

When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith* World

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INTRODUCTION

On October 11, 2006, forty-year-old Ginnah Muhammad brought suit against Enterprise Rent-A-Car seeking relief for \$2,750 in assessed damages to a rental car, damages she claimed were caused by thieves. Rather than discussing her claims, however, the court focused on her sartorial choices: Muhammad arrived in court wearing the *niqab*—a modesty veil, worn by some devout Muslim women, covering the head and face with the exception of the eyes.¹ Presiding Judge Paul Paruk gave her the choice of removing the *niqab*, or having her case dismissed. Paruk’s reasoning appeared to be pragmatic: “I can’t see your face and I can’t tell whether you’re telling me the truth and I can’t see certain things about your demeanor and temperament that I need to see in a court of law.”² Muhammad parried, requesting that her case be heard in front of a female judge before whom she would feel comfortable removing her veil. When Paruk rejected this option as impossible, Muhammad chose to have her case dismissed rather than remove her veil, stating, “I wish to respect my religion and so I will not take off my clothes.”³

Neither Muhammad nor any commentator contends that Paruk’s actions stemmed from anti-Muslim animus. To the contrary, his courtroom rules—while not statutorily mandated—appeared motivated by the desire to accurately judge the veracity of witnesses’ statements. Moreover, his decision would appear to be in line with the Supreme Court’s First Amendment jurisprudence: when faced with a conflict between religious practice and a rule or statute

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1. Catherine Elsworth, *Defeat for Woman Who Refused To Take Off Her Veil*, TELEGRAPH (London), Oct. 24, 2006, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/10/24/wveil24.xml>.

2. Transcript of Record at 4, *Muhammad v. Enterprise Rent-a-Car*, No. 06-41896-GC (Mich. 31st Dist. Ct. Oct. 11, 2006).

3. *Id.* at 6.

facially neutral toward religion, the Court's rulings indicate that religious practice must cede to facially neutral rules.⁴ As applied here, however, that jurisprudence forced Ginnah Muhammad to choose between following the tenets of her religion and pursuing justice through the courts. Ultimately, Muhammad chose to opt out of a key aspect of public life rather than abandon what she saw as her religious duty.

This Comment argues that Muhammad's case points to a line of jurisprudential difficulty that will become increasingly prevalent in the coming years. The principle that religious practice must bend to laws of general applicability in cases of conflict has reigned more or less dominant over the Court's First Amendment jurisprudence throughout American history.⁵ And most conflicts up to this point have involved minority religions—the Church of Jesus Christ of Later Day Saints⁶ and Native American religions,⁷ for example—whose practices, like polygamy and the use of peyote in religious ceremonies, faced widespread public disapproval and were often directly outlawed by secular law.⁸ This Comment argues that an increasing number of cases will emerge in coming decades in which the religious practices of major religions will come into more “accidental” contact with ancillary aspects of law and that these conflicts risk causing religious organizations and people to opt out of public life, thereby threatening democratic participation.

To that end, Part I outlines the Supreme Court's jurisprudence with regard to laws of general applicability that prohibit or conflict with religious practices. Part II argues that the effects of that jurisprudence have become more pronounced as a result of increased pluralism resulting from immigration and the growing divergence between secular law and traditional religious practices. Together, these two trends will cause more conflicts to arise between laws of general applicability and religious practices unforeseen or unconsidered by the drafters of those laws. These conflicts will likely result in increasing numbers of sincerely religious people and organizations choosing to “opt out” of aspects of public life rather than abandon their religious principles. Finally, Part III suggests possible legislative measures for ensuring that people of religious faith remain active participants in society, thereby maintaining the current balance of relations between religious practices and secular law without abandoning the regnant *Smith* line of jurisprudence. These include maintaining the current and previous balance of relations between religious practices and secular law through increased legislative carve-outs for religious people and groups, the

4. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

5. *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 110-13 (3d ed. 1999).

6. *Reynolds v. United States*, 98 U.S. 145 (1879).

