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Women and the Free Exercise Clause: Some Thoughts About a (Religious) Feminist Reading

Marie A. Failinger[*]

Among the dozens of Supreme Court cases on the free exercise of religion, women play a mostly invisible part. We know of Adell Sherbert[1] and Frieda Yoder;[2] and less famously, Alma Lovell,[3] Lillian Gobitis,[4] Paula Hobbie,[5] Sarah Prince,[6] and Lucie McClure.[7] We know that these women go out into the streets to tell the Good News, refuse to salute idols, refuse to work on the Sabbath, and refuse to go to school in violation of their religion. But, we do not hear their voices very loudly.

At the same time, until recently, we have consistently heard only one woman's voice among the United States Supreme Court Justices who propound on what the Free Exercise Clause, and related statutes,[8] require from the states in the protection of religious freedom. Justice O'Connor, the woman who served longest on the Court, has certainly made her mark on Religion Clause jurisprudence, though primarily in the Establishment Clause area—one powerful exception is her concurrence in *Employment Division v. Smith*.[9] Justices Kagan, Sotomayor, and Ginsburg, coming more recently to the religious freedom conversation, have also contributed

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1 Sherbert v. Verner, 374 U.S. 398 (1963).

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

3 Lovell v. City of Griffin, 303 U.S. 444 (1938).

4 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

5 Hobbie v. Unemp't Comp. Appeals Comm'n of Fla., 480 U.S. 136 (1987).

6 Prince v. Massachusetts, 321 U.S. 158 (1944).

7 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Cheryl Perich, at the center of one of the most recent important Free Exercise cases, was not making a Free Exercise claim. Rather, she was arguing, with the EEOC, that Hosanna Tabor Lutheran Church and School could not make the Free Exercise argument that, since she was a "minister," the court did not have jurisdiction to hear her Americans with Disabilities Act claim. Siding with the Church, the Supreme Court recognized the existence of a "ministerial exception" under the Free Exercise Clause for disability discrimination claims, and held that under the church's teachings, her position fell within that exception. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694 (2012). For more on the theological complexity of this conflict, see Marie A. Failinger, *Lutheran and Yet Not Lutheran: A Church School Tests the Dilemma of Church and State*, LXXXV THE CRESSET 19 (2012).

8 Congress has supplemented the Free Exercise Clause with religious freedom protections in the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4 (2001), and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000c-5 (2000).

9 494 U.S. 872, 906 (1990) (O'Connor, J., concurring).

important insights, again primarily in non-Free Exercise cases,[10] but how these newer Justices will shape their own Free Exercise jurisprudence is not as clear.

Yet, even in the early stages of jurisprudential development for these Justices, it might be helpful to ask whether we are hearing "a woman's voice" in either the litigants before the Court or the women Justices who write opinions about these cases. And, we might wonder whether there are distinct themes that might characterize a "woman's voice." As we move into theory, I will suggest that there may even be a religious feminist voice that provides a set of values that would help us fruitfully explicate the Free Exercise Clause. It goes without saying that talking of *a* "woman's" or "feminist" voice, or even a "religious feminist" voice, already essentializes a luxurious diversity of women's voices and opinions about the troubling issues that confront judges attempting to find a faithful reading of the Free Exercise Clause. Nevertheless, I believe that not exploring what such a voice might sound like risks too easy acceptance of the existing readings of Free Exercise. They have been largely constructed from a secular imagination, and by male judges and male litigants, about what is at stake in Free Exercise jurisprudence. Therefore, they do not represent the important diversity of expression about how robust Free Exercise protection might contribute to the flourishing of a pluralistic, but flawed, democratic culture.

In speaking of a religious feminist voice, I would make an initial response to the likely critique that a religious feminist voice is too particularist, to borrow Professor Shachar's term, because it fails to embrace the experience and commitments of secular feminists and secularists as a whole.[11] If secular feminists cannot (or choose not to) experience the Divine, whom many religious feminists argue is at the center of their lives, perhaps a religious feminist reading of the "secular" Constitution is more than just problematical on Establishment Clause grounds. One might argue that following such a voice not only excludes half of humanity, but ignores the ethical and philosophical voices of many women over the centuries who do not profess a religious commitment as well.

There are at least three kinds of responses to this concern, none of them "sure winners" foreclosing all debate about whether a religious feminist reading is valuable or defensible. All of these responses, however, are strong enough to justify at least an initial exploration of religious

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10 *See* discussion *infra* notes 103–16.

11 I borrow the term "particularist" from Ayelet Shachar, who in *Multicultural Jurisdictions* used the term "religious particularist" to refer to a sovereignty model in which religious communities would be delegated jurisdiction over certain matters, usually in family law. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS 72–78 (2001).

feminist themes. First, even if it were true that religious feminism has distinctive understandings and commitments that exclude those of secular feminists, to embrace secular feminist arguments as the "default" feminist approach also excludes important voices in a powerful way. Most of the world's women are still religious,[12] and their experience must be accounted for, if any jurisprudence is to embrace women's real experiences and challenges.

Second, theologies that embrace natural law theory, such as the three western monotheistic traditions (Islam, Judaism, and Christianity), would argue that the moral commitments religious feminism proposes can be tested by all people, regardless of their faith commitments, through reason and experience.[13] Theologically, they would argue that God the Creator has "written on our hearts," imprinted on us from the moment of our creation, the ethical values and demands that God makes of us for life in this world.[14] In these traditions, even the atheist who rejects the existence of God is already infused with the knowledge of right and wrong, and the innate

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12 For information on current religious affiliations in the world, see, for example, Pew Forum on Religion & Public Life, *The Future of World Religions: Population Growth Projections, 2010–2050: Why Muslims Are Rising Fastest and the Unaffiliated Are Shrinking as a Share of the World's Population* (Apr. 2, 2015), www.pewforum.org/2015/04/02/religious-projections-2010-2050 (noting that while the worldwide religiously unaffiliated population is expected to grow in absolute numbers from 1. 1 billion to 1.2 billion from 2010–2050, its percentage of the population is projected to decline from sixteen percent to thirteen percent). In the United States, women claim to be more religious as a group than men. *See* Pew Forum on Religion & Public Life, *America's Changing Religious Landscape: Christians Decline Sharply as Share of Population; Unaffiliated and Other Faiths Continue to Grow* (May 12, 2015), www.pewforum.org/2015/05/12/americas-changing-religious-landscape (noting the fact that while the percentage of American women who describe themselves as religiously unaffiliated is growing at the same rate of men, only nineteen percent claim to be religiously unaffiliated as compared with twenty-seven percent of men who describe themselves that way).

13 For samples of natural law arguments from Christianity, Islam, and Judaism that all persons can discover moral truths through reason, see, for example, JOHANNES HECKEL, A JURISTIC DISQUISITION ON LAW IN THE THEOLOGY OF MARTIN LUTHER 55–56 (2010) (noting that God's mercy "left man an inborn notion of what is law . . . . This is natural man's divine 'dowry' which makes him aware of what is right and moral . . . ."); Anver Emon, *Natural Law and Natural Rights in Islamic Law,* 20 J.L. & RELIGION, 351, 359, 362 (2004–05) (noting that the Mu'tazilite school held that "one can move from empirical investigations of benefits and harms to a determination of divine obligation" and that "[t]he capacity to make moral judgments is a natural endowment of human beings, or what al-Juwayni called the haqq al-adamiyyin"); Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073 (1991) (explaining how the Noahide laws govern all of humanity and how five of those commandments—namely, "theft, sexual offenses, idolatry, blasphemy, and bloodshed" are discoverable by logic and rational reasoning).

14 *Romans* 2:15 (ISV) ("They show that what the Law requires is written in their hearts, a fact to which their own consciences testify, and their thoughts will either accuse or excuse them."); *see also* Peter Judson Richards, *The Law "Written in Their Hearts"?: Rutherford and Locke on Nature, Government and Resistance,* 18 J.L. & RELIGION 151, 169 (2002–03) (quoting JOHN RUTHERFORD, LEX, REX, OR THE LAW AND THE PRINCE (1982) (noting that "even 'heathens have, by instinct of nature, both made laws morally good, submitted to them, and set kings and judges over them, which clearly proveth that men have an active power of government by nature'").

ability to understand how he or she must live with his or her neighbor.[15]

Finally, in the spirit of Rawls' "overlapping consensus" theory,[16] if we discover that religious feminism shares common cause with the arguments of secular feminism, the provenance or origins of those values should not cast suspicion over their validity; these are claims that can be embraced as consonant with the secular jurisprudence of the Free Exercise Clause.

I. WHAT WOULD CHARACTERIZE A RELIGIOUS FEMINIST'S READING OF THE FREE EXERCISE CLAUSE?

Philosophical roadmaps attempting to describe the "different voice" spoken by women, particularly feminists, have highlighted important contrasting themes in traditional (sometimes called "patriarchal") versus feminist approaches to difficult ethical or jurisprudential choices. Among these values has been the feminist emphasis on inclusivity and embrace of difference as a challenge to patriarchal ethical or legal systems that exclude groups from political and social participation or respect because of their innate differences or their religious or philosophical dissent from majoritarian culture or values.[17] A second value is contextualism: feminists emphasize that ethical and legal judgments should be made in full awareness and embrace of the context of cases.[18] They have largely rejected mechanical application of abstract rules to situations that are roughly equivalent in order to achieve justice, an approach which prioritizes regularity, predictability, and equal treatment. One specific contextual

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15 *See, e.g.*, George W. Forell, *Is There Lutheran Ethical Discourse*?, 15 WORD AND WORLD, no. 1, 1994–95, at 4 (noting that atheists and non-Christians have God's law written on their hearts and may cooperate in achieving the common good on this earth).

16 *See, e.g.,* John Rawls, *The Domain of the Political and Overlapping Consensus,* 64 N.Y.U. L. REV. 233, 235–36 (1989). Rawls notes "the fact that a diversity of comprehensive doctrines is a permanent feature of a society with free institutions, and that this diversity can be overcome only by the oppressive use of state power—calls for explanation." Of course, in justifying the use of overlapping consensus, Rawls assumes that "reasonable disagreement is disagreement between reasonable persons, that is, between persons who have realized their two moral powers to a degree sufficient to be free and equal citizens in a democratic regime, and who have an enduring desire to be fully cooperating members of society over a complete life. We assume such persons share a common human reason, similar powers of thought and judgment, a capacity to draw inferences and to weigh evidence and to balance competing considerations, and the like." *Id.* While some would argue that religious claims do not meet such criteria, most mainstream religionists would disagree.

17 CHERYL PRESTON, DECONSTRUCTING EQUALITY IN RELIGION, FEMINISM, LAW, AND RELIGION 27 (Marie A. Failinger, Elizabeth R. Schiltz & Susan J. Stabile eds., 2014)*; see generally* NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 10, 12 (2006).

