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William P. Marshall
University of North Carolina School of Law, wpm@email.unc.edu

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CORRESPONDENCE ON FREE EXERCISE REVISIONISM

In Defense of *Smith* and Free Exercise Revisionism

William P. Marshall†

In *Employment Division v Smith*, the Supreme Court held that the Free Exercise Clause does not compel courts to grant exemptions from generally applicable criminal laws to individuals whose religious beliefs conflict with those laws.[1] Professor Michael McConnell has powerfully attacked *Smith* in a recent article in the *Review*.[2] In this essay, I defend *Smith*'s rejection of the constitutionally compelled free exercise exemption against McConnell's critique.

The *Smith* opinion itself, however, cannot be readily defended. The decision, as written, is neither persuasive nor well-

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† Galen J. Roush Professor of Law, Case Western Reserve University. I would like to thank Erwin Chemerinski, James Lindgren, Maureen Collins and Melvin Durshslag for their comments on earlier drafts of this article. I am also indebted to Frank Calabrese and Susan Belanger for their research assistance.

[1] 110 S Ct 1595, 1606 (1990). The *Smith* litigation involved two members of the Native American Church who had been denied unemployment benefits after being fired for ingesting peyote, a drug used in the Church's sacraments. The Oregon Supreme Court held that a religious practice could not be the basis for the denial of unemployment benefits. The U.S. Supreme Court vacated the case and instructed the lower court on remand to determine whether peyote use was legal in the state, reasoning that if peyote use could be criminally punished, it could be a basis for the lesser penalty of denial of employment benefits. *Employment Division v Smith (Smith I)*, 485 US 660 (1988). On remand, the Oregon Supreme Court held that although the state did not currently enforce its drug law against sacramental peyote use, the law did not contain an exception for such use. When the U.S. Supreme Court considered the case for the second time, it held that enforcement of generally applicable drug laws against peyote users would not violate the Free Exercise Clause. For the two opinions by the Oregon Supreme Court, see 301 Or 209, 721 P2d 445 (1986); 307 Or 68, 763 P2d 146 (1988).

[2] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U Chi L Rev 1109 (1990).

crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction.[3] The opinion is also a paradigmatic example of judicial overreaching. The holding extends beyond the facts of the case, the lower court's decision on the issue, and even the briefs of the parties. In fact, it appears that the Court framed the free exercise issue in virtually the broadest terms possible in order to allow it to reach its landmark result.[4]

Smith, therefore, may ultimately serve better as fodder for the arguments of those who, like McConnell, oppose its result[5] than as support for those who, like myself, agree with the opinion's central contention.[6] My task is then to defend *Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself. In so doing, I concentrate on the two critical theoretical concerns that separate McConnell and myself: (1) the cogency of exemption analysis; and (2) the role of equality in free exercise theory.[7] Both concerns lead to a rejection of the free exercise exemption claim.

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[3] The Court's claim that *Wisconsin v Yoder*, 406 US 205 (1972), was decided on the basis of a "hybrid" constitutional right, see *Smith*, 110 S Ct at 1601, is particularly illustrative of poetic license. See James D. Gordon, *Free Exercise on the Mountain Top*, 79 Cal L Rev — (forthcoming 1991).

[4] Perhaps most disturbing about *Smith* is the harshness of its result relative to the religious tradition involved in the case itself. In this regard, it is useful to compare, for example, the concern for the Amish expressed in *Yoder*, 406 US 205. As in *Yoder*, the interest of the Native Americans in *Smith* may be more one of maintaining a community identity than a religious practice. Compare Ronald R. Garet, *Community and Existence: The Rights of Groups*, 56 S Cal L Rev 1001, 1034 (1983).

[5] See Gordon, 79 Cal L Rev — (cited in note 3); Douglas C. Laycock, *The Remnants of Free Exercise*, 1990 S Ct Rev — (forthcoming).

[6] See Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J L, Ethics & Pub Pol 591 (1990); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 S Ct Rev 373; Philip B. Kurland, *Religion and The Law* 17-18 (Aldine Publishing, 1962).

[7] Although Professor McConnell relies in part on text, history, and precedent in his attack on *Smith*, see McConnell, 57 U Chi L Rev at 1114-28 (cited in note 2), he acknowledges that the flaws in *Smith*'s use of text, history, and precedent "might have been overcome (or at least mitigated) by writing the opinion in a different way." Id at 1111. They are, therefore, of "lesser interest" than the theoretical dispute. Id. For a brief treatment of my views as to the text and history arguments as they pertain to whether the First Amendment distinguished between religious and non-religious belief, see text at notes 94-95. For a more general account of my views on text and history, see William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W Res L Rev 357, 373-79 (1989-90). Essentially I argue that the text of the free exercise clause is more properly read as protecting religion against laws that single it out for adverse treatment than as providing religion with special benefits. I also contend that history is at best ambiguous on the exemption issue although numerous factors suggest that the notion of constitutionally compelled exemptions would not have been within the framers' contemplation. It may be that

I. The Trouble With Exemptions

A. The Inherent Difficulties

Professor McConnell is correct when he asserts that merely because a judicial task necessary to enforce a constitutional provision is difficult does not mean it should be abandoned.[8] However, a particular analysis should be rejected when it undermines the constitutional values it purports to protect, is inherently arbitrary, forces courts to engage in a balancing process that systematically underestimates the state interest, and threatens other constitutional values. Such is the case with free exercise exemption analysis.[9]

First, exemption analysis threatens free exercise values because it requires courts to consider the legitimacy of the religious claim of the party seeking the exemption. Under the exemption analysis, the court must first determine, at a definitional level, whether the belief at issue is "religious." Then it must determine whether the belief is sincerely held. As has been well-documented, both inquiries are not only awkward and counterproductive; they also threaten the values of religious freedom.[10] Moreover, the judicial definition of religion does more than simply limit religion; it places an official imprimatur on certain types of belief systems to

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my own moderate historical response to McConnell is understated. Some suggest that the historical data more directly refutes the contention that the framers envisioned the creation of exemptions under the Free Exercise Clause. See West, 4 Notre Dame J Law, Ethics & Pub Pol at 623-33 (cited in note 6); Philip Hamburger, *A Constitutional Right to Religious Exemptions: An Historical Perspective* (forthcoming).

