2017

Peyote and Ghouls in the Night: Justice Scalia's Religion Clause Minimalism

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PEYOTE AND GHOULS IN THE NIGHT: JUSTICE SCALIA'S RELIGION CLAUSE MINIMALISM

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INTRODUCTION

The late Justice Antonin Scalia held a minimalist view of the religion clauses: the Free Exercise Clause does not protect against neutral laws of general applicability, and the Establishment Clause prohibits neither longstanding traditional practices nor legislative acts with a plausible secular purpose. In both free exercise and establishment cases, Scalia resisted judicial second-guessing of legislative judgments unless he saw an explicit singling out of religious practice. Yet Scalia had an uneven influence on religion clause jurisprudence. When it came to the Free Exercise Clause, he played a pivotal role in shaping a doctrinal framework that has arguably created more tensions than it has resolved. In contrast, when it came to the Establishment Clause, he failed to influence his colleagues to alter a doctrinal framework that arguably remains less coherent than it would have been under his proposed alternative. The net result is the worst of both worlds: a Court that followed Scalia into a murky free exercise experiment and ignored his pleas to clarify its understanding of establishment.

This Article explores Justice Scalia's religion clause minimalism in six opinions. It then considers three difficulties raised by his approach: one theoretical, one doctrinal, and one normative. The theoretical difficulty is that Scalia's minimalism made him less likely to help religious minorities that he believed worth protecting. The doctrinal difficulty is that his minimalism makes it difficult to justify the Court's protections for religious institutions. The normative difficulty—for those who favor strong religious liberty protections—is that his minimalism makes it hard to require that discretionary public funding include religious beneficiaries.

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I. JUSTICE SCALIA'S KEY RELIGION CLAUSE OPINIONS

Much of Justice Scalia's religion clause minimalism is captured in the views he expressed in a small number of opinions. This section first considers four of his concurrences and dissents in Establishment Clause cases: *Edwards v. Aguillard,*[1] *Lee v. Weisman*,[2] *Lamb's Chapel v. Ctr. Moriches Union Free School District*,[3] and *Bd. of Educ. of Village of Kiryas Joel v. Grumet.*[4] It then turns to two Free Exercise Clause cases: his majority opinion in *Employment Division v. Smith*[5] and his dissent in *Locke v. Davey.*[6]

A. Edwards v. Aguillard

Edwards v. Aguillard was decided during Scalia's first year on the Supreme Court.[7] The case involved Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act," which prohibited public schools from teaching evolution unless they also taught the theory of "creation science."[8] The purpose of the Act, according to its sponsor, Senator Bill Keith, was to promote academic freedom.[9]

The majority applied the three-part test announced in *Lemon v. Kurtzman*,[10] which requires courts to examine a law challenged under the Establishment Clause to ensure that it has a secular legislative purpose, that its principal or primary effect neither advances nor inhibits religious practice, and that it does not result in an "excessive government entanglement" between religion and government.[11] Based on its review of the legislative history, the Court concluded that the Act was intended to give an unfair advantage to a "particular religious doctrine."[12]

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[1] 482 U.S. 578 (1987).
[2] 505 U.S. 577 (1992).
[3] 508 U.S. 384 (1993).
[4] 512 U.S. 687 (1994).
[5] 494 U.S. 872 (1990).
[6] 540 U.S. 712 (2004).
[7] 482 U.S. 578 (1987).
[8] *Id.* at 580–81 (1987).
[9] *Id.* at 581.
[10] 403 U.S. 602 (1971).
[11] *Id.* at 612–13.
[12] *Aguillard*, 482 U.S. at 592 ("The legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to

Accordingly, the Act violated *Lemon*'s purpose prong: "a State's articulation of a secular purpose . . . [must] be sincere and not a sham."[13]

Justice Scalia's dissent scoffed at *Lemon*'s purpose prong.[14] He noted that the Court had found a lack of secular purpose in just three prior cases.[15] But even if *Lemon* controlled, he reasoned, the Act did not violate the Establishment Clause.[16] For Scalia, "it should not matter if legislators have a religious purpose in enacting a statute or if the statute happened to coincide with the legislators' religious beliefs, as long as there was also some secular purpose."[17] In Scalia's view, the Act's secular purpose was just what Senator Keith had claimed it was. Scalia also argued that the Act need not effectively further that secular purpose, so long as those who passed it did so with the secular purpose in mind.[18]

B. Lee v. Weisman

In 1992, the Court held in *Lee v. Weisman* that a "nonsectarian" prayer delivered during a public middle school's graduation ceremony violated the Establishment Clause.[19] Justice Kennedy's opinion for the Court ignored *Lemon* and focused instead on whether the prayer had a "coercive" effect on students attending the graduation ceremony.[20] Kennedy argued that students required to attend the ceremony were "psychologically obligated" to stand during the prayer.[21]

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provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.").

