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The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny

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THE FREE EXERCISE OF RELIGION AFTER THE FALL: THE CASE FOR INTERMEDIATE SCRUTINY

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I. INTRODUCTION

In *City of Boerne v. Flores*[1] the Supreme Court struck down the Religious Freedom Restoration Act of 1993[2] (RFRA or the "Act"), at least insofar as the Act is applied against state and local governments.[3] For the moment, at least, free exercise cases again are governed largely by the regime of *Employment Division v. Smith*,[4] under which the Free Exercise Clause is not deemed violated by laws of general applicability that happen to place substantial burdens on religion. Several Justices in *Flores*, however, again called for the Court to reconsider the principles of *Smith*.[5]

Should the Court or Congress take up this challenge? Consider three options:

> (1) After *Flores*, matters should be left to rest. The law (at least with regard to state and local governments) has now reverted to the rule of *Smith*. *Smith* should be accepted as wisely decided, and its principle left to govern future conflicts.
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> (2) After *Flores*, Congress should try again. *Smith*, an un-

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1. 117 S. Ct. 2157 (1997).

2. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

3. Whether RFRA still survives as a valid law currently binding on the federal government and its various agencies and instrumentalities is unclear.

4. 494 U.S. 872 (1990).

5. *See Flores*, 117 S. Ct. at 2176 (O'Connor, J., joined in part by Breyer, J., dissenting); *id.* at 2185 (Souter, J., dissenting); *id.* at 2186 (Breyer, J., dissenting). This was not the first time members of the Court have called for a reexamination of *Smith*. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571-72 (1993) (Souter, J., concurring in part and concurring in the judgment); *id.* at 577-78 (Blackmun, J., joined by O'Connor, J., concurring in the judgment).

wise decision, should be fought with all the resourcefulness that Congress can muster. Congress should pass a new law, "Son of RFRA." Using a combination of Congress's power to attach conditions on the receipt of federal largess, Congress's power to regulate interstate commerce, and Congress's enforcement power under Section 5 of the Fourteenth Amendment, and bolstered by a more exhaustive legislative record than that which supported the original enactment of RFRA, a new federal statute should be passed that reaches most, if not all, of the activities of state and local governments.[6]

(3) Whatever Congress may attempt, the Supreme Court should itself reconsider the *Smith* rule. Rather than approach the issue posed by *Smith* as an "all-or-nothing" dilemma, however, in which the choice is either the strict scrutiny test or rational basis review, the Court should adopt the intermediate scrutiny standard.

This Essay explores the third option.

II. THE CASE FOR INTERMEDIATE SCRUTINY

The problem posed by *Employment Division v. Smith* and RFRA, put simply, is this: What should the proper response be to challenges brought against neutral laws of general applicability, broad proscriptions that were not enacted with religion in mind and that do not mention or appear to concern religion, but that nevertheless happen to place substantial burdens on an individual's religious exercise? Suppose a local government passes a zoning law declaring that no more than four unrelated persons may reside in a residential dwelling. Five Buddhist monks, unrelated by blood, inhabit a commodious home in a residential neighborhood, where they live a contemplative life of physical labor and meditation, comprising a small "wat," or monastery. One day, zoning officials tell the five monks that in light of the ordinance, one of them must leave. A minimum of five monks, however, is necessary to perform most sacred Buddhist rituals, and the departure of one monk will burden substantially their

6. Congress has already taken steps in this direction. *See* Linda Greenhouse, *Laws Are Urged to Protect Religion*, N.Y. TIMES, July 15, 1997, at A15.

free exercise of religion. Must the monks buckle to the zoning law, or should they have some legally enforceable right to an accommodation of their religious practices? If some legally enforceable right to accommodation should exist, then what should its contours be?

Congress enacted RFRA in response to the Supreme Court's decision in *Smith*, which involved a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits after losing their jobs because they had ingested peyote in small amounts as part of a sacramental ritual.[7] They challenged an Oregon criminal statute forbidding the use of peyote, claiming what was in substance a constitutional right to a religious exemption from an otherwise applicable criminal law.[8]

Prior to *Smith*, the cases seemed to contain two different and opposing solutions to the issue. On the one hand, many decisions appeared to support the view that the Free Exercise Clause did not require exemption from the application of generally applicable laws. In *Reynolds v. United States*,[9] for example, the Court rejected the assertion that criminal laws forbidding polygamy could not be constitutionally applied to persons who practiced polygamy pursuant to religious command.[10] On the other hand,

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7. *See* 42 U.S.C. § 2000bb(a)(4); *Smith*, 494 U.S. at 874.

