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## Immigration, Sovereignty, and the Constitution of Foreignness

Michael J. Weil

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## Note

### THE FRIENDLY SEPARATION OF CHURCH AND STATE AND BANS ON MALE CIRCUMCISION

MICHAEL J. WEIL

*In 2011, San Francisco placed a measure to outlaw infant male circumcision on its November ballot. Members of the Jewish and Muslim faiths practice infant male circumcision as a tenet of their religions. If approved, this ballot measure would have raised serious questions about the scope of religious liberty protected under the Constitution. This Note argues that the Free Exercise Clause of the First Amendment prohibits governments from, at minimum, outlawing religious practices—at least not without satisfying the elements of strict scrutiny. This Note will undertake a critical analysis of the United States Supreme Court’s concept of neutrality as has been applied to religious practice and will advance an argument for the theory of “substantive neutrality.” Given that the San Francisco Ballot Measure fails to satisfy the substantive neutrality principle, and further that a circumcision ban does not serve a compelling state interest, the proposal would not be upheld under the rule advocated for in this Note.*

*Part II of this Note will provide a brief background of the religious motivations and social constructions of male circumcision and the medical debate over the procedure. Part III discusses the text and legislative motives of the San Francisco Ballot Measure. Subsequently, Part IV of this Note summarizes the Court’s Free Exercise Clause jurisprudence. Part V will analyze how a court considering the San Francisco Ballot Measure would apply these cases to the proposal, and it will show why analysis confined to the present rule is constitutionally deficient. Finally, the Note argues that substantive neutrality is the correct formulation of the neutrality requirement, and that the San Francisco Ballot Measure violates the principle.*

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# THE FRIENDLY SEPARATION OF CHURCH AND STATE AND BANS ON MALE CIRCUMCISION

MICHAEL J. WEIL\*

God . . . said to Abraham, “As for you, you and your offspring to come throughout the ages shall keep [m]y covenant . . . . [E]very male among you shall be circumcised. You shall circumcise the flesh of your foreskin and that shall be the sign of the covenant between Me and you. And throughout the generations, every male among you shall be circumcised at the age of eight days.”<sup>1</sup>

## I. INTRODUCTION

For the entirety of my faith’s existence, Jewish people have circumcised their sons,<sup>2</sup> both in times of normalcy and in times of great adversity, persecution, and death. The ritual of circumcision survived the Roman conquest,<sup>3</sup> the Babylonian conquest,<sup>4</sup> and even the concentration

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\* The George Washington University, B.A., *magna cum laude*, 2008; University of Connecticut School of Law, J.D., 2013. I would like to thank Professor Gordon Silverstein for his helpful feedback throughout the drafting of this Note. This Note is dedicated to my parents, Bena’ and Steven Weil, for their unyielding love and steadfast support. I would also like to thank Irina Lisker for her invaluable research assistance and unwavering encouragement. Finally, I would like to thank the editors of the *Connecticut Law Review* for their tireless efforts throughout the editing of this Note. Any errors contained herein are mine and mine alone.

<sup>1</sup> *Genesis* 17:9–12; *see also Leviticus* 12:2–3 (“When a woman at childbirth bears a male . . . [o]n the eighth day the flesh of his foreskin shall be circumcised.”). All biblical citations are from TANAKH: A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE TRADITIONAL HEBREW TEXT (1985).

<sup>2</sup> *See* Aaron Glantz, *Increasingly, A Ritual Is Bypassed*, N.Y. TIMES, July 29, 2011, at A17 (stating that Jewish parents have circumcised boys for thousands of years, following a biblical commandment); Brad A. Greenberg, *The Circumcision Wars*, WALL ST. J., June 3, 2011, at A13 (“This custom [of circumcision] is as old as Judaism itself.”); *see also* Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL’Y & L. 497, 513 (2002) (“The Israelites practiced the custom beginning, according to the book of Genesis, with the circumcision of Abraham at age ninety-nine.” (citing *Genesis* 17:24)).

<sup>3</sup> *See* DAVID L. GOLLAHER, CIRCUMCISION: A HISTORY OF THE WORLD’S MOST CONTROVERSIAL SURGERY 15 (2000) (describing efforts by the Jews during the Roman Era to convince Roman leaders to allow the practice of infant male circumcision to continue); *see also* LEONARD B. GLICK, MARKED IN YOUR FLESH: CIRCUMCISION FROM ANCIENT JUDEA TO MODERN AMERICA 31 (2005) (“Although Jews in the Roman Empire knew that others considered circumcision barbarous, most Jewish fathers acceded to what they believed was a divine mandate.”); Miller, *supra* note 2, at 517 (describing the Bar Kabbah rebellion and the Roman Emperor’s futile attempt to bar circumcision).

camp of Nazi Europe.<sup>5</sup> Muslims also practice circumcision as a religious rite.<sup>6</sup> Recently, “Inactivists”<sup>7</sup> in San Francisco proposed a city ordinance to criminalize nearly all forms of circumcision performed on males under age eighteen.<sup>8</sup> Marc Stern, associate general counsel for legal advocacy for the American Jewish Committee, referred to the proposal as “the most direct assault on Jewish religious practice in the United States. . . . It’s unprecedented in American Jewish life.”<sup>9</sup>

Aside from representing a “direct assault” on Jewish and Muslim religious practice, the proposal raises serious and fundamental questions about the extent of religious liberty in the United States today. The United States, it has been said, enjoys a “friendly” separation of church and state.<sup>10</sup> Alexis de Tocqueville made a similar observation, commenting:

I have expressed enough to characterize Anglo-American civilization in its true colors. This civilization is the result . . . of two quite distinct ingredients, which anywhere else have often ended in war but which Americans have succeeded somehow to meld together in wondrous harmony; namely the *spirit of religion* and the *spirit of liberty*. . . . Far from harming each other, these two inclinations, despite their apparent opposition, seem to walk in mutual agreement and

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<sup>4</sup> See GOLLAHER, *supra* note 3, at 15 (“Antiochus Epiphanes, the draconian ruler of Judea during the second century B.C., imposed severe penalties for circumcision as part of his assault on Judaism.” (citation omitted)).

<sup>5</sup> See Michael Gerson, *Making Circumcision Criminal*, WASH. POST, July 6, 2012, at A17 (describing a circumcision at the Janowska Concentration Camp in Poland); Israel Spira, *The Nazi Accomplice in Circumcision*, CHABAD.ORG, [http://www.chabad.org/library/article\\_cdo/aid/2619/jewish/h/The-Nazi-Accomplice-in-the-Circumcision.htm](http://www.chabad.org/library/article_cdo/aid/2619/jewish/h/The-Nazi-Accomplice-in-the-Circumcision.htm) (last visited Sept. 28, 2012).

<sup>6</sup> See *infra* Part II.A.2.

<sup>7</sup> “Inactivist” is the term by which members of the anti-circumcision movement refer to themselves. See, e.g., Mikaela Conley, *Circumcision Ban to Appear on San Francisco Municipal Election Ballot*, ABC NEWS (May 19, 2011), <http://abcnews.go.com/Health/san-francisco-vote-circumcision-ban/story?id=13638220#UGYyT6RSTcY> [hereinafter Conley, *Circumcision Ban*] (defining “inactivists” as “people who believe that infant boys have the right to keep their foreskin intact”).

<sup>8</sup> See Initiative Measure to Be Submitted Directly to the Voters: Genital Cutting of Male Minors (proposed Oct. 13, 2010), available at <http://sfgov2.org/ftp/uploadedfiles/elections/candidates/2011MaleCircumcision.pdf> [hereinafter San Francisco Ballot Measure]. The measure was removed from the ballot on July 28, 2011 by judicial order. See Maria L. La Ganga, *San Francisco Is Ordered to Halt Circumcision Vote*, L.A. TIMES, July 29, 2011, at AA5 [hereinafter La Ganga, *Judge Orders*] (stating that a court removed the initiative from the November 2011 ballot because it was preempted by state law).

<sup>9</sup> Conley, *Circumcision Ban*, *supra* note 7 (internal quotation marks omitted).

<sup>10</sup> PHILIP SCHAFF, CHURCH AND STATE IN THE UNITED STATES OR THE AMERICAN IDEA OF RELIGIOUS LIBERTY AND ITS PRACTICAL EFFECTS 10 (Arno Press 1972) (1888) (“Such liberty is impossible on the basis of a union of church and state, where the one of necessity restricts and controls the other. It requires a friendly separation, where each power is entirely independent in its own sphere.”).

support.<sup>11</sup>

How is it that this unique character of religious liberty described by Tocqueville and later Schaff came into being? It can at least partially be attributed to the dualities of religious freedoms protected by the First Amendment: The state is forbidden from showing favoritism to any one religion<sup>12</sup> and concomitantly is prohibited from interfering with any individual's or group's religious exercise.<sup>13</sup>

These pages explore the contours and boundaries of the Supreme Court's Free Exercise Clause jurisprudence as applied to the San Francisco Ballot Measure, focusing on two cases in particular: *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>14</sup> and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>15</sup> This Note argues that the Free Exercise Clause means that, at minimum, governments may not outlaw religious practices—at least not without satisfying the elements of strict scrutiny (a compelling state interest and narrowly tailored means).<sup>16</sup> This Note will undertake a critical analysis of the Court's concept of neutrality as has been applied to religious practice and will advance an argument for the theory of “substantive neutrality.”<sup>17</sup> Given that the San Francisco Ballot Measure fails to satisfy the substantive neutrality principle, and since there is no compelling state interest served by a circumcision ban, the proposal would not be upheld under the rule advocated for by this Note.

Part II of this Note will provide a brief background of the religious

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<sup>11</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 55–56 (Gerald E. Bevan trans., Penguin Books 2003) (1840).

<sup>12</sup> See U.S. CONST. amend. I [hereinafter Establishment Clause] (“Congress shall make no law respecting an *establishment* of religion.” (emphasis added)); see also *Everson v. Board of Ed.*, 330 U.S. 1, 15–16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . ‘In the words of Jefferson, the Clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” (quoting *Reynolds v. United States*, 98 U.S. 145, 146 (1878))).

<sup>13</sup> See U.S. CONST. amend. I [hereinafter Free Exercise Clause] (“Congress shall make no law . . . prohibiting the *free exercise thereof* . . .” (emphasis added)).

<sup>14</sup> 494 U.S. 872 (1990).

<sup>15</sup> 508 U.S. 520 (1993).

<sup>16</sup> The religion clauses of the First Amendment have been incorporated by the Court under the Fourteenth Amendment and are binding on the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); see LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 149 (2d ed. 1994) (“In 1940, when the Supreme Court incorporated the free-exercise clause into the Fourteenth Amendment, the Court assumed that the establishment clause imposed upon the states the same restraints as upon the United States.”).

<sup>17</sup> Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DEPAUL L. REV.* 993, 1001 (1990) [hereinafter Laycock, *Formal*] (noting that substantive neutrality understands the religion clauses to “require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance”).

motivations and social constructions of male circumcision and the medical debate over the procedure. Part III discusses the text and legislative motives of the San Francisco ballot measure. Subsequently, Part IV of this Note summarizes the Court's Free Exercise Clause jurisprudence. Here it is shown that, prior to *Smith* and *Lukumi*, the Court applied substantive neutrality when analyzing cases under the Free Exercise Clause. Part V will analyze how a court considering the San Francisco Ballot Measure would apply the rules elucidated in *Smith* and *Lukumi* to the proposal, and it will show why analysis confined to these decisions is constitutionally deficient. Here it is argued that substantive neutrality is the correct formulation of the neutrality requirement, and that the San Francisco Ballot Measure violates this principle.

## II. BACKGROUND: MALE CIRCUMCISION

"Circumcision is the removal of a simple fold of skin—the 'prepuce' (or 'foreskin')—that covers the glans (head) of the flaccid penis."<sup>18</sup> This section provides a background discussion on the religious, cultural, and medical ideas and controversies surrounding male circumcision.

### A. Religious Motivations

#### 1. Judaism and the *Berit Milah*<sup>19</sup>

In Judaism, the obligation of male circumcision is found in *Genesis* (the first book of the Pentateuch).<sup>20</sup> The biblical text teaches that God appeared to Abram at age ninety-nine to "establish My covenant between Me and you."<sup>21</sup> Under the covenant, God promised Abraham and his offspring all the land of Canaan (biblical Israel). In exchange for God's promise, the Jewish people were instructed to "circumcise the flesh of your foreskin."<sup>22</sup>

This covenant established between God and Abraham is central to Jewish theology. In fact, *Genesis* mandates that uncircumcised men be

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<sup>18</sup> Brian J. Morris, *Why Circumcision Is a Biomedical Imperative for the 21st Century*, 29 *BIOESSAYS* 1147, 1147 (2007).

<sup>19</sup> "Berit milah" translates from Hebrew to "covenant of circumcision." GOLLAHER, *supra* note 3, at 24. "The first stage of a ritual circumcision—the initial cut—is called by the Hebrew term *milah*. The Hebrew word for 'covenant,' in the Sephardic pronunciation now used in Israel, is *brit*—hence that term *brit milah*." GLICK, *supra* note 3, at 6.

<sup>20</sup> The Pentateuch includes the first five books of the Hebrew Bible attributed to Moses: *Genesis*, *Exodus*, *Leviticus*, *Numbers*, and *Deuteronomy*. STEPHEN PROTHERO, *RELIGIOUS LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW—AND DOESN'T* 162 (2007).

<sup>21</sup> *Genesis* 17:1–2.

<sup>22</sup> *Id.* 17:11.

cast out of the community.<sup>23</sup> The ritual of circumcision must occur during the daylight hours of the child's eighth day of life<sup>24</sup> and takes precedence over other religious obligations, including the obligation to refrain from labor on the Sabbath or Yom Kippur, the holiest day of the year.<sup>25</sup>

One scholar has offered this description of a typical bris<sup>26</sup>:

The bris is a joyous occasion to which guests are invited from near and far. If possible, ten men constitute a minyan, or quorum required under religious law, to conduct worship services. The parents select a godmother and a godfather (sandak) for the ceremony. The mother hands the child to the godmother, who in turn passes him to the godfather, whose job is to hold the child during the miloh (cutting). The ritual expert, or mohel, performs the operation and recites the prescribed prayers. At the mezizah, the traditional (but now largely abandoned) culmination of the ritual, the mohel sips wine and sucks the infant's penis, spitting the mixture of blood and wine into a glass. Afterwards, the assembled crowd joins in a festive meal, the *suedo shel mitzvo*.<sup>27</sup>

Aside from (or perhaps divorced from) the religious obligation, circumcision is a form of expressive conduct in the Jewish faith, signifying one's Jewish identity and place in the religion (and that of his or her child).<sup>28</sup> "A circumcised penis is a symbol of identity among Jews; it distinguishes the Jew from the non-Jews. It not only signifies the covenant, but also signifies a people that have suffered persecution throughout the ages."<sup>29</sup> This suggests that rather than being merely a Halakhic obligation, circumcision carries great cultural significance for Jewish people. For example, Leonard Glick argues that "Jews expect boys to be circumcised, simply as a time-honored ethnic custom, divorced from

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<sup>23</sup> *Id.* 17:14 ("[I]f any male who is uncircumcised fails to circumcise the flesh of his foreskin, that person shall be cut off from his kin; he has broken My covenant.").

<sup>24</sup> Miller, *supra* note 2, at 514 (stating that Jewish tradition holds that circumcision shall occur on the eighth day after birth).

<sup>25</sup> GOLLAHER, *supra* note 3, at 24; Greenberg, *supra* note 2, at A13.

<sup>26</sup> "Bris" is the term familiar to most Americans to describe the circumcision ritual. GLICK, *supra* note 3, at 6.

