

1-1-2000

Towards a Defensible Free Exercise Doctrine

Frederick Mark Gedicks
BYU Law, gedicksf@law.byu.edu

Follow this and additional works at: https://digitalcommons.law.byu.edu/faculty_scholarship



Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV., 925 (2000).

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Towards a Defensible Free Exercise Doctrine

Frederick Mark Gedicks*

*If you want to fight here, sir, this sure is lovely ground. We tuck in here behind this stone wall and I'd be proud to defend it. Best damn ground I've seen all day.***

I. Introduction: The Implausibility of Religious Exemptions

Almost from the moment that the Supreme Court abandoned the religious exemption doctrine in *Employment Division v. Smith*,¹ its defenders have worked to bring it back.² More than a decade later, however, *Smith* remains well-entrenched; not only has the Court confirmed *Smith*'s basic holding,³ but it also struck down Congress's first effort to restore the exemption doctrine, at least as it applied to the states.⁴ A less ambitious successor

* Professor of Law, Brigham Young University Law School; gedicksf@lawgate.byu.edu. I am grateful to Kif Augustine-Adams, Alan Brownstein, Jay Bybee, John Fee, Elizabeth Grimshaw, Cliff Fleming, Jim Rasband, Brett Scharffs, Ellis West, and Kevin Worthen for criticisms of earlier versions of this essay and prior related work. I also received valuable comments on an earlier version presented at a faculty workshop at the William Boyd School of Law at the University of Nevada-Las Vegas. Elizabeth Grimshaw and Matthew Todd provided excellent research assistance. Finally, I am indebted to The George Washington University Law School, and particularly Bob Tuttle, for affording me the opportunity to discuss these issues.

** MICHAEL SHAARA, *THE KILLER ANGELS* 35 (1974) (quoting Col. Bill Gamble, addressing Gen. John Buford, in Gettysburg, Pennsylvania, on June 30, 1863).

1 494 U.S. 872 (1990).

2 Throughout this essay I use "religious exemption doctrine" and "religious exemptions" to refer only to the constitutional rule developed in the Supreme Court's unemployment compensation cases (*Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963)) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). This rule directs that the Free Exercise Clause excuses a religious believer from complying with any law that burdens or otherwise interferes with the believer's religious practices, unless the government can show that an exemption threatens a compelling interest that cannot be protected by any less restrictive means. I do not intend these terms to apply to other areas of constitutional law that also use exemptions, such as incidental burdens on expressive conduct under the Speech Clause.

3 See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.") (citing *Smith*, 494 U.S. 872 (1990)).

4 See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* (1994), as being beyond the power granted to Congress under section 5 of the Fourteenth Amendment). A number of commentators have argued that RFRA is unconstitutional even as applied to federal government action. See, e.g., Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 *MONT. L. REV.* 5 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 *N.Y.U. L.*

law, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), faces an uncertain constitutional future.⁵

What many proponents of religious exemptions do not want to admit is that they no longer hold the high ground in the battle over religious liberty. During the nineteenth and early twentieth centuries, American society viewed the practice of religion—mostly "Judeo-Christian" religion—as an especially good activity entitled to special privileges.⁶ In *Holy Trinity Church v. United States*,⁷ for example, Justice Brewer's conclusions that Americans are "a religious people" and the United States "a religious nation" were the basis for a unanimous decision that declined to apply a federal immigration statute to an American parish.⁸ More recently, Justice Douglas's declaration in *Zorach v. Clauson*⁹ that Americans "are a religious people whose institutions presuppose a Supreme Being" was used to justify a released-time program that allowed public school students to leave during the school day to receive religious instruction, but not for any other reason.¹⁰

Holy Trinity Church and *Zorach* are no longer accurate reflections of the place of religion in American society. Their understanding of religious practice as a uniquely valuable social activity to be encouraged by government has been displaced by an understanding that reduces religious practice to a personal preference that is to be neither encouraged nor discouraged by gov-

REV. 437, 469-73 (1994); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 119-25, 132-39 (1996); Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 718-21 (1998); Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 14-19 (1998).

5 See Pub. L. 106-274, 114 Stat. 803 (2000), 2000 U.S.C.C.A.N. 106.

RLUIPA reinstated the exemption doctrine against federal and state land use regulations that burden religious practices, where the burden relates to a program that receives federal funds or affects interstate commerce. See RLUIPA § 2(a). It also reinstated the doctrine against governmental action that burdens the religious practices of prisoners and other persons in government custody or control. See RLUIPA § 3. Finally, RLUIPA amended RFRA to clarify that the latter remains valid as applied to federal action. See RLUIPA § 7.

It is unclear whether RLUIPA will satisfy the Rehnquist Court's increasingly restrictive interpretations of congressional power to regulate interstate commerce. Cf. Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 654-60 (1998) (making this argument with respect to the now defunct Religious Liberty Protection Act of 1999). For example, the Rehnquist Court may not permit Congress to rely on the commerce power to regulate areas traditionally left to state law, such as zoning and land use regulations, even when, as was the case with RLUIPA, Congress creates an extensive evidentiary record of the area's impact on interstate commerce. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740, 1748-54 (2000) (holding that Congress lacked power under the Commerce Clause to enact the Violence Against Women Act because the legislative record documenting substantial effects on commerce relied on "but-for-causation" and Congress articulated no limiting principle that would have prevented federalization of "traditional areas of state regulation," such as family law).

6 See FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 15-18 (1995) [hereinafter GEDICKS, *CHURCH AND STATE*].

7 143 U.S. 457 (1892).

8 *Id.* at 465, 470-72.

9 343 U.S. 306 (1952).

10 *Id.* at 313-15.

ernment.¹¹ This view is evident in the Supreme Court's equation of religious pacifism with secular moral objections to war,¹² and in its insistence that government must remain neutral between "religion" and "nonreligion."¹³ In terms of its social place and importance, religious practice today has lost its uniqueness, and now enjoys no greater cultural status than a number of indisputably secular activities.¹⁴

In this cultural environment, it is difficult to justify giving religious practices special constitutional protection that is not afforded to secular activities that appear to be just as morally serious and socially valuable as religion. As I have suggested elsewhere, we are no longer able to explain why religious practices are more virtuous or praiseworthy than caring for one's family, working on behalf of a vulnerable social group, supporting a political cause or candidate, or any number of other comparable secular activities.¹⁵ Even those seeking restoration of the religious exemption doctrine implicitly concede the force of this objection by suggesting that the doctrine should also protect actions prompted by secular moral beliefs.¹⁶ In short, the current cultural landscape prevents religious liberty from being plausibly defended by means of *religious* exemptions.

How, then, might religious liberty be protected, if not by exemptions? More precisely, how can those concerned about religious liberty argue for a meaningful level of constitutional protection for religious exercise without elevating it above comparable activities motivated by secular morality? As suggested by my prior work,¹⁷ my thesis is that religious practices should re-

11 See GEDICKS, *CHURCH AND STATE*, *supra* note 6, at 18-21.

12 See *United States v. Seeger*, 380 U.S. 163, 165-66 (1965); *accord* *Welsh v. United States*, 398 U.S. 333, 336-37 (1970) (plurality opinion) (applying *Seeger* to grant an exemption to registrant who had crossed off the word "religious" from the conscientious exemption box on his draft registration form); see also Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

13 This injunction first appeared in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), and has been repeatedly invoked by the Court in the decades since. See, e.g., *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 808-809 (1995); *Lee v. Weisman*, 505 U.S. 577, 627 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573, 644 (1989); *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968); *School Dist. v. Schempp*, 374 U.S. 203, 216 (1963).

14 See GEDICKS, *CHURCH AND STATE*, *supra* note 6, at 21:

Whereas the de facto [Protestant] establishment [of the nineteenth century] was built on the premise that religion is essential to civilized society, secular neutrality's requirement that government remain detached and neutral with respect to the religious choices of its citizens suggests that a wholly secular society is possible and perhaps even preferable. . . . After *Everson* it was thought that government can and should remain indifferent about how religious choice is exercised.

See also Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1057, 1058 (2000) (arguing that *Smith* "paved the way for a more fundamental questioning of our presuppositions about the power and role of religion in contemporary society," thereby "exposing the need for a jurisprudence that equalizes the liberty interests between majority and minority religious groups, and between religious and secular groups and individuals").

15 See Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 555-57 (1998) [hereinafter *Gedicks, An Unfirm Foundation*].

16 See *Gedicks, An Unfirm Foundation*, *supra* note 15, at 571-72.

17 See generally Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three*

ceive the same kind of constitutional protection afforded to expression and association under the Speech and Equal Protection Clauses. In other words, incidental restriction, time, place, and manner regulation, and prior restraint of religious activity, should be handled doctrinally in the same way that such restrictions, regulations, and restraints of expression are dealt with under the Speech Clause, and burdens imposed on religious practices by underinclusive but nonsuspect classifications should be handled doctrinally in the same way that burdens imposed by such classifications on speech and other fundamental rights and interests are dealt with under the Equal Protection Clause.