[8] McConnell, 57 U Chi L Rev at 1143-44 (cited in note 2). But see *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 545-49 (1985).

[9] At this point some care should be taken to distinguish a true commitment to exemption analysis like that advocated by McConnell and the less-than-nominal adherence to exemption analysis applied by the Court in its pre-*Smith* decisions. As the *Smith* Court notes and as McConnell and I both agree, the pre-*Smith* Court did not apply exemption analysis seriously. See also Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L Rev 299. The pre-*Smith* Court granted exemptions only in two circumstances: Amish exclusion from compulsory education requirements, see *Yoder*, 406 US 205, and religious applicant exclusion from unemployment compensation requirements, see, for example, *Sherbert v Verner*, 374 US 398 (1963) (first of four cases granting an exemption from unemployment compensation laws).

[10] Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv L Rev 933, 953-60 (1989); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 Stan L Rev 233, 241 (1989) ("to define religion is to limit it"); Marshall, 40 Case W Res L Rev at 386-88 (cited in note 7); Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 Wm & Mary L Rev 985, 988 (1986).

the exclusion of others. At the very least, as Justice Stevens has argued, this power of approval or disapproval raises Establishment Clause problems.[11]

McConnell seems delightfully unconcerned by this. "To be sure, the court may get it wrong, but what is the grave injury from that (other than the impact on the case itself)?"[12] This is indeed a strange response from someone who, as we shall see, bases much of his argument in favor of exemption on the need to protect religious minorities. Minority belief systems—not majority belief systems—will bear the brunt of the definition and the sincerity inquiries.[13] A court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous.[14] The religious claims most likely to be recognized, therefore, are those that closely parallel or directly relate to the culture's predominant religious traditions.[15] To put it in concrete terms, Mrs. Sherbert's claim that she is forbidden to work on Saturdays is likely to be accepted as legitimate;[16] Mr. Hodges's claim that he must dress like a chicken when going to court is not.[17]

Second, the exemption analysis requires courts to engage in a highly problematic form of constitutional balancing. In other doctrinal areas, the Court balances the state interest in the regulation at issue against the interests of the regulated class taken as a whole.[18] Exemption analysis, however, requires a court to weigh the state interest against the interest of the narrower class comprised only of those seeking exemption. This leads to both unpre-

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[11] See *United States v Lee*, 455 US 252, 263 n 2 (1982) (Stevens concurring).

[12] McConnell, 57 U Chi L Rev at 1144 (cited in note 2).

[13] In his response, McConnell argues that similar problems also occur in establishment analysis. Michael W. McConnell, *A Response to Professor Marshall*, 58 U Chi L Rev 329, 330 (1991). He is incorrect. Establishment inquiry entirely avoids the sincerity issue. Moreover, any definitional decision holding a minority belief not to be religious in the establishment context works in part to the minority belief's *favor*, because such a decision allows government support.

[14] See, for example, Tushnet, 1989 S Ct Rev at 382-83 (cited in note 6).

[15] Id at 383.

[16] See *Sherbert*, 374 US at 410 (free exercise rights of Seventh Day Adventist violated when state refused to give her unemployment compensation after she was fired for refusing to work on Saturdays).

[17] See *State v Hodges*, 695 SW2d 171 (Tenn 1985) (before holding defendant in contempt of court, trial court should have inquired into defendant's claim that dressing "like a chicken" when in court was his spiritual attire and his religious belief).

[18] Geoffrey R. Stone and William P. Marshall, Brown v. Socialist Workers: *Inequality as a Command of the First Amendment*, 1983 S Ct Rev 583, 598.

dictability in the process and potential inconsistency in result as each regulation may be subject to limitless challenges based upon the peculiar identity of the challenger.[19]

Third, the exemption balancing process necessarily leads to underestimating the strength of the countervailing state interest.[20] The state interest in a challenged regulation will seldom be seriously threatened if only a few persons seek exemption from it. A legitimate state interest is often "compelling" only in relation to cumulative concerns.[21] If, for example, one factory is exempt from anti-pollution requirements, the state's interest in protecting air quality will not be seriously disturbed. When many factories pollute, on the other hand, the state interest is seriously threatened. Weighing the state interest against a narrow class seeking exemption is similar to asking whether this particular straw is the one that breaks the camel's back.

Finally, in some circumstances, free exercise exemption analysis may result in a troublesome interplay with the Speech Clause that threatens both speech and free exercise interests. Many activities that raise only speech concerns when undertaken by a secular group—literature distribution, for example—will raise both speech and free exercise concerns when undertaken by a religious group. The problem is that allowing only free exercise exemptions from governmental restrictions on those activities would mean that only religious groups could engage in the expressive activity. Such a result offends the central Speech Clause principle of content neutral-

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[19] Id.

[20] McConnell's exemption analysis ignores the importance of the state regulatory interests as well. His test instructs courts to grant exemptions to all religious claims that do "not trespass on private rights or the public peace," McConnell, 57 U Chi L Rev at 1145 (cited in note 2) (quoting Gaillard Hunt, ed, 9 *The Writings of James Madison* 100 (G.P. Putnam's Sons, 1910)). Under McConnell's test, government can only intervene to prevent a person from harming his neighbors.