<sup>27</sup> Miller, *supra* note 2, at 514. Glick's description of the Jewish circumcision ritual is less sanguine. See GLICK, *supra* note 3, at 7–8 (describing the Jewish circumcision ritual).

<sup>28</sup> Miller, *supra* note 2, at 521 ("For Jews, circumcision was by far the most salient mark of identity—it was the feature that distinguished a Jew from other peoples, a covenant demanded by God for all Jews. Circumcision, said Maimonides, was a reliable indicator of a person's Jewish identity because it was painful. . . . Circumcision for Jews was an essential mark of self and, accordingly, was highly esteemed within Jewish culture."); see also GLICK, *supra* note 3, at 8 (stating that for many Jewish parents, circumcision "somehow helps to 'make the boy Jewish'").

<sup>29</sup> Abbie J. Chessler, Comment, *Justifying the Unjustifiable: Rite v. Wrong*, 45 BUFF. L. REV. 555, 584 (1997).

historical or theological context.”<sup>30</sup>

## 2. *Islam and Male Circumcision*

Although never mentioned in the Qur’an, circumcision is widely practiced among Islamic people as a religious obligation;<sup>31</sup> the ritual has been part of the Islamic tradition since the ninth century.<sup>32</sup>

Unlike the strict eight days of Judaism, the time when the procedure is performed among Muslims is not uniform.<sup>33</sup> Circumcision is sometimes performed only once the boy is able to read the Qur’an.<sup>34</sup> Other Muslims perform the ritual during the child’s infancy, perhaps as early as the seventh day of life<sup>35</sup> while still others perform the circumcision during puberty.<sup>36</sup>

## 3. *Christianity and Circumcision*

Christianity has never required circumcision as an act of religious faith.<sup>37</sup> Early Christians rejected circumcision, and its significance became a mark of distinction between Christians and non-Christians.<sup>38</sup> Recognizing that importing circumcision into Christianity would be unpalatable and hurt his evangelizing efforts, the Apostle Paul excised the practice from the new religion, explaining that Jesus had subsumed the old covenant between God and Abraham, which rendered circumcision irrelevant.<sup>39</sup> According to one scholar, “The Church abandoned circumcision under the doctrine that Christ had abolished circumcision and

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<sup>30</sup> GLICK, *supra* note 3, at 9. Glick estimates that less than ten percent of Jews who practice circumcision are strictly observant, or are even aware of the Biblical covenant. *Id.*

<sup>31</sup> See GLICK, *supra* note 3, at 5.

<sup>32</sup> *Id.* at 317 n.80; see also Chessler, *supra* note 29, at 585 (“Most Muslims consider circumcision essential and a *sunna*, an action of the prophet, which indicates that all past prophets performed it. There are many narrative reports which demonstrate that circumcision was a *sunna* at the time of Muhammad.”).

<sup>33</sup> See GOLLAHER, *supra* note 3, at 46 (noting that Muslim clerics have never agreed on a standardized time for the ritual); see also Miller, *supra* note 2, at 514 (stating there is no set time for circumcision in Islamic cultures, but the procedure must occur before the male reaches adulthood).

<sup>34</sup> Chessler, *supra* note 29, at 585.

<sup>35</sup> GLICK, *supra* note 3, at 283 n.3 (“Although the Muslim code of religious law (*shariah*) recommends performance of circumcision at the age of seven days, this is seldom followed.”).

<sup>36</sup> Thirteen years of age is generally taken as the latest acceptable age for circumcision among Muslims. Abraham circumcised Ishmael, the putative father of the Arab people, at age thirteen. *Id.*

<sup>37</sup> Miller, *supra* note 2, at 517.

<sup>38</sup> See GLICK, *supra* note 3, at 6 (“Until fairly recently Christians not only rejected but often vilified circumcision; from Paul’s time onward they interpreted the practice as prime evidence that Judaism was so fixated on irrelevant physical concerns that spiritual life was beyond reach.”); Miller, *supra* note 2, at 518 (stating that circumcision “became a mark, for Christians, of how they were different from Jews”).

<sup>39</sup> GLICK, *supra* note 3, at 36–37; see also Miller, *supra* note 2, at 517 (“Paul, the apostle to the Gentiles, viewed circumcision as meaningless and irrelevant.”).

other ritual separations between Jew and Gentile.”<sup>40</sup> For Christians, the rite of initiation (for both males and females) is the baptism.<sup>41</sup>

### B. *The Cultural Norm of Male Circumcision*

Circumcision ranks amongst the most common surgical procedures performed on newborn males worldwide<sup>42</sup> and in 2005, it was the third most commonly performed surgery in the United States.<sup>43</sup> Hospitals in the U.S. performed more than 1.2 million circumcisions in 2005.<sup>44</sup>

The procedure is common internationally, as “[g]lobally over 25% of men are circumcised.”<sup>45</sup> Rates of circumcision in the United States have declined from their peak during the 1950s when 90% of newborn males were circumcised in response to advice from the medical community about the procedure’s beneficial effects.<sup>46</sup> According to the Centers for Disease Control and Prevention (“CDC”), in 1999, 65% of all males born in U.S. hospitals were circumcised.<sup>47</sup> That number fell to 56% of newborns prior to leaving the hospital in 2005,<sup>48</sup> with some reports suggesting the number might be even lower.<sup>49</sup> Among Jewish American men, 98% have been circumcised.<sup>50</sup> Since Jews and Muslims comprise approximately 3% of the U.S. population, it has been estimated that only 10% of the circumcisions performed in the U.S. are religiously motivated.<sup>51</sup>

<sup>40</sup> Miller, *supra* note 2, at 517–18.

<sup>41</sup> GLICK, *supra* note 3, at 6–7.

<sup>42</sup> See *Circumcision (Male)*, MAYO CLINIC, <http://www.mayoclinic.com/health/circumcision/MY01023> (last visited Sept. 8, 2012) (“Circumcision is fairly common for newborn boys in certain parts of the world, including the United States.”). *But see* GLICK, *supra* note 3, at 4–5 (stating that the United States stands apart from the world in widespread circumcision of male newborns).

<sup>43</sup> Chaya T. Merrill et al., *Statistical Brief #45: Circumcisions Performed in U.S. Community Hospitals, 2005*, HEALTHCARE COST & UTILIZATION PROJECT (HCUP) (Jan. 2008), <http://www.hcup-us.ahrq.gov/reports/statbriefs/sb45.jsp> [hereinafter Merrill, *Statistical Brief #45*].

<sup>44</sup> *Id.*

<sup>45</sup> Morris, *supra* note 18, at 1147.

<sup>46</sup> Edward Guthmann, *Circumcision Losing Favor with U.S. Parents*, S.F. CHRON., June 21, 2007, at A1.

<sup>47</sup> *NCHS Health E-Stat: Trends in Circumcisions Among Newborns*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/data/hestat/circumcisions/circumcisions.htm> (last updated Feb. 3, 2010).

<sup>48</sup> Merrill, *supra* note 43.

<sup>49</sup> Officials from the CDC presented findings at the International AIDS Conference in Vienna in 2010 suggesting that just 32.5% of boys born in conventional hospitals were circumcised in 2009. Roni Caryn Rabin, *Steep Drop Seen in Circumcisions in U.S.*, N.Y. TIMES, Aug. 17, 2010, at D6.

<sup>50</sup> Glantz, *supra* note 2; *see also* Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL’Y & L. 87, 91 (1999) (stating that circumcision is “almost universal among Jewish men”). No figure for the rate of circumcision among Muslims or Christians could be obtained.

<sup>51</sup> *See* Eugene Volokh, *Proposed San Francisco Circumcision Ban (with No Discussion of Religious Freedom in this Post)*, THE VOLOKH CONSPIRACY (May 23, 2011, 11:24 AM), <http://volokh.com/2011/05/23/proposed-san-francisco-circumcision-ban-with-no-discussion-of->

Despite its decline, circumcision remains the cultural norm in the United States.<sup>52</sup> Given the ubiquity of the procedure and the social norms associated with circumcision, it is unsurprising that American parents are concerned that their son's genitals look like "everyone else's."<sup>53</sup> "Many focus on cosmetic justifications [for circumcisions], saying that they want their son to feel 'comfortable' among other boys in locker rooms, or that a boy should 'look like' his father."<sup>54</sup>

### C. Medical Arguments

Advocates for and opponents of circumcision have debated, and continue to debate, the relative benefits and harms of circumcision.

Medical evidence establishes that circumcision is correlated with lower the occurrences of urinary tract infections ("UTI") in infants;<sup>55</sup> circumcised men experience lower rates of penile and other cancers;<sup>56</sup> and circumcised men suffer from fewer sexually transmitted infections,<sup>57</sup> including human immunodeficiency virus/acquired immunodeficiency syndrome ("HIV"/AIDS).<sup>58</sup> The World Health Organization ("WHO") reports that

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religious-freedom-in-this-post (estimating that 90% of circumcisions are not religiously motivated); *see also* Povenmire, *supra* note 50, at 91 ("The vast majority of circumcisions in the United States, however, are upon non-Jewish and non-Muslim men.").

<sup>52</sup> *See* Miller, *supra* note 2, at 502 ("Circumcision of boys remains normative [in American culture], and the cultural revisionism of anti-circumcision norm entrepreneurs remains at the fringes of American public discourse.").

<sup>53</sup> Chessler, *supra* note 29, at 581. "Circumcised fathers are obsessed with conformity, wanting their child's penis also to be circumcised. They worry about the social problems an uncircumcised child may confront as he matures." *Id.* A 1987 study referenced by Volokh lists the following reasons for non-medical circumcision: the father being circumcised (11%); not wanting the son to look different from the father (18%); and "I just think it should be done" (9%). Volokh, *supra* note 51.

<sup>54</sup> GLICK, *supra* note 3, at 7.

<sup>55</sup> *See, e.g.,* Morris, *supra* note 18, at 1151 (stating there is a 2.5% incidence of urinary tract infection in uncircumcised boys, as compared to a 0.2% incidence in circumcised boys); Aaron A.R. Tobian & Ronald H. Gray, *The Medical Benefits of Male Circumcision*, 306 JAMA 1479, 1480 (2011); Kimberly K. Updegrave, *An Evidence-Based Approach to Male Circumcision: What Do We Know?*, 46 J. MIDWIFERY & WOMEN'S HEALTH 415, 416 (2001) (noting that the incidence of UTI in uncircumcised males is twelve times higher than among circumcised men).

<sup>56</sup> Morris, *supra* note 18, at 1151 (stating that uncircumcised men have a twenty-two times higher incidence of penile cancer and a 1.6 to 2.0 times higher incidence of prostate cancer than circumcised men); Tobian & Gray, *supra* note 55, at 1479; Updegrave, *supra* note 55, at 419.

<sup>57</sup> Morris, *supra* note 18, at 1150, 1151 (stating that circumcision provides "substantial protection" from the sexually transmitted diseases syphilis, chancroid, herpes, and human papillomavirus ("HPV")); Tobian & Gray, *supra* note 55, at 1479 (acknowledging that two trials demonstrated that circumcision reduces the risk of acquiring genital herpes by 28% to 34% and high-risk types of HPV by 32% to 35%); Updegrave, *supra* note 55 at 418 (estimating that the relative risk of an uncircumcised man contracting gonorrhea and herpes is twice as high for uncircumcised men and five times higher for candida and syphilis).

<sup>58</sup> *See, e.g.,* Gray & Tobian, *supra* note 55, at 1479 (asserting that consistent with observational studies in Africa and the United States, studies in Africa show a 51% to 60% decrease in HIV acquisition in circumcised men); Morris, *supra* note 18, at 1150 (finding that circumcision provides a

circumcision has been shown to lower men's risk of contracting HIV by up to 60%, and it is now recommended as part of a comprehensive program to eradicate HIV/AIDS in Africa.<sup>59</sup>

Citing insufficient medical data, the American Academy of Pediatrics ("AAP") does not presently recommend the procedure.<sup>60</sup> In its policy statement, the AAP notes that "[i]n the case of circumcision, in which there are potential benefits and risks, yet the procedure is not essential to the child's current wellbeing, parents should determine what is in the best interest of the child."<sup>61</sup> Further, in making this decision, "[i]t is legitimate for parents to take into account cultural, religious, and ethnic traditions, in addition to the medical factors."<sup>62</sup> Similarly, the CDC has not taken a position on the procedure.<sup>63</sup>

Opponents of circumcision argue that it should be outlawed because removing thousands of healthy nerve endings<sup>64</sup> on the infant is excruciatingly painful.<sup>65</sup> Other common criticisms of the procedure are that it can involve surgical complications (such as infection, hemorrhaging, and scarring);<sup>66</sup> that it can lead to disfigurement or loss of all or part of the

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two-to-eight-fold protection against HIV infection and circumcision led to a 56% to 75% risk reduction); Updegrave, *supra* note 55, at 418 (acknowledging that circumcision provides an average two-to-three-fold reduction in the prevalence of HIV; as much as an 8.2-fold reduction has been reported).

<sup>59</sup> WORLD HEALTH ORG., TRADITIONAL MALE CIRCUMCISION IN THE CONTEXT OF HIV PREVENTION 8 (July 30, 2010), available at [http://www.who.int/hiv/pub/malecircumcision/meetingreport\\_tmc\\_apr10/en/index.html](http://www.who.int/hiv/pub/malecircumcision/meetingreport_tmc_apr10/en/index.html).

<sup>60</sup> Am. Acad. of Pediatrics, *Circumcision Policy Statement*, 103 PEDIATRICS 686, 691 (1999), available at <http://www.cirp.org/library/statements/aap1999>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *Status of CDC Male Circumcision Recommendations*, <http://www.cdc.gov/hiv/topics/research/male-circumcision.htm> (last updated Aug. 27, 2009).

<sup>64</sup> See Email from Matthew Hess, President, MGBILL.ORG, to Author (Oct. 31, 2011, 4:58 EST) (on file with author) (writing that "[c]ircumcision of either gender removes thousands of nerve endings and interferes with normal sexual function").

<sup>65</sup> See Mark C. Alanis & Richard S. Lucidi, *Neonatal Circumcision: A Review of the World's Oldest and Most Controversial Operation*, 59 OBSTETRICAL GYNECOLOGICAL SURVEY 379, 388 (2004) (stating that the belief that circumcision causes minor amounts of pain has been proven false); Stephen Moses et al., *Male Circumcision: Assessment of Health Benefits and Risks*, 74 SEXUALLY TRANSMITTED INFECTIONS, 368, 371 (1998) (stating that "infants undergoing circumcision without anesthesia demonstrate physiological responses suggesting that they are experiencing pain and behavioral changes"); Povenmire, *supra* note 50, at 97 (asserting that circumcision is "known to be traumatic and painful for newborns . . . and results in a long-term heightened pain response"); see also Updegrave, *supra* note 55, at 420 (noting that the long held belief that circumcision causes no pain for the infant has been disproven).

