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Too Strict?

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TOO STRICT?

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Should the strict scrutiny standard[1] govern judicial review of claims that government has burdened religious freedom? American law's patchwork of rules applies that demanding standard to some claims but denies meaningful review to others.[2] Clear standards forbid burdening religious belief, as distinct from religiously motivated action, and subject deliberate discrimination against religious practices to strict scrutiny.[3] For other claims, an apparent difficulty arises from issues before courts that depend on the truth or importance of religious belief. The dominant rule in American case law forbids secular courts to determine these questions.[4] The point can be readily illustrated by disputes about religious speech. Most questions can be decided based on rules that apply to all forms of expression, thereby avoiding any need to evaluate religious dogma.[5] But two of the most important exceptions to free speech protec-

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1. For a recent Supreme Court definition of strict scrutiny, see Fisher v. Univ. of Tex. at Austin, 540 U.S. ___, ___, 133 S. Ct. 2411, 2417 (2013) ("[W]hen government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978)).

2. *See infra* Part II.

3. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). Courts regularly recite absolute protection for religious beliefs, but contests about beliefs are rare.

4. *See infra* Parts II.B, E.

5. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).

tion, fraud and defamation, require judicial determinations of truth.[6] As a result, some religious hucksters and defamers get a free pass.

The vexing issues about truth or importance of religious beliefs arise from demands for religious exemptions from facially neutral, generally applicable laws. These demands can be made by defendants, such as those accused of fraud or slander, or by plaintiffs seeking to establish an exemption. In either case, the established prima facie case for an exemption is to allege and prove that a law or administrative action imposes a substantial burden on one's religious freedom.[7] Like any litigant's claim, allegations of belief or burden might be false. Courts can sometimes decide whether claims are true and burdens are substantial based on historical records of a long-established faith or because the claimed burden is economic rather than spiritual.[8] But many novel or individual claims to spiritual burden have no external basis for evaluation, and even historical records can present questions beyond the competence of secular courts.[9] As a result, many religious freedom claims are accepted as true and substantial with no proof except the claim itself, forcing review to be based on other criteria. If the only other criterion is the compelling interest part of the strict scrutiny test, then courts face a dilemma: the only way to reject any claim of spiritual burden, weighty or trivial, honest or fraudulent, is to find the government's action narrowly tailored to serve a compelling state interest, a standard that the strict scrutiny test purports to make very difficult to satisfy.[10] Even if, as is often the case, a court thinks a claim before it should be sustained, it will often sense a slippery slope problem—how could an extended claim of the same sort, one that might pose greater problems for government or other persons, be rejected if it, too, must pass strict scrutiny?

The Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[11] held that the strict scrutiny standard is inappropriate for most religious exemption claims that in-

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6. *See* United States v. Alvarez, 567 U.S. ___, ___, 132 S. Ct. 2537, 2544 (2012) (dictum) (fraud); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.35(b)(iv) (8th ed. 2010) (defamation).

7. *See infra* Part II.B.

8. *See infra* Part II.C–D.

9. *See id.*

10. *See infra* Part II.F.

11. 494 U.S. 872 (1990).

voke the Free Exercise Clause.[12] The Court's opinion relied on some of the problems arising from courts' inability to determine religious truth.[13] But the Court failed to replace strict scrutiny with any form of meaningful review, leaving most issues in this realm to the political process.[14] Congress tried to fill that void with statutory causes of action that revived the strict scrutiny standard to govern many religious freedom claims, but it failed to address the standard's shortcomings identified by the Court.[15] The result is a set of rules that gives judicial protection against some fairly moderate and indirect burdens on religious freedom, often those of politically dominant faiths, but evades meaningful review of more serious interferences to minority faiths, particularly to those of American Indian religions.[16]

Exemption claims can be challenged as preferences, that is, on equality grounds.[17] The issue is routinely addressed in lawsuits by opponents of religious exemptions adopted by legislatures or administrators, but for various reasons, it is not often invoked as a government's defense in lawsuits seeking judicial exemptions.[18] When the preference claim

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12. *See id.* The majority opinion avoided use of the term "strict scrutiny" to refer to the standard it rejected, preferring the term "compelling interest," which appears numerous times, *e.g.*, 494 U.S. at 883, 886–88. That was the term used when heightened Free Exercise scrutiny was formally adopted in Sherbert v. Verner, 374 U.S. 398 (1963). *See* 494 U.S. at 883–84. As explained *infra*, text accompanying notes 57–70, *Sherbert* was decided before the strict scrutiny term had become a standard part of the constitutional lexicon. However, there can be no doubt that *Sherbert* involved a heightened scrutiny standard, requiring a "compelling state interest" to justify burdens on religious freedom and finding none on the record. 374 U.S. at 403, 406. Moreover, by the time of the *Smith* decision, proponents of the *Sherbert* rule described it as a strict scrutiny test. *See* 494 U.S. at 894–94 (Brennan, J., dissenting) (citing Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (describing the *Sherbert* test as strict scrutiny)). Congress certainly thought so when it embedded the strict scrutiny test in its statutory reaction to the *Smith* decision. *See infra* text accompanying note 76. In addition, scholars have commonly referred to the standard *Smith* rejected as the strict scrutiny test. *See, e.g.*, 2 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE 81–82 (2011).

13. 494 U.S. at 885–89.

14. *Id.* at 885.

15. *See infra* Part I.A.

16. *See infra* Part I.B.

17. *See infra* Part IV.A.

18. *Id.*

does appear, the vehicle for review is the Establishment Clause.[19] Confusing and shifting standards regarding the Establishment Clause have made this an uncertain measure.[20] However, the Supreme Court's 2005 decision in *Cutter v. Wilkinson*[21] offered possible clarity. The case reviewed the validity of a federal statute passed in reaction to *Smith*.[22] The *Cutter* Court rejected plaintiff's facial attack, but it outlined sensible rules in dicta for as-applied review that rely on the Establishment Clause and modify strict scrutiny.[23] For reasons not apparent, governments defending religious freedom claims were slow to invoke these guidelines until the recent *Hobby Lobby* litigation.[24] The federal statutes' incomplete coverage leaves some religious exemption claims to state laws, which vary considerably,[25] but if the *Cutter* scheme succeeds, it could lead to more uniform protections.[26]

This article argues that the strict scrutiny standard alone is ill-suited to evaluate most religious freedom claims. At the same time, the Supreme Court's 1990 abandonment of constitutional strict scrutiny and failure to adopt a suitable alternative[27] led to the present disorder in the law. The Court's dicta in *Cutter* point to a reasonable solution, but adoption of the *Cutter* guidelines is uncertain.[28]

The sections that follow first briefly review the history of the Supreme Court's religious freedom decisions. Part II analyzes how courts applying the strict scrutiny rule have addressed the problem of evaluating the truth and importance of claimed religious beliefs. Part III reviews the string of failed claims by followers of American Indian faiths who have sought protection of their religious interests in public lands.

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19. *See id.*

20. *See id.*

21. 544 U.S. 709 (2005).

22. *See id.* at 720–24. *See also infra* Part IV.A.

23. *See Cutter*, 544 U.S. at 719–24.

24. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751 (2014).

25. *See generally* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665 (1999).

26. *See infra* Part IV.

27. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990),

28. *See infra* Part IV.

Part IV addresses the tension between religious exemption claims and principles of constitutional equality and their possible resolution by the *Cutter* dicta. Part IV also discusses how religious exemption claims are addressed under the European Convention and other human rights regimes. Part V discusses other religious exemption topics of current legal interest: issues about prisoners' diets, medical treatment of children, contraception, and refugees.

I. RELIGIOUS FREEDOM IN THE COURTS

A. Rules

Present law applies a broad array of legal standards to religious freedom issues. Most claims based on the Free Exercise Clause receive minimal judicial scrutiny.[29] The major exception is for cases of deliberate discrimination against a particular faith, which is subject to strict scrutiny.[30] Claims arising under two federal statutes also get strict scrutiny.[31] Another federal statute gives individual workers significant but flexible protection without applying the strict scrutiny formula.[32] Religious ex-

29. *Smith*, 494 U.S. 872 (1990). *Smith*'s dicta retained heightened review of claims of deliberate discrimination against a faith, of what the Court called "hybrid" claims involving another constitutional right, and of claims involving "individualized government assessment." *Id.* at 884. Claims to autonomy by religious organizations were cited favorably and thus also survived. *Id.* at 887.

30. *See id.* at 877–78; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

31. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5 (2012); Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

32. The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 to require that employers accommodate employees' religious exercise claims to a reasonable extent. The 1964 Act simply forbade discrimination in employment on the basis of religion but did not require exemptions. *See* 42 U.S.C. § 2000e-2(a) (2012). The 1972 amendment mandated reasonable exemptions by defining "religion" as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

pression has strong protection under the Free Speech Clause, often based on the strict scrutiny standard.[33] Establishment Clause review of claims to freedom from religion has its own set of heightened review standards.[34] State statutes and constitutions further complicate the mix.[35] No one thinks the legal landscape is appropriate. Advocates for religious freedom seek strict scrutiny of all claims and argue that courts do not properly enforce the federal statutes.[36] Their opponents raise Establishment Clause and equality objections.[37] Nothing resembling a uniform approach is in sight. Moreover, an empirical description of claims that fail and those that succeed seems bizarre. Some fairly modest religious freedom claims are vigorously protected, while serious invasions are held not to state a cause of action.[38]

Events leading to today's disarray are a mix of constitutional rulings and statutes. Founding-era conflicts over state establishments and resulting discriminations against religious minorities were famous events,[39] but their modern relevance is at most indirect. Salient events for the rest of the nineteenth century were mostly political. Catholic efforts

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33. *See Smith*, 494 U.S. at 881; Cantwell v. Connecticut, 310 U.S. 296, 305 (1940). *See also* Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?* 8 U. PA. J. CONST. L. 431, 448 (2006).

34. *See infra* Part IV.

35. *See supra* note 25.

36. *See* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced,* 39 FORDHAM URB. L.J. 1021, 1054 (2012); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernisms*, 61 CASE W. RES. L. REV. 1211, 1252 (2011); Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1923–24 (2011). *See generally* Ira Lupu, *Federalism and Faith Redux*, 33 HARV. J. L. & PUB. POL'Y 935 (2009).

37. *See, e.g.*, René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725, 750 (2011); Leslie C. Griffin, *Fighting the New Wars of Religion: The Need For a Tolerant First Amendment*, 62 ME. L. REV. 23, 24 (2010); Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 373 (2009); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1272 (2008).

38. *See infra* Part I.B.

39. *See* Wesley J. Campbell, *Religious Neutrality in the Early Republic*, 24 REGENT U. L. REV. 311, 327 (2011).

to gain tax support for religious schools failed.[40] The Government supported and subsidized Christian missionaries trying to convert American Indian people.[41] Only two important matters reached the Supreme Court. When a Presbyterian congregation in Kentucky split apart over slavery, the Court held that courts must defer to church authorities.[42] The other was the federal government's successful campaign to outlaw Mormon polygamy.[43] In the century's most famous decision, the Court rejected Mormons' claim to protection of the Free Exercise Clause; the decision is usually said to interpret the Clause to protect only beliefs, not acts of religious obligation.[44]

Supreme Court decisions in the 1920s first protected religious freedom, ruling that states could not outlaw private religious schools[45] nor forbid them to teach foreign languages.[46] But the Court's reasoning in these cases was at most indirectly connected to the Free Exercise Clause. The opinions relied exclusively on the Court's substantive due process doctrine to hold that parents' constitutional liberty to determine their children's education outweighed competing state interests; the religion clauses were not mentioned.[47]

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40. *See* Aaron E. Schwartz, *Dusting Off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 72 MO. L. REV. 339, 370 (2007).

41. *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native America Free Exercise Cases*, 49 STAN. L. REV. 773, 776–77 (1997).

42. Watson v. Jones, 80 U.S. (13 Wall.) 679, 733–34 (1871).

43. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (sustaining U. S. government's dissolution of LDS Church corporation and seizure of its assets because of its promotion of polygamy); Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257, 269 (2006).

44. Reynolds v. United States, 98 U.S. 145 (1878). Some scholars have opined that the decision rested on broader grounds. *See, e.g.*, Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81 (1994) (arguing that the *Reynolds* Court found polygamy to be immoral and contrary to American values so that its suppression was justified, rather than on exclusion of any protection for actions inspired by religion).

45. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). *Pierce* also involved a military academy that made no religious freedom claim.

46. Meyer v. Nebraska, 262 U.S. 390 (1922).

47. Notwithstanding, there is a persistent practice of academic revision to claim that the decisions did rely on the Free Exercise Clause. *See, e.g.*, James C.

Modern law on religious freedom is customarily dated from the Supreme Court's 1940 decision in *Cantwell v. Connecticut*,[48] which held that the Free Exercise Clause protects actions as well as beliefs and restricts state governments under the incorporation doctrine.[49] The Court also indicated that some level of heightened review applied, but it invoked Free Speech precedents:

> In the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.[50]

Moreover, for the first twenty years or so under that standard, claims reaching appellate courts involved religious expression, claims that are now evaluated under the Free Speech Clause rather than under the Free Exercise Clause.[51]

Claims for religious exemptions unrelated to speech reached the Court in the 1960s, in parallel with activist decisions enforcing the Establishment Clause.[52] The two strains coalesced in unsuccessful attempts to

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Harkins, IV, *Of Textbooks and Tenets:* Mozert v. Hawkins County Board of Education *and the Free Exercise of Religion*, 37 AM. U. L. REV. 985, 986 n.6 (1988).

48. 310 U.S. 296, 303 (1940).

49. *Id.* at 310.

50. *Id.* at 311 (citing Thornhill v. Alabama, 310 U.S. 88 (1940)). *See also* Herndon v. Lowry, 301 U.S. 242, 246 (1937); Schenck v. United States, 249 U.S. 47, 52 (1919).

51. *See e.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953). *See* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 712 (2008).

52. *See* Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Non-preferential Favoritism of Religion*, 57 FLA. L. REV. 1, 4 (2005).

outlaw Sunday closing laws.[53] But the Court's 1963 decision in *Sherbert v. Verner*[54] hardened the free exercise test into the compelling interest formulation that became the heart of the strict scrutiny doctrine.[55] In 1972, Congress mandated some protection for religious interests of employees, but the statute does not use the strict scrutiny formula.[56]

The Court created the now-familiar strict scrutiny test gradually over several decades. The idea is often traced to Justice Stone's celebrated footnote 4 in *United States v. Carolene Products Co.*,[57] though he did not use those words.[58] The phrase "strict scrutiny" in its modern individual rights sense first appeared in Justice Douglas's opinion for the Court in *Skinner v. Oklahoma*,[59] which overturned the state's "three-strikes-and-you're-castrated" law.[60] Another famous occasion was Justice Black's dictum in *Korematsu v. United States*[61] stating that racial classifications are "immediately suspect" and require "the most rigid scrutiny."[62]

The companion "compelling interest" wording was first stated in Justice Frankfurter's concurring opinion in *McCollum v. Board of Education*,[63] which outlawed officially sanctioned Bible classes in public schools as an Establishment Clause violation.[64] The two phrases were first used together in Justice Harlan's dissent in *Shapiro v. Thompson*,[65] in which the Court overturned states' one-year duration-of-residence laws to qualify for welfare.[66] The terms first appeared together in a ma-

53. *See* Braunfeld v. Brown, 366 U.S. 599 (1961) (rejecting the Free Exercise Clause claim); McGowan v. Maryland, 366 U.S. 420 (1961) (rejecting the Establishment Clause claim).

54. 374 U.S. 398 (1963).

55. *Id.* at 398.

56. *See supra* note 32.

57. 304 U.S. 144 (1938).

58. *Id.* at 152 n.4 (1938) (arguing that restricting political process may "be subjected to more exacting judicial scrutiny" and protecting minorities "may call for a correspondingly more searching judicial inquiry").

59. 316 U.S. 535 (1942).

60. *Id.* at 541.

61. 323 U.S. 214 (1944).

62. *Id.* at 216 (Black, J., dissenting).

63. 333 U.S. 203, 223 (1948) (Frankfurter, J., concurring).

64. *See id.* at 212 (majority opinion).

65. 394 U.S. 618, 660 (1969) (Harlan, J., dissenting).

66. *Id.* at 627 (majority opinion).

jority opinion in *Graham v. Richardson*,[67] which overturned state laws that discriminated against lawful resident aliens applying for welfare.[68] As this review shows, the test did not arise within the context of any particular rights provision or claim.[69] Rather, since 1971, it has become part of the formulaic approach to all modern rights claims outside criminal prosecutions.[70]

Returning to the *Sherbert* version of strict scrutiny as applied to religious freedoms, the standard limped along for twenty-seven years, during which the Court famously protected Amish home-schooling[71] but found ways to reject most claims.[72] In 1990, the *Smith* Court threw out strict scrutiny for most claims in an odd decision that preserved and isolated the two protections the *Sherbert* standard had upheld—for the

67. 403 U.S. 365, 375 (1971).

68. *Id.* at 382–83.

69. *See* Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny, in* PUBLIC VALUES IN CONSTITUTIONAL LAW 219 (Stephen E. Gottlieb ed., 1993) (noting that the term "strict scrutiny" began in descriptive comments).

70. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 357 (2006). The concept is occasionally invoked in advocacy over other legal issues. *See, e.g.*, Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285 (2000); Donald L. Beschle, *"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality*, 38 HASTINGS L.J. 471 (1986–1987); Barry Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233 (1978).

71. Wisconsin v. Yoder, 406 U.S. 205 (1972).

72. *See* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357, 362 (2012) (stating that "free exercise strict scrutiny was rather feeble"); Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be a Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2039 (2011) (stating that "in the cases that reached the Supreme Court, religious objectors hardly ever won"); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 809 (2006) (stating that most *Sherbert*-era claims failed); James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment,* 78 VA. L. REV. 1407, 1417 (1992) (stating that between 1980 and 1990, eighty-seven percent of religious-freedom claims failed).

Amish and for unemployment claimants.[73] For all other claims, heightened review was available only for claims of deliberate discrimination against a religious practice, which duplicates equal protection dogma.[74] The Court identified genuine problems with the strict scrutiny test,[75] but instead of replacing it with a more suitable alternative, the opinion left most claimants without meaningful judicial review.

Congress reacted by attempting to restore strict scrutiny by statute. The Religious Freedom Restoration Act of 1993 (RFRA) codified a strong version of the *Sherbert* test.[76] But in 1997, the Supreme Court in *City of Boerne v. Flores*,[77] held that Congress lacked power to impose the statute's requirements on state governments.[78] Thus, RFRA survives only as a limit on the federal government.[79] By the time Congress tried to find a way around *Boerne*, some members had acquired doubts about granting strict scrutiny in all situations.[80] The resulting compromise, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), imposes a vigorous form of strict scrutiny to protect churches from land use restrictions and to give incarcerated persons strong rights to religious freedom.[81] No other interests are protected. Some states reacted to *Smith* by adding their own religious freedom protections or strengthening older ones.[82]

In sum, today's federal law gives strong constitutional protection to many religious freedom claims against the federal government, to religious expression and belief, to claimants who can prove deliberate discrimination, and to some Establishment Clause claims. Powerful statutory remedies are available to churches opposing zoning and other land-use

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73. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881–84 (1990). The Court also preserved decisions involving freedom of religious expression, but these are best grounded in the Free Speech Clause. *Id.* at 881–82.

74. *Id.* at 877, 881–82.

75. *See id.* at 888.

76. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

77. City of Boerne v. Flores, 521 U.S. 507 (1997).

78. *Id.* at 536.

79. *See* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 32 (2006).

80. *See* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 206 (2008).

81. 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

82. *See* Lund, *supra* note 25, at 477 n.67.

laws, to incarcerated persons, and to workers seeking accommodations from their employers. Other claims against state governments must look to state law. This patchwork makes political sense, in that it satisfies most religious interests with political clout. While the situation could change quickly, there is no serious move afoot for Congress to do more, and the Supreme Court shows no rustlings of change. But as Part III shows, it leaves some minority faiths in the dust.

B. Outcomes

As noted above, religious claims to unemployment payments and Amish home schooling won major decisions under Free Exercise strict scrutiny, and their victories survived the Court's retreat in *Smith*.[83] Religious schools also won important cases in the 1920s, and their claims survive under the Amish decision's umbrella.[84] Since 1940, many religious claims to free speech have succeeded, though these depend on the Free Speech Clause rather than the Free Exercise Clause.[85] RLUIPA has made winners of churches trying to resist zoning laws, decisions that save claimants money rather than directly protecting religious practice.[86] RLUIPA has also allowed many incarcerated persons to achieve greater religious freedom.[87] In current disputes about health insurance coverage for contraception, employers whose faiths represent a large percentage of American voters and whose claims are based on indirect "participation in evil" have prevailed.[88] Yet they can avoid participation (and save money)

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83. *See supra* text accompanying note 73; Janet V. Rugg & Andria A. Simone, *The Free Exercise Clause:* Employment Division v. Smith*'s Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S LEGAL COMMENT. 117, 135 (1990).

84. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990) (preserving Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), and, by implication, Meyer v. Nebraska, 262 U.S. 390 (1923)).

85. *See* Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?* 8 U. PA. J. CONST. L. 431, 448 (2006); *supra* note 51 and accompanying text.

86. *See* Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provision on Local Governments*, 39 FORDHAM URB. L.J. 1221, 1242 (2012).

87. *See* James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2117 (2009).

88. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751 (2014) (holding that business owners with religious objections to some forms of con-

by dropping health insurance coverage,[89] and similar claims consistently fail for the much smaller community of religious pacifists.[90] Still more dramatic are claims against the health care law in which the "substantial burden" is merely to sign a form to claim the law's religious exemption.[91]

Historically, the most famous losers were polygamists.[92] In modern times, the major losers are American Indian faiths that seek protection for sacred sites on public lands that had once belonged to their tribes. All final appellate decisions have rejected their claims.[93] The dominant theory in these cases is that their claims fail to state a cause of action.[94] This is so notwithstanding severe impacts on believers—in its leading decision in 1988, the Supreme Court admitted that proposed government action "could have devastating effects on traditional Indian religious practices" and could "virtually destroy the . . . Indians' ability to practice their religion."[95] Other losers include pacifists,[96] tax avoiders,[97] most claimants who try to avoid drug laws,[98] landlords and busi-

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traception did not have to offer them through their employees' health insurance plans).

89. *See* Liberty Univ. v. Lew, 733 F.3d 72, 99–100 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 683 (2013) (noting that large employers who fail to provide tax-exempt health insurance for employees are subject to a tax, not a penalty); Marty Lederman, *Hobby Lobby Part III–There is no "Employer Mandate,"* BALKINIZATION (Dec. 16, 2013, 9:36 AM), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html (stating that the amount of the tax for not providing health care is much less than employers spend on health plans).

90. *See* Office of Chief Counsel, Internal Revenue Service, *Memorandum*, (Apr. 22, 2013), http://www.irs.gov/pub/irs-lafa/20133303f.pdf. One estimate is that 100,000 people nationally would support a pacifist political party. *See Brief History and Current Condition of the United States Pacifist Party*, (Apr. 30, 2003), http://www.uspacifistparty.org/history.htm.

91. Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014) (accepting the claim that submitting a government form for exemption from the law's contraception provision constitutes a substantial burden on plaintiffs' religion).

92. *See* Reynolds v. United States, 98 U.S. 145 (1878).

93. *See infra* Part III.

94. *See infra* Part III.D.

95. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S.439, 451 (1988).

96. *See Memorandum*, *supra* note 90.

97. *See* United States v. Lee, 455 U.S. 252 (1982).

98. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990).

ness owners who claim a religious right to violate anti-discrimination laws,[99] opponents of Sunday closing laws,[100] and persons who seek to avoid official photos and other forms of identification.[101]

As this review shows, comparing religious freedom claims based on severity of impact reveals a legal scheme that makes little sense. Persons denied unemployment insurance, churches that want to avoid zoning laws, and contraception opponents have robust and vigorous legal protection against moderate, mostly economic costs that governments would impose on them. But Native American faiths have no judicial protection for outright denials of religious freedom. As explained below, religious freedom outcomes are rational only as an indirect byproduct of the strict scrutiny test.[102]

For Indian sacred site claims, critics have accused the courts of assorted failings—lack of understanding of Native religions, giving ownership an improper veto on religious use claims, undervaluing religious freedom, and others.[103] Critics assert that the strict scrutiny test has been dishonored.[104] But what if the problem is that very test?

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99. *See* Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013).

100. *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

101. *See* Lauren N. Harris, Comment, *You Better Smile When You Say "Cheese!": Whether the Photograph Requirement for Drivers' Licenses Violates the Free Exercise Clause of the First Amendment*, 61 MERCER L. REV. 611 (2010). *Cf.* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007) (stating that religious defenses to anti-discrimination laws vary depending on the protected class).

102. *See infra* Part II.

103. *See, e.g.*, Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1633 (2004).

104. *See, e.g.*, Allison M. Dussias, *Friend, Foe, Frenemy: The United States and American Indian Religious Freedom*, 90 DENV. U. L. REV. 347, 415 (2012); Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 DENV. U. L. REV. 981, 995–96 (2006); Lt. Col. James E. Key, *This Land is My Land: The Tension Between Federal Use of Public Lands and the Religious Freedom Restoration Act*, 65 A.F. L. REV. 51, 62 (2010).

II. UNMODIFIED STRICT SCRUTINY IS WRONG FOR RELIGIOUS EXEMPTION CLAIMS

A. Compare Free Speech and Equal Protection with Religious Freedom

The basic difficulties of using a strict scrutiny or compelling state interest test for religious freedom claims are revealed by comparing them with claims for denial of equal protection and for abridgement of free speech. For this purpose, claims of discrimination on the basis of religion are classified with other equal protection claims, and most religious speech claims are classified with other free speech claims. The contrast is with claims that a facially neutral law or policy improperly burdens freedom of religion such that litigants seek exemption from the law.[105]

One problem is separating important claims from trivial ones. For strict scrutiny review of complaints about denial of equal protection, plaintiffs must allege and prove discrimination against members of a protected class recognized by the Supreme Court: race, national origin, or religion.[106] Other kinds of discrimination receive lesser forms of scrutiny, most of them minimal review under the rational basis test.[107] Claims based on the Free Speech or Press Clause must invoke judicially-defined forms of protected speech, including religious speech.[108] There is a broad array of these, but several common forms of speech receive little or no protection: fraud and other commercial falsehoods, conspiracy, perjury, and other forms of lying under oath.[109] Narrower limits apply to pornog-

105. The problems with strict scrutiny of exemption claims do not apply to claims of intentional discrimination or to most issues about religious speech. *See supra* Part I. For empirical evidence of the discrimination-exemption distinction in case results, see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 860–62 (2006).

106. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3(a)(iii) (8th ed. 2010).

107. *See id.* §§ 14.3(a)(i) & (iv).

108. *See id.* § 16.

109. *See* United States v. Alvarez, 567 U.S. ___, ___, 132 S. Ct. 2537, 2544 (2012) (dictum); Helen Norton, *Lies and the Constitution*, 2013 SUP. CT. REV. 161, 170, 173, 192–93 (2012).

raphy, private defamations, nonverbal expressive conduct, and nondiscriminatory regulation of time, place, and manner.[110] Thus, for both discrimination and expression, the law has well-established categories that distinguish claims based on their importance and on the importance of competing values.

No like categories define claims to religious exemptions. One claiming an illegal restriction on religious freedom (discrimination and speech aside) can allege any apparently neutral law or decision to be a substantial burden on free exercise.[111] Potential claims are endlessly abundant. Countless ordinary government actions add to costs or otherwise limit religious exercise. An open-ended standard that addresses each claim with particularity could swamp the courts and trivialize the process. Legislators and administrators who are asked for religious accommodations have ample discretion to manage the subject, but judges have struggled to limit review to important claims.

A second problem is the proof needed for a prima facie case. For claims of interference with free speech or unlawful discrimination, the facts of plaintiffs' claims are concrete and capable of proof or disproof at trial.[112] By contrast, claims to religious exemption when artfully made are, with some exceptions, not traversable. Courts cannot adjudicate questions of religious truth or dogma.[113] This results in most religious exemption cases turning on the government's justification. Strict scrutiny is supposed to erect a very high bar so that most laws that burden religious freedom should be overturned.[114] But trivial religious freedom claims can state a prima facie case just as readily as substantial ones, so that a test designed to make the government's justification very difficult cannot operate as intended.

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110. *See* Norton, *supra* note 109, at 192–93.

111. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990).

112. For example, the issue of truth or falsity must be proved in defamation, fraud, and perjury cases. *See* 50 AM. JUR. 2D *Libel and Slander* § 21 (2014); 37 AM. JUR. 2D *Fraud and Deceit* § 7 (2014); 60A AM. JUR. 2D *Perjury* § 10 (2014). The issue of intent to discriminate on the basis of race must be proved in discrimination cases. *See also* Washington v. Davis, 426 U.S. 229 (1976).

113. *See Smith*, 494 U.S. at 887.

114. *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013). Actual applications of the test vary considerably, but all involve substantial levels of invalidation. *See* Winkler, *supra* note 105, at 802.

A third problem is the diversity of potential claims for religious exemption. Free speech and discrimination claims are refined into prescribed categories.[115] By contrast, religious practices vary endlessly, and their potential interactions with government are myriad as well, so that categorical rules for organizing the law cannot be effectively formulated. Risk that judicial responses will be inconsistent is much greater with religion than with speech and equality. For example, why should Amish parents' religious objection to public school laws be protected but not those of other fundamentalist parents?[116] Why should sabbatarians be excused from Saturday work for unemployment insurance purposes but be forced to observe Sunday closing laws?[117] Why should one faith's sacrament be protected but another's not?[118] How are courts to sort out prisoners' claims to novel, religiously-mandated diets?[119]

Given these problems, courts applying the compelling interest or strict scrutiny test to religious freedom claims have sought ways around it. The *Smith* Court instead simply abandoned the test for most claims,[120] but Congress forced us to consider it anew and in strengthened form.[121]

115. *See supra* notes 106–110 and accompanying text.

116. *Compare* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (sustaining Amish religious claim to exemption from compulsory school attendance law), *with* Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (rejecting a fundamentalist religious group's claim to exempt school children from reading certain assigned texts because the religious group did not prove that the texts had a coercive effect on the school children's practice of their religion).

117. *Compare* Sherbert v. Verner, 374 U.S. 398, 410 (1963) (sustaining sabbatarian's claim to unemployment insurance payments), *with* Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (rejecting sabbatarians' claims to exemption from Sunday closing laws).

118. *Compare* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (approving exemption for huasca, a hallucinogenic tea used in religious ceremonies), *with* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (rejecting ceremonial ingestion of peyote as exempt from state drug laws).

119. *See infra* notes 195–200 & 368 and accompanying text.

120. *Smith*, 494 U.S. at 885.

121. *See supra* notes 71 & 81 and accompanying text.

B. Prima Facie Case for Religious Free Exercise

Under the *Sherbert* rule, courts articulated a prima facie claim for constitutional free exercise violations. Claimants had to allege that the government's action substantially burdened their religious freedom.[122] RFRA and RLUIPA codified this definition.[123] Notably, the phrase departs from the constitutional text, which forbids only laws that "prohibit" free exercise of religion.[124] This wording shift has played a significant role in issues reviewed in this article.[125]

Ordinary judicial procedures require proof of a prima facie claim's allegations by a preponderance of evidence.[126] Elements of religious freedom claims pose special difficulties. Is a claim religious or secular? Is there in fact a substantial burden on religious freedom? Is plaintiff's claim sincere, that is, honest? When a claimant, or the agent of an institutional claimant, asserts a substantial burden under oath, can the claim's religiosity, burden, substantiality, or sincerity be tested by normal judicial process? Adjudication of these questions risks drawing secular courts into determinations of the veracity of professions of faith. In 1944, the Supreme Court held that truthfulness of a religious claim cannot be adjudicated in a mail fraud prosecution,[127] and similar rulings have been made in legal disputes over ownership of church property.[128] The

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122. *Sherbert*, 374 U.S. at 403. *See also* Jesse H. Choper, *In Favor of Restoring the Sherbert Rule—With Qualifications*, 44 TEX. TECH L. REV. 221 (2011) (asserting that, as applied in other cases, the *Sherbert* rule amounted to a diluted version of strict scrutiny).

123. 42 U.S.C. §§ 2000bb(b)(2), 2000bb-1(a), 2000cc(a)(1), 2000cc-1(a) (2012).

124. U.S. CONST. amend I.

125. *See infra* notes 243-248 and accompanying text.

126. *See Preponderance of the evidence*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Sept. 26, 2014).

127. United States v. Ballard, 322 U.S. 78, 86 (1944).

128. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721–23 (1976) (holding that the Establishment Clause precludes civil courts from interceding in disputes about church governance); Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970); Presbyterian Church in the United States v. Mary Elizabeth Blue Hill Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969) ("The First Amendment prohibits a State from employing religious organizations as an arm of the civil judiciary to perform

Court's recent approval of a ministerial exception to employment discrimination laws rejected judicial authority to review sincerity of grounds for terminating ministers.[129] Are other free exercise claims distinguishable?

Religiosity is necessarily at issue because of the constitutional text, often copied in state and federal statutes. Although often belabored in academic writings[130] and the subject of serious contests in other nations,[131] religiosity is seldom the focus of American free exercise lawsuits. One prominent contest was the extended battle between tax authorities and the Church of Scientology, which the Government eventually conceded.[132] The Supreme Court's best-known ruling was its 1971 rejec-

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the function of interpreting and applying state standards."); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 119–20 (1952) ("Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls."). However, the Court modified its doctrine in Jones v. Wolf, 443 U.S. 595 (1979), when it adopted the so-called neutral principles rule. *Id.* at 603–04 ("The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible . . . free[ing] civil courts completely from entanglement in questions of religious doctrine, polity, and practice."). The current rule involves courts in evaluating church rules to a limited extent and has made church property law much less certain.

129. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. ___, ___, 132 S. Ct. 694, 707–08 (2012).