By using this narrow definition, McConnell ensures that the free exercise interest will prevail in almost every instance because the state interest in preventing a person from harming his neighbors will apparently be recognized only in limited circumstances.

In this regard, McConnell's conclusion that exemptions should have been granted in *Alamo Foundation v Secretary of Labor*, 471 US 290 (1985) (discussed in McConnell, 57 U Chi L Rev at 1145), and *Bob Jones University v United States*, 461 US 574 (1983) (discussed in McConnell, 57 U Chi L Rev at 1146), is notable as the regulation at issue in *Alamo* was designed to prevent worker exploitation while the regulation at issue in *Bob Jones* was aimed at racial discrimination.

[21] Prohibitions against murder and theft are examples where the state interest is fully implicated by one offense.

ity; it creates, in effect, a content-based distinction in favor of religious expression.[22]

On the other hand, not granting free exercise exemptions in cases where speech activity is implicated in order to avoid the content neutrality problem[23] is also troublesome in that it leads to a pattern of results that only remotely effectuates free exercise values. Because much of the core of religious exercise—prayer, proselytization, and preaching, for example—is expressive conduct covered by the Free Speech[24] Clause, disqualifying expressive religious claims from exemption eligibility excludes the most fundamental aspects of religious exercise from free exercise consideration. The free exercise exemption would then primarily serve to protect activities at the periphery of religious exercise. Needless to say, there is a certain disutility in a doctrine that ultimately protects activities of marginal importance to the exclusion of those of central concern.[25]

B. McConnell's Categorical Response

McConnell is not blind to the difficulties inherent in exemption analysis. He recognizes that the balancing test prior to *Smith* was plagued by "arbitrariness" and was "unacceptably subjective."[26] He asserts, however, that while these problems cannot be entirely avoided, they can be substantially reduced. He then goes on to suggest that in at least three categories of cases exemption claims may be readily decided without forcing the courts to engage in "case-specific" balancing.[27] These categories are (1) cases "where the putative injury [addressed by the challenged enactment] is internal to the religious community";[28] (2) cases in which the exemption would make religious believers "better off relative to others than they would be in the absence of the government program to which they object";[29] and (3) claims in which minority religions seek the "same consideration under the Free Exercise

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[22] See *Heffron v Int'l Society for Krishna Consciousness*, 452 US 640, 652-53 (1981).

[23] The question of whether the Constitution prefers religious belief in a manner that would allow free exercise interests to trump content-neutrality requirements is addressed in Section II.C.

[24] See, for example, *Widmar v Vincent*, 454 US 263, 269 (1981)

[25] *Smith* itself, however, does not support the point however as it presents an example where a central religious practice was not expressive.

[26] McConnell, 57 U Chi L Rev at 1144 (cited in note 2).

[27] Id at 1145.

[28] Id. McConnell does allow a narrow exception from this rule in the case of injury to children.

[29] Id at 1146.

Clause that mainstream religions receive in the political process."[30] McConnell would, without balancing, immediately grant exemptions in cases that fall within the first and third categories, and deny them in cases within the second.

This categorical approach, however, does not succeed even as a limited response to the problems raised in exemption analysis. Indeed, it may exacerbate some of the difficulties. This is most apparent with respect to McConnell's first category—cases where the injury sought to be prevented by the state is internal to the religious community. As an example of this type of case, McConnell cites *Alamo Foundation v Secretary of Labor*.[31] In *Alamo*, the Court unanimously rejected a free exercise challenge to wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act as applied to commercial enterprises run by a religious organization ostensibly in furtherance of the organization's religious mission.[32] The Alamo Foundation employed a number of its members ("associates") in its enterprises and provided them with food, clothing, shelter, and other benefits rather than cash salaries.[33] This arrangement was apparently acceptable to the Foundation's employees because the receipt of wages allegedly conflicted with the religious beliefs of the Alamo religion.[34]

McConnell argues that a free exercise exemption from the FLSA should have been granted: "if members of the Alamo religious movement are inspired to work for the glory of God for long hours at no pay, their neighbors are not injured and the government has no legitimate power to intervene."[35]

The problem of course is that Alamo's neighbors *are* injured. The Foundation's business competitors are unfairly disadvantaged by the Foundation's reduced labor costs.[36] Non-Foundation employees may be harmed by the resulting "downward pressure on wages in competing industries."[37] Indeed, the whole neighborhood may be harmed if the Foundation's employees need to seek state

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[30] Id at 1147.

[31] 471 US 290 (1985), discussed in McConnell, 57 U Chi L Rev at 1145-46 (cited in note 2).

[32] *Alamo*, 471 US at 306. The Foundation's businesses included service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and candy production and distribution companies. Id at 292.

[33] Id at 292.

[34] Id at 303.

[35] McConnell, 57 U Chi L Rev at 1145 (cited in note 2).

[36] *Alamo*, 471 US at 299.

[37] Id at 302.

medical or welfare assistance because of their own lack of financial resources. Even the conclusion that any harm to the Foundation's own employees is not a matter of legitimate state concern is questionable. The state has a strong interest in assuring that the superior bargaining power of employers does not coerce employees to agree "voluntarily" to substandard wages.[38] There is no reason to believe that this interest is in any way diminished when the employer is a religious organization.[39] McConnell's conception of "internal," in short, evokes an economic and social insularity that is not realistic.[40] In a complex and interdependent society, few cases, if any, are likely to implicate matters that are the sole concern of the religious community.[41]

McConnell's second category would reject exemption claims that would make the religious believer better off than others, in the absence of the challenged regulatory enactment. His application of this principle, however, seems too limited to be meaningful. Again, the *Alamo* case is illustrative. Because exemption would allow it to pay lower wages than its competitors, the Alamo foundation is clearly better off relative to its business competitors after exemption than it would be had the FLSA never been enacted. One would then think that *Alamo* presents the archetypal second-category case where exemption should be denied. McConnell, however, supports the Alamo Foundation's claim for exemption.[42]

More broadly, although not necessarily better off relative to others in the absence of any regulation at all, exemptions will always make those exempted "better off" relative to others. Granting only religious objectors exemptions from neutral laws necessarily makes them better off than non-religious objectors whose claims will be denied. The Amish in *Wisconsin v Yoder*[43] are better off

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[38] Id.