<sup>66</sup> Alanis & Lucidi, *supra* note 65, at 389 (noting that minor bleeding and local infection are the most common complications of circumcision); Moses et al., *supra* note 65 at 371 (stating that complications of circumcision include infections and bleeding). The rate of post-operative complications for male circumcision is 0.2% to 0.6%. *Id.*; see also DOCTORS OPPOSING CIRCUMCISION, GENITAL INTEGRITY POL'Y STATEMENT, available at

penis;<sup>67</sup> that it can have psychological and emotional effects, including sexual dysfunction;<sup>68</sup> and (though exceedingly rare) that it can result in death.<sup>69</sup>

### III. THE SAN FRANCISCO BALLOT MEASURE

In the months following the development of this project, the San Francisco proposal was removed from the ballot by judicial order on an unrelated issue of state law. San Francisco is preempted from legislating in this area because the State of California already has a law regulating circumcisions.<sup>70</sup> Nonetheless, the constitutional question of whether a ban would violate the Free Exercise Clause is still alive and will likely surface again.<sup>71</sup> For example, as the first iteration of this Note was being written, the proponents of the San Francisco initiative planned to resubmit the circumcision ban to Congress and state legislatures across the country.<sup>72</sup> Also, somewhat beyond the scope of this Note, the mainstream media reported in the summer of 2012 on the decision of a judge to outlaw infant male circumcision, finding the procedure constitutes a form of bodily harm and is subject to criminal penalties.<sup>73</sup>

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<http://www.doctorsopposingcircumcision.org/DOC/statement04.html> (last visited Sept. 8, 2012) [hereinafter DOCTORS OPPOSING CIRCUMCISION] (listing hemorrhage, infection, and surgical mishap as immediate consequences of circumcision); *The Facts Behind Circumcision*, INTACT AM., <http://www.intactamerica.org/learnmore> (last visited Sept. 8, 2012) (stating that circumcision causes pain, infection, hemorrhage, and scarring).

<sup>67</sup> See DOCTORS OPPOSING CIRCUMCISION, *supra* note 66 (noting that more serious complications of circumcision include excision of part of the penis and amputation of the penis).

<sup>68</sup> See Alanis & Lucidi, *supra* note 65, at 390 (stating that many circumcision opponents have argued that removal of the foreskin causes sexual dysfunction); Moses et al., *supra* note 65, at 371 (noting anecdotal claims of physiological, emotional, and sexual adverse effects from male circumcision).

<sup>69</sup> Moses et al., *supra* note 65, at 371 (acknowledging that two deaths were reported from circumcision in the United States over a twenty-five year period). *But see* DOCTORS OPPOSING CIRCUMCISION, *supra* note 66 (citing a survey estimating 114 deaths in the United States annually from “circumcision-related causes”).

<sup>70</sup> See La Ganga, *Judge Orders*, *supra* note 8 (stating that San Francisco is preempted from banning circumcisions by the California Business and Professions Code because only the state is permitted to regulate medical procedures, and circumcision is a medical procedure).

<sup>71</sup> The proposal in San Francisco followed a similar proposal in Massachusetts during its 2009–2010 Session. Jessica Fargen, *Plan to Ban Circumcision a Longshot*, BOS. HERALD, Feb. 21, 2010, at 6. Additionally, MGM Bill is currently advocating for a federal and a state version of the male circumcision ban. Greenberg, *The Circumcision Wars*, *supra* note 2; *see also* *Congress and States Prepare for Another Circumcision Battle*, MGMBILL.ORG (Jan. 24, 2012), <http://mgmbill.org/pressrelease25.htm> (noting efforts to outlaw circumcision nationally and in eleven states).

<sup>72</sup> *2012 MGM Bill Submission State Office Guidelines*, MGMBILL.ORG, <http://mgmbill.org/2012.htm> (last visited Aug. 7, 2012).

<sup>73</sup> See, e.g., Benjamin Weinthal, *German Court Declares Circumcision a Crime*, JERUSALEM POST, June 27, 2012, at 6.

### A. *Chronology and Text of the San Francisco Ballot Measure*

The San Francisco Ballot Measure was proposed by the organization MGM Bill. MGM stands for “male genital mutilation.”<sup>74</sup> The sponsors of the proposal present the issue in extremely stark terms, often employing hyperbole to frame the issue. A group affiliated with MGM Bill, Intact America, explains on its website that circumcision “creates immediate health risks and can lead to serious complications,” which include “infection, hemorrhage, scarring, difficulty urinating, loss of part or all of the penis, and even death.”<sup>75</sup> They also compare the practice of male circumcision to female circumcision,<sup>76</sup> which they note is banned in the United States,<sup>77</sup> arguing that the female version of circumcision should not be banned while the male version remains legal. Other critics of circumcision resort to this false equation<sup>78</sup> of male and female circumcision.<sup>79</sup>

MGM Bill sees the issue as one of personal choice: If men want to be circumcised they should be able to choose so. The San Francisco proposal allowed men to be circumcised only after they reach age eighteen and prevents parents from making this irreversible choice for their sons. Matthew Hess, President of MGM Bill, said, “We’re not trying to stop people from getting circumcised if they want to. We just want to protect

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<sup>74</sup> See *A Bill to End Male Genital Mutilation in the U.S.*, MGMBILL.ORG, <http://mgmbill.org/index.htm> (last visited Aug. 7, 2012) (displaying headline referencing “Male Genital Mutilation”).

<sup>75</sup> *The Facts Behind Circumcision*, INTACT AM., <http://www.intactamerica.org/learnmore> <http://www.sfmgbill.org/Site/Home.html> (last visited Sept. 28, 2012).

<sup>76</sup> *Frequently Asked Questions*, MGMBILL.ORG, <http://mgmbill.org/faq.htm> (last visited Aug. 7, 2012) [hereinafter MGM Bill, *Frequently Asked Questions*] (“In the United States today, all forms of child female circumcision are prohibited . . . Males are not included in that legislation.”); *Congress and States Prepare for Another Circumcision Battle*, *supra* note 71 (“The [Male Genital Mutilation Bill] would protect boys from forced circumcision the same way that girls are protected under federal and state laws.”); Email from Matthew Hess, President, MGMBILL.ORG, to Author, *supra* note 64 (“I think circumcision of male children should be prohibited for the same reason that we prohibit female genital cutting . . . Every person—female and male—has the right to have their body left whole, and it is the government’s duty to protect those who cannot protect themselves.”).

<sup>77</sup> 18 U.S.C. § 116(a) (2006) (“Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.”).

<sup>78</sup> See *infra* Part V.B. for a discussion of the relative differences between male and female circumcision.

<sup>79</sup> See, e.g., Chessler, *supra* note 29, at 559 (“While concerns about female circumcision are at the forefront of human rights law, male circumcision, amazingly, continues to be virtually ignored. Although many activists and writers throughout the world condemn female circumcision, they fail to acknowledge the similarity between male and female circumcision, and to consequently reconsider the role of routine male circumcision in Western society.”).

children from getting it forced on them.”<sup>80</sup> Lloyd Schofield, a retired employee of the hotel industry and the leader of MGM’s efforts locally in San Francisco, said, “The foreskin is there for a reason . . . . It’s not a birth defect. It serves an important function in a man’s life, and nobody has a right to perform unnecessary surgery on another human being.”<sup>81</sup>

If approved, the proposed ban would have made it “unlawful to circumcise, excise, cut, or mutilate the whole or any part of the foreskin, testicles, or penis of another person who has not attained the age of 18 years.”<sup>82</sup> The penalty for violating this misdemeanor offense would have included a fine not to exceed \$1,000 and/or imprisonment.<sup>83</sup> There would have been a medical exception in circumstances where the operation was performed due to “clear, compelling, and immediate medical need with no less-destructive alternative treatment available.”<sup>84</sup> But when construing the medical exception, the proposal stated that “no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.”<sup>85</sup>

Opponents immediately challenged the proposal on grounds that it was preempted by California state law, which “contains a ‘clear’ prohibition” on these sorts of ballot measures.<sup>86</sup> The court agreed that the California Business and Professional Code, under which the state alone is empowered to regulate medical procedures, expressly preempted the measure.<sup>87</sup> It also held that the ballot measure, if approved, would violate the Free Exercise

<sup>80</sup> Heather Knight, *Circumcision Isn’t an Only-in-S.F. Ballot Issue*, S.F. CHRON., May 29, 2011, at D1 [hereinafter Knight, *Circumcision*]; see also MGM Bill *Frequently Asked Questions*, *supra* note 76 (“Unless there is a compelling medical reason to do so, no one has the right to cut off the working body part of a child.”); Email from Matthew Hess, President, MGBILL.ORG, to Author, *supra* note 64 (“Every person—female and male—has the right to have their body left whole, and it is the government’s duty to protect those who cannot protect themselves.”).

<sup>81</sup> Conley, *Circumcision Ban*, *supra* note 7.

<sup>82</sup> San Francisco Ballot Measure, *supra* note 8, § 5001.

<sup>83</sup> *Id.* § 5003.

<sup>84</sup> *Id.* § 5002(a).

<sup>85</sup> *Id.* § 5002(b). This Author asked Mr. Hess why a medical exemption was included, but not a religious one. He responded:

This would have no teeth with a religious exemption because any parent could simply check a box that says, ‘I wish to circumcise my son for religious reasons.’ Also, there is no religious exemption for female genital cutting and we feel that males deserve the same protection under the law. However, we recognize that there may be very rare instances where a circumcision must be performed for medical reasons (for example, a child gets in a serious accident that requires the foreskin be removed).

Email from Matthew Hess, President, MGBILL.ORG, to Author, *supra* note 64.

<sup>86</sup> Maria L. La Ganga, *Foes Sue to Get Circumcision Ban Taken off S.F. Ballot*, L.A. TIMES, June 23, 2011, at AA3.

<sup>87</sup> La Ganga, *Judge Orders*, *supra* note 8.

rights of Jews and Muslims.<sup>88</sup>

### B. *MGM Bill and Charges of Anti-Semitism*

The proponents of the San Francisco proposal asserted that there was no malice toward Judaism or Islam on their part in offering the proposed ban.<sup>89</sup> But some critics suggest an element of anti-Semitism, at least among some proponents of the ban.<sup>90</sup> As evidence, critics point to a comic book series authored by Matthew Hess titled “Foreskin Man,”<sup>91</sup> which catalogs the adventures of an Inactivist superhero on an anti-circumcision crusade.<sup>92</sup> One such critic—the Anti-Defamation League—condemned the comic book for its “grotesque anti-Semitic imagery and themes” and said the comic was “disrespectful and deeply offensive.”<sup>93</sup>

Tapping into “classic stereotypes of Jews,”<sup>94</sup> the comic book features “a bearded, black-hatted Jew with an evil grin and a bloody blade” (Monster Mohel) and “a blond, buff hero” (Foreskin Man) who fights the evil Jewish Mohel.<sup>95</sup> In the comic, Monster Mohel, holding a pair of bloody scissors and flanked by two armed men, appears in clothing traditionally worn by ultra-orthodox Jews.<sup>96</sup> According to the comic, Monster Mohel “likes nothing more than ‘cutting into the infantile penile

<sup>88</sup> *Id.*

<sup>89</sup> For example, in his email to the Author, Mr. Hess explained that, “[t]he common thread running through the Foreskin Man series [discussed below] is that forced circumcision of children is bad, not that Jews or Jewish customs are bad.” Email from Matthew Hess, President, MGMBILL.ORG, to Author, *supra* note 64.

<sup>90</sup> Adam Cohen, *San Francisco’s Circumcision Ban: An Attack on Religious Freedom?*, TIME (June 13, 2011), <http://www.time.com/time/nation/article/0,8599,2077240,00.html> (“Claims of insensitivity, however, have recently turned into charges of outright anti-Semitism. One of the referendum’s key supporters has written a comic book, *Foreskin Man*, that portrays a blond, Aryan-looking superhero doing battle with ‘Monster Mohel.’”).

<sup>91</sup> Mitchell Landsberg, *Comic Book Stirs Outrage in Fight Over Circumcision*, L.A. TIMES, June 4, 2011, at A1 [hereinafter Landsberg, *Comic Book*]; Allison Vekshin, *San Francisco Circumcision Referendum Stirs Anti-Semitism Debate*, BLOOMBERG (June 16, 2011; 12:01 AM), <http://www.bloomberg.com/news/2011-06-16/san-francisco-circumcision-ban-referendum-stirs-debate-over-anti-semitism.html> (quoting state Senator Mark Leno as referring to the comic strip’s images as “blatantly anti-Semitic” and stating that the images are “literally pulled from Nazi literature”). The comic strip is available at <http://www.foreskinman.com>.

<sup>92</sup> Knight, *Circumcision*, *supra* note 80.

<sup>93</sup> ADL Says *Anti-Circumcision Comic Book Offends with ‘Grotesque’ Anti-Semitic Imagery*, ANTI-DEFAMATION LEAGUE (June 3, 2011), [http://www.adl.org/PresRele/ASUS\\_12/6064\\_12.htm](http://www.adl.org/PresRele/ASUS_12/6064_12.htm).

<sup>94</sup> Will Kane, *Cartoon Campaign Prompts Charges of Anti-Semitism*, S.F. CHRON., June 7, 2011, at A1 [hereinafter Kane, *Cartoon Campaign*] (quoting Fred Astren, Professor of Jewish studies at San Francisco State University).

<sup>95</sup> Landsberg, *Comic Book*, *supra* note 91. Mr. Hess has stated that the Foreskin Man character is a caricature of himself. See Kane, *Cartoon Campaign*, *supra* note 94 (“Hess said he sees a bit of himself in Foreskin Man, noting that they both are of German ancestry and have light-colored hair.”).

<sup>96</sup> Landsberg, *Comic Book*, *supra* note 91. The men are depicted wearing black suits, white button down dress shirts, and black hats.

flesh of an 8-day-old boy.”<sup>97</sup> The comic book states that “after the glorified brit milah is complete, the delicious metzitzah b’peh provides the icing on the cake.”<sup>98</sup> “Metzitzah b’peh” refers to the practice of orally suctioning the wound after removing the foreskin of the penis to clean the wound.<sup>99</sup>

Hess denies that the cartoon or the proposal was targeted at Jewish religious practices.<sup>100</sup> In an email to this Author, he explained, “only one issue [of the Foreskin Man series] dealt with Jewish circumcision. The common thread running through the Foreskin Man series is that forced circumcision of children is bad, not that Jews or Jewish customs are bad.”<sup>101</sup>

#### IV. FREE EXERCISE CLAUSE JURISPRUDENCE

Thus far, this Note has considered the religious, cultural, and medical dimensions of circumcision without detailing the religious liberty interests at stake. We shall now turn to the voluminous jurisprudence interpreting the Free Exercise Clause of the First Amendment.

##### A. *Early Cases Interpreting the Free Exercise Clause*

###### 1. *Reynolds v. United States*

In its first Free Exercise Clause case, the Supreme Court concluded in *Reynolds v. United States*<sup>102</sup> that polygamy practiced for religious reasons was not protected under the Free Exercise Clause of the Constitution.<sup>103</sup>

Convicted of violating a statute that outlawed bigamy in the Utah Territory,<sup>104</sup> George Reynolds argued that, as a member of the Mormon

<sup>97</sup> Kane, *Cartoon Campaign*, *supra* note 94 (quoting *Monster Mohel*, MGBILL.ORG, <http://www.foreskinman.com/images/monster-mohel-card-back.jpg> (last visited Aug. 7, 2011)) (Hess says he “has no grudge against Jews, only one against those, Jewish or not, who practice circumcision”).

<sup>98</sup> *Monster Mohel*, MGBILL.ORG, <http://www.foreskinman.com/images/monster-mohel-card-back.jpg> (last visited Aug. 7, 2011).

<sup>99</sup> Andy Newman, *City Questions Circumcision Ritual After Baby Dies*, N.Y. TIMES, Aug. 26, 2005, at B5. This procedure has been all but abandoned and only occurs in the most ultra-Orthodox communities. *Id.*

<sup>100</sup> *See* Kane, *Cartoon Campaign*, *supra* note 94 (stating that conveying an anti-Semitic message in the Foreskin Man cartoon was “not the intention and not the point”).

<sup>101</sup> Email from Matthew Hess, President, MGBILL.ORG, to Author, *supra* note 64.