Professor Tuttle considers the effect of this thesis on land use and zoning regulations that burden religion, by analyzing how the thesis would apply to the recently enacted RLUIPA.¹⁸ He concludes that RLUIPA's reinstatement of the exemption doctrine is likely to be ineffective, if not counterproductive, in protecting against religiously burdensome land use regulation,¹⁹ whereas the statute's implicit reliance on Speech and Equal Protection Clause doctrines is both adequate to protect against such laws, and more reliable and consistent than the protection one could expect from the exemption doctrine.²⁰

I have three general responses. First, I want to clarify my own position, which extends beyond the Speech Clause and Equal Protection protection of religious activity to the development of an analogous doctrine under the Free Exercise Clause that is nevertheless distinct from that of these other Clauses. RLUIPA's apparent use of doctrinal concepts from the Speech and Equal Protection Clauses illustrates my approach.²¹ Second, I am less certain than Professor Tuttle that a Speech and Equal Protection Clause approach to protecting religious liberty would avoid the analytic pitfalls of burden analysis, although the problem is not insuperable, and certainly presents no greater challenge than is already presented by the religious exemption doctrine.²² Finally, I will respond to Professor Tuttle's trenchant observation that my position is not merely prudential, but an implicit normative concession to the primacy of state power that is fundamentally at odds with a believer's prior commitment to God.²³

II. *An Independent Meaning for the Free Exercise Clause*

A. *Protecting Religious Exercise as Religion*

Professor Tuttle's discussion of Speech Clause doctrine appears to assume that in the absence of religious exemptions, religious exercise would be protected as a constitutional liberty only to the extent that it can be charac-

Abnormalities, 75 IND. L.J. 77, 85-94, 104-119 (2000) [hereinafter Gedicks, *The Normalized Free Exercise Clause*]; Gedicks, *An Unfirm Foundation*, *supra* note 15, at 572-73.

¹⁸ See Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Use After Boerne*, 68 GEO. WASH. L. REV. ____ (2000).

¹⁹ See *id.* notes 27-30 and accompanying text (discussing RLUIPA § 2(a)).

²⁰ See *id.* notes 31-37 and accompanying text (discussing RLUIPA § 2(b)).

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

terized as speech or association.²⁴ This doctrinal position constitutes an unwarranted and premature abandonment of the Free Exercise Clause that leaves religious activity with no protection other than a superfluous guarantee against religious discrimination.

Abandonment of any independent doctrine for the Free Exercise Clause was one of the consequences of *Smith*'s recasting of the Clause's purpose from protecting a domain of religious liberty to preventing religious discrimination. Religious traits are already grouped with racial and ethnic ones as "suspect" or "arbitrary" bases of classification under both the Equal Protection and Establishment Clauses.²⁵ Consequently, when it characterized the Free Exercise Clause as a protection against religious discrimination, *Smith* left the Clause with nothing to do that is not already done by these other Clauses.²⁶ Advocating the protection of religious land uses only to the extent that they can pass as speech or association is to abandon the free exercise of religion as a distinct constitutional liberty.

Surely it makes more sense to proceed on the assumption that the Free Exercise Clause means something rather than nothing.²⁷ The most defensible

²⁴ See, e.g., Tuttle, *supra* note 18, text accompanying notes 271-72 ("As many have recognized, the 'exercise of religion' defies complete reduction to speech. Nonetheless, the fact that core speech activities are involved in many religious land uses, coupled with the history of protecting religious exercise through the Speech Clause, suggests that attending to speech analysis in this inquiry is both legitimate and likely to prove useful."). The most complete normative defense of this position is William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983). For a descriptive development of the position in light of recent developments in Speech Clause doctrine, see Mark Tushnet, *The Redundant Free Exercise Clause?*, LOY. U. CHI. L.J. (forthcoming 2001). I disagree with Professor Tushnet's conclusion, see *id.* at 16, that the forms of religious activity remaining unprotected by Speech Clause doctrine are relatively few.

²⁵ For condemnations of religious classifications under the Equal Protection Clause, see *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996); *Miller v. Johnson*, 515 U.S. 900, 911 (1995); *Board of Educ. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *Wade v. United States*, 504 U.S. 181, 186 (1992); *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987); *Friedman v. Rogers*, 440 U.S. 1, 17 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality opinion by Black, J.); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 92 (1900). For condemnation of such classifications under the Establishment Clause, see *Larson v. Valente*, 456 U.S. 228, 246-47 (1982); *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in judgment).

²⁶ See James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 113, 115 (1991) (making this point with respect to the Establishment Clause). Professors Bybee and West suggested to me that this redundancy is less the result of *Smith*'s contraction of the Free Exercise Clause than of the Court's dramatic expansion of the Equal Protection Clause beyond its originally intended bounds. On this view, the overinflation of the Equal Protection Clause to encompass religious discrimination does not count as a reason for expanding the reach of the Free Exercise Clause beyond such discrimination. Nevertheless, whatever the original understanding of the Equal Protection Clause, its expansion to religious discrimination has been established for at least a century. See *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900). In that light, it remains odd to read the Free Exercise Clause as having no greater reach than the Equal Protection Clause.

²⁷ This notwithstanding that the Supreme Court occasionally interprets constitutional provisions as if they really do mean virtually nothing. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962)

reading of the Free Exercise Clause cannot be one that reads it right out of the Constitution. Religious exercise was among those rights the framers of the First Amendment were most concerned with protecting against interference by the federal government they created in 1787,²⁸ and there is evidence that the framers of the Fourteenth Amendment were similarly concerned with protecting religious exercise against encroachment by state governments,²⁹ although not necessarily by exemptions.³⁰ Even assuming the correctness of *Smith's* holding that believers are not presumptively entitled to exemptions from laws that burden their religious practices, it does not follow that the Free Exercise Clause protects believers only against intentional discrimination that is already prohibited by other constitutional provisions.

Accordingly, although religious exercise often manifests itself as speech or association, I take the continuing presence of the Free Exercise Clause in the text of the First Amendment as a warrant to provide religious exercise with doctrinal protection irrespective of whether such exercise might also qualify for protection under the Speech Clause.³¹ In short, religious exercise should not be protected *as* speech, but rather *like* speech.

Freedom of expression is not the only conceivable doctrinal analogue from which to construct a new free exercise doctrine. For example, the Due Process Clause protects a woman's right to choose an abortion against "undue burdens" on that right, as a specific component of the more general liberty to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."³² These aspects of the constitutional right

(Guarantee Clause of Article IV); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (Privileges or Immunities Clause of § 1 of the Fourteenth Amendment); *see also* ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166-67 (1990) (comparing the Privileges or Immunities Clause to an ink blot).

²⁸ *See, e.g.*, THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); *see also* MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 36-37 (1978) (suggesting, *inter alia*, that if the Free Exercise Clause is not to be considered merely redundant or rhetorical, it could be understood to "have been intended to go part way toward protecting that special method of expressing opinion that is peculiar to religion, the worship service").

²⁹ *See, e.g.*, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 246-57 (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 49, 53-54, 150-51 (1986).

³⁰ Professor Lash has argued that the Fourteenth Amendment incorporated an understanding of the Free Exercise Clause that included religious exemptions. *See* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. REV. 1106 (1994) (arguing that relief from (i) anti-slavery laws that incidentally burdened the free exercise rights of slaves and the speech rights of abolitionists, and (ii) the universal military draft which incidentally burdened the free exercise rights of religious pacifists, was a principal motivation for inclusion of the Privileges or Immunities Clause in section 1 of the Fourteenth Amendment); *see also* AMAR, *supra* note 29, at 256 (endorsing Lash's argument). I have argued elsewhere that Lash's historical evidence does not support the view that the framers of the Fourteenth Amendment understood the Free Exercise Clause to encompass the religious exemption doctrine abandoned by *Smith*. *See* Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 82 n.17.

³¹ *See* Tushnet, *supra* note 24, at 3 n.7 (noting without endorsing "approaches to constitutional interpretation" that "insist that every constitutional provision have some independent meaning").

³² *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor,

to privacy strongly resonate not only with a substantive egalitarian understanding of free exercise, which would require that the government act so as to minimize its impact on religious belief,³³ but also with the common understanding of religion and religious belief as moral imperatives in one's life. A less optimistic analogue than the Due Process Clause would be the Press Clause, which the Court, consistent with *Smith*, has construed as not protecting the press from incidental burdens on news gathering and printing imposed by generally applicable laws.³⁴

Distinct constitutional interests do not necessarily deserve the same degree of constitutional protection simply because they are both "rights."³⁵ Nevertheless, as a working hypothesis, I believe the Speech Clause is the best template to use for the development of a newer free exercise doctrine, for three reasons. First, both the Speech Clause and the Free Exercise Clause have the same textual roots, both being located in the First Amendment, literally right next to each other.³⁶ Second, *Smith* itself invited the Speech Clause analogy, having expressly invoked Speech Clause doctrine as a constitutional norm that the religious exemption doctrine violated.³⁷

Finally, and most important, the Free Exercise and Speech Clauses both deal with a conceptually similar problem: they both extend constitutional protection to those whose personal beliefs constrain them to oppose the government or its laws. The Free Exercise Clause extends constitutional protection to those whose religious beliefs constrain them to *act* in opposition to government; the Speech Clause extends constitutional protection to those whose personal beliefs constrain them to *speak* in opposition to government.³⁸ Speech Clause protections are more broadly developed, however, including well-established doctrines that protect conduct engaged in for expressive purposes,³⁹ speech adversely affected by time, place, or manner regulation,⁴⁰ association with others for expressive purposes,⁴¹ and speech

Kennedy & Souter, JJ.); see also *id.* at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

³³ See *infra* note 50 and accompanying text.

³⁴ See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991) (holding that the Press Clause does not insulate a newspaper from liability for reporter's breach of promise of source confidentiality); *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (holding that the Press Clause does not protect a reporter's privilege of source confidentiality in grand jury proceedings).

³⁵ Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENTARY 7, 8 (1996); see generally Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269 (2000).

³⁶ See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . .").

³⁷ See *Employment Div. v. Smith*, 494 U.S. 872, 886 (1990).

³⁸ The Speech Clause also protects some of the same interests as the right to privacy under the Due Process Clause. See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (recognizing the Speech Clause protection against generally applicable law compelling unwanted disclosure of affiliation with expressive associations); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (same); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) ("The value of free expression . . . rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.").

