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Free Exercise and the Problem of Symmetry

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INTRODUCTION

The Supreme Court announced a controversial neutrality rule for the Free Exercise Clause in *Employment Division v. Smith*.[1] Native Americans had claimed an exemption from the drug laws so that they could use peyote, a hallucinogen, in sacred rites. Under existing precedent, their claim would have triggered strict scrutiny, requiring the government to show that it had a compelling interest that justified applying the drug laws to the ritual use of peyote.[2] But *Smith* put an end to the compelling interest test for the vast majority of free exercise claims. Strict scrutiny now would apply only to laws that had the purpose of discriminating on the basis of religion. Neutrality made *Smith* itself an easy case because the drug laws were not aimed at religion.[3] The neutrality regime announced in *Smith* has governed free exercise cases ever since.

Criticism of *Smith* was intense and widespread. Academics,[4] Justices,[5] and a bipartisan majority of Congress[6] noisily denounced the decision. Critics of *Smith* generally have made two normative arguments.

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1. Employment Div. v. Smith, 494 U.S. 872 (1990).

2. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

3. Incidentally, Congress did not think the issue so straightforward and it overturned the result in *Smith* by legalizing use of the drug in Native American rituals. 42 U.S.C. §§ 1996a-b (2000). Many states have likewise exempted the religious use of peyote from their drug laws. *See Smith*, 494 U.S. at 890 (listing state statutes).

4. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 [hereinafter Laycock, *Remnants*]; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) [hereinafter McConnell, *Revisionism*].

5. *See Smith*, 494 U.S. at 891–907 (O'Connor, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment); *id.* at 907–21 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

6. 42 U.S.C. § 2000bb (2000) (criticizing *Smith* explicitly).

First, they have objected that *Smith* leaves too much leeway for pervasive welfare-state regulation to burden religion while satisfying neutrality.[7] After all, laws not aimed at religion can hinder observance just as effectively as those that target religion. Second and related, critics of *Smith* have worried about religious minorities, who can suffer disproportionately from laws that enact majoritarian mores.[8] Arguably the drug laws unwittingly burdened a religious minority in just this way. These two normative arguments have driven much of the critical literature on *Smith*.

Curiously, the leading critics of *Smith* have not directed these arguments against neutrality itself. Instead, they think the Court has selected the *wrong sort* of neutrality rule.

The critics[9] have coined terms for two types of neutrality that have become commonplace in the literature. Neutrality can be defined generally as government evenhandedness toward private competition and choice.[10] But that basic definition allows for (at least) two more specific meanings. First, *formal neutrality*, the principle of *Smith*, protects against government policies that have the *purpose* of disfavoring religion. Second, *substantive neutrality*, the critics' proposal, prohibits laws that have the effect of disadvantaging a particular religious group (or religion generally) regardless of whether they have a neutral purpose. For example, the controlled substance laws at issue in *Smith* may well have violated substantive neutrality, even though their purpose had nothing to do with religion, because they had the effect of disfavoring Native Americans who used peyote in rituals. So while *Smith*'s rule—formal neutrality—insufficiently protects religious practice, substantive neutrality ensures that free exercise is not incidentally disfavored. The critics think neutrality can be rehabilitated in this way.

Thus, although the Court and its academic critics bitterly dispute the

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7. *See, e.g.*, Laycock, *Remnants*, *supra* note 4, at 38. For additional sources see *infra* note 40.

8. *See, e.g.*, McConnell, *Revisionism*, *supra* note 4, at 1152. For additional sources see *infra* note 41.

9. By the critics I mean a loose school of scholars who oppose *Smith*. The most prominent critics are Douglas Laycock and Michael McConnell. The critics usually share the two normative objections to *Smith* described above and they generally propose a neutrality-based alternative. *See, e.g.*, Thomas C. Berg, *Why A State Exclusion of Religious Schools From School Choice Programs Is Unconstitutional*, 2 FIRST AM. L. REV. 23, 32, 34 (2003) [hereinafter Berg, *Religious Schools*] (endorsing substantive neutrality); Stephen V. Monsma, *Substantive Neutrality as a Basis for Free Exercise-No Establishment Common Ground*, 42 J. CHURCH & ST. 13, 13 (2000); Carl E. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 26 (1997); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7, 51 (endorsing "substantive equality"); *see also* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 261 (1991) (endorsing "[n]eutrality of effect").

10. In the context of religion, that usually means government impartiality both among religions and between religion and irreligion.

outcomes of many cases, they agree on what it is they are arguing about. Their dispute is between two versions of neutrality.

Dissenting opinion on the Court likewise focuses on neutrality. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the majority approved and applied the formal neutrality rule of *Smith*.[11] Writing separately, Justice Souter questioned current doctrine and suggested that the critics' rule of substantive neutrality might be preferable.[12] Today, the Court may be moving away from *Smith*.[13] And substantive neutrality is the leading alternative to *Smith* on the Court as well as in the academic literature.[14]

This Article argues that neutrality of any stripe will insufficiently protect free exercise. Substantive neutrality, the critics' proposal, suffers from a conceptual difficulty that this Article calls the problem of symmetry. As a consequence, substantive neutrality cannot deliver the practical results that the critics envision.

Symmetry is the core conceptual feature of all neutrality rules. Recall that neutrality means government evenhandedness toward private competition and choice. Applied to religion, symmetry requires that neutrality rules apply in the same way to laws that benefit religion as they do to laws that burden it. Neutralists could not apply a very strict rule, substantive neutrality, to laws that burden religion but only a more permissive rule, formal neutrality, to laws that benefit religion. That regime would not be neutral. It would systematically advantage religion by, on one side, invalidating all laws that had the mere effect of burdening religion, while, on the other side, banning only laws that had the purpose of benefiting religion. An asymmetrical system like that would not be neutral in any meaningful sense. In order to be consistent, then, the critics would have to apply substantive neutrality in both directions and reject laws that have the effect of favoring religion.

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11. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (*Lukumi*), 508 U.S. 520, 531–32 (1993) (using the term "[n]eutrality" to describe the rule of *Smith*); *id.* at 562 (Souter, J., concurring in part and concurring in the judgment) ("Though *Smith* used the term 'neutrality' without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort.").

12. *Id.* at 576 (Souter, J., concurring in part and concurring in the judgment). *Cf.* Mitchell v. Helms, 530 U.S. 793, 869, 901 & n.19 (2000) (Souter, J., dissenting) (interpreting the Establishment Clause to require neutrality of effect). Justice Souter interpreted the dissenters in *Smith* to be advocating substantive neutrality without using the term. *Lukumi*, 508 U.S. at 562. Whether that characterization was correct is less interesting than what it reveals about how the debate is cast by *Smith*'s critics on the Court.

13. *See* Locke v. Davey, 540 U.S. 712 (2004) (assessing a non-neutral state policy without mentioning *Smith*). For a more detailed discussion, see *infra* text accompanying notes 127–133.

14. Justice O'Connor may be an exception to the consensus on neutrality, although she herself has not written on the matter. In *Lukumi* she signed an opinion by Justice Blackmun, who wrote that free exercise is "an affirmative individual liberty" and objected to "treat[ing] the Free Exercise Clause as no more than an antidiscrimination principle." *Lukumi*, 508 U.S. at 578 (Blackmun, J., joined by O'Connor, J., concurring in the judgment).

Yet prohibiting all laws that have the effect of advantaging religion would pose a serious problem for the critics. In theory, the critics acknowledge that substantive neutrality must ban laws that both favor and disfavor religion. But in practice, many of their concrete solutions would have the effect of benefiting religion. Specifically, the critics often rely on religious exemptions in order to remedy the non-neutral effects of general laws. Many of those exemptions will advantage religion relative to comparable secular commitments. Religious exemptions that benefit religion in this way will violate substantive neutrality once that rule is applied evenhandedly. The critics have not squarely faced that difficulty.[15]

One way of framing the problem is to say that substantive neutrality has intrinsic implications for the Establishment Clause. If substantive neutrality were applied symmetrically, as it must be, it would prohibit laws and policies that had the effect of benefiting religion, regardless of whether that was their object. It makes sense to think of a rule that prohibits certain benefits toward religion as implementing an antiestablishment norm. But such a strict reading of antiestablishment would cut against common conceptions of what the Constitution should require.

Consider for example the Religious Land Use and Institutionalized Persons Act (RLUIPA).[16] RLUIPA requires strict scrutiny—as a statutory matter—of substantial government burdens on religion in the context of prisons and certain land uses. The critics must strongly support RLUIPA because it protects religion against burdens on observance even where the restrictive law at issue is purposefully neutral.[17] An inmate who sued to receive halaal or kosher food would get the benefit of strict scrutiny, even though the prison dietary rules were not designed with religion in mind.

The trouble is that RLUIPA has the effect of advantaging religion and therefore is not substantively neutral. In *Cutter v. Wilkinson*, a case

15. Only one piece has hinted at the argument of this Article. Douglas Laycock once argued that free exercise includes a liberty component. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 313, 319 (1996) [hereinafter Laycock, *Religious Liberty as Liberty*]. But Laycock went on to argue that his neutrality rule could fully protect the liberty aspect of the Clause. *See id.* at 320 ("Government must be [substantively] neutral so that religious belief and practice can be free."); *id.* at 319–20 (arguing that liberty is protected by a rule of substantive neutrality). This Article therefore makes an original contribution to the literature by introducing a fully elaborated conception of substantive liberty.

16. 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

17. RLUIPA is a successor to the Religious Freedom Restoration Act (RFRA). Congress passed RFRA explicitly out of disagreement with *Smith*. *See* 42 U.S.C. § 2000bb (2000) (articulating the purpose of RFRA as restoring the compelling interest test in the wake of *Smith*). RLUIPA passed after the Supreme Court struck down portions of RFRA. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1998) (holding that Congress lacks power under section five of the Fourteenth Amendment to enact RFRA as against the states).

currently pending before the Supreme Court, the Sixth Circuit held that RLUIPA violates the Establishment Clause because it advantages religion over comparable secular beliefs.[18] Under RLUIPA, the court reasoned, burdens on free exercise would draw strict scrutiny, while burdens on other constitutional rights would be reviewed only for rationality in the prison context.[19] That disparity has the effect of advantaging religion over irreligion. To use the critics' terms (though the court did not), RLUIPA violates substantive neutrality. This does not mean that RLUIPA should be struck down—in fact it should not[20]—but it does mean that substantive neutrality would require that result.

This tension between the symmetry constraint and the critics' practical solutions is widespread. Many religious exemptions will incidentally advantage religion just as RLUIPA does. The Act therefore illustrates how the problem of symmetry frustrates the critics' effort to combat *Smith* from within the neutrality paradigm. Substantive neutrality would prohibit RLUIPA and many other religious exemptions that are central to the critics' project. Neutrality alone therefore cannot provide an account of the Free Exercise Clause that yields attractive outcomes in practice.

Fortunately, neutrality is not the only possible principle for the Free Exercise Clause. A liberty approach differs from neutrality and offers distinct advantages. Liberty is asymmetrical—it protects religious practice regardless of whether doing so incidentally advantages religion. This Article proposes a liberty rule, describes how it would work, and defends it against likely objections. Liberty diverges from the critics' proposal in significant ways. Chiefly, it does not suffer from the problem of symmetry. Liberty can be defined as the ability of private parties to pursue their interests, free of government interference or burden. That definition carries no inherent implications for state actions that benefit religion. A liberty approach is therefore free to reach results in real cases that more closely match the critics' vision.

Liberty not only is easier to defend; it also better captures the affirmative value of free exercise. Liberty of conscience matters in the U.S. constitutional tradition for many reasons, perhaps most of all because it recognizes the intrinsic value of developing and pursuing a comprehensive conception of the good.[21] A liberty rule therefore asks the

18. Cutter v. Wilkinson, 349 F.3d 257, 268–69 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 308 (2004). *Cf.* Madison v. Riter, 355 F.3d 310, 313 (4th Cir. 2003) (upholding RLUIPA); Charles v. Verhagen, 348 F.3d 601, 611 (7th Cir. 2003) (same); Mayweathers v. Newland, 314 F.3d 1062, 1068 (9th Cir. 2002) (same).

19. *Cutter*, 349 F.3d at 265; *see* Turner v. Safley, 482 U.S. 78, 89 (1987) (asking only whether burdens on constitutional rights in prison are "reasonably related to legitimate penological interests").

20. *See* discussion *infra* Part II.D.

21. *See* Martha C. Nussbaum, *A Plea for Difficulty*, *in* SUSAN MOLLER OKIN ET AL., IS

right question: not whether a challenged law disfavors religion relative to other commitments, but rather whether it burdens the free exercise of religion.

Consider an example that illustrates the difference between liberty and neutrality. The Newark Police Department instituted a policy that officers could not wear beards.[22] Muslim police officers objected that the policy prevented them from observing their faith. Under the *Smith* rule, the officers should have lost their case because the beard ban did not purposefully target religion. That outcome would have protected free exercise insufficiently. The trouble is that the critics' rule of substantive neutrality would not have produced a better outcome. Allowing only Muslim officers to wear beards would have advantaged them relative to officers who wanted to stop shaving for aesthetic or political reasons. That result would not have been neutral because it would have favored religion over irreligion. In fact, the Third Circuit did hold for the officers in the Newark case.[23] A liberty rationale best accounts for that outcome. The beard policy properly triggered heightened constitutional concern simply because it substantially burdened Muslim officers. And they probably should have prevailed because the city's interest in uniformity was relatively weak.

But liberty should not serve as the only free exercise norm. Imagine a government proclamation that carried no sanctions but simply declared, "this is not a Muslim nation." Government discrimination like that would not significantly burden liberty but it likely would violate the Constitution. Formal neutrality prohibits exactly that sort of purposive bias and consequently it enjoys widespread support from all parties to the current debate. Two independent principles therefore should protect free exercise: liberty and formal neutrality. Violating either one would trigger heightened scrutiny. Strict scrutiny, however, is probably inappropriate for the liberty component. One lesson of the Court's experience prior to *Smith* is that strict scrutiny protects too much.[24] A

MULTICULTURALISM BAD FOR WOMEN? 105, 107–08 (Joshua Cohen et al, eds., 1999); MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 81 (1999); *cf.* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982) (arguing that the speech clause serves an intrinsic value, "individual self-realization"). Even if religious conceptions of the good were not intrinsically valuable, government would still want to protect freedom of religion out of respect for the choices that citizens actually make. *See* Nussbaum, *A Plea for Difficulty*, *supra*, at 21. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 205–11 (1971) (defending liberty of conscience from the perspective of justice as fairness).

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

23. The court ruled for the officers using an obscure exception to *Smith*. *See id.* at 362. Its holding does not make sense under any sort of neutrality rule. For a fuller discussion of the case, see *infra* text accompanying notes 157–164.

24. *See* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 201 (2004) [hereinafter Laycock, *Theology Scholarships*] (discussing the era before *Smith* and noting that "many

more appropriate standard would be closer to intermediate scrutiny or the balancing approach that the Court has developed in its recent privacy cases:[25] Any substantial burden on religious practice must be justified by a state interest that is important enough to outweigh the practitioner's interest in observance. That test introduces its own difficulties, but its problems are preferable to the more serious drawbacks of substantive neutrality.

Part I defines substantive neutrality and explains its features. It then critiques substantive neutrality by arguing that it suffers from the problem of symmetry, which defeats many of the critics' core practical solutions. Part II argues for a particular type of liberty principle, which it calls substantive liberty. It defines substantive liberty, describes how it would work, and defends it against several anticipated objections, including the objection that liberty too runs afoul of the Establishment Clause. Although this Article does not offer a theory of antiestablishment, it takes a preliminary look and suggests that in fact the Establishment Clause leaves ample room for a liberty component of the Free Exercise Clause. The Article then concludes that critics of *Smith*, both on the Court and among commentators, are mistaken to think that neutrality can be refurbished. Neutrality alone cannot vindicate the vision of free exercise that the critics themselves rightly cherish. That vision requires liberty.