130. *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2012); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005). To be sure, American law is filled with contested claims that the Establishment Clause requires equality between religious and secular beliefs despite the Free Exercise Clause's religious preference. But these battles seldom depend on asking courts to decide whether a belief system is a religion. *See, e.g.*, Deborah Jones Merritt & Daniel C. Merritt, *The Future of Religious Pluralism: Justice O'Connor and the Establishment Clause*, 39 ARIZ. ST. L.J. 895, 936–40 (2007).

131. *See, e.g.*, Arrowsmith v. United Kingdom, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978) (holding belief to be political rather than religious). *See* Jilan Kamal, *Justified Interference With Religious Freedom: The European Court of Human Rights and the Need For Mediating Doctrine Under Article 9(2)*, 46 COLUM. J. TRANSNAT'L L. 667, 677 (2008).

132. *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680 (1989); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969). *See* Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some*

tion of a selective conscientious objector's exemption claim, although that involved no contested claim of religiosity.[133] Some opinions solemnly "find" a claim to be religious in circumstances where the matter is not seriously contested.[134] Moreover, dicta warn that secular beliefs are insufficient.[135] However, it is difficult to find an important instance where a court rejected an exemption claim by finding it to be secular. In the context of statutory religious exemptions from vaccination requirements for children, false claims are reported to be common, but state authorities do not contest the matter.[136] Hence while a limit in theory, proof of religiosity is not an important one in practice.[137]

C. Sincerity

Religious freedom opinions often recite that plaintiffs' claims must be sincere, a way to ask whether they are truthful in the special context of religion—not a test of factual truth but one asking whether a claimant's assertion of religious belief is honest.[138] Most reported claims appear to meet this criterion, and defending governments often concede it. Even when a claim might be doubtful, the claim itself is usually accepted as valid on its face, and governments usually lack any way to contest it. The criterion has been relied on to try to dismiss prisoners' claims on the basis of backsliding, that is, failure to observe rules of one's al-

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Thoughts on Selected Issues in Law and Religion, 47 DEPAUL L. REV. 85, 109–10 (1997).

133. *See* Gillette v. United States, 401 U.S. 437, 460–61 (1971) (holding that there is no constitutional right to exemption from conscription).

134. *See* Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972).

135. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989); United States v. Seeger, 380 U.S. 163, 193 (1965) (Douglas, J., concurring); Doswell v. Smith, 1998 U.S. App. LEXIS 4644, *8–15 (4th Cir. Mar. 13, 1998).

136. *See infra* Part V.A.

137. There are occasional disputes about claims of religious persecution to qualify for refugee status. Whether Falun Gong, a spiritual group that arose in China, is a religion for purposes of refugee law has been contested in many other nations, but its religious status is accepted in the United States. *See* Christopher Chaney, *The Despotic State Department in Refugee Law: Creating Legal Fictions to Support Falun Gong Asylum Claims*, 6 ASIAN-PAC. L. & POL'Y J. 130 (2005).

138. *See Seeger*, 380 U.S. at 185. *See generally* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 109–23 (2006).

leged faith.[139] This sometimes works in that context because prison authorities can observe claimants around the clock. However, in other contexts the sincerity criterion at best allows courts to dismiss claims artlessly made or belied by collateral admissions, both rare.[140]

To be sure, courts have often gone to elaborate lengths to "decide" that a claim is sincere.[141] One way courts have purported to find a claim to be genuine is by review of historical beliefs and practices of an established faith. Amish home-schooling was grounded on centuries of consistent practice.[142] In *Sherbert*, the plaintiff's refusal to work on Saturdays was an incontrovertible rule of her century-old church and supported in turn by the ancient scripture of the Hebrew Bible.[143] But the irrelevance of that approach was shown when Eddie Thomas's unemployment insurance claim was based on a purely personal belief not shared by the church to which he belonged; the Court held his claim to be as good as theirs.[144] Other personal beliefs not supported by rules of an institutional faith have similarly survived dismissal as false or insincere.[145] In *Hobby Lobby*, two companies claimed that compliance with the Affordable Care Act's contraception requirement burdened their beliefs that forms of contraception are sinful.[146] The claimed belief was surely sincere, and the Government conceded the point.[147] However, later in the litigation, the question arose whether the companies could drop

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139. *See infra* notes 198–200 and 206 and accompanying text.

140. *See* Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 149 (1997).

141. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 217 (1972).

142. *See id.*

143. *See* Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963); *Genesis* 2:2–3; *Exodus* 20:9–10.

144. Thomas v. Review Bd., 450 U.S. 707, 719 (1981) (holding for a Jehovah's Witness claimant notwithstanding finding that his refusal to work on tanks based on pacifist beliefs was not mandated by the faith).

145. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Security, 489 U.S. 829, 833 (1989); United States v. Seeger, 380 U.S. 163, 176 (1965).

146. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, ___, 134 S. Ct. 2751, 2764–67 (2014).

147. *See* 134 S. Ct. at 2779. The Government argued that the Court should find that corporations are not covered by the RFRA statute because determining sincerity of corporations would be difficult, but that was not a challenge to sincerity of plaintiffs' claim. *See id.* at 2774–75.

health care coverage and save money, thus suffering no burden.[148] In response, plaintiffs claimed a religious duty to provide health insurance for their employees.[149] Providing health insurance for employees is a tenet of no known faith, which raises doubts about its sincerity. Nevertheless, the Court accepted the claim at face value.[150]

D. Substantial Burden

Courts have been more willing to grapple with claims of substantial burden on free exercise.[151] Some decisions have attempted a limited definition of burden;[152] others have tried to distinguish substantial burdens from trivial ones.[153] In *Braunfeld v. Brown*,[154] which rejected a free-exercise exemption from Sunday-closing laws, the Court's four-justice plurality tested two possible limits.[155] The opinion pointed out that the laws did not penalize religious exercise, so their burden was indirect, a concept that could be applied without reviewing claims of religious truth.[156] The opinion also relied on the government's claim that mandated exemptions would cause many practical difficulties, implying a moderate standard of review to justify restrictions that would avoid or at least reduce the need to determine burden and substantiality.[157]

Two years later, the *Sherbert* Court rejected both limiting concepts, holding that indirect burdens were protected and requiring a compelling state purpose to justify such burdens.[158] The *Sherbert* dissenters objected that the Court's mandated exemption "based on religious con-

148. *See id.* at 2776.

149. *See id.*

150. *See id.* At another point in the opinion, the Court cited Thomas v. Review Bd., 450 U.S. 707 (1981), to stress that such questions cannot be reviewed by courts. *See id.* at 2778.

151. *See, e.g.*, Abdulhaseeb v. Calbone, 600 F.3d 1301, 1312–20 (10th Cir. 2010).

152. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 606, 608–09 (1961).

153. *See, e.g.*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); Sequoyah v. Tennessee Valley Authority 620 F.2d 1159 (6th Cir. 1980).

154. 366 U.S. 599 (1961).

155. *Id.* at 606, 609 (citing McGowan v. Maryland, 366 U.S. 420, 451 (1961)).

156. *Id.* at 608–09.

157. *Id.* at 608.

158. *See* Sherbert v. Verner, 374 U.S. 398, 403–07 (1963).

victions would necessitate judicial examination of those convictions."[159] Somewhat inconsistently, the same opinion noted that the burden on petitioner's religious freedom was "indirect, remote, and insubstantial."[160] RFRA and RLUIPA codified *Sherbert* on these points: indirect burdens are protected, and the standard is strict.[161]

Logically, the focal point of an effort to identify important burdens on religious freedom is represented by the word "substantial" in the formula. Trivial burdens should not be the basis for mandatory accommodations, at least not if any significant, competing interest is harmed. If protection is not limited to direct burdens, can courts review substantiality in another way? In some circumstances, burden translates into a financial cost of compliance that can be measured and evaluated without the need to adjudicate religious truth. But that works only so long as the claimed burden is economic. If instead a claimant alleges that taxes are sinful, an audit cannot determine substantiality or sincerity.

The Supreme Court's leading decisions reviewing religious attacks on taxes reveal the problem.[162] An attack on a sales tax based simply on the claim that it made religious practice more expensive was rejected.[163] However, Amish employers and workers sought exclusion from the Social Security system based on their belief in looking after their own, rather than simple economic burden.[164] The Court did not question

159. *Id.* at 421 (Harlan, J., dissenting).

160. *Id.* at 423.

161. Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, §§ 2(b)(1), 3(b), 107 Stat. 1488, 1488–89 (1993) (codified as amended at 42 U.S.C. §§ 2000bb(b)(1), 2000bb-1(b) (2012); Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, §§ 2(a)(1), 5(g), 114 Stat. 803, 803, 806 (2000) (codified at 42 U.S.C. §§ 2000cc(a)(1), 2000cc-3(g) (2012).

162. *See, e.g.*, Swaggert Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990); United States v. Lee, 455 U.S. 252, 257 (1982).

163. *Swaggert Ministries*, 493 U.S. at 391.

164. *Lee*, 455 U.S. at 257. The issue resurfaced in Liberty Univ. v. Lew, 733 F.3d 72 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 683 (2013). There, the plaintiffs claimed that the Affordable Care Act requirement that they buy insurance or pay a tax substantially burdened their religious practice. *Id.* at 85–86. The court held that payment of a moderate, nondiscriminatory tax does not substantially burden one's religion. *Id.* at 100. However, the Tenth Circuit called the payment a fine and held it to be a substantial burden. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1140–41 (10th Cir. 2013) (en banc), *aff'd*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751 (2014).

whether plaintiffs had proved a substantial burden on their faith; it rejected their claim based on the government's justification that the tax system could not function if compelled to recognize such exemptions.[165] Religious freedom proponents attacked the decision as an unjustified softening of strict scrutiny.[166] A similar question was before the Court in attacks on the contraception provisions of the Affordable Care Act.[167]

Public school disputes have revealed other aspects of the problem. The Supreme Court's famous *Yoder* decision mandated an exemption from compulsory school attendance laws for Amish teenagers.[168] The Court's opinion appeared to review in detail whether the claim was a substantial religious burden.[169] The point was yet more apparent in the Wisconsin Supreme Court's opinion: "How heavy is the burden? We think it is clear the burden of compulsory education is a heavy one."[170] Several points are notable. First, one can doubt whether that question was seriously contested by the State. Second, by finding in favor of a substantial burden, the courts did no more than other courts that have accepted a claim of substantial burden without traverse. In both situations this moved the crux of review to the government's defense, as in the Amish tax case.[171] The hard question is whether a court can reject a claim by finding it insubstantial.

As noted above, claims of religious belief have been found to be sincere based on tenets of a well-established religious community, like the Amish.[172] Courts have found alleged burdens to be substantial on the same basis.[173] However, no like proofs are possible for new faiths or for individual claims not shared by a religious community. Thus, Eddie Thomas's personal claim of substantial burden was upheld along with sincerity of his claim.[174] Weightiness of a claim can and often does affect

165. *Lee*, 455 U.S. at 259–60.

166. *See, e.g.*, Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 10 (1994).

167. *See supra* Part II.C.

168. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

169. *See id.* at 209–13.

170. State v. Yoder, 182 N.W.2d 539, 542 (Wis. 1971), *aff'd*, 406 U.S. 205 (1972).

171. United States v. Lee, 455 U.S. 252, 259–62 (1982).

172. *See supra* Part II.C.

173. *See, e.g.*, *Yoder*, 406 U.S. at 218–19.

174. Thomas v. Review Bd., 450 U.S. 707, 716–17 (1981).

legislative and administrative decisions on accommodations based on politics. It cannot be considered by judges.[175]

After *Yoder*, fundamentalist parents in Tennessee claimed a religious exemption from public school reading assignments, but their claim failed.[176] After stipulations that plaintiffs' claims were sincere and religiously based, the trial focused on whether required readings substantially burdened plaintiffs' free exercise of religion.[177] The district court held that they did, but the Court of Appeals' majority found no substantial burden, and the Supreme Court denied review.[178] Critics accused the court of improperly adjudicating religious beliefs.[179]

Decisions involving Native American faiths have generated three ways to restrict cognizable claims. In *Bowen v. Roy*,[180] the first case to reach the Supreme Court, welfare recipients objected to use of a social security number for their daughter.[181] A fragmented Court rejected their claim on mixed grounds.[182] The one most relevant to this discussion was the view that internal government operations were immune from Free Exercise review.[183] Next, the Court's one and only decision on Indian sacred sites, *Lyng v. Northwest Indian Cemetery Protective Association*,[184] invoked *Bowen's* internal operations rule and added two others.[185] The

175. *Id.* at 715–16. However, despite this formal ruling and best efforts to be impartial, one suspects that the number of burdened believers does in fact affect judges, at least indirectly.

176. Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1067 (6th Cir. 1987).

177. *Id.* at 1061.

178. *Id.* at 1069–70.

179. *See, e.g.*, Richard M. Eisenberg, *Must God be Dead or Irrelevant: Drawing a Circle That Lets Me In*, 18 WM. & MARY BILL RTS. J. 1, 29 (2009); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 993–94 (1996); Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 592–93 (1993).

180. 476 U.S. 693 (1986).

181. *Id.* at 695–96.

182. *See generally id.* (rejecting free exercise claim through a plurality and three concurring opinions).

183. *Id.* at 699. There were six opinions, none for more than three justices, mixing issues about jurisdiction with attempts to grapple with religious exemptions.

184. 485 U.S. 439 (1988).

185. *Id.* at 448–49, 457–58 (rejecting Indians' sacred site claim).

Court held that burdens qualifying for constitutional protection were limited to penalties imposed on religious exercise or to conditions imposed on receipt of government benefits.[186] Impairment of a sacred site on government land was neither, so its burden on religion was not entitled to constitutional protection.[187] The Court also made a slippery-slope argument; if plaintiffs' claim were recognized, there would be no way to reject more expansive variants.[188]

The *Northwest Indian Cemetery* dissent advanced another attempted limit, saying that protection should be confined to obligations that are "central" to a religion.[189] But that limitation would surely require courts to review issues of religious doctrine. Limiting claims to prohibitions on religious exercise has support in the constitutional text, but adding conditions on benefits has no logical support as a limiting principle. Rather, it simply creates the strange disparity between protecting Mrs. Sherbert's unemployment benefits while denying any protection for the *Northwest Indian Cemetery* claimants' place of worship. The slippery slope problem was more revealing—courts can only rarely determine whether a claimed burden is substantial. So courts must rely on assessing a claim's impact on the government or on other persons. For unemployment insurance, there did not seem to be a risk of excessive claims, but for sacred sites, excessive claims loomed in the justices' imaginations.

When the *Smith* Court abandoned most religious exemption claims, it stressed judicial incapacity to decide issues of religious belief,[190] and it expressly rejected adjudication of centrality.[191] Then RFRA and RLUIPA revived the prima facie case problem. Neither statute attempts to define burden. RFRA originally defined exercise of religion to mean "exercise of religion under the First Amendment to the Constitu-

186. *Id.* at 449.

187. *Id.*

188. *Id.* at 457–58. A similar worry seemed to underlie other rejected claims during the *Sherbert* era. *See, e.g.*, United States v. Lee, 455 U.S. 252, 259–61 (1982). However, the Court did not deny Mr. Lee any judicial review; it found the legal balance to be in favor of the government. *Id.* at 261.

189. *Lyng*, 485 U.S. at 474 (Brennan, J., dissenting).

190. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

191. *Id.* at 886–87.

tion."[192] This could have been read to incorporate the limits on covered burdens adopted by the pre-*Smith* Court, including immunity of government operations. But RLUIPA enacted an expansive definition of religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[193] The same statute amended RFRA to substitute this definition.[194] While the statute did not directly define burden, "any exercise" seems as broad as possible.

The Supreme Court's invalidation of RFRA as applied to states reduced the statute's applications to federal actions only, and RLUIPA is confined to land use regulations and institutionalized persons.[195] The land use context offers a secular way to address many claims of substantial burden. So long as a religious plaintiff complains about the cost of complying with zoning laws and the like, courts can evaluate the burden in dollar terms. There could be instances when a claimed burden is based on an article of faith rather than cost, but none has been reported to date, nor is this likely to be a significant problem in the future. In any case, it is of no relevance to the problem of sacred sites on public land.

RLUIPA's other application to institutionalized persons is more directly related to the special problems of religious freedom adjudications. Prisoners make a great variety of religious claims. Were courts to try to adjudicate religiosity, sincerity, burden, and substantiality in these cases, they would often be drawn into determinations of religious truth. To avoid that, many claims are deemed to state a prima facie case, moving review to the government's justification. During the *Sherbert* era, the Court eased the problem by reducing the government's burden of justification in the prison context.[196] Advocates rightly pointed out that this was far from the verbal promise of strict scrutiny.[197] The terms and con-

192. Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489 (1993) (codified as amended at 42 U.S.C. § 2000bb-2(4) (2012)).

193. Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, §§ 7(3), 8(7), 114 Stat. 803, 806–07 (2000) (codified at 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (2006)).

194. *Id.* at § 7(3), 114 Stat. at 806.

195. *See* Religious Land Use and Institutionalized Persons Act, *supra* note 193.

196. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987).