8. *See Smith*, 494 U.S. at 874-75.

9. 98 U.S. 145 (1879).

10. *See id.* at 166; *see also* United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring) (stating that the Free Exercise Clause does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability"). The Court in *Smith* also quoted the words of Justice Frankfurter in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940):

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

Smith, 494 U.S. at 879 (footnote omitted) (quoting *Gobitis*, 310 U.S. at 594-95). The Court's quote from *Gobitis* was arguably ill-conceived overkill, because in *Gobitis* the Supreme Court applied Justice Frankfurter's theory to sustain a school board's power to discipline a Jehovah's Witness child for failing to salute the American flag. *See Gobitis*, 310 U.S. at 600. *Gobitis* remained good law for only three years. It was overruled by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624

a number of Supreme Court decisions had appeared to support the principle that laws substantially burdening a religious practice must be justified by a compelling governmental interest and be narrowly tailored to effectuate that interest. A series of cases involving government benefits such as unemployment compensation, emanating from *Sherbert v. Verner*,[11] seemed to require the application of the strict scrutiny standard even to neutral laws of general applicability that only "indirectly" burdened religion.[12] In *Sherbert*, a Seventh-Day Adventist was discharged by her private employer because she would not work on Saturday, the Sabbath Day of her faith.[13] No law commanded the claimant to do that which was forbidden by her religion, or forbid her from doing that which her religion commanded.[14]

Nevertheless, the Supreme Court held that the First Amendment could be violated even when the burden at issue was only "indirect:"

> But this is only the beginning, not the end, of our inquiry. For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[15]

The Supreme Court in *Smith* resolved this split by opting for the line of precedent typified by *Reynolds*, holding that the Free

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(1943), in which Justice Jackson wrote the famous lines: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. Where *Gobitis* went wrong was in failing to see a distinction between "obedience to a general law" when that law proscribes only action, such as polygamy, or as in *Smith*, ingestion of a drug, and obedience to a law requiring the affirmative profession of beliefs, political or religious.

11. 374 U.S. 398 (1963).

12. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834-35 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140 (1987); Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

13. *See Sherbert*, 374 U.S. at 399.

14. *See id.* at 403.

15. *Id.* at 403-04 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

Exercise Clause imposed no heightened constitutional burdens on government when it sought merely to enforce neutral and generally applicable laws.[16] "[G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct," the Court argued, "'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense."[17]

The Court did not overrule the opposing line of precedent, however, but instead sought to distinguish it on the grounds that the cases in that line did not involve "the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children."[18] In contrast, the Court in *Smith* explained, the case before it did "not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[19] This attempt to reconcile these two lines of precedent was restated matter-of-factly in *Flores*, as the Court summarized its ruling in *Smith*.[20] As to *Sherbert v. Verner* and its progeny, the Court in *Smith* attempted to cabin those cases within the principle that "where the State has in

16. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990).

17. *Id.* (citations omitted) (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

18. *Id.* at 881 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); Follett v. Town of McCormick, 321 U.S. 573 (1944) (striking down a flat tax on solicitation as applied to dissemination of religious literature); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (same); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940) (striking a permit requirement for solicitation of contributions as applied to Jehovah's Witnesses distributing religious literature); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down a law requiring children to attend public schools rather than private schools)).

19. *Id.*

20. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2161 (1997) ("The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake.").

place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[21]

The Court's handling of prior precedent in *Smith* was not particularly satisfying. There is first the "hybrid right" business, and the question of why it should matter that a claim implicates more than one fundamental right, as if the Constitution were limited to two-for-one sales. The Court in *Smith* gave absolutely no reasons as to *why* the strict scrutiny test should be triggered only when a free exercise claim is coupled with some other constitutional claim. Is there some sort of constitutional chemistry at work, some sort of synergy created by the combination of ingredients, so that the free exercise claim, when joined with a privacy or free speech claim somehow activates an otherwise inert clause? Or was the Court in *Smith* saying something even simpler—that the Free Exercise Clause has no appreciable power of its own, at least in the absence of laws that especially target religion for discriminatory treatment? Perhaps prior cases that *seemed* to be grounded in the Free Exercise Clause simply were not really religion cases at all, but cases based on other rights, in which the subject matter just happened to involve religious issues.