I. AGAINST NEUTRALITY

This Part describes and critiques substantive neutrality. The first section defines substantive neutrality and distinguishes it from other types of neutrality. Section B then makes the central argument of this Part, namely that substantive neutrality cannot vindicate the critics' own vision for the Free Exercise Clause because of the problem of symmetry. Two real-world examples show how symmetry frustrates the critics' aspirations: RLUIPA, mentioned above, and *Sherbert*, a key precedent for the critics. Finally, Section C mentions a more general difficulty, one that religion-clause neutrality shares with virtually all neutrality rules, namely the problem of baselines.

A. FACIAL, FORMAL, AND SUBSTANTIVE NEUTRALITY

Neutrality can be defined as government evenhandedness toward private competition and choice. Regarding religion, neutrality prevents government from advantaging or disadvantaging a particular faith (or

commentators thought the compelling interest test was relaxed in some of the cases that the government won").

25. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The Texas [sodomy] statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

religion generally). As the *Smith* Court said, government may not "lend its power to one or the other side in controversies over religio[n]."[26]

To take an extreme example, lawmakers could not criminalize the celebration of Roman Catholic mass consistent with neutrality. Of course that law would violate liberty as well. But neutrality focuses on the fact that banning mass would disfavor Catholicism relative to other faiths and secularism.

This definition—government evenhandedness toward private choice—applies to all types of neutrality. Three specific sorts of neutrality appear in the cases: facial, formal, and substantive. Substantive neutrality is the most important here, but that term is difficult to explain without first briefly defining facial and formal neutrality.

1. *Facial neutrality*

Facial neutrality prevents the government from explicitly disfavoring religion.[27] For instance, facial neutrality would support the result in *McDaniel v. Paty,* where the Court invalidated Tennessee laws disqualifying ministers from holding certain state offices.[28] Those laws contravened facial neutrality because they employed a religious category—ministers—on their face.[29] Philip Kurland articulated the classic defense of facial neutrality, which he called the rule against religious classifications.[30] Some justices likewise have argued that

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26. *Smith*, 494 U.S. at 877; *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard, in* LAW & RELIGION 200, 214 (Stephen M. Feldman ed., 2000) (endorsing a definition of neutrality under which "government must not favor some individuals over others on the basis of their religious viewpoint").

27. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (*Lukumi*), 508 U.S. 520, 533 (1993) ("[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."). There is some confusion of terminology among courts and commentators here. Laycock, for instance, does not employ the distinction between facial and formal neutrality. *Cf.* Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990) [hereinafter Laycock, *Neutrality*].

Facial neutrality approximates what the Court sometimes calls general applicability. *See Lukumi*, 508 U.S. at 531 ("Neutrality and general applicability are interrelated . . . ."); *see also id.* at 557 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he terms [neutrality and general applicability] are not only 'interrelated' but substantially overlap."). While it is possible to imagine a law that, although generally applicable without respect to religion, nevertheless employed a religious classification, say in its preamble alone, it is hard to see how this distinction could amount to a real difference.

28. 435 U.S. 618, 629 (1978).

29. *See id.* at 621 n.1 ("'Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature.'" (quoting Tenn. Const., art. VIII, § 1 (1796)). A state statute adopted the same restrictions for delegates to a state constitutional convention. *See id.* at 621 (referencing Tenn. Pub. Acts, ch. 848, § 4 (1976)).

30. "The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read

religious classifications should be automatically invalidated, though that view has never prevailed.[31]

Many have rejected a simple rule of facial neutrality because that type of ban, although categorical, provides only limited protection. Congress could, consistent with facial neutrality, pass a law that had both the aim and the actual effect of singling out a particular creed for unfavorable treatment, so long as the law applied generally to everyone within a religion-neutral category. For example, the *Lukumi* Court went beyond facial neutrality. There, the Court invalidated Florida ordinances that prohibited certain killing of animals. The ordinances did not name Santeria, a religion that requires ritual animal sacrifice.[32] Nevertheless, the Court figured that the laws were so riddled with exceptions that they had the impermissible object of suppressing religious observance. If facial neutrality had been the only rule, the Florida ordinances might well have withstood constitutional challenge.[33] Contemporary courts and commentators realize that facial neutrality cannot suffice, and they therefore seldom argue that free exercise should protect only against religious classifications.[34] The Supreme Court has explained that the Free

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together as they should be, prohibit classification in terms of religion either to confer a benefit or impose a burden." PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 112 (1962); *see also* Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373 (embracing Kurland's proposal).

31. *See, e.g.*, *Lukumi*, 508 U.S. at 579 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) ("When a law discriminates against religion as such ... it automatically will fail strict scrutiny...."); *McDaniel*, 435 U.S. at 631–32 (Brennan, J., concurring in the judgment) ("Whether or not the provision discriminates among religions... it establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is absolutely prohibited.").

32. *See Lukumi*, 508 U.S. at 533–34 (ruling that the claim of facial discrimination was "not conclusive").

33. Another example of facial neutrality's failings is the ban on polygamy that was upheld in *Reynolds v. United States*. 98 U.S. 145, 168 (1878). Anti-polygamy statutes were designed to target Mormons, even though they applied on their face to all polygamists. *See* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2428 (1997) ("[Anti-Mormon laws] were enacted with the intention, and had the effect, of suppressing a religion, which violates the Free Exercise Clause under post-1990 caselaw.").

34. Facial neutrality might not only be under-protective, but also over-protective. The Court does not seem to think that the mere use of religious classifications always warrants special concern, independent of their purpose or even if they work to benefit religion. For instance, the Court has never suggested that legislative exemptions for religion are specially suspect simply because they employ religious classifications. *See, e.g.*, Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (upholding Title VII's religion exemption). This contrasts with affirmative action cases, where the Court sometimes suggests that racial classifications raise special concern because departing from race-blindness can cause social harm. *See* Grutter v. Bollinger, 539 U.S. 306, 325–27 (2003); Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 302–03 (2001) (discussing racial classifications). Religion, unlike race, is not generally considered to be so fraught that its mere classification could have pernicious unintended consequences. Facial neutrality for religion—if it has any place in the Court's jurisprudence—is probably best considered a tool to exhume illegitimate

Exercise Clause protects against hostility "masked as well as overt."[35]

2. *Formal neutrality*

Formal neutrality goes further and prohibits official action whose purpose is to discourage a particular faith (or belief in general), even if that object is not manifest on the policy's face.[36] It was this sort of evenhandedness—formal neutrality—that the *Smith* Court adopted and that now stands as the measure of constitutional protection under the Free Exercise Clause.[37] In *Lukumi*, again, the Court confirmed that interpretation and held that the Florida ordinances violated neutrality because their object was to interfere with the ritual sacrifices of Santeria, even though they did not explicitly target that sect.[38]

Virtually everyone agrees that formal neutrality as to religion is a good thing—i.e., that purposive government discrimination is objectionable.[39] According to both sides of the current debate, the state should not aim to single out religionists for unfavorable treatment. This Article does not challenge that consensus.

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purposes or effects.

35. *Lukumi*, 508 U.S. at 534.

> Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Id. at 533 (citations omitted)).

36. *Cf. Lukumi*, 508 U.S. at 562 n.3 (Souter, J., concurring in part and concurring in the judgment) ("While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure, and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law."). Some Justices object that formal neutrality properly examines not the actual subjective intent of legislators, but instead the objective purpose or object of the resulting legislation. *See id.* at 558 (Scalia, J., joined by Rehnquist, C.J., concurring in part and concurring in the judgment).

37. *Lukumi*, 508 U.S. at 534 ("Facial neutrality is not determinative.... Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against government hostility which is masked as well as overt."); *id.* at 562 (Souter, J., concurring in part and concurring in the judgment) ("Though *Smith* used the term 'neutrality' without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort."). Laycock and McConnell agree that *Smith* articulated a rule of formal neutrality, though they do not always distinguish between facial and formal neutrality. *See* Laycock, *Neutrality*, *supra* note 27, at 1000; McConnell, *Revisionism*, *supra* note 4, at 1153.

38. *Lukumi*, 508 U.S. at 534–35.

39. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue ... regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532; *see also id.* at 563 (Souter, J., concurring in part and concurring in the judgment) (calling it a "noncontroversial principle" that "formal neutrality" is a necessary element of free exercise, though it may not be sufficient); Eisgruber & Sager, *Equal Regard*, *supra* note 26, at 205 (calling it "common ground" that the state cannot punish or deny benefits on account of religious beliefs); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 140 (1986). Probably Laycock would agree that formal neutrality provides a necessary minimum of constitutional protection for religion. *Cf.* Laycock, *Neutrality*, *supra* note 27, at 1001 (arguing that to exclude religious schools from an otherwise-neutral aid program would violate formal neutrality).

The central question is whether formal neutrality is sufficient. Recall that the critics direct two normative arguments against *Smith*. First, they worry that *Smith* leaves far too much leeway for widespread state regulation to harm sacred practices while satisfying—or under the guise of—formal neutrality.[40] Second and related, critics assail *Smith* for neglecting religious minorities, whose practices may suffer from innocent laws that enact majority mores.[41] The *Smith* Court itself recognized that many religious practices would be placed "at a relative disadvantage" under its rule, but it expressed a hope that formal neutrality's shortcomings would be mitigated by the legislature, which could exempt religious minorities from burdensome laws of general applicability.[42]

Critics of *Smith* think that formal neutrality should serve not as the sole rule, but only as a minimum baseline of constitutional protection. In other words, the critics agree with the Court that government should not purposefully discriminate against religion, but they disagree with the Court that this rule alone ought to protect free exercise. This Article does not revisit that familiar debate. It joins the conversation at the point where the critics propose a solution: substantive neutrality.

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40. *See Lukumi*, 508 U.S. at 578 (Blackmun, J., joined by O'Connor, J., concurring in the judgment); *Smith*, 494 U.S. at 894 (O'Connor, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment) (arguing that Free Exercise "ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice"); *id.* at 901 ("There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."). Laycock puts the point this way:

> [T]he obvious forms of persecution are not the ones a contemporary American majority is likely to use. The scope of regulation in the modern administrative state creates ample opportunity for facially neutral religious oppression. Such oppressive laws may be enacted through hostility, sheer indifference, or ignorance of minority faiths. If the Court intends to defer to any formally neutral law restricting religion, then it has created a legal framework for persecution, and persecutions will result.

Laycock, *Remnants*, *supra* note 4, at 4. *See also* Thomas C. Berg, *Religious Liberty at the End of the Century*, 16 J.L. & RELIGION 187, 191 (2001) [hereinafter Berg, *End of the Century*]; Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 129–30 (1993); Laycock, *Remnants*, *supra* note 4, at 38; Laycock, *Neutrality*, *supra* note 27, at 1006; Monsma, *supra* note 9, at 25; James D. Gordon, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 107–08 (1991).

41. *See, e.g.*, *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment); Sherbert v. Verner, 374 U.S. at 398, 411 (1963) (Douglas, J., concurring) ("[M]any people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views."); *see also* Carter, *supra* note 40, at 122–23; Gordon, *supra* note 40, at 108; Monsma, *supra* note 9, at 24; Eisgruber & Sager, *Equal Regard*, *supra* note 26, at 204 ("[G]overnment is obliged to treat the deep religious commitments of members of minority religious faiths with the same regard as it treats the deep commitments of other members of the society."); McConnell, *Revisionism*, *supra* note 4, at 1153 ("[G]enuine neutrality toward minority religions is preferable to a mere formal neutrality, which can be expected to reflect the moral and religious presuppositions of the majority.").

42. *Smith*, 494 U.S. at 890.

3. *Substantive neutrality*

Substantive neutrality requires, in addition to an impartial purpose, a neutral effect. Government policies may not create effects that favor or disfavor religion.[43] Laycock, who coined the term, defines it this way:

> By substantive neutrality, I mean that government should "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or nonobservance."[44]

For example, the ban on peyote at issue in *Smith*, although part of a general criminalization of hallucinogens not aimed at religious practice, may have violated substantive neutrality because it had the effect of disadvantaging a central sacrament for certain Native American faiths.

Where state policies incidentally discourage religion, substantive neutrality calls for heightened scrutiny.[45] If the government fails to justify its actions, then the court may carve out a religious exemption in order to remedy the non-neutral effect. For instance, exempting the ritual use of peyote from the drug laws arguably would, to use Justice Brennan's words, "reflect nothing more than the governmental obligation of neutrality in the face of religious difference."[46]

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43. *See, e.g.*, Michael McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 35 (1989) ("[A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than comparable nonreligious activities.").

44. Laycock, *Remnants*, *supra* note 4, at 16 (quoting Laycock, *Neutrality*, *supra* note 27, at 1001). *See* Laycock, *Theology Scholarships*, *supra* note 24, at 160 ("I have long argued that government should be substantively neutral toward religion."); *see also Lukumi*, 508 U.S. at 562 (Souter, J., concurring in part and concurring in the judgment) ("[S]ubstantive neutrality . . . , in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws." (citing Laycock, *Neutrality*, *supra* note 27.)).

Some scholars endorse substantive neutrality without using the term. *See* Bradley, *supra* note 9, at 261 ("[Religious liberty is] defined as what happens when government provides no reason to practice or adopt any particular religious perspective. 'Neutrality of effect' is a convenient expression for this objective."); McConnell, *Revisionism*, *supra* note 4, at 1146 ("The purpose of free exercise exemptions is to ensure that incentives to practice a religion are not adversely affected by government action."); McConnell & Posner, *supra* note 43, at 34 ("[I]t may be impermissible to regulate churches and religiously motivated conduct, even under formally neutral criteria, in ways that have a substantially greater impact on religious exercise than on other activities."); Pepper, *supra* note 9, at 51 ("substantive equality").

45. The critics seldom acknowledge that substantive neutrality requires a balancing test, but this must be the case. Substantive neutrality cannot be absolute. For example, no exemption would be allowed for ritual human sacrifice even though the laws against murder have the incidental effect of prohibiting that practice. Realizing this, the critics occasionally say that their rule involves some sort of balancing. *See* Laycock, *Remnants*, *supra* note 4, at 30 ("A right to religious exemptions cannot be absolute; the state must be able to override it for sufficiently compelling reasons."); McConnell, *Revisionism*, *supra* note 4, at 1148–49 (acknowledging that in certain cases courts must determine whether government interests are important enough to override religious needs).

46. *Sherbert*, 374 U.S. at 409. Justice Brennan also seemed to advocate substantive neutrality in his dissent in *Goldman*, where he argued that the military's formally neutral dress code effectively disfavored Orthodox Jews who must wear a yarmulke. *See* Goldman v. Weinberger, 475 U.S. 503, 521

Substantive neutrality works on the same fundamental intuition as formal neutrality, namely that government should neither favor nor disfavor religious practice.[47] But it supplements that basic conviction with the realization that pervasive welfare state regulation will more often disadvantage religion inadvertently than through purposive discrimination.[48] Laws in a welfare state do not often aim to disadvantage religion, but they do often reach areas of life that affect believers. Prohibition of alcohol, for instance, did not target religion but would have contravened substantive neutrality had it not exempted Catholics and Jews from using wine in the Eucharist or at Seders.[49] To the critics, it is not simply purposive government bias that offends the constitutional tradition, but any state action that interferes with the principle that "religion is to be left as wholly to private choice as anything can be."[50]

Violations of substantive neutrality do not depend on actually altering behavior. Rather, government infringes substantive neutrality whenever it skews private ordering by creating incentives toward or against religion.[51] Critics have analogized their view of government evenhandedness to economic neutrality.[52] Like economic incentives, religious incentives might actually alter private choice only at the margins, where other decision-making factors hang in relative equipoise. In our example, the mass ban might prevent non-Catholics from joining the church, or it might thwart lapsed Catholics from practicing their faith more zealously, but only in marginal cases where the private citizen was not already either fully committed to Catholicism or resolutely uninterested. For the critics, the ban need not actually alter any private decision in order to violate neutrality. It is the very existence of a state incentive that constitutes a violation of substantive neutrality.[53] Government can distort religious pluralism by altering incentives, regardless of whether those incentives actually change behavior.

