THE DEVIL IS IN THE DETAILS: NEUTRAL, GENERALLY APPLICABLE LAWS AND EXCEPTIONS FROM *SMITH*

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In the wake of the Supreme Court's landmark decision in Employment Division v. Smith, *which overturned settled principles of free exercise jurisprudence, confusion abounds in the lower courts as to the reach and limitations of the Court's new test for determining the validity of free exercise claims. In this Note, Carol Kaplan examines the doctrinal reasoning and the substantive outcomes of lower court cases. She finds that while some of the inconsistencies are attributable to an absence of details in* Smith, *which sketched the bare contours of a new test without stepping through its application, other decisions resist the implications of* Smith, *and carve out such wide exceptions from its rule as to render it almost redundant. To address this problem, Kaplan first discusses the policy and jurisprudential goals that underlie the* Smith *decision. She then proposes a doctrinal model for the* Smith *test that furthers those goals by articulating the steps of the neutral, generally applicable analysis and delineating the boundaries of the exceptions to* Smith. *Kaplan concludes that* Smith *serves a bifurcated function that, on the one hand, seeks to ensure parity in the civil obligations of religious and secular citizens, while on the other, offers a tool for rooting out instances of legislative discrimination against religion and mandates that judges apply strict scrutiny to decisions by unelected administrative officials that impact upon the daily lives of all citizens.*

INTRODUCTION

In *Employment Division v. Smith*,[1] the Supreme Court held that two Native Americans who had used small amounts of peyote in a religious ritual were not eligible for an exemption from Oregon's drug control laws, as the challenged laws were "neutral" and "generally applicable."[2] The *Smith* ruling effected a fundamental shift in free exer-

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1 494 U.S. 872 (1990).

2 See id. at 884, 886 n.3. Alfred Smith and Galen Black, two Native American employees of a private drug rehabilitation center, admitted to using small amounts of peyote as part of a Native American religious ceremony. They were fired from their jobs and were refused unemployment benefits by the State of Oregon on grounds that they had been dismissed for "misconduct" for violating both the employer's strict policy against substance abuse by employees and an Oregon criminal statute prohibiting the use of peyote. See id. at 874. Black and Smith claimed that the criminal statute infringed on their rights to free exercise of religion. See id. Their claims were denied by Oregon's Department of Human

cise jurisprudence: It replaced the traditional compelling state interest test that had been utilized in religious accommodation cases since *Sherbert v. Verner*[3] with a test that presumes the constitutionality of any neutral, generally applicable law, even if it unintentionally burdens the free exercise rights of religious citizens.[4] The *Sherbert* test would still apply, however, to a narrow group of cases in which religious observers challenge laws or regulations containing a "mechanism for individualized exemptions."[5]

In the wake of *Smith*, confusion abounds in the lower courts, which interpret the Court's new test in significantly divergent ways. In some cases, the differences are substantially innocuous, as the ultimate holdings are in line with *Smith*. Still, these doctrinal inconsistencies warrant attention as they frustrate the lower courts' attempts to identify a coherent account of *Smith*. Moreover, some courts are interpreting *Smith* in at least two ways that undermine not only the Court's holding, but also the important jurisprudential and policy goals that the Court sought to promote. First, they construe the narrow "*Sherbert* exception" far too broadly, thus deciding more claims under the compelling state interest test than *Smith* intended. Second, they read *Smith* to provide an additional "hybrid rights" exception—which is controversial in itself[6]—and exacerbate the problem by interpreting this exception too broadly.[7] The effect of these two misinterpretations of *Smith* is that lower courts are producing decisions that are inconsistent with one another, and which, taken together, carve out so wide an exception to *Smith* as to render the case a nullity.

It is likely that courts misconstrue *Smith* because, as some commentators have observed, the decision was not well crafted and was based on mischaracterizations of precedent.[8] Furthermore, the *Smith*

Resources, but upheld by the Oregon Court of Appeals and affirmed by the Oregon Supreme Court. See id. at 874-75. The U.S. Supreme Court granted certiorari and overturned the rulings.

3 374 U.S. 398 (1963). The "*Sherbert* test" required courts to assess whether the state had imposed a substantial burden on the free exercise of religion, see id. at 403-04, and if so, to weigh the interests of the religious claimant against the state interest served by the law, see id. at 406-07. Only when the state interest was compelling, and where the challenged law was narrowly tailored to serve that interest, could the law be upheld. See id. at 407.

4 See *Smith*, 494 U.S. at 886 n.3 ("Generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling government interest . . . .").

5 Id. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)); see also infra notes 23-27 and accompanying text.

6 See infra note 13.

7 See infra notes 100-31 and accompanying text.

8 See, e.g., William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 308-09 (1991) (criticizing opinion as "neither persuasive nor well-

opinion itself does not articulate clearly a test for determining what is a neutral, generally applicable law,[9] nor does it expressly clarify how narrowly or broadly the *Sherbert* exception should be construed.[10] At the same time, *Smith* offers no clear indication of whether its reference to precedents that it describes as "hybrid situations"[11] establishes an additional exception to *Smith*. The Supreme Court has not yet spo-

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crafted," exhibiting "a shallow understanding of free exercise jurisprudence [with a] use of precedent [that] borders on fiction," and as "paradigmatic example of judicial overreaching" in that its "landmark result" holding nevertheless "extends beyond the facts of the case"); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1120 (1990) (criticizing opinion's use of precedent as "troubling, bordering on the shocking"); see also *Smith*, 494 U.S. at 903 (O'Connor, J., concurring in judgment) (declaring that same result could be reached under existing free exercise precedents and thus majority's strained reading of same is unnecessary); id. at 908 (Blackmun, J., dissenting) (criticizing majority opinion for its "distorted view of our precedents" and asserting that it was able to arrive at new rule "only by mischaracterizing" precedents).

[9] See, e.g., Douglas Laycock, Religious Freedom and International Human Rights in the United States Today, 12 Emory Int'l L. Rev. 951, 967 (1998) (commenting that "[t]he great ambiguity is that no one knows what is a neutral and generally applicable law"). As Laycock also points out, while there is evidence in *Smith* that the Court believes that "nearly all laws are neutral and generally applicable," there is also evidence that "religious practices are entitled to exceptions from regulatory laws in any situation where some secular practice also gets an exception," which would mean that "hardly any law is neutral and generally applicable." Id. In other words, "American laws are riddled with secular exceptions." Id.

[10] *Sherbert* and the cases that followed it involved denial of employment compensation to employees who were discharged because of religious practices. It remains unclear whether the Court in *Smith* intended to limit application of the *Sherbert* exception to such claims. See Rader v. Johnston, 924 F. Supp. 1540, 1552 n.23 (1996) (discussing split between courts over whether *Sherbert* exception applies outside of unemployment compensation cases and finding "no justifiable basis" for limiting consideration of exception to only those types of cases).

[11] *Smith*, 494 U.S. at 881-82 (referring to cases that involved "the Free Exercise Clause in conjunction with other constitutional protections" such as free speech, parental right to direct upbringing of children, and possibly freedom of association). Numerous commentators have questioned the validity of the hybrid rights exception. See, e.g., Joanne C. Brant, Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers, 56 Mont. L. Rev. 5, 30 (1995) (describing hybrid exception as "unartful tool to distinguish troubling precedent" and agreeing with critics who see hybrid exception as privileging combined claims over those involving free exercise rights alone, thus "making 'unenumerated rights superior to the enumerated ones'" (quoting Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 37)); James M. Donovan, Restoring Free Exercise Protections by Limiting Them: Preventing a Repeat of *Smith*, 17 N. Ill. U. L. Rev. 1, 4 n.18 (1996) (criticizing use of "ad hoc distinctions, such as [the Court's] convenient discovery of the 'hybrid' constitutional condition" in *Smith*); Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup. Ct. Rev. 323, 335 (describing common view among scholars that hybrid exception was "makeweight to 'explain' *Yoder*"); William L. Esser IV, Note, Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?, 74 Notre Dame L. Rev. 211, 213-14 (1998) (arguing that hybrid rights theory arose purely out of Court's need to carve out exception from its new rule in order to accommodate its decision in Wisconsin v. Yoder, 406 U.S. 205 (1972)); see also infra note 13.

ken on the question,[12] and the exception remains doctrinally very shaky.[13]

An additional reason why some courts produce decisions inconsistent with *Smith* may be that they resist the wider implications of the holding: The decision not only shifts the Court's interpretation of the Free Exercise Clause[14] and narrows its application,[15] but also implic-

[12] There is currently a circuit split over whether the hybrid rights exception is a valid exception to *Smith*. Compare Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704-05 (9th Cir. 1999) (applying hybrid rights exception and construing it to require that plaintiff "must make out a 'colorable claim' that a companion right has been infringed"), vacated, Nos. 97-35220, 97-35221, 2000 WL 1069977 (9th Cir. Aug. 4, 2000) (en banc), with Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (noting that it is difficult to "see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the . . . Clause if it did not implicate other constitutional rights" and refusing to apply hybrid rights exception "until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated"). While other courts do consider whether the hybrid exception applies to claims brought before them, most note the dubious status of the exception. See infra note 13.

[13] Justice Souter has deemed the hybrid rights exception "untenable," arguing that:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule. . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption . . . under another constitutional provision, then there would have been no reason . . . to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring); see also *Anchorage Equal Rights Comm'n*, 165 F.3d at 722-23 (Hawkins, J., dissenting) ("[T]here is real doubt whether the hybrid-rights exception even exists. . . . [T]he Supreme Court has never explicitly held [that it does]."); *Kissinger*, 5 F.3d at 180 (refusing to apply hybrid rights exception until Supreme Court decides that such exception exists); cf. Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998) ("It is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*. . . . [H]owever we believe that simply raising such a claim is not a talisman that automatically leads to the application of the compelling-interest test."). In *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 198-200 (3d Cir. 1990), the court undertook a detailed analysis of whether a right to freedom of association for religious purposes, in combination with a free exercise claim, might satisfy the hybrid rights exception. After observing that the hybrid exception in *Smith* appears to have changed the contours of rights to free speech, free exercise, and expressive association, the court concluded that it "would not expect a derivative right to receive greater protection than the right from which it was derived" and viewed as "particularly anomalous" a decision that would allow "corporate exercise [of religion to] receive[ ] greater protection than individual exercise." Id. at 199.

[14] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

[15] See McConnell, supra note 8, at 1111, 1116-19 (commenting that *Smith* "pushed to the forefront the central issue of interpretation of the Free Exercise Clause" and arguing that Clause can be interpreted either narrowly, to prohibit only deliberate discrimination against religion, or broadly, to provide maximum freedom for religious practice, and that historical record strongly suggests that narrow interpretation adopted by *Smith* Court is incorrect); see also Allan Ides, The Text of the Free Exercise Clause as a Measure of *Em-*

itly challenges long-held presumptions about the position of religion in society and makes courts institutionally irrelevant in the resolution of religious accommodation disputes.[16] Nevertheless, given that the Supreme Court reaffirmed *Smith* in a subsequent decision[17] and has deemed unconstitutional congressional attempts to undermine its holding,[18] lower courts should be dissuaded from misapplying *Smith* simply to find a way around its ruling.

This Note proposes a model for the *Smith* test that incorporates the reasoning of Supreme Court and lower court cases that have ap-

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ployment Division v. Smith and the Religious Freedom Restoration Act, 51 Wash. & Lee L. Rev. 135, 152 (1994) (noting that *Smith* Court chose narrow interpretation of Free Exercise Clause over expansive one, either of which would be plausible); R. Collin Mangrum, The Falling Star of Free Exercise: Free Exercise and Substantive Due Process Entitlement Claims in *City of Boerne v. Flores*, 31 Creighton L. Rev. 693, 700 (1998) (observing that while *Smith* avoided overturning prior, contrary case law, it nevertheless narrowed interpretation of scope of Free Exercise Clause, placing decision in tension with precedent); Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 153 (1997) (discussing *Smith* decision and declaring it to have "overturned precedent" in adopting narrow view of Free Exercise Clause, under which neutral, generally applicable laws "are categorically exempt from constitutional scrutiny, even when they prohibit or substantially burden religious exercise").

16 See infra Part I.B.

17 *Lukumi*, 508 U.S. at 547 (finding city ordinances prohibiting ritual sacrifice of animals nonneutral and not generally applicable under *Smith* and thus unconstitutional).