18 *See* LEVIT AND VERCHICK, *supra* note 17, at 13 (noting that feminist legal theorists are "drawn together by the methodologies they use, such as consciousness-raising . . . unmasking patriarchy, the use of stories and the political implications of personal experiences, an emphasis on voices not represented in the dominant tradition, contextual reasoning that focuses on particulars of experience, and asking questions about the gendered impact of policies or laws").

theme is the importance of starting from the realities of women's experience,[19] and working toward ethical or other judgments "from the ground up," rather than starting from an abstract ideal, even a feminist one, and "working down" toward a determination of a just result.

A third similarly related theme in feminist theory is to emphasize relationality in ethical and jurisprudential decisions. Rather than conceiving of the human in her basic essence and existence as autonomous and unencumbered by the needs and demands of others, feminist theory understands the human person as essentially and existentially related to others. This feminist theme posits that the essence of a human being cannot be understood except as she is connected to others.[20] Some feminists, like Robin West, have argued that women are connected in a unique and undeniable way to others as a result of their ability to birth children.[21] A final theme feminist theory emphasizes is the importance of moving women from positions of subordination to men toward relationships of equality. Feminists differ, however, on what this means: some feminists understand that goal as women's empowerment or self-determination,[22] while others ask this question through the lens of complementarity or reciprocity between men and women.[23]

Religious feminists might call for a somewhat different, more complex, lens in describing an authentic experience of human existence that has at its core a relationship with the Divine. We might express the religious feminist experience, and the ethics and jurisprudence flowing from it, as reflecting five relational values: gratitude, humility, compassion, generosity, and integrity.[24] This is not an exhaustive list of values we might

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19 *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4–5 (2003) (describing feminist scholarship's grounding in women's experience). As an example, Clare Dalton has explained that feminism is "the range of committed inquiry and activity dedicated first, to *describing* women's subordination—exploring its nature and extent; dedicated second to asking *how*—through what mechanism, and *why*—for what complex and interwoven reasons—women continue to occupy that position; and dedicated third, to change." Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought,* 3 BERKELEY WOMEN'S L.J. 1, 2 (1987) (emphasis in original).

20 CHAMALLAS, *supra* note 19, at 58–59 (describing West's argument as an emphasis on attachment, responsibility to others, empathy and relationships).

21 *Id.* at 58. But see the critique of West's theory, *id.* at 83–84, for its exclusion of lesbian relationships.

22 *See* PRESTON, *supra* note 17, at 27 (describing feminism as "allowing each woman to identify and define herself socially, economically and politically without external obstacles . . . . It is permitting choice, then valuing and respecting choices women make, at least to the extent choice is permitted and respected for men in society").

23 *See, e.g.,* ELIZABETH R. SCHILTZ, A CONTEMPORARY CATHOLIC THEORY OF COMPLEMENTARITY, FEMINISM, LAW, AND RELIGION 27 (Marie A. Failinger, Elizabeth R. Schiltz & Susan J. Stabile eds., 2014).

24 Some will recognize these values as a partial list of the virtues recognized in both ancient Greek and Roman, and later Christian and other thought. *See* ANDRE COMTE-SPONVILLE, A SMALL

want to see in a jurisprudence of human flourishing—virtue theorists will recognize the absence of traditional virtues such as courage, temperance, kindness, and justice.[25] But, I want to highlight those values that are especially associated with religious feminist thought and are especially neglected in the jurisprudence of the Free Exercise Clause.

As we go down this road of describing a feminist lens on the Free Exercise Clause, we must fully acknowledge another fact of life that most religious traditions recognize: humans and human experience reflect both good and evil. In many traditions, ethics, and indeed jurisprudence, must at their core be a reflection on the tug of war between these values/virtues and their opposites: against gratitude, envy, or self-absorption; against humility, pride; against compassion, mercilessness; against generosity, hoarding; and against integrity, inconstancy, or infidelity.[26]

Turning to the values especially characteristic of a religious feminist approach, religious women would argue that an authentic experience of the world necessarily engenders the response of gratitude. Even the human person who is most entrapped in her physical limitations (the disabled, the prisoner) and social constraints (the untouchable, the abused) has received the gift of life in all of its complexity. The Alzheimer's patient or the quadriplegic can still experience joy and love and hope, as well as all that the five senses—sight, sound, touch, smell, taste—have to offer as we move through our lives. Even the emotionally abused and the socially degraded person can go through life experiencing much, or most, of it as a horizon in which many of those interactions that give life meaning are possible. For example, one might argue that envying the material goods that one does not have, or the social possibilities that one's life has not offered, falsifies one's own existence. That envy is false not only because it ignores those goods and experiences an individual person does have, but it also pretends that these things out of reach are a necessary part of creating one's own authentic life.

TREATISE ON THE GREAT VIRTUES: THE USES OF PHILOSOPHY IN EVERYDAY LIFE 1–3 (Catherine Temerson trans., 2001); STANLEY HAUERWAS & CHARLES PINCHES, CHRISTIANS AMONG THE VIRTUES: THEOLOGICAL CONVERSATIONS WITH ANCIENT AND MODERN ETHICS 23 (2002) [hereinafter HAUERWAS & PINCHES]. However, I eschew the use of the word "virtue" to avoid the implication that these are qualities to be achieved by the self-willed striving of the individual, as the ancient Greeks would understand a virtue. Rather, with feminist epistemology, I understand these values as proceeding out of a true understanding of the nature of human life as relational. *See id.*

25 *See, e.g.,* HAUERWAS & PINCHES, *supra* note 24, at 20 (describing Plato's list of cardinal virtues of courage, temperance, justice and wisdom; and Aristotle's list that includes generosity, magnificence, high-mindedness, gentleness, truthfulness, wittiness, friendship, shame and "a nameless virtue between ambition and lack of ambition").

26 *Id.* at 20.

Women in the monotheistic religions would argue that all of these good things, which constitute our individual lives, are blessings from the Divine, and the only true response to such blessings is gratitude.[27] For a religious person, gratitude is a two-fold response. First, it is realism: it tells how things really are, by giving proper acknowledgement of the source and giver of these blessings, as well as the blessings themselves.[28] Second, it recognizes that the only truly human response in a situation in which full reciprocity is not possible because of the vast imbalance between giver and recipient is gratitude—gratitude is a reaching out to the giver that acknowledges not only the gift given, but also how the recipient experiences that gift.[29] In the Western monotheistic traditions, that experience of gratitude and awe is captured in the Psalmist's acknowledgement, "I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well."[30]

That same experience of each person's relationship with the Creator and the created world around her also engenders a necessary response of humility. To see the world truly requires one not only to understand the fullness of human existence and the capacity that lies within each person over a lifetime, but also the limitations built into any one person's possible life-course, or any one community's history.[31] The monotheistic traditions, among others, demand recognition that we humans are not only creators, but also creatures. Our creatureliness carries with it the baggage of physical limitations: within this skin, we can only see so much, carry so much, learn so much. But perhaps even more significantly, we must contend with the moral limitations: we will fail more often than we succeed in being everything our neighbor needs.[32] In the Christian tradition in which I learned these values, we acknowledge that this moral limitation is not only due to our creatureliness—our inability to understand and to act—but also our willful refusal to understand and to do what our neighbor requires.[33]

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27 *Id.* at 121.

28 *Id.*

29 *Id.*

30 *Psalm* 139:14 (NIV).

31 *See* HAUERWAS & PINCHES, *supra* note 24, at 47 (discussing the way in which we learn that no man is an island, and the importance of a community of friends).

32 *See* DOROTHEE SOELLE & SHIRLEY A. CLOYES, TO WORK AND TO LOVE: A THEOLOGY OF CREATION 29 (1984) ("My choices are limited by virtue of my being made from dust. And the theological question that ensues is: Can I affirm myself as one who is made from dust? Can I say that my having been created is very good? How do I, as a person made from dust, respond to the ontological project of being created for freedom . . . . Is it possible for me to value my 'creatureliness' in the knowledge that my existence was willed prior to my birth, that I am not here on this earth simply by chance, that I am needed, that I am not a disposable object, and that I am designed for freedom and equality?").

33 *See* Marc Kolden, *Work and Meaning: Some Theological Reflections,* 48 INTERPRETATION

Whether to recognize that humility is a feminist value has been a source of great contention in feminist thought. Some have suggested that humility is to women what pride is to men—that is, women's greatest sin is to belittle and erase their own selves, violating the essential value of respect for all persons.[34] Others have argued that women's humility is a harmful consequence of centuries of subordination, the greatest emotional damage done to women, which can only be rectified by empowering women toward independence as autonomous selves.[35]

However, humility, understood rightly, is "not a lack of awareness; it is the extreme awareness of the limits of all virtue and one's own limits as well . . . [it] is not contempt for oneself" or "the flip side of a kind of self-hatred . . . [r]emorse, bad conscience, or shame."[36] It is rather "the effort through which the self attempts to free itself of its illusions about itself" and becomes "exposed to love and to the light."[37] For women, humility exposes the illusion that we can do everything, and be everything, for those whom we love and we care for; humility helps us find a realistic balance between our power and our powerlessness, our love and its limitations, our strength and our weakness. Ana Novoa argues, "Humility of course is truth. Humility recognizes strength and giftedness, and further recognizes those and all other attributes as gifts. It is our responsibility in humility to accept, honor, affirm and use the ways in which we are gifted."[38]

Third, the values of generosity and compassion go hand in hand in a religious feminist jurisprudence. Compassion is the understanding that precedes generosity. It is to choose to participate, intellectually and emotionally, in the experience of others, particularly the suffering of others.[39] It is to "refuse[] to regard any suffering as a matter of indifference or any living being as a thing . . . [it] is the opposite of cruelty, which rejoices in the suffering of others, and of egoism, which is indifferent to that

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262, 263 (1994).

34 *See* Joy Ann McDougal, *Sin-No More? A Feminist Re-Visioning of a Christian Theology of Sin*, 88 ANGLICAN THEOLOGICAL REV. 215 (2006).

35 *See* Yvonne A. Tamayo*, Rhymes with Rich: Power, Law and the Bitch*, 21 ST. THOMAS L. REV. 281, 287 (2009) (quoting Professor Susan Estrich's description of the bargain women have struck to be submissive, due to "a lifetime of learned behavior resulting in gender-determined beliefs that power, control, and authority are inherently masculine qualities, while humility, docility, and compliance embody desirable feminine traits").

36 COMTE-SPONVILLE, *supra* note 24, at 140, 145.

37 *Id*. at 147. Comte-Sponville cleverly, and perhaps ironically, argues that a truly humble person would be led to atheism, since "[h]umanity makes for such a pathetic creation: how can we believe a God could have wanted *this*?" *Id.* (emphasis in original).

38 Ana Novoa, *Lessons from La Morenita Del Tepeyac*, 20 J.L. & RELIGION 267, 290 n.123 (2004–05) (distinguishing humility from subservience).

