise decisions only if Congress specifically instructed it to do so. It discussed three more pre-*Smith* decisions for the light that they shed on the rigor with which the articulated standard of review should be applied.[70]

Perhaps even more striking, as an affirmation of the continued importance of the pre-*Smith* free exercise decisions, is the Court's discussion of one of those decisions in its next RFRA case – the well-known Affordable Care Act exemption case, *Burwell v. Hobby Lobby Stores, Inc.*[71] In enacting the ACA, Congress required a wide range of employers to provide their employees with "a group health plan or group health insurance coverage" that offers "minimum essential coverage."[72] Congress made clear in the ACA that the requisite minimum coverage includes "preventive care" for women, but left it to a unit of the Department of Health and Human Services to promulgate regulations making that mandate more specific.[73] Hobby Lobby and two other closely held for-profit corporations, all firmly opposed to abortion on religious grounds, brought suit under RFRA seeking an exemption from the regulations insofar as the regulations call for coverage of certain contraceptive methods that work in a way that, in the plaintiffs' view, constitutes inducing abortion. In ruling by a 5-4 margin for the RFRA claimants, the Court in an opinion by Justice Alito found that the essential elements for relief set forth in RFRA were met: each claimant was a "person" whose religious exercise was being "substantially burden[ed]" by the federal government, and the government could not show that denying an exemption to the plaintiffs was "the least restrictive means" of serving a "compelling governmental interest."[74]

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application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (2018).

[70] *O Centro Espirita*, 546 U.S. at 435-37. The additional pre-*Smith* decisions that the Court discussed are *Braunfeld v. Brown*, 366 U.S. 599 (1961), *United States v. Lee*, 455 U.S. 252 (1982), and *Hernandez v. Commissioner*, 490 U.S. 680 (1989). *Braunfeld* and *Lee* are discussed *infra* text accompanying notes 97–104, 179–85, 252–53.

[71] 134 S. Ct. 2751 (2014). Although I focus on two Supreme Court applications of RFRA, other federal courts' applications of RFRA also illustrate the continued importance of the pre-*Smith* free exercise precedent. *See, e.g.*,Newdow v. Peterson, 753 F.3d 105, 109–10 (2d Cir. 2014) (relying on *Sherbert* and Thomas v. Review Bd., 450 U.S. 707 (1981)); Kremmerling v. Lappin, 553 F.3d 669, 684–85 (D.C. Cir. 2008) (relying on *Sherbert*, *Yoder*, and *Braunfeld*); Adams v. Comm'r, 170 F.3d 173, 177-80 (3d Cir. 1999) (relying on *Lee* and *Hernandez*). As noted *supra* note 55 and accompanying text, Congress codified in RLUIPA the same balancing formula as the one it had used in RFRA. RLUIPA decisions also illustrate the pre-*Smith* cases' continued significance. *See, e.g.,* Holt v. Hobbs, 135 S. Ct. 853, 863, 866 (2015) (relying on *Sherbert* and *Thomas*); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004) (relying on *Sherbert*, *Thomas*, and Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987)).

[72] 26 U.S.C. §§ 4980H(a), (c)(2); 5000A(f)(2) (2018).

[73] 42 U.S.C. § 300gg-13(a)(4) (2018).

[74] The words in quotation marks are the words used in RFRA. *See* 42 U.S.C. § 2000bb-1 (2018) (quoted *supra* notes 65–66).

In finding that the claimants qualified as "persons" under RFRA despite being for-profit corporations, the Court placed considerable weight on two of its pre-*Smith* free exercise balancing decisions.[75] Especially noteworthy for present purposes, however, is the Court's detailed attention later in the opinion to another pre-*Smith* decision, *United States v. Lee*.[76] At that point, the Court's focus was on whether the government had made the "least restrictive means" showing required by RFRA to justify substantially burdening the claimants' religious exercise.[77] Earlier in the opinion the Court had stated that RFRA's least-restrictive-means requirement "went beyond" the means-end requirement in the pre-*Smith* free exercise cases and "provided even broader protection for religious liberty."[78] Under that view of "least restrictive means," the government, in order to justify not exempting substantially burdened individuals, must show a stronger means-end connection than it had been obliged to show under the pre-*Smith* balancing test.[79]

In and of itself, that interpretation of RFRA's least-restrictive-means requirement is baffling to say the least. Perhaps most obviously, although the term, "least restrictive means," was not *invariably* used in the Court's pre-*Smith* free exercise cases to specify the means-end connection needed to justify not lifting a substantial burden on religious liberty, it certainly was used at times;[80] and when it was used, it was used with no apparent intent to mean anything any different than was meant by the several other terms, such as "necessary" or "essential" means,[81] used

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[75] *Hobby Lobby*, 134 S. Ct. at 2767, 2769-70 (discussing *Braunfeld*); *id.* at 2772–73 (discussing Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617 (1961)).

[76] 455 U.S. 282 (1982), discussed *infra* text accompanying notes 179–85, 252–53.

[77] The Court explicitly declined to decide whether the government had shown the requisite "compelling governmental interest." Instead, the Court assumed for purposes of argument that the government had done so and then focused on whether the least-restrictive-means requirement had been met. *Hobby Lobby*, 134 S. Ct. at 2780.

[78] *Id.* at 2761 n.3, 2767 n.18.

[79] The majority and dissent's somewhat heated exchange as to the meaning of "least restrictive means" in RFRA leaves no doubt that this was the majority's understanding of that term. C*ompare Hobby Lobby*, 134 S. Ct. at 2761 n.3, 2767 n.18 (majority opinion), *with id.* at 2792–93 & n.11 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., dissenting)

[80] *See, e.g.,* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); Thomas v. Review Bd., 450 U.S. 707, 718 (1981). Although *Sherbert*, one of the two pre-*Smith* cases explicitly cited in RFRA for the applicable standard of review, does not use the precise term, "least restrictive means," it uses a formulation that is plainly synonymous After assuming for purposes of argument that the state had a compelling interest in avoiding "spurious claims" for unemployment compensation, the Court held that the means-end connection needed to justify denying the requested religious exemption did not exist because the state could not "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." Sherbert v. Verner, 374 U.S. 398, 407 (1963).

[81] *See, e.g., Lee*, 455 U.S. at 257 ("essential"); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("necessary"). For other formulations, see, for example, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136. 141 (1987) (emphasis added) ("[I]nfringements [of free exercise] must be subjected to *strict scrutiny* and could be justified only by proof by the State of a compelling interest."); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (emphasis added) ("[O]nly those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion."). The Court's use in the pre-*Smith* free exercise case law of "least restrictive means" interchangeably with terms such as "necessary" or "essential" means was very much in keeping with its use of "least restrictive means" (or obviously synonymous terms, see *supra* note 80) in other areas of constitutional law. For example, with

in those cases to indicate the requisite means-end connection. If Congress indeed intended to codify in RFRA a more exacting means-end requirement than the one that was part of the pre-*Smith* balancing test, why would it choose a term to describe that distinctive requirement that was one of several terms used interchangeably in the pre-*Smith* case law to describe the requisite means-end connection in the pre-*Smith* balancing test?[82]

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regard to the means-end connection required by the First Amendment's Free Speech Clause to justify content-based restrictions on speech, see Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (emphasis added) ("[Such restrictions] can stand only if they survive *strict scrutiny*, which requires the Government to prove that the restriction furthers a compelling interest and is *narrowly tailored* to achieve that interest. . . . The Town cannot claim that placing strict limits on temporary directional signs is *necessary* [to serve its interest]. . . ."); Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) (emphasis added) ("[T]he court should ask whether the challenged regulation is the *least restrictive means* among available, effective alternatives."). Similarly, as to the means-end relationship that the state must show to defeat a challenge under the Fourteenth Amendment's Equal Protection Clause to a racial classification:

> *[S]trict scrutiny* must be applied to any admissions program using racial categories or classifications. . . . [T]he reviewing court [must] verify that it is *"necessary"* for a university to use race to achieve the educational benefits of diversity. . . The reviewing court must ultimately be satisfied that *no workable race-neutral alternatives* would produce the educational benefits of diversity. . . .

Fisher v. University of Texas, 570 U.S. 297, 310, 312 (2013) (emphasis added).

[82] This is not the place for me to explain in detail all the reasons that I find so dubious the *Hobby Lobby* Court's interpretation of RFRA's least-restrictive-means requirement. It may be useful, though, for me to discuss briefly two more.

First, that interpretation is very hard to reconcile with the fact that Congress provided in the "Purposes" subsection of RFRA that it was seeking to "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1) (2018). Congress's use of "restore" seems unambiguous – i.e., "to put or bring back into existence or use," https://www.merriam-webster.com/dictionary/restore. In light of the strong negative reaction to *Smith* across the political spectrum – a reaction that plainly fueled the passage of RFRA within a few years – it makes eminent good sense to understand Congress as saying, when it enacted RFRA in 1993, that it wished to bring back into existence the means-end and government interest requirements that existed in the era exemplified by *Sherbert* and *Yoder*. On the other hand, if, as the Court in *Hobby Lobby* maintained, Congress in RFRA intended to put in place a means-end requirement different from the one reflected in *Sherbert*, *Yoder*, and the Court's other pre-*Smith* free exercise case law, its choice of words was incongruous. (Note that although RFRA does not include a definition of "compelling interest test" in its "Definitions" section, *id.* §2000bb-2, it clearly is using that term in the Act's Purposes subsection as a shorthand for "compelling governmental interest" and "least restrictive alternative" – the standard-of-review requirements set forth in *id.* §2000bb-1.)

Second, as authority for its interpretation of "least restrictive means," the Court in *Hobby Lobby* relied on some language in Justice Kennedy's opinion for the Court in *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997), the decision holding that Congress lacked constitutional authority under Section Five of the Fourteenth Amendment to bind state and local governments by the constraints set forth in RFRA. "In *City of Boerne v. Flores*," the Court in *Hobby Lobby* stated, "we wrote that RFRA's 'least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify.'" 134 S. Ct. at 2761 n.3. The language quoted from *Boerne* was part of a sentence that reads, "In addition, the Act imposes in every case a least restrictive means requirement – a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify – which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations." *Boerne*, 521 U.S. at 535.

Be that as it may, the important point for present purposes is that, given the *Hobby Lobby* Court's interpretation of the least-drastic-means requirement, the deference that it showed to *United States v. Lee*,[83] a pre-*Smith* free exercise decision, sent a strong message that the pre-*Smith* case law continued to be of importance. The Court in *Hobby Lobby* went on at considerable length explaining why its finding in the case at hand that the government had *not* met the RFRA means-end requirement should be seen as consistent with its finding in *Lee* that the government in that case *had* met the free exercise means-end requirement.[84] "*Lee* was a free exercise, not a RFRA, case," the Court noted, "but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes [from which Lee sought an exemption]."[85] If, however, as the Court in *Hobby Lobby* maintained, the RFRA means-end requirement is more demanding than the one applied in *Lee* and other pre-*Smith* free exercise cases, the Court in *Hobby Lobby* had no real obligation to explain why the government would not prevail in *Hobby Lobby* even though it had prevailed in *Lee*. After all, the natural assumption would be that the difference in means-end requirements explains the difference in results.

Perhaps the *Hobby Lobby* Court's eagerness to reconcile its resolution of the case at hand with the result in *Lee* to some extent reflected reticence on the part of one or more of the Justices in the majority to put much weight on the notion that the RFRA and pre-*Smith* means-end requirements really are different. At a minimum, though, it is hard to see the Court's rather extended effort to reconcile the results of the two cases under the same standard as anything but an affirmation that *Lee* and the Court's pre-*Smith* free exercise case law as a whole remain very relevant today.[86]

The Court in *Hobby Lobby* may have been correct in interpreting the rather vague language that it quoted from *Boerne* to mean that RFRA imposed a stronger means-end requirement than existed in the pre-*Smith* balancing test. It is very doubtful, however, that the quoted language deserved nearly as much weight as the Court in *Hobby Lobby* gave it. It was not a summation of any discussion that preceded or followed it in the Court's opinion. Nor was it accompanied by any sort of documentation. Instead, it was simply a mid-sentence observation of the sort that, in an opinion spanning twenty-five pages in the U.S. Reports, probably reflected relatively little thought on the part of the Justice who authored it and even less on the part of the Justices who joined the opinion.

Indeed, if the quoted language from *Boerne* was as meaningful as the *Hobby Lobby* Court maintained, one would have expected that, nine years after *Boerne* and eight years before *Hobby Lobby*, the unanimous Court in *Gonzales v. O Centro Espirita*, 546 U.S. 418 (2006), discussed *supra* text accompanying notes 63-70, would not have been so inattentive to it. Writing for the Court, Chief Justice Roberts not only did not refer to that language when he described the RFRA test; he described the test in terms – RFRA"adopts a statutory rule comparable to the constitutional rule rejected in *Smith*," *id.* at 424 – that belie the notion that there was anything at all novel about its means-end requirement.

[83] 455 U.S. 252 (1982).

[84] *Hobby Lobby*, 134 S. Ct. at 2783–84.

[85] *Id.* at 2784.

[86] The Court in *Hobby Lobby* gave no indication that it saw any possible constitutional problems with interpreting RFRA's means-end requirement not only as *more* rigorous than the means-end requirement in the pre-*Smith* free exercise precedent but as *much more* rigorous. It described the RFRA requirement as "exceptionally demanding," *id.* at 2780 – a description that, as I discuss *infra* text

Lastly, as further support for the logic of looking to the pre-*Smith* case law for benchmarks to guide application of my proposed approach, I would like to offer an analogy. I suggest that the Supreme Court's and lower courts' determinations prior to *Smith* of whether burdens were substantial, government interests were compelling, and means-end relationships were necessary remained meaningful after *Smith* in much the same way as the body of federal general common law developed under *Swift v. Tyson*[87] continued to be meaningful even after *Swift*

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accompanying notes 176-78, 216-25, few observers would use to characterize the pre-*Smith* Court's application of the free exercise balancing test's means-end requirement.

Writing in dissent in *Hobby Lobby*, Justice Ginsburg raised constitutional concerns with what she called the Court's "immoderate reading of RFRA." *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, dissenting). In her view, the Court had "ventured into a minefield," and the mines lurking beneath the surface were a host of Establishment Clause problems. *Id.* She denied that RFRA's least-restrictive-means requirement was intended to be more demanding than the means-end requirement in the pre-*Smith* case law, and she maintained that "[m]isguided by its errant premise that RFRA moved beyond the pre-*Smith* case law," the Court "falters" not only in deciding whether the least-restrictive-means requirement is met but "at each step of its analysis." *Id.* at 2792–93. From her perspective, the *Hobby Lobby* Court was able to find a substantial burden on the claimants' religious liberty only because it was working with a conception of "substantial burden" significantly more protective of religious exercise than the conception reflected in the Court's pre-*Smith* case law. By the same token, in her view, the Court was able to find that the government had not met the least-restrictive-means requirement only because it was working with a conception of that requirement significantly more protective of religious exercise than the conception reflected in the Court's pre-*Smith* case law.