[13] *Id.* at 586–87.

[14] *Id.* at 613 (Scalia, J., dissenting) ("I doubt whether that 'purpose' requirement of *Lemon* is a proper interpretation of the Constitution. . . .").

[15] *Id.* at 614.

[16] *Id.* at 625–26. Scalia also argued that a secular purpose alone is sufficient "regardless of whether that purpose is likely to be achieved by the provisions they enacted." *Id.* at 614. He added: "Our task is not to judge the debate about teaching the origins of life, but to ascertain what the members of the Louisiana Legislature believed. The vast majority of them voted to approve a bill which explicitly stated a secular purpose; what is crucial is not their *wisdom* in believing that purpose would be achieved by the bill, but their *sincerity* in believing it would be." *Id.* at 621.

[17] Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 924 (1991).

[18] *Aguillard*, 482 U.S. at 621 (Scalia, J., dissenting).

[19] Lee v. Weisman, 505 U.S. 577 (1992).

[20] *Id.* at 592-93.

[21] *Id.* at 637 (Scalia, J., dissenting).

Scalia's dissent lambasted Kennedy's coercion framework as "a boundless, and boundlessly manipulable, test." [22] For Scalia, the "argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent."[23] He believed that students could freely choose to remain seated, but even if they were somehow "coerced" to stand, "maintaining respect for the religious observances of others is a fundamental civic virtue that government . . . can and should cultivate . . . ."[24]

Scalia's *Lee* dissent also highlighted his emphasis on the role of tradition in resolving Establishment Clause challenges. For Scalia, any test "that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."[25] Whatever line the Court drew must be "one which accords with history and faithfully reflects the understanding of the Founding Fathers."[26] Scalia called Kennedy's *Lee* opinion "conspicuously bereft of any reference to history."[27] In his view, applying the Establishment Clause through the lens of history was the only acceptable approach.[28] And, he argued, our history is "replete with public ceremonies featuring prayers of thanksgiving and petition."[29]

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[22] *Id.* at 632.
[23] *Id.* at 636.
[24] *Id.* at 638.
[25] *Id.* at 631 (quoting County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). *Cf.* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389 (2000) (Justice Scalia "takes an extremely narrow view of the protections" of the Establishment Clause as evidenced by his opinion in *Lee v. Weisman*, and "he emphasizes deference to majoritarian government decision-making. He gives no weight to the need for the judiciary to enforce these clauses, especially to protect those of minority religions.").
[26] *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).
[27] *Id.* at 631.
[28] *See id.* at 632 ("Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.").
[29] *Id*. at 633 (Scalia, J., dissenting) (referencing the Declaration of Independence, President George Washington's first inaugural address, President Thomas Jefferson's first inaugural address, President James Madison's first inaugural address, President George W. Bush's inaugural address, the national celebration of Thanksgiving, and the opening of congressional sessions with a chaplain's prayer). *But see* Nadine

Scalia concluded his opinion by criticizing *Lemon*. He observed that the Court in *Lee* had revealed the "irrelevance" of *Lemon* by ignoring the test altogether.[30] But he found the Court's application of the "psycho-coercion test" no better, asserting that it "suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself."[31]

C. Lamb's Chapel

The year after *Lee v. Weisman*, Scalia penned one of his most memorable lines concurring in *Lamb's Chapel v. Center Moriches Union Free School District.*[32] The case involved a church's challenge to a public school district denying it access to a school's facilities to show films on parenting and the family. The Court concluded that allowing the church to use the school's facilities did not violate the Establishment Clause.[33] Relying on *Lemon*, the Court concluded that the policy passed muster because the "film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members."[34]

Scalia's concurrence argued that allowing the church access to the school's facilities did not violate the Establishment Clause because "it does not signify state or local embrace of a particular religious sect."[35] He thought *Lemon* utterly unhelpful to the Court: "When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs no more than helpful signposts."[36] Yet despite

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Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 461 (1997) (arguing that Justice Souter's historical interpretation "met and bested" Justice Scalia's).

[30] *Lee*, 505 U.S. at 644 (Scalia, J., dissenting).

[31] *Id.* at 644.