39 COMTE-SPONVILLE, *supra* note 24, at 105.

suffering."[40]

Such participation in the life of the Other is complex, and in conditions of sin,[41] cautionary instructions are important. In a perfect world, perhaps, compassion would be characterized by the emptying of one's own experience and commitments to embrace the experience of the Other, a way of walking in solidarity through his pain. In conditions of sin, however, compassion can be easily distorted: as finite human beings, we can misunderstand the experience of the Other, or unconsciously substitute our own experience, which is more accessible to each of us, for the experience of the Other. When we mistake egoism for compassion, we can impose upon the Other assumptions and actions that are, at best, disrespectful to that person's authentic self, and at worst, downright harmful. A perhaps helpful corrective is to temper compassion with self-reflection on the human experience of solidarity, i.e., the realization that we are in fact interdependent, that there is self-interest in our care for the other, just as the Other has an interest in reciprocating our care.[42] Yet, solidarity, unless it is truly universally conceived, is also limiting: if we act solely out of solidarity, then we will not extend our recognition of suffering to those whose interests seem more remote to our own interests and goals, e.g., those who are geographically or socially distant, or politically or economically at odds with us.[43]

Generosity responds to this experiencing of the Other's pain with action. Comte-Sponville distinguishes generosity, this "virtue of giving," from the virtue of justice: in doing justice, we give every person his or her own due.[44] In enacting generosity, we give a person not what is rightly his or hers, but what is rightly ours as earthly justice conceives it.[45] (For Christians and many other religious believers, of course, nothing is "rightly ours" as human justice would calculate since everything comes from the generosity of the Creator.)[46] A different relational dynamic also attends our

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40 *Id*. at 106.

41 Christians recognize that human existence is marked by human sin as well as goodness. Theologically, it is "the substitution of some other reality for God, the placing of oneself or some created thing where God alone should stand." In Christian theology, sin also encompasses "the state of alleged independence, of asserted self-sufficiency" and "of that 'hardness of heart' that lasts, the ears that will not hear and the eyes that will not see" the "claims and prerogatives of God." TIMOTHY F. O'CONNELL, PRINCIPLES FOR A CATHOLIC MORALITY 68–69 (1978).

42 COMTE-SPONVILLE, *supra* note 24, at 88–89.

43 *See id*. at 88.

44 *See id.* at 86.

45 *Id.*

46 *See, e.g.,* Ronald Duty, *The Right to Property and Daily Bread: Thinking with Luther About Human Economic Rights*, J. LUTHERAN ETHICS (Feb. 1, 2009), www.elca.org/JLE/Articles/408 (Luther's theology "presumes that God gives these things abundantly for all, not that they are inherently scarce and available only for some. It assumes that there is a holistic relationship between individuals,

acting justly versus our acting generously. Comte-Sponville argues that "generosity is more subjective, more individual, more affective and more spontaneous, while justice . . . is always somewhat more objective, more universal, more intellectual and more considered."[47]

Finally, a religious feminist jurisprudence would require the embrace of integrity with its twin, fidelity.[48] For a religious feminist, the concept of integrity goes beyond the common definitions. Integrity does not simply mean the opposite of dishonesty, or even the notion that one's life-course demonstrates an "integral whole," that one is faithful to one's own self-conception.[49] Rather, integrity means the constancy in one's own character that is constituted by and reflected in constancy to others[50] and, for religious people, to God. To be faithful means to "admit to being the same, because I take the responsibility of a certain past as my own, and because I intend to recognize my present commitment[s] as still my own in the future."[51] To be valuable, one's integrity, the fidelity to self and to others that flows from it, must be directed toward a good value—for example, faithfulness to the truth, faithfulness to "the historicity of a value, to an always particular presence within us of the past, whether it be the collective past of humanity . . . or a more individual past, our own or that of our parent."[52] Fidelity embraces the promise to be constant as a person who [shows] faithfulness in loving one's neighbor as one is able.

II. THE EXPERIENCE OF RELIGIOUS WOMEN AND THE CONSTITUTION

With this introduction to the themes that might characterize the interpretive commitments of a religious feminist reading of the Free Exercise Clause, we might explore whether women plaintiffs in the Court's Free Exercise cases have lived out, or been judged by a religious feminist-informed vision of the Constitution. Because it is especially hard to hear the voice of most of these women in the pages of the U.S. Reports, our task must be primarily speculative and imaginative.

God, and others in a human community that is both mutually responsive and mutually responsible. His view of daily bread also presumes that there is a natural mutual dependence of human beings on God and each other for the things needed for human life. Furthermore, it sees human life and whatever is needed to sustain it as a gift of God and therefore as good.").

47 COMTE-SPONVILLE, *supra* note 24, at 87.

48 *See, e.g.*, Clea F. Fees & Jonathan Webber, *Constancy, Fidelity, and Integrity*, *in* THE HANDBOOK OF VIRTUE ETHICS 35 (Stan van Hooft & Nicole Saunders eds., 2013) (describing the virtues of constancy, fidelity, and integrity as forming a cluster of traits that are orientations toward personal commitments).

49 *See id*. at 14–15.

50 *Id*. at 15–16.

51 COMTE-SPONVILLE, *supra* note 24, at 21.

52 *Id.* at 22, 23, 25.

We might start with the zealous proselytizer about which we know the most, Sarah Prince. Reviewing her case with the precious few facts we have, we might speculate that Sarah Prince perhaps understood the values at the heart of a religious feminist expression of the Constitution at least a little better than law enforcement. Sarah was criminally accused of violating Massachusetts' child labor laws by bringing her niece, nine-year-old Betty Simmons, onto a street corner with her to distribute publications of the Jehovah's Witnesses.[53] In one reading of the facts, Prince was perhaps arrested simply for repeatedly disobeying the school attendance officer's attempts to stop her from bringing Betty with her to hand out these magazines.[54] It is also possible to wonder, against the background of this period, if the *Prince* case is one of the many involving the persecution of Jehovah's Witnesses simply because they were "troublesome" religious dissenters.[55]

But, even reading this case in the best light for the prosecution, neither Prince's arrest, nor the Supreme Court's subsequent affirmance suggests anything but a formulaic application of the law to these cases, a clear precursor to Justice Scalia's call in *Employment Division v. Smith* for uniform application above all else.[56] The context for Prince's arrest was a far cry from the conditions that gave rise to the Massachusetts child labor laws. Betty was handing out two religious magazines for what her magazine bag advertised as a contribution of five cents apiece.[57] She was in company of her guardian, who was standing on the street corner twenty feet away from Sarah.[58] The local authorities could clearly see Betty was not a "newsie" running the streets, nor a young girl alone in danger of being assaulted by strangers.[59] Nor was her aunt a depraved capitalist exploiting child labor so she did not have to pay her adult workers a fair wage, another impetus for the anti-child labor movement.[60] Betty herself testified that,

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53 Commonwealth v. Prince, 46 N.E.2d 755, 755 (Mass. 1943).

54 *See* Appellant's Brief at 7, Prince v. Massachusetts, 321 U.S. 158 (1944) (No. 98), 1943 WL 54417, at *7 (noting that "Perkins reminded Mrs. Prince that he had warned her about a year previous concerning her permitting her two sons, Donald and William, to engage in the 'selling' of 'the magazines.' He also told her that on a prior occasion he had discussed the law with her and even let her read the law. He also said he had written a letter to her explaining the law.") (citations omitted).

55 *See* Chuck E. Smith, 16 J.L. & RELIGION 547 (2001) (reviewing SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000)).

56 *See* Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 881, 885 (1990).

57 *Prince*, 46 N.E.2d at 756.

58 *Id.*

59 On the prevalence and hazards of night work by children before child labor legislation was passed, see Marie A, Failinger, *Too Cheap for Anybody but Us: Toward a Theory and Practice of Good Child Labor,* 35 RUTGERS L.J. 1035, 1058, 1063–64, 1076 (2004).

60 *Id.* at 1056, 1066–67.

"she was doing this work because she loved the Lord and He commands us to do it. She declared that it was her way of worshiping Almighty God."[61]

The all-male Supreme Court, even without knowing Sarah or Betty, or the full context in which Betty was being raised, also rejects her claim, positing a hypothetical parade of horribles that they believed justified criminalization of Prince's activity. Like the authorities below, their view of what was at stake for Betty Simmons does not seem at all related to the actual facts of the case:

> The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may, and at times does, create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[62]

In this passage, the Court reiterates two assumptions of the traditional view of rights that do not square with the feminist approach. First, they assume adult rights-holders are autonomous citizens who are properly empowered to make even foolish "martyr" choices about what is in their own best interest. Second, they assume that young women and girls are too emotionally and physically fragile to engage in public life: street proselytization, even with loving supervision, can lead to "emotional excitement, and psychological or physical injury."[63]

The Court's analysis betrays an unwillingness to exercise compassion or humility—the Justices are unwilling to put themselves in the shoes of a religionist engaging in activity that they simply do not understand except through the abstract lens of child abuse or neglect. The Justices also cannot seem to acknowledge that they really do not know whether Sarah Prince accurately claims that her family's street proselytization is essential to her niece's salvation. The opinion treats "martyrdom" (an excessive word for street proselytization, to be sure) as a personal idiosyncrasy of a zealot rather than as a possible call to duty from the Divine. Ironically, the Court

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61 *Id.*

62 Prince v. Massachusetts, 321 U.S. 158, 169–70 (U.S. 1944).

63 Alma Lovell, who went alone but with the same goals, won her case, arguing that seeking prior approval from secular authority for distributing the Good News would violate her faith, though under the Press Clause rather than the Free Exercise Clause. Lovell v. City of Griffin, 303 U.S. 444, 448 (1938). It is not clear whether the Court thought that Lovell, an adult woman, was more capable of making a "martyr" choice, or simply more entitled under the Constitution to do so.

reaches this conclusion despite its glancing recognition that something important may indeed be at stake for Betty: "The other freedom is the child's, to observe these [tenets], and among them is 'to preach the gospel . . . by public distribution of "Watchtower" and "Consolation," in conformity with the scripture: "A little child shall lead them."'"[64]

In these circumstances, the Court could easily have carefully crafted an exception or distinguished this case on several grounds from the paradigmatic cases for which the child labor laws were passed. Sarah Prince was not an exploiting employer sending her charges out into the dangers of the night street; she was a watchful supervisor of the children in her care. Hers was not a commercial, but a religious venture. But, in the Court's desire to elevate the abstract principle, the demand for uniformity in the face of contextual difference, the Court would not carve out such an exception.[65]

By contrast, though we cannot be sure from the scant facts we have, Sarah's behavior seems to better mimic the values of religious feminist thought. Sarah, Betty's custodian, has accepted the responsibility for her niece's religious education and spiritual welfare; and far from attempting to exploit her labor for gain, she risks arrest to engage her niece in those activities she understands as critical to her niece's religious education and salvation.[66] As Sarah understands the situation, Betty is simply carrying out the Lord's commands to preach the Gospel to every person.[67] As such, Sarah is likely exercising the virtue of gratitude—she understands that her religious calling to tell the Good News is responsive to the gifts that God has bestowed on Betty and her, most importantly the gift of everlasting life. She understands the Divine charge given to her to care for Betty, neither leaving Betty alone at home, nor leaving Betty alone to care for her own spiritual health. Instead, Sarah engages Betty in the work that, as Sarah understands it, is life giving for Betty.[68]

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64 *Prince*, 321 U.S. at 164.