I believe Justice Ginsburg's warning that an "immoderate reading of RFRA" raises serious Establishment Clause concerns is very apt. Does affording religious exercise substantially more protection than it would be afforded under the pre-*Smith* free exercise balancing test raise serious Establishment Clause concerns? As indicated in the remainder of this Article, I believe the answer is "yes." Was the Court in *Hobby Lobby* so protective of religious exercise that, in ordering an exemption for the plaintiffs, it essentially ordered an Establishment Clause violation? That depends on whether the magnitude of the burden and the relationship between means and end are best understood as Justice Ginsburg or the Court understood them. Both issues prompted not only extensive debate between the majority and dissent in *Hobby Lobby*, but also a range of views among commentators, *see, e.g.,*Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014); Ira S. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35 (2015); William P. Marshall, *Bad Statutes Make Bad Law*: Burwell v. Hobby Lobby, 2014 SUP. CT. REV. 71; Eric Rassbach, *Is* Hobby Lobby *Really a Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations*, 42 HASTINGS CONST. L.Q. 625 (2015), and it is beyond the scope of this Article to stake out and defend a position on the issues.

For now, I only underline that from the *Hobby Lobby* Court's perspective, the resolution of both issues did not present a close question. *See Hobby Lobby,* 134 S. Ct. at 2759 (majority opinion) ("If these consequences do not amount to a substantial burden, it is hard to see what would."); *id.* ("[I]n order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test."). In the Court's view, the validity of granting the requested exemption did not turn on interpreting the burden and means-end requirements under RFRA any differently than the pre-*Smith* precedent had interpreted those requirements under the Free Exercise Clause. The dissent plainly disagreed.

[87] 41 U.S. (16 Pet.) 1 (1842). *Swift* limited federal diversity courts' lawmaking authority to questions of "general," rather than "local," law. On the "particularly elusive" nature of that distinction, see CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 54 (8th ed. 2017).

came under the "sledge-hammer blows"[88] of *Erie Railroad Co. v. Tompkins*.[89] Even though the Court in *Erie* repudiated *Swift*'s basic approach to the lawmaking authority of federal courts in diversity cases, the Court subsequently has drawn on the *Swift*-era precedents in fashioning federal common law to resolve issues that are "essentially of a federal character"[90] but not covered by the Constitution or a federal statute.[91] In a similar vein, even though *Smith* repudiated the preexisting approach to federal free exercise rights, courts should be guided by the pre-*Smith* case law in making the determinations required by the proposed approach to Establishment Clause limitations on religious exemptions.

VI. SUBSTANTIAL AND INSUBSTANTIAL BURDENS

After examining in Section A the benchmarks supplied by leading federal free exercise precedents in the years prior to *Smith*, I turn in Section B to the weight to be given to a religious claimant's characterization of the magnitude of the burden. In Section C, I conclude my discussion of deciding substantiality of the burden by using as an illustration the burden on religious liberty experienced by the baker in the *Masterpiece Cakeshop* case.

A. How Substantial Is "Substantial"? Lessons from the Era of Free Exercise Balancing

Taken together, four Supreme Court free exercise cases decided in the thirty years before *Smith*—*Braunfeld v. Brown* in 1961,[92] *Sherbert v. Verner* in 1963,[93] *Wisconsin v. Yoder* in 1972,[94] and *Tony & Susan Alamo Foundation v. Secretary of*

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[88] Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 295 (1946).

[89] 304 U.S. 64 (1938).

[90] United States v. Standard Oil Co., 332 U.S. 301, 307 (1947).

[91] *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), is illustrative. As the Court explained in relying on *United States v. National Exchange Bank,* 214 U.S. 302 (1909), for guidance in crafting a federal common law rule for the commercial issue at hand:

> The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. . . . The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. . . . The desirability of a uniform rule is plain. And while the federal law merchant developed for about a century under the regime of *Swift v.* Tyson, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions. *United States v. National Exchange Bank*, 214 U.S. 302, falls in that category. . . .

Clearfield Trust, 318 U.S. at 366-67. For more on the nature of the federal common law that *Erie* left the federal courts free to develop, see WRIGHT & KANE, *supra* note 87, § 60.

[92] 366 U.S. 599 (1961).

[93] 374 U.S. 398 (1963).

[94] 406 U.S. 205 (1972).

Labor in 1985[95]—provide a good sense of the point at which the pre-*Smith* Court, applying its free exercise balancing test, would find that a burden on free exercise is sufficiently weighty to qualify as "substantial." To avoid creating a misimpression, I should note that although the free exercise claimants in two of the four cases selected for illustration managed to persuade the Supreme Court to grant the requested exemptions, free exercise claimants' success rate in the high court between 1960 and 1990 was well below fifty percent.[96]

By a 6-3 vote, the Court in *Braunfeld* rejected a free exercise challenge by Orthodox Jewish merchants to a Pennsylvania criminal statute prohibiting the sale on Sunday of various commodities, including some types that they sold. Unless they were willing to break with their religious tenets and work on Saturday, the Jewish Sabbath, the statute had the practical effect of denying them a valuable option—working six, rather than five, days a week—that merchants who observed a Sunday Sabbath or no Sabbath at all were free to enjoy. The Orthodox Jewish merchants maintained that an exemption was appropriate because closing on Sundays would cause them to "suffer substantial economic loss," put them in a position of "serious economic disadvantage" relative to their competitors, and render at least one of them "unable to continue in his business, thereby losing his capital investment."[97]

Writing for a plurality of four,[98] Chief Justice Warren did not deny that the Sunday closing law was apt to cause the Orthodox Jewish merchants some hardship, but he downplayed its significance. He repeatedly called attention to the fact that the law, though making it more difficult for them to observe the Jewish Sabbath, was not prohibiting them from doing so. They were not, the Chief Justice explained, "faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution."[99] There were, he pointed out, "alternatives open to appellants" that enabled them to be faithful to both their religion and the law—continuing in their present business and closing both Saturday and Sunday, or "engaging in some other commercial activity which does not call for either Saturday or Sunday labor."[100]

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[95] 471 U.S. 290 (1985).

[96] There were fourteen losing and five winning free exercise claims during those years. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1458 (1992) (listing the thirteen losing and four winning free exercise claims after *Sherbert*, which translate to fourteen losses and five wins when the results in *Braunfeld* and *Sherbert* are added in). For reasons discussed *infra* note 131, the 5-14 won-lost record is actually deceptively high as an indicator of the Court's level of receptivity to free exercise claimants from 1960 to 1990.

[97] *Braunfeld*, 366 U.S. at 601–02 (quoting the plurality opinion's summary of the merchants' arguments).

[98] The Chief Justice's plurality opinion was joined by Justices Black, Clark, and Whittaker. The other two votes for rejecting the merchants' free exercise challenge came from Justices Frankfurter and Harlan.

[99] *Braunfeld*, 366 U.S. at 605; *see also id.* (acknowledging that some cases involve "the choice to the individual of either abandoning his religious principle or facing criminal prosecution," but maintaining that "this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants").

[100] *Id.* at 605–06.

Conceding that the appellants' taking advantage of either alternative "may well result in some financial sacrifice," the Chief Justice underlined that they were in a position far preferable—"wholly different"—than "when the legislation attempts to make a religious practice itself unlawful."[101] According to the Chief Justice, the Sunday closing law "imposes only an indirect burden on the exercise of religion."[102] He acknowledged that it would be "a gross oversimplification" to say that any law burdening free exercise only indirectly is for that reason "unassailable."[103] He found, however, that the state's interest in "provid[ing] a weekly respite from all labor" and "set[ting] one day of the week apart from the others as a day of rest, repose, recreation and tranquility" was more than adequate to justify requiring the Orthodox Jewish merchants to bear the indirect burden that the law placed on them.[104]

Unlike the free exercise claimants in *Braunfeld*, those in *Sherbert* and *Yoder* satisfied the Court's substantial burden requirement and ultimately prevailed on free exercise grounds. Nothing decided or said by the Court in *Sherbert* or *Yoder*, however, contradicts the message of *Braunfeld* that the operative bar for substantiality is quite high.

In *Sherbert*, a Seventh-day Adventist was fired by her employer, a textile mill operator, for refusing to work on Saturdays, her religion's Sabbath. After she was unable to find work at another mill that did not also require working Saturdays, she applied for state unemployment compensation benefits. The state commission charged with administering the benefits statute ruled that her religious reason for refusing jobs requiring Saturday work did not constitute "good cause" for her refusals, within the meaning of the statute, and that she was therefore ineligible for the benefits.[105]

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[101] *Id.* at 606. In a lengthy separate opinion addressed not only to *Braunfeld* but also to its three companion cases on Sunday closing laws, Justice Frankfurter described the burden on free exercise in *Braunfeld* in somewhat stronger terms—"an undeniable financial burden"—than the Chief Justice had used. McGowan v. Maryland, 366 U.S. 420, 521 (1961) (Frankfurter, J., joined by Harlan, J., concurring in the judgment in *Braunfeld* and its companion cases) However, Justice Frankfurter also highlighted some factors that in his view made the burden less than oppressive. The statute does not, he pointed out, "make criminal" or "place under the onus of civil or criminal disability" any action that is "prescribed by the duties" of Judaism. *Id.* Moreover, "the measure of the burden is not determined by fixed legislative decree, beyond the power of the individual to alter. . . . [T]he legislature may have concluded that its severity might be offset by the industry and commercial initiative of the individual merchant." *Id.* Particularly in light of (a) Justice Frankfurter's use of only a reasonableness standard to decide the constitutionality of the legislature's not exempting Orthodox Jewish merchants from the statute's prohibition and (b) his conclusion that the standard was met ("the legislative choice of a blanket Sunday ban applicable to observers of all faiths cannot be held unreasonable," *id.* at 520), he, like the Chief Justice, is best understood as treating the burden on free exercise as insubstantial.

[102] *Braunfeld*, 366 U.S. at 606.

[103] *Id.* at 607.

[104] *Id.* The Orthodox Jewish merchants' free exercise challenge to the Sunday closing law was both to the law on its face and to the law as applied to them. The Court rejected both prongs of the attack, *id.* at 609, refusing to strike down the law in its entirety or to carve out an exemption from the law in favor of the free exercise claimants.

[105] Sherbert v. Verner, 374 U.S. 398, 399-401 (1963).

Justice Brennan, one of the *Braunfeld* dissenters, wrote an opinion of the Court in *Sherbert* for a 7-2 majority that included Chief Justice Warren, the author of the *Braunfeld* plurality opinion, and Justice Black, the only other member of that plurality still on the Court. Acknowledging that the state unemployment compensation law, as authoritatively interpreted by the state high court, placed a burden on the discharged employee that the *Braunfeld* plurality would have called "indirect," Justice Brennan quoted that plurality's recognition that burdens may be unconstitutional even if indirect.[106] He then underlined the seriousness of the burden in the case at hand:

> The ruling [denying an award of unemployment benefits] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[107]

After "consider[ing] whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right"[108] and concluding that no such interest existed, Justice Brennan held in favor of her free exercise claim.

Yoder involved a Wisconsin statute requiring parents to ensure their children's attendance at a public or private school until the age of sixteen. Noncompliance was punishable by a fine or imprisonment or both. Several Amish parents who refused to send their children to school after eighth grade were convicted of violating the statute despite their claim that they were entitled to a court-ordered exemption under the Free Exercise Clause.[109]

Writing for a Court that was unanimous except for one Justice's partial dissent,[110] Chief Justice Burger ruled that the Free Exercise Clause required exempting the Amish parents from the criminal statute. Citing for authority only the *Braunfeld* plurality's discussion of the difference between the burden on free exercise in *Braunfeld* and the burden on those facing criminal prosecution for adhering to their religious beliefs,[111] the Chief Justice found the burden on Amish free exercise to be "not only severe, but inescapable."[112] According to the Chief Justice, schooling after eighth grade implicates "attitudes, goals, and values" in such "sharp conflict" with the "fundamental mode of life mandated by the Amish religion" that requiring such

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[106] *Id.* at 403–04.

[107] *Id.* at 404.

[108] *Id.* at 406.

[109] Wisconsin v. Yoder, 406 U.S. 205, 207–09 (1972).

[110] In his partial dissent, Justice Douglas insisted that the Court needed to reach the issue of whether the defendants' children shared the defendants' religious objection to schooling after eighth grade. *Id.* at 241–46 (Douglas, J., dissenting in part).

[111] *Id.* at 218 (citing Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

[112] *Id.*

schooling for Amish children poses "a very real threat of undermining the Amish community and religious practice as they exist today."[113] It "would gravely endanger," he added, "if not destroy the free exercise of respondents' religious beliefs."[114]

In short, although *Sherbert* and *Yoder* are proof that the operative conception of substantial burden in the Court's pre-*Smith* free exercise case law is not insuperable, they do not alter the basic message sent by *Braunfeld*: a burden on free exercise must be formidable to qualify as substantial. Most obviously, the Court's opinions in *Sherbert* and *Yoder* underline the weightiness of the burden at hand. In addition, far from suggesting discontent with the way in which the substantial-burden requirement was applied in *Braunfeld*, the Court in *Sherbert* and *Yoder* was careful both to cite *Braunfeld* as illuminating the substantial-burden requirement and to highlight the difference in magnitude between the burden in *Braunfeld* and the one in the case at hand. Lastly, the willingness, noted above, of Chief Justice Warren, the author of the *Braunfeld* plurality, and Justice Black, the only other member of that plurality still on the Court at the time of *Sherbert*, to join the Court's opinion in *Sherbert* suggests that the two cases' conception of substantial burden are not materially, if at all, different.[115]

The *Alamo Foundation* case, the last of the four Supreme Court cases to be discussed, was decided more than a decade after the three other cases and only several years before *Smith*. The message that it sends about the Court's operative conception of substantiality fits comfortably with the ones sent by the three earlier cases.