[39] Rather, the combined religious and economic authority that a religious organization may have over one of its member-employees suggests that, if anything, its power to coerce is increased.

[40] McConnell's conception resembles the Court's early (and narrow) interpretation of Congress's Commerce Clause power. Compare *Railroad Retirement Board v Alton R.R. Co.*, 295 US 330, 357, 360 (1935), and *Hammer v Dagenhart*, 247 US 251, 273 (1918), with *Heart of Atlanta Motel v United States*, 379 US 241, 258 (1964), and *United States v Darby*, 312 US 100, 122-23 (1941).

[41] Even McConnell acknowledges, for example, that Bob Jones University's practice of racial discrimination may have effects outside the school's own campus. McConnell, 57 U Chi L Rev at 1146 (cited in note 2).

[42] To be fair, McConnell does not discuss *Alamo* in the context of his second category. Nevertheless, he clearly feels that the exemption in *Alamo* was wrongly denied. Id at 1145 n 160.

[43] 406 US 205 (1972).

having couched their objection to compulsory education in religious terms than a group of Thoreauians whose objection would be based on social or political grounds. Indeed, as shall be discussed, the essential problem with religious-only exemptions is that they necessarily create this form of disparity. If properly applied, McConnell's second category would eliminate the free exercise exemption.[44]

McConnell's third category allows exemptions in cases where minority religions seek the same consideration that majority religions have already received through the political process. McConnell even provides a helpful test to determine the cases that fit this category: Is the government interest so important that it would interfere with majority religious practice in order to effectuate it?[45] The application of this test, according to McConnell, would make many cases easy:

> Who can doubt that unobtrusive exceptions to military uniform regulations would be made if Christians, like Orthodox Jews, had to wear yarmulkes at all times? Who can doubt that there would be exceptions to social security (or, more likely, no social security at all) if mainstream Christians were forbidden by their religion to participate? . . . Other cases would come out the other way. A country could probably not survive if it allowed selective conscientious objection to war. Nor would it allow trespass or interference with the private rights of others. A government interest is sufficient if it is so important that it is not conceivable that the government would waive it even if the religious needs of the majority so required.[46]

The central problem with this test, however, is that it is virtually useless as an analytical tool because it fails to differentiate between valid and invalid claims. Quite simply, if this test were honestly applied, it is doubtful that any cases "would come out the other way." A society is never likely to find a strong regulatory interest in a measure that is hostile to the majoritarian tradition, and accordingly is unlikely to pass such a measure in the first place. Of course, at one level this conclusion reinforces McCon-

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[44] McConnell does not clearly define the parameters of his second category. He suggests that it would apply in cases in which the exemption would create an "incentive" for religious practice, but the term "incentive" is not developed. McConnell, 57 U Chi L Rev at 1145-46 (cited in note 2).

[45] Id at 1147.

[46] Id at 1148 (citations omitted).

nell's thesis, discussed below, that majority religions will seldom burden themselves and that minority religions therefore require special protection. At a more fundamental level, however, it reflects an understanding of the interplay between religious tradition, culture, and law which demonstrates the critical weakness of McConnell's argument.

Specifically, McConnell ignores that the measure of the importance of a state interest underlying a government prohibition is a function of the mores of the society, and those mores, in turn, are often a function of that society's religious values and traditions. The conclusion that polygamy should be proscribed, for example, is premised upon a cultural tradition intimately tied to this nation's religious beliefs and traditions. Thus, although polygamy would certainly not be prohibited if it were part of majority Christian practice, the "if" in this statement presupposes a social structure different from the existing one. A society in which polygamy is a majority religious practice is not the society in which we live. McConnell's test measures the regulatory interests of a culture that does not exist rather than the one that does.

McConnell's failure to recognize the role of religious tradition in the creation of social norms is equally apparent in his assertion that the state will protect against "trespass or interference with the private rights of others"[47] even if those protections conflict with the religious majority. Even assuming this statement to be true, "trespass," "interference," and "private rights" are all terms that must be interpreted according to the mores of the society—mores influenced by the society's religious values and traditions. Again, the religious background of society will influence the nature of the state interest. One cannot assume the existence of a religiously neutral society from which to measure the importance of state interests.

II. Exemptions and the Two Faces of Equality

McConnell and I also disagree on the role that equality must play in the free exercise context. McConnell relies on a concern of denominational equality in his support of the free exercise exemption. I, in contrast, rely on a concern for belief system equality in arguing that the free exercise exemption should be rejected.

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[47] Id.