<sup>102</sup> 98 U.S. 145 (1878).

<sup>103</sup> *See id.* at 164 (concluding that Congress could prohibit religiously-motivated polygamy in the Utah Territory because the First Amendment protects only the right to hold religious beliefs and opinions, and not the right actually to engage religious conduct). “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” *Id.* at 166.

<sup>104</sup> *Id.* at 146, 150–51. Under the statute:

Church, it was his religious duty to practice plural marriage, and thus he had a constitutional right to do so.<sup>105</sup> Therefore, the statute could not constitutionally be applied to him.

While acknowledging the religious obligation on the part of Mormons to practice polygamy,<sup>106</sup> the Court rejected Reynolds's claim that under the Free Exercise Clause, he actually had the right to *engage* in that conduct.<sup>107</sup> Instead, the Court held that the First Amendment only denied Congress the power to regulate religious belief (not action).<sup>108</sup> Congress had the power "to reach actions which were in violation of social duties or subversive of good order."<sup>109</sup> Thus, the Court held that the Free Exercise Clause protects only the freedom to believe; it does not include a contemporaneous right to actually act upon that belief.<sup>110</sup>

The Court in *Reynolds* feared that allowing religious observers to claim an exemption would lead to anarchy. The Court stated: "Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."<sup>111</sup> The Court's decision, however, seems based more on anti-Mormon animus pervasive at the time than on legal principle. Specifically, the Court attacked polygamy as "odious among the northern and western nations of Europe" and referred to the practice as "almost exclusively a feature of the life of Asiatic and African people."<sup>112</sup>

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Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years.

*Id.* at 146. Although written as a law of general application, the statute was enacted specifically with the purpose of eliminating religious polygamy, which had been legal under the territorial laws of Utah. CATHERINE COOKSON, *REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE* 7 (2001).

<sup>105</sup> COOKSON, *supra* note 104, at 193 n.4 (stating that for nineteenth century Mormons, plural marriage was a religious obligation); PROTHERO, *supra* note 20, at 204 (listing polygamy as a religious belief of Mormonism until 1890).

<sup>106</sup> COOKSON, *supra* note 104, at 193 n.4.

<sup>107</sup> See *Reynolds*, 98 U.S. at 164 (Reynolds's polygamy could constitutionally be criminalized because, under the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions").

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* The opinion quoted from Thomas Jefferson's Letter to the Danbury Baptist Association for the proposition that "the legislative powers of the Government reach *actions only* and *not opinions*." *Id.* (emphasis added).

<sup>110</sup> See *id.* at 166 ("Laws are made for the government of *actions* and while they cannot interfere with mere religious *belief* and *opinions*, they may with *practices*." (emphasis added)).

<sup>111</sup> *Id.* at 166–67.

<sup>112</sup> *Id.* at 164.

## 2. Prince v. Massachusetts

In *Prince v. Massachusetts*,<sup>113</sup> the Court upheld the criminal conviction of Sarah Prince, a Jehovah's Witness, who violated her state's anti-child labor law by allowing her nine-year old niece (over whom she had guardianship)<sup>114</sup> to sell the Church's magazine on a public sidewalk.

Having been convicted, Prince argued the both her and her niece's conduct could not constitutionally be criminalized because evangelizing and distributing the *Watchtower* magazine was a religious duty for Jehovah's Witness.<sup>115</sup> The Court rejected this argument, concluding that that the state's power to regulate the activities of children was more expansive than its authority over adults and that a state could constitutionally prohibit (even religiously inspired) child labor.<sup>116</sup> The state has a vital interest in preventing harm to children, pursuant to the *parens patriae* doctrine;<sup>117</sup> as such, a state may subject religious conduct to incidental regulation.<sup>118</sup>

In *Prince*, the Court recognized that the parental right to direct a child's religious upbringing is not without limits and may be subject to reasonable regulation. The Court stated, "Parents may be free to become martyrs themselves. But it does not follow [that] they are free, in identical circumstances, to make martyrs of their children . . . ."<sup>119</sup> As applied here, the state was within its regulatory authority to regulate a child's preaching on a public street.<sup>120</sup> Opponents of circumcision have relied on this "martyr" dictum to substantiate their claims that the procedure should not

<sup>113</sup> 321 U.S. 158 (1944).

<sup>114</sup> *Id.* at 161.

<sup>115</sup> *Id.* at 164.

The record in *Prince* showed that the girl considered herself a devout Jehovah's Witness and had 'begged' her aunt/guardian to allow her to help her distribute the literature. . . . If the literature had been given away instead of offered for sale the law would not have been applied.

COOKSON, *supra* note 104, at 26.

<sup>116</sup> *Reynolds*, 98 U.S. at 168–69.

<sup>117</sup> *Id.* at 166–67 ("[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by . . . regulating or prohibiting the child's labor . . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

<sup>118</sup> *See id.* at 168–69 (holding that legislation designed to regulate children's public activities and employment is within the state's police power even when one's "religious scruples dictate contrary action").

<sup>119</sup> *Id.* at 170. It is curious why the Court used such explosive language ("martyr") to describe the conduct at issue in the case (selling magazines on a public street). *See* COOKSON, *supra* note 104, at 27 ("Note the strong language of 'martyrdom' used to describe the situation in this case, which, after all, involved a nine-year-old girl and her aunt offering religious literature on a public street.").

<sup>120</sup> *Prince*, 321 U.S. at 170.

be permitted—for religious or any other reason.<sup>121</sup>

### B. Sherbert, Yoder, and the Compelling Interest Test

Through this point, the Court's cases have given great deference to legislatures and have shown little regard for the religious liberty interests at stake. In *Sherbert v. Verner*,<sup>122</sup> and subsequently in *Wisconsin v. Yoder*,<sup>123</sup> the Court's free exercise cases turned toward granting some modicum of protection to the religious liberty interests at stake with the development of the compelling interest test.<sup>124</sup>

#### 1. Sherbert v. Verner

In *Sherbert*, for the first time, the Court applied strict scrutiny<sup>125</sup> to a Free Exercise challenge placing upon the state the burden of demonstrating that its action was justified by a "compelling state interest."<sup>126</sup>

Adell Sherbert, a Seventh Day Adventist, was fired from her job as a mill worker after refusing to work on Saturdays, her faith's Sabbath.<sup>127</sup> The state denied her unemployment benefits because she had rejected other work (which would have also required her to work on Saturday) without what it considered to be good cause.<sup>128</sup>

Reversing the courts below, Justice Brennan held that denying Sherbert unemployment compensation imposed an unjustifiable burden on her religious liberty by forcing her to choose between her financial livelihood and her faith.<sup>129</sup> In so holding, the Court recognized that not only direct, but also indirect burdens of government action could implicate

<sup>121</sup> See, e.g., William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 347 (1984); Povenmire, *supra* note 50, at 104.

<sup>122</sup> 374 U.S. 398 (1963).

<sup>123</sup> 406 U.S. 205 (1972).

<sup>124</sup> This general statement might be somewhat of an oversimplification of the Court's free exercise cases during this period. The result in *Sherbert* seems to conflict with a decision three years earlier, *Braunfeld v. Brown*, where the Court upheld a city's mandatory Sunday closing law, as applied to Orthodox Jewish merchants. The law indirectly placed a burden on the merchant, an Orthodox Jew who did not work on Saturday such that he could observe the Jewish Sabbath. He argued that closing two days a week (one day for religious practice and one day by state compulsion) placed him at a competitive disadvantage as compared to his competitors and would force him out of business. *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961). Ruling against *Braunfeld*, Chief Justice Warren concluded that the government's goal of providing a uniform day of rest was paramount and could not be compromised to accommodate Braunfeld and others similarly situated. *Id.* at 608–09.

<sup>125</sup> Where strict scrutiny is the applicable standard of review, "a law will be upheld if it is necessary to achieve a compelling government purpose." ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 554 & n.15 (4th ed. 2011).

<sup>126</sup> *Sherbert*, 374 U.S. at 406.

<sup>127</sup> *Id.* at 399 & n.1.

<sup>128</sup> *Id.* at 399–401.

<sup>129</sup> *Id.* at 410 (holding that "South Carolina may not Constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest").

constitutional rights:

The [South Carolina Employment Security Commission's] ruling forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.<sup>130</sup>

Under *Sherbert*, to uphold a rule that imposes burdens on religious practice, the state must show a compelling interest in promulgating the regulations<sup>131</sup> and demonstrate that these regulations are the least intrusive means of achieving the state's interest.<sup>132</sup>

The *Sherbert* Court rejected the state's purported compelling interest—fear of fraudulent claims or dilution of the fund by making payments to claimants unable to find work on religious ground—as purely speculative and unsubstantiated.<sup>133</sup> Further, even if these concerns were legitimate, the state failed to show that the problem could not be addressed in some other way that did not infringe upon Sherbert's rights under the First Amendment.<sup>134</sup>

## 2. *Wisconsin v. Yoder*

*Sherbert* purported to establish strict scrutiny as the proper standard of review for evaluating Free Exercise claims.<sup>135</sup> However, the Court was reluctant to invalidate laws on that basis.<sup>136</sup> Aside from *Sherbet*, the only other case during this period where strict scrutiny was used to vindicate claims under the Free Exercise Clause was in the field of compulsory school attendance laws as applied to Amish schoolchildren in *Wisconsin v. Yoder*.<sup>137</sup>

Nine years after *Sherbert*, the Court considered whether Amish students were entitled to a constitutional exemption from the state's compulsory school attendance law on religious grounds, and concomitantly, whether their parents may be held criminally liable for

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<sup>130</sup> *Id.* at 404. The Court concluded that in construing the state's interest, the burden on religious rights is not determined solely by looking at the law's intent; the effect or impact of the law on religious conduct is also relevant. COOKSON, *supra* note 104, at 28.

<sup>131</sup> *Sherbert*, 374 U.S. at 406.

<sup>132</sup> *Id.* at 407.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *supra* notes 125–126 and accompanying text.

<sup>136</sup> CHEMERINSKY, *supra* note 125, at 1297.

<sup>137</sup> *Id.* The Court did apply strict scrutiny to strike down the ordinances at issue in *Lukumi*, discussed *infra* at Part IV.C.2.

failure to comply with the law. Under the unique circumstances in *Yoder*, the Court held that the Free Exercise Clause prohibited Wisconsin from compelling school attendance of Amish children after age sixteen.<sup>138</sup>

The plaintiffs in *Yoder*—parents of Amish school children—refused to enroll their teenage children in school because they believed that exposure to such “worldly influence” threatened the Amish values and way of life.<sup>139</sup> Their objection was limited to enrollment of teenage students because it was during that phase in life that Amish children learned self-reliance and obtained the skills crucial to living a life as an Amish farmer or housewife.<sup>140</sup> In spite of these arguments, the parents were tried, convicted, and fined \$5 each.<sup>141</sup>

On appeal, the Supreme Court sided with the Amish parents, holding that the state’s interest in compulsory school attendance (in this case) was not sufficiently compelling to overcome the parents’ right to freely exercise their religion.<sup>142</sup> The decision turned on how compulsory attendance infringed upon the rights of the Amish parents to steer the religious upbringing of their children.

Writing for the Court, Chief Justice Burger noted, “the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”<sup>143</sup> As applied, the compulsory school attendance law would “gravely endanger if not destroy the free exercise of [the Amish parents’] religious beliefs.”<sup>144</sup> The Court recognized that the Amish parents had a legitimate interest in keeping their teenage children sheltered from cosmopolitan influences<sup>145</sup> and that the interest advanced by the state in educating children was not sufficiently compelling to justify inhibiting

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<sup>138</sup> *Yoder*, 406 U.S. 205 at 234.

<sup>139</sup> *Id.* at 210 (“Old Order Amish Communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.”). The Amish parents objected to sending their children to high school because “the values [higher education] teaches are in marked variance with Amish values and the Amish way of life; they viewed secondary education as an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs.” *Id.* at 210–11.

<sup>140</sup> *Id.* at 211. The Amish did not challenge compulsory school attendance up to and through the eighth grade, because they believed children must learn the basic skills taught in the early grades. *Id.* at 212.

<sup>141</sup> *Id.* at 208.

<sup>142</sup> *Id.* at 234. Note that in making its ruling, the Court considered the religious freedom of the parents, not the children.

<sup>143</sup> *Id.* at 216.

<sup>144</sup> *Id.* at 219.

<sup>145</sup> *See id.* at 218 (“[S]econdary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the . . . Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith . . .”).

their religious practice.<sup>146</sup>

The Court rejected the State's argument that under the *parens patriae* doctrine, it had the power to act against the parents to advance the Amish children's best interest.<sup>147</sup> The Court reasoned that allowing the state to mandate two additional years of education for these Amish children would, in essence, allow the state to dictate the children's religious future.<sup>148</sup> The Court did cabin its expansive viewpoint on the reach of state power, distinguishing the case from situations involving the exercise of the police power, which would permit greater government regulation.<sup>149</sup> The Court explained that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child."<sup>150</sup> The Court distinguished *Yoder* from *Prince*, noting that "[t]his case . . . is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."<sup>151</sup>

### C. *The Modern Regime Under Smith and Lukumi*

Today, free exercise questions are resolved under the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which was fleshed out by a subsequent decision *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.

#### 1. *Employment Division, Department of Human Resources of Oregon v. Smith*

In *Smith*, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct his religion prescribes (or proscribes).'"<sup>152</sup>

Alfred Smith and Galen Black, both members of a Native American Church, ingested peyote as part of a religious ceremony.<sup>153</sup> Both were subsequently fired from their jobs as counselors at a drug treatment center

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<sup>146</sup> See *id.* at 222 ("It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as preparation of the child for life in the separated agrarian community that is the keystone of Amish faith.").

<sup>147</sup> *Id.* at 229–30.

<sup>148</sup> *Id.* at 232.

<sup>149</sup> COOKSON, *supra* note 104, at 32.

<sup>150</sup> *Yoder*, 406 U.S. at 233–34.

<sup>151</sup> *Id.* at 230. The question of physical harm to children is considered *infra* at Part V.B.

<sup>152</sup> *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

<sup>153</sup> *Id.* at 874.

and denied unemployment compensation by the State of Oregon because their terminating offense (illegal drug use) constituted work-related “misconduct.”<sup>154</sup> In its challenge to the state’s denial of this benefit, the Oregon Supreme Court held that Smith’s religious use of peyote fell within the state’s prohibition, that state law did not include an exception for sacramental usage, and that such prohibition did not violate the Free Exercise Clause.<sup>155</sup>

The Supreme Court, in an opinion by Justice Scalia, rejected Smith’s argument (seemingly in line with *Yoder*) that the Free Exercise Clause required a religious-conduct exemption from an otherwise valid state law.<sup>156</sup> Justice Scalia stated, “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>157</sup> This statement by the Court, of course, cannot be squared with the Court’s holding in *Yoder*. Instead, the majority in *Smith* held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>158</sup> As applied to Smith, the First Amendment did not mandate that he receive an exemption from Oregon’s state law prohibiting the possession of peyote for sacramental purposes.<sup>159</sup>

To the extent that the First Amendment requires exemptions from neutral and generally applicable laws for religious conduct, *Smith* seems to have eviscerated *Yoder*. However, rather than overrule *Yoder* and other cases granting religious exemptions, the Court recharacterized those cases as “hybrid situation[s]”<sup>160</sup> in which a challenge under the Free Exercise Clause is brought in conjunction with other constitutional protections.<sup>161</sup> On this basis, the only claims the Court had sustained involved a free exercise claim in connection with freedom of speech, freedom of the press, or the right of parents to direct the education of their children.<sup>162</sup> The claim raised in *Smith* did not present a hybrid claim since it was

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 876.