This explanation, more expansive than any the Court itself actually gave, is plausible for some of the precedents the Court sought to explain away. For example, *Pierce v. Society of Sisters*,[22] striking down a requirement that children attend a public school, was decided and explained on substantive due process grounds.[23] Although a majority of private schools then and now are affiliated with religious groups, the right to send children to private schools could be vindicated with no mention of the Free Exercise Clause at all. So too, the flat tax on the dissemination of information, struck down in *Murdock v. Pennsylvania*,[24] happened to have been applied to literature distributed by Jehovah's

21. *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

22. 268 U.S. 510 (1925).

23. *See id.* at 519-21.

24. 319 U.S. 105 (1943); *see also* Follett v. Town of McCormick, 321 U.S. 573, 577-78 (1944) (striking a tax on solicitation as applied to dissemination of religious literature).

Witnesses,[25] but easily could have been seen as a violation of the Speech Clause and its prohibitions on prior restraints.

Cantwell v. Connecticut,[26] however, is a somewhat tougher sell. Yes, *Cantwell* in theory might be explained entirely in free speech terms. The Connecticut law at issue stated that no person could solicit money, services, subscriptions, or any valuable thing for any alleged "religious, charitable or philanthropic cause" without a permit from the Secretary of the Welfare Council.[27] To obtain a permit, the Secretary had to determine "whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity."[28] The law was thus a prior restraint, empowering the official in charge of issuing the license to grant or deny permission on the basis of relatively standardless subjective judgments.[29] Indeed, subsequent cases, applying only the Speech Clause, have struck down such standardless prior restraints,[30] as well as various requirements imposing restrictions on how charities are organized or financed as a precondition to permitting solicitation.[31]

Cantwell is thus *understandable* as a free speech case in which the expression happened to be religious. There was no *necessary* reason for the *Cantwell* Court to invoke the Free Exercise Clause at all, but the Court *did*. If one looks at what

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25. *See Murdock*, 319 U.S. at 106-07.

26. 310 U.S. 296 (1940).

27. *Id.* at 301-02.

28. *Id.* at 302.

29. *See id.* at 304-05.

30. *See* Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 964 n.12 (1984) ("By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."); Kunz v. New York, 340 U.S. 290, 292-95 (1951) (striking down a law requiring persons wishing to conduct religious service to obtain a permit from the police commissioner when the statute contained no standards to guide exercise of discretion). *See generally* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 6:14-:16 (3d ed. 1996) (discussing the vagueness doctrine and its application to cases involving grants of unbridled administrative discretion to officials charged with the administration of laws regulating speech).

31. *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 638-40 (1980) (striking down an ordinance prohibiting solicitation of contributions by charitable organizations that do not use at least 75% of their receipts for "charitable purposes").

Cantwell said, as opposed to how it might later be deconstructed and reconstructed, then it was primarily a religion case. Although the Court did indeed find the prior restraint elements of the Connecticut law obnoxious, it consistently referred to the law as a previous restraint on the free exercise of religion.[32] The core of the Court's holding, and the bulk of the language throughout the opinion, was articulated in free exercise terms, though at times the Court did appear to invoke both free speech and free exercise guarantees.[33] At no point in *Cantwell*, however, was there even the remotest hint that the constitutional principle being enforced was dependent on the existence of a "hybrid" claim bridging two First Amendment rights.

Wisconsin v. Yoder[34] can be explained only as a free exercise case. The Court in *Yoder* held that Wisconsin could not enforce its compulsory school attendance law to require members of the Amish Mennonite Church to send their fourteen- and fifteen-year-old children to Wisconsin public schools.[35] The Court articulated its ruling entirely in Free Exercise Clause terms.[36] More importantly, *Yoder* is distinguished by its extended discussion of whether the objections the Amish had to sending their children to school were genuinely religious in nature, or were instead based on the nonreligious elements of the Amish "way of life."[37] The Amish claimed the two were essentially inseparable.[38] But the Supreme Court delved more deeply into the mat-

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32. *See Cantwell*, 310 U.S. at 305 ("Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment . . . .").