4. *An aside: neutrality v. equality*

Neutrality and equality both prohibit discrimination against religion,

(Brennan, J., dissenting). Brennan blended this rationale, which focused on minority faiths, with a concern for the liberty of all faiths. *See id.* at 521–22.

47. Perhaps substantive neutrality was designed to actually implement a liberty intuition using the language of neutrality. *See, e.g.*, Laycock, *Religious Liberty as Liberty*, *supra* note 15, at 319, 320. Regardless of whether that was the critics' motive, a neutrality test cannot implement a liberty principle. For an assessment of this failure, see *infra* text accompanying notes 192–208.

48. *See* McConnell, *Revisionism*, *supra* note 4, at 1133–35 (arguing that generally applicable laws will often have non-neutral effects).

49. *Cf. id.* at 1135; Laycock, *Neutrality*, *supra* note 27, at 1000.

50. Laycock, *Neutrality*, *supra* note 27, at 1002.

51. *See id.* ("[Religion] should proceed as unaffected by government as possible.").

52. *See, e.g.*, *supra* note 43, at 35.

53. *Cf.* McConnell, *Revisionism*, *supra* note 4, at 1146 ("The purpose of free exercise exemptions is to ensure that incentives to practice a religion are not adversely affected by government action.").

and thus they resemble each other. However, they are not identical. This subsection draws a distinction between neutrality and equality for the sake of clarity but ultimately concludes that little turns on it. Accordingly, the remainder of the Article follows convention and refers only to neutrality.

Recall that neutrality requires government evenhandedness toward private competition and choice. Equality, by contrast, concerns not private choice, but social status. With regard to religion, equality focuses its attention on minority sects, protecting them against discrimination, while neutrality focuses on private decision making.[54]

Eisgruber and Sager have built a theory of the religion clauses around an equality principle that they call equal regard. The central conviction of equal regard is that "[w]hat properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value."[55] Equal regard thus prohibits differential state treatment of religious groups. Purposive discrimination is not necessary to make out a free exercise claim, according to Eisgruber and Sager. Instead, a member of a minority faith need only show that the government has accommodated some other religious belief (or secularism) without similarly accommodating the minority religion.[56] Equal regard therefore differs from substantive neutrality insofar as it ignores whether a government policy skews incentives.[57] Only when the state selectively accommodates some group without accommodating minority faiths does the state run afoul of equal regard. Treating religious groups differently is prohibited by equal regard even when the difference does not alter incentives.

Consider a favorite example of Eisgruber and Sager, the Newark case mentioned above. A police regulation prohibited all officers from wearing beards. Muslim police officers challenged the beard ban on the ground that their religion required them to grow their facial hair. The Third Circuit held for the officers.[58] Eisgruber and Sager applaud that result, but only because of an additional fact: The police department exempted officers who had medical conditions that prevented them from

54. The analytic difference between neutrality and equality sharpens when we consider them as describing not negative rights, which prevent the government from taking certain action, but positive rights, which command the government to do something affirmative. Neutrality, unlike equality, has no positive component. While government may act affirmatively to promote equality among social groups, it cannot take positive steps toward neutrality. Rectifying social bias would by definition make the government less neutral, not more, because doing so would interfere with private preferences.

55. Eisgruber & Sager, *Equal Regard, supra* note 26, at 201.

56. *See id.* at 210.

57. *See id.* at 214.

58. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999). As explained below, that holding relied on an exception to *Smith* and can only be explained by a liberty rationale. *See infra* text accompanying notes 157–164.

shaving.[59] Eisgruber and Sager think that the department violated the principle of equal regard because of this secular exemption.[60] Accommodating secular needs but not religious ones offends the Constitution.[61]

Yet substantive neutrality would analyze the Newark case differently from equal regard, and this divergence illustrates the distinction between neutrality and equality. For equal regard, it is the different recognition of secular and religious needs that generates the constitutional complaint. If the secular medical exemption had not existed, Muslim officers would have had no ground for complaint.[62] For substantive neutrality, on the other hand, the trouble is that the beard ban disproportionately impacted Muslim officers. Neutralists would worry that Newark's ban disfavored Muslim officers regardless of whether it also included a secular exemption. Accommodating people who must shave for medical reasons does not affect a neutrality analysis. That is because the medical exemption did not impact private decision-making for Muslims. Medical conditions are beyond choice, and a government policy that treated them with special solicitude would not skew private incentives.[63] Equal regard, by contrast, concerns status independent of choice. Because the Newark policy exempted one group without also accommodating religion, it violated equal regard.

For Eisgruber and Sager, the central imperative of the Free Exercise Clause is to protect minority religious groups from political

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59. *Id.* at 361.

60. *See* Eisgruber & Sager, *Equal Regard*, *supra* note 26, at 220 (discussing the *Newark Lodge* case). At times it seems that equal regard protects only against purposive discrimination. Consonant with this version, Eisgruber and Sager might think that *Newark Lodge* involved intentional discrimination. But it is difficult to believe that a single medical exemption could establish purposive discrimination on the basis of religion.

At other times, they think that free exercise should require an exemption for religion whenever the government accommodates a secular concern, and not a religious one, even if it has overlooked religion unintentionally. *See id.* at 220.

Even this second reading of equal regard seems problematic. Equal regard looks less attractive if a single accommodation of a secular interest—and *only* some such anomaly like the medical exception in *Newark Lodge*—triggers a duty on the part of government to accommodate religion. Equal regard would not protect Muslim police officers in, say, Trenton from an identical regulation that did not think in advance to accommodate officers with dermatological conditions. Why the ability of Muslim officers to follow a commandment of their faith (without losing their jobs) should depend on the normatively insignificant accident of a single secular exemption is difficult to understand.

61. *See id.* at 210 ("Legislatures can make otherwise valid general laws more or less absolute as their democratic judgment dictates; but to the extent that variance from these laws is or would be permitted to accommodate the discrete and opposing interests of some members of the political community, equal regard insists that the same accommodation be made for the deep interests of minority religious believers.").

62. *See id.* at 214 (rejecting the idea that government must take affirmative steps to "create a regime equally hospitable to all belief systems").

63. This analysis puts aside the unlikely possibility that an officer would fraudulently claim to have a skin condition simply in order to be able to grow a beard.

discrimination,[64] not to keep government out of private competition among religions, as it is for neutralists. Eisgruber and Sager seem to prefer the term equality to neutrality for precisely this reason.[65] In that way, their theory of equal regard illustrates the distinction between neutrality and equality.

Without mentioning this distinction, the free exercise literature generally speaks solely in terms of neutrality. Since little turns on the difference, this Article follows that convention.

B. The Problem of Symmetry

Substantive neutrality suffers from a difficulty best called the problem of symmetry. The trouble stems from the central conceptual feature of neutrality, namely evenhandedness itself. Recall that neutrality can be defined as government evenhandedness toward private competition and choice. Every version of neutrality worthy of the name must object equally to government favor and disfavor. Substantive neutrality, in particular, must always apply as readily to official action that has the effect of advantaging religion as it does to policy that disadvantages it. The critics could not apply strict neutrality of effect to laws that burden religion but only a more permissive purposive neutrality to laws that benefit religion. That regime would not be neutral. Rather, it would systematically benefit religion. The critics understand this requirement of evenhandedness. Laycock's own definition of substantive neutrality prohibits not only "discourage[ment]" of religion, but also and equally "encourage[ment]."[66]

But in practice many of the critics' concrete recommendations will have the effect of advantaging religion. The critics' core practical solutions often feature religious exemptions. The trouble is that many of these religious exemptions will not only remove a disincentive to observance, but also and simultaneously encourage religiosity. Government exemptions advance religion over irreligion whenever they license only believers to engage in conduct that others would like to undertake for secular reasons.[67] Where religious duty coincides with secular interest in this way, carving out a religious exemption from a formally neutral law favors religion in violation of substantive neutrality. Religious exemptions will often violate a properly symmetric application

64. *See id.* at 201 ("What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination . . . .").

65. *See* Eisgruber & Sager, *Equal Regard*, *supra* note 26, at 213–14 (rejecting the term neutrality and preferring equal regard, which does not seek to avoid government actions that "influence the extent to which various religious and secular beliefs flourish").

66. *See* text quoted, *supra* note 44.

67. *See* Berg, *Religious Schools*, *supra* note 9, at 35 (noting that an improper incentive to choose religious conduct "will exist in cases where the exemption coincides substantially with self interest").

of substantive neutrality.[68]

Symmetry thus presents a difficulty for the critics because they strongly support many religious exemptions, both judicial and legislative, that have the effect of advantaging religion over other faiths or over comparable secular commitments. Not every exemption advances religion. For instance, federal and state legislative exemptions from drug laws for ritual use of peyote arguably do not favor Native Americans because peyote is unpleasant to use and therefore has not generated widespread secular demand. But many exemptions do favor observance. An exemption from prohibition for the sacramental use of wine, for instance, may well have had the effect of encouraging Catholicism.[69] If it were applied consistently and symmetrically, substantive neutrality would prohibit many practical proposals for exemptions that are critical to protecting free exercise.

One way of understanding the problem of symmetry is to say that substantive neutrality under the Free Exercise Clause carries inherent implications for the Establishment Clause.[70] Antiestablishment mirrors free exercise; it prohibits benefits to religion where free exercise prohibits burdens. Evenhandedness, the central conceptual characteristic of neutrality, means that a rule disallowing non-neutral effects under the Free Exercise Clause must also ban non-neutral effects in the opposite direction.[71] It makes sense to think of a rule that regulates benefits toward religion as implementing an antiestablishment norm.

Current Establishment Clause doctrine appears to exacerbate the substantive neutrality's problem of symmetry. The Court's sometime

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68. Some may object that formal neutrality likewise must be applied symmetrically and therefore that it too prohibits exemptions that advantage religion. This objection is incorrect because statutory and judicial exemptions are not designed to advantage religion. For a fuller discussion, see *infra* note 137.

69. Sometimes the literature describes substantive neutrality as prohibiting incentives to practice a particular faith. Laycock says that a religious exemption that coincides with self-interest might persuade people that they honestly hold religious views consistent with that interest. The lure of the incentive will create "cognitive dissonance" that the individual might resolve by taking up the protected belief or practice. *See* Laycock, *Neutrality*, *supra* note 27, at 1017.

But it is important to realize that actual conversion to the favored faith is not necessary to trigger the problem of symmetry. Recall that substantive neutrality bans government actions that disfavor observance regardless of whether they actually alter behavior. *See supra* text accompanying notes 51–53. This must be equally true for the Establishment Clause: incentives that benefit religion must violate substantive neutrality independent of any actions they actually prompt.

70. Justice Stevens recognized this problem in his earliest free exercise opinion. *See, e.g.*, United States v. Lee, 455 U.S. 252, 263–64 n.3 (1982) (Stevens, J., concurring) ("[I]f tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects.").

71. Growing numbers of constitutions in other countries protect religious liberty while rejecting antiestablishment and the separation of church and state. Whether neutrality would make sense as a norm in an asymmetrical system—one that protects against burdens on religion without prohibiting benefits to religion—is a difficult issue that is best pursued separately.

antiestablishment test, set out in *Lemon v. Kurtzman*, ostensibly bars (*inter alia*) government policies that have the principal effect of either advancing or inhibiting religion.[72] In other words, the *Lemon* test calls for something close to substantive neutrality under the Establishment Clause.[73]

The most astute proponents of substantive neutrality have noticed the problem of symmetry, though only in passing and without fully facing its practical consequences.[74] Two of the leading defenders of substantive neutrality attempt to address that difficulty in different ways. First, Douglas Laycock advocates a balancing test for substantive neutrality: A court faced with two non-neutral alternatives, one that discourages and another that encourages religion, should choose the course that creates the smallest incentive in either direction.[75] Courts should take "[t]he course that most nearly approaches substantive neutrality—the course that minimizes both encouragement and discouragement."[76] Where it is impossible to determine which course would be less neutral, however, courts should defer to the legislature and deny the free exercise claim.[77]

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72. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring) (discussing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)). One circuit has formulated an incentive test to determine whether legislative accommodations satisfy the Establishment Clause. The Eighth Circuit approved a law that allows religious health care providers that meet certain criteria to obtain Medicare benefits. The Court held that the appropriate test for an establishment is whether a legislative accommodation merely removes an impediment or instead creates an affirmative incentive to join a church. Children's Healthcare Is a Legal Duty, Inc. v. Min de Parle, 212 F.3d 1084, 1095 (8th Cir. 2000).

73. In actual fact, the Court does not normally invalidate exemptions that have the effect of advancing religion—the *Lemon* test notwithstanding. Thousands of federal and state statutes exempt religious practices from their provisions. It simply cannot be the case that these exemptions are unconstitutional whenever they have the inadvertent effect of advantaging religion. For fuller discussions, see *infra* text accompanying notes 92–95 and 224–233.

74. *See, e.g.*, Berg, *supra* note 9, at 35 ("[I]f the exemption of religiously motivated conduct creates an incentive to choose that conduct over the secular alternatives, then [sic] exemption would be improper under a choice analysis."); McConnell, *Revisionism*, *supra* note 4, at 1146–47 ("[T]he government is not required to create exemptions that would make religious believers better off relative to others than they would be in the absence of the government program to which they object. The purpose of free exercise exemptions is to ensure that incentives to practice a religion are not adversely affected by government action. By the same token, government action should not have the effect of creating incentives to practice religion."); McConnell & Posner, *supra* note 43, at 34 ("The Free Exercise Clause is thus the mirror image of the Establishment Clause. Both clauses are best interpreted from the standpoint of neutrality.").

75. *Compare* Laycock, *Remnants*, *supra* note 4, at 17 ("The magnitude of encouragement incident to an exemption is generally smaller than the magnitude of discouragement incident to criminalization, and so exemption comes closer to substantive neutrality."); *with* Laycock, *Neutrality*, *supra* note 27, at 1017 (suggesting that in some cases "denying the exemption appears to be more nearly neutral than granting it."); *see also* Monsma, *supra* note 9, at 30 (advocating minimizing favoring and disfavoring religion).

76. Laycock, *Neutrality*, *supra* note 27, at 1003. This passage is specific to the example that Laycock is discussing, the sacramental use of wine during prohibition, but it fairly characterizes his general approach.

77. *See id.*, at 1017 ("If we have no plausible estimate of which effect is larger, then there may be

Second, Michael McConnell suggests not a balancing test like Laycock's but a categorical approach: Courts should never command free exercise exemptions that would make believers better off than they would have been in the absence of the challenged government action.[78] In other words, a free exercise exemption should be denied if it would advance religion at all, even if that advantage would be smaller than the disadvantage created by the challenged government policy.

Whatever the relative merits of these two solutions, balancing and categorical, they both acknowledge the problem of symmetry. However, the critics do not fully appreciate the seriousness of that difficulty for their core practical solutions. Two examples illustrate its import.