³⁹ See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

⁴⁰ See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

prohibited *ex ante* by discretionary governmental action.⁴² Speech is also expressly protected by the fundamental rights/equal protection doctrine under the Equal Protection Clause.⁴³ Aside from the bar on religious discrimination, no comparable doctrines protect religious exercise.

The Court did not err in *Smith* by eliminating the religious exemption doctrine. Because it presupposed a constitutional status for religious practice superior even to that of expression under the Speech Clause, the religious exemption doctrine remains difficult to justify.⁴⁴ At least one error in *Smith*, however, is that it placed free exercise rights *below* the status of speech rights. When a law incidentally burdens expressive conduct or attempts to regulate the time, place, or manner of expression, there is no presumptive exemption for the expressive conduct analogous to the religious exemption doctrine, but the law is still subjected to meaningful review.⁴⁵ Similarly, burdens on organizations formed for expressive purposes, and regulatory schemes that delegate excessive discretion to government officials to prohibit expression before it occurs, are both subject to serious judicial scrutiny.⁴⁶ In contrast to the religious exemption doctrine, which presupposes the elevation of religious exercise above other fundamental rights and interests, a Free Exercise Clause doctrine that protects religious exercise to the same degree that Speech Clause doctrine protects speech and association ensures only that religious exercise receives the same level of protection that is currently extended to the fundamental right that I maintain it most closely resembles.

This brings me to a second clarification. Professor Tuttle characterizes the anti-discrimination aspects of Equal Protection Clause doctrine and the content-neutrality aspects of Speech Clause doctrine as being rooted in "formal equality" and "formal neutrality."⁴⁷ Although not inaccurate, this is

41 See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958).

42 See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Near v. Minnesota*, 283 U.S. 697 (1931).

43 See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973); see, e.g., *Police Dept. v. Mosley*, 408 U.S. 92 (1972).

44 See, e.g., William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 312-13 (1991).

45 Although initial applications of *O'Brien* and the time, place, or manner tests suggested that they called for minimal scrutiny, more recent applications and characterizations denominate them as species of heightened scrutiny. See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 87-88; *infra* note 65 and accompanying text.

46 See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) (prior restraints carry a "heavy presumption" of unconstitutionality and are upheld only when linked with "procedural safeguards designed to obviate the dangers of a censorship system"); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982) (government burdens on freedom of association are justified only when they have a "substantial relation" to an "overriding and compelling state interest").

47 E.g., Tuttle, *supra* note 18, text accompanying notes 32-34, 162, 226. Professor Laycock defines equality as requiring equal treatment in the government's imposition of penalties and the distribution of benefits, and neutrality as additionally requiring equal treatment in the government's speech and symbolic conduct. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 997 (1990) [hereinafter Laycock, *Neutrality Toward Religion*]. Because this distinction is not important for my purpose, I have used equality terminology for simplicity. Although I have previously characterized the current doctrinal regime of the Religion Clauses as "formal neutrality," Gedicks, *An Unfirm Foundation*,

the congregation might be more serious in kind from that suffered by one who holds property for commercial reasons, and thus might mandate a constitutional exemption if the differential nature of the harm could be demonstrated.

Protecting religious activity by analogy to Equal Protection and Speech Clause doctrines does not assume that religious activity is like any other activity, but rather like any other *constitutionally preferred* activity.⁵⁴ What I advocate is not a formal equality among constitutionally preferred and non-preferred activities, but rather a formal equality among constitutionally preferred activities, which as a group are elevated above other activities by virtue of their constitutional preference.⁵⁵ If we are to treat constitutional “likes” alike, religious exercise should generally be treated like other fundamental constitutional rights, and in particular like that fundamental right which I maintain it most closely resembles—namely, speech. Under the position I advocate, the baseline from which one measures deviations in ascertaining formally equal treatment is a substantive fundamental liberty. This distinguishes my position from the formal equality of *Smith*, where the baseline from which one measures such deviations is a nonpreferred liberty.

B. An Analogical Sketch of a Defensible Free Exercise Doctrine

My proposed free exercise doctrine would generally seek to protect religious activity under the Free Exercise Clause in the same manner and to the same extent that speech and association are protected under the Speech and Equal Protection Clauses. I would thus amend Professor Tuttle’s otherwise excellent discussion of how Speech and Equal Protection Clause doctrines might apply to religious land uses in general and to RLUIPA in particular by emphasizing that analogous doctrinal protections should apply to protect religious exercise even when the activity at issue cannot plausibly be characterized as expression or association for expressive purposes. An otherwise legitimate conduct regulation that incidentally burdens religious activity would be subject to the same sort of judicial scrutiny as conduct regulations that incidentally burden constitutionally protected speech and association; efforts to regulate the time, place, or manner of religious activity would be subject to the same level of judicial scrutiny as efforts to regulate the time, place, or manner of constitutionally protected speech and association; excessive governmental discretion in determining whether or under what conditions religious activity might be permitted would be as suspicious under the Free Exercise Clause as such discretion is under the Speech Clause when exercised to determine the permissibility of speech and association; and underinclusive classifications that burden the free exercise of religion would be subject to the same heightened scrutiny under the Equal Protection Clause as underinclusive classifications that burden speech and other fundamental

⁵⁴ See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 120.

⁵⁵ To use Professor Brownstein’s vocabulary, the *external formal* equality among Speech Clause and Free Exercise rights that I advocate would be the same measure of *internal substantive* equality among free exercise right holders that is now enjoyed by speech right holders.

somewhat misleading. As Professor Tuttle suggests, a regime of formal equality assumes that religious activity is not qualitatively different from any other activity.⁴⁸ On this assumption, there is no warrant for the government to treat religious activity better or worse than any other activity.⁴⁹ Under formal equality, the government is not obligated to adjust its actions—and, indeed, would be prohibited from making adjustments—to compensate for the special impact that its actions may have on believers as the result of their particular faith commitments. Such adjustments are the hallmark of “substantive equality,” which requires that government “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”⁵⁰ Although both formal and substantive equality hold that “like things be treated alike,”⁵¹ formal equality assumes that all activities are, in fact, alike; laws are assumed incapable of impacting activities in constitutionally distinct ways, and consequently differential impacts are not legally recognized. Substantive equality, on the other hand, presupposes that certain activities are not alike at all; laws are assumed to be quite capable of impacting different activities in constitutionally distinct ways, and consequently differential impacts may be the basis for legal action, once such impacts are properly shown.⁵²

For example, under a formal egalitarian regime, a statutory restriction on the remodeling of historic landmarks could not contain an exemption for a landmarked church whose congregants wish to move the altar in their sanctuary to comply with theological reforms.⁵³ Even assuming that such a statute imposes a greater harm on believers whose theology dictates the relocation of an altar than on an owner of a commercial building who wishes, say, merely to create more office space, formal equality would prohibit the government from mitigating this greater harm by excusing the congregation but not the commercial owner from complying with the law. Substantive equality, on the other hand, admits the possibility that because religious activity is qualitatively different from commercial activity, the harm suffered by

supra note 15, at 569-70, my own position differs in important ways from current doctrine, as I hope to have made clear.

⁴⁸ Tuttle, *supra* note 18, notes 158-62 and accompanying text. Professor Brownstein suggested to me that this constituted “external” formal equality, which treats constitutional rights the same as nonrights, and is to be distinguished from “internal” formal equality, which treats all constitutional rights holders in the same way.

⁴⁹ See PHILLIP B. KURLAND, *RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT* 17-18 (1962); see also Laycock, *Neutrality Toward Religion*, *supra* note 47, at 999-1001.

⁵⁰ Laycock, *Neutrality Toward Religion*, *supra* note 47, at 1001.

⁵¹ Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 16 [hereinafter Laycock, *Remnants*].

⁵² See *id.*

⁵³ Cf. *Society of Jesus of New England v. Boston Landmarks Comm’n*, 564 N.E.2d 571 (Mass. 1990) (upholding right of Jesuits under Free Exercise Clause to redesign their sanctuary to conform to changes dictated by Vatican II, notwithstanding sanctuary’s status as historical landmark); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (holding historic preservation ordinance unconstitutional under Free Exercise Clause as applied to church because city reserved right to determine whether any architectural change ostensibly required by religious belief was in fact for a bona fide religious purpose).

rights and interests.⁵⁶ I summarize below some of the issues relating to each of these doctrinal analogies.

1. *Incidental and Time, Place, or Manner Regulation of Religious Activity*

As Professor Tuttle discusses,⁵⁷ it is well-established that incidental and time, place, or manner regulation of speech is subject to intermediate scrutiny under the Speech Clause: such regulation is upheld if it (i) is content-neutral, (ii) is narrowly tailored to serve a significant government interest, and (iii) leaves open adequate alternative channels of expression.⁵⁸ Intermediate scrutiny of incidental and time, place, or manner regulation of expression serves at least two purposes. With respect to incidental restrictions, it ensures that government activity that burdens speech is the result of the government's genuine pursuit of legitimate goals, and not a covert attempt to engage in content-based regulation.⁵⁹ Second, with respect to both incidental and time, place, or manner restrictions, intermediate scrutiny ensures that government officials engage in a constitutionally acceptable balancing of government and individual interests, not sacrificing fundamental speech rights at the altar of relatively unimportant government goals.⁶⁰

Both purposes are implicated by incidental and time, place, or manner regulation of religious exercise. Laws that incidentally burden religious activity are conceptually analogous to laws that incidentally burden expression or association. Such laws present the danger, well-documented by Professor Tuttle and others, that facially neutral laws passed for legitimate purposes may be applied so as to disadvantage unconventional or unpopular religious activity, in the same way that government authorities often use facially neutral laws to disadvantage speech on the basis of its controversial content or

⁵⁶ See generally Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 89-94, 104-20; Gedicks, *An Unfirm Foundation*, *supra* note 15, at 572-73.