[32] 508 U.S. 384 (1993).

[33] The case also involved a free speech claim, on which the Court held that the school district's decision constituted viewpoint discrimination. *See id.* at 394 ("The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.").

[34] *Id.* at 395.

[35] *Lamb's Chapel,* 508 U.S. at 401 (Scalia, J., concurring).

[36] *Id.* at 399 (internal citations and quotations omitted).

Lemon's indeterminacy, and much to Scalia's chagrin, the test persisted: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."[37]

D. Board of Education of Village of Kiryas Joel v. Grumet

The following year, Justice Scalia dissented in a different Establishment Clause case.[38] This time, the plaintiffs were a minority religious sect, the Satmar Hasidim, who practiced a strict form of Judaism.[39] In 1977, a group of Satmars incorporated the village of Kiryas Joel.[40] Most of their children attended private religious schools within the village, but because those schools were unable to accommodate children with special needs, some children attended public schools outside the village.[41] This arrangement proved unsatisfactory to parents who saw their children confronting severe emotional difficulties in the public schools.[42] In 1989, the New York legislature responded by creating the Kiryas Joel Village School District.[43]

After other state residents sued the legislature, the Supreme Court held that the school district violated the Establishment Clause.[44] Writing for the majority, Justice Souter noted that "[b]ecause the religious community of Kiryas Joel did

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[37] *Id.* at 398.
[38] Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 732–52 (1994) (Scalia, J., dissenting). The residents of Kiryas Joel "interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls." *Id.* at 691 (majority opinion).
[39] *Id.* at 690.
[40] *Id.* at 691.
[41] *Id.*
[42] As a result, these children often went without the special services they were entitled to by law. *Id.* at 691–92.
[43] Although the statute granted the school board authority over elementary and secondary education of all school-aged children in the village, Kiryas Joel children without special needs continued to attend private religious schools. Accordingly, the new school district operated only a special education program for children with special needs. *Id.* at 693–94.
[44] *Id.* at 705.

not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one."[45] Souter explained that the majority's holding did not prevent New York's legislature from finding another way to accommodate the Satmars' special needs children, [46] but reasoned that "accommodation is not a principle without limits" and concluded that the statute "crosse[d] the line from permissible accommodation to impermissible establishment."[47]

Justice Scalia disagreed with the majority's invalidation of the school district. He believed there was "no possible doubt of a secular basis" for the law and argued that the majority had failed to overcome the "strong presumption of validity that attaches to facially neutral laws" by showing the absence of a secular basis. [48] Scalia also paid particular attention to the Satmars' non-mainstream beliefs, contending that even if the district had been created as a special arrangement *because* of those beliefs, it would be a constitutionally permissible accommodation. [49] In Scalia's view, our nation's history encouraged accommodations like this one: "When a legislature acts to accommodate religion, particularly a minority sect, 'it follows the best of our traditions.'" [50] He argued that the majority's "demand for 'up front' assurances of a neutral system"

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[45] *Id.* at 703.

[46] The majority proposed alternatives to the separate school district including bilingual and bicultural instruction for Kiryas Joel special needs children at a public school in the encompassing district and a separate bilingual and bicultural program offered by the encompassing district at a neutral site near a village parochial school. *Id.* at 707.

[47] *Id.* at 706–10. Writing for the majority, Souter also reasoned that similar to the law at issue in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the law creating Kiryas Joel Village School District was an impermissible "fusion of governmental and religious functions" because it "effectively identifies . . . recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly." *Id.* at 699, 702. In his dissent, Justice Scalia represented Souter's reasoning as "steamrolling . . . the difference between civil authority held by a church and civil authority held by members of the church," arguing that the "critical factor" that made *Larkin* unique was that the law at issue explicitly gave civil authority to churches as institutions, unlike the law creating Kiryas Joel Village School District that gave authority to a group of citizens who happened to be of a particular religious faith. *Id.* at 735 (Scalia, J., dissenting).

[48] *Id.* at 738, 752 (Scalia, J., dissenting).

[49] *Id.* at 743.