7. *Smith*, 494 U.S. at 874.

8. *See, e.g.*, U.S. REV. STAT. § 5352 (1878) (outlawing polygamy); OR. REV. STAT. § 475.992(4) (1987) (prohibiting the possession of nonprescribed “controlled substances,” including peyote).

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statutory return to a compelling state interest model via state legislation, potential “minimization procedures,” and requiring religious impact statements for proposed legislation.

I. THE JURISPRUDENCE OF RELIGION AND LAWS OF GENERAL APPLICABILITY

From the Supreme Court’s first major free exercise cases in the late nineteenth century through the early part of the twentieth century, the Court’s jurisprudence with regard to conflicts between laws of general applicability and religious practices was weighted toward secular laws and away from religious minorities.⁹ The landmark case of this period is *Reynolds v. United States*, in which the Court famously upheld a federal law prohibiting polygamy against a Mormon who claimed that polygamy was his religious duty. The Court’s reasoning was simple: “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”¹⁰ During this period, it appeared clear that religious practices must give way to generally applicable secular statutes. Religious minorities did win exemptions from some facially neutral laws, but this occurred most often when a free speech or due process claim applicable to all individuals, regardless of religion, was also involved.¹¹

Between 1963 and 1989, the Court’s jurisprudence took a different turn which seemed—at least in theory—to shift the balance toward upholding religious practices that conflicted with laws of general applicability. During this period, the Court applied a balancing test to determine whether religious individuals and groups had the right to exemptions from generally applicable laws. The individual claiming the exemption was required to demonstrate that the generally applicable statute interfered with his ability to practice his religion, while the state was required to demonstrate that granting an exception would interfere with a compelling state interest.¹² In balancing the two interests, if the Court found the secular end sufficiently compelling to outweigh the burden on the religious person’s free exercise and found the statute

9. ROTUNDA & NOWALK, *supra* note 5, at 110 (“The Court’s opinions prior to 1963 did not give special protection to religiously motivated activity.”); *see also* *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934).

10. *Reynolds*, 98 U.S. at 166.

11. *See, e.g.*, *W.V. State Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that children who were Jehovah’s Witnesses could not be compelled to recite the pledge of allegiance in public schools); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down the arrest and conviction of Jehovah’s Witnesses who distributed religious literature without a license that could only be obtained from a licensing officer who determined whether the literature was religious); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (striking down a requirement that children attend public schools as opposed to parochial, religious, and other private schools). *But see* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (denying Jehovah’s Witnesses a Free Exercise Clause exemption from a flag salute statute), *overruled, Barnette*, 319 U.S. 624.

12. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

narrowly tailored to promote that end, the statute was allowed to stand.¹³ In theory, this line of jurisprudence should have allowed for more exemptions to religious minorities than the previous standard, but in practice the story was far different.¹⁴ Although the Court granted Amish children an exemption from mandatory school attendance laws in perhaps the most celebrated case of this period,¹⁵ in the final tally, however, relatively few exemptions were granted under this test.

Since 1990, the Court has retreated from the two-part balancing test in favor of a standard reminiscent of the one it employed in the early part of the twentieth century. In *Employment Division v. Smith*, the Court upheld a statute banning the use of the psychotropic peyote plant in Native American religious rituals.¹⁶ In an opinion written by Justice Scalia, the Court held that “if prohibiting the exercise of religion . . . is not the object of a [law], but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”¹⁷ The Court explicitly affirmed that the state need satisfy the compelling interest test only in the case of laws targeting a specific religion, not when authorizing a law of general applicability. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,¹⁸ the Court invalidated a city ordinance prohibiting certain forms of animal slaughter on the grounds that the ordinance had been erected to ban the worship rite of a particular sect. Justice Stevens wrote for the Court that:

a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.¹⁹

Only three years after the Court’s decision in *Smith*, Congress responded by passing the Religious Freedom Restoration Act of 1993 (RFRA), which attempted to reinstate by statute the compelling standard test for free exercise.²⁰ RFRA provided that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . in furtherance of a compelling governmental interest; and . . . [if the law] is the least restrictive means of furthering that compelling governmental interest.”²¹ Although the Court had explicitly allowed room for

13. ROTUNDA & NOWALK, *supra* note 5, at 110.

14. 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 30 (2006).