⁵⁷ See Tuttle, *supra* note 18, text accompanying note 288 and Part II.B.1.

⁵⁸ See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 85-87 (summarizing the separate development and eventual coalescence of the incidental burden and time, place, or manner tests).

⁵⁹ For example, one of the continuing criticisms of *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding federal statute prohibiting destruction of draft registration cards), focuses on the majority's studied ignorance of evidence that Congress intended that the statute punish draft registrants who engaged in public destruction of their registration cards as a means of protesting the Vietnam War. See, e.g., Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 15-16; Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 WHITTIER L. REV. 17, 41-43 (1992).

⁶⁰ See, e.g., C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 942-43 (1983) (noting that the bureaucratic decisionmakers who administer time, place, or manner regulations "are systematically biased in favor of 'restraint and order,' which causes them to take "'a very restrictive view of the desirability and reasonableness of dissenting, disruptive activities'"); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1486-87 (1975) (explaining that the fundamental nature of speech rights dictates that the government cannot completely ban leafleting to prevent litter: "'cities will simply have to put up with some litter, to be satisfied with less than optimal vindication of the interest they are pursuing, unconnected with expression though it is'").

unpopular viewpoint.⁶¹ Similarly, many laws that directly burden religious exercise, in particular land-use and zoning regulations, are precisely analogous to time, place, or manner regulation of expression under the Speech Clause. As Professor Tuttle shows,⁶² the application of land use and zoning regulations to religious activity frequently dictates whether particular locations may be used for religious worship, the extent to which a religious group may alter the characteristics of the location where it worships, and what kinds of faith-based activities in addition to actual worship may take place at the location. Such laws thus directly control where, when, and under what circumstances religious activity may take place, in the same way that parade permits, sound ordinances, and other such restrictions directly regulate where, when, and under what circumstances otherwise protected expression may occur.

Thus, in the case of both incidental and time, place, or manner restriction of religious activity, judicial review should ensure both that government officials are not seeking to suppress religious activity because of its strangeness or lack of popularity, and that officials are not burdening religious activity out of excessive concern for less weighty government goals. *Smith*, however, subjects such regulations only to minimal scrutiny.⁶³ If religious exercise has the same fundamental constitutional status as speech, it should receive the same level of protection. By analogy to the Speech Clause cases, then, incidental burdens and time, place, or manner restrictions on religious activity should be upheld only if they (i) are religiously neutral, (ii) are narrowly tailored to serve a significant government interest, and (iii) leave open ample alternative means of engaging in the restricted religious activity.

The alternatives analysis dictated by the foregoing test could prove to be especially protective of religious exercise, particularly in cases of incidental burdens. It is not common for the Supreme Court to invalidate a content-neutral law that incidentally burdens protected expression, because alternative means of communicating the speaker's message are almost always left open by incidental burdens on speech.⁶⁴ When such alternatives are not available, however, courts have not hesitated to exempt speakers from the incidental burdens of general laws (although they do not always cite *O'Brien*).⁶⁵ By contrast, alternatives do not usually exist for engaging in re-

⁶¹ See Tuttle, *supra* note 18, text accompanying notes 157, 223-29, and Part I.A. The pervasive discrimination experienced by unpopular religions under the guise of land use and zoning regulation is also documented in W. Cole Durham, Jr., "Discrimination Against Minority Churches in Zoning Cases," Appendix to Brief of the Church of Jesus Christ of Latter-day Saints as *Amicus Curiae* for Respondents at A-1 to -23, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074), and Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999).

⁶² See Tuttle, *supra* note 18, Part I.A-B.

⁶³ See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 89 & nn.45-48.

⁶⁴ See William E. Lee, *The Futile Search for Alternative Media in Symbolic Speech Cases*, 8 CONST. COMMENTARY 451 (1991); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 & n.5, 222-24 (1983).

⁶⁵ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (tort of intentional infliction of emotional distress without required showing of *New York Times* malice held unconstitutional as applied to parodies of public figures and public officials because of potential chilling effect on political criticism); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (common law tort

ligious worship or otherwise satisfying religious obligations when the government incidentally burdens religious practices.⁶⁶ As a general matter, then, the inquiry into whether the religious claimant has "ample alternative means" of practicing her religion could result in more frequent invalidation of government action that incidentally burdens a claimant's religious exercise.

With respect to time, place, or manner regulation, Professor Tuttle shows that in the context of land use and zoning regulations, courts reviewing time, place, or manner regulation of so-called "low-value" adult entertainment have not generally held that the high expense of alternative locations by itself renders such locations unavailable or inadequate.⁶⁷ In cases involving "high-value" speech, by contrast, the Supreme Court has held that the excessive expense of alternative channels of communication is a sufficient reason for invalidating time, place, or manner regulations, even when the

of "malicious interference with a trade or calling" held unconstitutional under *O'Brien* as applied to nonviolent secondary civil rights boycott); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (minority political party held exempt from recipient and expenditure disclosure statute because of potential chilling effect on affiliation with party and dissemination of its unpopular ideas); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (municipal ordinance prohibiting all live entertainment held unconstitutional as applied to nude dancing because it effectively prohibited all such dancing everywhere in the city); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (dissolving under *O'Brien* injunction against nude dancing based on law regulating secondary effects of nude dancing accompanied by consumption of alcohol, which also by its terms applied to establishments that did not sell liquor); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (tort of libel per se without required showing of malice held unconstitutional as applied to criticism of government officials because of potential chilling effect on such criticism); *NAACP v. Button*, 371 U.S. 415 (1963) (regulation barring solicitation of legal business held unconstitutional as applied to NAACP because of potential chilling effect on discussion and institution of expressive litigation); *NAACP v. Alabama*, 357 U.S. 449 (1958) (production order issued in connection with litigation over qualification of NAACP to do business in state held unconstitutional to extent it required disclosure of members within the state because of potential chilling effect on affiliation with NAACP); *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1039-41 (S.D.N.Y. 1992) (total ban on begging held unconstitutional under both *O'Brien* and time, place, or manner decisions because it cut off "all means of allowing beggars to communicate their message of solicitation"); *Abney v. United States*, 451 A.2d 78, 84-85 (D.C. 1982) (ordinance prohibiting sleeping on grounds of U.S. Capitol held unconstitutional under *O'Brien* as applied to veteran protesting denial of benefits because veteran's "sleeping was an integral part of and necessary to" his protest, and there was no evidence "showing alternative means available . . . for the continued exercise of his 'rights'"); see also Laycock, *Remnants*, *supra* note 51, at 18-19 (discussing *Hustler*, *Brown*, *New York Times*, and *Alabama* in connection with a similar point); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 114 (1987) (observing that heightened scrutiny is applied to an incidental restriction on expressive conduct whenever it has either "a highly disproportionate impact on free expression or directly penalizes expressive activity," and that such scrutiny "is applied quite liberally whenever the challenged restriction significantly limits the opportunities for free expression").

Professor Brownstein has observed that although "the United States Supreme Court has seldom found a content-neutral regulation of speech to be invalid on First Amendment grounds during the last 10 to 15 years," in the lower federal courts "content-neutral regulations of speech will often be held unconstitutional under relatively careful review." Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENTARY 101, 115 n.45 (1999) (citing cases).

⁶⁶ See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 93 & n.61; Gedicks, *An Unfirm Foundation*, *supra* note 15, at 573 n.91.

⁶⁷ See Tuttle, *supra* note 18, notes 279-87 and accompanying text.

regulation is content-neutral and serves non-trivial regulatory interests. In *City of Ladue v. Gilleo*,⁶⁸ for example, the Court invalidated a ban on home-based signs because they are a common, inexpensive, convenient, and effective means of political communication that has no comparable alternative.⁶⁹ Similarly, in *Martin v. City of Struthers*,⁷⁰ the Court struck down a flat ban on door-to-door distribution of pamphlets and literature, in part because of its widespread use in poorly financed political causes, even though the ban protected a person's interest in remaining undisturbed in his or her home.⁷¹

Martin is especially important in this context because it was brought by a minority religious group punished for proselytizing door-to-door.⁷² As Professor Tuttle suggests, whether the expense of alternative locations is to become a component of an alternatives test in the context of religious land uses ultimately would depend on whether religious activity is understood as having a low-value constitutional status under the Speech Clause like adult entertainment, or is instead accorded high-value status like political speech, as was the case in *Martin*.⁷³

2. Standardless Licensing of Religious Activity

As Professor Tuttle has detailed,⁷⁴ most zoning and land use schemes give to local government officials and administrators broad discretion to prohibit or to permit religious land uses. Under the Speech Clause, licensing and other regulatory schemes that grant government discretion to prevent speech *ex ante* (as opposed to punishing it *ex post*) are subject to significant substantive and procedural restraints. Unless such discretion is controlled or limited by substantive standards governing the issuance of a license, it is presumptively unconstitutional as a prior restraint.⁷⁵ Limiting standards must be both

⁶⁸ 512 U.S. 43 (1994).

⁶⁹ See *id.* at 54-58. *Ladue* can also be read as holding that aesthetic interests count for little when used to justify regulating speech from one's own home. See *id.* at 58 ("[I]ndividual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods—incentives markedly different from those of persons who erect signs on others' land, in others' neighborhoods, or on public property.").

⁷⁰ 319 U.S. 141 (1943).

⁷¹ See *id.* at 145-46. The Court also suggested that the ban was not narrowly tailored. See *id.* at 148 (stating the city could "make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself.").

⁷² See *id.* at 142.