Alamo Foundation involved the applicability of the Fair Labor Standards Act's minimum wage, overtime, and recordkeeping requirements to individuals staffing a nonprofit religious foundation's commercial activities. The individuals engaged in the commercial activities were mainly people who had fallen into alcohol or drug abuse or criminal activity but then had been converted and rehabilitated by the foundation. Although the foundation called them "associates," rather than "employees," and did not compensate them with cash salaries for their role in the foundation's income-producing activities, the foundation did provide them with food, shelter, and other in-kind benefits.[116]

In a unanimous opinion by Justice White, the Supreme Court held, as a matter of statutory interpretation, that the Act applied to the associates' activities. The Court then turned to the foundation's argument that applying the Act to the associates' activities would violate their free exercise rights by forcing them, contrary to their religious convictions, to receive wages.[117] The Court noted that one of the affected individuals had testified at trial that "no one ever expected any kind of

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[113] *Id.* at 217–18.

[114] *Id.* at 219.

[115] In light of the almost complete turnover in the Court's membership between *Braunfeld* and *Yoder*, it is very difficult to draw any inference about consistency between those two cases' conception of substantial burden based on the voting patterns of Justices who sat in both cases.

[116] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 292-93 (1985).

[117] The Court acknowledged that the foundation had standing to raise the associates' free exercise rights. *Id.* at 303 n.26.

compensation, and the thought is totally vexing to my soul," while another had testified that "to even be considered to be forced to take a wage . . . offends my right to worship God as I choose."[118] The Court emphasized, however, that the Free Exercise Clause does not authorize courts to carve out an exemption unless a law "actually burdens" religious exercise,[119]and the Court found no such burden. No one, the Court pointed out, was being forced to take "cash wages" because the Act defines "wage" to include in-kind benefits.[120] Given that the associates were already receiving in-kind benefits, it would appear, the Court continued, that "application of the Act will work little or no change in their situation."[121] Finally, if the associates for some reason felt burdened by being paid in in-kind benefits, "there is nothing in the Act to prevent the associates from returning the amounts to the Foundation."[122]

When the federal courts of appeals apply Supreme Court case law, they speak with authority only second in importance to the Supreme Court's as to the meaning of that case law. A consensus on their part as to the meaning of particular cases therefore deserves considerable weight. According to a detailed study of free exercise cases decided by the federal courts of appeals in the ten years before *Smith*, the courts' decisions in those cases reflected broad agreement among the courts that the Supreme Court's operative conception of substantial burdens was one that treated a burden as substantial only if it was highly onerous.[123] Of the various cases discussed in the study, two, read in tandem, illustrate particularly well the conception of substantial burden reflected in the federal appellate cases of that era. One is a Sixth Circuit decision in 1983, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,[124] and the other is an Eighth Circuit decision the following year, *Quaring v. Peterson*.[125]

The *Lakewood* case involved a congregation's free exercise challenge to a city zoning ordinance limiting the construction of places of worship to areas not zoned for residential use. After worshipping for a number of years in a storefront in one of the city's nonresidential areas, the congregation had purchased a lot in an area zoned exclusively for residential use. It then applied unsuccessfully to the zoning board for

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[118] *Id.* at 303 n.27.

[119] *Id.* at 303.

[120] *Id.* at 303–04.

[121] *Id.*at 304.

[122] *Id.* The Court disposed in similar manner of the claim that the Act's recordkeeping requirements seriously burdened the associates' religious exercise: "This claim rests on a misreading of the Act. Section 211 imposes recordkeeping requirements on the employer, not on the employees." *Id.* at 303 n.27.

[123] *See* Ryan, *supra* note 96, at 1417, 1421. Within several years, the student author of the Note had begun an illustrious career at the University of Virginia, first as a member of the law faculty and, since 2018, as university president. McGregor McCance, *Board of Visitors Selects James E. Ryan as University of Virginia's Next President*, UVATODAY (Sept. 15, 2017), https://news.virginia.edu/content/board-visitors-selects-james-e-ryan-university-virginias-next-president [https://perma.cc/3WST-35CB].

[124] 699 F.2d 303 (6th Cir. 1983).

[125] 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided court sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985). Because the eight Justices sitting on the case split 4-4 on whether to affirm or reverse, there was no written opinion in the Supreme Court.

a variance and followed up with a free exercise challenge in federal district court that also failed.[126]

In affirming on appeal, the Sixth Circuit concluded that the congregation had failed to make the threshold showing of burden needed to trigger more than rational basis review. In reaching that conclusion, the court focused on three Supreme Court cases: *Sherbert* and *Yoder* as "primary examples of government actions which infringe religious freedom," and *Braunfeld* as "an informative contrast."[127] After acknowledging that requiring the congregation to conform to the zoning ordinance imposed "an indirect financial burden and a subjective aesthetic burden" on the congregation,[128] the court distinguished those burdens from the type found substantial in *Sherbert* and *Yoder*[129] and equated them with the type found insubstantial in *Braunfeld*.[130]

According to the study of federal appellate free exercise decisions in the ten years before *Smith*, the free exercise claimants prevailed in only twelve of the ninety-seven cases decided.[131] *Quaring* was in that select group of twelve. Frances Quaring sued in federal court for an exemption from a Nebraska statute limiting the issuance of driver's licenses to applicants who allow the DMV to take their photo and put it on the wallet-size license card that drivers must have on hand when driving. Describing herself as a Christian who does not adhere to the beliefs of any particular denomination, Quaring maintained that she would be violating the Second Commandment's prohibition on graven images[132] if she allowed her photo to be taken for this or any other purpose or if she had in her possession any photo or

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[126] *Lakewood*, 699 F.2d. at 303–05.

[127] *Id.* at 305-06.

[128] *Id.* at 307.

[129] *See id.* ("[T]his is not a case where the Congregation must choose between exercising its religious beliefs and forfeiting government benefits or incurring criminal penalties.").

[130] As the court explained:

> The Supreme Court's statement in *Braunfeld* accurately summarizes our conclusion about the nature of the Congregation's interest and the nature of the City's burden on that interest. The Lakewood ordinance 'simply regulates a *secular activity* and, as applied to the appellants, operates so as to make the practice of their religious beliefs *more expensive*.' [*Braunfeld*,] 366 U.S. at 605 (emphasis added). . . .

Lakewood, 699 F.2d at 307.

[131] Ryan, *supra* note 96, at 1417. Statistically, the record of free exercise claimants in the Supreme Court during those years seems quite a bit better: three victories out of a total of ten cases. *See id.* at 1458 (listing cases won and lost). However, those statistics are misleading for a variety of reasons. Most obviously, because the Supreme Court is highly selective in exercising its discretionary review authority and essentially decides only cases it is interested in deciding, the sample size is not only very small but also unrepresentative of the cases in the pipeline. In addition, the three free exercise victories in the Court all came in a very narrow range of cases—unemployment compensation cases—that could have been decided differently only if the Court was prepared to overrule a major precedent, *Sherbert*.

[132] The Second Commandment states, "Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth." *Exodus* 20:4; *Deuteronomy* 5:8.

depiction of people, animals, plant life, etc.[133] After the district court ruled in her favor, the Eighth Circuit affirmed by a 2-1 vote.

Before addressing the magnitude of the burden on Quaring's free exercise, the majority opinion underlined that although her beliefs were "unusual in the twentieth century," they qualified as religious under the courts' "expansive definition of religion" under the First Amendment.[134] They had "some support from historical and biblical tradition,"[135]and it was "clear" that Quaring sincerely held them.[136]

Turning to the nature of the burden, the court described it as "unmistakable."[137] The photograph requirement, the court explained, made Quaring choose between "following an important precept of her religion or forgoing the important privilege of driving a car."[138] According to the court, the burden placed on Quaring by making her choose between driving privileges and her religious beliefs was "indistinguishable" from the burden that the Supreme Court found unconstitutional in *Sherbert*, where forfeiting unemployment compensation benefits was the cost of staying true to one's religion.[139]

By 1984, the year *Quaring* was decided, so many people were already so dependent on driving to meet their and their family's everyday needs that one might have expected the court simply to offer generalizations to justify characterizing driving as an "important" privilege. Notably, however, the majority instead underlined the special importance of driving to Quaring. "Quaring needs to drive a car," the court pointed out, "for numerous daily activities, which include managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home."[140]

Writing in dissent, Judge Fagg maintained that the burden was no more than "incidental."[141] True, he conceded, "Quaring may experience daily inconvenience because she cannot drive a motor vehicle," but "[h]er difficulties . . . are not insurmountable and she is not the only person that has been faced with the need to make life-style adjustments precipitated by nonconformity with driver's license

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[133] Quaring v. Peterson, 728 F.2d 1121, 1122-23 (8th Cir. 1984), *aff'd by an equally divided court sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985)

[134] *Id.* at 1123.

[135] *Id.* at 1124. Drawing on several sources, including the testimony at trial of a religious studies professor and material in the *Encyclopedia Judaica* and elsewhere, the court described in considerable detail the support for Quaring's beliefs in some Jewish interpretations of the Second Commandment, especially interpretations from long ago but to some extent "modern-day" ones as well. *Id.* at 1124 & n.3.

[136] *Id.* at 1125.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 1129 (Fagg, J., dissenting).

requirements."[142] For Judge Fagg, the Supreme Court precedent most obviously in point was *Braunfeld*, not *Sherbert*.[143]

Perhaps the reason that the majority focused sharply on Quaring's special situation and insisted on equating the burden with the one found impermissible in *Sherbert* was simply that it wanted to counter as forcefully as possible the dissent's much less sympathetic characterization of the burden. Perhaps, however, at least in part, the reason was that the court recognized both that the Supreme Court's free exercise case law set the bar for substantiality quite high and that the burden at hand was not one that easily cleared the bar.

As I suggested at the start of this section, in incorporating into my proposed approach the relatively rigorous standard of substantiality applied in free exercise cases prior to *Smith*, I rely in part simply on respect for the accumulated wisdom of precedent. In addition, however, I rely on my own conviction that the standard reflected in precedent struck an appropriate balance between (a) a value—religious liberty—of the highest constitutional order and (b) the latitude needed by legislatures to govern effectively in what Chief Justice Warren in *Braunfeld* called "a cosmopolitan nation made up of people of almost every conceivable religious preference."[144] On the one hand, if, in such a religiously diverse society, a slightly more than minimal burden on some persons' religious liberty were enough to trigger application of the necessary-to-a-compelling-interest test, the potential for exemptions to undermine the efficacy of much lawmaking would be profound. On the other hand, in a nation in which legislators depend for their election and reelection on appealing to the will of the majority, legislators are often unaware of, or insensitive to, the impact that their laws will have on religious minorities. Under the circumstances, if the threshold of substantiality is so high that it is surpassed only in the most egregious cases, religious liberty, especially for religious minorities, would be seriously shortchanged. In my view, the standard of substantiality reflected in the pre-*Smith* case law represents a sound middle ground.

B. "Substantial" from Whose Perspective?

In determining in the years before *Smith* whether a burden on free exercise was sufficient in magnitude to require strong government justification, the Supreme Court took into account, but did not treat as determinative, the free exercise claimant's characterization of the burden. The Court's analysis of burden in *Braunfeld* and *Alamo Foundation*, summarized above, is illustrative. In both cases, the Court properly proceeded on the assumption that the magnitude of the burden is ultimately a matter for judicial determination. For a court to determine magnitude of the burden simply by deferring to the religious claimant's characterization of

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[142] *Id.* at 1128.

[143] In summarizing his reasons for rejecting Quaring's claim, Judge Fagg quoted for authority a couple of sentences from the plurality opinion in *Braunfeld*, *id.* at 1128–29, but he made no mention of *Sherbert* anywhere in his opinion.

[144] Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (plurality opinion).

magnitude essentially, and wrongly, delegates to the claimant the authority to resolve a legal issue within the court's responsibility and competence to resolve.[145]

Except in the most extraordinary circumstances, courts do, and should, defer to a free exercise claimant's representation that the belief allegedly burdened by government action qualifies as "religious" for purposes of the First Amendment. The Eighth Circuit's readiness, discussed above, to treat Quaring's "unusual" beliefs as "religious" exemplifies such deference. For courts to proceed otherwise and come to an independent determination whether the belief constitutes a sound or preferred understanding of the religion that the claimant purports to follow would enmesh courts in the resolution of questions of religious doctrine in a way that strikes at the heart of the Establishment Clause and its implicit prohibition on "active involvement of the sovereign in religious activity."[146] Such exercises of judicial autonomy would also be antithetical to core values of the Free Exercise Clause—in particular, its respect for individual freedom to adopt a non-orthodox understanding of the precepts of one's religion.[147]

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[145] *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94 (2017); Anna Su, *Varieties of Burden in Religious Accommodations*, 33 J.L. & RELIG. (forthcoming 2018), *available at* https://ssrn.com/abstract=3060692 [https://perma.cc/Y6QN-T8C9].

[146] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[147] *Thomas v. Review Board,* 450 U.S. 707 (1981), is probably the Court's most important statement of principles on the matter. Eddie Thomas quit his job at an Indiana factory when he was transferred from a department that made sheet steel for industrial uses to a department that made turrets for military tanks. He gave as his reason for quitting that, as a Jehovah's Witness, he believed that he should not be engaged in any work that is part of the process of producing arms for warfare. *Id.* at 709-10.

When Thomas applied for unemployment compensation under the Indiana Employment Security Act and reiterated that reason for quitting the job, the state board charged with administering the Act rejected his application on the ground that his reason for quitting did not come within Act's "good cause" requirement. He successfully appealed to a state intermediate appellate court, which ruled in his favor on federal free exercise grounds. However, the Indiana Supreme Court reversed, holding that his claim was not "religious" within the meaning of the Free Exercise Clause.

In reversing on that ground, the state high court relied in part on what it perceived as logical inconsistencies in Thomas's beliefs. In particular, Thomas had testified at trial that he would be comfortable doing certain work that, in the high court's view, was logically indistinguishable from the type of work that he actually declined to do. *Id.* at 715. The state court also relied on what it saw as Thomas's misunderstanding of the tenets of his religion. It pointed out that another Jehovah's Witness had testified at trial that Jehovah's Witnesses are not barred by their faith from doing the type of work Thomas maintained he could not do. *Id.*

By an 8-1 vote, the U.S. Supreme Court reversed. Writing for the majority, Chief Justice Burger maintained that "[t]he determination of what is a 'religious' belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. "Thomas drew a line," the Chief Justice went on, "and it is not for us to say that the line he drew was an unreasonable one." *Id.* Moreover, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id.* at 715-16. Although the Chief Justice cautioned that judicial deference to a free exercise claimant's characterization of a belief or practice as "religious" should not be wholly unlimited, he simultaneously affirmed how very broad that deference should be: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715.