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

16. 494 U.S. 872 (1990).

17. *Id.* at 878.

18. 508 U.S. 520 (1993).

19. *Id.* at 531.

20. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified in scattered sections of 5 and 42 U.S.C.).

21. 42 U.S.C. § 2000bb-1 (2000).

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legislative exemptions to generally applicable laws,²² its reaction to RFRA was swift. In *City of Boerne v. Flores*, the Court struck down RFRA's application to state laws on grounds that the statute exceeded Congress's Fourteenth Amendment power by impermissibly expanding the First Amendment and thereby intruding into the states' general authority to regulate for the health and welfare of their citizens.²³ In *Boerne's* wake, Congress has passed RFRA-like legislation to govern certain limited spheres, such as land use.²⁴ Further, several states have passed state-wide versions of RFRA,²⁵ although passage of RFRA-like statutes has failed in other states, including Ginnah Muhammad's home state of Michigan.²⁶

II. THE EFFECTS OF JUDICIAL DEFERENCE TO LAWS OF GENERAL APPLICABILITY

Adherents of minority religions brought many of the cases that arose under the Free Exercise Clause during the nineteenth and twentieth centuries. The Church of Jesus Christ of Latter Day Saints, for example, had fewer than one million followers until 1947,²⁷ and there were significantly fewer in 1878 when *Reynolds* was decided. Similarly, only 47,000 Americans self-identified as adherents of Native American religions in the 1990 census.²⁸

That minority religions should more often find their practices prohibited by laws of general applicability should not surprise; widely held religions are more likely to be taken into account when legislation is drafted. Much legislation, particularly in the early Republic, had roots that could be traced either directly

22. See *Smith*, 494 U.S. at 889.

23. 521 U.S. 507 (1997). The Court recently upheld RFRA's application to federal statutes in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006).

24. See Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (Supp. 2003). In passing RLUIPA, "Congress attempted to avoid the constitutional defects of RFRA, both by narrowing the scope of the law to the land use and institutional (primarily prison) contexts and by developing a legislative record that found a history of discrimination in land use practice." Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 221 (2006) (footnotes omitted).

25. See ALA. CONST. amend. 622; ARIZ. REV. STAT. § 41-1493.01 (West 2000); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. § 761.03 (West 2000); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); MO. REV. STAT. § 1.302 (2007); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2003); 51 OKLA. STAT. § 251 (2006); 71 PA. CONS. STAT. § 2401 (2006); R.I. GEN. LAWS §42-80.1-3 (2007); S.C. CODE ANN. § 1-32-40 (2003); TEX. CODE ANN. § 100.003 (Vernon 2004).

26. See Eugene Volokh, *Intermediate Question of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 597 n.2 (1999).

27. The Church of Jesus Christ of Latter-Day Saints, Church Growth, <http://www.mormon.org/learn/0,8672,967-1,00.html> (last visited Apr. 24, 2007).

28. U.S. CENSUS BUREAU, 2007 STATISTICAL ABSTRACT 73 (2007) [hereinafter RELIGION IDENTIFICATION REPORT], available at <http://www.census.gov/compendia/statab/population/religion/>. Note that because the Census Bureau is prohibited from asking a mandatory question on religious affiliation, see 13 U.S.C. § 221(3)(c) (2000), these figures are self-reported on a voluntary basis and hence are probably understated.

to the dominant mainline Protestant churches or indirectly to their concomitant worldview.²⁹ As the nation grew, its reform movements—which in several cases went on to spawn legislation and even constitutional amendments—were influenced by religion. The role of religion in abolitionism and the passing of the Thirteenth, Fourteenth, and Fifteenth Amendments, the temperance movement and the Eighteenth Amendment, female suffrage and the Nineteenth Amendment, and the civil rights movement and the repeal of Jim Crow laws is well documented by scholars.³⁰ Secular laws of general applicability could be expected to conflict with mainstream religions infrequently because they were constructed with those religions as part of their lawmakers' worldviews, whether as their own religions or as religions shared by those around them.