18 In response to *Smith*, Americans across the political spectrum joined in a powerful coalition that included religious leaders and churches, religious organizations, civil liberties organizations, politicians, and academics, and successfully lobbied Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (1994), to "restore the compelling interest test as set forth in Sherbert . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." Id. § 2000bb(b)(1). The Supreme Court overturned RFRA, however, declaring in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that Congress had exceeded the constitutional bounds of its powers. In so doing, the Court restored the *Smith* test, and with it, the controversy surrounding the decision. In the wake of *Boerne*, the same coalition lobbied Congress to pass the Religious Liberties Protection Act (RLPA), H.R. 1691, 106th Cong. (1999). The bill was passed by the House but has not yet been brought to a vote in the Senate where its prospects are unclear due to the withdrawal of support from civil rights and minority groups. See Jeremy Learning, RLPA Coalition Shrinks, Freedom Forum Online (Sept. 28, 1999) <http://www.freedomforum.org/religion/1999/9/28rlpacoalition.asp> (noting that coalition that lobbied Congress to pass RFRA included 60 groups, from conservative Christian Legal Society to liberal People for the American Way, but that "nearly half of the coalition's members announced they could no longer support RLPA" at meeting in September 1999 and withdrew, leaving little support for RLPA in Senate); see also Hearing on Religious Liberty Before the Senate Comm. on the Judiciary, 106th Cong. (June 23, 1999) (statement of Christopher S. Anders, Legislative Counsel, ACLU) <http://www.senate.gov/~judiciary/62399cea.htm> (discussing ACLU's opposition to RLPA on grounds that it could be used by religious advocates to deny basic rights to many minority groups); David E. Rosenbaum, House Approves Measure on Religious Rights, N.Y. Times, July 16, 1999, at A16 (discussing support from major religions for RLPA, but opposition from those who "worried that the law could be used as a defense by people accused of violating state or local antidiscrimination laws," as well as bill's unclear prospects in Senate).

plied *Smith* correctly. The purpose of the model is to clarify the doctrinal analysis implicit in the *Smith* decision. It is designed not only to correct doctrinal inconsistencies, including overly broad interpretations of the *Sherbert* exception, but also to narrow drastically those situations in which courts can apply the hybrid exception, at least until the Supreme Court has settled the controversy surrounding that issue. At such time, the model elaborated in this Note may be useful in demonstrating how the hybrid rights exception, unless significantly restricted by the Court, would undermine the important jurisprudential and policy goals that underlie *Smith*.

Part I of this Note examines the doctrinal changes to free exercise law that *Smith* has wrought, and considers the policy and jurisprudential goals that motivated the decision, as well as the wider implications of *Smith*. Part II surveys the decisions in the lower courts that produce inconsistent results, or circumvent *Smith* altogether, by confusing the *Smith* doctrine or construing the *Sherbert* and hybrid exceptions too broadly. Part III proposes a model for the *Smith* test that brings to the fore its bifurcated function: On the one hand, *Smith* requires that courts defer to ex ante legislative enactments of neutral, generally applicable laws; on the other hand, *Smith* expects courts to police ex post enforcement of laws and regulations by unelected government officials who wield considerable discretion. This Note concludes that it is only through strict application of the model developed herein that lower courts can mold a free exercise jurisprudence that is both fair and doctrinally coherent.

I

SMITH'S IMPACT ON FREE EXERCISE JURISPRUDENCE

Smith, which has been described as "the most important decision interpreting the Free Exercise Clause in recent history,"[19] transformed the doctrinal test that courts use to resolve religious accommodation disputes by eliminating the compelling state interest test for all but a narrow class of cases. Underlying the Court's decision were important jurisprudential and policy goals. Accordingly, when lower courts fail to apply the *Smith* test correctly, both the doctrinal and policy goals of *Smith* are undermined. In order to recognize the importance of a model that clarifies the functions of the *Smith* test, it is necessary to understand the doctrinal changes implemented by the decision, as well as the purposes underlying the reasoning in *Smith*.

[19] See McConnell, supra note 8, at 1114.

A. The Doctrinal Shifts in Smith *and Their Underlying Purposes*

Prior to *Smith*, free exercise jurisprudence applied the test first set forth in 1963 in *Sherbert v. Verner*,[20] which required the government to extend religion-based exemptions to any believer who demonstrated that a federal or state law substantially burdened her freedom to practice her religion, unless the government could prove that the law served a compelling state interest and was narrowly drawn to achieve that interest.[21] *Smith* reversed the presumption, holding that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[22] In other words, *Smith* established that unless a challenged law or regulation intentionally discriminates against religious conduct either on its face or in its operation, judges have no discretion to decide whether or not the plaintiff should be granted an exemption from the law on religious grounds.

Smith ameliorated this harsh sounding rule, however, by carving out the so-called *Sherbert* exception. The exception preserves the power of judges to invoke the compelling state interest test in those cases in which the concerns driving the Court in *Sherbert* are most pronounced. As the Court explained in *Smith*, "the *Sherbert* test . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[23] Indeed, most of the cases that followed *Sherbert* involved the denial of unemployment benefits to religious individuals by government employees who were accorded a high degree of discretion in making ex post as-

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[20] 374 U.S. 398 (1963) (holding that denial of employment benefits to Seventh Day Adventist who was terminated from job when required to work on Saturdays imposed unconstitutional burden on religious exercise).

[21] See id. at 403-07. The *Sherbert* test is a traditional balancing test which requires a court to weigh the extent to which a law burdens a claimant's freedom to practice her religion against the government's claimed interest. In *Sherbert*, the Court determined that denying the plaintiff unemployment benefits because she had lost her job rather than work on a Saturday and had refused other jobs because they required Saturday work schedules, "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." Id. at 404. In assessing the government's claimed interest in preventing fraudulent employment benefits claims that would dilute available funds, the Court asserted the need to apply strictest scrutiny "in this highly sensitive constitutional area." Id. at 406. The Court held that Sherbert's claim outweighed the state's interest. See id. at 406-09. Additionally, the Court found that if the state's concerns were compelling, it would nevertheless be incumbent upon the government to demonstrate that no other regulatory scheme could achieve the desired result without infringing on religious liberty. See id. at 407.

[22] Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990).

[23] Id. at 884.

sessments of applicants' eligibility for benefits.[24] By requiring that such claims be scrutinized strictly, the Court sought to ensure that citizens did not suffer unfair treatment on account of actions taken for religious reasons.[25] In keeping with this concern, *Smith* preserves the compelling state interest test in cases where the challenged law or regulation contains a "'mechanism for individualized exemptions,'"[26] that is, a standard whose criteria "invite consideration of the particular circumstances" behind an applicant's actions.[27]

Motivating *Smith*'s doctrinal shift is a set of interrelated, and somewhat complex, jurisprudential and policy goals. Justice Scalia, who wrote the majority opinion, sought to bring free exercise decisions in line with other areas of constitutional law by ensuring that the compelling state interest test applied to free exercise claims would be identical to the one applied to free speech and equal protection claims.[28] As Justice Scalia pointed out, in the free speech and equal protection fields, the compelling state interest test furthers constitutional norms,[29] whereas in the free exercise field it produces "a private right to ignore generally applicable laws—a constitutional anomaly."[30]

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24 See, e.g., Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (holding that denial of unemployment benefits to worker who refused to work on Sundays violates free exercise rights); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (same, for Seventh Day Adventist fired for refusal to work on Saturdays); Thomas v. Review Bd., 450 U.S. 707 (1981) (same, for Jehovah's Witness who quit job in factory when transferred to position manufacturing armaments).

25 The Court in *Sherbert* rejected the notion that the state could deny benefits to a citizen whose religion requires her not to work on a Saturday, as Sunday worshippers who object to working on their day of rest are expressly protected by state law. See *Sherbert*, 374 U.S. at 406 (noting that although state may authorize plants to operate on Sundays in times of national emergency, state statute expressly protects from discrimination Sunday worshippers who conscientiously object to Sunday work, so that "[n]o question of the disqualification of a Sunday worshipper for benefits is likely to arise, since [one] cannot suppose that an employer will discharge him in violation of th[e] statute"). In *Thomas*, the Court rejected the Review Board's determination that under state law "a termination motivated by religion is not for 'good cause.'" *Thomas*, 450 U.S. at 712-13, 720. In both cases the Court sought to limit the discretion of bureaucrats, holding that administrative officials may not conclude that religious reasons fail the generic "good cause" standard for determining eligibility for employment benefits. In *Hobbie*, the exemption from the regulations was made where employees lost their jobs "through no fault of their own," *Hobbie*, 480 U.S. at 138, which was no more precise than a "good cause" standard.

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

27 Id.

28 See id. at 885-86; see also McConnell, supra note 8, at 1137 (discussing *Smith* Court's concern with making free exercise jurisprudence compatible with precedents in areas of free speech, equal protection, and freedom of press).

29 See *Smith*, 494 U.S. at 885-86 (commenting that equal protection and free speech jurisprudence protect constitutional norms in that they guarantee "equality of treatment and an unrestricted flow of contending speech").

30 Id. at 886.

Furthermore, as several commentators have noted,[31] and as Justice Scalia implied,[32] courts that applied the compelling state interest test in free exercise cases tended to water it down. The reasons for this are obvious: In a society with a rich and increasingly diverse array of religious beliefs and practices, applying full blown strict scrutiny to every free exercise case would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," including environmental protection, public health, social welfare, and equal protection laws.[33] The Court responded to this problem in *Smith* by drastically narrowing the category of cases in which strict scrutiny applies, and then insisting that, in those cases, judges apply the test with full force. *Smith* therefore diminishes judicial power to grant religious citizens exemptions from their civic obligations, and thereby furthers another important policy goal: ensuring equal treatment of religious and secular citizens.[34] At the same time, *Smith* strengthens the Court's commitment to policing discriminatory bureaucratic decisionmaking, by requiring courts to apply strict scrutiny where claims resemble those in the unemployment cases.[35]

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31 See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994) (noting that compelling state interest test as applied to free exercise claims prior to *Smith* was "strict in theory but feeble in fact"). Other commentators point out that, prior to *Smith*, courts seldom found for the plaintiff even though they could apply the compelling state interest test to all free exercise claims. See infra note 134. More often than not, they deemed the interest to be compelling or the claimed burden to be insubstantial. See id.

32 See *Smith*, 494 U.S. at 883-84 (reviewing pre-*Smith* cases and finding that, except for unemployment compensation cases, Court "always found the [compelling state interest] test satisfied"); see also id. at 888 (commenting that "if 'compelling interest' really means what it says," many laws would not withstand test, and that watering down test in free exercise cases would "subvert its rigor in other fields where it is applied").

33 Id. at 888-89 (reviewing case law that would be undermined should Court decide that any legislation that does not further state interest "of the highest order" should be held "presumptively invalid[ ] as applied to the religious objector" (emphasis omitted)). But see McConnell, supra note 8, at 1141-43, 1151 (criticizing Court's "parade of horribles" as one-sided, and arguing that Free Exercise Clause is "a declaration that the right to practice religion is jurisdictionally beyond the scope of civil authority").

34 For the proposal that a theory of "equal regard" should underpin free exercise law, see Eisgruber & Sager, supra note 31, at 1255, 1283 (arguing that Religion Clauses should be interpreted to "require[ ] simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally" and comparing dedication of religious believers to those of secular artists (emphasis omitted)); see also Marshall, supra note 8, at 319-20 (discussing problem of exemptions for religious exercise which promote a form of inequality between religious and secular beliefs that "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").

35 See *Smith*, 494 U.S. at 884; see also supra notes 23-27 and accompanying text (describing *Sherbert* exception).

A related jurisprudential concern underlies the *Smith* Court's jaundiced view of the ability of courts to judge the merits of individuals' religious beliefs.[36] Pre-*Smith* jurisprudence required judges to assess whether the claimed burden on free exercise was "substantial" by inquiring into the sincerity of a plaintiff's beliefs and the centrality of the conduct in question to those beliefs.[37] Nevertheless, the Court frequently cautioned lower courts about the delicate nature of this task.[38] Taking a strong stand on the issue, *Smith* addressed the problem of judicial competence[39] by shifting the focus away from the merits of the

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[36] See, e.g., Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); Muslim v. Frame, 897 F. Supp. 215, 220 (E.D. Pa. 1995) ("The Court has repeatedly stated that judges should avoid being placed in a position in which they must determine the contours of religious doctrine. Such a determination, the Court found, is beyond the judicial competence."); see also Scott C. Idleman, The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power, 73 Tex. L. Rev. 247, 272 (1994) (discussing line of cases leading up to *Smith* that were concerned with, among other things, "the propriety of judicial examination of individual religious claims," and citing Court's concern over judicial competence in this area).

[37] See *Smith*, 494 U.S. at 886-87 (noting that it is inappropriate for judges to assess the centrality of individuals' religious beliefs); Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963) ("No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible."); see also Marshall, supra note 8, at 310-11 (discussing pre-*Smith* exemptions analysis, which required courts first to "determine, at a definitional level, whether the belief at issue is 'religious'[, then to] . . . determine whether the belief is sincerely held" and noting that this inquiry is not only "awkward and counterproductive," but also "places an official imprimatur upon certain types of belief systems to the exclusion of others," thereby "rais[ing] Establishment Clause problems" (citations omitted)).

[38] See, e.g., United States v. Lee, 455 U.S. 252, 263 n.2 (1981) (Stevens, J., concurring) ("[T]he principal reason for adopting a strong presumption against [claims for tax exemptions] is not a matter of administrative convenience [but] the overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims."). In *Thomas*, the Court noted that:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Thomas, 450 U.S. at 714.

[39] See *Smith*, 494 U.S. at 886-87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." (citation omitted)); *Frame*, 897 F. Supp. at 220 (noting that "the majority, the concurrence, and the dissent in *Smith* all agreed that a court lacked competence to determine whether a religious practice is central to a religion"); see also Brant, supra note 11, at 16-17 (observing that, in assessing validity of free exercise claims, judges have "resorted to notions of sincerity and centrality" and that *Smith* "assumes . . . that these determinations strain judicial competence to the breaking point," and thus "warns us that application of the compelling interest test in the free

plaintiff's claim entirely, and requiring instead that courts direct their inquiry toward the purpose, effect, structure, and enforcement of challenged laws and regulations.[40] Accordingly, where a law passes muster under the *Smith* test, judges have no recourse to any jurisprudential tool that empowers them to exempt a plaintiff from that law, even if the religious burden he or she suffers is extreme. As Justice Scalia tacitly acknowledged, this effectively punts the resolution of religious accommodation disputes back into the political process.[41] This result has wide-ranging ramifications in that it disturbs traditional notions of the position of religion in society, a result which, as is revealed next, some courts and commentators have vehemently resisted.