65 *See id.* at 170 (citing with approval Massachusetts' decision that "an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct.").

66 Again, in conditions of sin, we have to recognize that the converse may be true—perhaps Sarah's "compassion" for Betty's welfare was nothing more than the imposition of her own beliefs and understanding of Betty's spiritual situation, as the Court implies, and Betty's coercion into "martyrdom" in service of Sarah's own commitments.

67 *See Prince*, 321 U.S. at 162.

68 Appellant's Brief, *supra* note 54, at 4–6 (noting in several places that distribution of the literature was God's command). Some describe Jehovah's Witnesses beliefs as that "a person must manifest his faith in the manner Christ did by dedicating himself to Jehovah God, symbolizing that dedication by water immersion, and making public proclamation of the truth. He must be a teacher of

What the constable assumes to be sheer stubbornness, the refusal to obey his authority after he repeatedly attempts to get Sarah Prince to stop bringing children with her, might instead be an exercise in integrity. Even at the risk of arrest, Sarah chooses fidelity in her relationship to Betty and Betty's well-being; she chooses to "walk the talk" by teaching Betty in her deeds as well as her words that faithfulness to the commands of God is the highest form of fidelity. Her work provides a witness to her niece Betty that the reward for obedience to the Divine transcends even the comforts of this life that attend conformity to the expectations of the powerful, the authorities.

Indeed, there is some argument that Sarah herself is not simply a willful, aberrant zealot, but a citizen who is exercising the virtues of compassion and generosity for the public. Sarah explains that she and Betty hand out these religious messages "[f]or no other reason . . . but to tell the people of the one place of safety, that is in the kingdom of God under Christ that we prayed for."[69] For Sarah, the street is her church, the place where she and her niece are called in obedience to God's design for salvation for the whole world. Sarah's faith compels her to preach this good news to unbelievers, and to train her niece to do so. That this is a central tenet of her faith, the Court is not able to deny, but also does not choose to respect.[70]

Alma Lovell makes a similar powerful testimony about her responsibility to those unbelievers she is encountering on the street:

> We bring to the people the proofs that the time is at hand for the establishment of the kingdom of Jehovah God. The present disturbed condition of the nations, with the perplexity and distress prevailing among the people, are among the evidences that Satan's rule over the earth is nearing its end, and will be followed by God's kingdom which will bring righteousness and peace to all people who are willing to hear and obey Almighty God. I was doing this work in obedience to God's law which says, "And this gospel of the kingdom shall be preached in all the world for a witness unto all nations: and then shall the end come." *Matthew* 24:14. I am a Christian and have entered into

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God's Word and purposes. He cannot remain silent, thinking that belief alone is sufficient for salvation. Silence is not God's way to it." Matt Slick, *A Jehovah's Witness Must Become Worthy of Salvation,* CHRISTIAN APOLOGETICS AND RESEARCH MINISTRY (Oct. 24, 2015), http://carm.org/religious-movements/jehovahs-witnesses/jehovahs-witness-must-become-worthy-salvation.

69 Appellant's Brief, *supra* note 54, at 9.

70 The United States Supreme Court in *Prince* notes, "The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here . . . ." *Prince*, 321 U.S. at 165. For more on the importance of evangelism for a Jehovah's Witness, see *Fulfill Your Role as an Evangelizer*, THE WATCHTOWER, May 15, 2013, www.jw.org/en/publications/magazines/w20130515/successful-evangelizer.

> a covenant or agreement to do the will of God and obey His commandments. Therefore it is incumbent upon me to obey His mandate to preach the gospel. "For necessity is laid upon me; yea, woe is unto me, if I preach not the gospel!"[71]

Even the Supreme Court recognizes Lovell's belief that she "is sent by Jehovah to do His work," and that to stop would be "an act of disobedience to His commandment."[72] The Court reluctantly concludes, using autonomy as its backdrop, that as an adult, Alma is constitutionally entitled to risk her safety or her good name by walking the streets to hand out literature. Lovell wins her case under the Press Clause, successfully arguing that seeking prior approval from secular authority for distributing the Good News would violate her faith.[73]

We might also look at the women in Free Exercise cases who were forced to choose between their faith and their family's well-being. Perhaps the most famous female Free Exercise plaintiff, Adell Sherbert, was denied unemployment benefits because she refused to work on her Sabbath.[74] The plant where she had worked for thirty-five years suddenly changed its work policy to require that employees be available for work on Saturdays.[75] In this narrative, Sherbert, a relatively recent convert to the Seventh Day Adventist Church, which teaches that Christians are forbidden to work from sundown Friday to sundown Saturday, followed the demands of her religion and missed six work Saturdays.[76]

Sherbert, demonstrating a spirit of generosity and compassion, not only informed her supervisor of this conflict with her faith before missing work, to no avail, but also offered to be available for any work that would not require her to work Saturdays.[77] Yet, the unemployment compensation agency refused to find her "available for work," despite the fact that such work was likely available if they had only worked with her: over 150 other Adventists in the area were employed without incident in jobs not requiring Saturday work.[78]

By contrast to Adell Sherbert, the government enforcers of the South Carolina law rigidly refused to exercise the virtues of compassion and

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71 Appellant's Brief at 4, Lovell v. City of Griffin, 303 U.S. 444 (1938) (No. 391) 1937 WL 41018, at *4.

72 Lovell v. City of Griffin, 303 U.S. 444, 448 (1938).

73 *Id.*

74 Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

75 *Id.* at 399 n.1.

76 *Id.*; Brief for the Appellant at 6, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526) 1963 WL 105527, at *6.

77 Brief for the Appellant, *supra* note 76, at 6.

78 *Id.* at 7–10.

generosity. They refused to walk in Sherbert's shoes and offer her an accommodation which would alleviate the harsh consequences to a blue collar factory worker of lost wages and lost unemployment compensation. Neither would they seriously consider whether providing an exception for Sherbert, given the context, would frustrate the law in fact. We may surmise that they rested their decision on their "slippery slope" worry that it would be hard to deny an exemption in other more difficult cases where religionists asked for exemptions.

Paula Hobbie, also a recent Seventh Day Adventist convert, was similarly fired for refusing to work at her job as a jewelry store manager from Friday to Saturday.[79] Once again in her case, the Court confronted an employer and an unemployment compensation agency that refused to compromise: while Hobbie's supervisor worked out a schedule to permit Hobbie to exercise her faith and still remain employed, the general manager told her to be available for every shift or be fired. Despite this intransigence, the unemployment agency found that her refusal to work was "misconduct" that made her ineligible for benefits.[80]

In *Sherbert* and *Hobbie,* and the intervening case of *Thomas v. Unemployment Division*,[81] the Supreme Court took a quite different approach than the Justices employed in the *Prince* case. Following the well-known case of *Sherbert v. Verner,* which held sway in the Supreme Court for twenty-seven years, the Court in *Thomas* wrote:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[82]

Thus, both Sherbert and Thomas held that refusals to permit individuals to exercise their religious beliefs in their daily lives could be justified only by the State's proof of a compelling interest. This constitutional turn of events could be explained in many ways—perhaps, like *Lovell*, the Court was simply recognizing Sherbert's right to exercise her autonomy, or was concerned that the state was encroaching over the line between state and church. Yet, between *Sherbert* and *Hobbie,* another explanation is plausible.

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79 Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 130, 138 (1987).

80 *Id.*

81 450 U.S. 707 (1981).

82 Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981) (referring as precedent for this point to Sherbert v. Verner, 374 U.S. 398 (1963)).

In *Hobbie,* the State attempted to factually (and incorrectly) distinguish *Sherbert* on the grounds that Hobbie had recently converted, which in the government's view put the responsibility for causing the problem on her: "Hobbie was the 'agent of change' and is therefore responsible for the consequences of the conflict between her job and her religious beliefs."[83]

Once again, in these cases, the government offered the "autonomous citizen" model as a paradigm for the Court—for the government, religion is a "choice" that one makes separately from family and friends, from history or tradition, from one's other values and experiences. It is a "choice" for which the individual is "responsible" if it interferes with the rules of the market-based workaday world that are the presumed to be the proper standard for human experience.

However, the *Sherbert* Court rejects this understanding of the role of religion in the life of the believer. Instead, under the *Sherbert* test, it is the government's responsibility to exercise compassion—to walk in the shoes of Sherbert and Hobbie, to engage them in the context of their own religious understanding. Or at the least, the Court suggests, the state is required to respect the fact that these minority religionists might be refusing to work because of an authentic understanding of their own relationship with God and their employers, including their belief that, out of gratitude, they owed God their full engagement in praise and thanksgiving for one day out of the week. *Sherbert v. Verner* requires the government to see this expression of faith, and to consider whether there is any alternative way of meeting the state's interest besides violating these women's relationships with God.

We know little of Frieda Yoder or Barbara Miller, two fifteen-year-old children of the father-defendants in *Wisconsin v. Yoder*.[84] We do know that Frieda, alone among the Amish children, testified to her own belief in the Amish Christian tradition and way of life, and her desire to live according to its tenets.[85] While the Yoders won their case through application of the *Sherbert* rule, it is important to note in Justice Douglas' dissent some skepticism about whether the Amish children in this case were capable of making, and permitted to make, independent judgments about the wisdom of ending their public education. In Douglas' view, "the inevitable effect [of giving the parents a choice regarding their children's schooling] is to impose the parents' notions of religious duty upon their children."[86]

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83 *Hobbie,* 480 U.S. at 143.

84 406 U.S. 205, 207 n.1 (1972).

85 *Id.* at 237.

86 *Id.* at 242 (Douglas, J., dissenting in part).

Douglas' dissent embodies the ambivalence of judicial attempts to exercise humility about the courts' understanding of the experiences and religious commitments of the litigants before them. On one hand, Douglas' opinion seems to be a commendable attempt to bypass the opinions of state officials and the children's fathers to understand the situation and commitments of the Amish children who were affected by this conflict, a conflict in which they were treated as bystanders rather than central actors.