It is a very different matter, however, for courts to come to an independent determination whether the burden that the state has placed on adherence to a particular belief is as significant as the free exercise claimant maintains. Although courts cannot second-guess the religious claimant as to what actions his or her religion forbids or requires, the magnitude of the burden almost never turns simply on that question. The rare instances in which it does are when the claimant faces the stark choice of (a) do as the law dictates and suffer the personal turmoil and other adverse consequences of violating one's religion or (b) do as one's religion dictates and suffer incarceration and other adverse consequences of violating the law. Far more frequently, the claimant faces a choice that is not so stark, and the questions that need to be resolved to determine the magnitude of the burden include various ones of a nonreligious nature.

Consider, for example, the choice faced by the Orthodox Jewish merchants in *Braunfeld*[148] and the various nonreligious questions relevant to determining the magnitude of the burden on their religion. It was not a stark choice between following the law or following their religion. It was hardly inconceivable for them to follow both. At least in theory, there were a number of ways for them to do so. Most obviously, they could comply with the demands of their religion by not working on Saturday, comply with the demands of the state's Sunday closing laws by not working on Sunday, and make do with what they were able to earn Monday through Friday by cutting back on their costs of doing business or by reducing their personal lifestyle expenses, or both. Alternatively, they could rest on both days and try to make up the lost income from only working five days a week by extending their hours on weekdays or by adopting changes to their ways of doing business that would enable them to earn more per hour than they had been earning. Or they could diversify their businesses to include a component in which they could be engaged on Sundays without running afoul of the closing laws. Or they could change careers to a profession like law that the state would allow them to practice day and night on Sundays if they wished.

To decide the magnitude of the burden on the merchants, compiling a list of conceivable courses of action is a good start, but it is no more than that. The next, and much more difficult, step is to evaluate for each alternative its practical availability and its likelihood of achieving the desired effect. Such an evaluation entails answering a host of questions of a nonreligious nature.

The burden analysis is somewhat different with a burden stemming from a law conditioning eligibility for a government benefit on behavior antithetical to some people's religion, but the magnitude of the burden is similarly dependent on the answers to a variety of questions of a nonreligious nature. Consider, for example, the burden in *Quaring* stemming from Nebraska's driver's license photo requirement.[149] Whether or not the photo requirement substantially burdened Quaring's religion depended on how much pressure an inability to drive would exert on her decision

[148] *See supra* text accompanying notes 97-104.
[149] *See supra* text accompanying notes 132–43.

whether to abide by her religion, and the answer to that question of degree would turn on the answers to a variety of questions of a practical and nonreligious nature. To what extent, for example, would having the ability to drive contribute to her success in her business activities and to her having a sense of fulfillment in her personal activities? If she were unable to drive, what alternative means of transportation would exist for her? How easily accessible and affordable would they be? Were there ways that she could revise or restructure her business and personal activities to enable her to accommodate more easily being unable to drive? How significant would the costs be to her business success and personal fulfillment from any such revising or restructuring?

However easy or difficult it would be to answer these and other relevant questions, the questions do not call on the court to second-guess Quaring's representation as to what conscientious observance of her religion entails. The answers that Quaring might offer to such non-religious questions certainly deserve the court's careful consideration, but no more. It is the court's responsibility to answer them as best it can and ultimately to step back and view the answers collectively to arrive at a considered judgment as to the substantiality or insubstantiality of the burden at hand.

C. An Illustration: The Burden in Masterpiece Cakeshop

Under the proposed approach to whether or not a burden on religious liberty is substantial, there cannot help but be borderline cases – perhaps significantly fewer than if the applicable standard of substantiality were considerably lower, but undoubtedly some. From my perspective, the burden on the merchants in *Braunfeld*, which the Court by a 6-3 margin treated as insubstantial, qualified as one. I believe the burden on the bakery owner in *Masterpiece Cakeshop* almost certainly was no greater and probably was less. For purposes of illustration, the burden in *Masterpiece Cakeshop* is worth exploring in some depth.

Let me begin with an argument for discounting that burden that may have some appeal but ultimately should be rejected: that Phillips, the bakery owner, was simply off base in thinking that there was any connection between his filling Craig and Mullins's wedding-cake order and his being faithful to his religion as a Christian. In Phillips's mind, filling the order would violate his religion because it would send a message affirming same-sex marriage that would displease God.[150] But, someone may ask, was Phillips reading more significance into his filling that order than he

[150] As Phillips explained in his petition for Supreme Court review:

> Phillips . . . will not create cakes celebrating any marriage that is contrary to his understanding of biblical teaching. As a Christian, Phillips believes that God ordained marriage as the sacred union between one man and one woman, a union that exemplifies the relationship of Christ and His Church. And Phillips' religious conviction compels him to create cakes celebrating only marriages that are consistent with his understanding of God's design….

Petition for Writ of Certiorari, *supra* note 12, at 6 (internal cross-references omitted).

should have? Would people really interpret his filling a gay couple's order for a custom wedding cake as an affirmation by him that same-sex marriage is a good thing? Even more importantly – because displeasing God seems to be at the core of Phillips's religious objection – was there really any danger that God would interpret Phillips's actions that way? After all, even if some *people* might not appreciate the importance of the fact that Phillips is running his bakeshop in a state with a nondiscrimination statute that limits his freedom to decide which couples' orders to fill, surely *God* appreciates it!

I do think a court should be asking itself questions of this sort if properly adjudicating Phillips's constitutional rights truly requires determining how reasonable he was being in seeing a strong connection between his designing and making wedding cakes and his obligations as a Christian. But a proper adjudication of Phillips's constitutional rights requires nothing of the sort. Indeed, any attempt by the court to gauge the reasonableness of Phillips's belief is wholly out of bounds. As the Supreme Court has affirmed time and again, courts must take an individual's understanding of his or her religion as a given. The Court has acknowledged that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation as not to be entitled to protection under the Free Exercise Clause."[151] But Phillips's claim, even if based on an understanding of his job and his obligations as a Christian that many might not share, hardly belonged in the "so bizarre" category hypothesized by the Court for wildly idiosyncratic beliefs.

Phillips's claim of a substantial burden on his religious liberty, however, was unpersuasive nonetheless. In his petition for a writ of certiorari, Phillips maintained that "[t]his Court's review is needed to alleviate the stark choice Colorado offers to those who, like Phillips, earn a living through artistic means: Either use your talents to create expression that conflicts with your religious beliefs about marriage, or suffer punishment under Colorado's public accommodation law."[152] Writing shortly after *Masterpiece Cakeshop* was argued in the Supreme Court, two well-known political and social commentators, David Brooks and Andrew Sullivan, each described in terms much like Phillips's the choice that Colorado had offered him. "I worry," wrote Sullivan, "that a ruling that backs the right of the state to coerce someone into doing something that violates their religious conscience will also have terrible consequences."[153] Similarly, as Brooks put it, "Phillips is not trying to restrict gay marriage or gay rights; he's simply asking not to be forced to take part."[154] While underlining their support for same-sex marriage, Brooks and Sullivan also made clear that they felt great empathy for Phillips, and they faulted Craig and Mullins, the gay couple, for resorting to litigation to force Phillips's hand, rather than leaving him alone and making the most of their wedding without one of his cakes.[155]

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[151] *Thomas*, 450 U.S. at 715. For more on *Thomas*, see *supra* note 147.

[152] Petition for Writ of Certiorari, *supra* note 12, at 2.

[153] Sullivan, *supra* note 15.

[154] Brooks, *supra* note 15.

[155] *See id.* ("First, it's just a cake. It's not like they were being denied a home or a job, or a wedding. . . . Second, Phillips's opinion is not a strange opinion. . . . Third, the tide of opinion is quickly swinging

But the choice that Colorado was offering to Phillips was not nearly as stark as he, Brooks, and Sullivan described it. Just as Pennsylvania was not telling Braunfeld and his fellow Orthodox Jewish merchants that they had to start working on the Jewish Sabbath, Colorado was not telling Phillips that he had to start designing and making wedding cakes for same-sex couples. Colorado was insisting on nondiscrimination, which Phillips could have achieved in either of two ways: design and make wedding cakes for both same-sex and opposite-sex couples; or stop designing and making wedding cakes for sale to anyone. Although Phillips could not help but violate his religious beliefs if he opted for the first course of action, he could avoid violating those beliefs if he opted for the second.

Ultimately, for Phillips as for Braunfeld, the substantiality of the burden on religious liberty was a more-or-less, not black-and-white, question that turned on practicalities. How much of a choice did Phillips really have to abide by the demands of the law and his religion? As much as, or even more than, Braunfeld? The answer lies in the economic realities.

In *Braunfeld*, the six Justices who voted to deny the free exercise claim seemed satisfied that the economic realities were not so grim as to make the option of resting both Saturday and Sunday available to the merchants only in theory and not in fact.[156] Nevertheless, the merchants' capacity to mitigate the financial consequences of being closed Saturday and Sunday surely was quite limited. The fears that they expressed in court that their competitors, free to work six days a week, would be able to use that advantage to drive down the Jewish merchants' profits and perhaps even drive them out of business were hardly frivolous.

For Phillips, the option of running the bakery while no longer designing and making wedding cakes surely posed an economic challenge. I am inclined to doubt, though, that it posed a challenge as great as the one the merchants in *Braunfeld* had to face. In my view, his capacity to mitigate the financial consequences of giving up the custom wedding-cake business exceeded their capacity to mitigate the financial consequences of no longer selling their commodities on Sundays.

As Phillips noted in his petition seeking Supreme Court review, weddings were hardly the only occasion for which he did custom cakes to "communicate" the occasion's "celebratory themes." He also did them for birthdays, anniversaries, graduations, holidays, and more.[157] Devoting time and energy to building up that side of his business was surely not his preference, but it offered a promising means for him to recoup much, if not all, of his losses from getting out of the custom wedding-cake business.

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in favor of gay marriage. . . . Given that context, the neighborly approach would be to say: 'Fine, we won't compel you to do something you believe violates your sacred principles.'"); Sullivan, *supra* note 15 ("Why take up arms to coerce someone when you can easily let him be – and still celebrate your wedding? . . . And it seems deeply insensitive and intolerant to force the clear losers in a culture war into not just defeat but personal humiliation.").

[156] *See supra* note 101 (discussing Justice Frankfurter's opinion, joined by Justice Harlan, concurring in the judgment) and text accompanying notes 98–104 (discussing the plurality opinion).

[157] Petition for Writ of Certiorari, *supra* note 12, at 1–2.

When Phillips declined Craig and Mullins's request to design and make a wedding cake for them, he offered to sell them cookies and brownies,[158] and in describing Masterpiece Cakeshop, Justice Kennedy's opinion for the Court strongly implied that it sold a fairly wide range of baked goods.[159] It seems, then, that ramping up the non-custom-cake part of his business to help make up for income lost from not doing custom wedding cakes was a promising option, too.

Of course, money is not everything. It is hard to imagine that the merchants in *Braunfeld* suffered any loss other than economic when, to comply with the Sunday closing law, they stopped selling their wares on Sundays. Phillips, however, might well suffer an additional type of loss – one of self-expression – if, to comply with the nondiscrimination law, he were to go out of the business of designing and making wedding cakes. But that loss in self-expression is a loss that Phillips could significantly mitigate as well. Most obviously, he is free to design and make wedding cakes for him to give as wedding gifts to friends and family having opposite-sex marriages. Of course, it would be very understandable if that option holds much less appeal to Phillips than maintaining his custom wedding-cake business, but that is very different from saying that a substantial loss in self-expression is an inevitable cost of his heeding the demands of both his religion and Colorado's Anti-Discrimination Act.

VII. APPLYING THE NECESSARY-TO-A-COMPELLING-INTEREST TEST

Under my proposed approach, an exemption that lifts a substantial burden on religious liberty survives Establishment Clause scrutiny unless denying the exemption is necessary to serve a compelling state interest that the law's generally applicable terms are designed to serve. As discussed in Part V, I believe the Supreme Court's and lower courts' application of the necessary-to-a-compelling-interest test in the years of free exercise balancing prior to *Smith* furnishes valuable benchmarks for applying the test in this context. After examining leading precedents from that era in Section A, I look closely in Section B at the problem of "ripple effects" that is so central to the requisite means-end analysis. In Sections C and D, I again draw on *Masterpiece Cakeshop* to illustrate the application of my proposed approach.

A. More Lessons from the Era of Free Exercise Balancing

I proceed here much as I did in Part VI. I begin by discussing the application of the necessary-to-a-compelling-interest test in four Supreme Court cases—two in which the Court found that the demands of the test were met, and two in which the Court found that they were not. I then turn to two federal appellate decisions – one

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[158] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

[159] *See id.* ("The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes. . . ."); *see also id.* at 1726 (alluding to the bakery's sale of cupcakes).

finding the test's demands were met, and one finding they were not. I again caution, as I did in Part VI, not to infer from the free exercise claimants' fifty percent success rate in the cases selected for discussion that free exercise claimants generally prevailed at that rate in the pre-*Smith* era. Their success rate was far less.[160]

In *Sherbert v. Verner* in 1963[161] and *Wisconsin v. Yoder* in 1972[162]—two cases already discussed for their findings of a substantial burden[163]—the Court rejected arguments that denying the free exercise claimant an exemption was necessary to serve a compelling state interest. In rejecting those arguments, however, the Court in both cases offered reasons that indicated that, in the free exercise area, the necessary-to-a-compelling-interest test did not have the "strict in theory but fatal in fact"[164] clout that a leading scholar described it as having in the equal protection realm.

In *Sherbert*, the South Carolina Employment Security Commission interpreted the state unemployment compensation statute as disqualifying Sherbert from receiving benefits because she had failed to accept available work after her discharge. Under that interpretation, Sherbert's failure to take other employment after her discharge did not fall within the statute's "good cause" exception even though the only other work she could find was work she felt compelled to decline for the same reason as led to her discharge: she would have had to work on Saturdays, her Sabbath day as a Seventh-day Adventist. The South Carolina Supreme Court held that the commission had interpreted the statute correctly and that the Free Exercise Clause did not require the state to recognize Sherbert's reason as a basis for a constitutional exemption.[165]

In reversing the state high court's denial of a free exercise exemption, the U.S. Supreme Court firmly rejected the notion that denying Sherbert the exemption was necessary to serve a compelling state interest. As the Court explained:

> The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund, but also hinder the scheduling by employers of necessary Saturday work. But . . . no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor . . . [is there any] proof whatever to warrant such fears of malingering or deceit . . . [and even if there were,] it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of

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[160] *See supra* note 96 and accompanying text.