1. *A current example: RLUIPA*

The Religious Land Use and Institutionalized Persons Act (RLUIPA) illustrates how a symmetric application of substantive neutrality contravenes some of the critics' deepest normative commitments.[79]

RLUIPA is the most recent salvo in a protracted battle between the Supreme Court and Congress over the proper level of scrutiny for burdens on religious freedom. For nearly thirty years before *Smith*, the Court had applied strict scrutiny to burdens on free exercise under *Sherbert v. Verner*.[80] *Smith* abruptly ended that era and introduced a new regime of rational basis review for the vast majority of free exercise cases. Outraged by *Smith*, Congress reinstated the compelling interest test—as a statutory matter—in the Religious Freedom Restoration Act (RFRA).[81] Congress thought it could prohibit both federal and state governments from incidentally burdening religious practice. The Supreme Court responded by ruling that Congress lacked power to enact RFRA under section five of the Fourteenth Amendment, and accordingly it invalidated the statute as applied to the states.[82] In RLUIPA, Congress reinstated strict scrutiny, even against the states, but

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no basis in substantive neutrality for the courts to second-guess the legislature.").

78. *See* McConnell, *Revisionism*, *supra* note 4, at 1146–47; *see also* McConnell & Posner, *supra* note 43, at 42 (suggesting that religious exemptions should not be granted when they advantage believers over non-believers). McConnell, in his early article with Posner, at first purported to avoid the symmetry problem by concerning himself only with a believer's choice whether to observe the dictates of her given creed, not the choice among faiths. Somehow an exemption that removed an obstacle to an believer's choice to worship would not violate the Establishment Clause simply because it also advantaged that faith relative to other belief systems. *See* McConnell & Posner, *supra* note 43, at 38 & n.81. It is unclear, however, why an exemption that encouraged conversion would not be advantaging religion within the meaning of the Establishment Clause. Perhaps for this reason, McConnell abandoned this approach and faced the problem of symmetry more squarely in later work.

79. 42 U.S.C. §§ 2000cc to 2000cc-5 (2003).

80. Sherbert v. Verner, 374 U.S. 398 (1963).

81. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb TO 2000bb-4 (1993).

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

this time it relied on its Spending and Commerce Clause powers in the limited contexts of prisons and certain land uses.[83] For example, RLUIPA's prison provision prevents government from substantially burdening inmates' religious practice unless the state can demonstrate a compelling interest and narrow tailoring.[84]

In *Cutter*, the Sixth Circuit held that RLUIPA violates the Establishment Clause because it has the effect of advancing religion over irreligion.[85] Imagine two white supremacist inmates, both of whom wish to possess racist literature in violation of prison censorship rules.[86] One inmate bases his bigotry on the teachings of the Church of Jesus Christ Christian, Aryan Nation, while the other follows teachings of the Aryan Nation, a secular group. The religious white supremacist would benefit from strict scrutiny under RLUIPA, while the secular racist would receive only rational basis review because speech claims do not draw heightened scrutiny in the prison context.[87]

After considering that hypothetical, the Sixth Circuit ruled that RLUIPA violates neutrality of effect because it advantages religion over irreligion, "placing [government] power behind one system of belief."[88] The Sixth Circuit figured that Congress had advanced religion over comparable secular commitments, such as those protected by the Free Speech Clause.[89] Only burdens on religious speech draw strict scrutiny under RLUIPA, it reasoned, and therefore the expression of religious commitments receives greater protection than the expression of secular views grounded in, say, politics, philosophy, or aesthetics. Advantaging religion in that way violates the Establishment Clause.[90] In our terms, the

83. For Judge Wilkinson's history of RLUIPA, *see* Madison v. Riter, 355 F.3d 310, 314–15 (4th Cir. 2003).

84. 42 U.S.C. § 2000cc-1 (2000).

85. Cutter v. Wilkinson, 349 F.3d 257, 266 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004).

86. *Id.* at 266 (borrowing the hypothetical from *Madison v. Riter*, 240 F. Supp. 2d 566, 576 (W.D. Va. 2003), *rev'd.*, 355 F.3d 310 (4th Cir. 2003)).

87. *See* Turner v. Safley, 482 U.S. 78, 89–90 (1987) (considering only whether there is a "valid, rational connection" between a prison policy and a "legitimate governmental interest") (internal quotation marks and citation omitted).

88. *Cutter*, 349 F.3d at 266 (internal quotations and citations omitted). Would the Christian white supremacist draw greater protection than the secular white supremacist under a liberty approach? Not as a constitutional matter. Religion and speech both enjoy special status under the Constitution. However, it may well be permissible for Congress to provide additional protection for religion alone in the context of prisons and certain land uses. Doubtless Congress could do the same for speech if it wished.

89. *Id.* ("[T]he primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners.").

90. The *Cutter* court held that RLUIPA had the effect of conveying a "message of endorsement." *Id.* It added that "RLUIPA also has the effect of encouraging prisoners to become religious in order to enjoy greater rights." *Id.* The court declined to decide whether RLUIPA's purpose was neutral—that is, whether the law was formally neutral—holding that even if it were neutral in this way, the statute

Sixth Circuit overturned RLUIPA precisely because it contravenes substantive neutrality.[91]

The Fourth Circuit, ruling in a subsequent case, disagreed with *Cutter*.[92] There, Judge Wilkinson found that RLUIPA does not violate the Establishment Clause because the Constitution cannot prohibit Congressional exemptions whenever they somehow advantage religion over comparable secular commitments.[93] Any other result, Judge Wilkinson wrote, "would work a profound change in the Supreme Court's Establishment Clause jurisprudence and in the ability of Congress to facilitate the free exercise of religion in this country."[94]

That outcome must be correct. Some 2,000 statutes—state and federal—exempt religion from their provisions.[95] It simply cannot be the case that all those legislative accommodations are unconstitutional whenever they incidentally advantage religion in some way. The *Cutter* court's reasoning would undermine a longstanding tradition of legislative accommodation of religion in the United States.

However, Judge Wilkinson was mistaken to think that RLUIPA could be reconciled with substantive neutrality. He argued that "RLUIPA in no way is attempting to . . . advance religion in general in the prisons."[96] Although that may be true, it speaks to governmental purpose, not effect. Tellingly, Judge Wilkinson never squarely faced the *Cutter* court's central claim that RLUIPA advantages believers over nonbelievers. He recognized the problem, but he responded not that RLUIPA achieves a neutral effect, but instead simply that the Establishment Clause cannot require "commensurate protections" for religion and irreligion.[97] "[T]he Constitution itself provides religious exercise with special safeguards," he pointed out, but that protest was nothing more than an objection to neutrality itself.[98] Judge Wilkinson should have upheld RLUIPA by arguing that neutrality of effect could not be the right rule, despite the *Lemon* test. That reasoning would have

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would still fall because it violated neutrality of effect. *Id.* at 264.

91. Recall that the *Lemon* test requires something close to substantive neutrality. A challenged law must have a "principal or primary effect" that "neither advances nor inhibits religion." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The *Lemon* test also requires a secular purpose, or formal neutrality, and it prohibits state entanglement with religion. *Id.*

92. Madison v. Riter, 355 F.3d 310, 318 (4th Cir. 2003).

93. *Id.* at 318–19 ("The Establishment Clause's requirement of neutrality does not mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights.").

94. *Id.* at 320.

95. *See* Michael McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 5 (2000) [hereinafter McConnell, *Singling Out*] (citing James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992)).

96. *Madison*, 355 F.3d at 318.

97. *Id.*

98. *Id.* at 319.

been truer to his intuitions, but it would have presented a problem for the critics.

Surely the critics must agree that RLUIPA does not violate the Establishment Clause. After all, it has much in common with their core practical solutions. The critics are enthusiastic supporters of legislative accommodations generally, of RFRA in particular,[99] and presumably of RLUIPA as well. However, the logic of their proposal, substantive neutrality, would seem to dictate the result in *Cutter*—that RLUIPA is unconstitutional because it impermissibly creates an effect that advantages religion over comparable secular commitments. Symmetry requires that outcome. Likewise, many legislative exemptions that are designed to remove disproportionate burdens on religion will also advantage religion and run afoul of substantive neutrality. That result follows ineluctably from the symmetrical nature of neutrality—yet it frustrates many of the critics' most crucial practical solutions.

2. *Difficulties with* Sherbert

The critics' leading precedent for applying strict scrutiny to laws of general applicability, *Sherbert v. Verner*, also has the effect of encouraging religion in violation of substantive neutrality.[100] Critics of *Smith* have not come to terms with the difficulty that symmetry poses for that key authority. *Sherbert* concerned a Seventh-Day Adventist who was denied unemployment benefits because she refused to work on Saturday, her sabbath. Unemployment laws required applicants to accept "suitable work," a condition that disqualified her because she refused to work Saturdays. The Court carved out an exception for Sherbert and awarded her benefits.[101] It is hard to justify that result under a rule of symmetric substantive neutrality since the *Sherbert* ruling seems to advantage Saturday sabbatarians.

The Court has virtually held as much. In *Estate of Thornton v. Caldor*, the Court struck down a statute that was difficult to distinguish from the *Sherbert* exemption.[102] *Thornton* involved a Connecticut statute that allowed only sabbath-observant workers to choose their day off. Workers with comparable secular reasons for selecting their day off were

99. *See, e.g.*, Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994); McConnell, *Singling Out*, *supra* note 95, at 4–5 (defending legislative accommodations generally and RFRA in particular).

100. Sherbert v. Verner, 374 U.S. 398 (1963). For a fuller discussion, *see infra* text accompanying notes 43–53.

101. *Id.* at 410.

102. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985). Even before *Thornton*, Justice Rehnquist suggested that neutrality of effect would prohibit the result in *Sherbert*. Rehnquist pointed to establishment decisions holding that states may not pass laws that have the *effect* of advancing belief, regardless of their purpose, and argued that the result in *Sherbert* and *Thomas* would violate that rule by encouraging observance. *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 724–26 (1981) (Rehnquist, J., dissenting).

not accommodated by the law. Thus the Connecticut statute created a situation virtually identical to the result ordered in *Sherbert*. But the Court ruled that the Connecticut statute had the effect of advancing religion in violation of the Establishment Clause.[103]

Justice Brennan later attempted to defend *Sherbert* in the face of *Thornton*, arguing that the result in *Sherbert* "'reflect[ed] nothing more than the governmental obligation of neutrality in the face of religious differences,'" while the *Thornton* law isolated a particular class of believers for favorable treatment.[104] But it is difficult to understand how the *Sherbert* exemption does not similarly favor unemployed members of sabbatarian sects over unemployed secularists who would prefer to enjoy state benefits until they found a job that did not require them to work on Saturdays. The two exemptions differ in their purpose, but their effects are much the same.

Justice Stevens also saw the problem and also tried to justify the result in *Sherbert*. He distinguished between on the one hand a hypothetical tax exemption for believers, under which "every citizen would have an economic motivation to join the favored sects," and on the other hand the exemption created in *Sherbert*, under which "[n]o comparable economic motivation could explain the conduct of the employees."[105] For Stevens, a religious exemption for unemployed Saturday sabbatarians therefore does not encourage religion in the same way a tax exemption for all religious practitioners would.[106]

But Stevens's distinction must be wrong. Although it is true that the *Sherbert* exemption does not favor unemployed Seventh-Day Adventists over non-believers generally, the way a tax exemption would, it does

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103. *Thornton*, 472 U.S. at 710 n.9 ("Other employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off have no rights under the statute."); Micahel J. Sandel, *Freedom of Conscience or Freedom of Choice*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE, 74, 89 (James Davidson Humger & Os Guinness, eds., 1990) (critiquing Thornton).

104. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 145 & n.11 (1987) (quoting *Sherbert*, 374 U.S. at 409).

105. United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). In a subsequent case similar to *Sherbert*, Stevens reasoned simply that the state's refusal to accommodate believers evidenced a discriminatory purpose. *See Hobbie*, 480 U.S. at 147–48 (Stevens, J., concurring) (writing that the state "regards [Hobbie's] religious claims less favorably than other claims" (internal quotation marks omitted)). He did not say why the exemption still would not have the effect of unconstitutionally encouraging religion—something his own reading of the Establishment Clause prohibits.

106. Justice Stevens' defense of *Sherbert* is all the more interesting because he supports a substantive-neutrality approach to antiestablishment—that is, he believes that the Establishment Clause should prohibit government policies that have the effect of advantaging religion. But Justice Stevens' rule of substantive neutrality is *not* symmetric; he does not think it should apply to the Free Exercise Clause. Government may burden religion, so long as that is not its object. *Cf.* Laycock, *Neutrality*, *supra* note 27, at 1010 (noting that Stevens is a "judicial activist" on establishment issues, but a "minimalist" regarding free exercise). This asymmetric approach to the religion clauses has won few converts.

favor them over non-believers who are similarly unemployed and who have secular reasons for preferring a job that does not require them to work Saturdays.[107] The problem of symmetry thus puts up a serious—but so far unacknowledged—obstacle to *Sherbert*, a key precedent for the critics.

C. The Problem of Baselines

Substantive neutrality also suffers from a commonly recognized difficulty with neutrality rules generally, namely the problem of baselines. Whenever the question is whether a government action has effectively benefited religion, the answer will always depend on a comparative perspective. Compared to what state of affairs must a government policy have a neutral effect on religion?[108] One candidate is the status quo ante, i.e. the state of affairs before the challenged government program was put into effect. But what guarantees that the background government policies defining this ex ante situation were neutral as to religion?[109] How a court resolves the question of baselines will largely determine whether it finds that a government exemption has the effect of advancing religion or whether it concludes that the accommodation, in Justice Brennan's words, "reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[110]

RLUIPA illustrates the problem of baselines as well as the problem of symmetry. Defending the law's neutrality, Judge Wilkinson wrote for the Fourth Circuit that Congress had done nothing more than relieve religious practitioners from government-imposed burdens on free exercise in prisons.[111] The effect of RLUIPA, on this account, is neutral

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107. In *Smith*, Justice Scalia tried to assimilate *Sherbert* to the rule of formal neutrality by arguing that the unemployment board discriminated purposefully when it granted individualized exemptions on secular grounds but refused to do so on religious grounds. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990). But this revisionist history overrides the impressions of the litigants and judges involved in *Sherbert*, none of whom found intentional discrimination. Justice Brennan came the closest in the *Sherbert* opinion when he pointed out that the state exempts Christians from working when textile plants operate on Sundays during times of national emergency. Brennan thus argued that accommodating Christians, but not Sabbatarians, might have a discriminatory *effect*, but he never suggested, as did the *Smith* Court, that there was any evidence in *Sherbert* of discriminatory *purpose*. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

108. *See* Laycock, *Neutrality*, *supra* note 27, at 1005; McConnell & Posner, *supra* note 43, at 37.

109. For prior critiques of the baseline problem for neutrality, *see* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 San Diego L. Rev. 763, 793 (1993); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 333 (1986); Steven D. Smith, *The Restoration of Tolerance*, 78 Cal. L. Rev. 305, 319–21 (1990).

110. *Sherbert*, 374 U.S. at 409.

111. *See* Madison v. Riter, 355 F.3d 310, 318 (4th Cir. 2003) ("Congress has simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths.").

because it merely restores believers to the position they would have been in had the government not imposed prison regulations on them.[112]

On the other hand, the Sixth Circuit in *Cutter* compared the effect of RLUIPA not against the situation without prison regulations, but against the ability of other inmates to pursue secular commitments inside prison.[113] After all, a wide range of activities, both secular and sacred, is burdened by prison regulations. Measured against the ability to engage in these other activities, RLUIPA has the effect of advantaging religious practice. Whether government has acted to neutral effect thus depends on the baseline of comparison.

The critics have all but admitted that neutrality cannot solve the problem of baselines. For instance, they have acknowledged that neutrality cannot ground the common intuition that religion should receive basic police protection.[114] Other government services, such as public school facilities and unemployment benefits, similarly may or may not deserve inclusion in a baseline of comparison.[115] While neutrality must always confront this problem of baselines without solving it, liberty faces no such problem.[116] Liberty asks not whether a challenged program is neutral relative to some baseline or another, but rather only whether the state can afford to free religious groups from state-imposed burdens.