B. Smith*'s Wider Implications*

It should come as no surprise that the Supreme Court's decision in *Smith* unleashed a storm of rebuke aimed at the Court's apparent insensitivity to the needs of religious citizens and its abandonment of established free exercise doctrine.[42] Most commentators were highly critical of *Smith*,[43] some lambasting the Court for bearing an apparent

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exercise context places courts in the position of making arbitrary and unprincipled choices").

[40] See infra Part III.

[41] See *Smith*, 494 U.S. at 890 (commenting that decision does not banish "[v]alues that are protected against government interference . . . from the political process").

[42] See, e.g., Angela C. Carmella, A Theological Critique of Free Exercise Jurisprudence, 60 Geo. Wash. L. Rev. 782, 799 (1992) (finding both pre- and post-*Smith* protections for religious exercise to be inadequate); John Delaney, Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of *Oregon v. Smith*, 25 Ind. L. Rev. 71, 75 (1991) (describing *Smith* decision as de facto nullification of free exercise in context of criminal law); Frederick Mark Gedicks, The Rise and Fall of the Religion Clauses, 6 BYU J. Pub. L. 499, 505-06 (1992) (viewing *Smith* as abandoning "*Sherbert-Yoder* doctrine" and rendering free exercise of politically powerless religions "wholly dependent upon the goodwill of political majorities"); James D. Gordon III, Free Exercise on the Mountaintop, 79 Cal. L. Rev. 91, 116 (1991) (stating that *Smith* Court abdicated constitutional duty to enforce Free Exercise Clause); Douglas W. Kmiec, The Original Understanding of the Free Exercise Clause and Religious Diversity, 59 UMKC L. Rev. 591, 592 (1991) (asserting that historical analysis of Free Exercise Clause reveals constitutional error in *Smith* decision); Douglas Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 Geo. Wash. L. Rev. 841, 848 (1992) (seeing *Smith* decision as causing almost "total loss of any substantive constitutional right to religious practice"); McConnell, supra note 8, at 1129 (criticizing Court's theoretical argument in *Smith* as abandonment of its traditional role as protector of minority rights); see also Ira C. Lupu, Why the Congress Was Wrong and the Court Was Right—Reflections on *City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 793, 793 n.4 (1998) (listing sources expressing fears and dire pronouncements of clergy, scholars, and journalists on fate of religious freedom following *City of Boerne*).

[43] A handful of scholars disagreed with the criticism of *Smith*, but they were very much in the minority. See, e.g., Steven G. Gey, Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U.

hostility towards religious conduct by depicting it as a "cynical, disintegrating force bent on subverting the majesty of *The Law*."[44] Others predicted dire repercussions for liberal democracy in the wake of *Smith*, which they interpreted as stripping courts of the power to protect politically weak voices.[45] Some attributed the *Smith* decision to liberal discomfort with religious devotion.[46]

These and other academic discussions of *Smith* have emphasized the incommensurability of religious and secular realities, and the fact that there appears to be little chance of either viewpoint ever understanding or appreciating the values of the other.[47] Viewed in this way, the question of how to, or whether to, accommodate religious conduct that follows the dictates of a different sovereign—"God, whose law

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Pitt. L. Rev. 75, 95 (1990) (suggesting that *Smith* decision leaves principle of religious accommodation "exactly where it found it"); Marshall, supra note 8, at 308 (agreeing with *Smith*'s rejection of theory that religious accommodation is constitutionally compelled); Mark Tushnet, The Rhetoric of Free Exercise Discourse, 1993 BYU L. Rev. 117, 117 (noting that he is "among the relatively few who believe that the Court reached the right doctrinal result in *Smith*"). But cf. Eisgruber & Sager, supra note 31, at 1246, 1248 (arguing that while pre-*Smith* free exercise law was "in a shambles," *Smith* did little to improve situation, and rejecting both majority and minority views of function of Free Exercise Clause).

44 Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 Va. L. Rev. 671, 689 (1992).

45 See, e.g., Stephen L. Carter, The Resurrection of Religious Freedom?, 107 Harv. L. Rev. 118, 136-37 (1993) (arguing that churches and religious beliefs serve as bulwark against state tyranny by offering alternative viewpoints to that of state and that, to fulfill such role, churches and religious groups need courts' protection).

46 See id. at 138 ("The role of religions in the transmission of values . . . is viewed by many theorists of liberalism (as well as by secular political liberals) with a worrisome but perhaps understandable skepticism. . . . [L]iberalism [is] made uneasy by religious devotion . . . ."); see also Michael W. McConnell, "God Is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age, 1993 BYU L. Rev. 163, 173 (arguing that it is difficult for liberals to "appreciate the religious impulse," because "[f]aith seems antithetical to reason and obedience to higher authority seems submissive and antidemocratic. A liberalism based on individualism, independence, and rationalism thus has a tendency to see traditional religion as authoritarian, irrational, and divisive—as a potential threat to our democratic institutions.").

47 For example, one commentator has noted:

> The good life, seen through the eyes of biblical religion, is one of mutual obligation and submission . . . . [For this reason, i]ndividualism can be threatening to the religious sensibility because—understood in a particular way—it can foster and legitimate selfishness, self-love, even self-worship. The idea of independence or autonomy, similarly, can conflict with the conviction that we do not choose but we are chosen by God, whose law governs the universe . . . . And rationalism can easily be understood as opposed to faith and tradition. It can degenerate into skepticism and nihilism, the ultimate irrationality.

McConnell, supra note 46, at 172-73; see also Laycock, supra note 42, at 842 ("Religious issues are so intractable because different people have fundamentally different perceptions of reality. Serious secularists and serious religious believers do not understand each other well enough to even talk about the issues.").

governs the universe"[48]—becomes impossible for a secular judiciary to resolve without compromising its own neutrality in church-state relations.[49]

It is important to note, however, that *Smith* was provocative not only for the change it wrought in free exercise law, but also because the decision paved the way for a more fundamental questioning of our presuppositions about the power and role of religion in contemporary society.[50] The customary view of religion in free exercise jurisprudence is that, without the protection of the courts, some religions will be "crushed by the weight of majoritarian law,"[51] and that because religion provides an intrinsic good to society, its activities must be given special protections.[52] At least one commentator perceived in *Smith* a challenge to this view of religion as weak and politically disadvantaged, observing that the decision imagines religion as a potentially powerful force that is capable of "enter[ing] the political battlefield . . . to secure the accommodations most important to it."[53] Under this view, if religions can compete in the political marketplace of ideas, they have little need for the courts' protection except in cases of intentional acts of discrimination.[54] Other commentators responded to the suggestion in *Smith* that religious liberty should be protected only to the same degree as other constitutionally guaranteed First Amendment rights,[55] by rejecting the traditional idea that

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48 McConnell, supra note 46, at 173.

49 See Employment Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) (discussing Justice O'Connor's response to list of laws that may be open to challenge from religious citizens and noting that "[i]t is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice").

50 See Marci A. Hamilton, The Constitutional Rhetoric of Religion, 20 U. Ark. Little Rock L.J. 619, 619-20 (1998) (commenting that "[u]nderneath the messages about the outcome of cases rests [sic] unexamined presuppositions about religion, its power, and its role in society," and discussing "common wisdom," contradicted by *Smith* test, which holds that strict scrutiny is good for both religion and liberty).

51 Gedicks, supra note 44, at 690.

52 See John H. Garvey, All Things Being Equal . . ., 1996 BYU L. Rev. 587, 604-06 (arguing for privileging religious activity over morally neutral activities, because "[i]t follows from the goodness of religious practice that the government may not regulate religious expression because of its content").

53 Hamilton, supra note 50, at 624; see also id. at 622 (discussing how religion is depicted as both weak and in need of judicial support, and strong and politically capable, in constitutional debate); Marshall, supra note 8, at 321-22 ("Religion is not insular. It is a powerful social and political force that competes with other forms of belief in the shaping of the mores and values of the society which, in turn, become part of the society's political landscape.").

54 See Hamilton, supra note 50, at 624-25 (noting types of state activity that are not to be tolerated under *Smith*, including imposition or coercion of belief by state, religious persecution, and unfettered state discretion vis-à-vis religious belief or activity).

55 As Justice Scalia explained in *Smith*:

religious activities require special treatment, and advocating a free exercise jurisprudence that draws explicitly upon free speech doctrine.[56] Such a model suggests that it is only where the state deliberately undertakes to muzzle, constrain, or eradicate religious conduct that courts are required to intervene.

Smith thus paved the way for a paradigmatic shift in the legal and academic discourse about religious exercise.[57] Whether intentionally or not, *Smith* has confounded traditional ways of thinking about religion in society, exposing the need for a jurisprudence that equalizes the liberty interests between majority and minority religious groups,[58] and between religious and secular groups and individuals.[59]

> [W]e have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment. Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990) (internal citation omitted).

56 Scholars have argued that courts should develop a system of intermediate review of religious liberty claims, similar to the "time, place, and manner" analysis utilized in free speech jurisprudence. See, e.g., Frederick Mark Gedicks, An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions, 20 U. Ark. Little Rock L.J. 555, 572-73 (1998) (criticizing commentary on free exercise jurisprudence as failing to make any effort to "develop[ ] an intermediate position between the emphatically rejected exemption doctrine and the rubber-stamp rational basis review which this rejection seems to have left in its place" and arguing that available, alternative readings of *Smith* could yield standard of review analogous to time, place, and manner regulations of free speech, requiring close means-end relationship).

57 See, e.g., Eisgruber & Sager, supra note 31, at 1250-54 (criticizing majority and minority positions in *Smith* as turning on view of Free Exercise Clause as privileging religious exercise and proposing that, instead, Free Exercise Clause should be viewed as fulfilling protective function, and that "a claim for constitutional protection requires a showing of vulnerability or victimization"). Thus, while Eisgruber and Sager do not see in *Smith* itself a shift from viewing religious exercise as privileged to viewing it as in need of protection, they argue that the Court's decision requires new discourse on religious freedom. See id. at 1248 ("What is needed is a fresh start . . . . What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns.").

58 See, e.g., Marshall, supra note 8, at 311 (arguing that pre-*Smith* test, which required courts to determine whether conduct central to claimants' religious beliefs had been burdened, favored majority belief systems over minority ones because "[a] court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, [or] . . . when the belief . . . [is] incredulous").

59 See, e.g., Gedicks, supra note 56, at 567 (declaring that he has undergone change of heart as his "experience does not permit [him] to believe that religion and religious people hold the monopoly on moral conduct that would justify the extraordinary protection bestowed by religious exemptions"); cf. Eisgruber & Sager, supra note 31, at 1254-55 (rejecting exemption-based free exercise doctrine as "privileg[ing] religious commitments over other deep [secular] commitments that persons have" and comparing unequal effects of religious exemptions on artists and religious observers). According to the authors, while

It is these wider implications of *Smith*, which call into question long-held assumptions about liberty and equality, that some lower courts have been reluctant to accept. This is not surprising, given that a by-product of *Smith*'s reconfiguration of the judicial role is that religious adherents are forced to advance their interests through the political process, rather than through the courts. While Justice Scalia acknowledged that this "will place at a relative disadvantage those religious practices that are not widely engaged in," he believed it to be preferable to a "system in which each conscience is a law unto itself."[60] Clearly, this majoritarian solution would not reassure judges seeking to protect minority rights, especially in cases where plaintiffs are members of unfamiliar or marginal religious groups.[61] Furthermore, it may not be desirable for even established, mainstream religions to be forced to use the political process to win legislative exemptions, because injecting discussions of faith into political discourse may disadvantage some religions.[62] Nevertheless, however

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artists and the religiously observant may share a deep commitment such that they spend their "waking hours in devoted concentration," under an exemption-driven jurisprudence only the religious believer is "entitled in principle to arrangements that spare him the diverse costs of this behavior." Id. at 1255. In contrast, the artist "is not entitled to collect unemployment insurance if he is by virtue of his passion unavailable for work." Id. Eisgruber and Sager thus reject the notion that religious beliefs are intrinsically more valuable than other deeply held beliefs that are not religiously motivated, a sentiment that might be said to be implicit in *Smith*'s concern that secular laws not be subordinated to religious dictates. See *Smith*, 494 U.S. at 885 ("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'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense." (quoting Reynolds v. United States, 98 U.S. 145, 167 (1870))).

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

61 See, e.g., The Supreme Court, 1989 Term—Leading Cases, 104 Harv. L. Rev. 198, 204 (1990) (discussing how *Smith*'s "evisceration" of free exercise doctrine "abandons the fundamental liberty of religious conscience to the vagaries of the political process" and deeming this likely to protect only "'mainstream,' politically powerful religious groups," given that "'the history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups'" (quoting *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in judgment))).