Indeed, Ginnah Muhammad's case supports a further nuance of this idea that minority religions should more often come into accidental conflict with laws of general applicability. Muhammad's refusal to remove her veil was couched in striking language: "I will not take off my clothes."³¹ Most non-Muslim women would agree that one should not be asked to remove one's clothing to testify in court. The dissonance was definitional: those who drafted the rules governing Paruk's courtroom would never have thought to consider a face-covering "clothes" in the same sense that a skirt and blouse are "clothes," while to Muhammad this was a natural use of the word and the concept. From this difference in background assumptions arose Muhammad's conflict.

The effect, then, of a jurisprudence that consistently allows laws of general applicability to "trump" conflicting religious practices would be to screen out not only those religious practices that are hostile to commonly held opinion and directly outlawed by general applicability laws (as in the cases of peyote use and polygamy), but also those practices that are merely foreign to commonly held opinion and thus come into "accidental" contact with facially neutral laws (as in Ginnah Muhammed's own case). In both instances, however, the outlawed religious practices will predominantly be those of minority religions.

A. *Changes in the Effects of Free Exercise Jurisprudence Due to Immigration*

In a religiously homogeneous nation populated mainly by practicing mainline Protestants,³² this line of jurisprudence relatively infrequently

29. See, e.g., PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 192-98* (1965); see also *Vidal v. Philadelphia*, 43 U.S. 127, 198 (1844) ("It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *59 ("Christianity is part of the laws of England.")

30. See, e.g., PATRICIA U. BONOMI, *UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA* 221 (1986); DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* (2004).

31. Transcript of Record, *supra* note 2, at 4.

32. The first recorded census of religious bodies was reported in 1906 and included data from both 1890 and 1906. See DEP'T OF COMMERCE & LABOR, BUREAU OF THE CENSUS, *RELIGIOUS BODIES: 1906* (Bulletin 103, 1910), <http://www2.census.gov/prod2/decennial/documents/03322287no101-110ch03.pdf>

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produced instances of conflict between religious practices and facially neutral laws.³³ Those religions whose practices did conflict with secular laws of general applicability tended to be minority religions whose practices were widely regarded as illegitimate.

The demographics of the United States, however, have not remained steady since the eighteenth century. Rather, the demographics of immigrants have changed markedly in the past 150 years. According to the Census Bureau, while 98.9% of immigrants to the United States in 1850 emigrated from Europe or North America, by 1990 that number had dropped to 26.9%. In the same period, immigration from Asia (including the portion of the Middle East categorized as Southwest Asia) increased from 0.1% of all immigration to 26.3%, and immigration from Latin America increased from 0.9% to 44.3%.³⁴

Similarly, while the absolute number of self-described Methodists, Lutherans, and Episcopalians remained the same from 1990 to 2001 (that is, adjusting for population growth, their proportion in the population declined during that period), the number of Catholics increased apace with the increase in population, and the number of Muslims, Buddhists, and Hindus doubled or tripled.³⁵ The areas surrounding Detroit, from which Ginnah Muhammad hails, are heavily Muslim, home to many immigrants.³⁶ This change is not mere happenstance but rather, at least in part, the result of legislative action. American immigration policy has changed significantly over the past forty years,³⁷ sparked by the Immigration and Nationality Act of 1965, which reflected changing attitudes toward race.³⁸

This shift in demographics means that an increasing number of American citizens belong to religions not shared by the American Founders or by the members of the legislative branch who have written the majority of laws by which we live.³⁹ Inevitably, then, many citizens belong to religions that those who drafted the laws by which they are governed did not foresee.