A. Denominational Equality

McConnell's most sympathetic argument is that the denial of exemptions would have a disproportionate impact on minority groups. He is correct in noting that neutral restrictions have disproportionate impacts. This phenomenon, of course, is not unique to religion. One seeking to protest against a government policy by camping out in Lafayette Park[48] is more adversely affected by a government regulation prohibiting that activity than is one who seeks to protest in another manner. Normally, however, concerns of disproportionate impact do not support constitutional claims unless there is also an improper intent.[49]

Nevertheless, facially neutral laws are arguably more problematic in the free exercise context than in other contexts. As just noted, cultural traditions and social mores generally reflect majoritarian religious beliefs. Legislators are more likely to be aware of majoritarian religious practices (their own) when they fashion general regulations, and thus are unlikely to place disabilities on those practices. Similarly, they are less likely to be concerned with religious practices outside their religious tradition and accordingly are more likely to place burdens on those practices inadvertently.[50] McConnell thus plausibly argues that concerns of denominational neutrality might support allowing exemptions in those cases where the challenged regulation results in de facto inequality for a minority religious practice.[51]

On the other hand, the free exercise exemption "cure" is arguably worse than the "disease"—i.e., the harm to religious exercise created by neutral laws. After all, even without the free exercise exemption, the constitutional protection for religion is extensive and stringent. The Free Exercise Clause itself prohibits any direct attempt to single out religion for adverse treatment,[52] and the Free Speech Clause includes the protection of prayer, proselytizing, preaching, and aspects of religious conscience in its ambit.[53] Moreover, the incidental de facto inequality created by

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[48] *Clark v Community for Creative Non-Violence*, 468 US 288 (1984).

[49] See *Washington v Davis*, 426 US 229, 239-40 (1976).

[50] See Pepper, 1986 BYU L Rev at 314 (cited in note 9); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L Rev 993, 1015-16 (1990).

[51] But see text at note 54.

[52] *McDaniel v Paty*, 435 US 618, 629 (1978). In *McDaniel*, the Court declared unconstitutional a statute that barred "[m]inister[s] of the Gospel, or priest[s] of any denomination whatever," id at 621 n 1, from seeking office in the state house of representatives.

[53] See, for example, *Widmar v Vincent*, 454 US 263, 269 (1981).

neutral laws is just that—incidental. It occurs only randomly and haphazardly. Some minority religious beliefs will be aligned with majority beliefs, while other minority beliefs will not. The Amish, unlike Jews, are not disadvantaged by Sunday closing laws.[54] In other circumstances this pattern will be reversed. Jews, unlike the Amish, are not disadvantaged by social security laws.[55] One need not fully accept Professor Mark Tushnet's claim that in a complex society "the overall distribution of burdens and benefits is likely to be reasonably fair"[56] to acknowledge that minority religions will be on both sides of neutral laws.

Yet, one could argue that even if the harms to minority religion created by neutral laws are not pervasive or systemic, the concerns of denominational equality are so fundamental that they should still be redressed. This argument, however, ignores the harms that the free exercise exemption creates. As noted in Section I, exemption analysis is unduly problematic and counterproductive even to free exercise concerns.[57] Those reasons alone support its abandonment.

B. Equality of Belief

The free exercise exemption, however, raises another serious concern. Granting exemptions only to religious claimants promotes its own form of inequality: a constitutional preference for religious over non-religious belief systems.

Case law readily illustrates this problem. In *Wisconsin v Yoder*, the Court explicitly stated that constitutional exemption from compulsory education requirements was available only to the Amish on religious grounds and would not be available to a non-religious group seeking exemption because of adherence to, for example, the philosophical precepts of Henry David Thoreau.[58] Similarly, in *Thomas v Review Board*, the Court held that exemption from unemployment insurance requirements would be available to an individual whose religious tenets prevent him from working in an armaments factory, but would not be available to one whose claim was based upon "personal philosophical choice."[59]

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[54] See *Braunfeld v Brown*, 366 US 599, 603 (1961).

[55] See *United States v Lee*, 455 US 252, 257 (1982).

[56] Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 Georgetown L J 1691, 1700 (1988).

[57] See text at notes 9-15.

[58] 406 US 205, 216 (1972).

[59] 450 US 707, 713 (1981). *Thomas* also illustrates a problem noted earlier: How can a factfinder distinguish between those beliefs that are religious and those that are philosophi-

This favoritism for religious belief over other beliefs itself raises serious constitutional concerns. Most obviously, a constitutional preference for religious belief cuts at the heart of the central principle of the Free Speech Clause—that every idea is of equal dignity and status in the marketplace of ideas.[60]

The free exercise exemption also offends Establishment Clause principles. Special treatment for religion connotes sponsorship and endorsement;[61] providing relative benefits for religion over non-religion may have the impermissible effect of advancing religion.[62] In fact, the type of discrimination created by the free exercise exemption is arguably worse than the de facto inequality purportedly redressed by the exemption analysis because it is intentional, a matter of critical concern in equal protection analysis.[63] The explicit assertion in the free exercise claim that religious belief is uniquely entitled to constitutional protection[64] is also troublesome from another equal protection vantage. As the Court has noted, explicit endorsement of inequality is particularly egregious because it sends a clear message of second-class status.[65] Thus, the explicit inequality required by the free exercise exemption analysis more directly and powerfully harms equality interests than does the inadvertent de facto discrimination caused by generally applicable laws.

Importantly, religious belief cannot be qualitatively distinguished from other belief systems in a way that justifies special constitutional consideration. For example, bonds of ethnicity,[66] interpersonal relationships,[67] and social and political relationships[68] as well as religion may be, and are, integral to an individual's self-

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cal, moral or social? In *Thomas* the United States and Indiana Supreme Courts disagreed as to how to characterize Thomas's objection, the former finding it to be religious and the latter holding it to be philosphical. Id at 714-15.

[60] See, for example, Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U Chi L Rev 20, 25 (1975).

[61] See, for example, *King's Garden, Inc. v FCC*, 498 F2d 51, 55 (DC Cir 1974).

[62] See *Texas Monthly, Inc. v Bullock*, 489 US 1, 15 (1989) (plurality opinion).

[63] *Washington v Davis*, 426 US at 239-40.

[64] McConnell, 57 U Chi L Rev at 1152 (cited in note 2).

[65] See, for example, *Brown v Board of Education*, 347 US 483, 494 (1954).