197. *See, e.g.*, Sara Anderson Frey, *Religion Behind Bars: Prison Litigation Under the Religious Freedom Restoration Act in the Wake of* Mack v. O'Leary, 101

text of RLUIPA overrode that rule and required prisoners' claims to be protected by strict scrutiny. As pointed out above, courts have found that some claims can be summarily dismissed based on evidence of backsliding.[198] The basis for these dismissals alternates between sincerity and substantial burden depending on the factual record.[199] However, courts have reined in over-reliance on backsliding, and many claims do not involve alleged backsliding, particularly group claims.[200] These cases force courts to confront the problems identified here.

E. Is the Hands-off Rule Mistaken?

Some reported decisions rejected religious freedom claims by finding that plaintiffs failed to prove that their beliefs were sincere or substantial.[201] In other cases, dissenting judges made the same argument.[202] In other words, these courts and dissenters rejected the dominant rule that such questions are beyond secular courts' authority.[203] Scholars have also questioned the rule's correctness.[204] Were courts empowered to

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DICK. L. REV. 753, 761 (1997); Matthew P. Blischak, Note, O'Lone v. Estate of Shabazz: *The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 479 (1988); Tara Kao, Note, *They Can Take Your Body but Not Your Soul—Or So You Thought—The Third Circuit's Application of the* Turner *Standard in Prisoners' Free Exercise Cases*, 10 BOALT J. CRIM. L. 1, 19 (2005).

198. *See supra* text accompanying notes 139–140.

199. *See* Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1438–42 (2011).

200. *See* Cutter v. Wilkinson, 544 U.S. 709, 716 n.5 (2005) (assessing claims for all Muslim and all Jewish prisoners); Abdulhaseeb v. Calbone, 600 F.3d 1301, 1316–17 (10th Cir. 2010); Shakur v. Schriro, 514 F.3d 878, 887 (9th Cir. 2008); Lovelace v. Lee, 472 F.3d 174, 200 (4th Cir. 2006) (finding a substantial burden when prison removed Muslim prisoner from list of Ramadan participants after he allegedly broke the Ramadan fast).

201. This finding was notably true for several Indian sacred site claims. *See infra* Part III.A.

202. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 88–90 (1944) (Stone, C.J., dissenting).

203. *See supra* text accompanying notes 126–129.

204. *See* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013) (arguing that courts should decide religious questions when no religious institution is available).

adjudicate claims of religious truth, the difficulties addressed in this article could be avoided.

Nevertheless, governing Supreme Court precedent clearly rejects adjudicating religious truth on constitutional grounds.[205] To challenge that rule, one must address significant problems. Although claims based on established religions can be reviewed by relying on published information and testimony of established leaders, claims based on new faiths or purely personal beliefs can be tested only be asking finders of fact to evaluate whether plaintiffs' averments of faith are truthful. The risk that such review will be arbitrary and prone to error seems obvious. The two problems overlap when adherents of an established faith claim to believe something the faith's rules do not require or to believe that a tenet of minor importance to the faith is crucial to them. Beliefs of established faiths have an inherent advantage in seeking legislative exemptions. Preferring them in adjudications of sincerity and substantiality would extend that advantage. For these reasons, overturning the established rule seems neither likely nor desirable.

F. Government Justification as Primary Issue

As explained above, many skillfully framed claims that an apparently neutral law or decision substantially burdens plaintiff's free exercise of religion cannot be disproved.[206] The strict scrutiny test therefore shifts the burden of proof to the government, to justify its burden based on the high barrier erected by the test—the need to prove that the government's imposition is necessary to serve a compelling state interest.[207] RLUIPA spells out the burden shift.[208] Courts' ways around the test's severe standard of justification have been ad hoc and often evasive.[209]

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205. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 906–07 (1990) (O'Connor, J., concurring).

206. *See supra* Parts II.C–D.

207. *See* GREENAWALT, *supra* note 138, at 30, 32.

208. 42 U.S.C. § 2000cc-2(b) (2012).

209. *E.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (finding no cognizable burden despite obviously severe effects on religious freedom); United States v. Lee, 455 U.S. 252, 257 (1982) (easing the government's burden of justification while purporting not to); Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1067 (6th Cir. 1987) (purporting to find no substantial burden as a matter of law). The Court also relied on context to reduce the government's burden

However, at least the outcomes can be rationally sorted out by looking only at governments' justifications. The unemployment compensation cases involved modest, measurable, and certain impositions on government and on employers who pay premiums.[210] The schooling cases are a bit more difficult but still fit the pattern. It was easy for Wisconsin to comply with the Amish demand for home schooling but much more difficult for Tennessee schools to tailor reading assignments to the demands of each religious claimant.[211] The Wisconsin case involved some uncertainty about fairness to Amish teens denied two years of schooling, but evidence in the case met that concern—evidence about efficacy of Amish home-schooling, not about religious truth.[212]

Putting aside sacred sites for a moment, other failed claims from the *Sherbert* era also fit the pattern. As the Court observed, exemptions from use of social security numbers, participation in the Social Security system, and Sunday closing laws would have potentially significant and uncertain effects on government and on other persons.[213] Prisoners' claims from the *Sherbert* era were cabined by much greater deference to government discretion than strict scrutiny promises.[214] More recently prisoners' RLUIPA claims have been dismissed for backsliding.[215] Land use claims under RLUIPA can remove zoning protections from churches' neighbors and undermine open space, historic preservation, and traf-

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of justification. *E.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (prisons); Goldman v. Weinberger, 475 U.S. 503 (1986) (military).

210. *See* Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1187, 1220–21 (2005).

211. *See supra* note 116 and accompanying text. In *Yoder*, public schools were simply required to excuse Amish children from compulsory attendance; in *Mozert*, schools faced the burdensome task of tailoring reading assignments to each dissenter. *See Yoder*, 406 U.S. at 208–11; *Mozert*, 827 F.2d at 1059–60.

212. *Yoder*, 406 U.S. at 222.

213. *See* Bowen v. Roy, 476 U.S. 693, 700 (1986); United States v. Lee, 455 U.S. 252, 259 (1982); Braunfeld v. Brown, 366 U.S. 599, 609 (1961).

214. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987); United States *ex rel.* Washington v. Fay, 217 F. Supp. 931, 933 (S.D.N.Y. 1963); Pierce v. LaVallee, 212 F. Supp. 865, 869 (N.D.N.Y. 1962); In re Ferguson, 361 P.2d 417, 421 (Cal. 1961) (en banc); McBride v. McCorkle, 130 A.2d 881, 886 (N.J. Super. Ct. App. Div. 1957).

215. *See* Brady, *supra* note 199.

fic plans, but these effects are predictable and moderate;[216] churches are not glue factories. In *Lighthouse Institution for Evangelism, Inc. v. City of Long Branch* and similar cases, courts rejected claims that would have had more severe effects on government interests and on secular businesses.[217]

Claims for religious use of forbidden drugs always confront the government's contention that exemptions risk diversion of the allegedly sacred drug into the illegal marketplace, and this defense almost always wins.[218] For example, claimants in *Smith* put on a strong countering case based on the carefully controlled use of peyote in the Native American Church, but failed nonetheless.[219] A similar showing succeeded under RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[220] but of course the legal standard was statutory, so Congress could modify the decision if necessary. In any case, the drug cases fit the pattern—religious exemption decisions depend on evaluating the exemption's potential effects on government and on other persons.

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216. *See, e.g.*, Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 56 UCLA L. REV. 1779, 1787 (2010).

217. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3rd Cir. 2007) (finding that an exemption for religious claimant would exclude businesses serving liquor within 200 feet, so religious claimant was not similarly situated to secular businesses). The decision has been criticized by religious freedom advocates. *See, e.g.*, Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1060–64 (2012). However, the critiques do not address the case's special fact of harm to others.

218. *See, e.g.*, United States v. Lafley, 656 F.3d 936 (9th Cir. 2011); United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996); Nesbeth v. United States, 870 A.2d 1193 (D.C. 2005). *See also* Howard Henderson, Natalia Tapia, & Elvira M. White, *Religious Freedom and Controlled Substances: A Legal Analysis*, 46 CRIM. L. BULL. 304 (2010).

219. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 913–14 (1990) (Blackmun, J., dissenting); David Perry Babner, *The Religious Use of Peyote After* Smith II, 28 IDAHO L. REV. 65, 67 (1991).

220. 546 U.S. 418 (2006).

G. Summarizing the Problems

Many claims for religious exemptions depend on matters of religious faith that cannot be reviewed by secular courts. Whether or not a claim is honestly made, and whether or not it is in fact a substantial burden on plaintiff's religion, will be untested. Every claim will state a prima facie case. Strict scrutiny then shifts the burden to the government to prove that its law of general application is necessary to achieve a compelling state purpose. The theory of strict scrutiny is supposed to impose a very difficult standard to meet, so that the government should lose most claims.[221] Courts have sensed that this is an inappropriate scheme and have sought ways around it, not always forthright.[222] Notably, the *Smith* Court abandoned strict scrutiny for most claims, but with power to define the rules, Congress brought it back.

Two aspects of the problem need to be highlighted. When a court is confronted by an exemption claim that seems reasonable on the record before it, it may be concerned that today's claim will be expanded in the future and become unreasonable. If today's claim survives strict scrutiny, how can an expanded claim be distinguished? This is a classic slippery-slope problem that was relied on by the Court to reject an Indian sacred sites claim.[223] The second, related concern arises if a court is uncertain whether the record before it fully reflects the impacts of a proposed exemption order. Can it grant the order subject to later review and revision? The strict scrutiny formula makes that difficult.[224]

III. STRICT SCRUTINY AND NATIVE SACRED SITES ON PUBLIC LAND

Many religions have sacred sites, but they are much more important for indigenous faiths than others. Churches, mosques, and syna-

221. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. ___, ___, 133 S. Ct. 2411, 2417 (2013).

222. *See supra* note 209 and accompanying text.

223. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457–58 (1988).

224. To revise a ruling pursuant to the strict scrutiny formula, a court must find that a compelling interest that cannot be served by less burdensome means had arisen in the interim. Thus, it would not be sufficient simply to find that the exemption burdened other persons more than had been known at the time of the first ruling. *See infra* text accompanying notes 353–360 (discussing impact on other persons).

gogues are consecrated places, but adherents acquire ownership before sacred designation, while most Native sites are natural places.[225] To the extent American Indian tribes retain ancestral land, sacred sites on them are subject to tribal control and protection. But many sites are on land lost to tribes during European-American settlement.[226] Attempts to use these sites for ceremony and worship are in practice limited to undeveloped government land, but many of the most important sites are natural places in parks and other public lands.[227]

Until the recent past, Indian use of sacred sites on public lands was available only when land managers had no competing purpose, and judicial review was not sought for lack of favorable judicial precedents or access to counsel. These limits have changed significantly over the past half-century. The *Sherbert* decision in 1963 created an apparently helpful legal precedent.[228] Tribes and Indian individuals acquired access to counsel and the inspiration of the Civil Rights Movement.[229] And federal law began to respect Native sacred sites on public lands, albeit subject to Executive Department discretion.[230] Congress passed AIRFA, NEPA, and laws requiring adoption of formal plans for public lands,[231]

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225. *See infra* Parts III.A–C. (all reported sacred sites claims involved natural places).

226. Most contested sites are mountains or other heights. *See infra* Parts III.A–C. Many were originally taken from tribes for mining, and this remains an important competing interest, though recreational uses (skiing, climbing, etc.) are often the important competing uses today. *See, e.g.*, *infra* text accompanying notes 258–259 and 276–279 (skiing); 294–296 (mining).

227. Veneration in Native faiths usually depends on natural conditions, so that developed sites have lost sacred character. *See* Peter J. Gardner, *The First Amendment's Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?* 47 S.D. L. REV. 68, 68–69 (2002). Sites held in private ownership are implicitly beyond the reach of religious claims. The issue is rarely articulated, but it emerges in contests over leased sites on public lands. *See, e.g.*, *infra* notes 258–259 and 276–279 and accompanying text.

228. *See supra* text accompanying notes 54–55.

229. *See* CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 106–12 (2005).

230. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). An earlier executive order required federal agencies to inventory cultural properties on their lands and to consider their protection. Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (May 13, 1971).

231. American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (2012); National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (2012); Fed-

and a 1996 executive order requires executive branch agencies to accommodate Indian sacred sites.[232] Review under NEPA requires reports on all impacts of a proposed land use, and the statutes that mandate land use plans require reports on users. AIRFA and the executive order in turn require accommodation of Native religious interest revealed by these studies.[233] However, inevitably public lands authorities have not accommodated all Indian claims, and lawsuits followed. As discussed below, Native plaintiffs have prevailed in some trial courts but ultimately lost every appellate decision.

A. Northwest Indian Cemetery Protection Association

The Supreme Court's only review of an Indian sacred site claim was *Lyng v. Northwest Indian Cemetery Protection Association*,[234] decided during the *Sherbert* to *Smith* constitutional strict scrutiny era. Thus it is the most authoritative precedent for claims seeking to protect sacred sites on public lands. The case is also important for its facts and the Court's reasoning. The Forest Service planned to pave part of a logging road on federal land that passed through a place called Chimney Rock and to license logging of the area.[235] Chimney Rock is sacred to several Native tribes and is actively used for their religious ceremonies.[236] The Forest Service's environmental impact statement on the project included a detailed report on religious use that provided the factual basis for Indian plaintiffs' free exercise challenge.[237] The district court concluded that "construction of the Chimney Rock Section and/or implementation of the Management Plan would seriously impair the Indian plaintiffs' use of the high country for religious practices" and sustained the challenge.[238] The

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eral Land Policy and Management Act (FLPMA) of 1976, 43 U.S.C. § 1712 (2012) (requiring land use plans for BLM land); National Forest Management Act, 16 U.S.C. § 1604 (requiring land use plans for Forest Service land).

232. *See* 42 U.S.C. § 1996-1(a); 61 Fed. Reg. 26,771 (May 24, 1996).

233. 42 U.S.C. § 1996-1(a); 61 Fed. Reg. 26,771 (May 24, 1996).

234. 485 U.S. 439 (1988).

235. *Id.* at 442.

236. *Id.*

237. *Id.*

238. Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594 (N.D. Calif. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The district court first de-

Supreme Court reversed, despite its recognition that "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices."[239]

The Court's opinion relied on three grounds. First, it invoked the Court's prior decision in *Bowen v. Roy*, which rejected a challenge to a federal statute that mandated use of Social Security numbers in welfare administration.[240] In that case, applicants for benefits contended that their religious beliefs forbade assigning a number to their young daughter.[241] The *Bowen* Court said that internal government affairs were immune to Free Exercise claims.[242]

Second, the *Lyng* Court adopted a narrow definition of substantial burden on religious freedom that excluded the claims at issue in *Bowen* and *Lyng*.[243] While acknowledging that the Court "cannot determine the truth of the underlying beliefs,"[244] the Court attacked the issue using a crude exercise in textual interpretation and *stare decisis* reminis-

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nied a preliminary injunction, finding no unlawful burden on free exercise so long as plaintiffs had access to the site, citing several previous judgments. Nw. Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 586 (N.D. Calif. 1983). But after trial, the same judge ruled broadly in favor of the claimants. *See id.* at 594. The opinion detailed effects on the site caused by clear-cutting. *Id.* at 594–95. It distinguished precedents based on the concept of centrality, finding that the current case met that standard in contrast to others. *Id.* at 593–95. It then detailed the Government's proffered justifications and found them less than compelling. *Id.* at 595–97. The Court of Appeals majority agreed that the crucial issue was whether the site was indispensable or central to plaintiffs' faith and whether the Government's actions would substantially interfere. Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 692 (9th Cir. 1986). The appellate court held that the trial record supported its judgment. *Id.* at 692–93. It also rejected the government's argument that claims must be based on penalizing one's religious activities. *Id.* at 693. And it rejected an Establishment Clause defense. *Id.* at 693–94. The dissent said plaintiffs' proofs were insufficient. *Id.* at 701–03 (Beezer, J., dissenting).

239. *Lyng*, 485 U.S. at 451.

240. *Id.* at 448–49.

241. Bowen v. Roy, 476 U.S. 693, 695 (1986). The majority did not explain why unemployment insurance was different. Justice White thought it was not, so he dissented based on precedent. *Id.* at 732 (White, J., dissenting).

242. *Id.* at 699 (majority opinion).

243. *Lyng*, 485 U.S. at 456. Neither the majority nor the dissent used the phrase "strict scrutiny," although both discussed the concept of compelling state interest at length. The majority explained why that standard did not apply on the facts. *Id.* at 456.

244. *Id.* at 449.

cent of a first-year law class. The textual point stressed that the Free Exercise Clause forbids laws that "prohibit" the free exercise of religion and opined that the government actions in *Bowen* and *Lyng* were not prohibitions imposed on plaintiffs.[245] The Court also tried to distinguish the leading decisions that had upheld free exercise claims. The unemployment insurance decisions were said to involve penalties imposed on religious exercise.[246] The famous *Yoder* decision protecting Amish beliefs from Wisconsin's compulsory school attendance law was said to involve government coercion to violate religious beliefs.[247] These were held to be the only kinds of government actions prohibited by the Free Exercise Clause, so that a cognizable burden had to fall into one of these two categories. Because the burdens claimed in *Bowen* and *Lyng* fit neither category, they could not receive constitutional protection.[248]

The third ground relied on by the *Lyng* Court was likely its most important—a slide on the slippery slope. The opinion concluded that:

> Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area . . . . Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they . . . might seek to exclude all human activity but their own . . . within an area covering . . . more than 17,000 acres of public land.[249]

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245. *Id.* at 451. Professor Michael McConnell has effectively demolished that point elsewhere. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409, 1486–88 (1990).