62 See, e.g., Suzanna Sherry, Religion and the Public Square: Making Democracy Safe for Religious Minorities, 47 DePaul L. Rev. 499, 502 (1998) (arguing that providing greater role for religion in democratic society by including faith-based viewpoints in public debate does not promote all religious voices equally). In Sherry's analysis,

> A religious worldview is based primarily on faith, and a secular worldview primarily on reason. The European Enlightenment marks the transition from the one to the other. To the extent that the conflict between the religious and the secular reflects an underlying difference between an appeal to faith and an appeal to reason, modern American Judaism—especially Reform Judaism, but Conservative Judaism as well—is a post-Enlightenment religion. While some Christian sects may be similarly committed more to reason than to faith, those who prefer religious to secular justifications . . . are mostly faithful in a tradi-

valid these misgivings regarding *Smith* may be, lower courts are surely to be dissuaded from making an end run around the decision to produce results that fly in the face of both the holding and the purposes underlying the Court's doctrinal shift. Yet, as the next Part reveals, that is exactly what has occurred in some lower courts.

II
LOWER COURTS' DECISIONS APPLYING *SMITH*

Some judges, clearly shocked by the Court's decision to deprive them of the tool they customarily employ to protect minority rights,[63] have responded negatively to *Smith*, expressing their criticism of the decision both overtly and indirectly.[64] Indeed, the distortions and inconsistencies in lower courts' decisions after *Smith* indicate not only simple misunderstandings of the doctrine, but also a struggle to reinforce traditional views of the position of religion in our culture.[65] This latter phenomenon is most obvious in cases that apply an overly broad interpretation of the *Sherbert* exception, as well as those that apply the hybrid rights exception. Part II.A provides a general overview of cases that have been decided since *Smith*, reviewing some of the less important doctrinal confusions that have arisen. Part II.B focuses on

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> tionally pre-Enlightenment way. Moreover, to the extent that faith can be supported by reason, there is no need to inject religion into the argument. Thus, to appeal to religious belief is to appeal to faith rather than to reason, and in the United States the appeal to faith necessarily excludes most Jews.

Id. at 508-09.

63 See Christopher L. Eisgruber & Lawrence G. Sager, Congressional Power and Religious Liberty After *City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 128 (suggesting that "emotional opposition" to *Smith* may arise from perceptions that "the Court had abandoned its commitment to the *Carolene Products* doctrine, with its emphases on solicitude for preferred freedoms and the interests of discrete and insular minorities" (citing United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938))).

64 See, e.g., South Ridge Baptist Church v. Industrial Comm'n, 911 F.2d 1203, 1213 (6th Cir. 1990) (noting that "[d]espite the Supreme Court's previous jurisprudence in cases such as *Sherbert v. Verner*, the Court now seems to be moving strongly away from those cases" (citation omitted)); Rader v. Johnston, 924 F. Supp. 1540, 1549 & n.19 (D. Neb. 1996) (declaring that "*Smith* has significantly diminished constitutional protection for conduct mandated by an individual's religious beliefs" and noting that "the majority opinion in *Smith* has been harshly criticized by virtually every legal scholar and commentator addressing the decision"); Yang v. Sturner, 750 F. Supp. 558, 559-60 (D.R.I. 1990) ("While I feel constrained to apply the majority's opinion to the instant case, I cannot do this without expressing my profound regret. . . . One must wonder . . . what is left of Free Exercise jurisprudence when one can attack only laws explicitly aimed at a religious group.").

65 See EEOC v. Catholic Univ., 83 F.3d 455, 463 (D.C. Cir. 1996) ("[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs."); First Covenant Church v. City of Seattle, 840 P.2d 174, 185 (Wash. 1993) (noting paramount importance of protecting religious freedom even where city suffers loss of significant architectural elements).

a handful of decisions that exemplify serious departures from *Smith* and that flout the Court's holding and jurisprudential goals.

A. Inconsistencies in Lower Court Decisions

At first glance, the test elaborated in *Smith* seems to be simple and straightforward. A statute must be neutral in its purpose, generally applicable, and free of "a system of individual exemptions" in order to escape heightened judicial scrutiny.[66] If any of these three conditions is not met, *Smith*'s presumption in favor of the constitutionality of the statute disappears, and the state must show a compelling reason for burdening an individual's religious freedom.[67] Despite this apparent simplicity, lower courts, while ultimately reaching decisions consistent with *Smith*, interpret and apply its test in significantly divergent ways.[68]

In attempting to determine whether a challenged law is neutral and generally applicable, some courts closely scrutinize the law to determine whether it discriminates overtly or covertly against religious adherents.[69] In contrast, other courts omit such an analysis and fail to

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[66] Employment Div. v. Smith, 494 U.S. 872, 884, 886 n.3 (1990).

[67] See id. at 884.

[68] Cases that have been decided since *Smith* fall into three periods, each of which impact on the decisions. In the first are the cases decided immediately following *Smith* and before the passage of RFRA, 42 U.S.C. §§ 2000bb to bb-4 (1994), in which courts applied the *Smith* test alone. Between 1993 and 1997, courts analyzed free exercise claims under *Smith* and under RFRA, which required courts to apply the compelling state interest test to all free exercise claims. See id. § 2000bb (declaring as its purpose: "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened"). In 1997 RFRA was declared unconstitutional in City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[69] See, e.g., Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 698-99 (10th Cir. 1998) (holding that school board policy prohibiting part-time attendance by students because of state funding restrictions is neutral, generally applicable, and does not burden free exercise right of parents to home school child for religious reasons); Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 216 (2d Cir. 1997) (determining that because statute in question does not bar any particular religious practice, single out religion, or impose disabilities on basis of religion, right to free exercise has not been taken from church members denied use of public school auditorium for place of weekly religious worship); Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (holding that Ohio State University's curriculum was generally applicable to all veterinary students, was not aimed at particular religious practices, and did not contain system of particularized exemptions; thus, university did not violate plaintiff's right to exercise freely her religion); Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp. 2d 1012, 1015 (W.D. Tex. 1998) (holding that school board policy requiring proficiency testing of students before awarding credits for courses completed in nonaccredited private or home schools is valid, religion-neutral law of general applicability implicating no other constitutional protections); *Rader*, 924 F. Supp. at 1558 (holding that freshman housing policy cannot constitutionally be enforced on student requesting exemption for religious reasons when policy exempts certain students from mandatory housing rule).

consider whether the *Sherbert* exception applies.[70] Still other courts conflate the "generally applicable" inquiry with the "individualized exemptions" analysis,[71] reasoning that where a law contains a system of individualized exemptions it cannot be generally applicable.[72] Other courts conduct separate analyses of whether a law is neutral and generally applicable, or whether it contains a mechanism for individualized exemptions, identifying the latter as a separate inquiry that determines whether the case fits within the *Sherbert* exception.[73]

Courts also differ with regard to the appropriate breadth of the *Sherbert* and hybrid rights exceptions. Some courts restrict the *Sherbert* exception to unemployment compensation cases,[74] while others go to the opposite extreme, determining that any challenged law that contains a secular exception, but not a religious one, falls within the exception.[75] Still others apply the exception only to laws or regula-

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[70] See Yang v. Sturner, 750 F. Supp. 558, 560 (D.R.I. 1990) (withdrawing, in wake of *Smith*, earlier holding granting relief to Hmong plaintiff and declaring that statute governing autopsies is generally applicable, facially neutral, and without indication that law was enacted with animus towards any religious group). The court arrived at its conclusion after a purely facial analysis of the challenged regulations, despite evidence (presented in the underlying case) that the medical examiner had complete discretion to perform an autopsy without the permission of next of kin or a legal representative, even in cases where the cause of death did not fall into any of six legislatively enumerated categories that were supposed to trigger the potential need for an autopsy. See Yang v. Sturner, 728 F. Supp. 845, 846-48 (D.R.I. 1990). In the prior case, the court had adjudged the regulations to exceed the authority of the statute, and thus to be invalid. See id. at 857.

[71] See supra text accompanying notes 22-27 for an explanation of the individualized exemptions test. In some cases, incorrect application of the individualized exemptions analysis nevertheless results in the "correct" result. See *Rader*, 924 F. Supp. at 1552 n.24 (explaining court's interpretation of individualized exemptions analysis as subsumed within general applicability inquiry: "I have considered UNK's system of individualized exemptions as only one of several factors in the generally applicable inquiry.").

[72] See Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (applying exemptions analysis to exceptions in ordinance and concluding that law failed *Smith* test); First Covenant Church v. City of Seattle, 840 P.2d 174, 181 (Wash. 1992) (en banc) (reasoning that because landmark ordinance contained specific reference to religious facilities in providing exception from prohibition on alterations when required by liturgy, ordinance was not neutral, and because landmark laws would have required individualized assessment were church to have applied for permission to alter exterior of building, laws were not generally applicable).

[73] See, e.g., Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 698, 701 (10th Cir. 1998) (conducting neutral, generally applicable analysis separately from *Sherbert* exception analysis, which asks whether regulations contain mechanism for individualized exemptions); *Kissinger*, 5 F.3d at 179-80 (employing three-part analysis that considers neutrality, general applicability, and standardized exemptions separately).

[74] See, e.g., Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 n.10 (D. Utah 1992) ("The Supreme Court has expressly stated that the holding regarding statutes with individual exemptions applies only in the unemployment context.").

[75] See infra Part II.B.

tions that contain a mechanism for individualized exemptions resembling those found in the unemployment cases.[76]

Finally, while many courts have inferred that *Smith* creates a "hybrid rights" exception, most apply it as an alternative theory for assessing the validity of a free exercise claim that they have already analyzed under the *Sherbert* exception, or under the *Smith* test.[77] At least one circuit has refused to accept a hybrid rights exception until the Supreme Court clarifies its validity,[78] and another has recognized a hybrid claim only where free exercise rights are implicated in conjunction with fully cognizable parental rights.[79]

The impact of all of these contradictory applications of *Smith* is apparent in the diametrically opposed decisions reached by lower courts in similar cases.[80] In addition, the circuits are divided as to the continued vitality of the Religious Freedom Restoration Act (RFRA)

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[76] See, e.g., American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405, 1408-09 (9th Cir. 1991) (distinguishing exceptions that exclude "entire, objectively-defined categories of employees from the scope of the statute" from "individualized exemptions"); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932-33 (6th Cir. 1991) (distinguishing choice of school board to assign credits for prior work to students transferring from nonaccredited schools from "good cause" exemption standard in *Sherbert*); see also *Swanson*, 135 F.3d at 701 (distinguishing exceptions in school board policy from individualized exemptions in *Sherbert*); Henley v. City of Youngstown Bd. of Zoning Appeals, No. 97 CA 249, 1999 WL 476087, at *4 (Ohio Ct. App. June 30, 1999) (seeing no analogy between government assessment of application for accessory use permit and government assessment of eligibility for unemployment benefits in *Sherbert*).

[77] See, e.g., Miller v. Reed, 176 F.3d 1202, 1206-08 (9th Cir. 1999) (concluding that plaintiff's free exercise rights were not violated by neutral, generally applicable requirement that he furnish social security number, and that plaintiff did not present valid hybrid claim as he failed to supplement free exercise claim with another colorable constitutional claim); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 721-22 (N.J. 1997) (finding that New Jersey's constitutional guarantee of private employees' rights to organize and bargain collectively was neutral and generally applicable, and that state had compelling interest in allowing private employees to unionize, thus defeating hybrid claim if properly presented); Health Servs. Div. v. Temple Baptist Church, 814 P.2d 130, 135-36 (N.M. 1991) (holding that licensing requirements for child care facilities are neutral and generally applicable and finding no adequate additional constitutional claim presented that would require application of hybrid exception).

[78] See *Kissinger*, 5 F.3d at 180 (rejecting hybrid claim as "illogical"); see also Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1288 n.12 (S.D. Fla. 1999) (expressing doubt as to validity of hybrid claims and rejecting view that court must apply strict scrutiny whenever such claims are presented); cf. Krafchow v. Woodstock, 62 F. Supp. 2d 698, 712-13 (N.D.N.Y. 1999) (recognizing hybrid claim but conducting separate analysis of free exercise and free speech rights and finding violation of latter, but not former).

[79] See Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (finding that plaintiffs' claims did not fall "within the sweep of *Yoder*" as plaintiffs' allegations of interference with family relations and parental prerogatives did not amount to independently protected privacy or substantive due process claim, nor did one-time compulsory attendance at assembly threaten their entire way of life).

[80] See infra Part II.B.

as applied to federal law.[81] One consequence is that courts considering free exercise claims that challenge federal employment discrimination laws have arrived at contradictory holdings under *Smith* depending upon whether or not they conduct a RFRA analysis.[82] However, even where RFRA is inapplicable—for example in challenges to state civil rights statutes in the area of equal access to housing—courts have reached opposed decisions. While some courts conduct the free exercise analysis under *Smith* and uphold the challenged law, others seek ways to avoid *Smith*'s test and to place claims within the hybrid rights exception.[83] Likewise, in cases that challenge zoning regulations, some courts seek to exempt claims from *Smith* by applying an overbroad construction of the *Sherbert* exception, while others hold that zoning laws are, by definition, neutral and generally applicable.[84] The cases that exemplify the more serious problems arising out of overbroad interpretations of exemptions to *Smith* are discussed in greater detail below.