(describing the nation as 92.7% Protestant in 1890 and 92.2% Protestant in 1906).

33. ROTUNDA & NOWAK, *supra* note 5, at 6.

34. Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990* tbl.2 (U.S. Census Bureau, Working Paper No. 29, 1999), available at <http://www.census.gov/population/www/documentation/twps0029/twps0029.html>.

35. RELIGION IDENTIFICATION REPORT, *supra* note 27.

36. U.S. CENSUS BUREAU, STATE AND METROPOLITAN AREA DATA BOOK tbl.B-2 (2006), available at <http://www.census.gov/prod/2006pubs/smadb/smadb-06tableb.pdf> (reporting that between April 1, 2000 and July 1, 2005, Detroit had 72,285 international immigrants).

37. U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES: A DOCUMENTARY HISTORY, at xxxvi (Michael Lemay & Elliott Robert Barkan eds., 1999).

38. Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

39. Reuters, *Catholics Top Faith in New U.S. Congress*, Jan 3, 2007, available at <http://www.wwrn.org/article.php?idd=23844&sec=57&cont=all>.

B. *Changes in the Effects of Free Exercise Jurisprudence Due to Increasing Secularity*

The other religious demographic—along with Islam, Buddhism, and Hinduism—that doubled between 1999 and 2001 is those adults who self-identify as having “no religion,” a number that also includes those who are atheists, agnostics, humanists, or secular.⁴⁰ Experts argue that, proportionally, there are more atheists in the world than ever before.⁴¹ Further, Americans in positions of influence who continue to adhere to organized religions increasingly practice their religions in more “modern,” or less traditional, ways. That is, in the United States, the education levels of various denominations are inversely correlated with their church attendance: Episcopalians are both the most highly educated and attend church the least often among Christian denominations, while Baptists are the least educated and attend church most regularly.⁴² In addition, religions with high attendance rates correlated positively with belief in an afterlife, belief in miracles, and belief in the Bible as the literal truth.⁴³ Because education correlates well with public influence,⁴⁴ those denominations whose adherents have public influence are more likely to have adherents who spend less time in church and believe fewer traditional teachings.

This shift in religiosity will have an impact not only on minority religions but also on religions adhering to traditional ethical notions not shared by a less religious populace or considered by legislators and courts. Such traditionally religious individuals are more likely to find their religious practices in conflict with facially neutral laws than they would have a century ago when traditional religious moral notions were more widespread. One recent illustrative example of this phenomenon is Catholic Charities’ decision to end its 100-year old adoption service when faced with a Massachusetts ordinance outlawing discrimination on the basis of sexual orientation, which would have forced the organization to place children with homosexual couples in violation of its perceived religious mission.⁴⁵ As in the case of Ginnah Muhammad, when given the choice between abandoning its religious principles and opting out of public life, Catholic Charities chose the latter.

40. RELIGIOUS IDENTIFICATION REPORT, *supra* note 27.

41. Phil Zuckerman, *Atheism: Contemporary Numbers and Patterns*, in THE CAMBRIDGE COMPANION TO ATHEISM 47, 59 (2007).

42. Bruce Sacerdote & Edward L. Glaeser, *Education and Religion* 4 (Nat’l Bureau of Econ. Research, Working Paper No. 8080, 2001), available at <http://post.economics.harvard.edu/hier/2001papers/HIER1913.pdf>.

43. *Id.* at 36.

44. Every Senator in the 110th Congress, for example, has at least a bachelor’s degree. See Biographical Directory of the United States Congress, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Apr. 24, 2007) (search by position and Congress number).

45. Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A14.

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It seems likely that the combination of these two factors—the increase in pluralism as a result of immigration and a decrease in religiosity—will lead to increasing numbers of situations in which the religious beliefs of traditionally religious people and groups will come into conflict with facially neutral laws of general application.