246. *Lyng*, 485 U.S. at 450.

247. *Id.* at 458.

248. Several scholars have pointed out absurdities that arise from this reasoning. *See, e.g.*, Lt. Col. James E. Key, *This Land Is My Land: The Tension Between Federal Use of Public Lands and the Religious Freedom Restoration Act*, 65 A.F. L. REV. 51, 69 (2010); Jeff Pinter, *In Cases Involving Sites of Religious Significance, Plaintiff Will Fall in the Gap of Judicial Deference That Exists Between the Religion Clauses of the First Amendment*, 29 AM. INDIAN L. REV. 289, 313 (2004–05); Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 155 (1994).

249. *Lyng*, 485 U.S. at 452–53.

This reasoning is not absurd if one follows the strict scrutiny formula, but it leads to the question whether that formula should be modified.[250]

B. Failures in the Courts of Appeals

The Supreme Court's narrowing of prohibited burdens used to reject sacred site claims in *Lyng* had appeared in lower court cases, and its concern about a lack of limiting principles had doubtless worried lower courts as well, despite going unmentioned. In a remarkable string of defeats, every sacred site case reaching final judgment in a federal court of appeals has failed, albeit on assorted grounds.

The first reported decision, *Badoni v. Higginson*,[251] involved the Glen Canyon Dam and reservoir, one of the largest and most controversial damming projects in American history.[252] In 1974, Navajo groups and individuals sued to remedy violation of their free exercise rights caused by the government's flooding of sacred places and enabling tourist visits to the sites.[253] The Tenth Circuit Court of Appeals rejected the flooding claim, finding burdens on plaintiffs justified by the government's interests in maintaining the capacity of Lake Powell and in assuring public access to the national monument.[254] Next came *Sequoyah v. Tennessee Valley Authority*,[255] a challenge to flooding of sacred sites by

250. *See infra* Part IV.

251. 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980).

252. *See id. See also* Michael P. Lawrence, *Damming Rivers, Damning Cultures*, 30 AM. INDIAN L. REV. 247, 277 (2005–06).

253. *See Badoni*, 638 F.2d at 175–76. The dam was built between 1956 and 1963, and its reservoir, Lake Powell, reached capacity in 1980. *See also Glen Canyon Dam Construction History*, U.S. DEPT. OF THE INTERIOR: BUREAU OF RECLAMATION UPPER COLORADO REGION, http://www.usbr.gov/uc/rm/crsp/gc/history.html (last visited Oct. 2, 2014). One of its effects was to create access by water to Rainbow Bridge National Monument, a 290-foot high sandstone span that has long been a Navajo and Paiute sacred site. Before Lake Powell, the monument, remote and difficult to reach, had few visitors. Boat access on Lake Powell made access easy, bringing hordes of additional visitors. *See Badoni*, 638 F.2d at 175–76.

254. *Badoni*, 638 F.2d at 177–78. The court rejected the "enabling" claim based on the "no coercion" concept relied on by the Supreme Court in *Lyng*. *Id.* at 178.

255. 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980).

the Tellico Dam in Tennessee.[256] The Sixth Circuit Court of Appeals held that Indian plaintiffs failed to allege and prove that the dam would burden beliefs that were essential to their faith.[257]

The next decision, *Wilson v. Block*,[258] rejected a challenge to the expansion of a ski area on national forest land on Humphrey's Peak, highest of the cluster known as the San Francisco Peaks, in northern Arizona, and a sacred site to neighboring tribes.[259] The Court of Appeals followed the *Sequoyah* court's theory—that plaintiffs had failed to show that expansion would burden beliefs that were central or indispensable to their faith.[260] *Wilson* was followed by *Crow v. Gullet*,[261] the only reported dispute involving state rather than federal public lands.[262] In *Crow*, Lakota plaintiffs sued South Dakota officials claiming that sacred sites in a state park were harmed by improvements and tourists, and that access to the sites was unduly restricted by park rules.[263] The federal courts held that there had been neither proof of undue burden on religion nor of coercion to disobey the rules of plaintiffs' faith.[264]

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256. The dam was built by the Tennessee Valley Authority, and it flooded several historical Cherokee towns. In addition to the Indian claim, Tellico Dam involved prominent environmental conflicts. *See generally* WILLIAM WHEELER & MICHAEL MCDONALD, TVA AND THE TELLICO DAM 1936-1979 (1986).

257. *Sequoyah*, 620 F.2d at 1164. The District Court had relied on the no-coercion ground. 480 F. Supp. at 611–12.

258. 708 F.2d 735 (D.C. Cir. 1983).

259. *See id.* The Peaks tower over neighboring areas of high plateau and have long been objects of veneration in the religions of neighboring Indian nations. *See id.* at 738–39, 745. The ski area was built by the Forest Service in 1937 and later leased to a private operating company. *Id.* In 1977, a new operator sought permission for substantial expansion of the facility. *Id.* The Hopi and Navajo Tribes unsuccessfully objected in administrative proceedings, then sued claiming denial of free exercise rights. *Id.* The district court rejected their claim based on the no-coercion theory, that the government had not compelled actions contrary to belief, nor had it conditioned benefits on violation of religious duty. *Id.*

260. *Id.* at 742. Plaintiffs argued that the court had improperly decided a theological question. The court agreed that it should not do that, but denied that it had. *Id.* at 744.

261. 706 F.2d 856 (8th Cir. 1983).

262. *See id.*

263. *Id.* at 857. The sacred site involved is known as Bear Butte, in Bear Butte State Park, located northeast of Black Hills National Forest. *Id.*

264. *Id.* at 858.

In *Inupiat Community of Arctic Slope v. United States*,[265] the Inupiat plaintiff brought suit to stop federal oil and gas leases in submerged land off the north coast of Alaska, which included a weakly articulated religious freedom claim.[266] That claim was rejected by federal courts based on lack of coercion, on the government's interest in pursuing development of the area, and because the relief sought would create serious Establishment Clause problems.[267]

United States v. Means,[268] the last reported contest under the *Sherbert* standard, involved another event in the ongoing Lakota quest to recover South Dakota's Black Hills.[269] In *Means*, a group set up camp on federal land, sought a permit, and challenged its denial on religious freedom grounds.[270] They won in the federal district court, but lost on appeal because they failed to prove coercion to violate their beliefs.[271] In *Havasupai Tribe v. United States*,[272] the Tribe sued the Forest Service to contest its approval of an application for a uranium mine in the Kaibab National Forest.[273] Their sacred site claim suffered double body blows from the Supreme Court. It was filed about two months after *Lyng*, and the district court's decision rejecting their claim was issued shortly after *Smith*.[274]

After *Smith* ended serious review of exemption claims and RFRA was passed in reaction, there was a substantial gap in reported sa-

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265. 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984).

266. *See id.* Plaintiffs' main claim, also unsuccessful, was ownership of submerged land being leased. 548 F. Supp. at 185.

267. 548 F. Supp. at 188–89. The Court of Appeals affirmed per curiam without any mention of the free exercise claim. *Inupiat Cnty.*, 746 F.2d at 571.

268. 858 F.2d 404 (8th Cir. 1988).

269. *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 834 (1992).

270. United States v. Means, 627 F. Supp. 247, 249 (D.S.D. 1985).

271. The disputed area comprised about 800 acres in Black Hills National Forest. The district court's 1985 judgment found the Indians' religious interest in the site to be essential and the Forest Service's denial of a permit to be arbitrary and capricious. *See Means*, 627 F. Supp. at 269.

272. Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd per curiam sub nom.* Havasupai Tribe v. Robertson 943 F.2d 32 (9th Cir. 1991).

273. The tribe made an aboriginal title claim to the site, also denied. *Havasupai Tribe*, 752 F. Supp. at 1480.

274. *See id.* at 1485.

cred sites cases.[275] *Navajo Nation v. United States Forest Service*,[276] the first reported RFRA case on federal public land, involved a further development at the ski area on San Francisco Peaks.[277] To achieve a more reliable snow supply, the ski area's operator proposed to install equipment to make artificial snow using recycled wastewater.[278] Six tribes invoked RFRA to claim that wastewater would desecrate the mountain.[279] They lost in federal district court, won reversal before a circuit court panel, and then lost before that court en banc.[280] The decision held that RFRA had incorporated the limits stated in *Lyng*, including another schuss down the slippery slope.[281] Plaintiffs argued that Congress meant to impose coverage based on the most pro-plaintiff decisions of 1963-1990, because the statute mandates use of the compelling interest test in its strictest form.[282] However, the statute's words did not address its application to public lands. The court held that Congress intended to follow *Lyng* rather than override it.[283]

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275. In 1995, the Miccosukee Tribe sued to claim that federal action flooding a sacred site violated the Free Exercise Clause and lost based on *Lyng*. Miccosukee Tribe of Indians v. United States, 980 F. Supp. 448, 464–65 (S.D. Fla. 1997), *aff'd*, 163 F.3d 1359 (11th Cir. 1998). No one cited RFRA or *Smith* in conjunction with the case. The Tribe has a complex quarrel about Everglades water management by the Army Corps of Engineers. It has pursued the matter on various statutory and constitutional grounds in a series of decisions. *See* Miccosukee Tribe of Indians of Fla. v. United States, 716 F.3d 535, 553–55 (11th Cir. 2013). However, the Tribe did not renew its religious freedom claim after the 1997 decision.

276. 408 F. Supp. 2d 866 (D. Ariz. 2006), *aff'd in part & rev'd in part by* 479 F.3d 1024 (9th Cir. 2007), *on rehearing aff'd by* 535 F.3d 1058 (9th Cir. 2008) (en banc).

277. *See Navajo Nation*, 408 F. Supp. 2d at 869–71.

278. *See id. See also* Joshua A. Edwards, *Yellow Snow on Sacred Sites: A Failed Application of the Religious Freedom Restoration Act*, 34 AM. INDIAN L. REV. 151, 153 (2010). Legal standards for use of recycled waste water had been met. *See id.* at 154.

279. *See Navajo Nation*, 408 F. Supp. 2d at 869–70.

280. *See supra* note 276. *But see* Hopi Tribe v. City of Flagstaff, 2013 Ariz. App. Unpub. LEXIS 482, 2013 WL 1789859 (Ariz. Ct. App. 2013), *review denied*, 2014 Arizona LEXIS 6 (reinstating state nuisance claim based on same events).

281. *Navajo Nation*, 535 F.3d at 1067–73.

282. *Id.* at 1072.

283. *Id.* at 1067–73. The opinion did not rule on the government's justifications.

The competing opinions in *Navajo Nation* laid out opposing interpretations of the statute. The statute on its face specifies that claimants must prove their prima facie case for substantial burden on free exercise without any recognition of the difficulties that implies. The Court of Appeals panel stressed that the amended statute protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," specified the least restrictive means test, and defined cognizable claims based on substantial burden without direct connection to the word prohibit in the Free Exercise Clause.[284] The district court emphasized the express statutory purpose to "restore" the *Sherbert* rule and the statute's express reference to the First Amendment.[285] The government relied on a Senate Report stating that the statute follows the *Lyng* rule.[286] The decision has been sharply criticized in academic analyses.[287] But neither the courts' opinions nor most academic commentaries address the problems outlined in this article.[288]

Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission,[289] the next RFRA case, involved challenges to renewal of a license for an 1898 hydropower project at Snoqualmie Falls in Washington State, a sacred site to members of the Snoqualmie Tribe.[290] The Federal Energy Regulatory Commission (FERC) approved renewal on conditions that accommodated some of the tribe's religious concerns.[291] Both the Tribe and the power company sought review, but the Court of Appeals

284. *Navajo Nation*, 479 F.3d at 1031–33.

285. *Navajo Nation*, 408 F. Supp. 2d at 903.

286. *See Navajo Nation*, 535 F.3d at 1074.

287. *See, e.g.*, Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 454 (2012); Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENVTL. L. 437, 479 (2010); Peter Zwick, *A Redeemable Loss: Lyng, Lower Courts And American Indian Free Exercise on Public Lands*, 60 CASE W. RES. L. REV. 241, 265 (2009).

288. For an exception on one crucial issue, *see* Carpenter, *Limiting Principles*, supra note 287, at 389 ("The [Supreme] Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place.").

289. 545 F.3d 1207 (9th Cir. 2008).

290. *See id.* at 1210–12.

291. *Id.* at 1211–12.

affirmed.[292] On RFRA, the court held that the *Navajo Nation* coercion test controlled, so no cognizable claim was alleged.[293]

The most recent sacred sites ruling, *South Fork Band v. United States Department of Interior*,[294] involved Barrick Gold's large mine on public land in Nevada.[295] The company applied to expand the mine by about 11%, including slopes of Mt. Tenabo, sacred to local Shoshone bands.[296] The court rejected the Shoshones' RFRA challenge by applying the *Navajo Nation* coercion test.[297] The Shoshones dropped their RFRA claim prior to appeal of other claims.[298] But after remand, they made a new religious freedom claim, that the government had abused its discretion in applying the 1996 Executive Order.[299] This claim did not involve the strict scrutiny standard, but the court acted as though it did and rejected the claim on the ground that the Shoshones had failed to prove the disputed land to be a sacred place.[300]

C. Temporary Successes

In *Northwest Indian Cemetery* and *Means*, two cases that Native groups lost on appeal, plaintiffs won temporary victories in federal district courts.[301] Two other wins in district courts survived because defendants did not appeal. *Northern Cheyenne Tribe v. Martinez* was a 2003 suit that attacked the federal Department of Housing and Urban Development's funding for a proposed shooting range within earshot of Bear

292. *Id.* at 1219.

293. *Id.* at 1210. Disputes on other legal grounds continue. *See, e.g.*, 127 F.E.R.C. P62, 174, (F.E.R.C. 2009).

294. 643 F. Supp. 2d 1192, 1205 (D. Nev. 2009), *aff'd in part & rev'd in part sub nom.* S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior 588 F.3d 718 (9th Cir. 2009).

295. *Id.* at 1192.

296. *Id.* at 1205. For an earlier ruling in the case, see S. Fork Band v. U.S. Dep't of Interior, 2009 U.S. Dist. LEXIS 3664 (D. Nev. Jan. 7, 2009).

297. *See S. Fork Band*, 643 F. Supp.2d at 1207.

298. *See S. Fork Band*, 588 F.3d at 721.

299. S. Fork Band v. U.S. Dep't of Interior, 2010 U.S. Dist. LEXIS 88510, at *24–29 (D. Nev. Aug. 25, 2010).

300. *See id.*

301. *See supra* notes 243 & 281 and accompanying text.

Butte, a sacred site in South Dakota.[302] The federal district court granted plaintiffs a preliminary injunction based on both RFRA and RLUIPA.[303] Support for the subsidy lapsed, and the project was dropped, mooting the case.[304]

The other successful sacred site claim not yet overturned was *Comanche Nation v. United States*,[305] decided in 2008. In *Comanche Nation*, the Army began to construct a warehouse at Fort Sill, Oklahoma, directly south of Medicine Bluffs, a natural landform that is sacred to Comanches and other local Indian people.[306] The Comanche Nation sued to enjoin the project based on RFRA, and the federal district court granted a preliminary injunction in its favor.[307] After the decision, the Army proposed to move the building to a new site,[308] and the Comanches countered with a broader claim.[309] As of the writing of this article, no further activity has been reported in the case.

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302. *Northern Cheyenne Tribe v. Martinez*, Civ. 2003-5018, 2003 DSD 4 (D.S.D. Apr. 10, 2003), available at https://casetext.com/case/northern-cheyenne-tribe-v-martinez (last visited Dec. 22, 2014). Bear Butte was also the site involved in the South Dakota state park case. *See supra* note 263 and accompanying text.

303. *See generally Northern Cheyenne Tribe*, Civ. 2003-5018, 2003 DSD 4. The RLUIPA claim was based on the plaintiffs' claim to a property interest in the state park.

304. *See* James D. Leach, *A Shooting Range at Bear Butte: Reconciliation or Racism?*, 50 S.D. L. REV. 244, 291 (2005).

305. No. Civ-08-8439-D, 2008 U.S. Dist. LEXIS 73283 (W.D. Okla. Sept. 28, 2008).

306. *See id.*

307. *Id.* The court refused to apply the *Navajo Nation* coercion test because the Tenth Circuit had rejected it in a case challenging condemnation of private land. *Id.* at *10. The court held that plaintiffs had shown a substantial burden on their faith. The needs of the Army were a compelling purpose, but the Government failed the necessity test because the Army had not considered alternative sites for the warehouse. *Id.* (citing Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996)). The *Thiry* Court had held that RFRA applied, but plaintiffs had failed to show a substantial burden on their religion. *Thiry*, 78 F.3d at 1495.