33. *See, e.g., id.* at 308 ("Equally obvious is it that a State may not unduly suppress free communication of views, religious *or other*, under the guise of conserving desirable conditions.") (emphasis added).

34. 406 U.S. 205 (1972).

35. *See id.* at 234.

36. *See id.* at 214. The Court stated:

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

Id.

37. *Id.* at 210-13.

38. *See id.* at 215. The Court stated:

ter, making it clear that the success of the constitutional claim asserted by the Amish was *dependent* on it being grounded in religion, as opposed to a mere philosophical belief, such as the teachings of Henry David Thoreau:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[39]

Only after assuring itself that the claims of the Amish were authentically religious in nature did the Court hold that those religious beliefs trumped the interests of the state of Wisconsin in enforcing its compulsory attendance laws.[40] *Yoder* is thus

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> We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent.

Id.

39. *Id.* at 215-16 (footnote omitted); *see also* United States v. Ballard, 322 U.S. 78, 83 (1944) (stating that religious doctrines cannot be subjected to findings of "truth or falsity").

40. *See Yoder*, 406 U.S. at 216-17. The Court stated:

> Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal prefer-

unintelligible as a free speech or substantive due process claim. If the Amish parents merely had asserted a right to have their philosophical beliefs vindicated under the Free Speech Clause, or their rights to direct the education of their own children vindicated under the Due Process Clause, then the Court would have rejected their claim.[41] The injection of religious belief made all the difference. Additionally, the Court in *Yoder* clearly thought that it made enough of a difference to require striking down application of the Wisconsin law even though the law was both of "general applicability"[42] and ostensibly "neutral."[43] As

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ence, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world . . . . " This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

Id. (footnote omitted).

41. *See supra* note 39 and accompanying text.

42. Yoder, 406 U.S. at 220. The Court stated:

But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.

Id. (citations omitted).

43. *Id.* The Court stated:

Nor can this case be disposed of on the grounds that Wisconsin's

significant as Wisconsin's interests in enforcing its laws may have been, they were not persuasive enough for the Court in *Yoder*, and the Court's almost nostalgic Americana sympathy for the uncomplicated and virtuous life of the Amish people.[44]

If the *Smith* Court's insistence that prior cases could be explained as hybrid constitutional claims appeared disingenuous, its argument that the *Sherbert* line of cases was distinguishable on the principle that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"[45] was equally lame. This interpretation of *Sherbert* actually began to

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requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Id.

44. *See id.* at 217-18. The Court's sympathy is evident in the following passage:

> As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict. The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

Id.

45. Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

take hold four years before *Smith* in *Bowen v. Roy*.[46] The Court in *Bowen* rejected the argument that the *Sherbert* line of cases required a state welfare agency, in administering AFDC and food stamp payments, to accommodate the religious convictions of Native Americans who objected to the assignment of a Social Security number to their two-year old daughter, Little Bird of the Snow, because the assignment of such a number would destroy her uniqueness and rob her spirit.[47] The Court distinguished the unemployment compensation holdings in *Sherbert* and *Thomas v. Review Board*[48] on the theory that the system of unemployment benefits, which disqualified claimants if they had quit their jobs without good cause, in effect discriminated against religion if it refused to credit a religious reason as good cause.[49] The *Bowen* argument, seized upon in *Smith* and restated in *Flores*,[50] cannot be convincingly squared with the facts or language of *Sherbert*. That case contained no suggestion of discrimination against Adell Sherbert or her Seventh-Day Adventist faith unless we are to read surreptitious animus into the record on the mere fact that it was a Saturday that she claimed as her Sabbath. On its face, the South Carolina law was flat, neutral, and generally applicable. Nothing suggested that the state *would have granted* Adell Sherbert an exemption if she had claimed her Sabbath to be on Sunday, *or* that the state would have granted her an exemption if she had said she could not work on Saturdays because that was the day on which she committed to participate in a Henry David Thoreau reading group.[51] As Justice Harlan pointed out, South Carolina was merely unwilling to grant unemployment compensation to persons who were able-bodied but for personal reasons, religious or otherwise, refused to work on a given day.[52]

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46. 476 U.S. 693 (1986).