[161] 374 U.S. 398 (1963).

[162] 406 U.S. 205 (1972).

[163] *See supra* text accompanying notes 105–15.

[164] Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted).

[165] *Sherbert*, 374 U.S. at 399–401.

> regulation would combat such abuses without infringing First Amendment rights. . . . [166]

In short, the appellees failed the applicable test on two counts. They needed to show both a compelling interest (in denying the exemption) and a necessary means-end relationship (between denying the exemption and effectively serving a compelling interest), and they had shown neither.

Two aspects of the Court's opinion are especially worth noting. First, although the Court made clear that no compelling state interest had been proven, it seemed to suggest that it would have been open to persuasion if the state high court had characterized the interest in minimizing the filing of fraudulent claims as compelling and supported that characterization with meaningful findings. By any measure, minimizing the filing of fraudulent claims is hardly a trivial state interest. But it is also not plainly an interest of the highest order. For that reason, the Court's apparent concession that it may qualify as compelling if given a firm affirmation of importance by the state is some indication that the Court in free exercise cases prior to *Smith* was willing to apply the concept of "compelling" with some flexibility and with some deference to the state.

Second, although the Court in the above excerpt brushed aside the appellees' arguments in a way that may seem almost cavalier, there are also some significant indications in the Court's opinion, principally in footnotes, that the Court in fact was approaching the implications of creating an exemption with considerable care. In one footnote, for example, the Court pointed out that "[t]he record indicates that of the 150 or more Seventh-day Adventists in the Spartanburg area [where Sherbert lived and worked], only appellant and one other have been unable to find suitable non-Saturday employment."[167] The implication seems to be that, having consulted the record for concrete data, the Court was now satisfied that granting an exemption to Sherbert was not going to open the floodgates to a barrage of claims by Seventh-day Adventists that might pose a genuine threat to the solvency of the unemployment compensation program. To similar effect, the Court in another footnote observed that, prior to the South Carolina Supreme Court's decision in the case at hand, "state supreme courts had, without exception, granted benefits to persons who were physically available for work but unable to find suitable employment solely because of a religious prohibition against Saturday work."[168] In other words, having examined various state high courts' responses to requests like Sherbert's, the Court was persuaded that there was no good reason to fear the adverse consequences that the appellees maintained an exemption for Sherbert would bring.

In *Yoder*, as in *Sherbert*, the Court found not only a substantial burden on individual religious exercise but also an inadequate state justification for denying an exemption to lift that burden. Unlike the Court in *Sherbert*, however, the Court in *Yoder* treated the adequacy of the state's justification as a close

[166] *Id.* at 407.
[167] *Id.* at 399 n.2.
[168] *Id.* at 407 n.7.

question warranting detailed explanation. In providing that explanation, the Court in *Yoder* offered considerable insight into its operative conception of the necessary-to-a-compelling-interest test.

To assess the adequacy of the justification offered by Wisconsin for refusing to exempt the Amish from its requirement that all children attend school to age sixteen, the Court began by identifying two interests as central to that justification: "prepar[ing] citizens to participate effectively and intelligently in our open political system," and "prepar[ing] individuals to be self-reliant and self-sufficient participants in society."[169] The state characterized both interests as compelling, and the Court did not question that characterization. The Court did question, however, the state's insistence that, to serve those interests fully, it was necessary that the state be allowed to require Amish children to attend school to age sixteen, rather than only through eighth grade, as the Amish defendants were willing to let their children do. According to the Court, "the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children . . . would do little to serve those interests."[170]

In support of that conclusion, the Court highlighted several distinctive features of the Amish community, including the "self-sufficiency" the community has long managed to achieve[171] and the strong "vocational education" it has provided for Amish children in adolescence.[172] The Court credited the eight years of standard education that Amish children receive as going a long way toward serving both state interests.[173] It also underlined the special value for Amish children of having their education after those eight years be one tailored to their likely future of working on "the family farm" as part of "a separate, sharply identifiable and highly self-sufficient community."[174]

Perhaps most notable are the Court's comments on the state's justification in the final part of the opinion – the part devoted to summarizing the Court's holding and reasoning in the case. The Court made clear that it did not arrive lightly at the conclusion that Wisconsin's denying the Amish the requested exemption was not necessary to serve a compelling state interest. Rather, the Amish had succeeded in showing that their situation was very distinctive in a way that directly undercut the force of the state's justification for refusing to treat the Amish differently than anyone else for purposes of the compulsory education requirement. According to the Court, in showing the value of the Amish vocational education "in terms of precisely those overall interests" urged by the state in support of compulsory schooling to age sixteen, the Amish defendants had made a "convincing showing, one that probably few other

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[169] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[170] *Id.* at 222.

[171] *Id.* at 222–23.

[172] *Id.* at 224–25.

[173] *See id.* at 226-27; *see also id.* at 241 (White, J., joined by Brennan and Stewart, JJ., concurring) ("[T]he State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school.").

[174] *Id.* at 224–25, 229 (majority opinion).

religious groups or sects could make."[175] The *Yoder* Court's message to lower courts for adjudicating free exercise exemptions claims seems clear: Do not find that the state has failed to show the necessity of denying the requested exemption unless you are satisfied that granting the exemption to the claimant(s) before the court does not pave the way for a host of exemptions for others that, taken together, would substantially undermine a compelling state interest that the law is designed to serve.

United States v. Lee[176] and *Bob Jones University v. United States*,[177] two Supreme Court decisions in the early 1980s in which the Court found that free exercise exemptions were unwarranted despite substantial burdens on religious liberty, exemplify the Court's somewhat deferential application of the necessary-to-a-compelling-interest test in the free exercise area. According to some commentators, the Court's pre-*Smith* free exercise decisions finding the test's requirements met are so hard to explain in terms of the usual understanding of those requirements that the Court must have been tacitly applying a diluted version of the test.[178] As I will discuss, I do not share that view. For now, though, I underline that I do agree that the Court was applying the test in this realm with greater flexibility than it applied the test in deciding, for example, equal protection challenges to suspect classifications and free speech challenges to laws designed to silence the expression of certain points of view.

The Court's concern, expressed in *Yoder*, with the possible ripple effects of granting an exemption strongly resurfaced a decade later in *Lee*, another case involving the Amish. This time it prompted the Court to rule against the free exercise claim. Edwin Lee had several people working for him on his farm and in his carpentry shop. Lee was Amish as were all his employees. Lee sought an exemption under the Free Exercise Clause from the federal statutes requiring employers to file social security tax returns, withhold the employees' share of social security taxes, and pay the employer's share of such taxes. He maintained that his religion left him no choice but to refuse to pay the taxes. Pointing to the Biblical admonition, "But if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel,"[179] Lee explained that the Amish religion regards it as sinful for an employer to contribute to the national social security system rather than provide directly and adequately for his or her employees' well-being.[180]

The Supreme Court unanimously denied the free exercise claim. With Chief Justice Burger again writing for the Court, the Court quickly rejected the government's attempt to cast doubt on the substantiality of the free exercise burden and turned to the adequacy of the government's justification for requiring Lee to bear that burden. Applying the necessary-to-a-compelling-interest test, the Court first

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[175] *Id.* at 235–36.

[176] 455 U.S. 252 (1982).

[177] 461 U.S. 574 (1983).

[178] *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 93–96 (1995); McConnell, *supra* note 29, at 1127–28.

[179] 1 *Timothy* 5:8.

[180] *Lee*, 455 U.S. at 254–55 & n.3.

examined the importance of the government interest implicated by Lee's exemption claim. Describing the social security system as "by far the largest domestic governmental program in the United States today," and characterizing "mandatory participation" by covered employers and employees as "indispensable to the fiscal vitality of the social security system,"[181] the Court found that the government interest at stake met the compelling-interest requirement of the test.

The Court then turned to the test's requirement of a necessary means-end relationship and concluded that it was met as well. Unmistakably central to the Court's conclusion was an overriding concern with possible ripple effects of granting the requested exemption—a concern that, the Court noted, made the case at hand "[u]nlike the situation presented in *Wisconsin v. Yoder*."[182] Very simply, in the Court's view, this case was not about the threat posed to the fiscal vitality of the social security system by exempting Lee alone, or even all Amish employers, from the system. Rather, it was about the threat posed to the system by courts' inability to draw a logically defensible line between Lee's claim and "myriad" others "flowing from a wide variety of religious beliefs."[183] In fact, from the Court's perspective, the threat posed was even greater than that. Because "[t]here is no principled way, . . . for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act,"[184] a ruling in favor of Lee would invite a flood of claims for exemptions that would threaten the integrity of the entire system of taxation. "If, for example," the Court explained, "a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax."[185]

Like *Lee*, *Bob Jones University* was a tax case in which the Court concluded that denying a free exercise exemption was necessary to serve a compelling government interest. However, the Court's reasoning in *Bob Jones University* in support of that conclusion was quite different than its reasoning in *Lee*. In particular, the Court made clear that, for the necessary-to-a-compelling-interest test to be met, there need not always be a substantial likelihood of wide-ranging ripple effects. In some instances, granting the requested exemption simply to the free exercise claimant(s) before the court is enough to undermine substantially the compelling interest at stake.

Bob Jones University and another private nonprofit school, both run in accordance with their leaders' fundamentalist Christian beliefs, sought a free exercise exemption from an Internal Revenue Service revenue ruling that conditioned educational institutions' tax-exempt status on their not discriminating against

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[181] *Id.* at 258.
[182] *Id.* at 259.
[183] *Id.* at 260.
[184] *Id.*
[185] *Id.* In the final part of its opinion, the Court addressed, and distinguished, the exemption from the social security system that Congress had legislated for the self-employed who are religiously opposed to participating in the system. *Id.* at 260–61.

students on the basis of race. Both schools had racially discriminatory admissions policies that they claimed should not cost the schools' their tax-exempt status because the policies were adopted based on the school administrations' understanding of certain passages in the Bible.[186]

With Chief Justice Burger writing and only one Justice in dissent,[187] the Supreme Court rejected the schools' free exercise claim. The Court acknowledged that denying the schools tax-exempt status "will inevitably have a substantial impact" on their operation.[188] The government interest in not granting the schools that status, the Court maintained, was "compelling"—"a fundamental, overriding interest in eradicating racial discrimination in education."[189] Furthermore, that interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[190] In essence, even if no schools other than the two before the Court were relieved, for religious reasons, of the obligation to pursue racially nondiscriminatory admissions policies, that would be two schools too many. The harm to the compelling government interest would be done. There are, the Court insisted, "no less restrictive means" of achieving that interest than rejecting the two schools' free exercise claim.[191]

The study mentioned earlier of federal appellate free exercise decisions in the ten years before *Smith* found a pattern in the courts' application of the necessary-to-a-compelling-interest test that suggests a widely shared understanding among them that the Supreme Court case law called for a more flexible application of the test in the free exercise area than elsewhere.[192] Taken together, two cases included in that study – *EEOC v. Pacific Press Publishing Ass'n*,[193] decided by the Ninth Circuit in 1982, and *Quaring v. Peterson*,[194] decided by the Eighth Circuit in 1984 and already discussed here for its finding of a substantial burden – provide a

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[186] Bob Jones Univ. v. United States, 461 U.S. 574, 578-80, 583 & n.6 (1983). At the time the case was decided, the two schools' efforts to justify racial discrimination in terms of religious mandates may have struck many people as aberrational. Sadly, however, there was plenty of historical precedent. As Professor Eskridge observed in providing a detailed account of such efforts, "For most of American history, the law uncontroversially denied racial minorities equal treatment wherever religious majorities believed as a matter of faith that racial variation from 'whiteness' was malignant." William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665 (2011).

[187] Six Justices joined the Chief Justice's opinion in full, Justice Powell joined the opinion in part and concurred in the judgment, and Justice Rehnquist dissented.

[188] *Bob Jones Univ.*, 461 U.S. at 603–04. Although the Court never expressly characterized the burden on free exercise as substantial, it appeared to be treating it as such.

[189] *Id.* at 604.

[190] *Id.*

[191] *Id.* (internal quotation marks omitted).

[192] *See* Ryan, *supra* note 96, at 1417–21. I perhaps should note that, although I find very helpful the study's documentation of this more flexible application, I take a more positive view of that phenomenon, as I discuss *infra* text accompanying notes 216–25.

[193] 676 F.2d 1272 (9th Cir. 1982).

[194] 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided court sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985).

good sense of the way in which the test generally was applied by the federal courts of appeals.

The litigation in *Pacific Press* arose out of employment discrimination charges that Lorna Tobler, an employee of Pacific Press, filed with the EEOC. Pacific Press was a nonprofit publishing house affiliated with the Seventh-day Adventist Church and engaged in the business of publishing a monthly magazine, books, and other materials related to the Church's teachings. Tobler filed charges with the EEOC alleging that Pacific Press's wage scale discriminated against her as a married woman.[195] When Pacific Press learned of the charges, it retaliated against Tobler by a series of moves that increasingly diminished her scope of responsibilities. The EEOC filed suit against Pacific Press in federal district court for violating Tobler's federal rights under Title VII to be free from sex discrimination in employment and from retaliation for filing charges with the EEOC. Several months later, Pacific Press discharged her.[196] The district court ruled that Pacific Press's sex discrimination and retaliation both violated Title VII, and the Ninth Circuit affirmed.