<sup>156</sup> *Id.* at 878. Smith argued that his “religious motivation for using peyote” placed him “beyond the reach of a criminal law that is not specifically directed at [his] religious practice, and that is concededly constitutional as applied to those who use drugs for other reasons.” *Id.*

<sup>157</sup> *Id.* at 878–79.

<sup>158</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

<sup>159</sup> *Id.* at 890.

<sup>160</sup> *Id.* at 882.

<sup>161</sup> *Id.* at 881.

<sup>162</sup> *Id.*

“unconnected with any communicative activity or parental right.”<sup>163</sup>

## 2. Church of Lukumi Babalu Aye v. City of Hialeah

Two years after *Smith*, the Court considered the constitutionality of a series of ordinances enacted by the City of Hialeah, Florida, that outlawed the “sacrifice” of animals within the city.<sup>164</sup> Sacrifice is a religious practice of the Santeria religious.<sup>165</sup> Shortly after the Santeria Church announced plans to establish a house of worship in Hialeah, the City Council adopted a series of ordinances that prohibited the ritual sacrifice of animals.<sup>166</sup> One ordinance “defined sacrifice as to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption, and prohibited owning or possessing an animal intending to use such animal for food purposes.”<sup>167</sup> However, the ordinance applied only against “any individual or group that ‘kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh is to be consumed.’”<sup>168</sup>

Writing for a unanimous Supreme Court, Justice Kennedy reaffirmed the rule in *Smith*: neutral and generally applicable laws need not be justified by a compelling governmental interest, even if the law has an incidental effect on a particular religious practice.<sup>169</sup> *Lukumi* fleshes out *Smith* in two important ways. First, to avoid strict scrutiny, a law must be both neutral *and* (not *or*) generally applicable.<sup>170</sup> The Court distinguished laws that are facially discriminatory from those which act as a “covert suppression of particular religious beliefs.”<sup>171</sup> The Free Exercise Clause prohibits both facial discriminatory laws and “[o]fficial action that targets religious conduct” but still meets the requirement of facial neutrality.<sup>172</sup>

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<sup>163</sup> *Id.* at 882. As referenced above and discussed at considerable length below, *see infra* Part V, there are two independent arguments for how the San Francisco proposal might be challenged on free exercise grounds. The first is the substantive neutrality argument (namely that the formal neutrality rule of *Smith* is inconsistent with the earlier jurisprudence and is insufficiently protective of religious liberty). The second argument is that even under the rule in *Smith*, the proposal could not stand because it represents both a parental rights/free exercise violation and/or a communicative activity/free exercise violation.

<sup>164</sup> Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527–28 (1993).

<sup>165</sup> Animal sacrifice is a principal form of worship in the Santeria religion. *Id.* at 524 (“The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice.”).

<sup>166</sup> *Id.* at 525–26 (discussing the Church’s announcement to plan construction in April 1987 and the ordinances that were enacted beginning in June 1987).

<sup>167</sup> *Id.* at 527 (internal quotation marks omitted).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 531 (citing Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. at 879).

<sup>170</sup> *See id.* (“Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.”).

<sup>171</sup> *Id.* at 534 (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986)).

<sup>172</sup> *Id.*

“The Free Exercise Clause protects against governmental hostility which is masked as well as overt.”<sup>173</sup> (The laws at issue in *Lukumi* fell into the second category.) Second, if a law fails to satisfy the requirements of *Smith* because it is not both neutral and generally applicable, then it must be justified by a compelling interest and narrowly tailored to advance that interest to survive judicial review.<sup>174</sup>

As applied to the ordinances at issue in *Lukumi*, the Court concluded that they were neither neutral nor generally applicable.<sup>175</sup> The ordinances were not neutral because their objective was to ban the Santeria religious practice of animal sacrifice within the City of Hialeah.<sup>176</sup> As evidence of this intent, the Court looked to the language of the ordinances, which prohibited “sacrifice” and “ritual.”<sup>177</sup> Furthermore, the text of the ordinances made evident that the only conduct subject to the ordinances was the religious practice of Santeria.<sup>178</sup> The Court reasoned that by allowing some exceptions—for example, the slaughter of animals in accordance with the Jewish custom of kosher—any veneer of neutrality disappeared.<sup>179</sup> The Court called the ordinances a “gerrymander,” explaining how “careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.”<sup>180</sup> In addition, the Court concluded that the law was not generally applicable because it was under-inclusive: only killings performed for the purpose of ritual sacrifice were prohibited while copious other types of killings were either not prohibited or expressly exempted from the reach of the ordinances.<sup>181</sup>

Having concluded that the law was neither neutral nor generally applicable, the analysis turned to a *Yoder*-like strict scrutiny

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 531–32; *see also id.* at 546 (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”).

<sup>175</sup> *See id.* at 524 (“The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.”).

<sup>176</sup> *Id.* at 534 (stating that the object of the ordinances was the “suppression of the central element of the Santeria worship service”).

<sup>177</sup> *Id.* (finding that use of the words “sacrifice” and “ritual” constitutes evidence of discriminatory intent).

<sup>178</sup> *Id.* at 535.

<sup>179</sup> *See id.* at 536 (“The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter. . . . It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern.” (citations omitted)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 543–45 (giving examples of legal and exempted killings of animals, *inter alia*, fishing, mice and rat extermination, and euthanasia of stray animals).

examination.<sup>182</sup> Under the compelling interest test, the ordinances were unconstitutional because they were not sufficiently narrowly tailored: the city could have achieved its purported objective, the safe and sanitary disposal of animal remains, without targeting Santeria.<sup>183</sup> Also, the Court reasoned that given the under-inclusiveness of the ordinances—written to apply only to a small subset of conduct, specifically that having to do with a religious motive—the interests asserted by the government could not be all that compelling.<sup>184</sup>

## V. THE SAN FRANCISCO BALLOT MEASURE, THE FREE EXERCISE CLAUSE, AND SUBSTANTIVE NEUTRALITY

The case law outlined in the previous section sets forth the analytical framework for evaluating the constitutionality of the San Francisco proposal. Whether or not the proposal is constitutional turns on how neutrality is defined and applied by the Court. In applying the neutrality requirement, this Note argues that the Court should adopt the definition articulated by one scholar: substantive neutrality.

### A. *General Applicability and Neutrality*

Under the present rule, the Court would only need to find that the San Francisco proposal is of general application and formally (and/or objectively) neutral to survive constitutional scrutiny. This section argues that this standard is an insufficient protector of our religious liberty, and therefore should be abandoned in favor of a rule that more properly accommodates religious practices.

#### 1. *General Applicability*

Unlike the ordinances at issue in *Lukumi*,<sup>185</sup> the San Francisco Ballot Measure is a law of general application because it does not target a religious group. The conduct regulated by the proposal differs from other conduct examined earlier in this Note—bans on ritual sacrifice or polygamy—because circumcision is a majoritarian conduct practiced by a

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<sup>182</sup> See *id.* at 546 (requiring that a law that is not neutral or generally applicable “must undergo the most rigorous of scrutiny,” meaning that such a law “must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests” (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978), quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 546–47.

<sup>185</sup> The four ordinances in *Lukumi* were not generally applicable because they failed to prohibit the same non-religious conduct that was implicated by the Santeria sacrifice of animals: protecting public health and preventing animal cruelty. *Id.* at 543. Similarly, the ordinance exempted the commercial slaughter of small numbers of hogs and/or cattle, while prohibiting analogous religious conduct. *Id.* at 545.

large segment of the population.<sup>186</sup> As mentioned previously, it has been estimated that only 10% of circumcisions in the United States are performed for religious purposes.<sup>187</sup> Given the ubiquity of circumcision in the United States, the proposed ban does not attempt to regulate a conduct only engaged in by a small religious minority.<sup>188</sup> To the contrary, the proposal is written extremely broadly and specifically excludes religion as a valid reason for granting an exemption.<sup>189</sup> Therefore, it is generally applicable vis-à-vis religion. Whether it is neutral is a separate inquiry entirely.

One reason that the Court in *Lukumi* ruled those ordinances were not generally applicable was because of their under-inclusiveness (the ordinances were written to exclude many types of animal killings and exempted many others, such that the only forms of animal killing that were prohibited, effectively, were those engaged in for religious motivations). By way of contrast, the San Francisco proposal contains only a single exemption: circumcisions may be performed on males under age eighteen only when medically necessary.<sup>190</sup> It could be argued, based on *Lukumi*, that this exemption makes the law under-inclusive because exempting circumcision for one reason undermines the purpose of the entire legislative project.<sup>191</sup> But this type of exemption is different from the exemptions the Court found constitutionally impermissible in *Lukumi*. It does not appear that the drafters included this exemption so that the law would apply only to a narrow subset of circumcisions (as the drafter of the *Lukumi* ordinances intended that proposal to apply only to Santeria sacrifice). Rather, the San Francisco proposal is written to apply as widely as possible.<sup>192</sup> The proposal includes a single, narrowly written exception

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<sup>186</sup> As discussed above, circumcision is the most widely performed surgical procedure among newborn males in the United States and approximately eighty percent of men in the United States have been circumcised. See *supra* notes 42–44 and accompanying text.

<sup>187</sup> See *supra* note 51 and accompanying text.

<sup>188</sup> If the proposal did attempt to regulate conduct that was only engaged in by a religious minority, then it would be constitutionally suspect. See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (“[A] State would be ‘prohibiting the free exercise [of religion]’ if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.”).

<sup>189</sup> See San Francisco Ballot Measure, *supra* note 8, § 5002(a) (medical exemption to San Francisco Ballot Measure).

<sup>190</sup> See *id.* (“A surgical operation is not a violation of this section if the operation is necessary to the physical health of the person on whom it is performed because of a clear, compelling, and immediate medical need with no less-destructive alternative treatment available, and is performed by a person licensed in the place of its performance as a medical practitioner.”).

<sup>191</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (“All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.”).

<sup>192</sup> For example, the medical exemption in the San Francisco proposal is followed by a subsection stating that, “[i]n applying subsection (a), no account shall be taken of the effect on the person on

for occasions when circumcision is deemed medically necessary. The purpose of this medical exception is consistent with the broad purpose of the proposal, namely protecting the health, safety, and bodily integrity of the child.<sup>193</sup>

The law might also be challenged as under-inclusive because it applies only to circumcisions performed on persons under eighteen; adult men would be free to undergo circumcision at will. However, allowing circumcisions to be performed on adults, but not minors, does not compromise the legislative purpose. The sponsors of the proposal see circumcision as a matter of personal choice.<sup>194</sup> Thus, permitting adult men to be circumcised, but not infant boys, would be consistent with the legislative intent of the proposal. Further, since most circumcisions (religious and secular) are performed on boys in their infancy,<sup>195</sup> this would not create an opening to argue that the text is drafted to target only religious circumcisions (which, at least in the case of Judaism, mandate circumcision be performed on the child's eighth day of life).

## 2. Neutrality

In addition to being generally applicable, to avoid a strict scrutiny analysis, a law must also be neutral.<sup>196</sup> Whether a law is neutral, however, turns on how neutrality is defined. It is on this prong that this Note argues that the San Francisco proposal is most ripe for review and it is here where the flaws of the Court's present doctrine become apparent. Given the opportunity, the Court should jettison its present definition of neutrality and adopt substantive neutrality as the correct understanding of neutrality.

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whom the operation is to be performed of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual." San Francisco Ballot Measure, *supra* note 8, § 5002(b).

<sup>193</sup> But see Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 361 (2010) ("How many secular exceptions do there need to be before a religious claim under the Free Exercise Clause becomes possible?"). Lund refers to this as the "multiple secular baseline" problem." *Id.* Under the Equal Liberty theory, a secular medical exemption would potentially open the door to a religious one. *See id.* at 362 (criticizing Equal Liberty analysis when applied to free exercise questions and writing that the analysis devolves "into the same general applicability inquiry it seeks to replace"). Still, even the Equal Liberty critique falls short where, as here, there is only a single exception. Thus, the multiple secular exceptions of the problems identified in *Lukumi* are not present.

<sup>194</sup> Email from Matthew Hess, President, MGMBILL.ORG to Author, *supra* note 64 ("We support every man's right to undergo circumcision for any reason if he chooses to do so. All we are saying is that it shouldn't be forced on him.").

<sup>195</sup> See Merrill, *Statistical Brief #45*, *supra* note 43 (stating that the majority of circumcisions in the United States are performed on newborn babies).

<sup>196</sup> See *Lukumi*, 508 U.S. at 531 ("Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not be satisfied.").

### a. Facial (Formal) Neutrality

In *Smith*, Justice Scalia defined neutrality to mean nothing more than facial neutrality: “[A] state would be ‘prohibiting the free exercise [of religion]’ if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.”<sup>197</sup> An example given by the Court of a law that would not be facially neutral was one that banned statues used for religious purposes because it created a religious category (“worship purposes”) and singled out that category for disparate treatment.<sup>198</sup> (Apparently, under the Court’s myopic viewpoint, a law banning *all* statues would not violate the Free Exercise Clause, even though many religions practice idolatry.)

What the Court refers to as facial neutrality, Douglas Laycock terms “formal neutrality.” By his terminology, “[a] law is formally neutral if it does not use religion as a category—if religious and secular examples of the same phenomenon are treated exactly the same.”<sup>199</sup> Formal neutrality sees neutrality as a proxy for equality, and requires simply that religious and non-religious occurrences of the same phenomena be treated identically, without considering the reasons behind the conduct (or the effect a perfectly well-intentioned law has on religious practice).<sup>200</sup> Under a formal neutrality regime, religious exemptions would be unconstitutional because they create a religious classification.<sup>201</sup>

If formal neutrality is the ultimate test of the neutrality standard,<sup>202</sup> then the San Francisco proposal is constitutional even if there is no compelling state interest for the circumcision ban. The proposal does not create any religious categories. Rather, it criminalizes the circumcision of

<sup>197</sup> *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (quoting U.S. CONST. amend. I); see also *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring in part and concurring in the judgment) (“In my view, the defect of lack of neutrality applies primarily to laws that *by their terms* impose disabilities on the basis of religion . . . .”); Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 57 & n.30 (2007) [hereinafter Laycock, *Revisited*] (citing *Smith* for the proposition that the Court equates neutrality with formal neutrality).

<sup>198</sup> *Smith*, 494 U.S. at 877–78.

<sup>199</sup> Laycock, *Revisited*, *supra* note 197, at 54.

<sup>200</sup> See Laycock, *Formal*, *supra* note 17, at 999 (noting that formal neutrality “is closely akin to the equal treatment and equal opportunity side of the affirmative action dentate”); see also Laycock, *Revisited*, *supra* note 197, at 55 (noting that formal neutrality requires neutral categories, whereas substantive neutrality demands neutral incentives).

<sup>201</sup> Laycock, *Formal*, *supra* note 17, at 1000. For example, under Prohibition, the exception for sacramental wine would have been unconstitutional under a formal neutrality regime, as it would have treated religious and non-religious occurrences of the same conduct differently. *Id.*

<sup>202</sup> For a discussion of why formal neutrality is an insufficient standard, see Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 56 (2006) (Critics of *Smith* argue that “[b]y limiting judicial review to only those situations in which the government discriminates against religious beliefs or practices, and refusing to protect religious activities against substantial burdens imposed by neutral and general laws, the Court was not taking religious liberty seriously.”); Laycock, *Formal*, *supra* note 17, at 999–1001 (critiquing formal neutrality).

any person under age eighteen (save those performed pursuant to the narrow medical exemption).<sup>203</sup> By contrast, if the law had banned “brit milah,” or “circumcisions performed for religious purposes,” under *Smith* and *Lukumi* it would not be neutral and thus not upheld. But under a test that examines *only* the categories—as Justice Scalia set down in *Smith*—the San Francisco proposal would be neutral (and since I have already concluded that it is generally applicable, the Court would uphold it without even needing to perform the strict scrutiny analysis). Upholding the proposal on this basis—despite the fact that it would prevent a long held religious tradition from being performed—“could not be reconciled with any concept of religious liberty worthy of the name.”<sup>204</sup> Surely the Constitution requires more than this pyrrhic notion of equality.