47. *See id.* at 696.

48. 450 U.S. 707 (1981).

49. *See Bowen*, 476 U.S. at 708 ("If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. . . . [T]o consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion.").

50. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2161 (1997).

51. *Cf.* text accompanying note 39 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)).

52. *See* Sherbert v. Verner, 374 U.S. 398, 419 (1963) (Harlan, J., dissenting) (stating

Moreover, if the "system of exemptions" caveat to *Smith* is taken seriously, it cuts a potentially large loophole into the *Smith* ruling. Most zoning regimes, for example, have a special use permit procedure that allows exemptions, on a case-by-case and individualized basis, from the municipality's general zoning scheme.[53] Would the refusal of a zoning board to grant a special use permit to a church or Buddhist temple claiming religious hardship thus trigger the *Smith* "exemption exception?" If *Bowen* and *Smith* are accepted at face value, the answer should be "yes." The existence of such a system would take the case out from under the rule of *Smith* and back within the rule of *Sherbert*.

The point of this exercise is to demonstrate that *Smith* took a perplexing problem and two conflicting lines of precedent and resolved the problem and the conflict in a manner that was superficial and unconvincing. It would behoove the Court to try again. The landmark principle enshrined in *Smith* was announced without briefing or oral argument.[54] The *Smith* principle is, as both the enactment of RFRA and the public response to the Court's ruling in *Flores* attest,[55] a source of intense political disquiet. Several Justices have questioned the soundness of *Smith*, often making the eminently reasonable point that a rule of such profound moment merits full-dress examination before permanent entrenchment.[56]

If *Smith* is reconsidered, then it ought to be revised. In place of its stark rule, the flexible standard of intermediate judicial scrutiny should be adopted. Laws of general applicability that place substantial burdens on the free exercise of religion should be justified by substantial governmental interests and should be narrowly tailored to achieve those interests.

Intermediate scrutiny has proven to be a useful doctrinal ve-

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that the South Carolina Supreme Court "has consistently held that one is not 'available for work' if his unemployment has resulted not from the inability of industry to provide a job but rather from personal circumstances, no matter how compelling").

53. *See, e.g.*, DANIEL R. MANDELKER, LAND USE LAW §§ 6.53-.61 (3d ed. 1993).

54. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2186 (1997) (Souter, J., dissenting).

55. *See* Greenhouse, *supra* note 6, at A15.

56. *See* Employment Div. v. Smith, 494 U.S. 872, 921 (1990) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting); *supra* note 5 and accompanying text.

hicle in other areas of constitutional law,[57] and in the religion area it would strike an appropriate balance between the government's interest in the uniform adherence to laws of general applicability and the interest of individuals in receiving modest accommodation for the free exercise of religious beliefs. Most significantly, intermediate scrutiny is used in free speech cases in which "neutral" laws nevertheless place burdens on expression.[58] Adoption of an intermediate scrutiny standard would thus work no novel or arbitrary departure from the architecture of First Amendment doctrine, but would instead bring principles governing the freedom of religion into sensible synchronization with the principles governing freedom of speech.

The Court in *Smith*, as already noted, alluded to other constitutional provisions in undertaking its analysis, announcing its "hybrid right" theory.[59] The Court was right to look at other clauses, but it looked at them the wrong way. The problem posed by *Smith* is not unique to Religion Clause cases but has parallels in other areas of constitutional law as various as equal protection, freedom of speech and press, and even the Dormant Commerce Clause.

Starting with the most mundane, consider Commerce Clause jurisprudence. State laws that discriminate against interstate commerce are regarded generally as invalid per se.[60] In contrast, when a state statute regulates in-state and out-of-state commerce evenhandedly, and its negative effects on interstate commerce are only "incidental," the Court applies a balancing test.[61] In applying this balancing test, the formulation of which is quite close to "intermediate scrutiny," the Court engages in a moderately searching review,[62] largely attempting to determine

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57. *See infra* notes 60-79 and accompanying text.

