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Religious Conduct Exemptions under the New Zealand Bill of Rights Act 1990:

An advocacy for the “Equal Regard” reading of section 15

by

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A thesis
submitted in fulfilment
of the
requirements for the degree of
Doctor of Philosophy in Law

The University of Auckland, 2011
ABSTRACT

This thesis will consider the meaning of section 15 of the New Zealand Bill of Rights Act 1990, which guarantees the right to manifest religious belief in public and in private. The precise boundaries of this right have received little attention in the courts, but it is anticipated that litigation will become more common as the country becomes more religiously diverse.

I will assess the merits of adopting the current methodology applied by the courts of the United States of America when interpreting the Free Exercise Clause of the First Amendment to the US Constitution. I will argue that this methodology, which is meaningfully engaged only when religious conduct is restricted by discriminatory burdens imposed by the state, could provide a fair and workable system of protection for religionists in this country. I will also contend that the “Equal Regard” method fits well with an important strand in New Zealand’s constitutional culture and historical traditions, which favours equality over liberty, and democratic solutions to vexing questions concerning individual freedom. I will also argue that this approach is consistent with the country’s international obligations under certain United Nations human rights treaties, principally Article 18 of the International Covenant on Civil and Political Rights 1966.

Other judicial approaches in countries sharing our common law heritage to construing the right will be assessed and rejected as models for New Zealand, primarily due to the difficulties inherent in weighing the needs of religious believers against the secular policy goals of government. This, it will be argued, is a task better suited to the democratic branches of government, with the courts playing an auxiliary role in enforcing equality between all religions, and non-religion.

Finally, I will apply the Equal Regard methodology to a series of case studies involving Islamic religious practices that conflict with governmental regulation. These case studies will demonstrate how the methodology has the potential to provide genuine protection for persons wishing to conduct their lives in accordance with their deeply held spiritual commitments.
ACKNOWLEDGEMENTS

This thesis would not have been written without the support and friendship of many people. I agree with the truism that doctoral study is the loneliest of enterprises but I realise in retrospect that it was the only time in my student life when I have been completely dependent on the generosity, professionalism and kindness of others. To these people, impossible to list exhaustively here, I give my heartfelt thanks.

First, I would like to thank my primary supervisor, Professor Paul Rishworth of the University of Auckland Law Faculty. I benefited immensely from one-to-one discussions of my topic with Professor Rishworth over the last several years, and appreciated greatly his generosity with his time and, among many other things, his bookcase. I also thank him for the occasional lunch and, above all, for his calmness during my fallow periods. I recall in particular one episode at Forde’s in 2008 when in 30 minutes he cut this thesis conceptually in half and made the end perceivable for the first time. In some important ways this study is a product of Paul’s tutelage, although of course the thesis put forward here is all my own, as are any errors and omissions.

Mention also should go to my secondary supervisor, Dr Caroline Foster, who provided illuminating and detailed feedback on draft chapters. I would also like to thank Professors Warren Brookbanks, David V. Williams and Bruce Harris, as well as Dr Nin Tomas, Kris Gledhill, Bernard Brown and Treasa Dunworth for their encouragement, general bonhomie, and practical help over the years. I am also grateful for the assistance of the staff of the Davis Law Library, expertly led by Mary-Rose Russell and now Stephanie Carr. I would also like to extend warm regards to my occasional correspondent, Professor Rex Ahdar of the University of Otago. And I wish now to mention the debt I have to the late Professor Mike Taggart, who kindled my interest in the law when I took a Masters course with him in 2002 and whose humour and unique sensibility to all things will always be an inspiration to me.