On the other hand, Justice Douglas has great difficulty actually foregoing the temptation to substitute his own experience and imagination for that of Frieda Yoder and Barbara Miller. While he grudgingly concedes that Frieda testified that she herself had rejected high school because of her own religious belief, he expresses skepticism about whether Barbara Miller's or any other Amish child's choice, is in fact the real choice of that child.[87] Reiterating a tradition understanding that religion is an autonomous decision made by a separated individual—"*religion is an individual experience.*"[88]—he seems to reject as foolish the possibility that Frieda or Barbara can live the fullest lives possible to them as members of a close-knit faith community that rejects material success and worldly education. In so doing, he rejects the value of integrity, the notion that a life lived in faithfulness to relationships that these children have formed with their family and community may be more intrinsically beneficial to all than a life in which these children "explore their full potential," as an individualist understanding of democratic freedom might define it.

Lillian Gobitis and Lucie McClure come to us almost as afterthoughts in the pages of the Supreme Court. Lillian, age twelve, was the older of two children expelled from a Minersville, Pennsylvania, public school in the *Gobitis* case, for refusing to salute the flag because they understood that it was forbidden by Exodus 20.[89] The Witnesses described their refusal to salute as a theological necessity:

> To salute a flag means in effect that the person saluting the flag ascribes salvation and protection to the thing or power which the flag stands for and represents, and that since the flag and the government which it symbolizes are of the world and not of Jehovah God, it is wrong to salute the flag, and to do so denies the supremacy of Almighty God, and contravenes His express command as set forth in Holy Writ.[90]

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87 *Id.* at 243.

88 *Id.* (emphasis added).

89 Respondent's Brief at 5, Gobitis v. Minersville Sch. Dist., 310 U.S. 586 (1940) (No. 690), 1940 WL 46893, at *5.

90 *Id.*

Lucie was the third named plaintiff in the case that has come to be known as *West Virginia State Board of Education v. Barnette*, overturning the Supreme Court's decision in *Gobitis,* that a state could expel a child for failing to salute the flag, under the Speech Clause.[91] The plaintiffs explained that:

> [The Gobitis family members] are members of an unincorporated association of Christian people designated as Jehovah's Witnesses; that each and every one of Jehovah's Witnesses has entered into an agreement or covenant with Jehovah God, wherein they have consecrated themselves to do His will and to obey his commandments: they . . . believe that a failure to obey the precepts in the Bible will result in their eternal destruction.[92]

Once again, the *Gobitis* and *Barnette* plaintiffs recognize the importance of integrity understood as faithfulness to those with whom they are in relationship. On the one hand, they keep their covenant—their promise—to God and their religious community to give loyalty where it belongs. On the other, they are willing to acknowledge the lesser covenant they have as members of the political community. In both cases, these children stand "in respectful silence" while the non-Witness children saluted the flag. Moreover, the *Barnette* plaintiffs offered the state a patriotic pledge which would not compromise their religious beliefs while still respecting the state's concern that the schools "are dealing with the formative period in the development in citizenship" and that teaching civic participation was an important part of the public school curriculum.[93] That pledge read:

> I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray. I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all. I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.[94]

In *Gobitis,* the Witnesses also proved that their children "were always diligent to obey every rule of the school except the rule relating to the formal saluting of the flag" and that their community "willingly and diligently obey[s] all the laws of the state when such laws do not conflict

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91 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (overturning Gobitis v. Minersville Sch. Dist., 310 U.S. 586 (1940)).

92 Respondent's Brief, *supr*a note 89, at 4.

93 Appellees' Brief at 5, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (No. 591), 1943 WL 71856, at *5.

94 *Id.* at 8.

with the law of Almighty God."[95]

Yet, the Witnesses' pervasive showing of patriotic respect and offer to compromise with the state was met with stubborn resistance by state school officials: With no apparent sense of irony, in its resolution requiring salute of the flag, the West Virginia Board of Education began its edict by recognizing,

> [that] one's convictions about the ultimate mystery of the universe and man's relation to it [are] placed beyond the reach of law[;] . . . [that the p]ropagation of belief . . . is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting house[; that the Constitutions of the United States and of the State of West Virginia assure] . . . generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government.[96]

Nevertheless, the Board determined that it is "an act of insubordination" for children or their teachers to refuse to salute the flag, an "emblem of freedom in its truest, best sense . . . liberty regulated by law, protection of the weak against the strong."[97]

As is well-known, the Supreme Court reversed *Gobitis* and the school expulsions in *Barnette,* giving us one of the grand summaries of American jurisprudence, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[98]

What is not remembered is the way in which the Court, just before this stirring phrase, discounts and disrespects both the validity and the value of the dissent the *Barnette* children and their parents offered.

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the

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95 Respondent's Brief, *supr*a note 89, at 4.

96 *Gobitis,* 310 U.S. at 593 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

97 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

98 *Id.* at 642.

existing order.[99]

We see in that paragraph the way in which the Court has grounded its Free Exercise jurisprudence in a conception of the individual as an autonomous (perhaps strange, perhaps odd) free thinker, a theme that surfaces in other cases like *United States v. Seeger*[100] and *Gillette v. United States*.[101] In this way, religious freedom is formulated as a means to protect freedom of (aberrant) thought, not as a way of nourishing foundational values necessary to a flourishing democratic society.[102]

III. THE VOICES OF THE WOMEN JUSTICES ON RELIGION AND THE STATE

We might also explore whether we hear a "different voice" in the opinions of the women Justices in Religion Clause cases, and if so, if the development of Religion Clause jurisprudence has been influenced by their presence on the Court. Although it is one of the newest cases by the newest Justice, and not a Free Exercise case, a discernible difference can be seen in *Town of Greece v. Galloway*, challenging the practice of sectarian prayer in the Town of Greece under the Establishment Clause.[103] Justice Elena Kagan begins her dissenting opinion with three hypotheticals, all of them beginning with the invitation for the reader to put him or herself in the place of a minority religionist, by imagining that "[y]ou are" a litigant asked to pray before a trial, a voter asked to pray at the election booth, an immigrant asked to pray at a naturalization ceremony.[104] Or, she asks, what if "you are" a Christian subjected to a Jewish or Muslim prayer in a public setting?[105] Finally, she places "you," the reader, into the very scenario raised in the case, extensively discussing the way in which the very context of the case imposes a hardship on religious dissenters. She asks the reader

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99 *Id.* at 641–42.

100 United States v. Seeger, 380 U.S. 163, 185 (1965).

101 *See* Gillette v. United States, 401 U.S. 437 (1967).

102 *See* City of Boerne v. Flores, 521 U.S. 507, 564 (1997) (O'Connor, J., dissenting) (quoting THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 219 (1986)). There, O'Connor adopts as a rationale for protecting Free Exercise, the Founders' "shared . . . conviction that true religion and good morals are the only solid foundation of public liberty and happiness." *Id.* at 564.

103 Town of Greece v. Galloway, 134 S. Ct. 1811, 1841–54 (2014) (Kagan, J., dissenting).

104 *Id.* at 1842–43 (asking the reader to "[s]uppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all public functions with a chanting of the Sh'ma and V'ahavta. ('Hear O Israel! The Lord our God, the Lord is One . . . Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.') Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. ('God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.')").

105 *Id.* at 1843.

to empathize with the position the Town of Greece has put that dissenter in:

> Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations.[106]

In this extended exercise in imagination, Justice Kagan entreats her audience to a reading of the Establishment Clause that evokes all of the virtues we are discussing. First, she asks the Court's audience to exercise compassion, to "walk with" the religious dissenter as she both feels the sting of rejection and decides the course of least damage in responding to it. Second, she hints that a reading of the Establishment Clause should go beyond what might be "due" the religious dissenter under the Court's existing precedents such as *Marsh v. Chambers*[107] or its doctrines such as the anti-coercion rule championed by Justices Scalia and Kennedy.[108]

Moreover, hers is not the argument about protecting religious idiosyncrasy or autonomy we have seen in other Religion Clause cases such as *Prince.* Rather, she suggests that what is at stake is the relational nature of our polity, the relationship of citizens to each other:

> What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required—but that much is crucial—to treat every citizen, of whatever religion, as an equal participant in her government.[109]

Indeed, like our women plaintiffs in the Free Exercise cases, she not only bids her fellow citizens to recognize their bond with the religious dissenters they are excluding by these practices, but offers, in a spirit of compromise, "None of this means that Greece's town hall must be religion- or prayer-free."[110] Officials simply must take "especial care" to include every citizen as an equally valuable citizen.[111]

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106 *Id.* at 1844.

107 463 U.S. 783 (1946).

108 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992).

109 *Town of Greece*, 134 S. Ct. at 1850.

110 *Id.*

111 *Id.*

In making this argument, Justice Kagan takes up an arguably feminist constitutional position embracing contextuality, compassion, generosity, and integrity that Justice Sandra Day O'Connor first took in *Lynch v. Donnelly*.[112] Like Justice Kagan, in *Lynch*, Justice O'Connor insisted on going farther into contextual review than even the *Lemon* formula,[113] which asks for an "on-the-ground" review of government officials' intentions as well as the consequence of their actions and their "entanglement" with religion.[114] In her formulation of what has come to be known as the non-endorsement principle in *Lynch* and *County of Allegheny*, both involving crèches on public land Justice O'Connor called for an approach that is highly attuned to the relationships and situation posed by Establishment Clause cases: "[e]very government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion."[115] Moreover, she notes later, that judgment must include the "'history and ubiquity' of a practice . . . because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."[116]

The other women Justices have followed her in making this demand for a contextual approach to religious dissenter claims. For example, Justice Sotomayor's recent concurring opinion in the recent *Holt v. Hobbs* decision, protecting a Muslim prisoner's right to wear a short beard under RLUIPA, notes, "Nothing in the Court's opinion calls into question our prior holding in *Cutter v. Wilkinson* that '[c]ontext matters' in the application of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)."[117] Her opinion itself relies on Justice Ginsburg's opinion in *Cutter*, which similarly notes the importance of a contextual approach, involving the concerns of both parties, in reading of a RLUIPA claim: "While the Act adopts a 'compelling governmental interest' standard . . . '[c]ontext matters' in the application of that standard."[118]

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112 465 U.S. 668 (1984).

113 S*ee* Lemon v. Kurtzman, 403 U.S. 602 (1971).

114 Indeed, Justice O'Connor's description of the *Lemon* test skews toward the relational and contextual. In *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 393 (1999) (citing *Lemon*, 403 U.S. at 615), she claims that *Lemon* "requires examination of 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.'"

115 County of Allegheny v. ACLU, 492 U.S. 573, 624–25 (1989) (quoting *Lynch*, 465 U.S. at 694).

116 Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (quoting *County of Allegheny*, 492 U.S. at 630).