II. SUBSTANTIVE LIBERTY

This Part argues that a liberty component is necessary to any attractive conception of free exercise. Liberty triggers neither the problem of symmetry nor the problem of baselines. Although liberty suffers from its own difficulties, these are preferable to the more serious drawbacks of neutrality. Liberty also better comports with the critics' own central intuition about free exercise—namely, that its principal purpose is to protect the pursuit of conscience.

This is not to say that liberty should serve as the only free exercise norm. Formal neutrality enjoys widespread acceptance; both supporters and critics of *Smith* think that government should not purposefully discriminate against religion. Again, this Article accepts that consensus. Its central argument is that neutrality alone cannot sufficiently protect freedom of conscience, and that a liberty component is necessary to any

112. *Id.* at 318–19. "[N]eutrality does not mandate that when Congress relieves the burdens of regulation on one fundamental right, . . . it must similarly reduce government burdens on all other rights." *Id.*

113. *See* Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004).

114. I take this example and the next from Laycock, *Neutrality*, *supra* note 27, at 1005–06.

115. *See id.* at 1004–06 (public schooling and the equal access controversy).

116. *See id.* at 1006 ("[T]he principle of neutrality by itself is insufficient to define the baseline. . . . [t]he other principles of the religion clauses must be brought to bear."); McConnell & Posner, *supra* note 43, at 38 ("Economics cannot tell us which of these baselines to choose.").

attractive account of the Free Exercise Clause. Part I showed that the critics' leading alternative to *Smith*—substantive neutrality—fails to articulate a satisfactory conception of free exercise. This Part will argue that a combination of formal neutrality and liberty better vindicates the critics' own vision.

A liberty conception of free exercise holds that religion should be free of substantial government hindrances, so long as its exercise does not frustrate important state interests. Liberty trades on the same two uncontroverted understandings of free exercise that Eisgruber and Sager identify: first, people should not be punished or deprived of government benefits on account of their beliefs, and second, "important aspects of religious practice ... are largely beyond the reach of the collective authority of the state."[117] But these two tenets lead here to a different lesson than the one extracted by Eisgruber and Sager. Liberty puts religion beyond the power of the state not in the sense that government must treat religion evenhandedly, but rather in the sense that the state must refrain from burdening observance unnecessarily.

Courts should begin by asking the right question: whether the state has improperly impeded religious practice. That question better tracks the critics' most fundamental worry. Their concern is not that certain government policies are not really neutral, once neutrality is properly understood. Instead, their deepest anxiety is that laws will wrongly burden religious liberty.

Consider an analogy to free speech. We find the law against flag burning troubling not because it has a non-neutral effect, imposing a greater burden on those who burn flags for political expression than on those who burn them for light or heat. Rather, we are troubled (if we are) because the law burdens expressive activity—because it contravenes liberty.[118] In the case of religion, getting this distinction right matters, and matters greatly, because of neutrality's problem of symmetry. We care little whether exempting a particular form of political expression thereby favors speech, but neutralists must care whether exempting free exercise thereby favors it in a way that violates antiestablishment. Asking the wrong question will lead to predictable restrictions on religion, as the last Part demonstrated. And asking the right question reflects the affirmative value of liberty of conscience.

In this Part, Section A describes and defends a particular type of liberty principle, substantive liberty. Section B examines the actual practice of lower courts and argues that substantive liberty better comports with the intuitions of many federal judges. Lower court judges

117. Eisgruber & Sager, *Equal Regard*, *supra* note 26, at 205.

118. This example is adapted from Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1094 (1990).

regularly exploit doctrinal loopholes in order to reach results that circumvent the formal neutrality rule of *Smith*. Those results cannot be explained by any sort of neutrality—instead, they make sense only under a liberty account.

The next three sections anticipate criticisms. Section C acknowledges the most common critique of a liberty approach to free exercise, namely that it would require unprincipled judicial balancing. It replies that similar balancing tests work in the context of other liberty provisions without undue difficulty. Liberty's drawbacks, though non-trivial, should be preferred to neutrality's. Section D argues against critics who think that substantive neutrality effectively works to protect liberty as a sort of side effect. On their account, substantive liberty would be not so much wrong as unnecessary. Four examples show how substantive liberty yields results that differ from substantive neutrality's. Last, Section E defends substantive liberty against the objection that it would likely violate the Establishment Clause. Although this Article does not develop a theory of the Establishment Clause, it does suggest as a preliminary matter that a substantive liberty rule for the Free Exercise Clause would not contravene common understandings of antiestablishment.

A. Liberty Defined and Defended

Liberty protects thought and conduct from government burden or coercion, independent of any concern for evenhandedness—that is, without comparison to other religions or to secularism.

Formal liberty protects against purposive coercion. For example, the state laws in *McDaniel v. Paty* purposefully burdened liberty (as well as neutrality) when they barred ministers from serving in certain state offices.[119]

Contrasting formal liberty and formal neutrality is fairly easy. Government might purposefully disfavor a religion without aiming to burden the practice of that faith. In a recent example, the San Francisco city government officially denounced a conservative Christian group for its advertising campaign promoting the view that homosexuality is a sin. City ordinances deplored the "Religious Right" and its ads for "creat[ing] an atmosphere which validates oppression of gays and lesbians."[120] The Ninth Circuit held that even though "'targeting religious beliefs as such is never permissible'" under *Smith*,[121] the Free Exercise Clause should not prohibit state action that is "neither regulatory,

119. See section I.A.1 supra.

120. Am. Family Ass'n, v. City and County of San Francisco, 277 F.3d 1114, 1119–20 (9th Cir. 2002) (internal quotation marks omitted).

121. *Id.* at 1123–24 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

proscriptive, or compulsory."[122] San Francisco violated formal neutrality without impeding formal liberty.

It is more difficult to imagine the reverse, a law that purposefully restricted religious liberty in an evenhanded manner. The most obvious candidate, a state prohibition of all sacred practice, would not qualify because it would disfavor religion as a whole and thus violate neutrality as between religion and non-religion. So while almost every conceivable violation of formal liberty will also violate formal neutrality, the reverse is not true—formal neutrality bans much state action that will not offend formal liberty.

Substantive liberty protects against laws or policies that, although not intended to compel or inhibit, nevertheless create an effect that significantly burdens belief or practice. Controlled substance statutes, for instance, substantially restrict Rastafarians' sacred use of marijuana even though the drug laws were not designed to burden ritual practice.[123] Rastafarians would not likely receive an exemption under substantive neutrality because of the problem of symmetry—accommodating Rastafarians would advantage them in violation of the Establishment Clause. Substantive liberty differs from substantive neutrality because it would evaluate significant burdens on observance independently of whether any exemption would favor religion.[124]

Now that they have been defined, the leading free exercise principles might be depicted in the following way:

	NEUTRALITY	LIBERTY
FORMAL	Formal neutrality (purposive neutrality) (the rule of *Smith*)	Formal liberty (freedom from purposive burdens on religion)
SUBSTANTIVE	Substantive neutrality (neutrality of effect) (the critics' proposal)	Substantive liberty (freedom from incidental burdens on religion)

In sum, formal neutrality, the rule of *Smith*, protects against purposive discrimination, while substantive neutrality, the critics' proposal, also prohibits government actions that have the effect of

122. *Id.* at 1124.

123. Another example is *Yoder*, where the Court found that a compulsory education law, although neutral in purpose, nevertheless had the effect of preventing the Amish from adhering to their belief that children should not be educated in the public schools after eighth grade. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

124. In one place, Justice Brennan articulated some such distinction: "Under the Constitution there is only *one* relevant category—*all* faiths. Burdens placed on the free exercise rights of members of one faith must be justified independently of burdens placed on the rights of members of another religion." Goldman v. Weinberger, 475 U.S. 503, 521–22 (1986) (Brennan, J., dissenting).

disadvantaging belief. Formal liberty, though purely hypothetical, would guarantee against purposive state burdens on religion. And substantive liberty, the contribution here, protects against government policies that have the effect of burdening observance.

Here is how the proposal would work. Two principles properly protect free exercise: formal neutrality and substantive liberty.

1. *Formal neutrality*

As noted above, there is a consensus today in favor of formal neutrality, at least as a baseline of constitutional protection. Formal neutrality would work here similarly to the way it does in *Smith*: any purposive government discrimination against religion would receive heightened scrutiny. For example, the Court rightly held in *Lukumi* that certain ordinances violated formal neutrality because their object was to prohibit the ritual sacrifice of animals by a particular religion, Santeria.[125] Similarly, Congress could not declare "this is not a Muslim nation," even if that proclamation carried no sanctions. Formal neutrality protects against government disfavor regardless of burden.[126]

There is some question, however, whether formal neutrality should be protected as strongly it is under *Smith* and *Lukumi*. The Court's most recent free exercise case illustrates the problem with the compelling interest test for formal neutrality.

In *Locke v. Davey*, the Court upheld a scholarship program established by Washington state.[127] Joshua Davey won the scholarship, which recognizes exceptional students who have limited income and who plan to attend an accredited college in Washington. But when Davey enrolled at a qualified school affiliated with the Assembly of God and declared a major in theology with the intention of becoming a cleric, he lost the scholarship. Washington expressly excluded from its scholarship students majoring in devotional theology.[128] It justified that exclusion by

125. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 520 (1993). Applying strict scrutiny, the Court failed to discern a compelling state interest and invalidated the ordinances. *Id.* at 546–47.

126. Formal neutrality for free exercise differs in this way from content neutrality for free speech. In the speech context, neutrality usually functions as a side constraint, kicking in only once some government coercion has been shown. Government disfavor toward a particular viewpoint does not generally violate the speech clause absent some coercion—after all, government disfavors views whenever it takes positions on issues of the day. Once coercion exists, however, neutrality works as a side constraint to exclude certain government justifications.

In the free exercise context, by contrast, a violation of formal neutrality is impermissible regardless of whether the government policy burdens religion. For instance, a government pronouncement that Islam is misguided would violate the Free Exercise Clause even if it coerced no one.

127. Locke v. Davey, 540 U.S. 712, 725 (2004).

128. *See* WASH. REV. CODE § 28B.10.814 (1997) ("No aid shall be awarded to any student who is pursuing a degree in theology."); WASH. ADMIN. CODE § 250-80-020(12) (2004) ("'Eligible student' means a person who: . . . (g) [i]s not pursuing a degree in theology."). There was no debate between

arguing that it was necessary under its state constitution, which requires an unusually strict separation of church and state.[129] The Ninth Circuit understandably held that strict scrutiny applied to the scholarship under *Smith* and *Lukumi* because Washington's policy purposefully discriminated against religion.[130] Finding no compelling interest, it ruled for Davey and struck down the religion exclusion. Writing for the Court, Justice Rehnquist reversed the Ninth Circuit's decision and upheld the Washington scholarship's exclusion despite *Smith* and *Lukumi*.[131]

Assessing the holding in *Davey* is beyond the scope of this Article, which concerns a different problem. Two observations are nevertheless appropriate. First, it does seem odd to presume unconstitutional a program that imposes only a small burden on Davey's ability to pursue a theology degree.[132] After all, Davey was in fact able to continue his education without the merit scholarship on the same terms as the vast majority of other students.[133] Yet formal neutrality under *Smith* requires just this presumption of unconstitutionality.

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the parties that Davey was studying theology from a faith perspective.

129. *See* WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .").

130. Davey v. Locke, 299 F.3d 748 (9th Cir. 2002), rev'd, 540 U.S. 712 (2004).

131. *Davey*, 540 U.S. at 725.

132. *See id.* (noting that Washington's exclusion "places a relatively minor burden on Promise Scholars"); *Id.* at 720–21 ("In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit." (citations omitted)); *see also* Laycock, *Theology Scholarships*, *supra* note 24, at 214 ("The unifying theme [of *Davey*] is that facial discrimination against religion is presumptively unconstitutional if, and only if, the discrimination burdens a religious practice.").

133. Cases in the circuits likewise illustrate judicial discomfort with the strong rule of formal neutrality articulated in *Smith* and *Lukumi*. In the San Francisco case mentioned above, the Ninth Circuit considered a city ordinance that denounced a conservative Christian group for its homophobic advertisement campaign. Am. Family Ass'n, v. City and County of San Francisco, 277 F.3d 1114, 1124 (9th Cir. 2002). The court held that the ordinance did not implicate the Free Exercise Clause because the city's action was "non-regulatory" and "non-compulsory"—even though its denunciation of the "religious right" violated formal neutrality. *Id.* Under *Smith* and *Lukumi*, the city's action should have triggered strict scrutiny, but that standard did not comport with the Ninth Circuit's judgment.

Another Ninth Circuit panel similarly held that an Oregon regulation did not offend free exercise even though it specifically prohibited the provision of on-site services to a disabled student because he attended a religious school. KDM ex rel. WJM v. Reedsport Sch. Dist., 196 F.3d 1046 (9th Cir. 1999). The court reasoned that free exercise had not been thwarted because the state had provided equivalent services nearby and had even transported the student to and from the religious school. The court found that even though "the regulation, standing alone, 'discriminates' against students in religious schools," nevertheless in this case it did "not result in a *burden* on the free exercise of religion." *Id.* at 1051 (emphasis added).

These cases in the circuits suggest that the Supreme Court is not alone in feeling uncomfortable with a rule that holds presumptively unconstitutional every government action that purposefully treats religion differently.

Second, *Davey* illustrates that although strict scrutiny might not be the right standard, formal neutrality does capture a central norm of the Free Exercise Clause, namely that government should not purposefully single out religious practice for disfavor. To see this, imagine a program exactly like Washington's except that it excluded only Jews or Presbyterians.[134] Such an exclusion would contravene deep intuitions about religious freedom. But it would not draw heightened scrutiny under a liberty rule because it would burden students who were Jewish or Presbyterian only to the same small degree as Washington's program actually burdened Davey. This hypothetical suggests that formal neutrality should survive as an independent free exercise principle.

The holding in *Davey*, approving Washington's purposeful exclusion of religious students, raises the question of whether formal neutrality ought to continue to draw strict scrutiny, as it does under *Smith*, or whether some more nuanced approach would better fit the cases.[135] Rehnquist ducks the issue in *Davey*, leaving considerable tension between *Davey* and *Smith*.[136] This Article does not attempt to resolve that tension. Instead it simply accepts the current consensus that formal neutrality provides a minimum baseline of constitutional protection under the Free Exercise Clause.[137]

2. *Substantive liberty*

Substantive liberty remedies the deficiencies of neutrality. Under substantive liberty, even if a law did not purposefully discriminate against religion, it would still implicate free exercise if it had the effect of

134. *Cf.* Oral Argument Transcript at 50, Locke v. Davey, 540 U.S. 712 (2004) (02-1315), 2003 WL 22955928 ("QUESTION: If it—if it—if it isn't coercion of—of his religion, I suppose it would be okay to limit this—this exclusion to Jewish theology or to Catholic theology, because the response would be it doesn't—it doesn't coerce his religion at all.").

135. *Cf. id.* at 44-45 ("QUESTION: You—you don't know of any case that says that the less significant the interest the state has is [sic] the more latitude it has in discriminating against religion. You don't know of any case that said that? . . . [ANSWER]: No. And hopefully this won't be that one. (Laughter.)").

136. *See Davey*, 540 U.S. at 730 (Scalia, J., dissenting) (noting that the majority "opinion is devoid of any mention of standard of review").

137. Some might wonder whether formal neutrality must be applied symmetrically, and if so whether it too prohibits religious exemptions. It is true that formal neutrality, like all neutrality rules, must be applied evenhandedly. Government cannot act with the purpose of advantaging secular over sacred commitments. However, that symmetry constraint does not defeat religious exemptions. The purpose of most congressional and judicial exemptions is not to advantage religion, but instead to protect liberty by removing barriers to observance. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (holding that an exemption enacted with "the proper purpose of lifting a regulation that burdens the exercise of religion" did not violate the Establishment Clause). Other exemptions aim to remedy disadvantage. *Cf.* Sherbert v. Verner, 374 U.S. 398, 409 (1963) (noting that religious exemptions "reflect[] nothing more than the governmental obligation of neutrality in the face of religious difference[]") Either way, exemptions do not purposefully advantage religion. They may well have the effect of favoring religion, but that effect does not violate formal neutrality.

burdening religious practice. Any substantial state burden on religious practice would have to be justified by a sufficiently important state interest.