58. *See* United States v. O'Brien, 391 U.S. 367, 377 (1967) (applying intermediate scrutiny to content-neutral speech regulation); *infra* notes 72-75 and accompanying text.

59. *See supra* notes 18-19 and accompanying text.

60. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 626-28 (1978) (striking down ban on importation of out-of-state garbage); *see also* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 359-60 (1992) (same); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 339-42 (1992) (holding that a higher fee for the disposal of out-of-state waste is unconstitutional).

61. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

62. *See id.* The Court stated:

if the statute at issue serves such interests as environmental protection or public health, or is, in reality, parochial legislation designed to promote or enhance local business at the expense of out-of-state enterprises.[63]

In equal protection cases, the norm is that heightened judicial scrutiny is not triggered unless there is purposeful discrimination against a suspect or quasi-suspect class.[64] The classic explanation for this principle is that laws employing suspect criteria such as race or gender are inherently more odious and dangerous than neutral laws.[65] Race-conscious laws, for example, will rarely be justifiable on legitimate grounds, but race-neutral laws are likely to have legitimate functions despite their adverse impact on some racial groups.[66] The downside to the purposeful discrimination requirement is that it makes ferreting out unconscious racism or sexism more difficult.[67]

In speech and press cases, the doctrine is somewhat more confused. A line of cases involving the press appears to endorse the principle that the press enjoys no special First Amendment exemption from the coverage of generally applicable laws. In *Cohen v. Cowles Media Co.*,[68] for example, the Court refused to engraft a First Amendment defense onto a promissory estoppel claim brought against a newspaper that violated a promise of confiden-

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> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. (citation omitted).

63. *See id.*; *see also* Maine v. Taylor, 477 U.S. 131, 148-51 (1986) (affirming findings of a legitimate local purpose served by Maine's ban on live baitfish importation).

64. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 272-73 (1979); Washington v. Davis, 426 U.S. 229, 239 (1976).

65. *See, e.g.*, Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 559 (1977).

66. *See id.* at 559-60.

67. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

68. 501 U.S. 663 (1991).

tiality it had granted to a source.[69] The Court stated that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[70] Similarly, cases involving taxes on the press generally appear to track Equal Protection Clause analysis, sustaining taxes that are generally applicable, but striking down taxes that single out the press, or any subset of it, for disadvantageous tax treatment.[71]

In contrast to these press cases, however, free speech law is governed largely by a different test, that imposed by *United States v. O'Brien*.[72] In *O'Brien*, the Court applied an intermediate scrutiny standard when a law "unrelated to the suppression of free expression" caused an "incidental restriction" on free expression.[73] *O'Brien* is a workhorse of contemporary First Amendment law, applied constantly by courts to subject neutral laws of general applicability that nevertheless adversely impact on speech to intermediate scrutiny review.[74] Under the *O'Brien* test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free ex-

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69. *See id.* at 669-70.

70. *Id.* at 669; *see also* Citizen Publ'g Co. v. United States, 394 U.S. 131, 138-40 (1969) (sustaining application of antitrust laws to the press); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 192-94 (1946) (sustaining application of the Fair Labor Standards Act to the press); Associated Press v. United States, 326 U.S. 1, 19-23 (1945) (sustaining application of antitrust laws to the press); Associated Press v. NLRB, 301 U.S. 103, 120-21 (1937) (sustaining application of the National Labor Relations Act to the press).

71. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581-85 (1983); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). The Court has applied the same principle in the religion context. *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 389-92 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise). In *Leathers v. Medlock*, 499 U.S. 439 (1991), the Court seemed to compromise these principles, holding that a sales tax was constitutional even though it applied to only certain segments of the media. *See id.* at 447.

72. 391 U.S. 367 (1968).

73. *Id.* at 377.

74. *See generally* 1 SMOLLA, *supra* note 30, §§ 9:1-:17 (discussing the application of the *O'Brien* standard).