III. SOLUTIONS: PRESERVING DEMOCRATIC PARTICIPATION STATUTORILY

If changes in demographics and society's regnant ethos lead to an increase in the number of conflicts between religious practices and laws of general applicability, the effect of a jurisprudence granting almost complete deference to the latter will be to create situations that ask religious people to choose between being faithful to their religious beliefs and opting out of public life. Often, the sincerely religious can be expected to make that choice in favor of religion. And in many cases—like those exemplified by Ginnah Muhammad and Catholic Charities—the result of that choice will be that individuals or groups will not only cease offering the services they once provided to society, but may also choose to opt out of participation in the democratic process.

A. *Legislative Carve-Outs*

How could legislators avoid this result, if they wished to? The most obvious way would be to continue creating ad hoc carve-outs from statutes for those whose religious practices are hindered by them. This has been done, for example, for the use of peyote in Native American religious ceremonies.⁴⁶ Such carve-outs could apply to both statutes and procedural rules. In Ginnah Muhammad's case, such a carve-out might allow for testimony by veiled women on the premise that there are ways of determining the veracity of people's statements without seeing their face (from voice intonation or word choice, for example),⁴⁷ or even for the granting of Muhammad's request for the use of female judges in the limited context of small claims courts.⁴⁸

Solving conflicts between free exercise and laws of general applicability through a carve-out system has the virtue of allowing legislators to consider each religious practice and its effects in turn, to see how dangerous or hostile to civil order it actually is and how often the prohibiting of the practice would

46. 42 U.S.C. § 1996a (2000).

47. Many small claims courts allow testimony over the phone from witnesses who are ill, disabled, out of state, or unable to take time off of work. *See* RALPH WARNER, EVERYBODY'S GUIDE TO SMALL CLAIMS COURT 211 (2006).

48. Small claims courts differ from other courts in that the plaintiff is often his own only witness. *See id.* at 198 (recommending the use of witnesses in some cases, and adding that in others, "witnesses aren't as necessary"). Further, in most states, jury trials are not available in small claims court. *Id.* at 152. Thus, small claims proceedings have two unique characteristics: one veiled witness is particularly likely to be central to one side's case, and there would no need to worry about the constitutional concerns that could arise from a request for an all-female jury.

cause the exclusion of religious groups and people from public life. This virtue, though, is also the practice's weakness: it provides for the sort of discretionary judgment by public officials on the merits of religious practices that the Court held unconstitutional in *Cantwell v. Connecticut*.⁴⁹ Further, carve-outs can themselves negatively impact the widespread participation in public life that is democracy's lifeblood by undermining the notion of equal application of the law and, ironically, by allowing the very opting-out of public life that they were implemented to eliminate.

B. *Statewide RFRA*s

Several alternatives to more piecemeal, discretionary approaches are available. First, legislatures could consider the enactment of RFRA's at a statewide level. *Boerne* struck down, as an infringement of the states' police power, Congress's attempt (via the federal RFRA) to reintroduce the compelling state interest standard for state legislation that interfered with religious practices.⁵⁰ However, as mentioned above, twelve states have passed RFRA's of their own, requiring their legislatures to establish a compelling interest before interfering with a religious practice.⁵¹ Indeed, Alabama has gone so far as to enshrine RFRA-like language into its state constitution, thereby ensuring that not only legislatures, but all branches of government are held to the compelling interest standard.⁵² In Ginnah Muhammad's case, this distinction is particularly relevant as it was a judicial rule, rather than a statute, which brought about her predicament.

C. *Minimization Procedures*

Second, legislatures could require that a form of "minimization procedure" be enacted in all cases in which laws of general applicability and religious practices come into conflict. Such a strategy would ask lawmakers and religious groups to identify which parts of a religion's practices were essential and which were merely customary or incidental. In *Muhammad*, both Ginnah Muhammad and the presiding judge seemed to be pushing for such an accommodation, with Muhammad suggesting that the need to see a witness's face or to be tried by a male judge were not essential to the trial process and Judge Paruk suggesting that the *niqab* is a custom rather than "a religious thing."⁵³ The difficulty with such a remedy, as evidenced in this case, is that the two parties may differ as to which aspects of their own sphere are essential,

49. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

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

51. *See supra* note 25.