⁷³ See Tuttle, *supra* note 18, notes 263-68 and accompanying text; see also Laycock, *Remnants*, *supra* note 51, at 45 ("The Free Exercise Clause stands as textual evidence that religious speech is central to the First Amendment, like fully protected political speech and not like commercial speech, obscenity, or other categories of speech with only limited constitutional protection."); Tushnet, *supra* note 24, at 11 & n.28 (suggesting that religious speech ought to receive, if not the same protection as political and other "high-value" speech, at least the enhanced mid-level protection afforded commercial speech after 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)).

⁷⁴ See Tuttle, *supra* note 18, notes 366-68 and accompanying text.

⁷⁵ See, e.g., *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988); *Staub v. City of Baxley*, 355 U.S. 313, 321-24 (1958); *Kunz v. New York*, 340 U.S. 290, 293-95 (1951); *Saia v. New York*, 334 U.S. 558, 560-61 (1948); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938).

content-neutral⁷⁶ and “narrow, objective, and definite”;⁷⁷ broad appeals to a state’s police power do not pass muster.⁷⁸ Procedurally, licensing schemes must provide that the government shoulder the burden of proving that the proposed speech is not constitutionally protected, that the government either issue the license for the speech or seek judicial review of its refusal to issue it within a specified and brief period of time, that any restraint on the expression in advance of a final judicial determination be limited to “preservation of the status quo,” and that the final judicial decision on the restraint be rendered promptly.⁷⁹

By analogy to the standardless licensing cases, then, the exercise of government discretion to deny religious uses of property functions as a “prior restraint” of religious activity that should be subject to safeguards analogous to those set against prior restraint of speech—that is, the exercise of government discretion in applying zoning and other land use regulations to determine whether religious uses shall be permitted should be constrained by definite, objective, religion-neutral criteria, and the government should bear the burdens of (i) proving that the religious land use is not protected by the Free Exercise Clause; (ii) making a prompt decision about the use within a specified period of time; and (iii) seeking immediate judicial review and a prompt final judicial decision whenever it refuses to permit a religious land use.⁸⁰

⁷⁶ See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992); *Lakewood*, 486 U.S. at 760.

⁷⁷ E.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

⁷⁸ See, e.g., *Lakewood*, 486 U.S. at 769, 772 (holding “not in the public interest” and “necessary and reasonable” insufficient as standards for controlling discretion); *Shuttlesworth*, 394 U.S. at 150 (same with respect to “public welfare, peace, safety, health, decency, good order, morals or convenience”); *Staub*, 355 U.S. at 321 (same with respect to “the character of the applicant, the nature of the . . . organization . . . and its effects upon the general welfare”).

⁷⁹ See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). Professor Tribe additionally lists as procedural requirements for a constitutional licensing scheme that an adversarial hearing on the application be held when possible, and that any prior restraint ordered by a court be stayed unless the government provides for immediate appellate review. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-39, at 1059-61 (2d ed. 1988).

Although *Freedman* itself entailed review of a criminally enforceable film censorship statute, its procedural protections have since been applied by the Court in other First Amendment contexts. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547-48, 559 (1975) (use of public auditorium for performance of play including nudity); *Blount v. Rizzi*, 400 U.S. 410, 411-12, 415 (1971) (postal stop orders on delivery of pornographic materials); see also *Shuttlesworth*, 394 U.S. at 162-63 (Harlan, J., concurring) (arguing that the negative First Amendment consequences of standardless prior restraint of political demonstrations are more serious than those of film censorship); Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1549-50 (1970) (arguing that a “thorough comparison of film censorship and demonstration regulation” suggests that the *Freedman* factors should govern judicial review of licensing schemes for the latter as well).

⁸⁰ Professor Saxer has most fully developed the idea that all First Amendment rights should be protected from burdensome zoning and land use regulations by Speech Clause doctrines developed to deal with prior restraints and standardless licensing schemes. See Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1 (1998); Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 KY. L.J. 507 (1996).

The standardless licensing decisions reflect the reality that government discretion is frequently exercised to disadvantage controversial or unpopular speech.⁸¹ They resonate with *Smith*'s requirement that strict scrutiny be applied to government decisions that deny religious exemptions within the context of a system providing for individualized assessment of and exemption from a law's burdens on secular conduct.⁸² I have argued elsewhere that this portion of *Smith* is best understood as a determination that discretionary exemption schemes are not laws of general applicability, and thus present the risk that government might pursue legitimate goals by focusing the cost of such goals on unpopular, unusual, or obscure religions.⁸³ As I have indicated, Professor Tuttle's review of reported zoning and land use decisions involving religious uses confirms that local government discretion is frequently exercised to deny or otherwise to penalize uses sought by unpopular or unfamiliar minority religions, often at the same time that similar and even identical uses are approved for larger, more established religions.⁸⁴

Thus, applying the substantive and procedural principles of the standardless licensing cases to religious zoning and land use decisions—again, irrespective of whether the activity associated with the use might also be characterized as speech—would seem to be a rich source of potential doctrinal protection for the free exercise of religion in the context of land use decisions. Requiring that government rely on neutral definitive standards, for example, placing the burden of proving the inappropriateness of religious land use on the government and requiring that the government initiate immediate judicial review of any denial of an application for a religious land use, would make it significantly more difficult for government officials to cover anti-religious animus with the cloak of administrative discretion.

81 See *Forsyth*, 505 U.S. at 130-31; *Lakewood*, 486 U.S. at 758, 763-69; see also Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 573 (1999) [hereinafter Lupu, *The Case Against Codification*] ("Long prior to *Smith*, our civil liberties tradition had recognized the dangers of permitting local officials to exercise licensing authority over expressive activity without the benefit of determinate criteria. The absence of such criteria invites discriminatory treatment of groups disfavored by local decision makers.") (footnotes omitted).

82 See *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

83 See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 115-19; see also Lupu, *The Case Against Codification*, *supra* note 81, at 573:

[R]egimes of more open-ended discretion are typically most vulnerable to the charge that they are being administered in ways hostile to religion or to particular religious sects. Accordingly, one would expect administrative schemes characterized by a high degree of discretion—zoning schemes are the leading candidate—to forfeit the benefit of the *Smith* rule because such schemes fall into one or more exceptions to that rule.

For a contrary analysis distinguishing the "general applicability" and "individualized assessment" prongs of *Smith*, see Kaplan, *supra* note 14, at 1078-83.

84 See Tuttle, *supra* note 18, at notes 251-56 and accompanying text; see also John M. Smith, Note, "Zoned for Residential Uses"—Like Prayer? *Home Worship and Municipal Opposition in LeBlanc-Sternberg v. Fletcher*, 2000 BYU L. REV. 1153, 1174 ("[T]he true danger for religious minorities in land use disputes [is] the wide (and easily abused) discretion that municipal zoning authorities enjoy, both in how rules are made and in how they are applied.").

incidental government action that would change significantly the content or character of a religious association's beliefs, values, or activities would have to be narrowly tailored to a substantial government interest.

A doctrine of freedom of religious association under the Free Exercise Clause would protect many of the same interests now ostensibly protected by the church autonomy cases.⁹² These cases involved disputes within a denomination over ownership of church property or appointment to an ecclesiastical office that found their way into a secular court. The cases generally hold that a court may not adjudicate controversies between religious claimants when doing so would require judicial interpretation of the content or merits of a religious belief or practice.⁹³ Theological questions, in other words, are not justiciable by secular courts.⁹⁴ When adjudication calls for judicial interpretation of religious doctrine, the church autonomy cases call on the court to defer to the interpretation advanced by the denomination's internal gov-

the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Smith cited to the foregoing language as evidence of a potential "hybrid right" protecting religious association. *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990).

⁹² See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* was a pre-*Erie* diversity case decided under federal common law, but its holding and rationale were constitutionalized by *Kedroff*. See 344 U.S. at 115-16.

⁹³ See *Serbian E. Orthodox Diocese*, 426 U.S. at 708-09; *Presbyterian Church*, 393 U.S. at 449; see also *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979).

⁹⁴ See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 17.12, at 1322 (5th ed. 1995) ("Courts can never question a church's rulings on matters of religious doctrine."); *TRIBE*, *supra* note 79, § 14-11, at 1232 ("[L]aw in a nontheocratic state cannot measure religious truth. . . . [I]t is now settled that the resolution of religious questions can play no role in the civil adjudication of such disputes—that ecclesiastical doctrines cannot be used to measure right or wrong under civil law."); see also Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1851 (1998) ("If civil courts were to deny church property to a body that would otherwise control it because the body has been guilty of a 'departure from doctrine,' civil courts would address matters for which they are woefully ill-suited, and the legal rule would frustrate changes in religious understandings.").

It has never been made clear whether the justification for this rule of nonjusticiability should be a religious group autonomy right or a lack of judicial competence. A number of commentators have made the former argument, see, e.g., Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981), including me, see Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 105 [hereinafter Gedicks, *Group Rights*]. More recently, Professor Esbeck has made the latter argument. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42-51, 58 (1998) (arguing that the Establishment Clause deprives federal and state courts of subject matter jurisdiction over intra-church disputes that depend on the resolution of religious questions). *Jones v. Wolf*, 443 U.S. 595 (1979), seems to undermine both accounts. See *infra* text accompanying notes 96-97.