#### b. Object Neutrality

The decision in *Lukumi* suggests that the Constitution requires more than simple formal neutrality: It also requires what shall hereinafter be referred to as object neutrality. The Court explained: “[I]f the object of a law is to infringe upon or restrict practices [engaged in] because of their religious motivation, the law is not neutral . . . .”<sup>205</sup> The ordinances in *Lukumi* were struck down on this basis because the object of the legislation was the “suppression of the central element of the Santeria worship service”<sup>206</sup>—referring to animal sacrifice.

Even proponents of the San Francisco proposal would concede that their goal was to ban the practice of circumcision in the city, whether engaged in for religious or secular reasons.<sup>207</sup> The more complicated matter is determining whether the proponents’ objective was to target the religious behavior, *as such*, or if that was merely an incidental effect of a broader legislative project.

Proving another person’s objective is difficult and speculative at best. The strongest evidence of anti-Semitism as a motivating factor for the San Francisco proposal is the Foreskin Man cartoon featuring “Monster Mohel.”<sup>208</sup> Religious circumcisions constitute a tiny minority (less than ten percent) of the circumcisions performed in the United States.<sup>209</sup> Thus, it is curious why Hess chose to focus the comic strip on Jewish

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<sup>203</sup> San Francisco Ballot Measure, *supra* note 8, § 5001.

<sup>204</sup> Laycock, *Formal*, *supra* note 17, at 1000.

<sup>205</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1992).

<sup>206</sup> *Id.* at 534.

<sup>207</sup> Email from Matthew Hess, President, MGBILL.ORG to Author, *supra* note 64 (stating that the most common argument against the proposal is that it “would violate parents’ freedom of religion” but “parents aren’t legally allowed to cut off other healthy body parts from their children, so why should we make an exception for the foreskin?”).

<sup>208</sup> See *supra* Part III.B (discussing anti-Semitism in the comic book series titled “Foreskin Man”).

<sup>209</sup> *Supra* note 51 and accompanying text.

circumcisions and demonize the ritual and those who perform it.<sup>210</sup> The portrayal of Jewish circumcision in these comics is misleading and, thus, suspicious. Also, by its terms, the proposal explicitly forbids any accommodation for circumcision performed as a religious rite when applying the health exception.<sup>211</sup> But since religious circumcisions make up such a small percentage of the procedures performed in the United States, why was it necessary to bar a religious exemption? The proposal did not single out circumcisions performed for cultural purposes, but, as has been shown above, many more circumcisions are performed for cultural rather than religious purposes. Since so few people could take advantage of the religious exemption, the law could accommodate the religious practice (by exempting religious circumcisions) without sacrificing its legitimate secular objective.<sup>212</sup>

The proponents of the San Francisco proposal deny anti-Semitism was a motivating factor behind the proposal. They claim their objective was simply to protect all children from forced circumcision, not to target Jewish or Muslim religious practices, as such.<sup>213</sup> And it must be acknowledged that, given the ubiquity of the procedure in the United States and the small number of religious circumcisions performed, the motivation was not likely an attack on Jews and Muslims.<sup>214</sup> For these reasons, it would be difficult to sustain an argument that the law is not neutral by virtue of some impermissible object.<sup>215</sup>

### c. Substantive Neutrality

Does the Free Exercise Clause—and the values it sought to codify and

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<sup>210</sup> Hess defends that only one issue of the Foreskin Man comic book focused on Jewish circumcision. He wrote to the Author that “[t]he common thread running through the Foreskin Man series is that forced circumcision of children is bad, not that Jews or Jewish customs are bad.” Email from Matthew Hess, President, MGBILL.ORG to Author, *supra* note 64.

<sup>211</sup> San Francisco Ballot Measure, *supra* note 8, § 5002(b).

<sup>212</sup> Hess claims that a religious exemption could not have been included because the proposal “would have no teeth with a religious exemption because any parent could simply check a box that says ‘I wish to circumcise my son for religious reasons.’” Email from Matthew Hess to Author, *supra* note 64. Notice that Hess does not argue that circumcision is so harmful that a religious exemption could never be justified, but instead raises a concern about how an exemption might be implemented.

<sup>213</sup> *See id.* (“The common thread running through the Foreskin Man series is that forced circumcision of children is bad, not that Jews or Jewish customs are bad.”).

<sup>214</sup> The San Francisco Ballot Measure is more like the law at issue in *Smith* (a general criminal prohibition having an incidental effect on religious observers) than the ordinances struck down in *Lukumi* (an ordinance written with the objective of outlawing conduct performed only by a minority religion, which excluded or exempted similar conduct performed for secular reasons). *See supra* notes 158–159, 177–181 and accompanying text.

<sup>215</sup> *See* Eugene Volokh, *Proposed San Francisco Circumcision Ban, and Religious Freedom*, VOLOKH CONSPIRACY (May 23, 2011, 12:25 PM), <http://www.volokh.com/2011/05/23/proposed-san-francisco-circumcision-ban-and-religious-freedom/> (stating that courts require strong evidence to set aside a law that is neutral on its face vis-à-vis religion).

protect—require simply facial (and/or object) neutrality, or does it also require something more? A third way of understanding the neutrality requirement, the way this Note advocates, is that the First Amendment requires that laws also be substantively neutral.

Substantive neutrality is concerned with the incentives (and disincentives) created by law vis-à-vis religious conduct.<sup>216</sup> Laycock believed that “substantive neutrality insists on minimizing government influence on religion.”<sup>217</sup> A law is substantively neutral to the extent that it does not encourage nor discourage religious conduct or belief.<sup>218</sup> Laycock elegantly writes that substantive neutrality means that:

Government should not interfere with our beliefs about religion either by coercion or by persuasion. Religion may flourish or wither; it may change or stay the same. What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government.<sup>219</sup>

Laycock offers the following example to explain the difference between a law that is formally neutral and one that is substantively neutral. A statute that states that “[c]hildren cannot consume alcoholic beverages in any amount for any purpose” is formally neutral because religion is not a category under the law and alcohol is forbidden to be consumed by all children, whether for a religious purpose or otherwise.<sup>220</sup> The law, however, is not substantively neutral because by (implicitly) forbidding children from taking communion, it discourages adherents from engaging in an act essential to the Catholic worship service.<sup>221</sup>

An exemption to the hypothetical law described above would be substantively neutral because it is unlikely that this accommodation would incentivize anyone to engage in a religious act unless he was inclined to do

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<sup>216</sup> Laycock, *Revisited*, *supra* note 197, at 65 (writing that substantive neutrality is about “[n]eutral incentives, neither encouraging nor discouraging religion” and stating that this theory offers “a coherent conception of neutrality that is consistent . . . with regulatory exemptions for religious behavior”).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 54–55; see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1146–47 (1990) (advocating for incentive neutrality, whereby “free exercise exemptions [are given] to ensure that incentives to practice a religion are not adversely affected by government action”).

<sup>219</sup> Laycock, *Formal*, *supra* note 17, at 1002.

<sup>220</sup> Laycock, *Revisited*, *supra* note 197, at 55. For much the same reasons, the San Francisco proposal is formally neutral.

<sup>221</sup> See *id.* (explaining that “[f]orbidden children to take communion wine, or criminally punishing their parents and the priest who gives them the sacrament, powerfully discourages an act of worship”). That is why, during Prohibition, the National Prohibition Act, which forbade the sale or consumption of alcoholic beverages in the United States, exempted the use of sacramental wine. Laycock, *Formal*, *supra* note 17, at 1000.

so anyway. Few people are likely to convert to Catholicism or even attend Catholic Church services more regularly because their children would get to taste (literally) a sip of wine—the exception being those who already desired to do so, until being deterred by the government’s prohibition.<sup>222</sup> Thus, the hypothetical law is not substantively neutral, *but an exemption to it is*, because the latter does not change anyone’s incentives; it does not create an impetus for religious conduct that did not already exist, whereas the former creates a significant disincentive for engaging in the religious activity.<sup>223</sup> But it must be conceded that, to the extent that an exemption incentivizes religious conduct, the motive for which did not already exist, there would be a potential claim under the Establishment Clause.

Justice Souter’s concurrence in *Lukumi* vigorously argues for substantive neutrality.<sup>224</sup> Like Laycock, Justice Souter argues that neutrality means more than simply the absence of government hostility toward a particular religious group.<sup>225</sup> Rather, the Free Exercise Clause requires not just formal neutrality, but also substantive neutrality. As Justice Souter wrote, “A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids.”<sup>226</sup> After reviewing recent scholarship on the history and original meaning of the Free Exercise Clause,<sup>227</sup> Justice Souter concludes:

There appears to be a strong argument from the Clause’s development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities

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<sup>222</sup> Laycock, *Revisited*, *supra* note 197, at 55. Without the exemption, it would have been a crime to take Communion or conduct a traditional Passover Seder during Prohibition. Laycock, *Formal*, *supra* note 17, at 1000.

<sup>223</sup> Laycock, *Revisited*, *supra* note 197, at 55.

<sup>224</sup> Justice O’Connor’s concurrence in *Smith* embraced substantive neutrality as well. She would have denied the claimant’s unemployment compensation because she believed that the State’s interest in uniform application of its drug control laws was sufficiently compelling to infringe upon religious liberty. See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 903–06 (1990) (O’Connor, J., concurring in the judgment) (applying the compelling interest test to affirm the appellants’ convictions under Oregon state law).

<sup>225</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 565 (1993) (Souter, J., concurring in part and concurring in judgment) (writing that “[o]ur cases have established that ‘[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden’”(quoting *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384–85 (1990))).

<sup>226</sup> *Id.* at 561.

<sup>227</sup> See *id.* 574–76 (stating that “recent scholarship rais[es] serious questions about the *Smith* rule’s consonance with the original understanding and purpose of the Free Exercise Clause”).

necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State.<sup>228</sup>

Accordingly, Justice Souter would hold that the neutrality needed to implement the purpose of the Framers "be the substantive neutrality of our pre-*Smith* cases, not the formal neutrality sufficient for constitutionality under *Smith*."<sup>229</sup>

Under a substantive neutrality rule, the San Francisco proposal would not be upheld to the extent it applied to religious practice (absent a compelling state interest) because it disincentivizes religious adherents from engaging in their religion's prescribed conduct. Substantive neutrality requires neutral incentives, and to the extent that it criminalizes circumcision and imposes monetary penalties and incarceration on those who perform that act, the law creates an impermissible disincentive from engaging in religious conduct.<sup>230</sup> Unlike an object neutrality regime, where the intent of the law (or its sponsors) matters, substantive neutrality does not care about intentions, only incentives.

An exemption to the San Francisco proposal for religious adherents (and only for these people) is substantively neutral and thus in keeping with the objectives of the Free Exercise Clause.<sup>231</sup> It is unlikely that the exemption would encourage non-adherents to convert to Judaism or Islam solely for the purpose of circumcising their sons in San Francisco. Very few people would be so incentivized by the exemption that they would convert religions to take advantage of this minor accommodation.<sup>232</sup> Thus, the exemption is substantively neutral because it is unlikely to change anyone's incentives to pursue circumcision, but criminalizing the religious conduct would disincentivize the religious activity. But, to the extent that the exemption would encourage people to join the Jewish or Islamic faiths—or to participate in these faiths' practices to a greater degree, for those already members—that would be a basis for denying the exemption

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<sup>228</sup> *Id.* at 575–76.

<sup>229</sup> *Id.* at 576.

<sup>230</sup> If enacted, the proposal's likely consequence would be that religious circumcisions would continue unabated, with families simply travelling outside of San Francisco to have the ritual performed on their sons. Instances of non-religious circumcisions, which primarily occur in the hospital, however, would likely decrease as parents, sans religious motivation, are less likely to find alternative accommodations.

<sup>231</sup> An exemption for only religious adherents might offend the Equal Protection Clause of the Fourteenth Amendment, see U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."), but that issue is beyond the scope of this Note.

<sup>232</sup> This is especially true as applied to the San Francisco proposal. Those not qualifying for the exemption could simply go to somewhere else to have the circumcision performed. Conceivably, if a national ban was imposed, the argument that the exemption is substantively neutral is weaker.

as creating an establishment of religion.<sup>233</sup>

There is a legitimate fear that some people would lie about (or exaggerate the extent of) their religious affiliation to exploit the exemption given to religious adherents. This fear is compounded by the fact that the Court will not inquire into the veracity of a religious adherent's claim.<sup>234</sup>

While a certain amount of dishonest behavior is inevitable, for many people, religion is a deeply personal and private matter, such that few are likely to feign religious belief to take advantage of this minor accommodation.<sup>235</sup> Further, even if there were more than a few spurious religious exemption claims, would that be a sufficient reason for denying those true religious observers some accommodation? Surely the existence of a right under the Free Exercise Clause does not depend on the potential for skulduggery by a determined few. Just as Blackstone understood that it was better that ten guilty go free than one innocent be convicted,<sup>236</sup> it is preferable that a few illegitimate exemptions be granted than deny those true followers the right to practice their religious obligations.

As the reviews by Laycock<sup>237</sup> and others<sup>238</sup> make clear, prior to *Smith*, the Court embraced a substantive neutrality approach—both in its Free Exercise and Establishment Clause cases. In *Everson v. Board of Education*,<sup>239</sup> the Court explained “[n]either [a state nor the federal government] can force [or] influence a person to go or to remain away from church against his will.”<sup>240</sup> In *Sherbert*, the Court taught that a religious exemption “reflects nothing more than the governmental obligation of neutrality in the face of religious differences.”<sup>241</sup> This reasoning is a clear embrace of substantive neutrality—recall that an exemption creates a religious category and thus violates the formal

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<sup>233</sup> See Lund, *supra* note 193, at 377 (analogizing from *Smith* about the effect exemptions have on non-observers). Lund writes that “[t]o the extent that letting the Native American Church use peyote incentivizes other to join the Church, we have a reason to deny the exemption or extend it to deep rooted claims of secular conscience.” *Id.*

<sup>234</sup> See *Smith*, 494 U.S. at 887 (1990) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” (quoting *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989))).

<sup>235</sup> This is especially true in the case of the San Francisco proposal, as the determined secularist could simply go one town over and have his son circumcised at any hospital or doctor’s office.

<sup>236</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 (“[T]he law holds, that it is better that ten guilty persons escape, than that one innocent [s]uffer.”).

<sup>237</sup> Laycock, *Revisited*, *supra* note 197, at 57–59 (reviewing and analyzing cases under the religion clauses of the First Amendment).

<sup>238</sup> See, e.g., Lund, *supra* note 193, at 354 (stating that prior to *Smith*, the Court embraced a substantive neutrality approach).

<sup>239</sup> 330 U.S. 1 (1947).

<sup>240</sup> Laycock, *Revisited*, *supra* note 197, at 57 (quoting *Everson*, 330 U.S. at 15).