117 Holt v. Hobbs, 135 S. Ct. 853, 867 (2015).

118 Cutter v. Wilkinson, 544 U.S. 709, 722–23 (2005) (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

Second, in *Lynch* and *County of Allegheny*, Justice O'Connor has also demanded that the constitutionality of a government religious display be judged through an exercise of compassionate understanding of how these displays' messages affect the political self-understanding of the most vulnerable of citizens. For "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[119]

Justice O'Connor has followed this theme in her few Free Exercise opinions as well. In her *Smith* concurrence, she twice calls out the importance of a compassionate review by the Court and the state about how the government's laws affect minorities.[120] Once again, she echoes the theme that this review must be highly contextual with respect to the individual believer's situation-the Court must

> apply this test *in each case* to determine whether the burden on the *specific plaintiffs* before us is constitutionally significant and whether the *particular criminal interest* asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws *might usually serve* a compelling interest in health, safety, or public order, the First Amendment *at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim*.[121]

Moreover, Justice O'Connor argues that the state must both see and respect the non-political harm it has caused to particular believers in Free Exercise cases, even in those cases where it must reluctantly decide to apply the law anyway. As she puts it in *Smith*, "the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs . . . laws that, *in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in*

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119 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 573, 625 (O'Connor, J., concurring).

120 Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

121 *Id.* at 899 (emphases added). In her interesting dissent in *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 710–11 (1989), Justice O'Connor employed the same technique used by Justice Kagan in *Town of Greec*e to demand that the Court, and the reader, put themselves in the shoes of a Scientologist: "Neither has [the IRS] explained why the benefit received by a Christian who obtains the pew of his or her choice by paying a rental fee, a Jew who gains entrance to High Holy Day services by purchasing a ticket, a Mormon who makes the fixed payment necessary for a temple recommend, or a Catholic who pays a Mass stipend, is incidental to the real benefit conferred on the 'general public and members of the faith,' . . . while the benefit received by a Scientologist from auditing is a personal accommodation" which is not tax deductible.

the civil community."[122] She moreover notes the "harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."[123] Justice Ginsburg strikes a similar chord in interpreting RLUIPA in the *Cutter* case, noting how the law "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."[124]

This demand for the government to really see the religious dissenter and care what the law is doing to her is described in other ways in the female Justices' opinions. Justices Ginsburg and Sotomayor similarly reject the right of the government to turn a blind eye to the harms it causes when it requires religious dissenters to conform to secular law. In *Cutter,* for example, Justice Ginsburg notes that "government need not 'be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.'"[125] Rather, under RLUIPA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[126] Similarly, in *Hobbs*, Justice Sotomayor notes that judicial deference to prison administrators' experience "does not extend so far that prison officials may declare a compelling governmental interest by fiat."[127]

The rhetoric of the *Smith* majority opinion clearly favors the argument that religion is an individualistic preference and that the religious dissenter is eccentric and subversive, echoing the Court's opinions in cases like *Prince* and *Barnette.* These dissenting beliefs, Justice Scalia argues, citing Justice Frankfurter in *Gobitis,* "contradict the relevant concerns of a political society" and thus do "not relieve the citizen from the discharge of political responsibilities."[128] Permitting religious exemptions unless there is

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122 *Smith*, 494 U.S. at 897 (O'Connor, J., concurring) (emphasis added). Similarly, in *Bowen v. Roy*, 476 U.S. 693 (1986), in which a Native American father objected to the possible spirit-destroying attachment of a Social Security number to his daughter's record, Justice O'Connor opined, "[o]nly an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 728 (O'Connor, J., concurring in part and dissenting in part). In this case, Justice O'Connor's skepticism about a *Smith*-type law of neutral applicability rule is similarly grounded in the importance of looking contextually at the precise burden or conflict of loyalties imposed upon a religious minority citizen.

123 *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

124 Cutter v. Wilkinson, 544 U.S. 709, 721 (2005).

125 *Id.* at 720 (quoting Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994)).

126 *Id.*

127 Holt v. Hobbs, 135 S. Ct. 853, 867 (2015) (Sotomayor, J., concurring) (quoting Yellowbear v. Lampert, 741 F.3d 48, 59 (10th Cir. 2014)).

128 *Smith*, 494 U.S. at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–595 (1940)).

a compelling state interest, he argues, would permit a religious believer "to become a law unto himself,"[129] and to "ignore generally applicable laws."[130] The possibility that the believer is making a conscientious choice out of a relationship with God and other persons does not seem within the realm of Justice Scalia's imagination about religious dissent.

Rather than suggesting that religious liberty is principally for the eccentric, the women Justices call for respect for the role of religion in the life of believers and the community. Justice O'Connor's concurrence in *Smith* insists that "an individual's free exercise of religion is a preferred constitutional activity," not an anomaly.[131] In *City of Boerne*, she underscores this point historically by discussing at length Madison's concern that early drafts of the Free Exercise Clause using the term "toleration" wrongly suggested that "the right to practice one's religion was a governmental favor, rather than an inalienable liberty."[132]

These women Justices also understand the importance of religious dissenters' ability to be faithful and constant to the relationships in their lives. In Justice O'Connor's argument for a robust Free Exercise regime in *Smith,* she honors the virtue of integrity by asking that the state not insist that religious believers abandon their commitments to each other and to their God as a price of honoring their citizenship commitments to their neighbors and the authorities.[133] The standard test that the *Smith* Court propounds refuses to consider the terrible bind in which a uniform law with no exceptions or contextualization places the citizen who wants to be faithful to both God and country.

The Free Exercise cases where women are plaintiffs are but a subset of these cases—all Lillian Gobitis, Lucie McClure, Frieda Yoder and the rest are asking is that they be allowed to meet commitments to both sets of relationships. By contrast to the *Smith* ruling, in her lengthy historical dissent in *City of Boerne* calling for a review of the *Smith* decision, Justice

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129 *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–167 (1878)).

130 *Id* at 886. Certainly, there is other language in this opinion which contradicts the individualistic understanding of religious dissent. For example, Justice Scalia quotes *Braunfeld v. Brown*, 366 U.S. 599, 606 (1963), noting that uniform application of general laws to religious dissenters is important "[p]recisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' . . . and precisely because we value and protect that religious divergence." *Smith*, 494 U.S. at 888. Similarly, Justice Scalia grudgingly accepts that there is a cost to religious dissenters, albeit in his view an acceptable cost: "Accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890.

131 *Id.* at 901 (O'Connor, J., concurring).

132 City of Boerne v. Flores, 521 U.S. 507, 555 (1997) (O'Connor, J., dissenting).

133 *See Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

O'Connor notes that the very exemptions sought by believers such as Adell Sherbert and Lillian Gobitis were historically granted to religious dissenters, whether it was the requirement that they take an oath, or an exemption from military conscription.[134] Despite the high public cost, she notes, the Founders recognized the importance of respecting religious conscience.[135] Moreover, she cites with approval not simply an individualist argument for Free Exercise, but Madison's own relational argument that tracks the religious concerns of gratitude and humility:

> This right is . . . unalienable; [both] because the opinions of [people] . . . cannot follow the dictates of other[s] . . . [and it entails] a duty towards the Creator. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. [E]very man who becomes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign.[136]

To Madison, then, duties to God were superior to duties to civil authorities—the ultimate loyalty was owed to God above all.

The importance of integrity in the relationship of the religious believer with the world is evidenced as much in Justice O'Connor's opinions upholding the state's regulation as those where she would overturn it. In *Jimmy Swaggart Ministrie*s, for example, she contrasts the imposition of a sales tax on a large religious corporation's income with previous license taxes imposed by municipalities on evangelizers seeking donations:

> The hand distribution of religious tracts is an age-old form of missionary evangelism . . . utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching in the pulpits.[137]

Thus, Justice O'Connor makes the very argument that Sarah Prince made: the street is my church, and the people to whom I provide tracts for a donation are those I am called to serve.

At the same time, we continue to see the women Justices' recognition that there is room for compromise between the state and the believer, that

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134 *Flores*, 521 U.S. at 534 (O'Connor, J., dissenting).

135 *Id.* at 539.

136 *Id.* (quoting 2 WRITINGS OF JAMES MADISON 184–85 (G. Hunt ed.1901)).

137 Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 385 (1990) (quoting Murdock v. Pennsylvania, 319 U.S. 105, 108–09 (1943)).

the right to religious dissent is not an absolute right. In *Cutter*, Justice Ginsburg cites the compromise-laden "room for play in the joints" phrase.[138] In *Holt,* Justice Sotomayor emphasizes that the right to protection for religious exercise must be judged as "relative" and does not impose an impossible burden on the state to "refute every conceivable option to satisfy RLUIPA's least restrictive means requirement" or "prove that they considered less restrictive alternatives at a particular point in time."[139] Justice Ginsburg similarly argues in *Cutter,* "[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."[140]

IV. TOWARD A RELIGIOUS FEMINIST THEORY OF THE FREE EXERCISE CLAUSE

In light of the themes we see being expressed by the women Justices on the Court on Religion Clause issues, we might take some tentative steps toward what rule of law for Free Exercise jurisprudence a religious feminist might propose. It should be one that accounts for the feminist focus on contextuality and relationality, as well as reflecting the particular human values that religious feminists would highlight: those of gratitude, humility, compassion, generosity, and integrity. To make an easy start, such a principle would no doubt look a lot more like the *Sherbert* test than the *Smith* rule, but we might ask whether it is possible to articulate something more specific than *Sherbert* yields.

First, like the practice of women justices that we have been discussing, such a rule would eschew automatic judicial deference to uniform rules of law, whether they are legislative or judge-made. Instead, judges would take an active role in probing the concrete context in which a religious believer asserted a Free Exercise claim. Such a first step does not mean there would be no deference to legislators or administrators. For example, it may be clear from the legislative history or even the language of a statute or regulation that the legislature or executive has carefully considered just such a case as the religious dissenter has filed. When a legislature has respectfully considered the harm posed to religious believers by a uniform rule and expressly concluded, with findings of fact, that the harm to others in the state clearly outweighs the harm to religious believers, a court may defer to those findings of fact and conclusions if they are consistent with the evidence before the court. The rhetoric and practice of judicial deference in these circumstances would reflect not the rigid claims of jurisdictional

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138 Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

139 Holt v. Hobbs, 574 U.S. 867, 868 (2015) (Sotomayor, J., concurring).

140 *Cutter*, 544 U.S. at 722.

incompetence of the judiciary,[141] but active engagement with the circumstances coupled with the judicial humility that sounds in rhetoric of self-restraint.

Second, such a rule would assume that religious plaintiffs have a right to be fully heard on their claim of conscience, as a matter of showing respect for their situation and their particular dilemmas. The values of compassion and generosity require no less. If such a hearing took the form of a traditional trial before a judge, a feminist reading of the Free Exercise Clause would suggest that the courts be reasonably generous in permitting religious litigants to introduce evidence about the nature of their religious belief and why the legal compulsion they are resisting would cause a true conflict of conscience.