3. Religious Association

Although Professor Tuttle does not discuss it,⁸⁵ a doctrine of religious association under the Free Exercise Clause could be developed by analogy to the freedom of association under the Speech Clause. The Supreme Court has long recognized that meaningful protection of the freedom of speech also requires protection of a freedom to associate with others for expressive purposes.⁸⁶ The freedom of speech, in other words, includes the freedom to join with others to exchange ideas and pursue expressive goals.⁸⁷ Accordingly, the Court has held that incidental and time, place, or manner burdens on the freedom of association are subject to heightened scrutiny under the Speech Clause: government action that threatens to change the content or character of an association's message must be narrowly tailored to protect a compelling or substantial government interest unrelated to the suppression of ideas.⁸⁸

Professor Tuttle is correct, of course, that many of the most important dimensions of religious exercise do not constitute the communication of ideas,⁸⁹ and thus are not protected by the freedom of association.⁹⁰ An analogous freedom of *religious* association under the Free Exercise Clause, however, could protect group religious exercise directly: meaningful protection of the individual right to practice one's religion would also require protection of the right to associate with like-minded others to enhance spiritual experience through joint worship and other communal activities, even if such activities cannot plausibly be characterized as expressive.⁹¹ Accordingly,

⁸⁵ Professor Tuttle expressed concern in the oral presentation of his paper that relying on Speech and Equal Protection Clause doctrines to protect religious activity would further weaken the Court's church autonomy cases (*Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)), but did not include this discussion in the final version of his paper.

⁸⁶ See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

⁸⁷ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 2451 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Buckley v. Valeo*, 424 U.S. 1, 21 (1976); *NAACP v. Button*, 371 U.S. 415, 429-31 (1963); *Alabama*, 357 U.S. at 460.

⁸⁸ See, e.g., *Dale*, 120 S. Ct. at 2451; *Roberts*, 468 U.S. at 623; *Button*, 371 U.S. at 437-38.

⁸⁹ See Tuttle, *supra* note 18, text accompanying notes 268-72.

⁹⁰ The Court has observed that although "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups . . . a group must engage in some form of expression, whether it be public or private," in order to receive the protection afforded by the freedom of association. *Dale*, 120 S. Ct. at 2451. Professor Tushnet suggests that the recent expansion of the right of expressive association apparently effected by *Dale* could protect a wide range of religious activities that would otherwise be left without protection under the standard "speech" paradigm. Tushnet, *supra* note 24, at 26.

⁹¹ *Roberts* hints at a right of religious association independent of expression. See 468 U.S. at 622, quoted with approval in part in *Dale*, 120 S. Ct. at 2451 (emphasis added):

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward these ends were not also guaranteed. . . . Consequently, we have long understood as implicit in

erning structure or, if no such interpretation is forthcoming, to abstain altogether from adjudicating the case.⁹⁵

Since 1979, however, the abstention rule of the church autonomy cases has been subject to a serious qualification. In *Jones v. Wolf*, the Supreme Court held that a secular court properly adjudicates internal denominational disputes if it does so by reference to “neutral principles of law,” without resort to interpreting religious doctrine.⁹⁶ In that event, the court is permitted to take into account interpretations of religious doctrine rendered by the denomination’s internal governing structure, but is not required to do so.⁹⁷ Since *Smith*, some courts have understood “neutral, general laws” from that decision as being synonymous with “neutral legal principles” in *Jones*, thereby expanding the neutral principles exception to apply to virtually any secular law that does not facially classify on the basis of religion.⁹⁸

When read with *Smith*, the neutral principles exception of *Jones* seriously undercuts the protection from government intrusion that the church autonomy cases once afforded to religious groups. After all, when neutral legal principles suggest how a denominational dispute should be decided, the independence and autonomy of the church is irrelevant, and a court may proceed to resolve the dispute in accordance with such principles even if the resolution ignores or contradicts the result indicated by the church’s own governing structure.⁹⁹ This means that the church autonomy cases provide no obstacle to a court that wishes to intervene in a denominational dispute, as long as the court can identify (as it nearly always can) a secular law whose application would resolve the dispute without resort to interpretation of religious doctrine.

⁹⁵ See *Serbian E. Orthodox Diocese*, 426 U.S. at 709-10; *Presbyterian Church*, 393 U.S. at 449-51; *Gonzalez*, 280 U.S. at 16; *Watson*, 80 U.S. (13 Wall.) at 727, 733.

⁹⁶ 443 U.S. at 602-03.

⁹⁷ See *id.* at 605 (rejecting a rule of “compulsory deference”); see also Greenawalt, *supra* note 94, at 1859 (“In *Jones* . . . the Court indicated that civil courts need not defer to higher church authorities if they instead rely on authoritative documents that can be interpreted without invoking religious understandings.”).

⁹⁸ See, e.g., *Sanders v. Baucum*, 929 F. Supp. 1028, 1034 (N.D. Tex. 1996) (holding that laws found to be religiously neutral and generally applicable under *Smith* and *Lukumi* “can be applied to resolve even internal disputes within a church without offending the First Amendment”); *Smith v. O’Connell*, 986 F. Supp. 73, 79-80 (D.R.I. 1997) (implicitly equating “neutral laws of general application” under *Smith* with the “neutral-principles approach” of *Jones*), *aff’d on other grounds sub nom.*, *Kelly v. Marcantonio*, 187 F.3d 192 (1st Cir. 1999); *Morris v. Midway S. Baptist Church*, 203 B.R. 468, 475 (Bankr. D. Kan. 1996) (holding that statute invalidating debtor preferences is “a valid and neutral law of general application” whose application to tithes rested on “neutral principles of law” that did not entangle the court in religious questions); *Moses v. Diocese of Colo.*, 863 P.2d 310, 320-21 (Colo. 1993) (equating the “‘neutral principles’ doctrine” with “neutral laws of general applicability”); *Prince v. Firman*, 584 A.2d 8, 12-13 (D.C. 1990) (holding that because statute is constitutional under *Smith*, it constitutes a “neutral property disposition rule” that does not entangle the court in interpretation of religious doctrine). For an exhaustive discussion of this issue in the context of tort liability, see Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000).

⁹⁹ Gedicks, *Group Rights*, *supra* note 94, at 133. This is precisely what the *Jones* dissenters maintained would be the consequence of rejecting compulsory deference. See 443 U.S. at 611-14 (Powell, J., joined by Burger, C.J., Stewart, J., & White, J., dissenting).

Anchoring the church autonomy principle in a Free Exercise Clause analogy to freedom of association under the Speech Clause might actually provide more reliable protection for religious group activity than that afforded by existing doctrine under the church autonomy cases. Under a right of religious association analogous to freedom of association under the Speech Clause, the justification for a court's refraining from adjudicating an internal dispute of a religious group would not be the nonjusticiability of theological questions, and religious groups would not be vulnerable to court adjudication of their internal disputes whenever a court can identify an applicable secular law, as they currently are under the expanding neutral principles exception of *Jones* and *Smith*. Rather, the internal affairs of religious groups would be protected from government regulation whenever such regulation would restrict or alter the group's beliefs and practices, unless the government could articulate a compelling justification. That government regulation or court intervention might be on the basis of neutral principles would be irrelevant.

Additionally, protecting church autonomy by a right of religious association rather than by a rule of religious nonjusticiability would not extend to religious groups any greater protection than the freedom of association extends to advocacy groups founded on secular morality. In that respect, a right of religious association is more in tune than the church autonomy cases with a contemporary culture that is no longer able to distinguish religiously motivated activity from activity motivated by secular commitments of comparable moral seriousness.

4. *Underinclusive Classifications that Burden Religious Activity*

One of the murkier aspects of *Smith* is the constitutional effect of exemptions for secular conduct from laws that do not exempt religious exercise. The easy cases are at the extremes. When a law contains no exemptions for any behavior, secular or religious, it is difficult to invalidate the law under the Equal Protection Clause even if it burdens religion: because the Equal Protection Clause protects equal treatment rather than a substantive liberty, laws that treat everyone alike *a fortiori* do not violate the Clause, unless some justification is shown for deviating from formal equality.¹⁰⁰ At the other extreme, laws that exempt all secular conduct but no comparable religious conduct—that is, that effectively apply only to religious exercise—are an obvious form of religious discrimination, as the Court held in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*: Religious discrimination is unconstitutional (under no less than three clauses) whether or not the Free Exercise Clause is understood to protect a substantive liberty.¹⁰¹ RLUIPA incorporates this antidiscrimination principle.¹⁰²

The difficult case is the one in the middle, where a law exempts some secular conduct while leaving substantial amounts of secular conduct and all

¹⁰⁰ See *supra* text accompanying notes 39-45.

¹⁰¹ See 508 U.S. 520, 535-36, 542 (1993); *supra* text accompanying notes 21-24.

¹⁰² Religious Land Use and Institutionalized Persons Act of 2000 § 2(b)(2) ("No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.").

religious exercise subject to the law—say, a statute prohibiting the use of marijuana that exempts medicinal use of the drug, but not religious sacramental use,¹⁰³ or a law enforcement dress code prohibiting beards that exempts those with certain skin conditions, but not those whose religious beliefs require them to wear beards.¹⁰⁴ I have argued that such a law is not “generally applicable,” and that, therefore, a government refusal to exempt religious conduct that is incidentally burdened by such a law should be subject to strict scrutiny under *Smith* and *Lukumi*.¹⁰⁵ I link this argument to the Warren Court’s fundamental rights/equal protection doctrine, under which underinclusive, nonsuspect classification schemes that burden fundamental rights are subjected to strict scrutiny, even when the burden is merely incidental.¹⁰⁶ Similarly, suspicion of underinclusion that disadvantages religious land uses seems to animate RLUIPA.¹⁰⁷

Professor Tuttle rightly observes that *Smith* could “prove to be a barrier to full development of the fundamental rights approach.”¹⁰⁸ Although religious exercise is expressly protected by the Constitution and is thus a proper candidate for protection by fundamental rights analysis,¹⁰⁹ *Smith* seems to have determined that free exercise rights are not fundamental.¹¹⁰ Tuttle side-steps this problem by observing that the Court has applied heightened scrutiny to underinclusive classifications in certain cases without feeling it necessary to hold that the underlying liberty interest is fundamental.¹¹¹ He suggests that a similar analysis might be applied to underinclusive classifica-

¹⁰³ Cf. *Dorf*, *supra* note 35, at 273 (noting apparent unfairness of exempting members of Native American Church from anti-peyote laws, but not cancer patients undergoing chemotherapy from anti-marijuana laws).