[66] William P. Marshall, *Discrimination and the Right of Association*, 81 Nw U L Rev 68, 86 (1986).

[67] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L J 624, 635-37 (1980); *Roberts v United States Jaycees*, 468 US 609 (1984).

[68] Robert A. Nisbet, *The Quest for Community* 70-73 (Oxford, 1968); Douglas O. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 Mich L Rev 1878, 1882 (1984).

identity.[69] Similarly, both non-religious and religious groups further the values of pluralism by fostering diversity within society and forming "intermediate communities" that shield the individual from the state.[70]

McConnell argues that religious belief is uniquely entitled to exemption because it involves a duty to God—a transcendent sovereign.[71] This contention, however, is neither persuasive nor fully accurate. First, to the extent that it depends on a notion that special suffering attaches to violations of extra-temporal obligations, the argument is extraordinarily overbroad. The violation of deeply held moral or political principles may cause as much psychic harm to the believer as would a violation of a religious tenet, even if the latter is believed to have extra-temporal effect.[72]

Second, not all religions are theistic—Buddhism and Taoism are but two examples.[73] Moreover, even with respect to theistic religions, some religious exercise is based upon religious custom rather than divine obligation.[74] Belief in an external sovereign, therefore, does not distinguish religious belief from all other forms of belief. McConnell then may not rely upon any purported special significance of extra-temporal belief as justifying special treatment for religious exercise because not all religious exercise is premised upon extra-temporal obligation.[75]

Perhaps the most significant evidence of the constitutional equivalency between religious and non-religious belief systems, however, is the critical role they share in the social and political process. Religion is not insular. It is a powerful social and political force that competes with other forms of belief in the shaping of the

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[69] Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 NC L Rev 303, 307 (1986). But see Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw U L Rev 1115, 1166 n 208 (1988). Even Conkle, however, ultimately does not defend the religious/non-religious distinction.

[70] Garet, 56 S Cal L Rev at 1034-35 (cited in note 4); Marshall, 40 Case W Res L Rev at 380-82 (cited in note 7).

[71] McConnell, 57 U Chi L Rev at 1151-52 (cited in note 2).

[72] See John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 Conn L Rev 779, 793 (1986); David A. J. Richards, *Toleration and the Constitution* 96-97 (Oxford, 1986).

[73] See *Torcaso v Watkins*, 367 US 488, 495 n 11 (1961).

[74] Dietary laws, for example, may be products of religious custom rather than divine obligation.

[75] It could be argued that *only* theistic claims should be entitled to free exercise exemption because of the allegedly special significance attached to extra-temporal obligation. This position, however, would run afoul of the concern for denominational neutrality lying at the heart of the exemption argument. The Court itself has suggested that theistic and non-theisteic religious beliefs are constitutionally equivalent. See *Torcaso*, 367 US at 495.

mores and values of the society which, in turn, become part of the society's political landscape. Thomas's claim that it is wrong to engage in armaments work or Bob Jones University's claim that racial discrimination is divinely based are morally and politically laden and, if accepted by enough persons, would dramatically influence social and political reactions to those issues. Religious views on the sanctity of life form a part of the social and moral background from which political issues as diverse as capital punishment, abortion, animal rights, the environment, and foreign policy will be resolved.[76]

The recognition of religion's influential role in the social and political process also demonstrates that the fundamental inequality created by the free exercise exemption extends beyond the individual unfairness illustrated by cases such as *Thomas*, where religious pacifists win while moral or philosophical pacifists lose. Exempting religious beliefs and organizations from neutral laws enhances religion's ability to influence social norms and the political process. If the religious exemption works to insulate religious beliefs from social forces, as McConnell urges it should,[77] those beliefs will enjoy a false vitality in the political arena relative to competing secular beliefs that must stand or fall on their own accord. If religious organizations are exempted from regulatory requirements such as the FLSA, social security, or sales tax obligations,[78] for example, they will have more resources available to carry on their religious enterprise, proselytize, and disseminate ideas. Furthermore, judicial vindication through the free exercise exemption is its own reward. A Supreme Court decision granting exemption in *Bob Jones*, for example, would have bestowed a credibility and legitimacy upon the religious belief in question simply by its being

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[76] Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 77, 156-60 (Oxford, 1988); Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 Wm & Mary L Rev 1011, 1060 (1985-86). Significantly, it is partly because of religion's influence in the political process that McConnell asserts that minority religions need exemption from secular law. "In a world in which some beliefs are more prominent than others, the political branches will inevitably be selectively sensitive to religious injuries." McConnell, 57 U Chi L Rev at 1136 (cited in note 2).

[77] McConnell suggests that the essence of the free exercise clause is "counter-assimilationist." Id at 1139.

[78] *Alamo Foundation v Secretary of Labor*, 471 US 290 (1985) (FLSA); *United States v Lee*, 455 US 252 (1982) (social security); *Jimmy Swaggart Ministries v Board of Equalization of Cal.*, 110 S Ct 688 (1990) (sales tax).

judicially recognized as constitutionally sacrosanct. Other forms of belief will not acquire this special judicial reinforcement.[79]

C. McConnell's Response

At this point, McConnell has two responses. First, he argues that the anti-exemption position is inconsistent, and second that the Constitution prefers religious belief, functional equivalency aside.