The Ninth Circuit quickly disposed of Pacific Press's free exercise defense to the sex discrimination charge. Requiring Pacific Press not to discriminate on the basis of sex, the court maintained, could have "no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women."[197]

The court acknowledged, however, that Pacific Press's free exercise defense to the retaliation charge presented a more complicated issue. Church doctrine prohibited Church members from suing the Church. Pacific Press made membership in the Church a condition of employment for all of its employees. Tobler, a Pacific Press employee and member of the Church, had violated Church doctrine by suing Pacific Press, a Church-affiliated corporation.[198] Holding Pacific Press liable under Title VII for disciplining Tobler in accordance with religious principles would have, in the court's words, "a substantial impact on the exercise of religious beliefs."[199]

Under the circumstances, the relevant question thus became whether denying Pacific Press an exemption from Title VII was necessary to a compelling interest, and the court found that it was. At issue, the court stated, was "the government's compelling interest in assuring equal employment opportunities"[200]—an interest that Title VII's legislative history made clear is a "'highest priority.'"[201]That interest, the court maintained, "is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."[202]

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[195] *Pacific Press*, 676 F.2d at 1274–75.
[196] *Id.* at 1275.
[197] *Id.* at 1279.
[198] *Id.* at 1274–75, 1280.
[199] *Id.* at 1280.
[200] *Id.*
[201] *Id.* (quoting Senate committee report).
[202] *Id.*

To establish the necessary means-end relationship between not granting the requested exemption and serving the compelling government interest in equal employment opportunity, the court cited two key considerations. First, "protecting the individual's right to bring charges under Title VII" is vital to serving that interest because "[u]nder Title VII, EEOC enforcement actions are triggered only when the individual complainant files charges with the Commission."[203] Second, if Pacific Press is held exempt from liability under Title VII for its religion-based retaliation, the negative repercussions in terms of equal employment opportunities would be far-reaching. A free exercise exemption authorizing Pacific Press to retaliate against Tobler for behavior protected by Title VII logically would call for exemptions of the same sort for "the hundreds of diverse organizations affiliated with the Adventist Church, including businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums."[204] Not surprisingly, after expressing this concern about ripple effects, the court, as authority for rejecting Pacific Press's free exercise claim, pointed to the Supreme Court's analysis and resolution of the "similar free exercise issue" in *Lee*.[205]

As noted earlier,[206] *Quaring v. Peterson*, the driver's-license-photo case, is one of the relatively few federal appellate cases in the decade before *Smith* in which the free exercise claimant prevailed. The court's perception that granting Quaring an exemption was highly unlikely to open the floodgates to many similar claims goes a long way toward explaining the court's comfort in carving out the exemption. According to the court, Quaring's belief that her religion forbids her from being photographed is sufficiently "unusual" that "[p]ersons seeking an exemption [like hers] from the photograph requirement on religious grounds are likely to be few in number."[207]

To be sure, one reasonably may question whether the potential ripple effects of granting Quaring an exemption were as limited as the court maintained. The court offered its assessment of potential ripple effects in essentially conclusory fashion. It made no real attempt to ascertain the prevalence of Quaring's understanding of the Second Commandment among Christians, not even acknowledging, for example, that many Amish and Mennonites share it.[208] Although the court in a footnote did

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[203] *Id.*

[204] *Id.*

[205] *Id.* at 1280-81. In keeping with *Lee*, the court in *Pacific Press* would have done well to discuss more broadly the possible effects of granting Pacific Press an exemption. At a minimum, such effects would extend beyond granting similar exemptions to Adventist Church-affiliated businesses to granting ones to businesses affiliated with *any* religion with a prohibition on member suits. In addition, granting the exemption to Pacific Press would help pave the way for religiously affiliated businesses seeking an exemption from other Title VII obligations that conflict with religious doctrine.

[206] *See supra* text accompanying note 131.

[207] Quaring v. Peterson, 728 F.2d 1121, 1123, 1127 (8th Cir. 1984), *aff'd by an equally divided court sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985).

[208] *See Mennonites Are at Odds with License-Photo Rules*, N.Y. TIMES, Mar. 25, 2007, at A22; Lauryn Schroeder, *House Bill Could Give Amish a Religious Exemption from Photos on State IDs*, HUFF. POST, Jan. 31, 2015, https://www.huffingtonpost.com/2015/01/31/31/amish-photo-id_n_6581376.html. Of course, the number of Amish and Mennonites who would seek a religious

acknowledge "some support" for Quaring's belief in "modern-day interpretation of Jewish law," it focused primarily on the centuries-old origins of that "minority position" in Jewish law and was entirely vague as to proportion of Jews who currently share it.[209] In addition, the court evinced no recognition whatsoever that some members of non-Judeo-Christian faiths refuse for religious reasons to comply with photograph requirements.[210]

Even assuming, however, that the court in *Quaring* significantly underestimated the ripple effects of exempting Quaring from the DMV's photo requirement,[211] the case is no less important for present purposes. The question at hand is the courts' *operative standard* in applying the necessary-to-a-compelling-interest test in free exercise cases before *Smith* – the degree of flexibility with which the courts applied that test, not how good a job the courts did in applying it. Whether the court in *Quaring* was correct or mistaken about the likely ripple effects of granting Quaring an exemption, the case illustrates equally well that in the era of free exercise balancing

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exemption from the DMV photo requirement is limited by the fact that many in both groups are religiously opposed to driving cars. *See What's the Difference Between Amish and Mennonites?*, AMISH AM., http://amishamerica.com/whats-the-difference-between-amish-and-mennonites/ [https://perma.cc/B6HH-FMAZ] (last visited June 26, 2018). Despite the potential for, and actuality of, horse and buggy accidents with pedestrians and cars, people are generally not required to get a license to drive a horse and buggy, as many Amish and Mennonites do from a young age. *See* Melissa Siegler, *Residents Push Back Against Proposed Amish-Buggy Rules*, WIS. STATE FARMER, Dec. 19, 2017, https://www.wisfarmer.com/story/news/state/2017/12/19/residents-push-back-against-proposed-amish-buggy-rules/9662640011/.

[209] *Quaring*, 728 F.2d at 1124 n.3. Seemingly implicit in the court's discussion is that the only Jews currently taking a view on the Second Commandment similar to Quaring's are Orthodox. However, Orthodox Jews are a sufficiently numerous group that one would want to know much more about the prevalence of this belief among Orthodox Jews before trying to draw any inferences about how many Jews might seek an exemption if one were granted to Quaring.

[210] For example, Muslim women who wear a hijab commonly object on religious grounds to any requirement that they be photographed with their face not covered by the veil. As University of Georgia Professor Alan Godlas has explained, "Not only would removing it be a violation in their mind of the Quran, it's a violation of an element that's essential to who they are. It is the most important single religious symbol to many Muslim women." Matt Bean, *Freedom of Religion Meets the DMV*, CNN.COM, May 23, 2003, http://www.cnn.com/2003/LAW/05/23/ctv/freeman. Citing traditional Native American religious teachings, some Native Americans have refused to have their photographs taken in the belief that the photo would "steal their soul." Matt Crowley, *Soul Theft Through Photography*, SKEPTICAL BRIEFS, vol. 24:1, Spring 2014, https://www.csicop.org/sb/show/soul_theft_through-photography.

[211] In fairness to the court, I should note that in saying that, "Persons seeking an exemption from the photograph requirement on religious grounds are likely to be few in number," the court may not have meant that it had arrived at a firm conviction that few people were apt to seek an exemption like the one sought by Quaring. Rather, the court may only have meant that, *based on the evidence provided by the state*, it did not anticipate more than a few claims like Quaring's. At the start of its discussion of whether denying Quaring an exemption could be justified as necessary to serve a compelling state interest, the court made clear its understanding that the burden was on the state to establish such a justification. *See Quaring*, 728 F.2d at 1126 ("To prevail, the Nebraska officials must demonstrate that their refusal to exempt Quaring from the photograph requirement serves a compelling state interest."). In addition, at the end of that discussion, the court took care to add the qualifier, "[a]t least on this record," to its conclusion that the state had failed to establish the requisite justification. *Id.* at 1127.

that *Smith* abruptly brought to a close, courts were willing to carve out exemptions only when they were persuaded that the ripple effects would be quite limited.

The *Quaring* court's attention to the grounds for exemption already recognized by state law is important for much the same reasons. As the court noted, "photographs of the licensee are not required on learner's permits, school permits issued to farmers' children, farm machinery permits, special permits for those with restricted or minimal driving ability, or temporary licenses for individuals outside the state whose old licenses have expired."[212] In the court's view, the state's allowing those various grounds for exemption was tantamount to an admission that none of the interests that the state put forward to justify denying an exemption to Quaring could be all that compelling.[213] Writing in dissent, Judge Fagg maintained that the court was drawing an erroneous inference from the existing exemptions. In his view, those exemptions were readily distinguishable from the one sought by Quaring, and the court was wrong to discount the importance of the asserted state interests based on the existing exemptions.[214] I am inclined to disagree,[215] but even if I were persuaded by Judge Fagg's objection, I would see *Quaring* as no less valuable for present purposes. Either way, it illustrates well that courts prior to *Smith* were loath to carve out free exercise exemptions absent evidence that in their view cogently demonstrated that the requested exemption would not undermine vital state interests.

To justify incorporating into my proposed approach the relatively flexible way in which courts applied the necessary-to-a-compelling-interest test in free exercise cases before *Smith*, I rely, as I did to justify incorporating those cases' operative

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[212] *Id.* at 1126.

[213] *Id.* ("Because the state already allows numerous exemptions to the photograph requirement, the Nebraska officials' argument that denying Quaring an exemption serves a compelling state interest is without substantial merit.").

[214] *Id.* at 1128 (Fagg, J., dissenting) ("[T]he majority attaches significance to the fact that Nebraska exempts certain categories of permittees and temporary licensees from the photograph requirement; however, the limitations placed upon these provisional operators deny any meaningful comparison with the state's regular license holders.").

[215] In trying to assess the importance of the interests that the state articulated in *Quaring*, I not only would find the existing exemptions more telling than Judge Fagg found them, but I also would be influenced by the driver's license photo requirements in other states. The court in *Quaring* pointed out that, at the time, a "few states" did not require anyone to have a driver's licenses photo and added that, "Notably . . . one of the Nation's most populous states, New York, does not require photographs on driver's licenses." *Id.* at 1126 & n.5 (majority opinion). The court noted an Indiana Supreme Court decision that had carved out a free exercise exemption from the state's driver's license photo requirement, *id.* at 1126 n.4, but it did not discuss more broadly the existence of official state policies in the form of a state statute or regulation providing for exemptions for religious reasons from the photo requirement. Though probably not available in a single source at the time, state-by-state information of this sort became readily available twenty years later in a published report. *See* COUNCIL ON AM.-ISLAMIC RELATIONS RESEARCH CTR., RELIGIOUS ACCOMMODATION IN DRIVER'S LICENSE PHOTOGRAPHS: A REVIEW OF CODES, POLICIES AND PRACTICES IN THE 50 STATES 3 (2004), http://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVJ.pdf [https://perma.cc/26UA-2DPD]. According to that report, as of 2004, thirteen states had official policies providing for religious exemptions from the photo requirement, three had express policies precluding such exemptions, and the remaining states were silent on the issue. *Id.* at 5.

standard of substantiality, not only on the weight of relevant precedent but also on my own conviction of the basic soundness of that precedent. For the reasons that follow, I am persuaded that the courts in free exercise cases prior to *Smith* were right to apply the necessary-to-a-compelling-interest test in the way they did.

As noted earlier,[216] I do not share the view expressed by some commentators that the courts' applications of the test in the free exercise area reflected a conscious effort on their part to dilute the test. If I did, I would have great difficulty defending those applications. For decades the Supreme Court has maintained that a state can only justify placing a substantial burden on an individual right of fundamental constitutional importance by showing that imposing such a burden is necessary to serve a compelling state interest.[217] In my view, that formulation strikes an appropriate balance between the seriousness of the constitutional harm that the law inflicts on affected individuals and the level of justification that the lawmaker should be expected to offer. Only a state justification of the highest order should suffice to justify an invasion of individual rights that constitutes grave constitutional harm.

I know of no persuasive reason for holding laws that substantially burden free exercise—a right that, by virtue of its explicit mention in the First Amendment, indisputably has fundamental constitutional importance—to a test any less demanding than the one applied to laws that substantially burden other fundamental rights. The incongruity of doing so seems especially apparent when one considers free exercise alongside rights that the Court has treated as fundamental even though they lack the kind of indisputable grounding in constitutional text, history, or structure that free exercise has.[218] Although the Court in *Smith* by a 5-4 margin took a very different view of free exercise – a view that, for the most part, relegated it to second-class status – Congress twice has firmly rejected that view. In responding to *Smith* with a near-unanimous enactment of RFRA and a unanimous enactment of RLUIPA, Congress has strongly and, I believe, correctly affirmed the soundness of holding substantial burdens on free exercise to the same exacting standard of review as the one to which substantial burdens on other fundamental rights are held.[219]

It is undoubtedly true that, prior to *Smith*, courts applied the necessary-to-a-compelling-interest test more flexibly in the free exercise area than they applied it, for example, in equal protection cases involving suspect classifications

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[216] *See supra* text accompanying note 178.

[217] *See supra* note 43 and accompanying text.

[218] The right of privacy that the Court recognized as fundamental in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and treated as so weighty in balancing individual and governmental interests in *Roe v. Wade*, 410 U.S. 113 (1973), is probably the most obvious example. Although I firmly believe (for reasons largely not reflected in the Court's less than impressive opinions in *Griswold* and *Roe*) that the Court was correct in recognizing the fundamentality of that right, I readily concede that there is room for reasonable people to disagree. *See, e.g., Griswold*, *supra*, at 508-10 (Black, J., joined by Stewart, J., dissenting); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 927–43 (1973).

[219] *See supra* note 55 and accompanying text. RFRA was passed in the House of Representatives by unanimous consent in a voice vote and in the Senate by a roll call vote of 97-3. 139 CONG. REC. 9687, 26416 (1993). RLUIPA was passed by unanimous consent in a voice vote in both the House and Senate. 146 CONG. REC. 16703, H7192 (2000).

and free speech cases involving content-based regulations.[220] I suggest, however, that the greater flexibility in application in free exercise cases did not reflect tacit substitution of a less demanding test. Rather, it reflected the courts' application of the usual test with a degree of deference to the lawmaker warranted by the difference in context.

In equal protection cases involving racial or other suspect classifications,[221] courts only sensibly approach the question whether the law satisfies the necessary-to-a-compelling-interest test with a healthy dose of skepticism. Any time lawmakers make a conscious decision to treat people better or worse on the basis of race or another suspect characteristic, there is good reason to be concerned that the law is rooted in prejudice and harmful stereotypes and that the objective the law purportedly serves is a pretext and cover for a more insidious objective.[222] Similarly, in free speech cases involving laws prohibiting certain speech in an effort to suppress the speaker's message, courts also have good reason to apply the necessary-to-a-compelling-interest test with anything but deference to the lawmaker.[223] Laws that ban the expression of certain messages from the realm of public debate, rather than allow such messages to be tested in the marketplace of ideas, strike at the heart of the Free Speech Clause. To give laws of that sort the benefit of any doubt is antithetical to what the Clause is all about.[224]

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[220] The Equal Protection and Free Speech Clauses provide, respectively, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1, and "Congress shall make no law . . . abridging the freedom of speech," *id.* amend. I. The latter applies to state and local government by virtue of the Fourteenth Amendment's Due Process Clause. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[221] The Supreme Court has characterized classifications on the basis of race, nationality, alienage, and religion as "suspect." *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) ("Unless a classification trammels fundamental personal rights or is drawn upon suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discrimination. . . ."); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.").