¹⁰⁴ See *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

¹⁰⁵ See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 115-19. For a careful analysis of underinclusive classifications that disadvantage religion, see Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 766-80 (1999).

¹⁰⁶ See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 115-19; Gedicks, *An Unfirm Foundation*, *supra* note 15, at 573-74.

¹⁰⁷ See § 2(b)(1) (“No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”).

¹⁰⁸ See Tuttle, *supra* note 18, text accompanying note 231.

¹⁰⁹ See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). The Court stated:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. (emphasis added).

¹¹⁰ See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 119-21.

¹¹¹ See Tuttle, *supra* note 18, notes 231-50 and accompanying text (discussing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (applying heightened scrutiny to city’s denial of special-use permit for home for mentally disabled)).

tions that burden religious exercise even in the absence of a determination that the free exercise of religion is fundamental.¹¹²

I agree that there remains reason to hope that general applicability analysis will develop into a significant protection of religious exercise, even if the Court remains committed to the position that the Free Exercise Clause protects only a religious antidiscrimination norm. Although the Court in *Lukumi* seems to understand general applicability as merely a synonym for religious neutrality, parts of the opinion hint at the broader reading that both Professor Tuttle and I have suggested.¹¹³ Lower courts have taken these hints and have begun to develop a doctrine under which a government's failure to exempt religious conduct when it has already exempted comparable secular conduct is subject to strict scrutiny.¹¹⁴ Although it is always open to the Supreme Court to repudiate these decisions, this will become progressively more difficult to do as more of such decisions accumulate.

¹¹² See *id.*

¹¹³ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."); *id.* at 543 ("The ordinances are underinclusive for those ends [of protecting public health and preventing animal cruelty]. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential."). Professor Duncan reads this language from *Lukumi* and other language in *Smith* as more than a hint, arguing that it requires strict scrutiny of any law that contains secular exemptions but no religious exemptions. Richard F. Duncan, *Free Exercise at the Millennium: Smith, Lukumi and the General Applicability Requirement* (unpublished manuscript, on file with *The George Washington Law Review*). I have argued that the Court itself does not seem to read general applicability this broadly, understanding it as merely a synonym for religious neutrality. See Gedicks, *The Normalized Free Exercise Clause*, *supra* note 17, at 113-14.

¹¹⁴ See *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (holding that police department's refusal to exempt Muslim police officers from no-beard rule when rule provided for medical exemptions is subject to strict scrutiny, because "[w]e are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not"), *cert. denied*, 528 U.S. 817 (1999); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886-87 (D. Md. 1996) (holding that application of historic preservation ordinance against church is subject to strict scrutiny when ordinance provided for exemptions in case of a "major improvement program" of benefit to the city, "financial hardship," or circumstances that would not be in the "best interest of a majority of persons in the community," but did not provide for religious exemptions); *Rader v. Johnston*, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (holding that refusal to exempt evangelical Christian from parietal rule requiring that freshman live in university housing is subject to strict scrutiny where "exceptions are granted . . . for a variety of non-religious reasons, [but] are not granted for religious reasons," "[o]ver one third of the freshman students . . . are not required to comply with the parietal rule," and there exists a system of individualized assessment, which "refused to extend exceptions to freshmen . . . for religious reasons"); *Horen v. Virginia*, 479 S.E.2d 553, 557 (Va. Ct. App. 1997) (holding that government intent to discriminate against religion may be inferred from state law prohibiting possession of owl feathers, which exempted "taxidermists, academics, researchers, museums, and educational institutions," but not those who possess owl feathers for bona fide religious uses). But see *Jackson v. District of Columbia*, 89 F. Supp. 2d 48 (D.D.C. 2000) (declining to apply general applicability analysis to underinclusive classifications burdening free exercise rights of incarcerated prisoners).

III. The Alternatives Conundrum

As Professor Tuttle explains, the religious exemption doctrine requires that someone make a judgment about whether the claimant's religious exercise is "substantially burdened" by government action.¹¹⁵ *Smith* maintained that the necessity of this judgment places proponents of the religious exemption doctrine between two equally unsatisfactory positions: either the court must analyze the requirements of the claimant's religion against the burden imposed by the government's action, or it must defer to the claimant's own interpretation of what her religion requires and how the government has interfered with those requirements.¹¹⁶ The former seems to draw courts into the constitutionally impermissible task of interpreting religious doctrine,¹¹⁷ while the latter raises the risk of insincere, strategic exemption claims, with each believer being the sole judge of her own need to be excused from observing the law.¹¹⁸

Professor Tuttle argues that use of Speech and Equal Protection Clause doctrines to protect religious exercise avoids the analytical dead-end of "substantial burden" analysis, by avoiding inquiry into the content of a claimant's religious beliefs.¹¹⁹ I agree that the Equal Protection Clause's focus on whether harm from government action is "fairly distributed or disproportionately placed on religious exercise" obviates any need to analyze the claimant's religious obligations to determine the extent to which they might be burdened by the action.¹²⁰ Speech Clause doctrine, however, merely presents the problem in a different form. The third element of the test for incidental and time, place, and manner regulation of speech asks whether the speaker has "ample alternative channels of communication" for her ideas.¹²¹ If courts deal with incidental and time, place, and manner regulation of religious activity under the Free Exercise Clause in the same way that they deal with such regulation of expression is dealt with under the Speech Clause, as I have argued that they should, courts will be required to decide whether there exist ample alternative means of satisfying the claimant's religious obligations.¹²² Whether an alternative to a burdened practice is in fact constitutionally satisfactory would require that a court determine whether the alternative satisfies the religious obligation that otherwise would have been met by the burdened

¹¹⁵ See Tuttle, *supra* note 18, text of paragraph accompanying notes 455-56.

¹¹⁶ *Employment Div. v. Smith*, 494 U.S. 872, 885-87 & 887 n.4 (1990); see also Tuttle, *supra* note 18, note 463 and accompanying text.

¹¹⁷ See *Smith*, 494 U.S. at 886-87. Burden analysis does not necessarily require judicial analysis of the claimant's belief system. Professor Lupu, for example, has proposed that a "substantial burden" on a claimant's religious exercise be recognized only when "religious activity is met by intentional government action analogous to that which, if committed by a private party, would be actionable under general principles of law." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 966 (1989) [hereinafter Lupu, *Where Rights Begin*] (emphasis omitted).

¹¹⁸ See *Smith*, 494 U.S. at 879, 885, 888-90.

¹¹⁹ Tuttle, *supra* note 18, text of paragraph following note 490.

¹²⁰ *Id.* text of paragraph accompanying note 491.

¹²¹ See *supra* text accompanying notes 47-48.

¹²² See *supra* text accompanying notes 53-59.

practice. This, in turn, would require the inquiry into the claimant's religious beliefs that was condemned by *Smith*.¹²³

I will not attempt to work through this problem here, except to suggest that it is not insuperable. First, although some analyses of alternatives require interpretation of religious doctrine, many do not. This is particularly the case with land use and zoning regulations. Although most religions require that their adherents meet and worship together, comparatively few require that this be done on a particular parcel of land.¹²⁴ It requires little theological investigation or sophistication, for example, for a court to find that a city's use of its zoning regulations to keep a congregation from obtaining any place to meet within the city boundaries burdens the church members' right of religious association.¹²⁵ When a jurisdiction refuses to permit religious worship at a particular place, a court generally could determine whether adequate alternative worship locations exist within the jurisdictional boundaries without interpreting religious doctrine.

Second, even when the theological requirements of the plaintiff's beliefs must be ascertained, that determination will often not be controversial. The abstention rule of the church autonomy cases was developed in response to cases in which the religious litigants themselves were divided over the proper interpretation of their dogma; it makes sense in such situations that secular courts be constitutionally prohibited from choosing up theological sides. By contrast, determination of the content of a claimant's religious beliefs in order to determine whether the claimant believes them, and whether these beliefs are really burdened by government actions, is a less complex and intrusive enterprise.¹²⁶ Indeed, the purported extension of the abstention

¹²³ A similar problem exists with association, where a court must determine whether incidental government action would skew the message of an expressive association, or as I have suggested, alter the character of its religious beliefs. See *supra* text accompanying note 70. With respect to secular associations, however, the Court still gives substantial deference to an expressive association's own understanding of its message and what would interfere with or alter it. See, e.g., *Boys Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 2453 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."). Similar deference to a religious group's self-understanding would largely eliminate the need for courts to engage in analysis of the group's dogma.

¹²⁴ But see *Smith*, *supra* note 84, at 1172 (observing that "particular sacred locations have always been integral" to Native American religion, and that "the link between favorable locations and the vibrancy of religious activity conceivably affects many churches for whom frequent congregating and close community living are an exercise of faith"). "Sacred site" and similar conflicts are a relatively small proportion of church-state conflicts over land use in the United States. Because the everyday living and worship of the Christian majority does not generally entail either a unique, nonfungible geographic place or community living, however, it is likely that such conflicts disproportionately affect minority religions.

¹²⁵ Cf. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (invalidating ordinance prohibiting all live entertainment as applied to nude dancing because of lack of evidence of similar entertainment in nearby cities).