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[81] In bankruptcy cases, for example, some circuits hold that, under RFRA, religious adherents who have tithed moneys to churches are immune from constructive fraud statutes and thus the transactions cannot be avoided. See, e.g., Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 861 (8th Cir. 1998) (holding, on remand from Supreme Court, that RFRA "is an appropriate means by Congress to modify the United States bankruptcy laws"); Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge), 220 B.R. 386, 398 (Bankr. D. Idaho 1998) (same). The jurisprudence in this area of law is, however, woefully unsettled. In both these cases, RFRA was held to have survived *Boerne* with respect to its application to federal laws. See *Young*, 141 F.3d at 858-61; *Hodge*, 220 B.R. at 393-401 (arguing that *Boerne* was decided narrowly, that RFRA did not violate separation of powers, that RFRA was within Congress' power to pass, and that it did not violate Establishment Clause). In contrast, other circuits, while noting the many arguments against finding any part of RFRA to have survived *Boerne*, have merely assumed without deciding that RFRA applies to federal laws. See, e.g., Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 834 (9th Cir. 1999); Adams v. Commissioner, 170 F.3d 173, 175 (3d Cir. 1999); Alamo v. Clay, 137 F.3d 1366, 1368 (D.C. Cir. 1998); United States v. Grant, 117 F.3d 788, 792 n.6 (5th Cir. 1997). Some courts in circuits that take the "undecided" approach to RFRA's continued vitality allow trustees to recover moneys tithed to churches. See, e.g., Waguespack v. Rodriguez, 220 B.R. 31, 36-37 (Bankr. W.D. La. 1998) (interpreting *Boerne* as having declared RFRA "unconstitutional in its totality and for all purposes" and finding no free exercise violation in limiting debtor's payments of tithes to church); cf. Hartvig v. Tri-City Baptist Temple of Milwaukie, Inc. (In re Gomes), 219 B.R. 286, 294 (Bankr. D. Or. 1998) (finding no need to determine whether RFRA is constitutional as applied to federal statutes because avoidance of tithing transactions does not impose substantial burden on plaintiff's free exercise rights).

[82] Compare Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 809-10 (N.D. Cal. 1992) (finding, under *Smith*, no violation of Christian school's free exercise rights in application of Title VII to female employee's wrongful termination claim), with EEOC v. Catholic Univ., 83 F.3d 455, 470 (D.C. Cir. 1996) (subjecting Title VII claim to strict scrutiny under RFRA and finding state's interest in anti-discrimination insufficient to outweigh church's free exercise interest).

[83] See infra notes 120-29 and accompanying text.

[84] See infra notes 87-90 and accompanying text.

B. A Closer Look at Problem Cases

Central to the model proposed in this Note is the idea that an important function of the *Smith* test is to distinguish clearly between those claims that challenge the discriminatory enforcement of regulations by bureaucratic decision makers, and those cases where plaintiffs seek relief from neutral, generally applicable laws that inadvertently burden their free exercise rights.[85] However, courts frequently overlook this distinction, most notably by reading the "individualized exemptions" analysis in *Smith*—used to determine whether or not a case fits within the *Sherbert* exception—too broadly.

This mistake has occurred most frequently in free exercise challenges to landmark preservation laws and regulations.[86] While some courts determine that zoning and landmark preservation ordinances are neutral and generally applicable,[87] others have held that such ordinances contain "individualized exemptions" and therefore fall within the *Sherbert* exception and so can survive only if they serve a compelling state interest.[88] The implications of this difference of interpretation are significant. Under the first interpretation, courts uphold decisions by zoning boards to deny churches permission to modernize, demolish, or enlarge historic buildings.[89] Under the second interpretation, after finding that historical preservation is not a compelling in-

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[85] See infra Part III.

[86] The Supreme Court's decision in *City of Boerne v. Flores* concerned a zoning board's denial of a clergyman's application to enlarge a church building under an ordinance governing historic preservation. See City of Boerne v. Flores, 521 U.S. 507, 512 (1997). The church appealed under RFRA; the district court held RFRA to be unconstitutional and the Fifth Circuit reversed. See id. The majority decision in *Boerne* reached only the issue of RFRA's constitutionality and reversed the Fifth Circuit's judgment that it was constitutional. See id. at 536. Accordingly, *Boerne* provides no direct authority on the issue of whether or not zoning and landmark preservation ordinances are neutral and generally applicable under *Smith*.

[87] See, e.g., Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 402 (6th Cir. 1999) (holding that zoning ordinance is "a 'neutral law of general applicability'" and thus city's refusal to grant permission for land to be used for Catholic cemetery was not free exercise violation (citation omitted)); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (holding that zoning ordinance excluding church from commercial area is neutral law of general applicability that does not unconstitutionally burden free exercise); Henley v. City of Youngstown Bd. of Zoning Appeals, No. 97 CA 249, 1999 WL 476087, at *4-5 (Ohio Ct. App. June 30, 1999) (finding no individualized exemptions in zoning ordinance and concluding that, because ordinance is general law, denying church permission to use accessory building as dwelling place does not violate free exercise).

[88] See infra note 90.

[89] See, e.g., Rector of St. Bartholemew's Church v. City of New York, 914 F.2d 348, 353 (2d Cir. 1990) (finding zoning and landmark preservation ordinances to be neutral and generally applicable and to contain no mechanism for individualized exemptions that would place them within *Sherbert* exception and holding, therefore, that denial of permit to raze building adjacent to church and replace with high-rise office tower is not free exercise violation).

terest, courts have held landmark preservation ordinances unconstitutional as applied to churches.[90]

In *Rector of St. Bartholemew's Church v. City of New York*,[91] the court deemed the landmark preservation law in question to be valid, neutral, and generally applicable, on the grounds that such a law is part of a comprehensive zoning plan and applies to any property with an historical or aesthetic interest or value.[92] Concluding that the *Sherbert* exception was inapplicable, the court looked to whether the laws were discriminatory in operation or effect but found no proof that the zoning commission had discriminated, either intentionally or not, against the church or other religious claimants in designating landmark status.[93]

In contrast, in *Keeler v. Mayor of Cumberland*,[94] the landmark preservation ordinance in question was found to contain a system of individualized exemptions because the law stipulated three circumstances in which property owners could be granted permission to alter or demolish an historic building.[95] Without inquiring into whether

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[90] See, e.g., Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (finding that landmark preservation ordinance contains individualized exemptions and thus fails *Smith*'s neutrality and general applicability test); First Covenant Church v. City of Seattle, 840 P.2d 174, 181-82 (Wash. 1993) (finding that landmark ordinances contain mechanism for individualized exemptions and therefore fall within *Sherbert* exception); see also First United Methodist Church v. Hearing Exam'r for Seattle Landmarks Preservation Bd., 916 P.2d 374, 377, 379 (Wash. 1996) (finding claim subject to *Sherbert* exception even where church intends to raze building and sell property for commercial interest).

[91] 914 F.2d 348 (2d Cir. 1990).

[92] See id. at 355 ("'[T]he New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.'" (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978))).

[93] See id. at 354-55 (declaring that "absent proof of the discriminatory exercise of discretion," fact that ordinance grants substantial discretion to Landmarks Preservation Commission is of "no constitutional relevance").

[94] 940 F. Supp. 879 (D. Md. 1996). In its initial complaint, the church in *Keeler* claimed violation of its rights under RFRA. The court found RFRA to be an unconstitutional violation of the separation of powers and granted the city's motion to dismiss on this count. See Keeler v. Mayor of Cumberland, 928 F. Supp. 591 (D. Md. 1996).

[95] See *Keeler*, 940 F. Supp. at 886. Sections 6 and 7 of the ordinance required individuals seeking to reconstruct, alter, or remove any exterior feature of an historic building, or to demolish any structure, to apply for a Certificate of Appropriateness. The Landmarks Commission, an administrative body, was empowered to negotiate with applicants to try to come to an economically feasible arrangement to preserve the building. If this proved impossible, the ordinance required the Commission to reject the application. See id. at 885. The Commission's obligation to reject the application was suspended only where:

> (1) The structure is a deterrent to a major improvement program which will be of substantial benefit to the City of Cumberland; (2) Retention of the structure would cause undue financial hardship to the owner; or (3) The retention of the structure would not be to the best interest of a majority of persons in the community.

Id. at 886 (quoting Cumberland, Md., Ordinance 2970, § 7.d).

there was any discriminatory enforcement of the landmark ordinance, the court simply deemed the exceptions in the landmark ordinance to constitute individualized exemptions, and placed the claim within the *Sherbert* exception.[96] In holding that this case fell outside *Smith*, the court announced an extremely broad reading of the *Sherbert* exception: "[W]here the government enacts a system of exemptions, and thereby acknowledges that its interest in enforcement is not paramount, then the government 'may not refuse to extend that system [of exemptions] to cases of 'religious hardship' without compelling reason.'"[97] This interpretation of the *Sherbert* exception suggests that any kind of secular exemption in the text of a statute—whether it be applied through a highly discretionary or an entirely objective assessment—makes a religious exemption mandatory. Such a conclusion clearly flies in the face of the holding in *Smith*.[98] If the holding in *Keeler*—that where the government provides an exception to its landmark preservation laws for secular reasons, it must also extend exceptions for religious reasons—was correct, then the holding in *Smith* would surely have been that where government exempts from prohibition certain secular, medical uses of drugs, it is required to exempt religious uses as well. But *Smith* squarely rejected exactly that proposition.[99]

The second way in which courts have destabilized, if not eviscerated, the holding of *Smith* is by applying a very broad interpretation of the hybrid rights exception.[100] The hybrid exception has been inferred from that part of the *Smith* decision that distinguishes free exercise precedents which involve the Free Exercise Clause "in conjunction with other constitutional protections."[101] These passages in *Smith* suggest that a law must be subjected to strict scrutiny if it implicates free exercise rights along with other constitutionally guar-

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96 See *Keeler*, 940 F. Supp. at 886 ("[T]he ordinance 'has in place a system of individualized exemptions.' The ordinance embodies a legislative judgment that the City's interest in historic preservation should, under certain circumstances, give way to other interests, such as furthering major development and protecting property owners from financial hardship." (quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990)).

97 See *Keeler*, 940 F. Supp. at 886 (quoting *Smith*, 494 U.S. at 884).

98 Cf. American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1991) (distinguishing exceptions that "exclude entire, objectively-defined categories" from application of statute from "individualized exemptions").

99 See *Smith*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

100 While this Note shares the doubts of many commentators as to whether the hybrid exception is doctrinally defensible, it nevertheless recognizes its existence, but proposes that it be read extremely narrowly.

101 *Smith*, 494 U.S. at 881.

anteed rights.[102] The fact that courts have recognized such an exception to *Smith*'s general rejection of the compelling state interest test in the context of free exercise challenges has led plaintiffs, as was predicted,[103] to assert innumerable additional constitutional claims in the hope of placing their free exercise claim under the old *Sherbert* test.[104] However, as applied in most cases, the hybrid rights exception is generally given an extremely narrow interpretation. As a result, hybrid claims are commonly restricted to those enumerated in *Smith*,[105] with courts finding for the religious party predominantly in cases where the decision could stand on the independent constitutional right.[106]

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102 The contours of the hybrid rights exception are extremely vague, and there is considerable controversy as to the validity of the doctrine. See supra notes 12-13.

103 One commentator argued that, as a result of *Smith*:

> [L]ower federal and state courts will be relatively free to establish their own interpretations and analysis of the hybrid exception. Consequently, few religious objectors will present courts with pure federal free exercise claims. Instead, plaintiffs will approach the challenge with an arsenal of interrelated First Amendment rights including freedom of speech and freedom of association in conjunction with free exercise.

Renee Skinner, Note, *The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*: Still Sacrificing Free Exercise, 46 Baylor L. Rev. 259, 278 (1994).

104 See, e.g., Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999) (rejecting plaintiff's free exercise and right to interstate travel claims); Reich v. Shiloh True Light Church of Christ, No. 95-2765, 1996 WL 228802, at *3 (4th Cir. May 7, 1996) (per curiam) (rejecting church's free exercise and "other fundamental rights" claims for exemption from federal Fair Labor Standards Act to use child labor for commercial construction projects); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 724 (N.J. 1997) (denying relief to school that challenged, on free exercise and free association grounds, New Jersey Constitution's requirement that lay teachers be afforded collective bargaining rights); Health Servs. Div. v. Temple Baptist Church, 814 P.2d 130, 136 (N.M. 1991) (denying church exemption from state licensing requirements for child care facilities sought on grounds of free exercise right and right to direct upbringing of children).

105 494 U.S. at 881-82 (discussing free exercise claims made in combination with free speech, free press, and parental right to direct education of child claims and envisioning possible freedom of association hybrid claim).

106 See Esser, supra note 11, at 242 (surveying lower court decisions employing hybrid rights exception and concluding that hybrid claim has been "judicially limited 'precisely because it had the potential to swallow the rule'" (quoting Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 214 (1994))). After reviewing more than 20 state and federal cases, Esser notes that almost every case decided in favor of the religious plaintiff on a hybrid free exercise ground had already been decided on another basis, and that the success of a hybrid claim is "directly tied to the constitutional strength of the right with which free exercise is combined. Thus, free speech hybrids are more likely to win than parental right to educate hybrids." Id. at 243. Esser therefore concludes that "Justice Souter was right: '[T]here [was] no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.'" Id. (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in judgment)).

Nevertheless, some courts have snubbed this judicial limitation of the hybrid exception and have created novel hybrid rights,[107] thereby severely threatening the coherence of *Smith*, as well as its most important underlying goals. In these cases, challenged laws that would no doubt satisfy *Smith*'s neutral, generally applicable test, and that contain no individualized exemptions, are nevertheless invalidated as applied to religious plaintiffs.