308. *See* Associated Press, *Records Show Nearly $650K Lost in Medicine Bluffs Case,* NATIVE AMERICAN TIMES (last visited Dec. 22, 2014), http://www.nativetimes.com/news/tribal/2560-records-show-nearly-650k-lost-in-medicine-bluffs-case. The court denied the government's motion to dismiss the case as moot. *See* Comanche Nation v. United States, 2008 U.S. Dist. LEXIS 98084 (W.D. Okla. Dec. 3, 2008).

309. *See id.*

D. Analysis

What can we conclude from this litany? Of twenty-six rulings, at least eleven invoked the coercion test to deny a cause of action.[310] At least six other rulings purported to sit in judgment on the substantiality of the religious claim; most decided based on the so-called "centrality" or "indispensability" of the claimed interest.[311] Three of these rulings rejected claims on this basis; three found the claimed beliefs to be central, thus purporting to find a limiting principle.[312] Only one ruling relied solely on the government's justification to reject a claim.[313] No opinion seriously questioned religiosity or sincerity of a claim or relied on the Establishment Clause to reject a claim.

The record can be summarized to observe that twenty of twenty-six rulings were made on unsatisfactory grounds. The coercion rule bizarrely prefers rather modest claims like temporary unemployment compensation over the profound impact shown in *Lyng*.[314] The centrality rule draws courts into improper adjudication of religious truth. Results in all Supreme Court exemption decisions show that the only empirically sound basis for sorting winners from losers is the impact on government and other persons.[315] But in most situations, courts resist relying on government justifications to reject claims, implicitly recognizing that strict scrutiny's terms indicate that justifications should usually fail. From the standpoint of those faithful to sacred sites, the main point is that well over half the reported judgments took the easy way out by relying on the coercion test.[316]

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310. *See supra* notes 247–248, 257, 259, 264, 267, 271, 275, 281, 293, 297 and accompanying text (decisions that relied on the no-coercion rationale).

311. *See supra* notes 189, 238, 257, 260, 264 and accompanying text (decisions that relied on finding centrality or its absence).

312. *See supra* notes 257, 260, 264 and accompanying text (not central to the faith); *see supra* notes 189 & 238 and accompanying text (central or essential to the faith).

313. *See* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

314. *See supra* notes 238–239 and accompanying text (severe impact in *Lyng*); *supra* text accompanying note 210 (modest burden in the unemployment cases).

315. *See supra* Part II.F.

316. *See supra* notes 247–248, 257, 259, 264, 267, 271, 275, 281, 293, 297 and accompanying text (decisions that relied on the no-coercion rationale).

Another way to characterize the opinions is to recognize that, in most cases, the judges were struggling with uncertainties about the immediate and potentially negative effects of the plaintiffs' claims on the government and on other persons. As a formal matter, these concerns were put to distinct purposes. Under the *Lyng-Navajo Nation* rule, they induced rulings finding no cognizable burden on religious freedom.[317] In other decisions, they led courts to decide that a religious belief was not central to the faith.[318] This analysis also explains the successful sacred site rulings in *Northern Cheyenne Tribe* and *Comanche Nation*: imposition on the government and on other persons was specific, modest, prospective, and temporary, in contrast with other claims.[319] It also hints at the Indians' success in other interim decisions by lower courts.[320] Temporary and preliminary decisions can be revisited, alleviating concern over uncertainties.

IV. A POTENTIAL SOLUTION?

A. Constitutional Equality, Non-Establishment, and Modified Compelling Interest Review

One way out of exemption difficulties that is strongly advocated by opponents of exemption claims is based on the constitutional principle of equality. Exemption claims seek preferences for the religiously observant not enjoyed by others. This creates conflicts with constitutional equality and anti-establishment norms, which readily qualify as compelling state interests.[321]

Courts have often confronted the equality issue in Establishment Clause challenges to legislative or administrative preferences for reli-

317. *See supra* notes 247–248, 257, 259, 264, 267, 271, 275, 281, 293, 297 and accompanying text (decisions that relied on the no-coercion rationale).

318. *See supra* notes 257, 260, 264 and accompanying text (not central to the faith); *see supra* notes 189 & 238 and accompanying text (central or essential to the faith).

319. *See supra* Part III.C.

320. *See supra* notes 243 & 281 and accompanying text.

321. *See* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV 493, 513 (2009).

gious activities. Analysts call these "discretionary" accommodations, and many have been sustained. Supreme Court decisions have upheld religious exemptions from taxes, conscription, and laws forbidding discrimination in employment.[322] The Court's opinions recite the metaphor that "there is room for play in the joints" between the free exercise and Establishment Clauses,[323] allowing the government to accommodate religion beyond free exercise requirements without offense to the Establishment Clause.[324] Tax preferences were sustained in part because they are shared by all religions and by many secular activities, much reducing the claim of religious preference.[325] However, the Court disallowed a legislative preference for religious days off work,[326] and dicta have warned generally that preferences may not go too far.[327]

The preference issue also arises in free exercise lawsuits.[328] The Court faced the question in its 1961 Sunday closing cases. In both the Establishment Clause and Free Exercise Clause decisions, the opinions noted that mandated accommodation would create a religious preference that would be difficult to administer.[329] The issue lurked on the periphery of other decisions during the 1963-1990 reign of the *Sherbert* rule.[330] It

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322. *See* Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 720 (1970); Welsh v. United States, 398 U.S. 333, 343–44 (1970); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338–40 (1987).

323. *Walz*, 397 U.S. at 669.

324. *Id.*

325. *Id.* at 675. In 2002, subsidies for religious schools were sustained adding an even more exacting stress to equality. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).

326. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985). *Cf.* TWA v. Hardison, 432 U.S. 63 (1977) (holding that employer did not violate Title VII duty of accommodation because excusing Hardison from Saturday work was undue hardship).

327. *See, e.g., Zelman,* 536 U.S. at 715 (Souter, J., dissenting); *Walz*, 397 U.S. at 699; Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 28 (1989).

328. *See* McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

329. *McGowan*, 366 U.S. at 451; *Braunfeld*, 336 U.S. at 608.

330. *See* Olsen v. C.I.R., 709 F.2d 278, 281 (4th Cir. 1983); Equal Emp't Opportunity Comm'n v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 89 (1981) (holding that a restaurant is not required to accommodate its facial hair standards for Sikh employee); Balt. Lutheran High School Ass'n, Inc. v. Emp't Sec. Admin., 490 A.2d 701, 712 (Md. 1985) (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

was then stressed in *Smith* as a reason to abandon constitutional exemption claims.[331]

RFRA and RLUIPA brought the issue back in statutory form.[332] These are legislative accommodations, but they are obviously quite different from legislative or administrative decisions to make specific accommodations. Courts are required to grant accommodations to all qualifying claimants unless the government can meet its burden to prove a compelling purpose that cannot be achieved by less burdensome means. Both statutes require accommodations based on a verbally enhanced version of the *Sherbert* constitutional rule.[333]

As related above, the Court reviewed an Establishment Clause attack on RLUIPA in *Cutter*.[334] The Court rejected the claim that the statute is facially invalid.[335] And the next year's *O Centro* decision upheld an exemption claim under RFRA.[336] Although both decisions sustained exemptions, the Court's opinions suggested a solution to the problems posed by the strict scrutiny test.

As is well known, the Establishment Clause has had a rocky modern history, rigorously applied to forbid official prayers and other religious activities in public schools, decisions that caused considerable political backlash and revision within the Court as its membership has become more conservative.[337] The Court's leading formal rule for its application, known as the *Lemon* test, has suffered an extraordinary barrage of criticism within and without the Court, yet has never been expressly

331. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888–89 (1990),

332. *See supra* notes 76–81 and accompanying text (describing enactment of the statutes).

333. *See supra* notes 76 & 81 (citing statutes). *See also* JOHN J. DELANEY, STANLEY D. ABRAMS, & FRANK SCHNIDMAN, HANDLING THE LAND USE CASE: LAND USE LAW, PRACTICE & FORMS § 46:6 (2012).

334. Cutter v. Wilkinson, 544 U.S. 709, 712–13 (2005). *See supra* notes 21–24 and accompanying text.

335. *Cutter*, 544 U.S. at 720.

336. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006). *See supra* note 220 and accompanying text.

337. *See* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 784 (2006).

jettisoned.[338] Indeed, the *Lemon* test played a role in *Cutter*: the Court of Appeals applied it to hold RLUIPA facially invalid.[339]

The Supreme Court unanimously reversed,[340] shunning the *Lemon* test. The Court also went to considerable lengths to point out how RLUIPA as applied could violate the Establishment Clause, and how a RLUIPA claim could be rejected by satisfying the statute's strict scrutiny standard.[341]

One important criterion added by Establishment Clause review is for courts to weigh an exemption's effects on the interests of other persons.[342] One of the oddities of the strict scrutiny formula is its verbal limit to consider only interests of government.[343] Yet the essence of many limits on rights is to protect other persons, not government as a corporate entity.[344] This is particularly obvious in the case of religion when one recalls the many abusive practices that have been done in the name of faith.[345]

American courts have at times invoked protection of other persons as the basis for a compelling government purpose asserted in de-

338. Lemon v. Kurtzman, 403 U.S. 602 (1971). For a summary of the criticism, see Gey, *supra* note 337, at 731.

339. Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003), *rev'd*, 544 U.S. 709 (2005).

340. *Id.*

341. *See* 544 U.S. at 722.

342. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (holding religious accommodation invalid because it imposed excessive burdens on other persons); Lynch v. Donnelly, 465 U.S. 668, 688 (1984)) (O'Connor, J., concurring) (holding Establishment Clause violated when government action sends a "message to nonadherents that they are outsiders"); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (stating that Establishment Clause analysis should consider effects of a government action on third parties).

343. *See supra* note 1 (wording of the test).

344. *See, e.g.*, Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 619 (2003) (fraud); Gertz v Robert Welch, Inc., 418 U.S. 323, 345 (1974) (defamation); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (private racial discrimination). The point is explicit in the text of the European Convention. *See infra* text accompanying note 399 (quoting and citing the European Convention standard for justifying burdens on religious freedom).

345. *See, e.g.*, CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007).

fense of a strict scrutiny claim.[346] But omission of an "other persons" criterion from the strict scrutiny formula nevertheless has consequences. Evidence of an exemption claim's impacts on other persons is not required and thus is presented unevenly.[347] Trial judges and juries are not required to consider it or make findings about it. And it can be considered as a basis for decision only indirectly, by deeming the government to have acted for that purpose.[348] One court said it was irrelevant.[349] By contrast, Establishment Clause review makes it a necessary element.[350]

A second criterion affected by Establishment Clause review is the burden of proof. When claimants make out a prima facie case, strict scrutiny shifts the burden to the government and imposes a very high barrier to success.[351] The Establishment Clause's countervailing standard is some sort of heightened review and has suffered from considerable uncertainty.[352] However, its articulation in the context of the *Cutter* review of RLUIPA implies a flexible standard that blunts the strict scrutiny standard.[353]

The context of *Cutter* was prisoners' religious burden claims authorized by RLUIPA.[354] The Court's opinion gave a sympathetic account of the plight of prisoners denied reasonable accommodations of their faiths.[355] At the same time, it responded to prison officials' concerns.[356] It declared security needs of prisons to be a compelling interest in all cases,

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346. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 28–31 (1905) (smallpox vaccination). *See also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452–53 (1988) (using interests of others as part of slippery slope argument).

347. *Compare* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (considering effects on third parties), *with* Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (not considering effects on third parties).

348. *See supra* note 1 (wording of the test).

349. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1044–45 (9th Cir. 2007) ("Even if there is a substantial threat that the Snowbowl will close entirely as a commercial ski area, we are not convinced that there is a compelling *governmental* interest in allowing the Snowbowl to make artificial snow from treated sewage effluent to avoid that result."), *vacated*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

350. *See supra* note 342.

351. *See supra* notes 207–208 and accompanying text.

352. *See supra* notes 337–341 and accompanying text.

353. Cutter v. Wilkinson, 544 U.S. 709, 722–23 (2005).

354. *See generally id.*

355. *Id.* at 721.

356. *Id.* at 717, 720.

rather than looking at the facts of each.[357] On whether government costs can justify rejecting an exemption claim, we are treated to an intriguing footnote:

> Directed at obstructions institutional arrangements place on religious observances, RLUIPA does not require a State to pay for an inmate's devotional accessories. See, *e.g.*, *Charles* v. *Verhagen*, 348 F.3d 601, 605 (CA7 2003) [sic] (overturning prohibition on possession of Islamic prayer oil but leaving inmate-plaintiff with responsibility for purchasing the oil).[358]

Why not? How can cost be a compelling reason to deny a fundamental right protected by strict judicial scrutiny? But looking at the other side of the issue, exemption claims usually seek freedom from government rules, not subsidies. In the prison context, every exemption imposes some costs on the prison. Many are modest, or at least clearly justified to equalize opportunities for observers of faiths not served by the existing chaplaincy system.[359] The Court is willing to entertain the claim that costs are relevant in determining prisoners' claims, but the standard for doing so is hard to discern.

These limits may not live up to the theory of strict scrutiny.[360] But the limits were in an opinion, for a nearly unanimous Supreme Court that purports to be based on Congressional intent.[361] The Court also said

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357. *Id.* at 717.

358. *Id.* at 720 n.8. *See also id.* at 726 ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.").

359. *See* Taylor G. Stout, *The Costs of Religious Accommodation in Prisons*, 96 VA. L. REV. 1201, 1214 (2010).

360. No specific criticism of the *Cutter* dicta has been found. For a general argument for construing RLUIPA strictly, see Laycock & Goodrich, *supra* note 36.

361. The Court's opinion was unanimous save Justice Thomas's opinion arguing, as he had previously, that the Establishment Clause is not properly imposed on state governments under the incorporation doctrine. *Cutter*, 544 U.S. at 731 (Thomas, J., concurring).

that RLUIPA's function is to alleviate "*exceptional* government-created burdens on private religious exercise."[362]

References to congressional intent in *Cutter* and *O Centro* imply flexibility in applying RLUIPA and RFRA in another way.[363] Statutory accommodations can be modified legislatively. The process is difficult, but it relieves reviewing courts of the worry that recognizing an exemption that turns out to be excessive could be overturned only by judicial reversal. Statutory rules are inherently more flexible, which seems to have made the *O Centro* Court more willing to allow use of a potentially harmful drug than was the *Smith* Court in interpreting the Free Exercise Clause.[364]

The *Cutter* dicta, properly applied, could meet most of the problems of religious strict scrutiny explained in previous sections. Because review often depends exclusively on governments' justifications, the important need is for a standard based on a more realistic burden of justification than that provided by the strict scrutiny formula's words. Proper respect for religious freedom should maintain heightened review but without the formal rigidity of strict scrutiny. The *Cutter* opinion's dicta appeared to meet this standard.[365]

One way to evaluate whether the *Cutter* dicta could achieve a workable system to address the flaws in the strict scrutiny formula is to review reported claims for apparent excesses in either direction, whether too many apparently just claims are denied, or accommodations appear to be made for doubtful and expensive claims. In the prison context, some reviewers have warned of excessive costs,[366] while religious rights

362. *Id.* at 720 (majority opinion) (emphasis added).

363. *Id.* at 714; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 419 (2006).

364. *See supra* notes 11–13 and accompanying text (describing and citing *Smith*).

365. *Cutter*, 544 U.S. at 731–33.

366. *See, e.g.*, Stout, *supra* note 359 (stating that RLUIPA is often overly burdensome on prisons; the Establishment Clause defense underutilized); Morgan F. Johnson, Comment, *Heaven Help Us: The Religious Land Use and Institutionalized Persons Act's Prisoners Provisions in the Aftermath of the Supreme Court's Decision in* Cutter v. Wilkinson, 14 AM. U. J. GENDER SOC. POL'Y & L. 585 (2006) (asserting that prisoners who invent religious claims are preferred over others and that the *Cutter* dicta, while helpful, did not go far enough).

advocates have claimed insufficient protections for religious needs.[367] Many reported cases are diet claims, based on both established and non-traditional faiths.[368] Some are of doubtful sincerity, but so long as security and costs set outer limits, the system seems workable. RLUIPA's other subject, land use regulations, has had major effects on local zoning laws, but these seem to be what the statute intended.[369] Based on this evidence, the statute has not generated a flood of doubtful claims.

As explained above, a principal failing of the present set of rules is to deny any review to claims involving Indian sacred sites on public lands. The main concern underlying that rule is courts' inability to identify a limiting principle to cabin future expansion of claims.[370] The *Cutter* dicta offer an answer, albeit one that may be challenging to apply in the sacred sites context. Invoking Establishment Clause review, *Cutter* requires courts to evaluate impacts that an accommodation has on interests of others.[371] This is a limiting principle both in the context of an existing claim and as a way to limit future claims. The difficulty is to articulate how to weigh competing claims that will often be diffuse and uncertain. However, requiring courts to consider the question will generate much better records on the question than have past adjudications that ignored it. Moreover, there are reported decisions arising from challenges to sa-

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367. *See, e.g.*, Aaron K. Block, Note, *When Money is Tight, is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000*, 14 TEX. J. C.L. & C.R. 237 (2009) (*Cutter*'s allowance of costs to justify regulations mistaken); Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 (2005) (broadly supporting the statute).

368. *See* Gaubatz, *supra* note 367, at 558–59.