Substantive liberty resembles the test that the Court applied under *Sherbert v. Verner*.[138] That is, it applies heightened scrutiny to burdens on free exercise. However, it modifies *Sherbert* in two significant respects in order to make free exercise doctrine more workable.

First, heightened scrutiny here gets triggered only by substantial burdens on religious activity.[139] This modification follows RFRA, where Congress required strict scrutiny as a statutory matter but also adopted a threshold requirement of substantiality.[140] The substantiality requirement strikes a compromise that allows challenges to incidental burdens on free exercise without opening the floodgates to suits of every conceivable kind.[141] Substantiality might foreclose, for instance, challenges to government actions that did not directly burden religious practice, but that created only an indirect burden, meaning that they simply made observance more difficult or costly.[142] A tax on peyote would impose a direct burden on Native Americans, while an income tax that made purchase of the sacrament more expensive would not. A substantiality requirement might also filter out challenges to laws that leave open alternate channels for observance.[143]

Second, substantive liberty requires something less than strict scrutiny of burdens on religious practice. Instead, it entails a version of intermediate scrutiny that would require the government to show only that it had an interest important enough to circumscribe religious liberty.[144] The Court seems to be growing increasingly receptive to balancing tests that fall somewhere in between compelling interest and rational basis. In *Lawrence v. Texas*, the Court reasoned that homosexual

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138. *Sherbert*, 374 U.S. at 403; *see* Laycock, *Theology Scholarships*, *supra* note 24, at 202 (calling the rule of *Sherbert* "substantive liberty").

139. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1210–19 (1996).

140. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)(3) (2003) (protecting only against laws that "substantially burden religious exercise"). The *Sherbert* Court also seemed to focus on "substantial burdens," though not in its articulation of the test itself. *Compare Sherbert*, 374 U.S. at 403 (articulating the test) *with id.* at 406 (applying strict scrutiny to the "substantial infringement" of Sherbert's free exercise); *see also* Employment Div., of Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) ("Under the *Sherbert* test, governmental actions that *substantially* burden a religious practice must be justified by a compelling governmental interest.") (emphasis added).

141. *See* Dorf, *supra* note 139, at 1212–13.

142. *Cf. id.* at 1209–10 (suggesting a similar substantiality requirement for incidental burdens on speech).

143. *See id.* at 1215 (making a similar point by analogy to free speech).

144. *See* McConnell, *Revisionism*, *supra* note 4, at 1127–28 (advocating something less that strict scrutiny for burdens on free exercise).

sodomy laws had no "legitimate state interest" that could "justify [their] intrusion into the personal and private life of the individual."[145] Similarly here, it makes sense to simply ask whether the state has an interest sufficient to justify a substantial burden on free exercise.

Both of these modifications learn from the Court's experience applying *Sherbert* over nearly thirty years. During the period between *Sherbert* and *Smith*, the Court articulated a rule of strict scrutiny while in fact arriving at results that could only be explained by some lower standard.[146] Many critics agree with Justice Scalia that the Warren and Burger Courts in fact applied something less than strict scrutiny.[147] Moreover, many critics concede that the Court is right to shy away from the compelling interest test, even though these same commentators take issue with particular rulings of the *Sherbert* era.[148] The Court's highest standard should not be implicated every time a general law interferes with religious practice, however lightly or indirectly. A test that differs from *Sherbert*—by (1) protecting only against substantial burdens, and (2) requiring a lower level of scrutiny—would be more workable and would better approximate common conceptions of free exercise than did the compelling interest test.[149]

Not only is substantive liberty workable, it is also attractive. Recall the critics' two normative critiques of *Smith*. Free exercise can be burdened just as readily by a law that does not aim to target religion as by one that does.[150] Moreover, religious minorities will bear the brunt of laws that implicitly enact majority values. Substantive neutrality fails to address those two concerns because of the problem of symmetry. Substantive liberty, by contrast, asks the right question of free exercise

145. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

146. *See* McConnell, *Revisionism*, *supra* note 4, at 1127.

147. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) (noting that the Court's results have not conformed to strict scrutiny even where it has "purported to apply the *Sherbert* test"); United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment) (arguing that the strict scrutiny standard articulated by the Court does not explain its holdings particularly well and citing cases); *see also* McConnell, *Revisionism*, *supra* note 4, at 1128 (discussing other critics who have advocated some form of intermediate scrutiny).

148. *See* McConnell, *Revisionism*, *supra* note 4, at 1127 ("Even the Justices committed to the doctrine of free exercise exemptions [from formally neutral laws] have in fact applied a far more relaxed standard [than strict scrutiny] to these cases, and they were correct to do so. The 'compelling interest' standard is a misnomer.").

149. Incidental burdens on speech are also protected with a version of intermediate scrutiny. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

150. *See Smith*, 494 U.S. at 893 (O'Connor, J., concurring in the judgment) ("A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion .... [He is barred] regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons."); *cf.* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 110 (1998) (arguing that liberty in the free speech context is burdened just as readily by a law that prohibits noisemaking as by one that targets speech).

claims. What is worrisome about the formal neutrality rule of *Smith* is not that it fails to detect whether a state law or policy is really neutral, once neutrality is properly understood. The deepest concern about *Smith* instead is that it allows the government to thwart observance even where restricting religious liberty is unwarranted. In cases described in the next section, courts have acted to relieve such unwarranted government restrictions. Only a liberty component can adequately account for their outcomes.

B. CIRCUMVENTING NEUTRALITY

One indication of what free exercise should protect is what it actually does protect, especially when courts must work hard in order to circumvent the rule of *Smith* and achieve the right outcomes in particular cases. Lower federal courts have reached results in this way that cannot be explained by any sort of neutrality. Their decisions only make sense as enacting an implicit principle of substantive liberty.

For instance, one court reviewed a school dress policy that prevented students from wearing rosaries as necklaces because gangs were using the beads to signal membership.[151] There was no claim that the no-rosary policy purposefully targeted Catholics or otherwise violated formal neutrality. Nevertheless, the court in *Chalifoux* exempted Catholics under an obscure exception to *Smith*, the hybridity doctrine.[152] The *Smith* Court had said that strict scrutiny would remain appropriate in cases of hybridity, where free exercise and another constitutional right were both implicated.[153] (Probably the *Smith* Court did this solely to distinguish *Yoder*, an important precedent that otherwise seemed to flatly contradict *Smith*'s new rule of formal neutrality.[154]) Applying the hybridity exception, the *Chalifoux* court exempted Catholics from the school dress code because wearing rosaries implicated both free exercise and free expression.[155]

Formal neutrality cannot justify that ruling because the school acted with a purpose that was neutral as to religion. But neither can

151. Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 664 (S.D. Tex. 1997).

152. *Id.* at 671.

153. *See Smith*, 494 U.S. at 881–82.

154. Wisconsin v. Yoder, 406 U.S. 205 (1972); McConnell, *Revisionism*, *supra* note 4, at 1121. In *Yoder*, the Court exempted Amish children from attending school after the eighth grade in violation of their beliefs, despite a formally-neutral truancy law. *Yoder*, 406 U.S. at 234–36. The *Smith* Court tried to distinguish *Yoder*, a clear departure from formal neutrality, by saying that it involved a hybrid combination of two rights, free exercise and the right to parent. *See Smith*, 494 U.S. at 881.

155. *Chalifoux*, 976 F. Supp. at 671. It is tempting to object that cases decided under the hybridity exception do not imply any particular view of free exercise at all because they can always be understood to turn on the partner right (here, free speech). But this reading would drain the hybridity doctrine of any content because it would mean that a hybrid right can always be fully accounted for by the partner provision. In order to make sense, the hybridity rule must mean *something* for free exercise.

substantive neutrality. Doubtless many students who were not Catholic might have liked to wear rosaries to school, whether as an aesthetic choice, or as a political statement, or simply to flaunt a restrictive dress code.[156] Exempting only Catholics, but not students with comparable secular reasons for wanting to wear a rosary, incentivized religion in violation of substantive neutrality. Only substantive liberty can account for the court's sense of the correct outcome in the rosary case.

A second example is *Newark Lodge* case discussed earlier. There, the police department implemented a policy that required all officers to shave their beards.[157] Muslim officers challenged the policy on the ground that it prevented them from fulfilling a religious commandment.[158] The court executed an end run around neutrality using another exception to the rule of *Smith*, this one for cases where the government creates a system of individualized assessments but then refuses to accommodate religion. The *Newark Lodge* policy was facially neutral because it was designed to foster uniformity and discipline in the department.[159] However, a letter from the police chief suggested that exemptions based on medical conditions would be acceptable.[160] The Third Circuit ruled that the existence of a single secular exemption rendered the policy a system of individualized exemptions within the meaning of the *Smith* exception.[161] It therefore applied strict scrutiny and granted an exemption

156. Another hybridity case is similarly inexplicable by formal or substantive neutrality. The Third Circuit found a hybrid right involving freedom of association where the Salvation Army sued to obtain an exemption from a state boarding house statute for one of its rehabilitation centers. Salvation Army v. Dep't of Community Affairs, 919 F.2d 183, 197, 201 (3d Cir. 1990).

157. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

158. *Id.*

159. *Id.* at 366–67 (outlining the department's interests in the shaving policy). The court hinted that the medical exemption evidenced discriminatory intent because it suggested that the department "decid[ed] that secular motivations are more important than religious motivations." *Id.* at 365. Whatever the meaning of this passage, it strains credulity to say that a single medical exemption evidences an intent to discriminate against religion. More likely, the department valued health concerns over a whole range of other interests, both secular and sacred.

160. *Id.* at 361. The department challenged the existence of a medical exemption in its reply brief on appeal, presumably once it became clear that the court might apply the compelling interest test on that basis. The court refused to entertain the challenge, both because of procedural waiver and because of the police chief letter. *See id.* at 365 n.6.

161. The court ultimately found that the compelling interest test had not been satisfied and ruled in favor of the officers. *Id.* at 366–67. Application of the *Smith* exception for individualized assessments seems incorrect here because the police department's sole secular exemption seemed categorical, not individualized. The individualized assessments exception is probably best understood as a device for detecting discriminatory purpose. A government system that grants case-by-case exemptions but refuses to accommodate religion may well be violating formal neutrality. But a single secular exemption like the one in *Newark Lodge* hardly seems to indicate purposive discrimination. The Third Circuit was more faithful to the *Smith* exception for individualized assessments when it recently held that the town of Tenafly had allowed so many particular dispensations, both secular and sacred, to its prohibition on the private use of city utility poles that its refusal to grant a similar exemption for the creation of an eruv constituted discrimination against Orthodox Jews. *See* Tenafly

from the shaving requirement for the Muslim officers.[162]

Here too, substantive neutrality cannot account for the result because of the problem of symmetry: Exempting sacred beards, but not secular ones, advantages religion in violation of neutrality. Liberty, by contrast, explains the outcome. Probably the court thought that the Muslim officers' liberty interest was so strong, and the department's countervailing interest in uniformity so weak, that the officers should prevail despite formal neutrality.[163] In other words, the result in *Newark Lodge* is best explained by substantive liberty.[164]

Finally, the circuits have unanimously upheld the right of churches to discriminate in hiring clergy even though civil rights statutes are formally neutral as to religion.[165] For instance, the Roman Catholic Church may refuse to ordain women as priests despite employment discrimination laws like Title VII. Ministerial exemptions, as these have come to be known, inexplicably persist after *Smith* even though the civil rights statutes are not aimed at religion. What is more, ministerial exemptions violate neutrality of effect because they advantage churches over secular organizations that also would prefer to discriminate in hiring. Neither formal nor substantive neutrality can explain the doctrine of ministerial exemptions as well as an implicit liberty norm.[166]

No reading better explains these results—Catholic rosaries, the Newark police, and ministerial exemptions—than a conception of the Free Exercise Clause that includes the substantive protection of liberty.[167]

Eruv Ass'n, v. Borough of Tenafly, 309 F.3d 144, 168 (3d Cir. 2002).

162. *Newark Lodge*, 170 F.3d at 366–67.

163. *See id.* at 360 (describing the Muslim injunction to wear beards as a "commandment" and the failure to do so a "major sin"); *id.* at 366–67 (outlining the weakness of the government interest in uniformity).

164. Eisgruber and Sager have another interpretation of this case, one that is consistent with their proposed free exercise principle, "equal regard." *See supra* text accompanying notes 55–65 (discussing Eisgruber and Sager's reading of the *Newark Lodge* case).

165. *See* Alicia-Hernandez v. Catholic Bishop, 320 F.3d 698, 702–04 (7th Cir. 2003) (holding that the Free Exercise Clause prohibited an employee's Title VII suit because she performed ministerial functions for her church employer); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 804–05 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1302–05 (11th Cir. 2000); EEOC v. Catholic Univ. of America, 83 F.3d 455, 461–63 (D.C. Cir. 1996); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972).

166. *See* Eisgruber & Sager, *Equal Regard*, *supra* note 26, at 206 (using the ministerial exemption as an example of the "uncontroverted" view that "important religious practices have a distinct status in our understanding of constitutional justice"); Berg, *End of the Century*, *supra* note 40, at 198–99 ("[E]very court of appeals to consider the issue since *Smith* has reaffirmed virtually absolute constitutional protection for clergy employment decisions .... The clergy exception permits courts to protect a definable core of religious autonomy ...."). None of the rationales that courts offer for the ministerial exemption after *Smith* grounds this doctrine in neutrality. *See, e.g.*, *Roman Catholic Diocese of Raleigh*, 213 F.3d at 800–01.

167. *Cf.* Laycock, *Theology Scholarships*, *supra* note 24, at 203 ("*Lukumi* and the trend of lower court opinions read *Smith* in a way that provides substantial protection to religious liberty.").

In fact, substantive neutrality would have obstructed each of these outcomes. That is a problem for the critics, who doubtless would have supported them in practice. Substantive neutrality therefore stymies the critics' own conception of what free exercise means. It also fails to capture the affirmative value that courts are implementing when they work hard to circumvent the rule of *Smith*. They are protecting liberty.

C. Objections to Liberty

Smith itself was directed largely against the liberty rule of the previous era. To the *Smith* Court, neutrality seemed to offer an antidote to the disorder of liberty.[168] Justice Scalia, the author of *Smith*, worried that strict scrutiny of burdens on religion was threatening the rule of law.[169] Strict scrutiny seemed to give individuals the power to exempt themselves from laws that burdened their religious beliefs—unless the government could meet the high burden of showing that it had a compelling interest.[170] Any idiosyncratic faith could challenge a law and render it presumptively unconstitutional.[171] Judges could not adjudicate these claims in any consistent manner because courts are ill equipped to assess the centrality, strength, or plausibility of belief.[172] Therefore, no "principle of law or logic" could govern a court's effort to balance religion against state interests.[173] Subjective, unprincipled judicial decision making would result.[174] In Justice Scalia's view, "[a]ny society adopting such a system would be courting anarchy."[175] Neutrality seemed more objective because it apparently freed judges from assessing whether a government interest was important enough to warrant a liberty restriction.