[222] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Plyler v. Doe, 457 U.S. 202, 216–17 n.14 (1982); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 728–33 (1974); Gary J. Simson, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1250–51, 1253–58 (1974).

[223] *See, e.g.,* Brown v. Entm't Merch. Ass'n, 564 U.S. 786 (2011); Texas v. Johnson, 491 U.S. 397 (1989).

[224] Justice Black's opinion for the Court in *Schacht v. United States*, 398 U.S. 58 (1970), eloquently makes the point. Schacht was convicted of violating the prohibition in 18 U.S.C. § 702 on wearing a military uniform without authorization. As part of a larger demonstration against the Vietnam War, Schacht had worn an army uniform as a costume in an antiwar skit that he and two others performed outside a military induction center in Houston. At trial and on appeal, he argued unsuccessfully that he in fact was authorized to wear the uniform by Congress's express allowance in 10 U.S.C. § 772(f) for an actor in a film or play to wear the uniform of one of the military branches "if the portrayal does not tend to discredit that armed force." In reversing the conviction, the Court held that the final clause of § 772(f) – the language just quoted – was unconstitutional and must be struck from the statute:

> When this restriction [§ 772(f)] is read together with 18 U.S.C. § 702, it becomes clear that Congress has in effect made it a crime for an actor wearing a military uniform to say things

In contrast, prior to *Smith*, claims for exemptions under the Free Exercise Clause almost invariably were aimed at laws that, in the overwhelming majority of their applications, were not objectionable in the least. The free exercise claimant's attack on the law was not grounded in any suspicion that the law was the product of hidden bias or disrespect for core constitutional values. Quite the contrary. The claimants generally conceded that the law served a laudatory objective and made a good or even excellent contribution to the general welfare. The problem that the claimants sought to remedy was that in operation the law, though entirely religion-neutral on its face, placed a distinctive burden on individuals adhering to certain religious beliefs. Perhaps the lawmaker had a dim awareness that the law was creating a special burden but failed to appreciate its gravity. Alternatively, as is especially apt to happen with religious beliefs shared by only a tiny proportion of society, the lawmaker made the law not even recognizing that it would have a special adverse impact on some people because of their religious beliefs.

Either way, for courts to apply the necessary-to-a-compelling-interest test with some degree of deference to the lawmaker has a logic in the free exercise area that it lacks in the two other areas mentioned. The fact, therefore, that courts before *Smith* were applying the test in free exercise cases with a deference to the lawmaker missing from their applications of the test in those other two areas did not mean that the courts in free exercise cases were not *really* applying the test. Rather, it simply meant that they were applying the test with sensitivity to a factor not present in the other areas.

B. A Closer Look at, and Method for Analyzing, Ripple Effects

As I highlighted in discussing courts' applications in free exercise cases of the necessary-to-a-compelling-interest test, a recurrent and major concern has been whether the ripple effects of exempting the claimant before the court would be so extensive as to undermine substantially the state's ability to achieve a compelling interest served by the law. That concern has been so central to applications of the test because the concern is rooted in constitutional limitations that the courts have no latitude to ignore—specifically, constitutional limitations under the Equal Protection, Establishment, and Free Exercise Clauses on treating people differently on the basis of religion.

The Supreme Court for many years has included religion on its short list of "suspect classifications" under the Equal Protection Clause.[225] In keeping with that

> during his performance critical of the conduct or policies of the Armed Forces. . . . [Schacht's] conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment. . . .

Schacht, 398 U.S. at 62-63.

[225] *See supra* note 221.

characterization, absent a showing that the difference in treatment is necessary to serve a compelling state interest, courts must strike down any law that treats some persons better than others based on their adherence to different religions or religious beliefs or based on some persons' adherence to some religion and others' adherence to none. The Supreme Court also has interpreted each of the Religion Clauses in a manner that, for all practical purposes, duplicates the Equal Protection Clause's demand for extraordinary justification if and when the government uses religion as a basis for differences in treatment.[226]

These powerful constitutional limitations on unequal treatment on the basis of religion have profound implications for religious exemptions. Those implications are perhaps most easily understood from the perspective of a legislature contemplating exempting adherents of religion X (or religious belief Y) from the demands of a particular law. A legislature that is thinking about creating a religious exemption must begin by asking itself (a) whether it has a constitutionally adequate justification for not expanding the exemption to include adherents of other religions (or religious beliefs) and (b) if not, which other religions (or religious beliefs) must be included within the exemption to satisfy the constitutional constraints on differences in treatment. By definition, a religious exemption classifies – treats some people better than others – on the basis of religion. With a religious classification at issue, the measure of constitutional adequacy is whether the difference in treatment is necessary to serve a compelling state interest. Because that is a highly demanding standard to meet, the legislature frequently will recognize that its answer to (a) must be "no" and that, to satisfy the formidable equality demands of the Establishment, Free Exercise, and Equal Protection Clauses, it must expand the exemption to encompass adherents of certain other religions (or religious beliefs).

Having arrived at such a conclusion, a legislature may decide that the benefits of creating the exemption do not outweigh the costs and that, as a matter of policy, it ought to abandon the exemption idea. However, if it resolves to press onward, its constitutional inquiry is only half done. Having established the scope that the exemption must take in order to comport with constitutional limitations on unequal treatment, the legislature must then ask itself the distinctly Establishment Clause question: Will the creation of an exemption of that scope substantially undermine the achievement of a compelling interest that the law is designed to serve? If so, then the legislature would wisely pass on the exemption idea altogether because in all likelihood the contemplated exemption for adherents of religion X (or religious belief Y) will be struck down under the Establishment Clause, even if expanded beyond adherents of religion X (or religious belief Y) to satisfy constitutional constraints on unequal treatment.

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[226] With regard to the Establishment Clause, see Kiryas Joel Vill. Bd. of Educ. v. Grumet, 512 U.S. 687, 702–05 (1994); Larson v. Valente, 456 U.S. 228, 244–46 (1982). As to the Free Exercise Clause, see Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2019–21 (2017); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993).

The requisite analysis is somewhat different if the legislature is contemplating an exemption that preferences religion over nonreligion—for example, an exemption limited to those who, for religious reasons, feel compelled not to engage in the activity required by the law. Now the legislature must first ask itself whether the constitutional limitations on unequal treatment require that the exemption be expanded to avoid preferring religion over nonreligion. Do some people for nonreligious reasons feel a level of compulsion not to engage in the required activity that is comparable in intensity to the compulsion felt by those who would benefit from the contemplated religious exemption? [227] If so, then the legislature must acknowledge that, unless it expands the exemption to include those feeling comparable compulsion for nonreligious reasons, the exemption almost certainly will not survive the strict scrutiny triggered by a religious classification.

Having arrived at that juncture in its thinking, the legislature may decide as a policy matter that the exemption idea is not worth pursuing. Assuming, however, that it decides that an expanded exemption is better than none at all, the legislature still faces a sizable Establishment Clause hurdle. It now must ask itself whether the expanded exemption would substantially undermine the achievement of a compelling interest that the law is designed to serve. If its answer is "yes," the legislature would do well to leave the exemption idea behind rather than invite invalidation of the expanded exemption under the Establishment Clause.

C. An Illustration: A Variation on Masterpiece Cakeshop

For purposes of illustration, consider a variation on *Masterpiece Cakeshop* that I offered in the Introduction: Suppose that after losing in the Colorado Court of Appeals, Phillips succeeds in persuading the Colorado Supreme Court to hear the case. Suppose also that the Colorado high court decides to reverse the judgment of the Colorado Court of Appeals on the ground that, under the Colorado Constitution's free exercise guarantee, Phillips is entitled to an exemption from the state's Anti-Discrimination Act. If the U.S. Supreme Court grants certiorari to decide whether the court-created exemption violates the federal Establishment Clause, how should it rule?

As discussed earlier,[228] I believe that, though hardly trivial, the burden the Anti-Discrimination Act places on Phillips's religious liberty is not sufficiently weighty to qualify as "substantial" under the proposed approach. If the Court were to take the same view, then, under that approach, it would hold that, unless there is no rational justification for denying him the exemption, the Colorado high court's exempting Phillips from the Act violates the Establishment Clause. The Court would then go on to find that a rational justification plainly exists, because denying Phillips an exemption is a reasonable means of serving the Colorado interest underlying the Act of protecting

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[227] *See* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 511–15 (2017); Simson, *supra* note 22, at 914–15.

[228] *See supra* Part VI.C.

patrons of places of public accommodation from discrimination on the basis of sexual orientation.

But what if the Court at the start of its Establishment Clause analysis instead were to take the view that the burden on Phillip's religious liberty is best understood as substantial? Then, under my proposed approach, the Court would hold that the Colorado high court's exempting Phillips from the Act survives Establishment Clause review unless denying the exemption is necessary to a compelling state interest. That would be a rigorous standard for those opposing the exemption to meet, but it is also a standard I believe they could meet. In fact, as I explain below, I do not see it as a close question. My explanation has importance for any religious exemption claim, but it has special importance for a type of claim made more and more often in recent years: what Professors NeJaime and Siegel have called "complicity-based conscience claims" – claims that, like Phillips's, are based on "religious objections to being made complicit in the assertedly sinful conduct of others."[229]

Applying the necessary-to-a-compelling-interest test to the Colorado high court's decision to exempt Phillips from the Act, the Court would find an Establishment Clause violation if two conditions are met: a compelling state interest would be served by denying Phillips the exemption, and denying the exemption is necessary to serve that interest. I submit that the Court should conclude that both conditions are met. As to the first, Colorado's interest in protecting patrons of places of public accommodation from discrimination on the basis of sexual orientation seems at least as important to the well-being of the people of the state as the interest in *Yoder* of fostering individual self-reliance and self-sufficiency, the interest in *Lee* of ensuring the fiscal vitality of the social security system, and the interest in *Pacific Press* of assuring equal employment opportunities – all interests that, as already discussed,[230] the Supreme Court or a federal appeals court treated as compelling. Concededly, none of those interests is so vital to the general welfare that the state would stop at nothing to defend it. The same can be said, however, of numerous governmental interests that the Court has treated as compelling in free speech and other cases in which it applied the necessary-to-a-compelling-interest test.[231] Ultimately, for present purposes, it is the operative conception of "compelling" state interest, not some abstract or hypothetical

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[229] Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015). Professors NeJaime and Siegel observed that "[c]omplicity claims are now asserted by growing numbers of Americans about some of the most contentious 'culture war' issues of our day." They also pointed out that such claims typically are aimed at "persons who act outside of traditional family roles" and "seek exemptions from laws designed to protect others whose beliefs and actions the claimants condemn." *Id.* at 2520 & n.12.

[230] *See supra* Part VII.A.

[231] Consider, for example, the following interests that the Court has treated as compelling: the interest in protecting the judicial system from outside pressures that the Court in *Cox v. Louisiana*, 379 U.S. 559 (1965), cited in rejecting a free speech challenge to a prohibition on picketing near a courthouse; the interest in ensuring an informed electorate that the Court in *Dunn v. Blumstein*, 405 U.S. 330 (1972), found insufficiently well-served in upholding a voting rights challenge to a durational residence requirement for voting; and the interest in achieving a diverse student body that the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), recognized in upholding a University of Michigan Law School affirmative action admissions program.

conception, that counts, and by that yardstick, the anti-discrimination interest at issue in *Masterpiece Cakeshop* comfortably qualifies as compelling.

If any uncertainty remains as to whether that interest deserves the "compelling" label, the text of the Colorado Act should dispel it. The Act specifically names "sexual orientation," along with race, religion, national origin, sex, marital status, and disability, as a "discriminatory" and "unlawful" basis for a place of public accommodation to treat some patrons worse than others.[232] The Act's inclusion of sexual orientation on such a short list with race, religion, national origin, and sex makes clear the great importance that Colorado attaches to the interest at hand. The Supreme Court has singled out as constitutionally "suspect" any state discrimination on the basis of race, religion, or national origin,[233] and the Court has been only moderately less skeptical of the validity of any state discrimination based on sex.[234] It is hardly a stretch to assume that Colorado regards eradicating discrimination on those bases by private actors – ones, like Phillips, operating a place of public accommodation – as a state interest of compelling importance.

Granted, a court deciding whether or not a state is acting within federal constitutional bounds cannot responsibly treat a state interest as compelling simply because the state regards it as such. The question is one of federal, not state, law. It would be inconsistent with basic principles of federalism, however, for a court not to show significant deference to the importance that a state can demonstrate it attaches to a particular interest. When, as with the anti-discrimination interest at issue in *Masterpiece Cakeshop*, the state clearly treats an interest as compelling, and when a court is satisfied, as it should be in this instance, that the interest may fairly be characterized as one of compelling importance to the general welfare, a finding that the interest is compelling is in order.

I suggest that the second condition noted above – a necessary means-end relationship between denying the exemption and achieving a compelling state interest – is met because, in and of itself, an exemption for Phillips is so harmful that Colorado needs to deny it in order to ensure that achievement of the state's compelling interest is not substantially compromised. After all, the harm that an exemption for Phillips threatens to inflict on same-sex couples is hardly limited to their having to look elsewhere for a custom wedding cake and perhaps having to settle for one not as good as Phillips could make.[235] Instead, it includes the humiliation, stigma, and other adverse effects of being refused service because of

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[232] COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2018). The Act also names "color" and "ancestry," which are commonly subsumed under "race" and "national origin," respectively. For clarity and simplicity, I use only the two latter terms. For the same reasons, I use "religion" rather than the Act's word, "creed," which encompasses, and is often equated with, "religion" but is used infrequently enough today to invite possible misunderstanding.

[233] *See supra* note 221.

[234] *See* United States v. Virginia, 518 U.S. 515, 531–34 (1996).

[235] In his petition seeking Supreme Court review, Phillips seemed to suggest otherwise. *See* Petition for Writ of Certiorari, *supra* note 12, at 6 ("Although Respondents Craig and Mullins easily obtained a free wedding cake with a rainbow design from another bakery, they filed a charge of sexual orientation discrimination….").

one's sexual orientation. That harm, like the harm in *Bob Jones University* to applicants denied admission because of their race,[236] is very real and does not go away simply because something much like the desired item – whether a custom wedding cake or a college education – can be purchased elsewhere.