369. For criticism, see generally MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005); Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779 (2010); Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805 (2006). For defense, *see* Laycock & Goodrich, *supra* note 36; Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons*, 31 HARV. J.L. & PUB. POL'Y 717 (2008).

370. *See supra* text accompanying note 249. *See also infra* notes 417–419 and accompanying text (describing the additional problem posed by polycentric disputes).

371. *See supra* note 342 and accompanying text.

cred sites accommodations granted by federal land managers.[372] Indians' opponents raised Establishment Clause claims in which impacts on them were at issue.[373] Courts appear to have handled these claims well, suggesting that they could readily determine accommodation claims by Native religious groups on the same basis.[374]

B. Hobby Lobby Reviews Cutter

Nine years later, the *Cutter* dicta were battle-tested in *Hobby Lobby* and other challenges to the contraception mandate imposed under the Affordable Care Act.[375] In *Hobby Lobby*, the Court held that for-profit corporations can maintain religious freedom claims under the Religious Freedom Restoration Act.[376] As usual, plaintiffs' sincerity and substantial burden claims sailed by on assertion alone, so the case depended on the government's compelling interest and lack of a less burdensome alternative.[377] The majority ruled for plaintiffs, reasoning that the government could readily provide contraception coverage for plaintiffs' employees by extending its exemption for religious non-profits.[378] The principal dissent by Justice Ginsburg invoked her *Cutter* opinion to argue that interests of the employees should outweigh the claim.[379] Justice Kennedy's short concurrence stressed his view that "the record in these cases shows that there is an existing, recognized, workable, and al-

372. *See, e.g.*, Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007); Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999).

373. *See Access Fund*, 499 F.3d at 1042–46; *Bear Lodge*, 175 F.3d at 820–22 (finding lack of harm to plaintiffs).

374. *See Access Fund*, 499 F.3d at 1045.

375. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751 (2014).

376. *Id.* at 2767–75.

377. *Id.* at 2754, 2757.

378. *Id.* at 2779–83.

379. *See id.* at 2790 n.8, 2801, 2802 n.25 (Ginsburg, J., dissenting). The majority addressed *Cutter* in a detailed footnote quoting *Cutter*: "It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Id.* at 2781 n.37 (majority opinion) (citing Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)). But the footnote discussed the point obliquely and failed to explain the phrase "adequate account." *Id.*

ready-implemented framework to provide coverage [of contraceptives]."[380]

Whether the alternative is as readily available as the majority claimed is at issue in numerous other lawsuits in which religious nonprofits claim that filing the government's form to obtain exemption from the contraception mandate is a substantial burden on their religious freedom. The issue has divided lower federal courts.[381] Three days after announcing its *Hobby Lobby* decision, the Court granted an injunction pending appeal in *Wheaton College v. Burwell*,[382] so long as a party notified the government in writing without using the form.[383] The majority's theory was that contraceptive coverage by other means was as readily available without use of the contested form.[384] The female justices were again unpersuaded and dissented in strong terms.[385] One wonders what the majority will do if a religious organization argues that giving *any* notice to the government offends its faith substantially.

The crucial question is whether the majority interprets religious claims under RFRA to trump all or most others, or at least one majority justice would join dissenters to balance them against harm to other persons. Nothing in these decisions gives a clear answer. Even so, the decisions strongly protect claims to religious freedom made by some of the nation's most powerful and privileged persons. Hobby Lobby Stores has no problem paying its female employees in cash that they can spend on "sinful" contraceptives, but is substantially burdened if it must pay them with government-subsidized insurance coverage.[386] Even more refined is Wheaton College's objection.[387] Meanwhile, Indian sacred sites can be entirely destroyed without any judicial review.

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380. *Id.* at 2786 (Kennedy, J., concurring).

381. *See* Wheaton Coll. v. Burwell, 573 U.S. ___, ___, 134 S. Ct. 2806, 2811 (2014) (Sotomayor, J., dissenting).

382. 573 U.S. ___, 134. S. Ct. 2806 (2014)

383. 134 S. Ct. at 2807.

384. *Id.* ("Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives.").

385. *Id.* at 2807 (Sotomayor, J., dissenting).

386. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, 134 S. Ct. 2751 (2014).

387. *See Wheaton College*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting).

C. Lessons from Abroad

Adjustments in the standard for religious exemption claims are suggested by examining religious freedom provisions in other human rights regimes. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights, and rights regimes were made part of the postwar constitutions of West Germany, Italy, and Japan.[388] Since then, human rights guarantees have blossomed in other international provisions, national constitutions, and statutes.[389] Even totalitarian states have felt the need to enact guarantees, albeit lacking any means of enforcement.[390] All democratic regimes include a guarantee of religious freedom.[391] But no other nation or system has adopted the American strict scrutiny formula as its enforcement framework; the Supreme Court of South Africa deliberately refused to do so.[392]

When the U.S. Bill of Rights was adopted, enforcement and its problems were but little understood. One consequence was failure to attempt any articulation of limits on rights. Thus, the First Amendment flatly says "no law" shall impair rights to expression and religious freedom.[393] Of course these rights have never been read that way; the Supreme Court has defined the competing interests that allow restrictions.[394] The need to do so is particularly obvious for the religion clauses because, applied in absolute form, they would conflict with one another.[395]

Drafters of modern rights regimes have thought limiting provisions ought to be part of their texts.[396] Some have adopted general provi-

388. *See* LOUIS HENKIN, THE AGE OF RIGHTS 1 (1990).

389. *See id.* at 6.

390. *See id.* at 29.

391. *See id.* at xvii.

392. *See* Christian Educ. South Africa v. Minister of Educ. 2000 (4) SA 757 (CC) at para. 31 (S. Afr.).

393. U.S. CONST. amend. I.

394. *See* United States v. Alvarez, 567 U.S. ___, ___, 132 S. Ct. 2537, 2544 (2012) (dictum). Justice Black tried to fashion a scheme faithful to the demand of "no law," but it never captured a majority of the Court. *See* Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview,* 37 N.Y.U. L. REV. 549, 553, 559 (1962).

395. *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

396. *See, e.g., infra* notes 397–399.

sions that do little more than legitimate the American practice of judicial definition.[397] But prominent ones go further. Most important is the European Convention on Human Rights (ECHR), because of its extensive territory (now forty-seven nations) and record of enforcement by the European Court of Human Rights.[398] Its provision protecting freedom of religion includes the following limiting language:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[399]

Several aspects of this provision bear on American religious freedom litigation. First, the ECHR explicitly recognizes that rights should be limited to protect "the rights and freedoms of others."[400] As explained above, that limit is omitted from the strict scrutiny wording, though it can be recognized indirectly or in Establishment Clause review.[401] In judgments of the European Court, this criterion is carefully reviewed in every case.[402]

A second aspect of ECHR law that could usefully be applied to American exemption claims is the formal procedure the European Court

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397. *See, e.g.*, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

398. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

399. *Id.* at art. 9.

400. *Id.*

401. *See supra* text accompanying notes 343–344.

402. *See* Joined Cases C-71 & C-99/11, Germany v. Y, 2012 Eur. Ct. H.R. para. 5; Kokkinakis v. Greece (A260-A), Eur. Ct. H.R. ¶ 47 (1993); Stephanos Stavros, *Freedom of religion and claims for exemption from generally applicable, neutral laws: lessons from across the pond?*, 6 E.H.R.L.R. 607, 620 (1997). The same limit appears in European Convention art. 10, which governs freedom of expression. European Convention, art. 10.

has established to apply the requirement that limits be "prescribed by law" and "necessary in a democratic society."[403] The procedure is denominated as the doctrine of "proportionality" and is quite elaborate.[404] Some aspects of the doctrine relate to the European Convention's multinational dimension and have no application within the United States.[405] But part of its core meaning is to impose on the legislative and executive branches the obligation to give full consideration to religious freedom claims. Failure to do so sends a claim back to those branches with orders to review the claim and interim protections to preserve it.[406] This allows the political branches, which have much broader discretion, to have a focused opportunity to address the claim. On review by the court, the doctrine provides for review of any limitation's necessity, allowing the court to assure adequate consideration of religious freedom under a flexible standard.[407]

A third useful change in the strict scrutiny formula applied to religious freedom claims would be to eliminate the formal notion of shifting the burden of proof. The familiar concept is that when a plaintiff has made out a prima facie case, the burden of proof shifts to the government to justify its actions.[408] RLUIPA codifies this shift.[409] Such burden-shifting is inappropriate in religious exemption cases when claimed religious beliefs are not subject to ordinary standards of proof. One consequence of the traditional rule is to contribute to the unease judges feel in uncertain cases. As already noted, inability to revisit a ruling on new facts can generate rejection of a claim.[410] Making subsequent review possible could lead to greater willingness to order relief in uncertain cases. There may be implicit recognition of this point in the absence of any ref-

403. European Convention, art. 10.

404. *See* Nicolas A.J. Croquet, *The European Court of Human Rights' Norm-Creation and Norm-Limiting Processes: Resolving a Normative Tension*, 17 COLUM. J. EUR. L. 307, 340 (2011).

405. *See* Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699, 723 (2006).

406. *See id.* at 720–21.

407. *See id.* at 724.

408. *See* PUBLISHER'S EDITORIAL STAFF, PLAINTIFF'S PROOF OF A PRIMA FACIE CASE §1:1.40 (Thompson Reuters 2013).

409. 42 U.S.C. § 2000cc-2(b) (2006).

410. *See supra* text accompanying note 10.

erence to plaintiffs' burden of proof in most religious exemption judgments, in contrast to free expression and racial discrimination cases.[411]

Yet another adjustment the ECHR system makes to address problems arising from the strict scrutiny standard is its jurisprudence on manifestation of religion. The text of Article 9 protects freedom "to manifest one's religion or beliefs."[412] By expanding protection to nonreligious beliefs, the European Convention achieves greater equality for believers and non-believers, the lack of which is a point of frequent academic attacks on American law.[413] However, this addition expanded the difficulties of defining justified limits to the right. The ECHR responded by limiting the scope of occasions that qualify as manifestations of religion or belief.[414] Breaking a general law based on a claim that one's acts or omissions were inspired by one's beliefs is not sufficient to invoke Article 9.[415] Rather, the act or omission must qualify as a manifestation through worship, teaching, practice, or observance.[416]

The European Convention system adjusts review of some claims to recognize that they are what Professor Fuller called "polycentric" disputes, affecting parties not before a court.[417] This factor makes courts reluctant to grant strict scrutiny protection that will be very hard to dislodge later. Professor Fuller advanced this as a reason to deny review.[418] Modern courts are more likely to allow review but on standards that take the polycentric problem into account.[419]

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411. *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 565, 573 (1998).

412. European Convention, art. 9.

413. *See, e.g.*, LEITER, *supra* note 130.

414. *See* PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 210 (2005).

415. *Id.* at 211.

416. *See* PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 210–91 (2005).

417. *See* Lon. L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

418. *See id.; see also* Grundberg v. Upjohn Co., 813 P.2d 89, 98–99 (Utah 1991).

419. *See* Itzchak E. Kornfeld, *Polycentrism and the International Joint Commission*, 54 WAYNE L. REV. 1695, 1701 (2008).

D. Effect of a Changed Rule on Sacred Site Claims

Would a more flexible standard change outcomes? Strong partisans of religious rights will object to this proposal because it appears to reduce protection for religious rights and fails to protect at least some sacred sites. But some proponents of Native rights will approve a standard that achieves significant success as superior to the existing string of failures. If the proposed changes make no difference to outcomes, there would be no reason to consider them. Therefore it is important to try to assess what would have happened to prominent failed cases under the proposed legal concept.

Lyng is again the most useful case to begin the review. The Court's opinion worried about hypothetical, more restrictive claims Indians might make.[420] Plaintiffs strongly denied any such intent, and critics have argued this was improper speculation.[421] However, the Court's remarks reflected some of the concerns discussed in this article—that expanded claims could not be traversed and would more severely impact interests of the government and of other users of the land.[422] Any court order would be very difficult to revisit under a strict scrutiny standard. The Court's failure to say anything about the standard of review implied discomfort with the *Sherbert* standard.

The proposed alternative standard would address each of these concerns. First, it would have required a full record of effects of the proposed restriction on other persons. This would define a protective order by the claims made and the effects proved. New claims or facts would allow revision. If necessary to shoehorn into the strict scrutiny test, the Court could have used the maneuver stated in *Cutter* and the *Comanche Nation* case: declaring all Forest Service plans compelling interests and resting the decision on manipulation of the necessity requirement.[423] On the record in *Lyng*, this should have readily sustained the Indians' claim.

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420. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452–53 (1988).

421. *See, e.g.*, Dussias, *Friend, Foe, Fremeny*, *supra* note 104, at 415; Carpenter, *Old Ground*, *supra* note 104, at 995–96.

422. *See supra* text accompanying note 10.

423. *See supra* notes 357–362 and accompanying text.

The site was undeveloped, so no investments would have been lost,[424] and, despite exaggeration by the Court, it was of relatively modest size.[425] The unimportance of the site to the government was revealed by subsequent scrapping of the plan and adding the site to a wilderness area.[426]

The proposed standard also shows why the *Comanche Nation* judgment was correct.[427] The only competing interest was that of the Army, impact on it was readily apparent, and review focused on insisting that the government adequately review and account for religious interests.[428] The proposed standard would have improved the discourse in other sacred site decisions, but a positive outcome would have been more difficult in many instances because sites involved more preexisting investment, greater geographic extent, and more potential interests of other persons than did that in *Lyng* or *Comanche Nation.* One reaction to this consideration is to claim that religious freedom should not take a back seat to property rights, but this is naïve. No one is going to order destruction of a substantial structure against its owner's will to meet a religious freedom claim even when the owner is a government. One opinion rejecting a sacred site claim hypothesized a religious claim to require destruction of the Lincoln Monument.[429] What makes reported sacred site claims plausible is the fact that none was fully developed; plaintiffs in these cases sought to forestall planned projects.

Battles over the ski area on San Francisco Peaks illustrate several difficult points.[430] The facility was built in 1937.[431] A legal challenge be-

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424. *See* Nw. Indian Cemetery Protection Ass'n v. Peterson, 565 F. Supp. 586, 590, 595–96 (N.D. Calif. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n 485 U.S. 439 (1988).

425. *See id.* at 596–97.

426. *See* Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, *in* INDIAN LAW STORIES 487, 527 (C. Goldberg et al., eds. 2010).

427. *See supra* notes 305–309 and accompanying text.

428. *See* Comanche Nation v. United States, 2008 U.S. Dist. LEXIS 73283 (W.D. Okla. Sept. 28, 2008).

429. Badoni v. Higginson, 455 F. Supp. 641, 645 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

430. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

431. *See supra* note 259.

fore any construction would have avoided conflict with a vested interest. Because of the very large area at issue, a proper record of competing interests would have been particularly challenging.[432] However, until such a record is required, it is speculative to assume its content. The administrative record is part of the picture, but it is limited to subjects the Forest Service selects and to parties who choose to participate.

A number of other reported decisions have suffered from the same problem as *Navajo Nation*—tribes' claims were made after significant investment had been made in developments they opposed.[433] In *Sequoyah* and *Badoni*, the Tellico and Glen Canyon dams were built.[434] However, at least in *Badoni*, protection of the tribal interest would not have required stopping the project.[435] In any case, tribes are now active in protecting their interests, so that missed chances to anticipate developments are much less likely.

V. OTHER ISSUES OF NOTE

Aside from the special case of Indian sacred sites, areas in which the strict scrutiny test generates notable challenges will often involve either conflicts between parents' beliefs and their children's medical interest, or situations in which claimants have strong incentives to make false claims. This section discusses some important examples.

Competent adults have a common-law right to refuse medical treatment that now has constitutional stature.[436] But American governments have established medical rights for, and duties to, children against parents whose religious or other beliefs deny some or all forms of medical treatment. The usual threshold for state compulsion is a substantial threat of death or severe impairment.[437] Thus, faith-healing parents have

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432. *See Navajo Nation*, 535 F.3d at 1064 (Peaks area comprises 74,000 acres).

433. *See* Laurie Ensworth, Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U. L. REV. 141, 143–45 (1983).

434. *See* Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608, 610 (E.D. Tenn. 1979); *Badoni*, 638 F.2d at 175.

435. *See Badoni*, 638 F.2d at 176 (secondary claim to restrict tourist visits to the sacred site, Rainbow Bridge).

436. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 271–79 (1990).

437. *See* Ann MacLean Massie, *The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach*, 21

been required to permit medical treatment of their children facing these threats,[438] and Jehovah's Witness children have been given blood transfusions over their parents' objections.[439] Constitutional attacks on these laws have failed, a rather clear instance where rights to religious freedom are limited by competing rights of other persons, here children who are under the age of consent to forgo medical treatment.[440] Governing constitutional rules for these matters are fairly stable.

Two other situations present more active and uncertain conflicts. One arises from disputes over mandatory vaccination laws. The other involves conflicts over the practice of infant male circumcision. Both add insight to the issues addressed in this article.