<sup>241</sup> *Sherbert v. Verner*, 374 U.S. 398, 409 (1963); see Laycock, *Revisited*, *supra* note 197, at 57–58 (quoting passages from *Sherbert* and *Yoder* to show the Court’s embrace of substantive neutrality).

neutrality rule;<sup>242</sup> thus, when the Court speaks of neutrality it must think of it in the substantive sense. Similarly, in *Yoder*, the Court held that “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it *unduly burdens* the free exercise of religion.”<sup>243</sup>

A “friendly” separation of church and state requires substantive neutrality. In leaving religion as a matter of private choice, substantive neutrality provides the greatest amount of religious liberty possible under the Constitution. Commenting on *Smith*, one author wrote that the Court “reduc[ed] the protection of the Free Exercise Clause, in large measure, to an equality right as opposed to a liberty right.”<sup>244</sup> If this is so—if the Free Exercise Clause mandates simply equality in terms—then the Clause is rendered superfluous, since other provisions of the Constitution provide for equality, specifically the Equal Protection Clause of the Fourteenth Amendment.<sup>245</sup> Therefore, if religious liberty is to remain a fundamental value in our democracy, then the constitutional protection of the Free Exercise Clause should not end at the absence of hostility. It must also include the freedom from incidental (perhaps inadvertent, but nonetheless oppressive) governmental restraints on religious conduct.

Substantive neutrality is a means of preserving religious liberty, which is a concept beyond religious equality. The idea embraces religious freedom by minimizing government influence over religion,<sup>246</sup> thus leaving it as a matter of private and personal choice to the greatest extent practical. Formal neutrality is a necessary condition for religious liberty, but at times it can be insufficient. To quote Laycock, “If the free exercise of religion includes anything beyond bare belief, it must be the right to perform the sacred rituals of the faith.”<sup>247</sup>

Laycock’s formulation might be cabined to recognize that there are times when a compelling governmental interest justifies the infringement on religious liberty. This Note does not argue that all religious conduct is beyond government regulation; regulations infringing on religious practice, however, must be justified under the strict scrutiny construct the Court uses when government regulation infringes on the exercise of fundamental

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<sup>242</sup> See Laycock, *supra* note 17, at 1000 (arguing that the religious exemption to Prohibition was unconstitutional under a formal neutrality rule).

<sup>243</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (emphasis added); see Laycock, *Revisited*, *supra* note 197, at 58 (discussing *Yoder* and substantive neutrality).

<sup>244</sup> Daniel D. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 *CARDOZO L. REV.* 1755, 1755 (2011).

<sup>245</sup> U.S. CONST. amend. XIV.

<sup>246</sup> Laycock, *Revisited*, *supra* note 197, at 65; see also *Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (“A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs as unimportant, because unfamiliar.”).

<sup>247</sup> Laycock, *Formal*, *supra* note 17, at 1000.

rights. For example, fundamentalists in Mali recently cut off the hand of a man accused of larceny in accordance with their religious beliefs.<sup>248</sup> Obviously there is some conduct—stoning and human sacrifice, for example—that a modern society cannot allow regardless of religious beliefs. The rule the Court used prior to *Smith* dealt with this problem through the compelling interest test; *Smith* does away with this accommodating standard.

The position that religious observers are entitled to some relief from generally applicable laws having an incidental effect on their religious practice is not without detractors. Typical is the argument advanced by legal scholar Abbie Chessler, who suggests that just because “circumcision is a tenet of certain religions is not a reason to provide an exemption from a generally applicable criminal law.”<sup>249</sup>

Chessler is correct to conclude that under the *Smith* rule, prohibition of circumcision would be upheld, even against those who justify it on religious grounds;<sup>250</sup> even so, her lack of concern for the liberty interests at stake is disconcerting. Furthermore, her analysis of the underlying legal principles is spurious. Quoting from *Smith*, Chessler writes that the Court has never held that religious belief is a valid excuse from any otherwise valid and generally applicable law.<sup>251</sup> But, of course this is not true, as *Yoder* held that religious beliefs *could* relieve one from his obligation to follow a law pursuant to the to the compelling interest test.<sup>252</sup> Moreover, Chessler recites this text from *Minersville School District v. Gobitis*<sup>253</sup>:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious belief. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.<sup>254</sup>

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<sup>248</sup> Adam Nossiter, *Islamists in North Mali Amputate Man's Hand*, N.Y. TIMES, Aug. 10, 2012, at A4.

<sup>249</sup> Chessler, *supra* note 29, at 601.

<sup>250</sup> *Id.* at 599. Povenmire also recites that a ban on circumcision would be upheld—even without a compelling government interest—provided it is neutral and generally applicable. Povenmire, *supra* note 50, at 117.

<sup>251</sup> Chessler, *supra* note 29, at 599 (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990)).

<sup>252</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that the First Amendment prevented Wisconsin from enforcing that compulsory school attendance law against the Amish parents); see McConnell, *supra* note 218, at 1120 (citing *Yoder* for the proposition that religious beliefs have been used to excuse compliance from a generally applicable law).

<sup>253</sup> 310 U.S. 586 (1940).

<sup>254</sup> *Id.* at 594–95.

It is curious why Chesser and Justice Scalia in *Smith*<sup>255</sup> rely so heavily on this case, given that *Gobitis* was overturned three years later in *West Virginia State Board of Education v. Barnette*,<sup>256</sup> with that Court stating that some rights are beyond the whims of the political process, included among them “freedom of worship.”<sup>257</sup> As one scholar criticized, “Relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*.”<sup>258</sup>

In addition to being unnecessary after *Smith*, it has also been argued that religious exemptions are inappropriate because they amount to favoritism for religious people over nonreligious people. This is the Equal Liberty theory.<sup>259</sup> But exemptions can be reconciled with any supposed favoritism to religious conduct depending on where one sets the baseline for determining incentives.<sup>260</sup> Taking the proposal in San Francisco as our example, if the baseline is the present state of the law: any child may be circumcised for religious and non-religious purposes, and a law is subsequently enacted prohibiting circumcisions, the religious liberty of those who practice circumcisions has decreased; their conduct has been disincentivized. However, people who do not practice circumcision as a religious obligation have not lost any religious liberty relevant to the present discussion. Thus, the Equal Liberty critique falls short because an exemption for religious observers restores their liberty interest to absolute zero, putting them at the same level as the non-religious person.

Relatedly, there is an argument that a religious exemption would violate the Establishment Clause by advancing religious interests in some way. To the extent that an exemption does violate the Establishment Clause by privileging religious adherents, the response given by substantive neutrality is simply that:

Government does not establish a religion by leaving it alone;

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<sup>255</sup> *Smith*, 494 U.S. at 878–79 (citing *Gobitis* for the proposition that the Court has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,” and referring to *Gobitis* as a case from the Court’s “free exercise jurisprudence”).

<sup>256</sup> 319 U.S. 624, 642 (1943).

<sup>257</sup> *Id.* at 638 (stating that a purpose of the Bill of Rights was to place certain rights, including freedom of speech and freedom of worship beyond the reach of momentary political majorities); see McConnell, *supra* note 218, at 1124 (stating that the Court fails to mention that *Gobitis* was overturned by *Barnette*).

<sup>258</sup> McConnell, *supra* note 218, at 1124 (footnotes omitted).

<sup>259</sup> Lund, *supra* note 193, at 356 (“Equal Liberty’s core claim [is] in the absence of things like hostility, neglect, or indifference, religious exemptions are constitutionally inappropriate because they essentially amount to favoritism for religious groups and individuals.”); see also Laycock, *Revisited*, *supra* note 197, at 80–81 (discussing Stephen Gey’s theory that any accommodation for religious conduct violates the Establishment Clause).

<sup>260</sup> See Laycock, *Formal*, *supra* note 17, at 1005 (“[S]ubstantive neutrality requires a baseline from which to measure encouragement and discouragement.”).

government does not benefit religion by first imposing a burden through regulation and then lifting that burden through exemption, and, in most cases, such exemptions do not encourage anyone to engage in a religious practice unless he was already independently motivated to engage in the practice.<sup>261</sup>

An exemption does not favor a religion by simply lifting an underlying regulation that is burdensome to the religious faithful. Professor Laycock notes that the Court has rejected on numerous occasions the argument that exemptions violate the Establishment Clause.<sup>262</sup>

As applied to the subject of this Note—the proposed circumcision ban in San Francisco—the argument is that there is no establishment of religion where an exemption is carved out to restore religious adherents to the position they enjoyed before government stepped in and burdened their religious conduct in the first place. Thus, an exemption for Jews and Muslims to the San Francisco proposal would not privilege them; it would merely restore them to the status quo ante. Exemptions do not create an establishment of religion because no exemption would be needed had the government not intervened in the first place by burdening the religion through its regulatory powers.

If the Free Exercise Clause means anything, surely it means that government cannot impose a Hobson's choice on religious adherents: abandon your centuries-old religious tradition or continue to practice that tradition but subject yourself to criminal sanctions. *Smith's* formal neutrality requirement and *Lukumi's* object neutrality requirement are insufficient protectors of religious liberty. Something more is needed to ensure that government does not have the unintended consequence of limiting religious practice. That “something” is substantive neutrality. Evaluating laws by the incentives they create—rather than only by the categories they establish or the goal of the legislation—offers the greatest level of religious freedom possible.

It is illuminating to consider how the results of several cases previously discussed in this Note might differ under a substantive neutrality regime. Since the Court applied something akin to substantive neutrality in *Sherbert* and *Yoder* (without actually calling it that), the

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<sup>261</sup> Douglas Laycock, *The Religious Exemptions Debate*, 11 RUTGERS J.L. & RELIGION 139, 153–54 (2009).

<sup>262</sup> *Id.* at 154 n.53 (citing a list of cases where the Supreme Court rejected the argument); see also Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1798 (2006) (“There is no significant originalist support for the core idea that exempting religion from regulation establishes religion . . . . I have found no one in the eighteenth century who attacked them as an establishment of religion or denied that legislatures had power to enact them.”).

results in those two cases would not change under the rule advocated for in this Note.

If the Court continued along the *Sherbert/Yoder* line in *Smith*, the result might have differed. The State of Oregon imposed a (facially) neutral and generally applicable law banning the possession of peyote. Two Native Americans who ingested peyote as part of a religious ceremony<sup>263</sup> challenged that law as applied to them.<sup>264</sup>

Under a substantive neutrality regime, the law would have been upheld in the aggregate, but an exemption might have been carved out for people (such as the appellants) who possessed peyote for religious reasons. Of course, if the religious practice was so demonstrably dangerous, then there was a compelling state-interest for proscribing the conduct and it could still be regulated under the substantive neutrality rule. This is the argument made by Justice O'Connor in her concurrence in *Smith*, where she wrote:

I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish" its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance . . . . Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.<sup>265</sup>

Thus, by applying substantive neutrality, Justice O'Connor gets the same result as the Court does, but under a different form of analysis: she recognized that the law imposed a burden on the religious adherents but concluded that the state's interest in regulating was nonetheless sufficiently compelling to impose such a burden. Her analysis is predicated on the important role that states play in policing illegal drug use. It is conceivable that if the conduct at issue were something other than illegal drug use (male circumcision perhaps), Justice O'Connor's rule would have led her to a different result than that reached by the Court.

By tweaking the facts in *Lukumi* slightly, we can also consider how the

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<sup>263</sup> See *supra* note 153 and accompanying text.

<sup>264</sup> See *supra* note 156 and accompanying text ("Justice Scalia, rejected Smith's argument . . . that the Free Exercise Clause required a religious-conduct exemption [for himself] from an otherwise valid law.")

<sup>265</sup> Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 905 (1990) (O'Connor, J., concurring) (citations omitted).

result would have differed under a substantive neutrality rule. Recall that in *Lukumi*, the Court struck down the four ordinances at issue because they were neither neutral nor generally applicable. If the ordinances had been written without the problems identified by the Court—namely if the city council did not have as its objective banishing Santeria from Hialeah—and if the ordinances were not written to apply only to religious sacrifice, the result would potentially have been different. In our hypothetical, under Justice Scalia’s formal neutrality rule from *Smith*, the claimants in *Lukumi* would have lost because a truly neutral and generally applicable statute forbidding the slaughter of animals within the city would not violate the Free Exercise Clause.

However, analyzing the same hypothetical statute under substantive neutrality, the analysis is more nuanced and the outcome less certain.<sup>266</sup> Since our hypothetical lacks the exemptions and narrow definitions of the *Lukumi* ordinances, it is a law of general application. However, the hypothetical statute would not be substantively neutral because it creates a disincentive for engaging in religious conduct, to wit, the ritual sacrifice of animals in accordance with Santeria. (The disincentive is whatever the punishment is for violating the hypothetical rule, presumably a fine and/ or imprisonment.)

The second step is to consider whether there is a compelling state interest in applying the ban to the Santeria religious adherents. Whether or not such an interest exists would turn on what the state claims are its interests in promulgating the regulation. The Court in *Lukumi* found no compelling interest existed because the state’s purported interest—the safe and sanitary disposal of animals—could be achieved in a more narrowly tailored way without targeting the Santeria faith.<sup>267</sup> Moreover, even if the state did have a valid purpose in legislating in this field, it was undermined by the under-inclusiveness of the law, which was written to only apply to Santeria adherents.<sup>268</sup> Under the hypothetical law described above, these flaws are not present, so the Court could find that the state does have a compelling interest in applying its regulation to the Santeria adherents. Still, it seems that the City of Hialeah would be able to regulate animal slaughter in a more narrowly tailored way. For example, it could impose regulations and penalties for the unclean disposal of animal carcasses without actually banning ritual sacrifice. Thus, perhaps the hypothetical law is not sufficiently narrowly tailored to survive under a strict scrutiny analysis.

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<sup>266</sup> Justice Souter’s concurrence in *Lukumi*, where he advocates for the substantive neutrality rule, see *supra* notes 224–229 and accompanying text, does not explain how he would have applied that rule to the facts of that case.

<sup>267</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1998).

<sup>268</sup> See *supra* note 184 and accompanying text.

### B. *Compelling Interest Test*

Once we accept substantive neutrality as the proper way to conceptualize the neutrality requirement, we could only conclude that the San Francisco proposal is not substantively neutral because it creates a disincentive against engaging in religious conduct: criminal prosecution and financial sanction. Thus, the ballot measure can only be saved if it can be justified by a compelling state interest.<sup>269</sup> The compelling interest test places a high bar on state interference with religious conduct; in *Lukumi*, the Court referred to it as “the most rigorous of scrutiny.”<sup>270</sup>

Cases where the Court has used the compelling interest test to strike down laws that threatened religious liberty are instructive.<sup>271</sup> In *Sherbert*, the Court held that protecting the state’s unemployment fund from spurious religious claims was not a sufficiently compelling reason to deny the claimant unemployment compensation.<sup>272</sup> Similarly, in *Yoder*, the Court found that the state’s interest in ensuring that all students were educated was not sufficiently compelling to impose upon the Amish religious practice a requirement that Amish children attend school through age sixteen.<sup>273</sup> Finally, in *Lukumi*, the Court found that because the ordinances were under-inclusive by not regulating analogous secular conduct, they could not survive review under the compelling interest test.<sup>274</sup> Under a substantive neutrality rule (which is what the Court essentially applied in *Sherbert* and *Yoder*), these laws would fail because they force religious adherents to make the unconscionable choice between following their religious tradition or facing state sanction—without there being compelling state interest necessitating that choice be made.<sup>275</sup> Substantive neutrality, unlike formal or object neutrality, would require such an interest when the state attempts to place a roadblock in front of religious practice.

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<sup>269</sup> See *Lukumi*, 508 U.S. at 531–32 (stating that a law that is not neutral and not generally applicable “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest”).

<sup>270</sup> *Id.* at 546.