> pression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[75]

The Court similarly applies "intermediate scrutiny" in speech cases to most other content-neutral regulations of speech, such as "time, place, or manner" regulations.[76] Even the well-established intermediate scrutiny standards of the *O'Brien* and content-neutrality doctrines, however, are not always applicable. In *Wisconsin v. Mitchell*,[77] for example, a unanimous Supreme Court held that the First Amendment was not triggered *at all* by a law that enhanced the penalty for crimes committed out of racial bias when the principal evidence of that bias was hateful words uttered by the criminal.[78] The mere evidentiary use of speech to establish intent, the Court held, did not penalize expression, but merely used it to establish an underlying element of the crime.[79]

What is the point of this potpourri? At the very least, it demonstrates that there is no *inexorable* force to the Supreme Court's ruling in *Smith*. Under current doctrine, nondiscriminatory laws are handled in different ways under different constitutional clauses. Indeed, sometimes they are handled in different ways under the same clause. The application of some level of review higher than the deferential rational basis standard to neutral laws of general applicability that substantially burden religion would not run contrary to all constitutional tradition and common sense. Rather, it is the kind of thing we do all the time. If it's good enough for the Commerce Clause, then it's good enough for me.

Purely as a matter of doctrine scrivening, the question might be put just this simply: Why has Free Exercise jurisprudence

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75. *O'Brien*, 391 U.S. at 377.

76. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

77. 508 U.S. 476 (1993).

78. *See id.* at 488-90.

79. *See id.* at 489. The Court thus distinguished *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), in which the Court had struck down a "hate speech" law on the grounds that the law engaged in impermissible content-based and viewpoint-based discrimination. *See Mitchell*, 508 U.S. at 487.

never evolved its own version of the *O'Brien* test? If we apply intermediate scrutiny to laws that incidentally burden speech, then why not to laws that incidentally burden religion?[80]

The creation of an *O'Brien* test for free exercise cases has several advantages. First, by bringing free exercise cases into a parity with speech cases, the problem of distinguishing when expression or conduct is religiously motivated and when it's not would disappear. The *Wisconsin v. Yoder* conundrum, in which we must determine whether an objector's problem with a law is truly religious or merely philosophical,[81] would evaporate. Neutral laws of general applicability that burden *either* religious or philosophical expression or beliefs would be equally protected.[82] Second, this approach would mitigate and perhaps entirely mute the objection to the *Sherbert* strict scrutiny approach originally made by Justice Harlan and echoed most recently in *Flores* by Justice Stevens. This is the claim that *granting* a special accommodation for religion actually violates the Establishment Clause. This was Justice Harlan's point in his *Sherbert* dissent,[83] and Justice Stevens echoed the theme in his short concurrence in *Flores*.[84] For if governments were constitutionally required to justify incidental restrictions that substantially burden First Amendment rights by meeting the standards of intermediate scrutiny, then religion would not be singled out for specially advantageous treatment, but would rather be given the same modestly enhanced protection that applies to all burdens on belief, whatever their source.

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80. This proposal would apply with equal force to press cases, such as *Cohen*, which also should be subjected to at least intermediate scrutiny. *See supra* notes 68-70 and accompanying text. The editorial decision to expose a duplicitous confidential source ought to be granted at least some enhanced First Amendment protection beyond the unvarnished law of contracts and promissory estoppel. These issues, however, are beyond the purview of this Essay.

81. *See supra* notes 37-39 and accompanying text.

82. The Supreme Court has already shown a tendency to move in this direction in the military draft cases, interpreting conscientious objector provisions in a manner that all but erases the distinction between religion and philosophy. See Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

83. *See* Sherbert v. Verner, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting).

84. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring).

III. CONCLUSION

Those who do not like doctrine do not like intermediate scrutiny, for it simply adds to the complexity and artificiality of constitutional law. Intermediate scrutiny tests, whether applied under the First Amendment, the Equal Protection Clause, or the Commerce Clause, are always the stuff of compromise. The Court adopts intermediate review when it is not willing to relegate the constitutional policy issues at stake entirely to legislative judgment, but when it believes that there are sufficiently persuasive justifications for legislative activity in an area where the highly intrusive strict scrutiny review is not warranted. Compromise is not always bad, however. In many areas of constitutional law, intermediate scrutiny has proven to be a perfectly serviceable judicial tool, employed with reasonable stability and predictability by lower courts as a body of law grows in an area by accretion over time. Intermediate scrutiny would be a sensible compromise to the balance of competing interests posed by *Smith* and RFRA and would bring religion and speech jurisprudence into a synchronization that would promote the logical evolution of the law in both fields.