52. ALA. CONST. amend. 622.

53. Transcript of Record, *supra* note 2, at 5.

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with each arguing for the importance of the element of his own practice.

Self-identification of nonessential practices, therefore, could be inefficacious, while allowing such distinctions to be made by a third party would again smack of the discretionary factor that the Supreme Court deemed illegitimate in *Cantwell*.⁵⁴ One further possibility in this line of thinking would be to allow religious groups and government bodies as a whole (rather than on the individual level) to designate certain practices as essential or nonessential, thereby making the decision on behalf of their parishioners or practitioners. This practice, though, might fall prey to the charge that it did not sufficiently protect individual conscience, particularly in cases in which widespread disagreement existed within a religious body as to which religious practices were really essential.

D. *Religious Impact Statements*

Finally, states could require religious impact statements, analogous to the environmental impact statements required under the National Environmental Protection Act of 1969,⁵⁵ to be appended to potential legislation. Such a solution has great advantages. It does not fall afoul of the Establishment Clause, because impact statements would not require action, but rather alert legislators to potential difficulties. Further, it could greatly mitigate the number of “accidental conflicts” between religious practice and secular statutes that can arise when certain religions simply fall outside of legislators’ fields of view. Finally, a model exists to aid in implementation in the analogous institution of environmental impact statements.

However, the differences between the environment and religion could give rise to difficulties with religious impact statements. Environmental impact statements must be produced in connection with all “major federal actions significantly affecting the quality of the human environment.”⁵⁶ Religious impact statements, however, would be intended to *discover* which statutes affected “the quality of human religion” rather than merely applying to that already established sphere. As such, they could require wider use and, thus, greater administrative burden.

Moreover, one question that often arises in the examination of environmental impact statements is how to define “environment,” a term that courts have chosen to interpret broadly.⁵⁷ A similar issue would doubtless arise in the case of religion—which beliefs systems and groups count as religions, and which are mere world views or social organizations? While just as complex

54. 310 U.S. at 307.

55. 42 U.S.C. § 4332 (2000).

56. *Id.* § 4332(c).

57. MARTIN S. BAKER ET AL., ENVIRONMENTAL IMPACT STATEMENTS: A GUIDE TO PREPARATION AND REVIEW 4 (1977).

as the question of defining “environment,” giving meaning to the term “religious” in this context would be a particularly sensitive area of inquiry. Indeed, one major strain in Free Exercise jurisprudence that has been completely consistent over the years is that the government may not define what constitutes religion.⁵⁸ An opt-in process whereby religions registered to be considered in religious impact statements, however, could somewhat alleviate this problem.

CONCLUSION

As this Comment goes to press, Ginnah Muhammad has reportedly been granted a new hearing, following her appeal of Paruk’s earlier ruling.⁵⁹ It is not yet clear whether Muhammad will be allowed to wear her *niqab* during that proceeding.

Regardless of the outcome of her trial, however, Muhammad’s case points not merely to an idiosyncratic clash between the religious practices of conservative Muslims and the rules of American trial practice, but rather to a growing trend of cases whose resolution could have serious consequences for the democratic participation of religious individuals and organizations. Current Supreme Court jurisprudence is ill equipped to deal with a rise in the number of conflicts between religious practice and statutes of general applicability. Without legislative aid, the application of *Smith*-type reasoning may increasingly lead to the self-exclusion of religious minorities from the public sphere. The solutions to this problem that this Comment has suggested are certainly not exhaustive, but are rather a call for legislators to begin considering how they will face this new challenge.

58. See *Cantwell*, 310 U.S. at 307.

59. Zachary Gorchow, *Woman Who Refused To Remove Veil Granted a New Hearing*, DETROIT FREE PRESS, Jan. 23, 2007.