[50] *Id.* at 744 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

from the New York legislature violates both traditional accommodation doctrine and the role of judiciary,[51] concluding that their decision to strike down the law "continues, and takes to new extremes, a recent tendency of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration."[52]

E. Employment Division v. Smith

The 1990 decision in *Employment Division v. Smith*[53] is easily Justice Scalia's most important, and most controversial, religion clause opinion.[54] The case involved two Native American spiritualists who sued under the Free Exercise Clause after losing their jobs and being denied unemployment benefits for using peyote during one of their worship services. Scalia's majority opinion showed little empathy for the plaintiffs. The law banning peyote, Scalia wrote, was a "neutral law of general applicability."[55] It did not single out any particular religious belief or even religious belief in general. Rather, it applied to all people, religious or not, and it applied to all peyote use, religious or not.[56] These generally applicable laws need only pass the rational basis test—the fact that they might incidentally curtail religious practice did not matter.

Scalia's conclusion had far-reaching effects: most laws are neutral laws of general applicability, and the few that are not typically run afoul of equal protection norms.[57] *Smith* thus relegated the constitutional protections for free exercise to almost

[51] *Id.* at 747.
[52] *Id.* at 752.
[53] 494 U.S. 872 (1990).
[54] *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades.").
[55] 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).
[56] *Id.* at 884 (describing the Oregon ban on peyote as an "across-the-board criminal prohibition").
[57] *See* Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 465 (1997) (arguing that under *Smith*, "the Free Exercise Clause amounts merely to a shadow of the Equal Protection Clause, guaranteeing only formally equal treatment of all religious beliefs; so long as a governmental rule on its face applies equally to all religious beliefs and was not intentionally designed to have an adverse impact on any particular faith.…").

no practical significance.[58] For Scalia, this reasoning was part and parcel of an ordered democracy.[59] Anything else would raise the specter of anarchy.[60]

Smith also shifted the focus of free exercise jurisprudence from constitutional to statutory law. Its broad holding triggered a number of state and federal legislative responses.[61] In 1993, Congress enacted the Religious Freedom Restoration Act

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[58] Scalia's opinion also drew ire for its attempt to distinguish precedent. In what qualifies as one of his most implausible doctrinal contributions, Scalia announced the concept of "hybrid rights." On this view, a free exercise challenge to a neutral law of general applicability might nonetheless trigger heightened scrutiny if the law also implicated some other constitutional right. *Smith*, 494 U.S. at 881–82. For example, Scalia wrote, "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id.* at 882. The confused doctrine was soon debunked as unworkable; in fact, as Professor Christopher Lund has noted, even Justice Scalia eventually abandoned the idea. Christopher C. Lund*, A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y, 627, 631–32 (2003) (citing Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 171 (2002) (Scalia, J., concurring)).

[59] Scalia believed he was on firm historical ground, as evidenced by his concurring opinion in *City of Boerne v. Flores*, 521 U.S. 507, 537-38 (1997). As Professor Gregory Sisk observes, Scalia's *Boerne* concurrence "contended that the historical evidence also undercuts a broad reading of the Free Exercise Clause. He interpreted colonial and revolutionary era religious freedom charters to prohibit only discriminatory laws targeted at religion; he construed charter caveats or provisos limiting the scope of religious liberty to peaceable conduct as broadly mandating obedience to general civil laws; and he argued that exemptions from civil laws on religious grounds during the colonial and founding period were understood to be a matter of legislative grace." Gregory C. Sisk, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 519 (2004); *see also* Richard Garnett, *Justice Scalia, Religious Freedom, and the First Amendment,* HERITAGE FOUNDATION SPECIAL REPORT NO. 186 (August 30, 2016) (arguing that *Smith* "is better grounded in history and tradition than [Scalia's] critics contend.").

[60] *See Smith*, 494 U.S. at 888 ("[T]he rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."); *see also id.* at 890 ("that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself"). Justice O'Connor offered a different view. *See id.* at 902 (O'Connor, J., concurring) ("The Court's parade of horribles . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."). It is worth noting that the two hundred years prior to the *Smith* opinion had not produced this "parade of horribles."

[61] The legislative response was itself consistent with Justice Scalia's views. *See* Marc O. DeGirolami, *The Optimist: For Scalia, Textualism Was a Matter of Trust*, COMMONWEAL (Feb. 23, 2016), https://www.commonwealmagazine.org/optimist ("Many critics of *Smith* . . . miss that what may first appear as a hard and parsimonious rule for religious freedom is closely coupled in Scalia's opinion with a deep faith and optimism that people, acting through their legislatures, would do right by their religious brethren, would be magnanimous and charitable toward them whenever they could be…").