McConnell's assertion that the anti-exemption position is inconsistent is based on *Smith*'s endorsement of statutory religious exemptions.[80] As McConnell argues, "[i]f there is nothing wrong with statutory commands of the sovereign that make exceptions from generally applicable laws in cases of conflict with religious conscience, then there should be nothing wrong with constitutional commands of the same sort."[81]

While *Smith's* apparent wholesale endorsement of statutory exemptions helps McConnell with this argument, a more careful assertion that statutory religious exemptions may be permissible in some circumstances does not cede as much as McConnell suggests. To begin with, statutory exemptions present a different inquiry than do constitutional exemptions. Statutory exemptions raise the Establishment Clause issue of what the Constitution allows; the free exercise exemption asks what the Constitution requires. A conclusion that the Free Exercise Clause does not require a particular result does not mean that the Establishment Clause necessarily prohibits that result. As McConnell himself has argued, there should be some space for permissible legislative action between the two constitutional commands.[82]

Furthermore, the nature of the establishment inquiry differs from its free exercise counterpart. Establishment inquiry considers the extent to which a government action may be interpreted as the endorsement of religion.[83] Limited statutory exemptions, however, do not necessarily send this forbidden message.

Finally, McConnell's analogy between the constitutionally compelled free exercise exemptions and statutory exemptions fails

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[79] A holding under the Free Speech Clause that racist speech is protected does not have this same legitimizing effect because, unlike the free exercise claim, the protection of racist speech does not require the court to find that the idea in question stems from a divine belief.

[80] *Smith*, 110 S Ct at 1606.

[81] McConnell, 57 U Chi L Rev at 1150 (cited in note 2).

[82] Michael W. McConnell, *Accommodation of Religion*, 1985 S Ct Rev 1, 3.

[83] See, for example, *County of Allegheny v ACLU Greater Pittsburgh Chapter*, 109 S Ct 3086, 3100 (1989).

on its own terms. Unlike constitutional exemptions, statutory exemptions are not presumptively valid. Those that benefit only religious institutions face stringent constitutional review on such grounds as establishment,[84] free speech,[85] and equal protection.[86] The claim for the free exercise exemption, on the other hand, creates a presumption in favor of vindicating the free exercise interest—a presumption that offends the countervailing constitutional concerns.[87] In short, it is the *rejection* of the free exercise claim—not its acceptance—that is most consistent with the constitutional treatment of statutory religious exemptions.[88]

McConnell's case thus must ultimately rest on the contention that the Constitution prefers religious belief. He is prepared to make this argument. In the last section of his article, he candidly asserts that the free exercise exemption reflects a constitutional recognition of the theological position "that God is sovereign" and the commensurate political position "that government is a subordinate association."[89]

Obviously, if the Free Exercise Clause endorses religious belief in this manner, it would support the contention that the favoritism of religiously-based belief systems over non-religiously-based sys-

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[84] See, for example, *Texas Monthly, Inc. v Bullock*, 489 US 1, 15 (1989) (state statutory sales tax exemption for religious periodicals violates the Establishment Clause); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327, 334-35 (1987) (applying Establishment Clause scrutiny to a religious exemption from Title VII's prohibition against religious discrimination in employment).

[85] *Texas Monthly*, 489 US at 25-26 (White concurring) (statute that provides tax exemption for religious publications discriminates on basis of content of publication and therefore violates Free Press Clause of First Amendment).

[86] *Milwaukee Montessori School v Percy*, 473 F Supp 1358, 1359 (E D Wis 1979) (day-care licensing statute which created distinction between private parochial schools and other private schools was an unconstitutional denial of equal protection).

[87] Presumptive deference to statutory exemptions also exacerbates the concerns of improper favoritism for religiously-based belief systems over non-religiously-based systems created by the free exercise exemption. Tushnet, 1989 S Ct Rev at 379-80 (cited in note 6).

[88] The inconsistency that McConnell attacks would exist, if at all, only if the Court were readily to defer to legislatively created religion-only exemptions while simultaneously denying the free exercise claim. Justice Scalia, in particular, seems to be embarking on this course. Compare *Smith* with *Texas Monthly*, 489 US at 29, 58 (Scalia dissenting). However, there is nothing inherent in allowing statutory exemptions that is inconsistent with denying the free exercise claim as long as religion-only statutory exemptions are subject to rigid scrutiny.

[89] McConnell relies heavily on Madison's *Memorial and Remonstrance Against Religious Assessments* in making this argument. McConnell, 57 U Chi L Rev at 1151-52 (cited in note 2). Madison, however, cannot be too easily claimed as authority for this position. In other writings, Madison is quite clear in his opposition to special exemption for religion. See West, 4 Notre Dame J L, Ethics & Pub Pol at 627-30 (cited in note 6) and authorities cited therein.

tems is not constitutionally suspect (although it would perhaps support special deference only to theistic religious claims).[90] This position, however, is more revisionist than *Smith*. At least since 1944, the Court has rejected the claim that the Constitution prefers one particular mode of belief. As the Court stated: "it may be doubted that any of the great liberties in the First Article can be given a higher place than the others."[91]

McConnell's proposed change in constitutional understanding would require fundamental changes in other doctrinal areas. First, it suggests that Establishment Clause norms have been too rigidly enforced. If the recognition of allegiance to God is a preeminent constitutional value, then government bodies should be able to publicly acknowledge this fact without running afoul of the Constitution.[92] Similarly, if religious belief is supreme, the legality of direct aid to religions in the pursuit of their religious mission should also be reexamined.[93] McConnell's assertion is also inconsistent with Speech Clause principles. It suggests that content-discrimination in favor of religious ideas might be permissible under the Speech Clause.[94] And in cases in which both speech and free exercise rights are implicated, a content-based result in favor of religious speakers might be required.[95] Finally, McConnell's proposition suggests that laws that favor religion over non-religion should be readily upheld—establishment, equal protection, and speech principles notwithstanding.

Precedent then is clearly not on McConnell's side. Neither is text or history. That the text of the First Amendment explicitly references religion and not other belief systems does not support the conclusion that religion is the preferred value. Rather, the explicit reference to religion reflects the fact that religious groups had often been persecuted and therefore needed special protection. The text, in short, is consistent with protecting religion from discrimination; it does not compel discrimination in favor of religion.