For example, in *Vigars v. Valley Christian Center*,[108] one of the few cases to consider a Title VII employment claim against a religious institution under *Smith*,[109] the court asserted that Title VII was without question a neutral, generally applicable law and that, under *Smith*, its incidental impact on the free exercise rights of a Christian school would not constitute a violation of the Free Exercise Clause.[110] In contrast, in *EEOC v. Catholic University of America*,[111] the court found that application of Title VII's prohibition of sex discrimination would both burden the university's free exercise rights and violate the Establishment Clause's bar against excessive government entanglement in religion. The court deemed this to be a "hybrid situation" under *Smith*,[112] and so applied the compelling state interest test,[113]

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107 See Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705, 709, 711 (9th Cir. 1999) (rejecting "independently-viable-rights" standard for conjoined constitutional claim in favor of associated "colorable claim" standard and finding possible takings and free speech claims on behalf of landlords), vacated, Nos. 97-35220, 97-35221, 2000 WL 1069977 (9th Cir. Aug. 4, 2000) (en banc); EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) (finding that university had both free exercise and establishment claims regarding EEOC's attempt to enforce Title VII against denial of tenure to female professor).

108 805 F. Supp. 802 (N.D. Cal. 1992) (finding no violation of Christian school's free exercise rights in application of Title VII to female employee's claim that she was fired on grounds of sex because of her out-of-wedlock pregnancy).

109 Most of the post-*Smith* Title VII employment discrimination cases were decided under RFRA. See, e.g., Gallo v. Salesian Soc'y, 676 A.2d 580, 593-94 (N.J. Super. Ct. App. Div. 1996) (finding that plaintiff's claims of sex and age discrimination trumped religious school's free exercise claim under RFRA compelling state interest test).

110 See *Vigars*, 805 F. Supp. at 809-10.

111 83 F.3d 455 (D.C. Cir. 1996).

112 See id. at 467. Besides constituting a novel "hybrid" claim, the combination of free exercise and establishment claims defies logic in that the first claim suggests that government is *preventing* the university from practicing its religion, while the second suggests that government is favoring or sponsoring a particular religious practice, or religion in general. See Esser, supra note 11, at 242 (describing hybrid claim in *Catholic University* as "bizarre twist").

113 See *Catholic Univ.*, 83 F.3d at 468. The court may have reached the same result regardless of the applicability of the hybrid rights exception to *Smith*, as it found that Title VII must be subjected to strict scrutiny under RFRA. See id. at 470. In light of the fact that the continued vitality of RFRA as applied to federal laws is uncertain, and that the hybrid exception used as the alternative means to remove the claim from *Smith*'s reach may well have been overbroad, it is possible that the whole of the majority's opinion is less than the sum of its parts.

holding that the government's interest in eliminating employment discrimination was not sufficiently compelling to overcome the university's right to employ ministers of its choice.[114] Other circuits have followed *Catholic University*,[115] interpreting it as standing for the proposition that religious institutions are exempted entirely from the *Smith* test.[116] However, given that an important purpose motivating

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The court also based its decision on application of the "ministerial exception" to Title VII. See id. at 461-65 (holding that ministerial exception, which forbids courts from interfering in relationship between church and its clergy, survived *Smith* and applied to nontenured professor even though she was not ordained minister, because "the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission"). It is unclear whether this exception alone was sufficient to exempt the university from Title VII, however, as the exception arguably allows religious employers to discriminate in hiring and firing decisions only on the basis of religion, and not on the basis of sex, race, or national origin. See, e.g., Joanne C. Brant, "Our Shield Belongs To The Lord": Religious Employers and a Constitutional Right to Discriminate, 21 Hastings Const. L.Q. 275, 284 (1994) ("The exemption only extends to discrimination based on an employee's religion and does not authorize discrimination on the basis of sex, race, color, or national origin."). Turning to the legislative history, Brant finds that "Congress considered and rejected a blanket exemption that would have placed religious employers outside the scope of covered 'employers.' Instead, Congress chose to tailor the exemption narrowly, exempting religious institutions only from the law's prohibition of religious discrimination." Id. at 284-85. See also *Vigars*, 805 F. Supp. at 807 (referring to legislative record of Title VII in concluding that "although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, [and] national origin"). But see McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir. 1972) (implying exception to Title VII that permits religious organizations to discriminate on basis of sex when hiring ministers).

114 See *Catholic Univ.*, 83 F.3d at 467-68. The court therefore rejected the view expressed by other courts that the state's interest in preventing sex discrimination is compelling. See *Vigars*, 805 F. Supp. at 810 n.5 (noting that "the state's compelling interest in enforcing Title VII and eradicating sex discrimination would likely have outweighed the substantial burden that application of Title VII to this case will place on defendant's free exercise rights"); *Gallo*, 676 A.2d at 593 ("We conclude that the State's interest in abolishing age and gender discrimination is compelling, beyond cavil.").

115 The importance of *Catholic University* lies not in its result on the facts, but in its illustration of how a distortion of the hybrid rights exception can easily lead to decisions with far-reaching doctrinal implications. The limited significance of the case, standing alone, was brought out in Judge Henderson's concurrence: Even if Sister McDonough prevailed in her sex discrimination claim with the D.C. Circuit, the Vatican retains ultimate authority in deciding whether she would secure tenure at the university. Accordingly, Judge Henderson found that "any relief we might grant her at this stage . . . is similarly within the exclusive control of the Holy See," where it is "beyond judicial review." *Catholic Univ.*, 83 F.3d at 476 (Henderson, J., concurring).

116 See, e.g., Combs v. Central Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999) (applauding D.C. Circuit's conclusion in *Catholic University* that *Smith* applies only to free exercise restrictions on individuals' religious conduct, not to "the ability of a church to manage its internal affairs"). The holding in *Combs* is based on a somewhat confusing mélange of Free Exercise and Establishment Clause principles, and asserts that the federal court has no jurisdiction to hear the employee's Title VII claim because of the church-state entanglement that would necessarily arise if the

the decision in *Smith* was to treat the interests of secular and religious citizens with equal regard[117] and to prevent the anomaly of "a private right to ignore generally applicable laws,"[118] it makes no sense to interpret *Smith* in a way that broadly exempts religious employers from the proscriptions that apply, without question, to all secular employers.[119]

Similar inconsistencies arise in the area of laws mandating equal access to housing. Despite findings by two state supreme courts within the Ninth Circuit that religious landlords' free exercise rights are not infringed by state constitutional or statutory provisions that prohibit them from discriminating against unmarried heterosexual couples,[120] the Ninth Circuit Court of Appeals invoked the hybrid rights exception and came to the opposite conclusion.[121]

The plaintiffs in *Thomas v. Anchorage Equal Rights Commission*[122] argued that the housing laws[123] violated their rights to free

church, as employer, had to defend its hiring and firing decisions. See id. at 351 (holding that constitutional separation of church and state prevents court from applying Title VII to church). Under this reading, churches are accorded a wholesale exception from Title VII, and, most likely, all other civil rights protections for employees. See also EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505, 513 (E.D.N.C. 1999) (following decision in *Catholic University* distinguishing between free exercise rights of individuals and churches and holding that latter are exempted completely from application of *Smith*).

117 See supra note 34.

118 Employment Div. v. Smith, 494 U.S. 872, 886 (1990).

119 This should not be read to disparage the "ministerial exception" contained in Title VII, which allows religious organizations to make hiring decisions for clergy positions based on religion.

120 See Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) (finding challenged Alaska statute to be neutral and generally applicable under *Smith*, and therefore not violative of landlord's free exercise rights); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) (finding under *Smith* and RFRA that California Fair Employment and Housing Act did not violate free exercise rights of religious landlord by prohibiting her from discriminating against unmarried heterosexual couples). Although Congress enacted RFRA shortly before *Swanner* was decided, the court found that the plaintiff's claim would not survive, as "compelling state interests support the prohibitions on marital status discrimination." Id. at 280 n.9.

121 See Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) (finding that landlord's claim challenging Alaska fair housing statute need not be considered under *Smith*'s neutral, generally applicable test because it falls within hybrid exception and holding after applying strict scrutiny that preventing marital status discrimination is not compelling state interest), vacated, Nos. 97-35220, 97-35221, 2000 WL 1069977 (9th Cir. Aug. 4, 2000) (en banc).

122 165 F.3d 692 (9th Cir. 1999). While *Anchorage Equal Rights Commission* did not survive review, see *Anchorage Equal Rights Comm'n*, 2000 WL 1069977 at *7 (finding that claim was neither ripe nor justiciable), the opinion by Judge O'Scannlain serves as a useful example of the kind of doctrinal erosion that may be achieved through an overbroad reading of the hybrid rights exception.

123 See *Anchorage Equal Rights Comm'n*, 165 F.3d at 702 (specifying that it is unlawful to refuse to "'sell, lease[,] or rent' to unmarried cohabitants" or to "'make a written or oral inquiry or record' of the marital status of a prospective lessee[,]" or to "'represent to a

speech as well as free exercise, and in addition constituted a taking of property in violation of the Fifth Amendment.[124] Finding that the case fell within the hybrid exception, the court held that, because protecting against discriminatory treatment on the basis of marital status was not a compelling state interest,[125] religious landlords could refuse to rent to unmarried heterosexual couples.[126] Similarly, in *First Covenant Church v. City of Seattle*,[127] the church argued that a landmark preservation ordinance violated both its free exercise rights and its free speech rights.[128] The court found that the church had a valid hybrid rights claim because the church building itself "'is an expression of Christian belief and message,'" and thus any regulation of the church's exterior appearance would infringe on its free speech.[129]

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person that real property is not available for inspection, sale, rental, or lease' on the basis of the lessee's marital status" (alterations in original) (quoting Alaska Stat. § 18.80.240(1), (3), (5) (Michie 1994) and Anchorage, Alaska Mun. Code § 5.20.020(A), (C), (E) (Municipal Code Corp. through Mar. 21, 2000, <http://www.municode.com>))).

124 See id. at 707-11 (analyzing plaintiffs' Fifth Amendment takings and First Amendment free speech claims). But see id. at 724-25 (Hawkins, J., dissenting) (asserting that Fifth Amendment takings claim "suffers from a host of fatal flaws," while First Amendment free speech claim suffers from twin problems of being "at odds with all established precedent" and "run[ning] afoul of even the most basic notions of protected religious expression").

125 See id. at 717.

126 Plaintiff-appellees, Christian landlords who owned a number of multi unit rental properties, claimed that renting to unmarried couples violated their religious beliefs about extramarital sexual relations. See id. at 696. The court determined that they had standing to challenge the state and municipal anti-discrimination law on the grounds that they faced a "reasonable threat" of prosecution, id. at 698, and that the issues before it were "fit for judicial resolution[,]" id. at 699, even though no claims had been filed against the plaintiffs, see id. at 697.

127 840 P.2d 174 (Wash. 1992).

128 In addition to finding a hybrid rights exception because the church presented a free exercise claim in conjunction with a free speech claim, see id. at 181-82, the court also deemed the ordinance nonneutral and nongeneral and thus subject to strict scrutiny, see id. at 180-82, on the basis that the ordinances contained an exception *for churches*, exempting them from landmark regulation when "'alterations are necessitated by changes in liturgy.'" Id. at 178 (quoting Seattle, Wash., Ordinance 112,425 (Sept. 17, 1985)). As is discussed below, this is a distortion of the neutral, generally applicable analysis, as the mere fact that an ordinance references religion on its face is not sufficient to trigger strict scrutiny without proof of discriminatory intent on the part of the legislature or a finding that the ordinance is discriminatory in its actual operation and effect. See infra Part III.A.

129 *First Covenant*, 840 P.2d at 182 (citation omitted); see also First United Methodist Church v. Hearing Exam'r for Seattle Landmarks Preservation Bd., 916 P.2d 374, 379 (Wash. 1996) (adopting same hybrid analysis used in *First Covenant* and overturning lower court's decision because it "simply failed to apply a strict scrutiny analysis"). While there is little doubt that building exteriors are "expressive," it is commonly accepted that municipalities may regulate the exteriors of buildings, despite the infringement on this form of "communication." For example, American Jurisprudence notes that:

> An ordinance which requires that an applicant for a building permit first submit his plans to an architectural review board is not unconstitutional per se merely because it purports to regulate the use of land for an aesthetic purpose.

In each of these cases, the courts appear to have gone out of their way to squeeze ordinary free exercise claims into the hybrid exception. Having done so, the courts then determined that the law in question furthered state interests that were insufficiently compelling to overcome the religious party's free exercise interest.[130] It is precisely this type of decisionmaking, in which "judges weigh the social importance of all laws against the centrality of all religious beliefs,"[131] that *Smith* sought to prevent.

To guard against the misapplications of *Smith* discussed above, and to demonstrate how a broad reading of exceptions to *Smith* cuts against the Court's doctrinal and jurisprudential goals, this Note next proposes a model that details and clarifies the test established in *Smith*. Beyond clarifying *Smith*'s operation, however, the model also seeks to fashion a free exercise jurisprudence that is responsive to the new conversation generated by *Smith*.

III

ELABORATING A MODEL FOR THE *SMITH* TEST

The efforts of courts to evade *Smith* may well stem from judicial anxiety over leaving a constitutional right unprotected,[132] especially

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> A city's interest in maintaining economic and general well being allows it to utilize its zoning power to regulate matters of aesthetics and to create architectural review boards.