(RFRA) in direct response to *Smith*.[62] After the Supreme Court struck down a major section of RFRA,[63] Congress responded in 2000 with the Religious Land Use and Institutionalized Persons Act (RLUIPA).[64] With the exception of the Court's recognition of the ministerial exception in its 2012 *Hosanna-Tabor* decision,[65] almost every major free exercise case in the last quarter-century has been a statutory RFRA or RLUIPA case rather than a case arising under the federal Free Exercise Clause.[66]

Smith led to another decision that would have later ripples in free exercise law: *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.[67] In *Lukumi*, the Court held that several city ordinances banning animal sacrifice violated the Free Exercise Clause.[68] In doing so, the Court offered a more detailed framework for evaluating whether a law is "neutral" and "generally applicable." The neutrality inquiry focused on whether the law "targets religious conduct."[69] The generality inquiry focused on the law's "categories of selection"—whether it was overbroad or underinclusive with respect to the government interests it aimed to promote.[70] The Court found that the ordinances in *Lukumi* were neither neutral nor generally applicable.[71] Taken together, the ordinances "had as their object the suppression of religion," and they proscribed only "conduct motivated by religious belief."[72] Accordingly, the ordinances triggered strict scrutiny, and the Court invalidated them under that standard.[73] More than twenty years later, *Lukumi* remains the Court's definitive

[62] Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).
[63] City of Boerne v. Flores, 521 U.S. 507, 512 (1997).
[64] 42 U.S.C. § 2000cc (2012).
[65] Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., 565 U.S. 171 (2012).
[66] *See, e.g.,* Holt v. Hobbs, 135 S. Ct. 853 (2015) (RLUIPA); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (RFRA); Zubik v. Burwell, 136 S. Ct. 1557 (2016) (RFRA); Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (RFRA).
[67] 508 U.S. 520 (1993).
[68] *Id.* at 547.
[69] *Id.* at 534.
[70] *Id.* at 542.
[71] *Id.* at 542–43.
[72] *Id.* at 542, 545.
[73] *Id.* at 546 ("It follows from what we have already said that these ordinances cannot withstand this scrutiny.").

statement on how to analyze free exercise claims in light of *Smith*.

Yet even the strongest reading of *Lukumi* leaves holes in post-*Smith* free exercise protections. The ongoing effects of *Smith*'s prescription for evaluating neutral laws of general applicability are illustrated in the Court's 2010 decision, *Christian Legal Society v. Martinez*.[74] The case involved a Christian student group whose members held to a theological creed and met regularly for Bible study and prayer.[75] Neither the composition nor the practices of the religious group made any difference in light of *Smith*. Because the regulation at issue (a policy requiring student groups to accept "all-comers") was a neutral law of general applicability, the majority dismissed the free exercise claim in a footnote.[76]

F. Locke v. Davey

In *Locke v. Davey*, the Supreme Court considered a Washington state college scholarship program that was not available to students pursuing a degree in "devotional theology."[77] Davey, a student who was denied the scholarship because he was studying to be a pastor, challenged the program as violating the Free Exercise Clause.[78] After noting the existence of "play in the joints" between the Establishment and Free

[74] 561 U.S. 661 (2010).
[75] Brief for Petitioner at 5, *Martinez*, 561 U.S. 661 (No. 08-1371) ("The national Christian Legal Society maintains attorney and law student chapters across the country. Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to integrate Christian faith with legal practice, organize transportation to worship services, and host occasional dinners. The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship. . . . [T]o be officers or voting members of CLS—and to lead its Bible studies—students must affirm their commitment to the group's core beliefs by signing the national CLS Statement of Faith and pledging to live their lives accordingly." (citations omitted)); *see also id.* at 6 (quoting CLS's Statement of Faith).
[76] *Martinez*, 561 U.S. at 697 n.27 ("CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." (citations omitted)).
[77] Locke v. Davey, 540 U.S. 712, 712 (2004).
[78] *Id.* at 720–23.

Exercise Clauses, the Court distinguished the facts in *Locke* from those in *Lukumi*.[79] The law at issue in *Lukumi* was an absolute ban on ritualistic animal slaughter; the Court characterized the program in *Locke* as a mere "disfavoring" of religion that did not rise to the level of non-neutrality. The Court also pointed to the Establishment Clause implications of using state funds to fund religious study.[80] The Court found that the state's legitimate interest in not funding religion was enough to outweigh any chance that the refusal to fund devotional theology majors stemmed from animus towards religion.[81]

Scalia's *Locke* dissent picked up on two themes from his *Kiryas Joel* dissent. First, he restated his concern for minority faiths: "Let there be no doubt: This case is about discrimination against a religious minority."[82] To be sure, the "minority" status of Locke's Christianity was less apparent than that of the Satmar Jews. But Scalia rested his claim on the state's singling out of Locke's "deep religious conviction" as distinct from "only a tepid, civic version of faith" to which "the State's policy poses no obstacle."[83]