The courts have been somewhat uneven in granting religious litigants a full hearing. On one hand, in the Central American sanctuary cases and in civil disobedience cases protesting nuclear or foreign policy, some courts have been rigid in blocking introduction of evidence regarding plaintiff's religious beliefs.[142] On the other, many of the Supreme Court Free Exercise cases have involved fairly robust presentations of evidence about religious beliefs that force a crisis of conscience when believers are being coerced to act against conscience. As just two examples of the latter, the Court allowed significant evidence about Amish religious beliefs and historical interaction with the outside world in *Wisconsin v. Yoder*[143] and in *Lyng v. Northwest Cemetery Association,*[144] a similarly fulsome presentation of evidence about

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141 Scholars have made a good case for a jurisdictional reading of the Religion Clauses, including an argument about its compatibility with theological claims that may have motivated the drafters. *See, e.g.*, IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE (2014). The jurisdictional approach brings a commendable level of certainty to the problem of who has authority to make decisions about religious exercise. However, its drawback is precisely that rigidity and clarity, which may not respect unique contextual factors that call for a better balance of judicial inquiry and self-restraint.

142 *See, e.g.*, Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation,* 62 TENN. L. REV. 899, 952–62 (1995) (discussing recalcitrance of judges to permit Sanctuary movement defendants to introduce evidence about their religious reasons for sheltering Central American refugees); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENGLAND L. REV. 3, 33–34, 54–55, 65 (2003) (comparing cases in which the jury was allowed to hear religious claims of defendants arguing necessity in nuclear weapon cases and Sanctuary and other cases where the courts refused such testimony); Felton Davis, *Civil Disobedience and the Law*, WARISACRIME.ORG (Mar. 2013), warisacrime.org/sites/afterdowningstreet.org/files/cdandlaw.pdf (describing civil disobedience cases such as *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), in which defendants were permitted to introduce some evidence regarding their religious beliefs, as well as cases such as *United States v. Montgomery* (the "Pershing Plowshares" case), 772 F.2d 733 (11th Cir. 1985), in which prosecutors successfully excluded evidence regarding religious beliefs and defenses such as necessity).

143 For a summary of this evidence, see Brief for the Peititoner at 15–17, Wisconsin v. Yoder, 406 U.S. 205 (1972) (No. 70–110), 1971 WL 126407, at *15–17.

144 For a summary of these claims, see Brief for the Petitioners at 2–14, Lyng v. Northwest

Native American beliefs about sacred lands.

One objection to the introduction of religious evidence in Free Exercise cases may be that trials will drag on, creating an inefficient use of court resources, and records will become riddled with irrelevant evidence. However, such evidence certainly is not irrelevant to one of the consistent questions that the courts ask in Free Exercise cases—i.e., whether the defendant sincerely identifies a conflict between his religious beliefs and the state's demands. Moreover, to the extent that a Free Exercise case has the value of illuminating minority religions' difficulties with majoritarian laws that unwittingly or thoughtlessly impose severe constraints on minority religionists, a trial record can serve as public education about the nature of these conflicts, which is one of the values of public trials themselves.[145] Moreover, good trial judges can manage requests to introduce evidence in ways that permit both fulsome and efficient creation of a record, putting pressure on litigants to eliminate redundancy and to sharpen their central religious claims and the evidence supporting them.

Beyond efficiency and relevance concerns, there may be some concern that permitting religious litigants to introduce religious evidence risks the possibility that judges will make religious judgments—e.g., that a defendant is not sincere because his version of his religion does not square with others' version of what his religion requires, or that one sect or school of a particular religion represents the "true" theology in such a religion.[146] While such a concern is valid, it is not inevitably true that presentation of religious evidence results in impermissible theological fact-finding by courts. That a court agrees to hear religious claims as a matter of compassion and generosity does not automatically require a court to pass on the objective validity or centrality of such claims.

Third, the Court needs to re-interpret or perhaps re-invent the language of "compelling" in the compelling state interest test if that is the starting point for a feminist-inspired reading of the Free Exercise Clause. As it has been interpreted in the Free Exercise cases, the term "compelling" has been given a range of interpretations from "subordinating" i.e., more important than the interest of the plaintiffs when those interest are balanced, to "of overriding importance" (also a comparative term, but suggesting an interest

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Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013), 987 WL 880342, at *2–14.

145 Richmond News v. Virginia, 448 U.S. 555, 569 (1980) (quoting State v. Schmit, N.W.2d 800, 807 (Minn. 1966)) (noting "[i]t is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice"); State v. Schmit, 139 N.W.2d 800, 807 (Minn. 1966).

146 *See* Marie A. Failinger, *United States v. Ballard*, *in* LAW AND RELIGION CASES IN CONTEXT 41–42 (Aspen Press, Leslie Griffin ed., 2010).

of great concern to the state).[147]

As just one example, courts hearing free exercise claims have found non-compelling the state's claimed interests "to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for 'personal' reasons; and to avoid a detailed probing by employers into job applicants' religious beliefs,"[148] while finding compelling a "public interest in maintaining a sound tax system," free of "myriad exceptions flowing from a wide variety of religious beliefs."[149]

Closer attention to the word itself, "compelling" may hold a key. It differs from other descriptors used to describe important state interests, such as "weighty" or "substantial"[150] in that it is a rhetorical rather than a metaphysical descriptor. It does not require the Court to create a priority list for the legislature about which interests—for example, national security or violence—should carry more weight than other interests—for example, administrative convenience. Rather, to "compel" in this circumstance means to convince a decision-maker that the state has made its case for the refusal to waive the applicability of the law to a particular Free Exercise case. Thus, the term need not imply that the test is almost always "fatal in fact"[151] because it requires an impossibly weighty interest of the state. Rather, in reality, the Court's actions have resembled the descriptions of strict scrutiny as a "balancing" test between the individual's and the state's interests,[152]

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147 *Lukumi Babalu Aye* suggests that compelling also means comprehensive, noting that if the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993).

148 Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 719 (1981).

149 Hernandez v. Comm'r, 490 U.S. 680, 700 (1981).

150 *See, e.g.*, United States v. Paradise, 480 U.S. 149, 166 (1987) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in judgment)) (describing the compelling state interest in remedying past or present racial discrimination as "a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program"); Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (noting that the University's compelling interest in educational diversity as implemented by "its critical mass idea, which creates 'substantial' educational benefits").

151 See Justice O'Connor's similar point in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

152 *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 569 (1993) (Souter, J., concurring in the judgment) (discussing the Court's precedents that were "illustrative of the general nature of free-exercise protections and the delicate balancing required by our decisions in [*Sherbert* and *Yoder*] when an important state interest is shown"). Indeed, in *Burwell*, the Court suggested that, "RFRA did more than merely restore the balancing test used in the Sherbert line of cases; it provided even broader protection for religious liberty than was available under those decisions." Burwell v. Hobby Lobby, Inc., 134 S. Ct. 2751, 2761 n.3 (2014).

one that that initially puts the thumb on the scales of the religious individual; or those that suggest that the state is being put to its proof that it has deeply considered and studied how it will effectuate its interests.[153]

However, if we must think of the compelling state interest test as a balance—and the question of whether the state's interest "overrides" the plaintiff's, or vice-versa—that balance can only be properly calculated if the nature of the plaintiff's interest is adequately accounted for. This is particularly true in cases where the plaintiff is being required to violate her conscience and invade the integrity of her relationships with other persons and communities of which she is a part. Those cases such as *Smith* that imply that claims of conscience are personal predilections[154] miss the mark, because they do not rest on adequate scholarly accounts of the way in which conscience is formed and how it is different from merely personal preference.[155]

Thus, taking the time to listen to a plaintiff describe the trajectory of religious experience which has led her to the conclusion that, like Sarah Prince, she must obey God rather than men and according that belief full respect is critical to this endeavor. The value of compassion suggests that both government and the courts that hear religious exemption cases must be well enough acquainted with the dilemma facing religious objectors that they can grasp, at least in its essence, what is at stake in the minds of such believers.

At the same time, in conditions of sin, both governments and the courts who hear these cases need to be prepared, if absolutely necessary, to interrogate religious believers about whether their "sincere religious belief" is a matter of personal whim or darker personal motivations such as racism or homophobia. Most religious dissenters who have succeeded in their claims (and many who have not) can describe in detail an honest and reasoned position from within the religious or spiritual tradition which they claim has called them to disobey the secular law.[156] They are not relying on

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153 *See, e.g.*, *Thomas*, 450 U.S. at 719 (citing the lack of evidence to support the state's interest).

154 Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) (in which Justice Scalia's remark excoriating a Free Exercise regime that would permit an individual to become "a law unto himself" essentially equates conscience claims with refusals to obey the law for idiosyncratic personal reasons).

155 *See* Marie A. Failinger, "*No More Deaths": On Conscience, Civil Disobedience, and a New Role for Truth Commissions*, 75 U.M.K.C. L. REV. 401, 421–25 (2007) (describing medieval Catholic and Lutheran views of the operation of the conscience).

156 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 208 (1972) (describing history of Amish religion and reasons for refusal to attend school); Gillette v. United States, 401 U.S. 437, 439–40 (1971) (describing conscientious objection based on centuries of Catholic just war theory); Goldman v. Weinberger, 475 U.S. 503. 510 nn.1, 2 (1986) (Stevens, J., concurring) (describing Goldman's request to wear yarmulke based on Orthodox Jewish custom and belief); Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 459–62 (1988) (Brennan, J., dissenting) (describing longstanding

a "gut hunch" or an emotional reaction to the state's law to justify their claims.

We must be candid about the risks here: such an interrogation risks the specter of judges making improper theological conclusions about the validity of dissenters' claims, and possibly judging some claims as not religious or spiritual because believers cannot point to a long-standing, well-documented tradition of religious thought to support their positions. Justice Jackson, speaking in *Ballard*, correctly warned of the possibility that judges' and juries' unwillingness to accept the objective truth of a religious claimant's statement will color their assessment of whether that claimant is sincere in his belief or an imposter.[157] And, the Court in *Thomas v. Review Board* reminds that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[158]

Nevertheless, reserving the possibility of such a test in the most extreme cases where the religious claimant cannot articulate any basis for his or her belief may be necessary to avoid Justice Scalia's "parade of horribles" suggesting that religious belief may be used as a cloak to hide behind anarchic and idiosyncratic exercises that "thumb their nose" at the authority of the state.[159] However, employing the value of integrity as constancy in one's own character and constancy to others, courts can look for a course of past action in the religious dissenter as someone who has taken responsibility for her actions and her future in relationship to others in the community.[160]

A constitutional focus on a "compelling" interest also implies, consistent with the values of humility and compassion, that the government present actual evidence about its conclusion that a uniform rule is so significant that it must be applied to plaintiffs in order to effectuate the offered state interest. Humility as a value requires that one be prepared to acknowledge one's own limitations. For the state, one of those limitations in promulgating laws is limited information about how such laws will affect its constituencies, both now and in the future. A government that has acted on the basis of limited and thus flawed knowledge about the nature of the burdens that its citizens carry should be prepared to correct mistakes it may have made based on faulty and incomplete information.