¹²⁶ See, e.g., Greenawalt, *supra* note 94, at 1906 (noting that the "major basis for the [*Smith*] decision is that courts should not have to assess religious understandings and the strength of religious feeling in order to decide if the religious claim is strong enough to warrant an exemption," and that this inquiry is, "despite its difficulty, not nearly as difficult as the inquiry" prohibited by the church autonomy cases). Professor Greenawalt notes that *Smith*'s reluctance to

rule to secular court analysis of free exercise burdens dates only to 1981.¹²⁷ Many of the Court's pre-*Smith* decisions did not hesitate to examine and describe relatively unfamiliar belief systems as a foundation for determining both the claimant's sincerity and the extent of the burden on her religious exercise.¹²⁸ Indeed, even in *Lukumi*, decided three years after *Smith*, the Court had little difficulty determining the nature of free exercise claimants' unusual religious rituals and the extent to which government action burdened those rituals.¹²⁹

In this context, the Court's refusal to interpret religious doctrine to determine free exercise burdens or alternatives is odd—a bit like withholding risky medical treatment from a terminal patient. In this area, at least, the disease is still usually worse than the cure. As Justice Brennan argued in *Lyng v. Northwest Indian Cemetery Protective Association*, the majority's refusal to examine the substantiality of the burden in that case, out of "apparent solicitude for the integrity of religious belief and its desire to forestall the possibility that courts might second-guess the claims of religious adherents," led to a far worse result—the sacrifice of "a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents."¹³⁰ It is perversely ironic that the Court has determined to preserve the theological integrity of religious groups by leaving them defenseless against destructive (albeit "incidental") government action.

It would be worth reconsidering whether it makes sense to continue absolutely to prohibit secular court examination of religious doctrine, at least in contexts in which a religious claimant seeks relief from government burdens on her religious exercise.¹³¹ In that context, at least it is the claimant herself who has sought the court's assistance. Moreover, as in the exercise of all of the "passive virtues," it would always be open to a court to decline to decide a free exercise case when the particular facts and circumstances drew the court too deeply into a religious question. Certainly *Smith*'s sweeping condemnation of even the most marginal inquiry into religious doctrine, like so

engage in analysis of burden and sincerity resonates with the underlying premises of the church autonomy cases. See *id.*

¹²⁷ See Samuel J. Levine, *Rethinking the Supreme Court's Hands-off Approach to Questions of Religious Practice and Belief*, 25 *FORDHAM URB. L.J.* 85, 92-101 (1997) (arguing that the application of the religious question doctrine from the church autonomy cases to free exercise claims in *Thomas v. Review Board*, 450 U.S. 707 (1981), significantly expanded the reach of the doctrine and departed from the Court's prior use of the doctrine); see also Lupu, *Where Rights Begin*, *supra* note 117, at 939-42 (arguing that *Braunfeld v. Brown*, 366 U.S. 599 (1961), instituted the requirement that courts investigate the burden imposed by government action on free exercise claimants, although the need for a more precise specification of the requirement was not evident until the late 1980s).

¹²⁸ See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442-44, 448-55 (1988); *Wisconsin v. Yoder*, 406 U.S. 205, 209-12 (1972).

¹²⁹ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524-31 (1993).

¹³⁰ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 475-76 (1988) (Brennan, J., dissenting); see also Levine, *supra* note 127, at 133-34 (concluding that the Court's determination to avoid all adjudication of religious questions has resulted in, *inter alia*, "unduly harsh governmental limitations on religious liberties").

¹³¹ Professor Levine has called for such a reconsideration. Levine, *supra* note 127, at 134.

much else in that decision, does not square with the Court's decisions in free exercise cases before and since.

IV. *The Penultimate God of an Ultimate World*

Professor Tuttle observes that although the "shift from free exercise to equal protection and free speech should help to safeguard religious liberty," this "practical gain, though, comes at a cost: by abandoning the rhetoric of free exercise exemptions, we give up on an important institutional reminder of the state's penultimacy, the state's reticence before the transcendent."¹³² He goes on to suggest that my reasons for abandoning free exercise exemptions are not merely prudential, but also ethical: "Because religious exemptions cannot be justified according to [a dialogic] standard, a consistently moral person should not make such claims."¹³³ He rejects this position, concluding that "where religious land uses enjoy more modest and better established privileges, such as those embodied in some states' due process standards, religious institutions have no moral obligation to refrain from enjoying that privilege."¹³⁴

Defenders of religious liberty are caught in a contradiction. Only an understanding of society that places religious belief and activity at its moral foundation can justify the religious exemption doctrine, but that understanding has been decisively rejected in favor of a pluralism that makes people morally accountable largely to themselves. To cling to the former understanding is to withdraw from the world as it now is, but to defend religious liberty in the terms of individual (secular) conscience is indeed to abandon the obligation to God that invests religion with its moral power.

Professor Tuttle is caught in this contradiction, as am I. He will use the Speech Clause and Equal Protection Clause analogies "because they are likely to be more reliable safeguards against the threats of discrimination or exclusion,"¹³⁵ yet he also insists that "[t]he exceptional nature of religious belief and conduct depends on a religious justification: that God is God, and the state is not."¹³⁶ Tuttle is right that the most effective arguments in defense of the free exercise of religion are not those that claim for it a special, superior status among constitutional rights, but rather those that seek for religious exercise the same level of protection accorded to other constitutional rights. Yet he is also right that to protect religious exercise in this way is implicitly to concede that its ultimate justification is the same as that offered for other constitutional rights in this (post) modern age—namely, the positive law of the state, rather than the will of God.

For my part, I have always understood my position to be prudential, not ethical; because a defense of the religious exemption doctrine is no longer plausible, one must construct other defenses of religious liberty, which take into account the changed position of religion relative to other human activi-

¹³² Tuttle, *supra* note 18, text of paragraph following note 498.

¹³³ *Id.* text of paragraph following note 500.

¹³⁴ *Id.* second to last sentence of piece.

¹³⁵ *Id.* last paragraph of piece.

¹³⁶ *Id.* text of paragraph following note 498.

ties in the contemporary world. This is not to argue that it is wrong to defend religious exemptions, but only that, in the long run, no effective defense is possible. To the extent that a residuum of religious exemptions persists under state law, as Professor Tuttle suggests,¹³⁷ I say enjoy them while they last.

Nevertheless, how we talk about ourselves cannot help but change us, and Professor Tuttle is right to warn that what seems only prudential may also become normative. Perhaps it is my preoccupation with plausibility and prudence that makes me personally uncomfortable, believer though I am, with any justification for religious exemptions that does not engage nonbelievers in terms they can understand and answer. Certainly it was my conclusion that no such justification can be formulated in the current legal and cultural climate that led me to look beyond religious exemptions for alternate constitutional defenses of religious liberty. I do not, however, advocate my personal ethic as a public one. If equality of speech and religion mean anything, they must mean that people are free to advocate their views in whatever terms they wish to use, and that those who hear such views are likewise free to accept or reject them on whatever basis pleases them. It is my view that sectarian arguments carry little weight in all but the most local public contexts, but it is also my view that government policing of sectarian language in the public square is no less a tyranny than any other content-based regulation of speech.

Does this counsel that defenders of religious liberty continue to press for the unattainable—restoration and vigorous enforcement of the religious exemption doctrine? I think not. As Mormons well know, forceful, long-term opposition to fundamental cultural assumptions not only threatens marginalization, but also destruction. If I am right that contemporary American society no longer holds religion as an especially valuable activity, then no argument can save religious exemptions, and much will be lost in the hopeless attempt to defend them. Professor Tuttle is correct that something valuable, even precious, is lost with the abandonment of this testimony of the state's penultimacy. Still, while believers may mourn the loss of religious exemptions, they must accept that such exemptions are gone, and will not return.

V. *Conclusion: Equality and the High Ground*

No single factor can be said to have won the Union victory in the three-day Battle of Gettysburg, now recognized as the turning point in the Civil War. The absence of cavalry for most of the battle left the Confederates with unreliable intelligence about the size, strength, and location of the Union forces. Ambiguous orders and inexperienced leadership in several Confederate units prevented them from exploiting advantages at crucial early points in the battle. At the same time, the Union forces uncharacteristically maintained their nerve despite appalling losses from repeated Confederate attacks, with their officers at times even showing the tactical brilliance normally associated with the Confederates.

¹³⁷ See *id.* at Part I.B.

Nevertheless, one undeniable influence on the outcome of the battle was the decision of an advance unit of Union cavalry led by John Buford to stand against a much larger force of Confederate infantry on Seminary Ridge east of Gettysburg on the morning of July 1, 1863, the first day of the battle. Although his unit took heavy losses, Buford's action delayed the Confederate advance by several hours, giving the Union army time to occupy the high ground south of the town before the Confederates got there.

James Longstreet, one of Lee's generals, is reported to have urged that the Confederates withdraw from Gettysburg and march on to Washington. This would have forced the Union army to leave its superior positions and give chase, thereby allowing the Confederates to choose the battleground. Instead, Lee chose to fight on the ground chosen by the Union. From that point on, Gettysburg consisted of repeated, unsuccessful Confederate attempts to dislodge the Union army from its superior positions, climaxing in George Pickett's hopeless charge into the center of the Union line on July 3, 1863. So ended the Battle of Gettysburg, and the South's last, best hope for victory.¹³⁸

Those who favor strong protection of the free exercise of religion face a choice about the doctrinal ground they wish to defend in fighting for religious liberty in the United States. Our attachment to religious exemptions should not obscure the hard truth that they can no longer be defended. If free exercise doctrine makes a difference to religious liberty—and almost everyone acts as if it does—then the time has come to abandon the religious exemption doctrine and construct a more plausible and defensible doctrine that takes account of the regrettably diminished place of religion in contemporary society. The hope of such a move is that it may yet lead to meaningful constitutional protection of religious liberty.

¹³⁸ For an overview of the Battle of Gettysburg, as well as the events leading up to and following the battle, see BRUCE CATTON, *THE CIVIL WAR* 372-425 (1984). For a narrative account of the battle told from the viewpoints of officers from both sides, see MICHAEL SHAARA, *THE KILLER ANGELS* (1974).