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[90] See text at notes 73-75.

[91] *Prince v Massachusetts*, 321 US 158, 164 (1944).

[92] Compare *Engel v Vitale*, 370 US 421, 424 (1962) (finding an Establishment Clause violation in the daily recital of a denominationally neutral prayer in public schools despite the fact that students were free to remain silent or be excused from the room while the prayer was being read).

[93] Compare *Grand Rapids School District v Ball*, 473 US 373, 382 (1985); *Committee for Public Education v Nyquist*, 413 US 756, 798 (1973); *Lemon v Kurtzman*, 403 US 602, 612-13 (1971).

[94] Compare *Texas Monthly*, 489 US at 25-26 (White concurring).

[95] See text at notes 22-23.

Nor does history support the supremacy of religion claim. In another article, McConnell argues that the rejection of the term "conscience" in an earlier draft of the First Amendment is evidence that the framers rejected the protection of all conscience in favor of protection for religious conscience only.[96] This historical claim, however, does not refute the contention that the protection provided by the Free Exercise Clause was limited to direct persecutions of religious exercise and was not intended to provide religion with special benefit over and above other types of belief.[97]

Moreover, the history and text arguments are weakened by the fact that the Establishment Clause suggests that the framers did not see religion as the beneficent force that McConnell assumes. Instead, the Establishment Clause uniquely singles out government advancement of religion as a matter to be avoided. Because there is no comparable limitation on other types of belief systems, the claim that religion is preferred is not persuasive.[98]

The non-establishment point is particularly critical given the role of religion in politics and society. As noted previously, religion is a primary force in the development of cultural mores and values. To suggest that religion receive added vitality in this role by either directly aiding its dissemination or insulating it from other social forces wholly distorts the non-establishment principle.

Indeed, although the free exercise exemption helps religion extend its political and social influence,[99] it does not protect the integrity of religion itself. First, the integrity of religion does not benefit from a system that encourages individuals to characterize their beliefs in religious terms in order to gain government beneficence or exemption.[100] Religion is not served when it becomes the tool for fraudulent or specious claims.[101] Second, and more importantly, the inviolability of religious belief, the concern most pressing to McConnell, is not preserved by constitutional exemptions that nevertheless require claimants to vindicate their religious beliefs in court. The religious believer still submits to secular author-

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[96] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1410, 1495 (1990).

[97] Hamburger (forthcoming) (cited in note 7).

[98] In his response, McConnell argues there is inconsistency in not allowing religion to be singled out for free exercise purposes while allowing it to be singled out for establishment purposes. See McConnell, 58 U Chi L Rev at 330 (cited in note 13). He misses the point. If the Establishment Clause prohibits special advancement of religion, it would be inconsistent to read the Free Exercise Clause as *requiring* special advancement.

[99] See text at notes 76-79.

[100] West, 4 Notre Dame J L, Ethics & Pub Pol at 603-04 (cited in note 6) (citing *Mone v Commissioner of Internal Revenue*, 774 F2d 570, 571 (2d Cir 1985)).

[101] See *United States v Kuch*, 288 F Supp 439, 443, 445-46 (D DC 1968).

ity, and a secular authority still rules on the religious claim.[102] Third, the claim that religious beliefs somehow need special insulation and greater protection than their secular counterparts demeans religion. It implies that religion cannot survive on its own. It thus conflicts with the principle of religious voluntarism which posits "that spiritual and ideological claims [should] seek recognition on the basis of their intrinsic merit."[103]

Finally, McConnell's claim that religion should be treated as the product of an externally imposed obligation ignores another understanding of religion—one that holds that religion, along with other quests for ultimate Truth, should be treated as a product of man's freedom rather than his external obligation.[104] Significantly, it is this latter view that is more consistent with the commitment to freedom expressed in the First Amendment itself.[105]

In the end what is important about McConnell's assertion of the constitutional priority of religious obligation is that it identifies the assumptions necessary to support the free exercise claim for exemption. Religion must be viewed as a product of theistic obligation rather than individual freedom, and the Constitution must be viewed as embodying a special commitment to that form of belief. If both assumptions are accepted, the claim for special religious exemption from neutral laws becomes plausible.[106] The premise that religion is based on duty to a sovereign God, however, is controversial from a religious standpoint. It ignores non-theistic religious belief and rejects a competing theistic religious concept that true faith in God is premised upon freedom. The assumption that the Constitution embodies a special commitment to theistic obligation, in turn, contradicts two essential constitutional themes. Special treatment belies equality; obligation opposes freedom. The

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[102] Some argue that the strength of religious belief is most fully developed when that belief opposes secular precepts. Stanley Hauerwas, *Freedom of Religion: A Subtle Temptation*, 73 Soundings 317, 319, 337 (1989). Compare Soren Kierkegaard, *Fear and Trembling* (Princeton, 1983).

[103] Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 Harv L Rev 513, 517 (1968).

[104] Rather than being antithetical to faith in God, the notion that religion is a product of freedom is itself profoundly religious. See generally Fyodor Dostoevsky (C. Garnett, trans), *The Brothers Karamazov*, "The Grand Inquisitor" 299-309 (Modern Library, 1950) (In Dostoevsky's work, Jesus is seen as offering freedom to humanity while the church, in contrast, is seen as offering miracle, mystery, and authority).

[105] Marshall, 40 Case W Res L Rev at 411 (cited in note 7).

[106] To be consistent with these assumptions, however, eligibility for exemption should be tied to theistic beliefs, and the exemption claim must still overcome the difficulties inherent in exemption analysis noted earlier.

case in favor of the free exercise exemption, in short, depends upon ill-advised leaps of faith.