I would next like to acknowledge the camaraderie of my PhD candidate colleagues. From 2007 we formed a community at the Postgrad Law Office on the 7th floor of the Short Street Building that was, I believe, a constant source of succour to all of us, and meant we were never truly alone despite our individual travails. To Herman Salton, Guy Campion Charlton, Justin Glyn, Ned Fetcher, An Hertogen, Deidre Bourke, Yolinda Chan, Stephanie Mead, Myriam Kleinmann and Angela Thomson, I offer my warmest thanks for your genuine collegiality. I also wish to mark here the loss of my colleague and friend Jason Karl in 2010. I would also like to mention the friendship of doctoral scholars at other faculties, particularly Judith Hammond, Lyndon Burford and David Lindsey at Politics. Thanks are also due to Klaus, Georgos, Big Vern, Paddy, Simon, Barbara and Otto for their convivial presences on the 7th floor.

I now turn to Dr Paul Vincent, Shakespearian scholar and professional freelance editor *sans pareil*. Dr Vincent took me in hand in mid-2010 and guided me through the difficult last months, not only with a thorough and speedy proofreading service that went down to the wire (well, almost – where were you at 3a.m. on 1 February 2011?), but also with his wise coaching tips for navigating the psychological reefs that lurk around the final months preceding submission. Thank you, Paul, for transporting me through the vortex.
I am also hugely grateful to Catherine Redmond and Ned for vital help in assembling my bibliography at short notice. Ned is, moreover, to be congratulated on his sustained appetite for and generosity with cheese-and-shallot toasted sandwiches, although I for one may never be able to look a shallot in the eye again. Much the same could be said of Charlton’s Chicago Dogs. I must also here salute OGH President John Sadler and his impromptu mid-afternoon visits to cajole and admonish what seemed to him my slow progress with dire warnings and stern homilies, all washed down with lashings of cognac, seafood treats, and, on occasion, The Widow.

Thanks are also due to Jennifer Braithwaite and Ned again for insightful comments on draft chapters. I convey here my fondest thoughts too to: Timothy Gordon, Benny Ord, Marvin & Jennifer Hendrickson, Lawrence Carter & Marie, Anatole & Malgosia, Putoi, Mo Thompson, Lionel & Janetta, Sarah Redmond, Sigrid Buschbacher, Douglas Hou, Nick Pearson, Philipp Lemke, Tobias Schmidt, Phil Behrens, Bridget Dingle, Peggy Walter, Tity & Morgane, Jay & Claire, Chris Piper, Herr Doktor Heagney, Paul Murray & Sanae, Mouse & NQ, Andy Saker, Jeff Drane, Juliet Fisher & Ray, Barton & Frances, Donna Foster, Jenny De Leon, Morgan & Pat Jones, Gwendo & Viv, and Nicola Jackson – for reasons they will understand.

I also would like to mention some of my old cohort from the aquatinted undergraduate years at Victoria University last century: Duncan McGill, John Phibbs, Richard Sudell, Rat, Sam Irvine (honorary), Verwoerd, Mengel, Nash, Bolger, Allie & Ewen, CJ & Leigh, Morton & Jo, K.A. Morrison, and the Dickeys – and thank them for their continued friendship and peerless generosity. To Duncan I express special gratitude, and not only for the seemingly endless supply of coffee and laksa when I met him in town for lunch. I am also extremely grateful to my old friend from Woodstock days, S.P. Reilly, who was sent on hopeless missions to rainswept archival depositories in Wellington even as I luxuriated in balmy Auckland.

Mention is now overdue to the administrative staff at the Auckland Law Faculty. I am forever in special debt to Joanne Anderson, Theresa Ryan, and Françoise Godet for their sense of fun, friendship and all-round conscientiousness during my studies. They understood well the pastoral-care side of postgraduate study and I know I am not alone in being grateful in this regard. Thanks also go to Jeanna Tannion, Eddy Van De Pol and Andi Martin, who came to the faculty later but were always helpful and cheerful presences. Thanks are also owed to Bruce and Bipin at IT, and to Megan Baker for her early efforts in setting up the PhD facility on the 7th floor.

I am also grateful for the Law Faculty’s support in attending conferences in Wellington and Canberra, and also for the University of Auckland Doctoral Scholarship that I received. Thanks are also due to the Ministry of Foreign Affairs and Trade, in particular to John Mills, for enthusiastic research assistance and generous funding for two trips to the capital.