In my view, the above reason alone is sufficient to establish the necessity of denying Phillips an exemption. Assuming, however, for purposes of argument, that it is not, I submit that the necessity of denying him an exemption is established beyond debate when that reason is considered in tandem with the potential ripple effects of granting him the exemption. As discussed below, granting Phillips an exemption from the Anti-Discrimination Act triggers an obligation to grant one to countless others because the state must satisfy the strictures that the Equal Protection Clause and the Religion Clauses place on differences in treatment on the basis of religion; and granting such a multitude of exemptions cannot help but substantially undermine the achievement of Colorado's compelling interest in protecting patrons of places of public accommodation from discriminatory treatment based on sexual orientation.

Most obviously, if Phillips is granted an exemption, one must also be granted to other Christian bakers in Colorado who share Phillips's understanding of Christianity as a prohibition on designing and making wedding cakes for same-sex couples. It is difficult to estimate how many Colorado bakers meet this description.[237] On the one hand, some Christian denominations, such as the Episcopal and Presbyterian Churches,[238] officially support same-sex marriage, and many members of Christian denominations officially opposed to same-sex marriage, such as the Roman Catholic and Mormon Churches,[239] deviate from their church's position.[240] On the other hand, a sizable proportion of Colorado adults – almost two-thirds – call themselves Christian;[241]a significant percentage of members of denominations officially opposed to same-sex marriage do adhere to their church's position; and individual Christians religiously opposed to same-sex marriage are entitled to respect

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[236] *See supra* text accompanying notes 189-91.

[237] For the story of a bakery owner who shares not only Phillips's views about custom wedding cakes and same-sex marriage but also his readiness to litigate all the way to the highest appellate court to defend those views, see Adam Liptak, *Across the Atlantic, Another Court Case About Cake and Gay Rights*, N.Y. TIMES, Dec. 19, 2017, at A18.

[238] *See* David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/ [https://perma.cc/Y5AJ-7BAH].

[239] *See id.*

[240] *See Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical*, PEW RES. CTR. (June 26, 2017), www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical [https://perma.cc/F7HV-3GSN]. Most striking is the support among Catholics— sixty-seven percent. *See id.*

[241] *See Religious Landscape Study: Religious Composition of Adults in Colorado*, PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/state/colorado/ [https://perma.cc/C497-QMEC].

for free exercises purposes in their understanding of Christianity, even if that understanding deviates from their particular denomination's official position.[242]

Of course, any exemption granted to Phillips cannot conceivably be limited to bakers who are Christian. Islam and Orthodox Judaism, for example, officially oppose same-sex marriage.[243] Though only a very small percentage of the state population,[244] Colorado's Muslims and Orthodox Jews may include some bakers who share Phillips's views on same-sex marriage; if so, they would have every reason to claim a right to an exemption like his.

If the only Coloradans able to make potent religious-equality claims for exemptions like the one granted to Phillips were likeminded Christian, Muslim, and Orthodox Jewish bakers, the ripple effects of granting Phillips an exemption might be no big deal. However, those claims are truly no more than the *tip of the tip* of the iceberg.

First of all, consider the very wide range of businesses covered by the Colorado Act's prohibition against discrimination on the basis of sexual orientation. The Act bars such discrimination in any "place of public accommodation,"[245] which it initially defines in broad terms: "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public."[246] It then names, as *non*exclusive examples ("including but not limited to"), more than thirty types of covered businesses, ranging from businesses "offering wholesale or retail sales to the public" to businesses where people can "eat, drink, sleep, or rest" to barbershops, hospitals, mortuaries, and more.[247]

If Phillips is granted an exemption, a multitude of people in the wide variety of businesses covered by the Act thereby acquire potent religious equality claims for exemptions of their own. Consider, for example, a caterer and a reception-hall owner who, as a Christian and an Orthodox Jew, respectively, believe that same-sex marriage is sinful. The caterer believes that her catering a same-sex wedding reception would be sinful because it would facilitate the same-sex couple's sinful behavior. The reception-hall owner believes his renting the hall for such a reception would be sinful for a somewhat different reason: it would send a message to God, the same-sex couple, their wedding guests, and anyone else who learns about it that he approves of, and encourages, same-sex marriage.

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[242] *See* Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981), discussed *supra* note 147. Although some Christians belong to no denomination, fewer than one percent of Christians nationally seem to fit that description, *see Religious Landscape Study: Religions,* PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/ [https://perma.cc/7K9F-E7Z3] (last visited June 26, 2018), and the percentage in Colorado appears to be only slightly higher, *see Religious Landscape Study: Religious Composition of Adults in Colorado*, *supra* note 241. In seeking Supreme Court review, Phillips asserted that his opposition to same-sex marriage derives from his Christian faith, but he did not identify himself as belonging to any particular denomination. *See supra* note 150.

[243] *See* Masci & Lipka, *supra* note 238.

[244] *See Religious Landscape Study: Religious Composition of Adults in Colorado, supra* note 241 (listing Muslim population as less than 1% and the Jewish population – of which Orthodox Jews are a subset – as 1%).

[245] COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2018).

[246] *Id.* § 24-34-601(1).

[247] *Id.*

Under the Supreme Court's definition of "religion," a court cannot treat the caterer's or the reception-hall owner's religious objections to using her catering services or his reception hall for a same-sex marriage as any less deserving of respect than Phillips's objections. Perhaps a much higher proportion of people who are religiously opposed to same-sex marriage would be supportive of Phillips's claim than would support either of the other two. For constitutional purposes, however, that is beside the point, as are questions such as whether the causal connection between the caterer's agreeing to cater a same-sex wedding and the same-sex couple's actually getting married is too attenuated for the caterer's facilitation objection to be taken seriously. Perhaps the court finds the reception-hall owner's reason for his religious objection to be unpersuasive because the court believes that no one sensibly infers anything about a reception-hall owner's beliefs from the identity of the people renting it. That too has no place in the court's decision.

The basic principle, according to the Court, is simple: "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[248] I have no misgivings about that principle. I have *enormous* misgivings, however, about the consequences that principle can unleash in combination with exemptions for Phillips's and others' conscience-based complicity claims.

If the almost boundless ripple effects of granting an exemption to Phillips are not apparent from the examples discussed thus far, the following hypothetical claim arising outside the context of the same-sex wedding itself should leave no room for doubt. A restaurant owner maintains that, as a Muslim, he believes that same-sex marriage is sinful and that he is complicit in the sin of same-sex marriage if he provides service to any same-sex couple, married or not. After all, he reasons, providing service to married same-sex couples promotes same-sex marriage by making clear to unmarried same-sex couples that they will be accepted by society if they decide to marry. By the same token, in his view, providing service to unmarried same-sex couples is problematic because it tells them that society welcomes them as a couple and thereby enhances the likelihood that they will remain together long enough to get married.

Whether shared by many or few, the restaurant owner's religious beliefs are no less entitled to protection than Phillips's. Granting an exemption to Phillips and not to the restaurant owner would be a difference in treatment on the basis of religion lacking the strong justification that religious classifications demand. As should be apparent, similar religious equality objections could be made with comparable force by owners of almost any of the many businesses covered by the Colorado Anti-Discrimination Act. Granting an exemption to Phillips opens the door wide to claims for exemptions from owners of retail clothing stores, barber shops, gyms, movie theaters, and more. Even the owner of a mortuary could have a strong religious equality claim for an exemption if one is granted to Phillips. If she sincerely believes she would be complicit in the sins of same-sex couples who marry if she does not do her utmost to deter same-sex marriage by refusing to provide funeral services for anyone who entered into such a marriage, is her belief any less entitled to respect than Phillips's?

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[248] Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

Finally, I call attention to two types of ripple effects not mentioned in the above discussion. I saw no need to explore them in that discussion, because of the many more obvious ripple effects that, I believe, make an exemption for Phillips constitutionally untenable. I note them now, however, because in some instances, it may make a difference to consider them. First, as noted earlier,[249] the Equal Protection, Free Exercise, and Establishment Clauses invalidate the use of any religious classification, including one that prefers religion to nonreligion, unless the classification is necessary to serve a compelling state interest. Accordingly, if A is exempted from a law that she cannot obey for religious reasons, then, unless it is necessary to a compelling interest to do otherwise, an exemption also must be given to B, who, for reasons of conscience that constrain her with comparable force, is similarly unable to obey the law. Second, as the Court acknowledged in *Lee*,[250] ripple effects are not limited to claims for exemptions from the particular law under review. Assume, for example, that Colorado has a law that provides protection against sexual orientation discrimination in a variety of circumstances not covered by the Anti-Discrimination Act. An exemption for Phillips from the Anti-Discrimination Act very likely would call for exemptions from that other law too.

D. Legislative vs. Judicial Exemptions, and Another Variation on Masterpiece Cakeshop

The final step of my proposed approach, Step 4, calls for some deference to the lawmaker in applying the necessary-to-a-compelling-interest test to a legislative exemption that lifts a substantial burden on free exercise. Like Step 3, which deals with court-created exemptions, Step 4 focuses the court's attention on the question of whether denying the exemption at hand is necessary to serve a compelling state interest. However, unlike Step 3, Step 4 tells the court not to address the question directly and give the answer that it would give as a court exercising its independent judgment. Instead, the court's job is to address the question only indirectly through the lens of the legislature's implicit judgment that the exemption is constitutional under the applicable Establishment Clause standard of review. Even if a court, as a matter of independent judgment, would conclude that denying a legislative exemption is necessary to serve a compelling state interest – a conclusion that would require invalidating the exemption if it were judicially created – the court under Step 4 should uphold the exemption if it determines that the legislature had a substantial basis for coming to the contrary conclusion. In essence, the court gives the benefit of the doubt to legislative exemptions when their validity presents a close question.

Consider for purposes of illustration another variation on *Masterpiece Cakeshop* that I offered in the Introduction. Suppose that after getting no relief in the Colorado courts, Phillips decides not to seek U.S. Supreme Court review but instead pursues in earnest a legislative solution. Suppose also that before long he and some influential allies succeed

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[249] *See supra* Part VII.B.

[250] *See* United States v. Lee, 455 U.S. 252, 260 (1982); *supra* text accompanying notes 184–85.

in persuading the Colorado legislature to enact an exemption to the Anti-Discrimination Act very similar in scope to the one that he had sought in court. Under my proposed approach, should the legislative exemption survive an Establishment Clause challenge even though, for the reasons set forth in Parts VI.C and VII.C, a judicially crafted exemption of essentially the same scope should not?

The answer almost certainly is "no" regardless of whether the court determines that the burden on religious liberty lifted by the exemption is insubstantial or substantial. If the court determines that the burden is insubstantial, as I have suggested it most reasonably would do, the unconstitutionality of the legislative exemption is clear. Under Step 2, the fact that an exemption is legislative, rather than judicial, is of no importance, and an exemption that lifts an insubstantial burden violates the Establishment Clause unless there is no rational basis for denying the exemption, In this instance, the existence of a rational basis is beyond dispute: serving the state interest underlying the Anti-Discrimination Act of protecting the populace from discrimination on the basis of any of the characteristics listed in the Act. Accordingly, the exemption should fall.

The result should be no different if the court determines that the burden is substantial, as I have suggested it has at least a reasonable basis for doing (even though not a basis that I find ultimately persuasive). Although giving the benefit of the doubt to a legislative exemption can mean the difference in close cases between upholding an exemption and striking it down, the Establishment Clause issue presented here is simply not a close one. For the reasons detailed in Part VII.C, a legislative exemption akin to the one Phillips sought in court so seriously detracts from the state's ability to serve its compelling anti-discrimination interest that the Colorado legislature has no substantial basis for believing that denying the exemption is not necessary to a compelling state interest.

CONCLUSION: THE PARTNERSHIP BETWEEN THE RELIGION CLAUSES

In closing, I would like to discuss briefly a few related ideas. It is beyond the scope of this Article to attempt to explore any of them in the depth they deserve, but I do think broaching them now helps place in proper perspective the Establishment Clause approach I have proposed.

At the start of the Article,[251] I made clear that I predicate my proposed approach on the assumption that, despite some Justices' expressed desires to the contrary, the endorsement test continues to be good law in the Supreme Court and has not been displaced by a coercion test as the primary measure of an Establishment Clause violation. To avoid any possible misunderstanding, I would like to underline here a couple of points about that assumption.

First, in making explicit my reliance on that assumption, I do not mean to imply that Establishment Clause limitations on religious exemptions are necessarily insignificant if endorsement is not the applicable test. Note, for example, that in denying an Amish employer's request for an exemption from social security taxes, the Court in *United States*

[251] *See supra* note 19 and accompanying text.

v. Lee[252] characterized the effect of granting the exemption in terms that mirror the coercion test and have possible far-reaching implications for other religious exemptions. "Granting an exemption from social security taxes to an employer," the Court explained, "operates to impose the employer's religious faith on the employees."[253]

Second, and more broadly, the endorsement test represents not only what I believe *is* the governing Establishment Clause test in the Supreme Court but also what I believe it should be. As I have argued elsewhere,[254] interpreting the Establishment Clause as providing the protection against government sponsorship of religion guaranteed by the endorsement test comports much better with the text and history of the Clause than interpreting it as affording protection only against government coercion. An interpretation limited to coercion wrongly treats as inconsequential the various significant harms caused by government endorsement of religion, ranging from alienating nonadherents of the favored religion to degrading the favored religion and more.[255]

An interpretation of the Establishment Clause that limits it to a constraint on coercion also makes the Clause little, if anything, more than a carbon copy of its companion clause in the First Amendment—the Free Exercise Clause. For those who look at a strong Establishment Clause as the enemy of religious liberty, that may seem an interpretation with much to commend it, but as a final point, I want to urge a different perspective—one that sees both of the First Amendment's Religion Clauses as essential partners in the enterprise of preserving religious liberty. My proposed approach in this Article to Establishment Clause limitations on religious exemptions takes those limitations seriously but, I believe, no more seriously than the ultimate objective of preserving religious liberty demands.

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[252] 455 U.S. 252 (1982), discussed *supra* text accompanying notes 179–85.

[253] *Id.* at 261. For an analogous argument that prohibitions on same-sex marriage violate the Establishment Clause even if a coercion test is applied, see Gary J. Simson, *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132, 194–97 (2012) (maintaining, a few years prior to the Court's invalidation of such prohibitions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that prohibitions on same-sex marriage coerce same-sex couples to live their lives within legal constraints best understood as codifications of religious beliefs).

[254] *See* Simson, *supra* note 19, at 301–04.

[255] *See id.* at 304–08; Gary J. Simson, *Endangering Religious Liberty*, 84 CALIF. L. REV. 441, 464–68, 479–81 (1996).