83 Am. Jur. 2d Zoning & Planning § 211 (1992); see also Reid v. Architectural Bd. of Review, 192 N.E.2d 74 (Ohio Ct. App. 1963) (holding that aesthetic restrictions on exterior appearance of house did not violate freedom of expression). In finding a hybrid rights exception, the court relied solely upon the viewpoint of one commentator who hypothesized that landmark preservation and architectural review of churches might violate the Free Exercise and Free Speech Clauses of the First Amendment, and did not cite any precedential authority for this ruling. See *First Covenant*, 840 P.2d at 182 (citing Angela C. Carmella, Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, 36 Vill. L. Rev. 401, 490-98 (1991)).

130 See Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 717 (9th Cir. 1999) ("There is simply no support from any quarter for recognizing a compelling government interest in eradicating marital-status discrimination that would excuse what would otherwise be a violation of the Free Exercise Clause."), vacated, Nos. 97-35220, 97-35221, 2000 WL 1069977 (9th Cir. Aug. 4, 2000) (en banc); EEOC v. Catholic Univ., 83 F.3d 455, 467 (D.C. Cir. 1996) (finding government interest in eliminating employment discrimination to be insufficient to overcome religious institution's interest in employing ministers of its choice); *First Covenant*, 840 P.2d at 185 (holding that city's "interest in preservation of esthetic and historic structures is not compelling"). Other courts have considered following *Anchorage Equal Rights Commission* in questioning whether fair housing laws that protect on the basis of marital status serve a compelling state interest. See McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998), vacated in part, 593 N.W.2d 545 (Mich. 1999) (vacating and remanding for further consideration portion of prior decision that held that Civil Rights Act does not violate Free Exercise Clause by prohibiting discrimination on basis of marital status).

131 Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

132 See *First Covenant*, 840 P.2d at 185 ("The possible loss of significant architectural

for religious minorities. It may also reflect a reluctance on the part of courts to surrender the traditional view that religion requires special protection.[133] However, as the model proposed in this Note makes clear, the function and operation of the *Smith* test should mitigate much of the concern. Although *Smith* has, in theory, reduced the number of cases to which the compelling state interest test applies, in practice it leaves untouched that area of free exercise law that polices government actions most susceptible to valid charges of discrimination.[134]

The test elaborated in *Smith* can be summed up as follows: Where a law lacks neutrality, general applicability, or contains a system of individualized exemptions, there is no presumption of its constitutionality. Instead, the state must show a compelling reason for burdening an individual's religious freedom.

While *Smith* itself provides very little guidance as to how the "neutral, generally applicable" test should apply, the Court had occasion to spell out the prongs of *Smith*'s test in far greater detail in a subsequent case, *Church of the Lukumi Babalu Aye, Inc. v. City of*

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elements is a price we must accept to guarantee the paramount right of religious freedom."); see also supra notes 60-62 and accompanying text.

133 See *Catholic Univ.*, 83 F.3d at 463 ("[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs."); see also supra notes 50-50 and accompanying text.

134 Significantly, in almost 30 years preceding *Smith*, the Supreme Court had decided very few free exercise claims in favor of plaintiffs. See Tushnet, supra note 43, at 121-22 (noting that "the actual protection afforded religious exercise by the Supreme Court and federal appellate courts applying pre-*Smith* law is not nearly as great as post-*Smith* rhetoric suggests" and citing various empirical studies to support this claim, including one finding that between 1963 and 1990, of 17 Supreme Court cases addressing free exercise claims, only 4 prevailed, and of 97 appellate court claims in 1980s, only 12 prevailed). If these data are accurate, then of the four Supreme Court cases in which plaintiffs prevailed, three concerned applicants who were denied unemployment benefits: Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 619 (1987); and Thomas v. Review Bd., 450 U.S. 707 (1981). The fourth is Wisconsin v. Yoder, 406 U.S. 205 (1972).

My own research on cases decided in this period on free exercise grounds alone yielded a fifth, McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating, as unconstitutional violation of free exercise right, state law prohibiting members of clergy from serving as delegates at political conventions). In contrast, many of the cases that were decided *against* the plaintiffs involved claims for exemptions from income tax laws, from social security tax payments, and from having to accept or use a social security number, all of which were challenges to neutral, generally applicable laws.

Two commentators who have attempted to assess the impact of *Smith* on free exercise claims have found that "[t]here is no evidence that the federal courts since *Smith* have become less kind to Free Exercise claims; it is even possible that they have become more sympathetic." Eisgruber & Sager, supra note 63, at 130-31.

Hialeah.[135] Through a detailed analysis of the reasoning in *Lukumi* and with reference to interpretations of *Smith* used in some lower court cases, it is possible to construct a model for the *Smith* test that both clarifies the doctrine and demonstrates the distinct analytical functions of each prong of the *Smith* test.

A. "Neutrality" and "General Applicability"

While some courts distinguish between the neutrality and general applicability analyses by separating them into two distinct prongs,[136] the two inquiries overlap in many significant ways, such that it is easier to collapse them into a single test.[137] As the Court demonstrated in *Lukumi*, the focus of the inquiry into neutrality does differ somewhat from that of general applicability. The neutrality analysis considers the intent of the law, looking at the text of the law on its face[138] as well as behind the text, to determine whether the law masks the discriminatory intent of legislators,[139] while the general applicability analysis focuses more on the design, construction, or enforcement of a law.[140] These two inquiries overlap, however, in that a law or a legislature's nonneutral intentions may emerge out of the general applicability analysis which, in essence, deconstructs the law and checks its enforcement.[141]

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135 508 U.S. 520, 547 (1993) (holding that city ordinance banning ritual sacrifice of animals was aimed specifically at those who practice Santeria religion which involves animal sacrifice as part of worship ceremony, and was thus unconstitutional).

136 See, e.g., id. at 533-42 (conducting detailed analysis of neutrality of ordinances first, before "turn[ing] next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability"); Kissinger v. Board of Trustees, 5 F.3d 177, 179-80 (6th Cir. 1993) (employing three-part analysis of plaintiff's claim by analyzing general applicability of school policy and considering whether policy was neutral, before considering whether policy contained individualized exemptions).

137 Cf. *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring) (asserting that "the terms ['neutrality' and 'general applicability'] are not only 'interrelated,' [as the majority suggests], but substantially overlap").

138 See id. at 533 ("To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face."). While the Court asserted that the words "sacrifice" and "ritual" do not have exclusively religious meanings, "the choice of these words is support for [its] conclusion" that the ordinances targeted the Santeria religion. Id. at 534.

139 See id. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.").

140 See id. at 557 (Scalia, J., concurring) (commenting that "the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment").

141 See infra Part III.A.2.

The Court's analysis in *Lukumi*, where it ruled that the City of Hialeah had violated the Free Exercise Clause[142] when it passed a series of ordinances banning the ritual sacrifice of animals for purposes of religious worship,[143] demonstrates the kind of detailed, overall analysis of challenged laws that courts are required to make in order to determine whether or not they pass the "neutral, generally applicable" prong of the *Smith* test. A close reading of the opinion reveals that there are approximately five questions that courts should address in applying the first prong of the *Smith* test. The first three questions generally focus the inquiry towards the question of a law's neutrality, while the second two consider a law's general applicability.

1. "Neutrality" Questions

Writing for the majority in *Lukumi*, Justice Kennedy defined a law's lack of neutrality in terms of its purpose: If it seeks to restrict practices purely because they are religiously motivated, it is flawed.[144] However, as he pointed out, the inquiry into a law's neutrality does not stop at facial neutrality as "the [Free Exercise] Clause [also] 'forbids subtle departures from neutrality'" that may be masked or covert.[145] In determining whether a law departs from neutrality, Justice Kennedy therefore looked to the events surrounding its enactment to determine whether there was any evidence of discriminatory intent on the part of the legislators.[146] However, Justice Scalia, joined by Chief Justice Rehnquist, explicitly stated his objection to courts' examining the subjective motivations of legislatures on the ground that it is "virtually impossible to determine the singular 'motive' of a collective leg-

142 See *Lukumi*, 508 U.S. at 542 ("[T]he . . . inquiry leads to one conclusion: The ordinances had as their object the suppression of religion.").

143 See id. at 526-28 (citing Hialeah, Fla., Ordinance 87-40 (incorporating Florida's animal cruelty laws); id. 87-52 (defining "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption"); id. 87-71 (declaring it unlawful for "any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah"); id. 87-72 (defining "slaughter" as "the killing of animals for food")).

144 See id. at 533 (citing Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990)).

145 Id. at 534 (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).

146 See id. at 540 (noting that courts should consider background history, events leading up to enactment of law or policies, and legislative or administrative history, including "contemporaneous statements" made by decision makers (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977))). The question whether the neutrality inquiry should include scrutiny of a legislature's subjective motivations for enacting a law, or should focus only on the objective purpose of a law as determined by its effect in its actual operation, remains open. Justice Kennedy wrote the majority opinion in *Lukumi* and was joined by Justices Rehnquist, Scalia, Stevens, Souter, and Thomas. However, only Justice Stevens joined the part of the decision that advocated that courts should consider circumstantial evidence in assessing the neutrality of the law.

islative body."[147] Instead, Justice Scalia focused on the operation of the law, asserting that, "[h]ad the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals . . . they would nonetheless be invalid."[148] He also laid out a correlative rule stating that even if lawmakers exhibit animus towards religion, a law cannot be found to "prohibi[t] the free exercise of religion" unless it is actually discriminatory in effect.[149]

By combining Justice Kennedy's and Justice Scalia's analyses, the "neutrality" inquiry can be broken down into three questions. First, does the law target religion on its face? This step invites a straightforward textual analysis of the law. As Justice Kennedy put it, "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context."[150] Where a law overtly discriminates against religion in its text, it obviously fails the *Smith* test and is void unless the state can argue that it serves a compelling interest. Even if a law is facially neutral, however, the inquiry should proceed to the next question: Is the law discriminatory in its object or purpose?[151] This step addresses Justice Kennedy's concern about whether there is evidence in the legislative record that is suggestive of a discriminatory intent on the part of lawmakers.[152] However, as both Justice Kennedy and Justice Scalia assert, the actual effect of a law indicates its real purpose.[153] Accordingly, even if evidence is found of a discriminatory intent on the part of lawmakers, it is the third and final question that is dispositive on the law's neutrality: Does the law discriminate in its actual operation or effect? In answering the third question, courts typically must consider the general applicability of the law, since an examination of the construction, design, and enforcement of a law can best determine whether its actual, covert purpose is to discriminate against religious believers.[154]

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147 Id. at 558 (Scalia, J., concurring in part and concurring in judgment).

148 Id. at 559 (Scalia, J., concurring in part and concurring in judgment).

149 Id. at 558-59 (Scalia, J., concurring in part and concurring in judgment).

150 Id. at 533.

151 See id. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

152 See supra note 146.

153 See *Lukumi*, 508 U.S. at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."); id. at 558 (Scalia, J., concurring in part and concurring in judgment) ("The First Amendment [refers] . . . to the effects of the laws enacted.").

154 See id. at 534-38 (undertaking detailed analysis of design of laws, finding that they were intended to operate "in tandem," and concluding that "suppression of the central element of the Santeria worship service was the object of the ordinances").

2. *"General Applicability" Questions*

As Justice Scalia explained in his *Lukumi* concurrence, laws may fail the general applicability test if, while appearing neutral in their terms, they in fact target the practices of a particular religion for discriminatory treatment "through their design, construction, or enforcement."[155] Justice Kennedy delved into the design and construction of the ordinances at issue in *Lukumi* in great detail, providing useful insight into the analytical steps that comprise the general applicability inquiry.[156]

Once again, by combining the reasoning of the two Justices, it is possible to discern a set of questions that should be addressed as part of the general applicability inquiry, which focuses on the actual operation and effect of a law.[157] First, is the law designed to achieve a general or a specific purpose? In *Lukumi*, although the ordinances purported to further two general government interests—promoting public health and preventing cruelty to animals[158]—on closer examination Justice Kennedy found that taken together, they were "gerrymandered with care to proscribe religious killings of animals, but to exclude almost all secular killings."[159] Accordingly, the uniform purpose of prevention was considerably undermined by the many secular exceptions, because animal killings committed for secular purposes, such as euthanasia or scientific research, would be no less likely to constitute animal cruelty or to pose a threat to public health than similar acts committed for purposes of religious worship.[160] Indeed, where

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155 Id. at 557 (Scalia, J., concurring in part and concurring in judgment).

156 See id. at 535-40 (analyzing design, operation, and effect of each ordinance in turn, as well as their aggregate effect). Justice Kennedy, like Justice Scalia, viewed neutrality and general applicability as interrelated. See id. at 531 ("Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

157 That Justice Kennedy addressed this set of questions as part of the neutrality analysis has no substantive bearing on the outcome of the inquiry. See id. at 557-58 (Scalia, J., concurring in part and concurring in judgment) ("[C]ertainly a law that is not of general applicability (in the sense I have described) can be considered 'nonneutral'; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability.").

158 See id. at 543.

159 Id. at 542. The Court noted that the ordinances either failed to prohibit or expressly permitted many types of animal killing for nonreligious reasons, including fishing, extermination of mice and rats within a home, euthanasia of stray or unwanted animals, infliction of pain or suffering for medical testing, poisoning in yards or enclosures, and some hunting. See id. at 543-44 (citing Fla. Stat. ch. 828.058, .02, .08, .122(6)(b) (1993)).