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168. *See* Employment Div. Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879–82 (1990).
169. *See id.* at 885.
170. *Id.* at 885–86.
171. *Id.* at 888–89.
172. *Id.* at 886–87.
173. *Id.* at 887.
174. *See id.*
175. *Id.* at 888. Michael McConnell confirms that this is the central complaint of *Smith*:

> Virtually the entire theoretical argument of the *Smith* opinion is packed into this one sentence:
>
> > It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

McConnell, *Revisionism*, *supra* note 4, at 1129 (quoting *Smith*, 494 U.S. at 890); *see also* Cass R. Sunstein, *Should Sex Equality Law Apply to Religious Institutions?*, *in* Susan Moller Okin, Is Multiculturalism Bad for Women? 85 (Joshua Cohen et al. eds., 1999) ("The best defense of the *Smith* principle is that even if it protects religious liberty too little, it comes close to protecting religious liberty enough—and it does so with the only principle that real-world institutions can apply fairly and easily.").

Certainly, substantive liberty does require balancing religious interests against governmental ones.[176] And balancing requires judgment. However, there are four good reasons why the costs of substantive liberty are preferable to the problems with substantive neutrality.

First, balancing tests pervade constitutional law. Subjectivity has not proven an insurmountable obstacle to balancing tests associated with liberty provisions such as free speech and substantive due process.[177] Free speech doctrine, for instance, asks courts to balance expressive interests against public norms. Incidental burdens on speech are upheld only if they further an important state interest. That rule enforces something close to substantive liberty, and it does so using a balancing test.[178] Judges also determine the importance of speech whenever they distinguish between categories of expression based on their importance (think of obscenity and non-obscenity).[179] And they necessarily assess the importance of expression whenever they weigh it against state interests, even where the law at issue targets expressive acts. Otherwise courts would have to strike down every law that purposefully burdened expression.[180]

Admittedly, some commentators have argued that the speech clause should be interpreted to protect only against intentional content discrimination.[181] They think that free speech, like free exercise, should require only formal neutrality. The strongest argument against a balancing test for the Free Speech Clause is similar to the argument of *Smith*, namely that judges cannot objectively weigh the value of speech

176. Judgment is required not only in the balancing itself, but also in the preliminary inquiry into whether the burden is substantial. *See* Dorf, *supra* note 139, at 1216 ("The very concept of a substantiality test implies a subjective weighing process.").

177. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (asking whether homosexual sodomy laws were backed by a "legitimate state interest" that could "justify [their] intrusion into the personal and private life of the individual"); United States v. O'Brien, 391 U.S. 367, 377 (1998) (holding that an incidental burden on speech can by upheld only "if it furthers an important or substantial government interests" and if it "is no greater than is essential to the furtherance of that interest").

178. *See O'Brien*, 391 U.S. at 376–77 (1998); Dorf, *supra* note 139, at 1201–02 ("[I]ncidental burdens [on speech] frequently arise that present at least a strong prima facie case for heightened scrutiny.").

179. *See* Adler, *supra* note 150, at 110–11.

> [I]f it violates the First Amendment for courts to distinguish between the serious nonexpressive wrongs and harms that justify prohibiting speech, and the less serious nonexpressive wrongs and harms that do not, then *a fortiori* it should violate the First Amendment for courts to distinguish between different categories of expression, say, between obscene and non-obscene speech . . . .

Id.

180. *See id.*

181. *See* Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 927, 930–31 (1993) (arguing that the Free Speech Clause does not properly protect against incidental burdens on speech); *id.* at 932 (arguing that "the value of speech cannot be balanced against the government's [non-expressive] interests in any way that is principled and that respects the very freedom of thought that the First Amendment itself protects").

against state interests in avoiding the non-expressive harms.[182] But balancing tests have persisted in the speech context despite such concerns; they have not been replaced with formal neutrality rules.[183]

There is no reason to think that courts are any less able to apply a balancing test to religion than to speech.[184] Sacred and secular commitments present similar challenges to a society that, on the one hand, is committed to recognizing their importance but, on the other hand, realizes that liberty—of thought, belief, and expression—should sometimes yield to the public good.

Second, Justice Scalia did worry that religion is a particularly inappropriate subject for judicial balancing. Of course, religious practitioners do have an autonomy interest in deciding themselves whether their beliefs count as a religion. And it may be inappropriate for judges to assess the centrality and importance of sacred practices. But actually judges rarely do this. Few cases require courts to determine that a religious interest is not sufficiently important. In fact, it is difficult to think of instances where the Court has rejected a free exercise claim on the ground that the practice in question was insufficiently central or important. In the vast majority of cases, judges examine the religion only to determine what the claim is.[185]

For example, the Supreme Court itself recently rejected a free exercise claim without questioning the centrality or importance of religious conviction. In *Locke v. Davey*, mentioned earlier, the Court seemed to balance "[t]he State's interest in not funding the pursuit of devotional degrees" against the "relatively minor burden" that the exclusion placed on ministry students.[186] It did not gainsay ministry students' strong interest in training to become clerics.[187] Instead, the Court determined that losing a small, elite scholarship would not significantly hinder that interest.[188] Usually courts will be able to avoid second-guessing religious claims.

Third, neutrality rules also risk requiring courts to assess the strength of religious claims. Even *Smith*'s rule of formal neutrality does

182. *See* Adler, *supra* note 150, at 110–11. Justice Scalia thinks this analogy to free speech helps his cause, and he urges that it would be just as improper for the Court "to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." *Smith*, 494 U.S. at 887.

183. *See* McConnell, *Revisionism*, *supra* note 4, at 1144 ("In most areas of constitutional law . . . the majority of the Court does not hesitate to weigh the social importance of laws against their impact on constitutional rights.").

184. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 200–01 (1977) (arguing that government cannot prefer religious morality to non-religious morality).

185. *Cf.* McConnell, *Revisionism*, *supra* note 4, at 1150–53 (noting that rejecting *Smith* will not result in unprincipled balancing in many cases).

186. Locke v. Davey, 540 U.S. 712, 725 (2004).

187. *Id.*

188. *Id.*

this in two ways. First, it obliges courts to determine whether a particular conviction is religious. Judges must assess the believer's basic claim that a religion is involved. Second, *Smith*'s rule requires judges to use a balancing test for laws that intentionally discriminate against religion.[189] Avoiding all balancing would require the Court to automatically invalidate any law that targeted religion, regardless of whether the government's interest was compelling. But that *per se* rule would be as wrong for free exercise as it would be wrong for free speech.

Recall from the last Section that in practice many judges work hard to circumvent *Smith* and to reach outcomes that cannot be justified under any sort of neutrality rule.[190] When judges do this, they necessarily weigh the importance of religious practices against the government's interest in enforcing the challenged law. Currently they conduct that balancing covertly. Substantive liberty would bring to light what is already happening in practice.

Not only formal neutrality, but also substantive neutrality requires significant balancing. That must be true because laws cannot be invalid *per se* whenever they have the effect of disadvantaging religion. Ritual human sacrifice, for instance, is not automatically exempted from murder laws simply because it is incidentally disadvantaged by them. Some exercise of judgment is required.[191] Substantive liberty therefore does not entail an altogether different type of judicial balancing than the rule it is designed to replace.

A final reason to tolerate the costs of substantive liberty is that neutrality rules entail even greater difficulties, as Part I showed. The problem of symmetry means that substantive neutrality cannot deliver attractive results in concrete cases. It prevents courts from granting many of the core exemptions that substantive neutrality is designed to generate.

In sum, neutrality promises to provide a less subjective, more principled basis for free exercise doctrine. That promise drove the Court's argument in *Smith*. And admittedly substantive liberty does ask courts to weigh free exercise claims against governmental interests. But balancing tests are an accepted part of current doctrine for other liberty provisions in constitutional law. Moreover, neutrality rules in fact involve the exercise of far more subjective judgment than is commonly

189. One rationale for the *Davey* result is that Washington's interest in enforcing its state antiestablishment rule was compelling enough to overcome its intentional exclusion of religious students from its scholarship program. *Id.* at 722.

190. *See supra* text accompanying notes 151–167.

191. *See* Laycock, *Neutrality*, *supra* note 27, at 1004 (acknowledging that substantive neutrality "requires more judgment[]" than does formal neutrality); Laycock, *Remnants*, *supra* note 4, at 32–33 (recognizing that courts will have to assess the degree of burden on free exercise but saying "I think they could handle it").

recognized. And they entail considerable costs. Overall, then, critics of *Smith* should prefer liberty's problems to neutrality's. Substantive liberty offers a more attractive solution to the critics' problems with *Smith* than does their own effort to refurbish neutrality.

D. LIBERTY AS A SIDE EFFECT?

Some neutralists may object that the difference between substantive liberty and substantive neutrality, while perhaps correct conceptually, is meaningless in practice because guaranteeing neutrality also effectively shields liberty as a kind of side effect.[192] Admittedly, neutrality does resonate with religious freedom because banning government bias also often protects against coercion. To take our simple example, a law that barred Catholics from saying mass would violate both neutrality and liberty. Prohibiting the state from discriminating against Catholics in that case would also effectively free Catholics from a burden on their right to perform a rite. Because of this overlap, it is tempting to say that neutrality also protects liberty incidentally.

Actually, however, substantive liberty is distinct from substantive neutrality both as a conceptual matter and in many real cases. Consequently, liberty can not be protected as a side effect of neutrality. In fact, protecting neutrality alone will not only fail to guarantee liberty in a significant number of cases, but it will also predictably work to restrict free exercise in practice.

Notice first that substantive liberty does not differ from neutrality only in the sense that it protects more. Sometimes it protects less. Imagine a government temperance campaign—purely educational, without prohibitions or sanctions—that promoted the view that drinking alcohol is unhealthy and immoral under all circumstances. Such a

192. *See, e.g.*, Berg, *End of the Century*, *supra* note 40, at 191 (equating "religious liberty, or freedom" with substantive neutrality); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 261 (1991) (comparing religious liberty and neutrality of effect); Laycock, *Neutrality*, *supra* note 27, at 1002 ("Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized."); Laycock, *Religious Liberty as Liberty*, *supra* note 15, at 319–20 (arguing that government coercion is best prevented by a rule of substantive neutrality); William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 193 (2000) ("[The Court's approach in *Smith*] sensibly furthers religious liberty interests."). On the Court, Justice Souter seems to think that substantive neutrality will satisfy the concerns of the *Smith* dissenters. But the *Smith* dissenters probably urged something closer to a liberty conception of the clause. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 562–63 (1993) ("The four Justices who rejected the *Smith* rule . . . read the Free Exercise Clause as embracing what I have termed substantive neutrality. The enforcement of a law 'neutral on its face,' they said, may 'nonetheless offend the Free Exercise Clause's requirement for government neutrality if it unduly burdens the free exercise of religion.'") (quoting Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 896 (1990) (O'Connor, J., joined by Brennan, Marshall, and Blackmun, JJ.)) (alterations omitted).

campaign would disadvantage Catholics who use wine in communion, thereby violating substantive neutrality. But it would not necessarily burden them in a way that would contravene substantive liberty because the government education campaign imposes no penalties.[193] Disfavoring religion is not the same as burdening it.

But the main point here is that substantive liberty would prohibit certain laws that substantive neutrality would not. The problem of symmetry means that substantive neutrality is powerless to exempt believers from laws that disadvantage them without first considering whether such an exemption would advantage religion. Many believers would therefore go unprotected under the critics' rule of substantive neutrality. Substantive liberty, on the other hand, does not suffer from the problem of symmetry. It asks solely whether the state can afford to relieve burdens on religious practice consistent with important state interests. So while substantive neutrality would pause before granting a free exercise exemption in order to ask whether the exemption would advantage religion, substantive liberty would require no such consideration.

Four examples illustrate this difference:

First, substantive liberty would not demand the invalidation of RLUIPA or prohibit exemptions like the ones it requires. In *Cutter*, a case described in detail above, the Sixth Circuit held that carving out exemptions for religious inmates under RLUIPA would have the effect of advantaging religion over secular convictions in violation of antiestablishment.[194] Under substantive neutrality, *Cutter* surely must be rightly decided. Symmetry demands that neutrality of effect apply evenhandedly to the Establishment Clause and to the Free Exercise Clause. But substantive liberty would be free to grant exemptions like those demanded by RLUIPA without considering whether they would advance religion over irreligion. In fact, liberty might well *require* many RLUIPA-like accommodations as a constitutional matter (though substantive liberty would involve a lower level of scrutiny). By prohibiting accommodations that substantive liberty might require, substantive neutrality might actually restrict free exercise.

Religious exemptions from the drug laws provide a second illustration of how substantive neutrality would not protect liberty as a side effect. Substantive neutrality would reject outright certain claims for

193. This hypothetical temperance campaign probably would not have the effect of making Catholics feel like outsiders in the political community because the campaign was not aimed at religion.

194. Cutter v. Wilkinson, 349 F.3d 257, 267 (2003), *cert. granted*, 125 S. Ct. 308 (2004). Of course *Cutter* concerns the Establishment Clause, not the Free Exercise Clause. But the point remains that substantive neutrality must confront the Establishment Clause, whereas substantive liberty could grant RLUIPA-like exemptions without considering the Establishment Clause in the same way.

accommodation from the drug laws. For instance, Rastafarians would not be protected under substantive neutrality. An exemption would advantage Rastafarianism relative to secularism because there is a strong secular market for marijuana. (Similarly, exempting only the liturgical use of wine during prohibition might have run into the problem of symmetry.[195]) Peyote, by contrast, causes nausea and other unpleasant side effects and consequently has generated virtually no secular market.[196] People generally do not use peyote except for religious purposes. Therefore, exempting the ritual use of peyote from the drug laws would not substantially advantage Native American sects from the standpoint of neutrality. Substantive liberty, however, would consider Rastafarian and Native American claims for exemptions from the drug laws using the same test. In both cases it would simply ask whether the state had a strong enough interest in prohibiting the ritual use of drugs. The results might differ for the two faiths—for instance if the state had a greater interest in regulating marijuana than peyote—but that difference would not be dictated by symmetry.

Third, imagine a hypothetical municipal park that admits only town residents on the theory that only those who pay local taxes should enjoy the park because it is maintained by the town fisc.[197] So structured, the ordinance does not violate formal liberty because it does not aim to burden religion. It is also formally neutral because its purpose is neither to favor nor disfavor an obscure creed. So far liberty and neutrality are working in tandem.

Now suppose a group of nonresident nature worshippers wishes to perform rituals in the park because of some special spiritual significance to that place—say, a divine tree. Assume that the park is particularly beautiful and many nonresidents would like to enjoy it. In that case, sacred interests would dovetail with secular interests. Accommodating only tree worshippers under those circumstances would incentivize the park lover's religion. That would trigger the problem of symmetry. Park worshippers would lose under substantive neutrality.[198]

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195. Such an exemption did in fact exist for Christian communion. *See* National Prohibition Act, ch. 85, Title II, § 6, 41 Stat. 305, 311 (1919). However, the small quantities of wine used at communion probably would not have lured many wine lovers to the faith.

196. *See* H.R. REP. No. 103-675, at 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2404, 2409 ("There is virtually no illegal trafficking in peyote—Drug Enforcement Administration (DEA) data indicates that between 1980 and 1987, only 19.4 pounds of peyote was confiscated, while during the same period the DEA seized over 15 million pounds of marijuana."); *see also Smith*, 494 U.S. at 917–18 (Blackmun, J., dissenting) (distinguishing between marijuana and peyote).

197. These facts are adapted from Leydon v. Town of Greenwich, 777 Conn. A.2d 552 (2001).

198. Park worshippers would likely lose regardless of how the symmetry difficulty is handled. Under McConnell's categorical approach, any advantaging effect would defeat the free exercise claim. *See supra* text accompanying note 43. Even under Laycock's balancing test the tree devotees would lose, assuming any exemption would advantage tree worship more than the current policy

By contrast, substantive liberty would require the court to consider only whether a significant burden on tree rituals could be accommodated consistently with important state interests.[199] It would not consider whether an exemption would advantage tree worship. Of course, a court could evaluate the probability of fraud.[200] But the court would not consider evenhandedness, and the tree worshippers would likely win because accommodating a small number of idiosyncratic zealots would cost the town so little.