Scalia was less consistent about another aspect of *Kiryas Joel*. In the earlier case, he had approvingly enlisted the Court's view that "there is ample room for . . . 'play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" [84] By *Locke*, he had soured on the concept, castigating the majority's "principle of 'play in the joints'" and noting "I use the term 'principle' loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives."[85]

II. THREE DIFFICULTIES

[79] *Id*. at 718–20.
[80] *Id.* at 718.
[81] *Id.* at 725.
[82] *Id.* at 733.
[83] *Id.* at 733.
[84] 512 U.S. at 743–44 (quoting Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970)).
[85] 540 U.S. at 728.

The six opinions from Justice Scalia discussed in the previous part highlight some of the major themes of his religion clause jurisprudence. Collectively, they show his minimalist approach to the religion clauses: The Free Exercise Clause does not protect against neutral laws of general applicability, and the Establishment Clause prohibits neither longstanding traditional practices nor legislative acts with a plausible secular purpose. In both free exercise and establishment cases, Scalia resisted judicial second-guessing of legislative judgments unless he saw the explicit singling out of religious practice.

Scalia's approach to religion clause cases also raises a number of difficulties. This section considers three of them: one theoretical, one doctrinal, and one normative.

A. Legislative Deference and Religious Minorities

Part and parcel to Justice Scalia's religion clause minimalism was his deference to legislative decision making.[86] But Scalia also repeatedly expressed concern and empathy for religious minorities.[87] These two preferences are in some theoretical tension with each other. Lacking the power of the majority, religious minorities are less likely to prevail in legislative contexts. The political vulnerability of religious minorities seems to be an explicit cost of the free exercise regime established by *Smith.*

The theoretical tension between legislative deference and a concern for religious minorities is also evident in the Establishment Clause context. For example, in many parts of

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[86] Steven Goldberg, *Antonin Scalia, Baruch Spinoza, and the Relationship Between Church and State*, 23 CARDOZO L. REV. 653, 660–62 (2002) ("In *Boerne*, Scalia vigorously defended the *Smith* approach, under which the church must make its case before the representative branches of government, not the courts. . . . Scalia does not explicitly rely on the idea that legislatures are more rational than alternative institutions such as the courts, although he may believe they are. Scalia's focus is instead on legitimacy: legislatures are elected; federal judges are not.").

[87] In addition to his express concern for religious minorities in *Kiryas Joel* and *Locke*, Justice Scalia also supported the minority religion litigant in a number of other cases. *See* Antony Barone Kolenc, *Mr. Scalia's Neighborhood: A Home for Minority Religions?*, 81 ST. JOHN'S L. REV. 819, 837 (2007) (collecting cases). Antony Kolenc suggests that "Scalia's record reveals a man deeply concerned with the rights of practitioners of minority religions." *Id.* "Indeed, when it comes to government targeting of religion, Scalia has proved himself a more vigilant guardian of minority religious rights than most of the Court, conservatives and liberals alike." *Id.* at 838.

this country, legislators are quick to endorse religious symbolism that reflects majoritarian religious preferences. The kind of civil religion that flows out of this symbolism is far from neutral toward religious traditions. It is most often aligned with American Protestantism, and most frequently alienates religious minorities. Seen from this light, Scalia's legislative deference seems largely unsympathetic to those disadvantaged by the preferentialism for civil religion.[88]

The costs of legislative deference may also increase if more general support for religious freedom starts to wane. For example, in past eras, even when Catholics failed to influence majoritarian policies, they typically prevailed in seeking legislative exemptions. But the possibility of exemptions even for relatively mainstream religions may be less plausible today in light of changing cultural norms.

We can see the implications of these shifting norms—and Justice Scalia's absence from the Court—in the recent denial of certiorari in *Stormans v. Selecky.*[89] *Stormans* involved a grocery store and pharmacy owned by Christians whose sincerely held religious beliefs prevented them from selling certain emergency contraceptives, like Plan B, that they believed prevented fertilized egg implantation. The Washington State Board of Pharmacy mandated that pharmacies stock and sell contraceptives like Plan B.[90] While the regulations contained a number of secular exceptions, the Board's regulations did not accommodate sincerely held religious beliefs.[91]

The Stormans family argued that the regulations unfairly targeted "religiously motivated referrals."[92] They prevailed in the district court, but the Ninth Circuit reversed, accepting the State's position that the regulations were "necessary 'to ensur[e]

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[88] As Professor Erwin Chemerinsky has argued, "Justice Scalia ignores the importance of the Establishment Clause in preventing the government from making those of other religions feel unwelcome and keeping the government from using its power and influence to advance religion or a particular religion." Justice Kagan raised similar themes in her dissent in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting).