Conversely, a government that has overstated the interest it has in regulating citizens generally should be prepared to acknowledge that it has

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Native religious beliefs about sacred lands).

157 Failinger, *United States v. Ballard*, *supra* note 146, at 42–43.

158 *Thomas*, 450 U.S. at 714.

159 *See Smith*, 494 U.S. at 902.

160 *See supra* notes 48–51 and accompanying text.

overreached, and that it need not have regulated in some subset, or perhaps most subsets, of cases governed by its reach. We might look to some of the Court's Speech Clause cases to set a properly high standard for courts in putting the state to its proof that its laws reflect a well-researched and well-reasoned and focused, i.e., narrowly tailored, approach to the evils they are attempting to eradicate.[161] The Free Exercise Clause demands no less.

To avoid Justice Jackson's concern that judges and juries might discount a plaintiff's sincerity because of their disbelief about her claims, the value of compassion suggests that the decision-maker be trained to be capable of walking in the shoes of the religious plaintiff, at least minimally. The value of compassion requires that any government decision-maker seek to understand at a very basic level why a religious plaintiff would consider the duties of her faith to so gravely implicate her salvation or her intrinsic moral integrity that she would be willing to violate the secular law and face the consequences before giving that up. Again, we might call upon Justice O'Connor's Religion Clause cases to articulate what the nature of the compelling state interest test might mean in religious test cases. She has suggested that a judge may and must make a judgment about whether the state has trenched upon Establishment Clause concerns using a "collective standard to gauge 'the "objective" meaning of the [government's] statement in the community.'"[162] Thus, the judge must be the "personification of a community ideal of reasonable behavior, determined by the [collective] social judgment."[163] The "reasonable observer . . . must be deemed aware of the history and context of the community and forum in which the religious display appears."[164] This call would seem to implicate the need for the decision-maker to have a basic understanding of the religious plurality of his or her community coupled with the curiosity and willingness to learn more from litigants about their traditions.

The value of humility suggests that courts should be more prepared to constitutionally "bless" regulatory schemes potentially trenching on Free Exercise rights if they contain procedures for seeking waivers or exemptions when a law is inaptly applied to religious believers. Recall how Justice Scalia characterized the unemployment benefits process as anomalous for First Amendment law because it permits religious believers,

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161 *See, e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803, 821–22 (2000) (dissecting paucity of evidence for a restriction on adult-oriented TV); Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (dissecting inadequate evidence of effectuation of the state's interest even in a commercial speech case); Turner Broad. Sys. v. FCC, 512 U.S. 622, 667 (1993) (dissecting the inadequate evidence and inferences in a commercial speech case).

162 Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995).

163 *Id.* at 780.

164 *Id.*

like others, to bring evidence and receive individualized determinations that the "seeking work" or "good cause" termination rules of those systems were not justly applied to them.[165]

Instead of considering the unemployment cases as aberrant exceptions and cases like *Smith* with its uniform and apparently unconsidered law treating all drugs in all settings the same as the norm, the Court should be holding up laws that have exemption processes as desirable examples of how constitutional laws should be written. Similarly, states that adopt general religious exemption laws[166] that permit courts to consider context-driven exemptions from all or some large subset of state statutes should be praised, not condemned, for carving out the opportunity for religious believers to present a valid defense. The recent rash of attacks on "little-RFRA" statutes being introduced in state legislatures in the wake of the rise of same-sex marriage[167] has perhaps made for good political theater about important equality values, but the demise of these statutes in the wake of these isolated controversies makes for bad constitutional law. Waiver and exemption statutes do not certainly spell the end to non-discrimination or other important laws; they simply give religious dissenters the opportunity to make a case for why the laws should not be applied to them, a case which needs to be more fulsome and compelling than "it just seems wrong to me."

Crafting these statutes, however, may require more than simply mimicking *Sherbert v. Verner*. Such statutes, without at least specific direction to administrative bodies about how to implement them,[168] risk the

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165 *See* Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).

166 For a listing of the twenty-three current state "little-RFRA" laws, see, *State Religious Freedom Laws*, NAT'L CONFERENCE OF STATE LEGISLATORS, www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Sept. 9, 2015), and for the current status of 2015 legislation, see State Religious Freedom Restoration Legislation, NAT'L CONFERENCE OF STATE LEGISLATORS, www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx (last visited Sept. 7, 2015).

167 *See, e.g.*, Tony Cook, Tom LoBianco & Doug Stanglin, *Indiana Governor Signs Amended "Religious Freedom" Law*, USA TODAY (Apr. 2, 2015, 6:50 pm), www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106. The case of Indiana's little-RFRA illustrates how lack of contextual attention to all of the public interests involved and the resulting lack of careful tailoring can leave room for questions about whether religious dissenters are entitled to engage in actions that violate the human rights of others. As a result of the public controversy surrounding its law, controversy that probably would not have erupted but for a national basketball tournament, Indiana amended its RFRA to exclude refusals to provide services or goods to the public based on sexual orientation or a number of other disadvantaged groups.

168 For various examples of state statutory religious freedom exemptions, see Daniel O. Conkle, *Free Exercise, Federalism and the States as Laboratories*, 21 CARDOZO L. REV. 493, 496–98 (1999). Professor Conkle describes several alternatives. For example, a legislative study committee or administrative regulations might craft "specifically defined religious exemptions for particular legal contexts." A state "might provide a more lenient standard of scrutiny in certain contexts, such as prisons," or a law might define "more precisely what constitutes a prima facie claim for relief," by defining substantial burden and exercise of religion. A state might be more specific about what a

same a-contextual approach insensitive to the needs of those who may suffer harm because of a religious exemption that a blanket "neutral, generally applicable" statute risks to these believers.

Finally, the value of humility expects the state to have considered alternatives in light of the possible harm to be caused to its religious citizens by the law. Again, the Court has been unclear exactly what the terms "narrowly tailored" or "least restrictive alternative" mean in the context of protecting religious expression. In recent years, the Court claims to have moved from an extreme understanding of these terms, i.e., holding the state must design the most narrow statute humanly conceivable. Instead, it has tended to invalidate only those statutes that are breathtakingly overbroad and do not significantly advance the state's purported interest.

Yet, neither a "substantial overbreadth" nor an "absolutely no alternatives" definition of narrow tailoring appropriately applies to religious freedom cases. A religious adherent who is forced to violate her conscience is not comforted by the fact that a law is narrowly designed to regulate only a small class of people, including her. Nor does her problem go away if the state can show that it chose an alternative which least restricts the most freedom, if it still violates her conscience. Rather, the Court's formulation that a restriction of her religion must be really "necessary" in order to achieve the state's important and convincing interest properly respects the delicate balance between freedom of conscience and the state's need to use law as a means to serve the community.

Thus, if we had to formulate a religious feminist reading of the Free Exercise Clause into a usable principle of law, it might read something like this: When the court faces a religious plaintiff who sincerely believes that her faith requires her to violate the law, the court must be convinced that, given the history and context of the plaintiff's belief and the state's promulgation of the law, the state has either (a) provided for a robust process for exempting a plaintiff from enforcement of the law, one which allows her to make a full case for her religious objection before a well-informed and neutral decision maker, such as an administrative law judge; or (b) fully considered and documented, in its legislative history, that application of the law to the plaintiff and those like her is necessary in order

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"compelling" interest is (i.e., prevention of direct harms to specific parties or to public health, safety, etc.), or when the state has offered a "least restrictive means" to further it. A state might craft a law that provides different standards of scrutiny for "core" religious acts such as worship or religious rituals, and another standard for conscientious objection to laws. Eugene Volokh has suggested a different approach: permitting courts to use the tradition of religious freedom jurisprudence in the United States to make a "common law" of religious exemptions coupled with specific legislative and executive agency exemptions instantiated in law, with the burden of justification on the government if there is no evidence of a legislative exemption from the religious freedom law, Eugene Volokh, *A Common Law Model for Religious Exemptions,* 46 UCLA L. REV. 1465, 1503–04 (1999).

to effectuate its state interest; or (c) shown the court, by clear and compelling evidence, that it is necessary to regulate religious believers whose exercise is substantially burdened to achieve the state's interest, and that the state's interest is compelling enough to override the plaintiff's exercise of her religious beliefs, given the full context of the state's application of its law to individual plaintiffs.

CONCLUSION

As we have seen, it is possible to hear, albeit dimly, "a woman's voice" in the Supreme Court's Free Exercise jurisprudence, both in the actions of women litigants in these cases, and more clearly, the language that the women justices use to articulate how the Free Exercise Clause should be interpreted. These litigants' actions and these justices' opinions call for a careful evaluation of the context in which religious freedom conflicts arise by a decision-maker who is well-versed in the history of his or her community, including its religious diversity. The women justices also call for a respectful hearing of the stories of religious dissenters, one that, if not fully empathetic, at least attempts to "walk a mile" in the shoes of such believers in an attempt to understand why they feel obliged to refuse the state obedience to particular laws. A feminist reading of the Free Exercise Clause thus emphasizes the importance of a fully contextual and relational perspective on religious freedom conflicts.

As these arguments of the justices suggest, in a religious feminist reading, the Constitution calls legislatures, executives and courts to respond to the reality of religious minorities in their midst by exercising those virtues the Constitution should embody. The Free Exercise Clause should be read to effectuate the vision of those Founders who understood religious liberty as a blessing, and were willing to protect the liberty of all, religious and secular, in gratitude for that blessing.[169]

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169 *See, e.g.*, *James Madison, Memorial and Remonstrance Against Religious Assessments*, THE FOUNDERS' CONSTITUTION, http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (noting that "[w]hilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered" and closing with the prayer that "the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity and the happiness of the Commonwealth."). See the Preamble to the 1870 Constitution of the State of Illinois, ILL. CONST. pmbl., beginning "We, the People of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors . . . " and other state constitution preambles. *See State Preambles*, E REFERENCE DESK, www.ereferencedesk.com/resources/state-preambles (last visited

By asking the state to consider the plight of religious minorities, these justices essentially ask for the law to demonstrate compassion and generosity to religious groups and individuals who are powerless to effect majoritarian protection on their own. Such virtues require that government respect these minorities by giving careful attention to the stories of religious dissenters. They also call for serious and concrete self-reflection, borne out of the virtue of humility, on whether the state has truly considered the plight of religious minorities in its decision-making process, according their dilemmas of conscience value equal to those accorded majority believers. When that consideration has not been a significant part of the legislative process, the value of humility also requires the state to re-consider whether believers' requests for an exemption from generally applicable laws due to conflicts of conscience may be granted without serious damage to the state's interests. While there are no shortcuts to handle assertions of religious freedom claims, the Constitution and the experiment in religious liberty that it has fostered require no less.

Sept. 7, 2015).