Fourth and finally, the Court's Sabbath cases likewise demonstrate how substantive neutrality would not protect liberty as a side effect. Consider *Braunfeld*, where the Court rejected a challenge by Orthodox Jewish shop owners to a Sunday closing law.[201] They had claimed that the law imposed disproportionate costs on people who observed the sabbath on Saturday because they were forced to close their businesses on two days per week instead of one.[202] Substantive neutrality would have denied their claim because an exemption would have favored Jews by giving them a huge competitive advantage over storeowners who could not open on Sundays.[203] And in fact the *Braunfeld* Court did reason in part that an exemption would have created an incentive for secular merchants to claim a sacred duty to close on Saturdays.[204]

To similar effect is *Thornton*, where the Court invalidated a Connecticut statute that protected all employees from working more than six days per week but gave only sabbath observers the power to choose their day of rest.[205] The Court ruled that the Connecticut statute had the effect of advancing observance in violation of the Establishment

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disadvantages it. *See supra* text accompanying note 44.

199. Provisos like this one were common in early state constitutions. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461–62 (1990) (discussing early state free exercise clauses); McConnell, *Revisionism*, *supra* note 4, at 1117–18 (same).

200. *See* Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 20–30 (considering the effects of incentives to fabricate religious belief on the outcomes of Supreme Court cases).

201. Braunfeld v. Brown, 366 U.S. 599, 609 (1961).

202. *Id.* at 601–02.

203. *Id.* at 608–09 ("To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against.").

204. An exemption would create a "temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day." *Id.* at 609. The Court seems to be thinking here of fraud, but arguably an exemption would have created an incentive effect in favor of honest Saturday sabbatarianism as well. That incentive might have affected decisionmaking at the margins—not only among people who are sincerely considering conversion, but also among lapsed Jews who might feel an incentive to become observant.

205. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985).

Clause.[206] And indeed the Connecticut statute did advantage sabbatarians over others who wished to take Saturday off for secular reasons.[207] *Thornton* was an antiestablishment case, but it has implications for our problem. Substantive liberty would consider free exercise exemptions for sabbatarians without engaging in the *Thornton* calculus. Instead it would simply consider whether any substantial burden on observance could be lifted consistent with state interests.

In sum, liberty works differently from neutrality in practice and it cannot be protected incidentally, as a mere side effect.[208] Substantive neutrality would prohibit some non-coercive government actions that substantive liberty would not, such as the alcohol abstinence campaign. And substantive neutrality, applied symmetrically, could not grant certain exemptions that substantive liberty would. These four examples—*Cutter*, the drug laws, the park worshipper hypothetical, and the sabbath cases—illustrate how substantive neutrality presents an analytic consideration, symmetry, that does not trouble substantive liberty.

Liberty asks in the first instance only whether government action substantially burdens the free exercise of religion, and if so whether a magnanimous state could not protect ritual observance consistent with the liberty of others and public peace. That is a meaningfully different analysis with real practical yield.

E. Two Limits to the Scope of the Project

This Article limits its scope in two ways. First, it defends a liberty conception of the Free Exercise Clause but does not develop a corresponding theory of the Establishment Clause. Second, it addresses the constitutional protection of religion alone, leaving aside the question of whether similar protection should be extended to deeply held secular commitments.

The first limit leaves the Establishment Clause for another day. Some might object that circumscribing the argument in this way artificially insulates it from the criticism that substantive liberty too will predictably run afoul of the Establishment Clause. Admittedly, a strong liberty principle will result in exemptions from formally neutral laws, and those exemptions may well encourage belief relative to similarly situated disbelief. If the Establishment Clause were to include an independent

206. *Id.*

207. *Id.* at 710; *see also id.* at 711 (O'Connor, J., concurring) ("All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers . . . .").

208. Laycock seems to acknowledge this difference in one place, where he contrasts free exercise, which requires neutrality, with the right to an abortion, which protects liberty. *See* Laycock, *Theology Scholarships*, *supra* note 24, at 177 ("The right to choose an abortion is a right to be free of undue burdens; the right to religious liberty is a right to government neutrality.").

principle of substantive neutrality—such that it prohibited any government policy that had an *effect* of encouraging religion—then antiestablishment might well frustrate certain applications of a liberty conception of free exercise.[209] For example, accommodating Muslim police officers in Newark will advantage Islam regardless of whether that exemption is granted under substantive neutrality or substantive liberty. And the *Lemon* test purports to prohibit laws that have the primary effect of advancing religion.[210] That aspect of the *Lemon* test would present a problem for substantive liberty if it were applied consistently. But in actual practice it is not. A preliminary look suggests that the Establishment Clause does not in fact require substantive neutrality.

Both theory and practice suggest this conclusion. In theory, first, antiestablishment does not present the same type of inherent difficulty for liberty as it does for neutrality. Symmetry is intrinsic to neutrality's very structure because neutrality speaks to both sides of a dispute in the same breath. Every version of neutrality must apply evenhandedly.[211] For example, protecting Orthodox Jews from the economic effects of the Sunday closing laws would have removed a cost to observing the sabbath on Saturday, but it would also have given Jewish merchants an even larger economic advantage over their competitors.[212] Such an effect could not be called neutral.

By contrast, a liberty conception of free exercise does not carry any inherent implication for laws that benefit religion. Differently put, nothing in substantive liberty requires a substantive neutrality conception of antiestablishment. The question remains whether substantive neutrality might offer an independently attractive theory of antiestablishment. A preliminary look suggests not. Recent scholarship has argued that the Establishment Clause too should be understood to protect liberty.[213] If that is correct, then the Establishment Clause may present no bar to a substantive liberty view of free exercise in theory.

In practice, second, the Establishment Clause leaves ample room for a substantive liberty conception of free exercise. Courts simply do not require strict neutrality of effect. Certain statutes and judicial decisions implement something similar to substantive liberty—without raising a

209. Current law still does prohibit government policies that have the "primary effect" of advancing religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). But that rule seems to be fading in favor of a consistent principle of formal neutrality for both clauses. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 668–70 (2002) (O'Conner, J., concurring).

210. *Lemon*, 403 U.S. at 612.

211. *See supra* text accompanying notes 66–68 (arguing that neutrality is inherently symmetrical).

212. *See* Braunfeld v. Brown, 366 U.S. 599, 608–09 (1961).

213. Noah Feldman, for instance, thinks that equality does not provide an attractive principle for the Establishment Clause. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

widespread concern that they constitute establishments.

The best example is the Religious Freedom Restoration Act (RFRA), which protects a strong version of substantive liberty.[214] Recall that Congress passed RFRA in 1993 in order to counteract *Smith* and restore the compelling interest test, if only as a statutory matter.[215] Accordingly, RFRA requires the government to show a compelling interest and narrow tailoring whenever government laws or policies effect a "substantial[] burden" on religious practice.[216] That formula protects a strong version of substantive liberty.[217]

What makes the example so apt is that RFRA may well create effects that advantage religion relative to secular commitments across a range of federal law. And yet there has been no common complaint that RFRA violates the Establishment Clause, even though the statute has been successfully attacked on other constitutional grounds.[218] No circuit court that has considered the question has held that RFRA violates antiestablishment.[219] On the Court, only Justice Stevens has argued otherwise. In *City of Boerne v. Flores*, where the Court held that Congress lacked power under section five of the Fourteenth Amendment to enact RFRA against the states, Justice Stevens argued in two short paragraphs that RFRA also violates the Establishment Clause.[220] Other Justices have indicated that legislative exemptions for religion pose no constitutional difficulty.[221] And the vast majority of commentators thinks that RFRA does not constitute an establishment of religion.[222] Only a few writers have questioned RFRA on establishment grounds, and they have

214. 42 U.S.C. § 2000bb (1993).

215. *See* § 2000bb (articulating the purpose of RFRA as restoring the compelling interest test in the wake of *Smith*); S. REP. No. 103-111, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893 (same).

216. *See* § 2000bb-1(b).

217. This Article does not recommend, however, strict scrutiny for free exercise. There is a broad scholarly consensus that the Court's free exercise cases under the compelling interest test of *Sherbert* did not in fact implement so strict a test. Instead, this Article suggests that substantive liberty would relieve a substantial burden on religious freedom unless the government could show that it had an interest that was important enough to override the free exercise right. *See supra* text accompanying notes 138–150.

218. *See* City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (holding that Congress lacks power under section five of the Fourteenth Amendment to pass RFRA as against the states).

219. *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997); Sasnett v. Sullivan, 91 F.3d 1018, 1021–22 (7th Cir. 1996); EEOC v. Catholic Univ., 83 F.3d 455, 469–70 (D.C. Cir. 1996); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd on other grounds*, 521 U.S. 507 (1997); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 862–63 (8th Cir. 1998).

220. *See City of Boerne*, 521 U.S. at 536–37 (Stevens, J., concurring) ("[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain.").

221. *See, e.g.*, Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 905–07 (1990) (O'Conner, J., concurring) (approving of statutory exemptions for sacramental peyote use); Sherbert v. Verner, 374 U.S. 398, 422–23 (Harlan, J., dissenting) (arguing that a state could carve out an exemption like the one the Court created in *School District of Abington Township v. Schemp*, 372 U.S. 203, 222 (1963), without running afoul of the Establishment Clause).

222. *See, e.g.*, McConnell, *Singling Out*, supra note 95.

not carried the day.[223]

After RFRA was hobbled in *Boerne*, Congress passed RLUIPA, which reestablished strict scrutiny in the context of prisons and certain land uses.[224] Three circuit courts have found no establishment flaw with RLUIPA.[225] Now the Sixth Circuit has gone the other way and held in *Cutter* that RLUIPA advantages religion, as discussed above.[226] Although the decision provides some basis for thinking that a liberty rule for free exercise might contravene the Establishment Clause in some cases, it remains a minority view that will likely fail to carry the Supreme Court. On balance, these two examples—RFRA and RLUIPA—suggest, at least as a preliminary matter, that the prevailing constitutional understandings of the Establishment Clause will pose no bar to a free exercise rule of substantive liberty.

Many other statutes likewise single out religion for special solicitude in the context of particular provisions. Some 2,000 statutes in the U.S. exempt religion from their provisions.[227] Although the Supreme Court has not upheld every such exemption,[228] it has never suggested that a legislative exemption would be unconstitutional simply because it advanced religion in some way—that is, on the ground that it violated neutrality of effect.[229] On the contrary, the Court has said that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the

223. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 9–14 (1998); William J. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection, and Free Speech Concerns*, 56 MONT. L. REV. 227, 237–42 (1995). Even Eisgruber and Sager, who advocate an "equal regard" view of the religion clauses, do not argue decisively that RFRA violates the Establishment Clause. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1308 (1994) (noting that RFRA "may itself be unconstitutional under the equal regard standard").

224. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No 106-274, 114 Stat. 803 (2000).

225. *See* Madison v. Riter, 355 F.3d 310, 317 (4th Cir. 2003); Charles v. Verhagen, 348 F.3d 601, 611 (7th Cir. 2003); Mayweathers v. Newland, 314 F. 3d 1062, 1068 (9th Cir. 2002). *But see* Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016, 1025 (E.D. Wis. 2003) (holding that RLUIPA violates the Establishment Clause); Madison v. Riter, 240 F. Supp. 2d 566, 581–82 (W.D. Va. 2003) (same).

226. Cutter v. Wilkinson, 349 F.3d 257, 266–67 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004); *see supra* text accompanying notes 88–91.

227. *See* McConnell, *Singling Out*, *supra* note 95, at 5 (citing James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992)).

228. *See, e.g.*, Estate of Thornton v. Caldor, 472 U.S. 703, 710–11 (1985) (striking down a state law that limited the work week to six days, but allowed only Sabbath observers to choose their day off); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989) (invalidating a tax exemption for religious publications).

229. *See* McConnell, *Singling Out*, *supra* note 95, at 2 (noting that courts and most scholars have assumed "that exemptions for religious activity are legitimate; the debate is over whether they should be constitutionally required").

exemption comes packaged with benefits to secular entities."[230]

No one would argue, for example, that allowing Roman Catholics to use wine in religious ceremonies during prohibition constituted an impermissible establishment, even though it advantaged that church relative to others who wished to use wine in secular ceremonies.[231] Similarly, ministerial exemptions from employment antidiscrimination laws are not commonly condemned under the Establishment Clause, though they are controversial on other grounds.[232] To date, only isolated voices among judges and commentators have questioned legislative immunities for religion.[233] Antiestablishment in the U.S. does not bar all government actions that benefit religion incidentally.

In sum, substantive liberty entails no intrinsic understanding of the Establishment Clause in theory. And in practice, statutory exemptions that bear a close resemblance to what judges might award under substantive liberty enjoy widespread support in the U.S. constitutional tradition.

The second way in which this Article limits its scope is by addressing religion alone. It defers the question of whether similar constitutional protection should extend to deeply held secular convictions grounded in, say, morals, politics, philosophy, or aesthetics. Although substantive liberty for religion seems attractive, it may be arbitrary to deny similar protection to strong secular beliefs. Advocating evenhandedness among secular and sacred commitments is probably the most appealing aspect of work by Eisgruber and Sager. Their work captures a contemporary conviction that the Constitution should not privilege religion over other forms of modern conscience.[234] Nothing inherent in substantive liberty prevents such an expansive conception, although marrying the two

230. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987). *See also* Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972) ("The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."); Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970) ("We cannot read New York's [tax exemption] statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.").

231. *See* National Prohibition Act, ch. 85, Title II, § 6, 41 Stat. at 311 (1919). This argument brackets for the moment the Equal Protection Clause.

232. *See Amos*, 483 U.S. at 336–40 (upholding Title VII's exemption for churches which discriminate on the basis of religion, 42 U.S.C. § 2000e-1); McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972) (upholding an implied statutory exemption that permits churches to discriminate on the basis of sex in some circumstances).

233. *See* McConnell, *Singing Out*, *supra* note 95, at 6–7 (including Justice Stevens among the opponents of legislative exemptions); ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 26 (1996); *see also* Tushnet, *supra* note 30.

234. *See* Eisgruber & Sager, *Equal Regard*, *supra* note 26, at 205 ("Our freedom of belief extends to political, aesthetic, and moral matters, to matters that are religious and antireligious.").

approaches would raise qualitatively different concerns.

In any case, a separate body of scholarship addresses the question of religion's uniqueness.[235] That literature is beyond the scope of this Article, whose argument is considerably narrower—only that the critics' own concern for free exercise cannot be fully vindicated by their rule of substantive neutrality. Whether substantive liberty should protect religion alone, or also similarly deep secular convictions, is a question that must be left for future work.

CONCLUSION

Neutrality alone cannot provide an attractive conception of the Free Exercise Clause. Formal neutrality captures an important intuition, namely that government should not be allowed to purposefully discriminate against religion. However, the critics argue correctly that formal neutrality is insufficient. Laws can burden religious practice even if that is not their purpose. Many state regulations will unwittingly interfere with observance in ways that can be devastating. These regulations will often implicitly enact majority values that burden minority sects. For these reasons, the critics have waged an influential campaign against the Court's current rule of formal neutrality.

Yet the critics' proposal, substantive neutrality, suffers from a conceptual difficulty, the problem of symmetry, that frustrates many of their most important practical proposals. Substantive liberty offers a more attractive conception of the Free Exercise Clause. Government should ask the right question of claims when faced with free exercise claims: not simply whether the challenged polices are neutral, once neutrality is properly understood, but rather whether the state should be able to burden liberty of conscience. A benevolent modern state, recognizing the importance of religious freedom in its Constitution, should embrace and protect liberty.

235. *See, e.g.*, AMY GUTMANN, *Is Religious Identity Special?*, *in* IDENTITY IN DEMOCRACY 151–91 (2003).