[89] 136 S. Ct. 2433 (2016).

[90] *Id.* at 2434.

[91] *Id.* at 2435.

[92] *Id.* at 2434–35 ("'The rule,' it warns, 'does not allow a pharmacy to refer a patient to another pharmacy to avoid filling the prescription due to *moral or ethical objections.'*") (emphasis in original).

that its citizens have safe and timely access to their lawful and lawfully prescribed medications.'"[93] The Supreme Court denied certiorari.

Justice Alito's dissent from the denial of certiorari argued that the Board's regulations effectively created a religious gerrymander.[94] He contended that the regulations were likely invalid under *Lukumi* and pointed out that while *Smith* shielded a "neutral law of general applicability," *Lukumi* clarified that "a law that discriminates against religiously motivated conduct is not 'neutral.'"[95] Alito and two other justices saw evidence of "discriminatory intent" in *Stormans* similar to that criticized in *Lukumi*.[96] Beyond intent, Alito saw "striking" similarities between the rules in *Stormans*.[97]

The religious pharmacists in *Stormans* are reasonably viewed as a religious minority within the Washington regulatory framework. Yet *Smith*'s framework limits the free exercise protections available to them, and the Court's denial of certiorari suggests a more narrow reading of *Lukumi* in Scalia's absence. The theoretical tension between legislative deference and a concern for religious minorities persists.

B. Free Exercise Minimalism and Religious Institutionalism

The second difficulty is a doctrinal one. *Smith* is widely seen as having limited the free exercise right. As Michael McConnell has observed, Scalia correctly observed that free exercise law prior to *Smith* was "poorly developed and unacceptably subjective," owing largely to "the arbitrariness of judicial balancing under the prior compelling interest test."[98] But instead of developing a "more principled approach," the *Smith*

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[93] *Id.* at 2435.
[94] *Id.* at 2437 (Alito, J., dissenting) ("While requiring pharmacies to dispense all prescription medications for which there is demand, the regulations contain broad secular exceptions but none relating to religious or moral objections; the regulations are substantially underinclusive because they permit pharmacies to decline to fill prescriptions for financial reasons; and the regulations contemplate the closing of any pharmacy with religious objections to providing emergency contraceptives, regardless of the impact that will have on patients' access to medication.").
[95] *Id.* at 2436.
[96] *Id.* at 2436–37.
[97] *Id.* at 2437.
[98] McConnell, *supra* note 54, at 1144.

opinion "proposes to solve this problem by eliminating the doctrine of free exercise exemptions."[99]

Scalia never retreated from his position in *Smith*, but he nevertheless joined the Court's opinion in *Hosanna-Tabor v. EEOC*, the 2012 decision that recognized a ministerial exception for religious organizations.[100] It is difficult to see why the minimal rational basis scrutiny that Scalia applied to neutral laws of general applicability should not apply to the generally applicable neutral law in *Hosanna-Tabor*.[101] Nor is the Court's reliance in *Hosanna-Tabor* on the intersection of free exercise and establishment principles entirely convincing. If *Smith* is right about the weak protections of the Free Exercise Clause, then combining those protections with anti-establishment concerns means either that the Establishment Clause is doing all of the work (in which case the free exercise references are purely cosmetic) or that the combination between free exercise and establishment creates some kind of "super right."[102]

I have suggested elsewhere that the Court's deference to neutral laws of general applicability in *Smith* and its recognition of the ministerial exception in *Hosanna-Tabor* appear to be on a collision course.[103] To illustrate the doctrinal tension, consider a twist on the "all-comers" policy validated by the Court in *Christian Legal Society v. Martinez*.[104] Based on the reasoning of *Martinez*, a public school can deny recognition of a private student group if the group refuses to open its membership and leadership to any student at the school. The policy is a neutral law of general applicability, and as the Court itself observed in

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[99] *Id.*
[100] 565 U.S. 171, 188 (2012).
[101] *See* JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 25 (2016) (critiquing the logic of *Hosanna-Tabor* in light of *Smith*).
[102] Or perhaps even a "hybrid right"? *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881-82 (1990) (proposing concept of "hybrid rights"). In my view, the real problem with *Hosanna-Tabor* is that the Court's weak free exercise and freedom of association precedents left it without the jurisprudential resources to protect the church in a more straightforward manner. *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 823–26 (2014); *see also* Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 111–12 (arguing that "*Smith* augured the waning of religious accommodation" and "[*Hosanna-Tabor*'s] ministerial exception simply represents the refracted glow of constitutional protection in the gathering gloom").
[103] *See* INAZU, *supra* note 101, at 25.
[104] 561 U.S. 661 (2010).