160 See id. at 544 ("The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity.").

the number of secular exceptions in a law suggest excessive tailoring of the law's application, the likelihood increases that the law is structured to intentionally target religious conduct.

The second question takes this analysis one step further: Is the law constructed so that in its actual operation it targets only religious conduct or singles out a particular religion? In *Lukumi*, Justice Kennedy found that in actuality, "almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members."[161] Under *Smith*, should the law in question fail either step of the generally applicable analysis, there is little doubt that it has been designed to burden religious exercise, and is therefore neither generally applicable nor neutral. Such a law can only stand if the state can show that it serves a compelling interest.

Two cases decided in lower courts illustrate the subtle reach of the neutral, generally applicable analysis. In *Fraternal Order of Police v. City of Newark*,[162] the court invalidated on free exercise grounds a grooming ordinance requiring all uniformed police officers to be clean-shaven absent valid medical reasons.[163] The court understood that the medical exception did not constitute an "individualized exemption."[164] However, when it focused on the underlying purpose of the rule—to promote uniformity and esprit de corps—it found that the existence of the medical exception undermined the state's interest in complete uniformity.[165] This conclusion was bolstered by the fact that the police department was unable to explain why an exception for religious reasons would have a different impact upon the purposes of

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161 Id. at 535. The Hialeah ordinances exempted religiously motivated animal killings for the "primary purpose of food consumption," excluding, by their terms, ritual methods of animal slaughter required by Jewish laws of *kashrut*, while prohibiting the sacrifice of animals as offerings to a deity, a fundamental practice of the Santeria religion. See id. at 535-36. Once again, ritual slaughter of animals for the sole purpose of food consumption is not necessarily less cruel, or more health conscious, than similar ritual slaughter carried out as part of worship.

162 170 F.3d 359 (3d Cir. 1999).

163 See id. at 367. Two Sunni Muslim officers argued that, for religious reasons, they could not shave their beards. They were ordered to appear for disciplinary hearings, at which time they filed their complaints in court. See id. at 360-61.

164 Id. at 365.

165 See id. at 366. The court distinguished the rule from the law in *Smith*, explaining that the existence of a prescription exception from generally applicable laws forbidding the use of certain drugs did not undermine "Oregon's interest in curbing the unregulated use of dangerous drugs." Id. In contrast, the court found that the medical exception "indicates that the Department has made a value judgment that secular (i.e. medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." Id.

the rule than would an exception for medical reasons.[166] The court reasoned that the only possible justification for the police department's policy was that allowing exemptions for religious officers would mark them as members of a religion, and accordingly held that the regulations were unconstitutional.[167]

In contrast, the court in *Hines v. South Carolina Department of Corrections*[168] upheld a similar regulation requiring prisoners in a state-run facility to be clean-shaven, without taking into consideration the fact that the regulation contained an exception for prisoners who were unable to shave for medical reasons.[169] While at first glance it may appear that the court paid insufficient attention to the medical exception and thereby reached the wrong outcome, on further analysis it becomes clear that the exception did not undermine the purpose of the regulation, which in this case was to promote discipline and safety in prisons.[170] The court therefore correctly concluded that the regulation was constitutional under *Smith*.[171]

The combined effect of the five-step neutrality and general applicability inquiries is to identify intentionally discriminatory laws, whether they do their work overtly or covertly, that impose a burden on plaintiffs because of their religion. When laws are found to fail this prong of the *Smith* test, they are automatically subjected to strict scrutiny. However, if the laws pass muster under this prong of *Smith*, the inquiry shifts to the second prong, which considers whether or not the challenged law falls within the *Sherbert* exception.

B. "Mechanisms for Individualized Exemptions"

The second prong of *Smith* focuses judicial inquiry on the manner in which statutes or regulations are enforced, to assess whether or not

166 See id. at 366-67 (noting that police department failed to demonstrate why religious exemptions to grooming policy threaten important city interests, but medical exemptions do not).

167 See id. at 367 (concluding that if this is "real reason" that policy distinguishes between religious and medical exemptions, "we have before us a policy the very purpose of which is to suppress manifestations of the religious diversity that the First Amendment safeguards").

168 148 F.3d 353 (4th Cir. 1998).

169 See id. at 358.

170 See id. at 356 (describing purposes of regulation as eradicating use of "extreme hairstyles and a lack of grooming to symbolize [prisoners'] defiance to prison authority," as "officials were aware that prison gangs used hairstyle to maintain group identity," and noting that long hair, extreme hairstyles, and beards allowed inmates to change their appearance quickly and thereby avoid capture if they escaped, or to avoid identification if they committed crime in prison, and that inmates had "concealed drugs, weapons and other dangerous contraband in their long hair or dreadlocks").

171 See id. at 358.

their impact is impartial as between different religions or between secular and religious citizens. In distinguishing the unemployment compensation cases in *Smith*, Justice Scalia focused on the impact a "mechanism for individualized exemptions" can have on religious plaintiffs.[172] The unemployment benefits regulations at issue in *Sherbert* and the cases that followed it contained a "good cause" exemption that required officials to make highly discretionary decisions regarding the eligibility for an exemption of every application they reviewed.[173] That is, the regulation provided no basis for an objective assessment of eligibility, so it was left to each individual official to apply her own view of what did and did not constitute "good cause" for quitting a job or refusing available employment. *Smith* should be understood to require that courts be highly vigilant in policing these discretionary, case-by-case decisions made by unelected officials.[174]

The determination of whether the *Sherbert* exception is triggered proceeds in two steps. The first focuses on whether a law contains a mechanism similar to the "good cause" criterion in that it is open to unfettered discretionary interpretation.[175] If such a mechanism exists, the second step requires courts to determine whether it is enforced in a discriminatory manner.[176] Absent evidence of discrimination in the actual enforcement of the regulation, the *Sherbert* exception is not triggered, and there is no need to apply the compelling state interest test.

The landmark preservation cases are helpful in demonstrating the subtle distinction that *Smith* draws between legislative and bureaucratic decisionmaking. In *Keeler*, as discussed above, the court confused legislatively enacted, ex ante exceptions to the landmark ordinance with ex post, individualized exemptions that are granted ac-

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172 Employment Div. v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

173 See, e.g., Thomas v. Review Bd., 450 U.S. 707, 717 (1981) (noting that "Indiana requires applicants for unemployment compensation to show that they left work for 'good cause' in connection with the work").

174 See *Smith*, 494 U.S. at 884; *Thomas*, 450 U.S. at 713; Sherbert v. Verner, 374 U.S. 398, 406 (1963).

175 Laws, regulations, policies, and statutes that contain catch-all exceptions based on "good cause" standards, or that apply "except in exceptional circumstances," or prohibit conduct "other than in cases of hardship" would fall into this category. Each of these exceptions requires authorities to make discretionary decisions as to when an individual's unique circumstances meet the standard, based entirely upon their own assessment of the facts, without reference to any external, objective standard. See, e.g., infra note 178.

176 See Rector of the Vestry of St. Bartholemew's Church v. City of New York, 914 F.2d 348, 354-55 (2d Cir. 1990) (interpreting *Smith* to hold that degree of discretion afforded administrative official or body is relevant only insofar as there is proof that discretion is exercised in discriminatory fashion).

cording to something akin to a "good cause" standard.[177] The confusion is understandable: All enforcements of laws are ex post, and in most cases, they require some kind of individualized assessment of the facts. However, the override provisions in *Keeler*, unlike the unemployment benefit regulations in *Sherbert*, do not require from officials a highly discretionary judgment that rests upon entirely subjective criteria.[178]

The court in *Rader v. Johnston,*[179] in contrast, correctly applied the exemptions analysis by distinguishing discretionary exemptions from enumerated exceptions. In *Rader*, the challenged regulation was a state university's rule requiring all full-time freshmen to live on campus during their first year of college. The rule contained four exceptions,[180] three of which contained objective criteria that would exempt a freshman student from the on-campus housing requirement.[181] However, the fourth exception provided no such objective criteria, but rather required the university administrator to determine on a case-by-case basis whether a student should be permitted to live off-campus due to "significant and truly exceptional circumstances."[182] The court observed that the school had granted exemptions under this provision for a multitude of secular reasons,[183] but had never granted one for religious reasons.[184] The court rightly concluded that university administrators had not enforced the standard impartially as between

177 Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (treating override provisions contained in landmark preservation laws as individualized exemptions despite objective criteria used to make individual assessments).

178 See id. at 886 (discussing exceptions to landmark ordinance). The exceptions at issue in *Keeler* required officials to determine, for example, whether preservation of a landmarked building would impede "major development." Id. Such an assessment does not rest entirely on the discretion of the official, as many objective facts must be taken into account. The same applies when assessing whether the preservation of a building "would not be to the best interest of a majority of persons in the community." Id. A determination of "financial hardship" also rests on objective facts and information. Id. In the unemployment benefit cases, by way of contrast, the "good cause" standard could be interpreted to mean just about anything at all by the person making the determination as to whether applicants qualified for benefits.

179 924 F. Supp. 1540 (D. Neb. 1996).

180 See id. at 1544, 1546.

181 They were: if the student was at least 19 years old on the first day of class; if the student was married; and if the student lived with parents or guardians and commuted from within a 20 mile radius around the campus. See id. at 1546 & n.9.

182 Id. at 1546.

183 For example, exemptions were granted to a student who wished to drive his pregnant sister to class, a student who was depressed and experienced headaches, a student with learning disabilities, a student mourning the death of loved ones, and a student caring for her great-grandmother. See id. at 1546-47.

184 See id. at 1546-47, 1553.

secular and religious applicants, and required the school to extend its discretionary exemptions to religious students.[185]

It becomes clear from this model that the first prong of the *Smith* test enables judges to root out intentional acts of discrimination by legislatures, whether they are overt or covert, by subjecting all challenged laws to a rigorous analysis of their purpose and their effect. Furthermore, the second prong of the *Smith* test entirely leaves unchanged that area of free exercise law in which state activity is most susceptible to legitimate charges of discrimination.[186] Accordingly, it is essential that this second prong be read to trigger the *Sherbert* exception only when a challenged law or regulation allows for wholly discretionary decisions by unelected officials who discriminate between religious and secular reasons for granting individual exemptions from otherwise generally applicable laws. Where the exception applies, and where there is actual evidence of discriminatory enforcement, the law or regulations cannot stand unless the state can show that it serves a compelling government interest.

C. The Hybrid Exception

When a challenged law passes both prongs of the *Smith* test, those courts that recognize hybrid claims may choose to determine whether the claim fits within the hybrid exception. As has already been discussed, an overly broad interpretation of the hybrid exception may easily lead to results that erode *Smith*'s holding and undermine the purposes motivating the Court's decision.[187] Hybrid rights exceptions enable plaintiffs who challenge neutral, generally applicable, and exemptionless laws to gain the advantage of strict judicial review of those laws, despite *Smith*'s requirement that courts remain deferential towards legislatures while rigorously policing bureaucratic decisionmaking. To ensure that hybrid rights cases remain within the parameters established in *Smith*, the exception must be construed extremely

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185 See id. at 1555, 1558; cf. Bowen v. Roy, 476 U.S. 693, 708 (1986) (noting that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion").

186 According to Professor Douglas Laycock, the biggest threat to religious freedom arises from "low-level government official[s]" who are insensitive toward, and ignorant about, the special needs of religious individuals and groups, especially those who adhere to less familiar sects. See Laycock, supra note 9, at 956. Because of the "pervasiveness of regulations in all aspects of our lives," id. at 957, Laycock maintains that it is in their everyday encounters with the administrative state that religious individuals face religious hostility and discrimination, see id. at 957-58 (discussing consequences of insensitivity on part of regulators responsible for enforcing law). Under this view, the *Sherbert* exception targets exactly those situations where religious citizens are most likely to suffer intentional or unintentional discrimination.

187 See supra notes 129-31 and accompanying text.

narrowly.[188] Ideally, the exception should apply only in cases that closely resemble, both substantively and factually, the so-called "hybrid" precedents alluded to in *Smith*.[189]

CONCLUSION

In light of *Smith*'s radical re-reading of free exercise jurisprudence, it is not surprising that many courts have resisted the impact of the decision. It is also understandable that lower courts have interpreted *Smith* inconsistently, given how little guidance the opinion provides. Nevertheless, where courts interpret the *Sherbert* or hybrid rights exception too broadly, they run the risk of carving out exceptions so wide that they consume *Smith*'s rule. The model for the *Smith* test elaborated in this Note provides a clear way to distinguish between those cases that unequivocally fall within *Smith*'s purview and those cases that fail the neutral, generally applicable test, or that fall within the *Sherbert* exception. In addition, this Note reveals the importance of an extremely narrow reading of the hybrid rights exception to ensure that courts do not circumvent the *Smith* test or erode its wider purposes. Finally, the model makes clear that *Smith* differentiates between legislative and bureaucratic decisionmaking, mandating a deferential level of judicial review for the former, while requiring courts to be vigilant in policing discretionary bureaucratic determinations.

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188 See, e.g., Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (refusing to find hybrid claim as plaintiff's claims of parental right to direct child's education did not resemble claims of parents in *Wisconsin v. Yoder*).

189 See Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990) (reviewing hybrid precedents that contained free exercise claims in combination with claims of freedom of press, freedom of speech, right of parents to direct education of their children, compelled speech, and right to free association).