<sup>271</sup> One additional case where the Court used the compelling interest test to uphold a substantively unneutral law requires mention. In *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986), the Court denied an Orthodox Jewish man who wished to wear a yarmulke with his military uniform an exemption from the Army’s dress code. Even if the result in *Goldman* does not seem right (for example, was the military’s interest in conformity sufficiently compelling?), the analysis the Court applied continued to show deference to the religious practice through its embrace of substantive neutrality.

<sup>272</sup> *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

<sup>273</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972).

<sup>274</sup> *Lukumi*, 508 U.S. at 546.

<sup>275</sup> Even under the substantive neutrality advocated for by this Note, laws burdening religious practice will not be upheld where there is a compelling state interest in outlawing the practice. For example, a law outlawing the hypothetical religious practice of stoning “disobedient women” would be upheld (even though it is not substantively neutral) because the state has a compelling interest in policing domestic violence and protecting women.

Supporters of a ban on male circumcision argue that there is a compelling interest to justify such an infringement on religious liberty, although they do not explain why the ban (even if rational) is compelling. As one writer observed: “It is no longer necessary to demonstrate a compelling governmental interest in order to uphold the constitutionality of such laws, although such an interest is present in the case of circumcision.”<sup>276</sup> Similarly, Chessler simply writes, “[t]he government . . . maintains a compelling interest in protecting children from harmful religious practices,”<sup>277</sup> without demonstrating why the government’s interest in legislating is sufficiently compelling.

Contrary to what the critics charge, there is no compelling interest that justifies upholding the San Francisco proposal. The medical evidence that circumcision is harmful or dangerous to men is inconclusive at best, although the weight of the evidence suggests that circumcision has many positive medical benefits.<sup>278</sup> However, the key point to infer from the lack of consensus (to the extent such a lack of consensus in fact exists within the medical community) is that it cannot possibly be as dangerous to children as the Inactivist community suggests. Surely if the procedure led to the “parade of horrors” the Inactivists claim, the procedure would have been abandoned long ago. Thus, given that the procedure has not been shown to be demonstrably harmful to children, the state’s interest in imposing the circumcision ban is not sufficiently compelling. Therefore, the proposal would fail when subjected to a rigorous strict scrutiny analysis.

But, assuming for the sake of argument that the medical evidence conclusively proved circumcision’s harmful health consequences, the proposal would then still need to be balanced against the deprivation of religious liberty to survive the constitutional challenge. The Court’s reasoning in *Yoder* is instructive on this point: Even if there are some health consequences to circumcision (just as there are invariably some negative consequences to ending a child’s education at age sixteen), are they so compelling as to justify the state denying religious adherents the right to continue a centuries-old religious tradition?<sup>279</sup> The lack of

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<sup>276</sup> Povenmire, *supra* note 50, 117–18 (footnote omitted).

<sup>277</sup> Chessler, *supra* note 29, at 598.

<sup>278</sup> See *supra* Part II.C. (discussing the medical debate over circumcision).

<sup>279</sup> In his dissenting opinion in *Yoder*, Justice Douglas considered the problem that a parent’s decision not to send his children to school was a decision having permanent, irrevocable consequences. See *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting) (“It is the future of the student, not the future of the parents, that is imperiled by today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today . . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.”). The decision of parents to circumcise their children, similarly, is a choice that is permanent and cannot be undone. To some, this is a rationale for upholding the San Francisco circumcision ban (assuming it

consensus among medical experts concerning circumcision—and the plausible medical benefits gained from the procedure—demonstrate that this is simply not the case.

In addition to making medical arguments to justify the ban, Inactivists commonly compare male circumcision to female circumcision,<sup>280</sup> arguing that it does not make sense to ban one but not the other. Under the compelling state interest test, however, this comparison falls apart. Chessler, for example, writes, “Claims that [male and female circumcision] cannot be linked perpetuates the continued legitimacy of one human rights abuse, male circumcision, through the condemnation of another. An analogy must be made between the two; regardless of whether a child is male or female, neither should be subject to genital mutilation.”<sup>281</sup>

At least one religion (Islam) holds female circumcision out as a religious obligation;<sup>282</sup> a hypothetical law banning it would be generally applicable, but not substantively neutral. But, while male circumcision has some plausible medical consequences (and many more medical benefits), female circumcision is much more serious and devastating to the woman.<sup>283</sup> Female circumcision often involves the removal of the entire clitoris,<sup>284</sup> whereas male circumcision involves the removal of just the foreskin surrounding the head of the penis. The equivalent male version of female circumcision would be the removal of the entire head of the penis. Also, the purposes of the two procedures differ. Whereas circumcised males are still able to enjoy sexual activity, the removal of a woman’s clitoris has the object of denying her sexual pleasure. For these reasons, a ban on male circumcision could not be justified under the compelling interest test, whereas an identical ban on female circumcision

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was approved). Under the proposal, those men who choose to be circumcised may do so of their own volition at age eighteen, the age of majority in the United States. However, this rationale would not be a sufficiently compelling basis for trampling on the religious practice of circumcision. As noted above, in the Jewish faith, circumcision must occur on the eighth day of life, save a few minor exceptions. Thus, leaving the choice to men at age eighteen would gravely trample upon the religious practice (just as compulsory school attendance laws trampled upon Amish religious practice). More globally, parents make thousands, if not more, irrevocable decisions on behalf of their children. Thus, singling out this decision for disparate treatment would not only fail the substantive neutrality principle, but quite possibly would violate the less accommodating formal neutrality rule.

<sup>280</sup> See, e.g., Email from Matthew Hess, President, MGMBILL.ORG to Author, *supra* note 64 (comparing female circumcision to male circumcision).

<sup>281</sup> Chessler, *supra* note 29, at 612.

<sup>282</sup> Islam appears to be the only religion to embrace that custom as part of its religious tradition. See Chessler, *supra* note 29, at 581–83 (discussing female circumcision in the Islamic tradition); Povenmire, *supra* note 50, 114–15 (“Many Muslims believe that the tenets of their faith require surgery, although this is contested by some Islamic scholars.” (footnote omitted)).

<sup>283</sup> Some of the complications that may result from female circumcision include bleeding, infection, pain, urinary tract infections, scarring, cysts and sexual and physiological side effects. Chessler, *supra* note 29, at 562–63.

<sup>284</sup> *Id.* at 561; Povenmire, *supra* note 50, at 115.

is easily justifiable.

### C. Hybrid Claim

The decision in *Smith* suggested that the only cases where a claim under the Free Exercise Clause had been vindicated were “hybrid situation[s]” involving not just a free exercise claim but also a claim connected to a constitutionally protected communicative activity or parental right.<sup>285</sup> Thus, the *Smith* Court characterized *Yoder* not as a free exercise case<sup>286</sup> but as a case concerning a parent’s right to direct the religious upbringing of his or her children.<sup>287</sup> The Court held in *Smith* that no such hybrid claim was raised because the activity in question, peyote use for religious conduct, did not implicate either communicative or parental rights.<sup>288</sup>

Circumcising children as a matter of religious tradition involves both communicative and parental rights.

#### 1. Communicative Activity

As an example of a communicative right connected to a free exercise case, the *Smith* Court cited<sup>289</sup> the statute invalidated in *Cantwell v. Connecticut*.<sup>290</sup> In *Cantwell*, the Court struck down a licensing system for religious and charitable organizations under which an administrator had discretion to deny a license to any cause deemed non-religious.<sup>291</sup>

Likewise, for those who perform circumcision as a matter of religious obligation, there is significant communicative value associated with their conduct. In Judaism and Islam, circumcision is a way of identifying

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<sup>285</sup> Emp’t Div., Dept’ of Human Res. of Or. v. Smith, 494 U.S. 872, 881–82 (1990).

<sup>286</sup> *Id.* at 881 n.1 (stating that both cases dealing with communicative or parental rights have “adverted to the non-free-exercise principle involved”).

<sup>287</sup> *Id.* For this proposition, the Court cited to *Yoder*’s reliance on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which held that parents had the right to direct the education of their children by choosing between public and private schools. Justice Souter disputed the Court’s reliance on *Pierce* in *Smith* to classify *Yoder* as a hybrid rights case. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566–67 n.4 (1993) (Souter, J., concurring in part and concurring in the judgment) (noting that the *Yoder* Court’s characterization of *Pierce* as “inapplicable” and stating that the State’s actions must be justified under the Free Exercise Clause). McConnell also criticizes this false distinction, noting that *Yoder* held that parents may not violate the compulsory attendance law for non-religious reasons. “Thus, according to *Yoder* parents have no right independent of the Free Exercise Clause to withhold their children from school, and according to *Smith* they have no such right under the Free Exercise Clause.” McConnell, *supra* note 218, at 1121.

<sup>288</sup> *Smith*, 494 U.S. at 882. Justice Souter’s concurrence in *Lukumi* argued that the hybrid distinction, while unnecessary, would cover the situation in *Smith*, since taking peyote under the facts of that case involved communicative and associational rights. *Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in judgment).

<sup>289</sup> *Smith*, 494 U.S. at 881.

<sup>290</sup> 310 U.S. 296 (1940).

<sup>291</sup> *Id.* at 304–07.

oneself as a member of the religion.<sup>292</sup> A government ban on circumcision would be equivalent to banning jewelry without an exception for crosses, or banning head coverings without an exception for the Muslim headscarf. All of these activities involve religious acts that have significant communicative and associational value, raising both free speech and free exercise claims.

## 2. Parental Rights<sup>293</sup>

The second type of hybrid claim that the Court acknowledged in *Smith* was a claim implicating the parental right to raise one's children without state inference, as the Court recognized in *Yoder*.<sup>294</sup>

According to *Smith*:

*Yoder* said that “the Court’s holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by the record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.”<sup>295</sup>

Applying the holding in *Yoder* to the San Francisco proposal, the latter implicates a parent’s right to direct his or her child’s upbringing<sup>296</sup> by denying the right to welcome his sons into the chosen faith through a centuries-old tradition. And, specifically with regard to medical decisions (the decision to circumcise a child or not is a medical one), the Court has recognized a parent’s right to make decisions about his or her children’s

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<sup>292</sup> See, e.g., Aryeh Citron, *The Mitzvah Circumcision (Part I)*, CHABAD.ORG, [http://www.chabad.org/library/article\\_cdo/aid/1014930/jewish/The-Mitzvah-of-Circumcision-Part-I.htm](http://www.chabad.org/library/article_cdo/aid/1014930/jewish/The-Mitzvah-of-Circumcision-Part-I.htm) (last visited Aug. 21, 2012) (referring to circumcision as “a sign, affixed in our flesh, that we are believers in the one G[o]d”); see also *supra* notes 28–30 and accompanying text (discussing male circumcision as a form of expressive conduct in the Jewish religion).

<sup>293</sup> This Note focuses on religious exemptions to the San Francisco proposal. There is also an argument, only partially developed here, that parents have a right regardless of religious prerogative to make decisions for their children. For a discussion of that argument, see Eugene Volokh, *Proposed San Francisco Circumcision Ban (with No Discussion of Religious Freedom in this Post)*, *supra* note 51.

<sup>294</sup> See *Smith*, 494 U.S. at 881 (recognizing the rights of parents, acknowledged in *Pierce*, to direct the education of their children).

<sup>295</sup> *Id.* at 881 n.1 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)).

<sup>296</sup> See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that a state law requiring that parents enroll their children in public school through age sixteen “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”).

medical care.<sup>297</sup> Thus, given the plausible medical reasons for circumcision (reduced urinary infection, and reduced risk of penile cancer and HIV/AIDS<sup>298</sup>), and absent some compelling medical evidence of the procedure's harmful effects (presently none exists), the normal presumption of parental deference applies, and parents have the right to make this medical decision for their children.

Inactivists argue, relying on *Prince*,<sup>299</sup> that even if parents have the right to direct their children's religious and medical upbringing, they do not have the right "to make martyrs of their children."<sup>300</sup> While it is true that the parental right to direct a child's upbringing is not limitless,<sup>301</sup> the test the Court has developed accounts for this limitation. Under the compelling interest test, a parent's right to raise his or her child is balanced against the potential harm to the child by following the parent's religious choice.

In our case, there is a world of difference between denying a child lifesaving medical treatment and allowing him to be circumcised as a member of a religious faith. As noted several times before, the harm of circumcision has not been conclusively established, and there are many plausible medical benefits derived from the procedure. Even as there exists some debate within the medical community about the efficacy of circumcision, the charge that boys are "martyred" by circumcision is nothing more than hyperbole of the worst sort. As the discussion above shows, instances of death as a result of circumcision are practically non-existent.<sup>302</sup> Therefore, the ordinary presumption of parental deference applies, and the parental right to raise one's child enjoined with the free exercise right to practice one's religion is applicable in requiring an exemption for religious followers to a circumcision ban.

#### IV. CONCLUSION

This Note has considered one aspect of the tension between liberal democracy and religious freedom. For laws to have any significance, citizens must not disregard them at will. And yet, the essence of religious liberty requires that believers enjoy some modicum of accommodation when their faith's practices conflict with generally applicable laws. This

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<sup>297</sup> See *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (holding that parents have a role in their children's medical decisions with the presumption that parents will act in their children's best interest).

<sup>298</sup> See *supra* notes 55–59 and accompanying text.

<sup>299</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child . . . to ill health or death.").

<sup>300</sup> *Id.* at 170.

<sup>301</sup> See *Parham*, 442 U.S. at 604 ("We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized.").

<sup>302</sup> See *supra* note 68 and accompanying text.

Note has considered this tension in the context of the proposal in San Francisco to ban male circumcision, and has argued for the adoption of one theory that partially resolves this tension.

This Note argued that the San Francisco proposal does not comport with the values of religious liberty, as defined by the Court's jurisprudence, and therefore it should not be upheld pursuant to the Free Exercise Clause of the First Amendment. While the proposal is generally applicable, it is not neutral because it dis-incentivizes religious followers from engaging in certain conduct, here, infant male circumcision.

Admittedly the Court's definition of neutrality is in flux. Thus, more significant perhaps than whether the proposal is neutral is how the Court conceptualizes the neutrality requirement. This Note argued that the Court should adopt substantive neutrality as the fullest embodiment of religious liberty. However, under the Court's present understanding of the neutrality requirement—formal and object neutrality—the ballot measure would be found to be neutral and therefore upheld. But a nation as committed to religious liberty as ours should not accept the mere absence of hostility as the ceiling for our religious liberties; that is just the floor.

If substantive neutrality is how neutrality is understood, this proposal could not stand (at least to the extent that it would apply to Jews and Muslims in the exercise of their religious practices). Rightly, the Court applies strict scrutiny when a state deprives its citizens of the fundamental right to engage in religious conduct. No compelling state interest has been shown, nor could be shown, that would justify this proposal. Moreover, religious observers seeking an exemption have a solid hybrid claim, as the proposal implicates both communicative and parental rights.

Adopting a substantive neutrality rule is consistent with religious liberty and does not violate the Establishment Clause. Substantive neutrality—that is, requiring the government to provide neutral incentives and disincentives for religious conduct—offers the greatest amount of protection for religious adherents that our Constitution could provide. Liberty does not just mean the right to believe in something; it also includes the concomitant right to act upon that belief. A rule that holds formal neutrality sufficient to meet the constitutional threshold is itself insufficient because it fails to account for those occasions where governmental action has an incidental deleterious effect on religious conduct.

This Note began by presenting the concept of a “friendly” separation of church and state. Perhaps such a separation requires mere formal or object neutrality: If the government is not hostile to religion, then it is acting neutrally and its regulations would be constitutional. But our Constitution and the cause of religious liberty demand more. Put simply, the government should not be in the business of picking winners and losers in the religious marketplace.