A. Conflicts over Vaccination of Children

State laws requiring vaccinations against smallpox were passed at various times in the nineteenth century, each time overriding determined opposition.[441] Constitutional attacks failed, beginning with *Jacobson v. Massachusetts* in 1905.[442] During the twentieth century, all American jurisdictions adopted laws requiring vaccination of children against a

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HASTINGS CONST. L. Q. 725, 725–29 (1994) (issue governed mostly by statutes; variations noted).

438. *See* Massie, *supra* note 437, at 730 (law differs somewhat among states).

439. *See Divorce, Blood Transfusions and Minor Children*, DIVORCE, BLOOD TRANSFUSIONS, AND OTHER LEGAL ISSUES, http://jwdivorces.bravehost.com/blood.html (last visited Mar. 5, 2014).

440. *See* Prince v. Massachusetts, 321 U.S. 158 (1944). *See also* Jennifer L. Hartsell, Comment, *Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 512–19 (1999). Because constitutional defenses fail, most state legislatures have been persuaded to pass statutory exemptions for parents who are adherents of spiritual-healing faiths, and these generate other constitutional issues. *See id.* at 519–22.

441. *See* Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1104–07 (2005); James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L. J. 831, 842–50 (2001-02).

442. Jacobson v. Massachusetts, 197 U.S. 11 (1905); *see also* Zucht v. King, 260 U.S. 174 (1922).

list of contagious diseases that grew steadily.[443] At the same time, most state laws included or added exemptions to mandatory vaccination based on religious objections, and a large minority added philosophical objections unrelated to religion.[444] All states also exempt children who should not be vaccinated for medical reasons such as allergies.[445] The exemptions for belief-based objectors reflect two political forces: the significant influence of organized religions,[446] and the relationship of vaccination to compulsory school-attendance laws. Mandatory vaccination and school attendance were connected in some nineteenth-century laws, and in the twentieth century the connection was adopted in every state.[447] Children are required to attend a public or approved private school, and admission to either is conditioned on vaccinations.[448] Without belief-based exemptions, some children would be kept out of school, undermining educational goals and straining compulsory attendance laws.

Evaluating vaccination laws requires basic scientific information on contagion and vaccines. No vaccine should be required absent proof that its benefits clearly outweigh its costs, but only one current requirement might fail this test.[449] The next issue is the concept of herd immunity. A contagious disease will disappear from a community when a certain percentage of residents are successfully vaccinated, a number that varies among diseases by ease of contagion from around two-thirds to more than 90%.[450] A small number cannot be vaccinated because of allergies or other medical reasons, some vaccinations do not successfully achieve immunity, some children are too young to be vaccinated, and some par-

443. *See* Hodge & Gostin, *supra* note 441, at 850–52, 867–75.

444. *See* Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 75 (2011).

445. *See id.*

446. This is revealed by the wording of many statutes limiting religious exemptions to members of recognized or established faiths. *See* Hodge & Gostin, *supra* note 441 at 861.

447. *See* Jacobs, *supra* note 444, at 74.

448. *See id.* at 77. Approved home schooling is subject to the same requirement. *Id.*

449. *See* Allan J. Jacobs, *Needles and Notebooks: The Limits of Requiring Immunization for School Attendance*, 33 HAMLINE L. REV. 171 (2010) (detailing scientific and legal grounds for compulsory vaccination and finding them satisfied for all required immunizations except Gardasil, which is required in few jurisdictions).

450. *See* Jacobs, *Belief Exemptions*, *supra* note 444, at 79.

ents do not vaccinate children for social reasons unrelated to belief.[451] Thus, belief-based exemptions defeat herd immunity when their number, combined with those itemized in the last sentence, reduces a community's percentage of successfully vaccinated persons below the pertinent threshold.[452] Recent outbreaks of contagion and empirical data about vaccinated children show that herd immunity in the U.S. is declining to some extent, which has led medical experts to call for tightening or eliminating belief-based exemptions.[453]

This scheme generates constitutional law issues worthy of the densest law-school exam question. Starting with equal protection, all existing statutes discriminate between belief-based exemptions based on religion and those with other motivations.[454] All exemptions discriminate against those who undergo the expense, inconvenience, mild pain, and risks of vaccination.[455] If herd immunity is achieved, those exempted are free-riders who enjoy the benefit. Exemptions for medical reasons are favored over belief-based exemptions in some states.[456] All of these discriminations have generated lawsuits, mostly unsuccessful. One form that has been struck down is the requirement in some states that exemption for religious belief be based on tenets of an established religious organization.[457] Only one state court has overturned all belief-based exemptions as unjust discrimination against the vaccinated.[458]

As usual, equal protection claims can readily be morphed into due process. Children whose vaccinations did not succeed and those who cannot be vaccinated for medical reasons are required to attend school

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451. *See id.* at 81–83. Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 90–91 (E.D.N.Y. 1987).

452. *See* Jacobs, *Belief Exemptions*, *supra* note 444, at 83.

453. *See id.* at 80–81.

454. *See id.* at 75 (stating that thirty-two states exempt only for religious beliefs, sixteen for both religious and philosophical beliefs, two for neither).

455. *See id.* at 76–77.

456. *See id.* at 79–80.

457. *See, e.g.*, Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 90–91 (E.D.N.Y. 1987).

458. Brown v. Stone, 378 So.2d 218, 223 (Miss. 1979). In addition, West Virginian statutes allow medical exemptions only. W. VA. CODE § 16-3 (1999).

and are subjected to increased risk of contagion by the presence of classmates enjoying belief-based exemptions.[459]

The claims of vaccination opponents, both religious and nonreligious, connect to three issues addressed in this paper. First, the array of issues encounters the uneven set of protections for religious rights.[460] RFRA, the federal statute imposing strict scrutiny, applies only in Washington, D.C., and other places under federal jurisdiction.[461] Heightened federal constitutional review is available only when discrimination between religious faiths can be shown.[462] Second, claims of legitimate religious objectors raise profound issues about rights of other persons. Parents who deny vaccination to their children put them at risk of death or bodily harm, as is the case of other refusals of medical treatment. In this instance, the risk extends as well to other persons in the community who are subjected to increased risk of contagion.

One issue posed by vaccination laws is that falsely claiming religious exemption is easy. In practice, states make little effort to verify the sincerity or substantiality of exemption claims.[463] Were states to do so, they would often confront the hands-off rule forbidding secular authorities to determine matters of faith.[464] The no-enforcement practice eases the tension over preference for religious exemptions over other forms of genuine belief; both get a free pass.[465] However, the vaccination context involves a possible motive of pure selfishness—to enjoy herd immunity without undergoing the costs and risks of immunization. At the same time, there are surely honest claims of religious obligation involved in this and other medical exemption disputes. The strict scrutiny test is a poor tool to sort out these issues.

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459. *See* Jacobs, *Belief Exemptions*, *supra* note 444, at 95–108 (analyzing due process claim).

460. *See supra* Part I.A.

461. *See supra* notes 77–79 and accompanying text.

462. *See supra* notes 3 & 74 and accompanying text.

463. *See* Jacobs, *Belief Exemptions*, *supra* note 444, at 76–77; Linda E. LeFever, Comment, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PENN ST. L. REV. 1047, 1047–48 (2006).

464. *See supra* Part II.E.

465. *See supra* note 130.

B. Disputes About Infant Male Circumcision

Infant male circumcision has deep religious roots for the Jewish and Muslim faiths that did not originate in any medically-based interest.[466] There have been occasional efforts to forbid the practice based largely on prejudice, but the practice otherwise continued without legal conflict over many centuries.[467] Three recent developments have raised legal questions. The first, and most straightforward, are efforts to insure sanitary conditions to protect boys against infection and disease and to require anesthesia to prevent pain.[468] A second involves invocations of modern concepts of individual rights to claim that infant circumcision be banned as an unwarranted invasion of children's rights.[469] Countering that, the third is recent medical evidence that male circumcision has important health benefits.[470]

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466. *See* Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL'Y & L. 497, 512–16, 519–20 (2002).

467. *See id.* at 517. Botched circumcisions have long been a subject of tort law. *See id.* at 504–06; Matthew R. Giannetti, Note, *Circumcision and the American Academy of Pediatrics: Should Scientific Misconduct Result in Trade Association Liability?*, 85 IOWA L. REV. 1507 (2000).

468. *See* Cent. Rabbinical Cong. of the United States & Canada v. New York City Dep't of Health & Mental Hygiene, No. 12-CV-7590, 2013 U.S. Dist. Lexis 4293 (S.D.N.Y. Jan. 10, 2013), *vacated*, Cent. Rabbinical Cong. of the United States v. New York City Dep't of Health & Mental Hygiene, No. 13-107-CV, 2014 U.S. App. LEXIS 15726 (2d Cir. Aug. 15, 2014); American Academy of Pediatrics, *Task Force on Circumcision, Circumcision Policy Statement*, 103 PEDIATRICS 686 (Mar. 3, 1999), *available at* http://pediatrics.aappublications.org/content/103/3/688.full.html.

469. *See* Miller, *supra* note 466, at 502; Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in The United States*, 7 AM. U.J. GENDER SOC. POL'Y & L. 87 (1998/1999).

470. *See New Data on Male Circumcision and HIV Prevention: Policy and Programme Implications*, WHO/UNAIDS Technical Consultation on Male Circumcision and HIV Prevention: Research Implications for Policy and Programming (6–8 March 2007), http://libdoc.who.int/publications/2007/9789241595988_eng.pdf?ua=1; *see also* American Academy of Pediatrics Task Force on Circumcision, Circumcision Policy Statement (Aug. 27, 2012), *available at* http://pediatrics.aappublications.org/content/130/3/585.full.html (cautiously favoring circumcision if done under sanitary conditions and with anesthesia).

To date there have been few court contests, although one reported case raised an issue reviewed in this article. At issue in *Central Rabbinical Congress of the United States & Canada v. New York City Department of Health & Mental Hygiene,* was New York City's mandate of written consent of at least one parent to a traditional form of circumcision mandated by some orthodox Jewish authorities because the procedure risks transmission of contagious disease.[471] There can be little doubt that banning circumcision would impose a substantial burden on observant Jews (and Muslims), but was it a substantial burden to require written consent of one parent? The only federal right at issue was the Free Exercise Clause.[472] Under the *Smith* standard, plaintiffs had to prove discrimination against their faith.[473] They lost this claim in the District Court but won on appeal.[474] However, the trial court also reviewed their claim under the New York State Constitution, which involved a balancing test that constituted a heightened form of review, albeit well short of strict scrutiny.[475] For this test, the court held that "the regulation imposes a relatively minor burden on the free exercise of religion" that was outweighed by the city's interest.[476]

In 2011, circumcision opponents in San Francisco gathered enough petition signatures to put a proposed ban with no religious exception on the city ballot.[477] A judge ruled that the measure was beyond local power under California law, and the state legislature then amended the law to make that judgment explicit.[478] There was considerable publicity when a German court ruled, in a case involving a Muslim boy, that

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471. *Cent. Rabbinical Cong.*, 2014 U.S. Dist. LEXIS 15726, at *2–3, *6–21.

472. *See id.* at *3–4.

473. *See id.* at *23–25.

474. *Id.* at *4–5 (applying constitutional strict scrutiny).

475. *See* Cent. Rabbinical Cong. of the United States & Canada v. New York City Dep't of Health & Mental Hygiene, No. 12-CV-7590, 2013 U.S. Dist. Lexis 4293 (S.D.N.Y. Jan. 10, 2013) at *106–07.

476. *See id.* at *108.

477. *See* Andrew E. Behrns, Note, *To Cut or Not to Cut?: Addressing Proposals to Ban Circumcision Under Both a Parental Rights Theory and Child-Centered Perspective in the Specific Context of Jewish and Muslim Infants*, 21 WM. & MARY BILL RTS. J. 925, 925 (2013); Michael J. Weil, Note, *The Friendly Separation of Church and State and Bans on Male Circumcision*, 45 CONN. L. REV. 695, 698 (2012).

478. *See* Behrns, *supra* note 477, at 925 n.4; Weil, *supra* note 477, at 698 n.8.

religious circumcision inflicted grievous bodily harm and could be prosecuted.[479] The German parliament promptly modified the ruling to protect religious practice,[480] but in 2013, the Parliamentary Assembly of the Council of Europe published a resolution that appeared to call for the European Union to outlaw male as well as female circumcision.[481] In general, conflict about the subject appears to be growing, so that difficult issues may reach the courts.[482]

C. False Claims

As this paper has stressed, claims for exemption from general laws can be made by false assertions that courts cannot test, which the unmodified strict scrutiny test over-protects.[483] There is no evidence that actual sacred sites claims by American Indian faiths have been false, but fear that they might be expanded, possibly falsely, has haunted their claims and caused most to fail.[484]

Difficulties arise in situations where claimants have strong incentives to misrepresent religious claims. As explained above, vaccination is an important field in which exemption claims threaten the health of many.[485] Another situation discussed above involves prisoners, but as

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479. *See* Landgericht Köln [LG] [District Court of Cologne] May 7, 2012, 151 Ns 169/11, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2128, 2008 (Ger.), *available at* http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/151_Ns_169_11_Urteil_20120507.html; Bijan Fateh-Moghadam, *Criminalizing male circumcision? Case Note: Landgericht Cologne, Judgment of 7 May 2012 – No. 151 Ns 169/11*, 13 GERMAN LAW JOURNAL 1131–1145 (2012), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1464 (acquitting doctor because he had acted in good faith with his understanding of the law at the time).

480. BÜRGERLICHES GESETZBUCH [CIVIL CODE], Dec 20, 2012, BUNDESGESETZBLATT , §1631(d) (Ger.).

481. *See* B.C., *Circumcision and the law: A clash of entitlements*, THE ECONOMIST (Nov. 14, 2013), http://www.economist.com/blogs/erasmus/2013/11/circumcision-and-law. The Assembly is an important advisory body to the Council of Europe.

482. *See id.*

483. *See supra* Part II.

484. *See supra* Part III.

485. *See supra* Part V.A.

explained, the *Cutter* dicta and the prison setting seem to create a reasonable balance that allows courts to address the issues sensibly.[486]

An additional area of potential conflict involves claims for refugee status based on alleged religious persecution; however, the facts of persecution can be tested by ordinary methods of proof.[487] An invented religion would be unlikely to support such proof, so the only issue in practice is whether a claimant is an adherent of a faith against which persecution is provable.[488]

Yet another twist is presented by lawsuits to claim religious exemptions from the Affordable Care Act.[489] Because the statute is strongly contested politically, there is an incentive to mask political opposition in religious garb.[490] Existing claims offer at least one hint of false faith, and they involve serious doubt about the substantiality of burdens. Business claimants with employee health care plans claim that indirect provision of insurance for contraception is a substantial burden, while paying women sufficient wages to buy it is not.[491] These claimants could drop coverage and pay a tax lower than the existing cost, and they claim this option is also a substantial burden.[492] Parties entitled to a religious ex-

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486. *See supra* text accompanying notes 354–362.

487. *See, e.g.*, Michael Kagan, *Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT'L L. 1179 (2010).

488. *See id.* at 1230–33. *But see* Christopher Chaney, *The Despotic State Department in Refugee Law: Creating Legal Fictions to Support Falun Gong Asylum Claims*, 6 ASIAN-PAC. L. & POL'Y J. 130, 172 (2005) ("[T]he extent to which adjudicators are forced to bend the law to accommodate the USDOS results in a burden of credibility so low that it practically invites fraudulent claims of Falun Gong membership. The resulting success of Falun Gong asylum claims provides valuable ammunition to human smugglers in the PRC.").

489. *See supra* Part IV.B.

490. *See, e.g.*, S.M., *Religious Objections to Obamacare: The Butterfly Effect*, THE ECONOMIST (Jan. 3, 2014), http://www.economist.com/blogs/democracyinamerica/2014/01/religious-objections-obamacare.

491. *See* Liberty Univ. v. Lew, 733 F.3d 72, 99 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 683 (2013).

492. *See* Marty Lederman, *How to Understand* Hobby Lobby, in SCOTUSblog (Feb. 23, 2014), http://www.scotusblog.com/2014/02/symposium-how-to-understand-hobby-lobby/.

emption claim that signing the official form to claim it is a substantial burden.[493]

CONCLUSION

Religious claims for judicially crafted exemptions from general laws have troubled American courts since they became common in the 1960s. The Supreme Court's attempt to apply strict scrutiny to constitutional free exercise claims generated outcomes inconsistent with the test. For this and other reasons, the *Smith* Court abandoned that regime but failed to replace it with rules better suited to the subject. Congress intervened with strong statutory protections for certain kinds of claims, some of which were disallowed by the Court, but the statutes failed to address the difficulties that had plagued the constitutional regime. The result is a patchwork of protections that favors the politically powerful, shielding churches from zoning laws and large employers from accommodating the reproductive rights of their female workers but leaving American Indian faiths unprotected. The Court's *Cutter* dicta suggested a way to modify the practical application of the statutes, but the Affordable Care Act contraception cases put that possibility in doubt. The main basis for exclusion of Indian claims hangs in the balance. One must hope for a path to restore judicial review of those claims.

493. *See supra* notes 381–385 and accompanying text; Michael C. Dorf, *Obamacare and Participation in Evil,* VERDICT (Jan. 15, 2014), *available at* http://verdict.justia.com/2014/01/15/obamacare-participation-evil.