Martinez, the *Smith* rule means that the free exercise clause does not come into play. But suppose that the student group denied recognition for noncompliance with the school's all-comers policy is a Baptist group sponsored by a church that considers every member to be a minister of the Gospel.[105] Under the reasoning of *Hosanna-Tabor*, the group's ministerial designation of every member plausibly brings it within the protections of the ministerial exception, even against a neutral law of general applicability. It's not clear how the above hypothetical is resolved in light of *Smith* and *Hosanna-Tabor*. And the ambiguity points to the doctrinal tension that *Smith* creates and that *Hosanna-Tabor* does not sufficiently resolve.

C. Public Funding of Religion

For those who favor strong protections for religious freedom, Scalia's religion clause minimalism creates a normative difficulty in cases involving public funding. Many funding cases raise both an Establishment Clause issue (*may* the government fund religion?) and a Free Exercise Clause issue (*must* the government fund religion?). Scalia's approach to Establishment Clause cases almost always answered the first question affirmatively, and when it comes to funding cases (as distinct from other Establishment Clause cases), the Court, at least during Scalia's tenure, usually agreed. But Scalia was less clear when it came to the Free Exercise Clause. The key question for him, consistent with his views in *Smith*, was whether the government had singled out religion for negative treatment in its funding decision. Scalia believed that the scholarship program in *Locke* violated the Free Exercise Clause because it had singled out religion. But in the absence of such discriminatory treatment, the denial of funding would presumably pass muster under *Smith*.

One wrinkle to this inquiry emerges from a line in Scalia's *Locke* dissent:

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[105] In fact, the group might not even have to be formally attached to a church. *See* Conlon v. Intervarsity Christian Fellowship, 777 F.3d 829, 833–37 (6th Cir. 2015) (applying the ministerial exception to parachurch campus ministry organization).

> When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.[106]

The complicating questions are what counts as "generally available" and what counts as "solely on the basis of religion."

Consider recently withdrawn legislation in California that would have denied state grants to religious colleges and universities that failed to comply with the state's antidiscrimination norms pertaining to sexual orientation and gender identity (SOGI).[107] First, it is not evident that the state grants qualify as a "generally available" public benefit or whether they fall into a different category of funding. Second, because the proposed law focused on SOGI protections and not, for example, gender, it would have affected only religious colleges and universities. Does this mean that the SOGI antidiscrimination norm was a funding limitation based "solely on the basis of religion"? The question is one of *de facto* vs. *de jure* effects on religion. In fact, the legislation discriminates against only religious schools. But on its face, the legislation is a neutral law of general applicability. Scalia's free exercise minimalism makes it difficult to protect religious colleges and universities from this kind of legislation.[108]

CONCLUSION

This Article has examined some of Justice Scalia's contributions to the Supreme Court's religion clause jurisprudence, and some of the difficulties that these contributions have left with us. The Court that moves forward without Justice Scalia will continue to struggle with those

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[106] Locke v. Davey, 540 U.S. 712, 726–27 (2004). For a similar argument, *see* INAZU, *supra* note 101 [Confident Pluralism], at 66–80 (applying a public forum analysis to generally available forms of public funding).

[107] *See* Patrick McGreevy, *State Senator Drops Proposal that Angered Religious Universities in California*, L.A. TIMES, Sept. 1, 2016.

[108] The question of *de facto* and *de jure* singling out of religion applies in contexts beyond funding.

difficulties. In this area of the law, his colleagues and those who follow the Court's religion clause jurisprudence will likely come to see a mixed record. Scalia helpfully clarified some aspects of religion clause doctrine, and he rightly pushed against some of the vague doctrine that emerged around the Establishment Clause. But he also left us with *Smith*—a case that creates unsatisfying doctrinal tensions, substantially weakens religious liberty protections and which, to borrow a memorable line, like some ghoul in a late night horror movie, continues to stalk our free exercise jurisprudence.