Finally, I pay special homage to all my family in New Zealand and in Japan, past and present, especially to Izumi and our respective parents. You were all never far from my mind throughout the doctoral voyage.
for 泉

Thy firmness drawes my circle just,
And makes me end, where I begunne.
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Chapter 1

Introduction: Religious exemptions from general laws – a tale of two neutralities

Every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private. (New Zealand Bill of Rights Act 1990, section 15)

[1] If any people congregated upon account of religion, should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. Meliboeus, whose calf it is, may lawfully kill his calf at home, and burn any part of it that he thinks fit: for no injury is thereby done to any one, no prejudice to another man’s goods. And for the same reason he may kill his calf also in a religious meeting. Whether the doing so be well pleasing to God or no, it is their part to consider that do it…. And thus what may be spent on a feast may be spent on a sacrifice. And if, peradventure, such were the state of things, that the interest of the commonwealth required all slaughter of beasts should be forborn for some while, in order to the increasing of the stock of cattle, that had been destroyed by some extraordinary murrain; who sees not that the magistrate, in such a case, may forbid all his subjects to kill any calves for any use whatsoever? Only it is to be observed, that in this case the law is not made about a religious, but a political matter: nor is the sacrifice, but the slaughter of calves thereby prohibited. (John Locke A Letter Concerning Toleration, 1689)

1. Introduction

In October 2004, Mrs Fouzya Salim declared at the Auckland District Court that she would rather kill herself than uncover her face while giving evidence for the prosecution in a criminal trial.\(^2\) Salim was an Afghani immigrant to New Zealand who considered it a central tenet of her Islamic faith that, except in extreme emergencies, she was forbidden to remove her burqa\(^3\) in public. Ranged against her claim was the common law presumption that evidence should be given in open court, and the right of the accused in the case to be afforded a fair trial. This right, it was argued, included the ability of defence counsel, and triers of fact, to assess the facial demeanour of witnesses as an important aspect of effective cross-examination. For her part, Salim invoked section 15 of the New Zealand Bill of Rights Act 1990 (“BORA”), which guaranteed her right to manifest her religious beliefs in public.

In response to Salim’s reliance on s 15 BORA, Judge Lindsay Moore elected to craft an exemption to the common law rule on witness testimony, stating that to ask Salim to unveil in front of those present in the courtroom would be “contrary to the interests of justice”.\(^4\) Accordingly, the judge determined that she could give evidence behind a screen, where she would be permitted to wear a veil covering her hair, and her face could only be viewed by female court staff, counsel, and by the judge. This was despite arguments by the defence that to accommodate veiling in the courtroom would be to endorse a discriminatory and misogynist practice of a primitive religious culture that was foreign to New Zealand. Such a concession,

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2. Elizabeth Binning “I’d rather kill myself than remove veil, woman tells court” New Zealand Herald (27 October 2004). Salim spoke on behalf of herself and her sister, who was also called on to give evidence but did not wish to reveal her face.
3. The burqa is a loose-fitting garment that covers the entire body of the wearer, save for an opening for the eyes.
1. Introduction

the argument continued, would give succour to terrorist elements within the Islamic world, and would compromise an important process within New Zealand’s secular court system that had ancient roots and was in line with gender equality norms long accepted in Western society generally.5

The Razamjoo decision is emblematic of the way in which all Western liberal democracies, due in part to immigration from countries of non-Christian heritage, are currently under pressure to revise matters concerning individual and group rights to the free exercise of religion, as well as the related fundamental constitutional question of the proper relationship between church and state.6 The issue of whether persons ought to be exempt from laws that impede their ability to act in accordance with the dictates of their religion has manifested itself in many contexts in recent years. Some controversies that have been litigated overseas include: whether Native Americans should be able to ingest sacramental substances when this is banned by the law of the land;7 whether Muslim and Sikh students should be permitted to wear religious attire that contravenes the rules governing dress at educational institutions;8 and whether the Hindu owners of sacred animals ought to be exempt from health and safety standards that apply to all other members of the population.9

The phenomenon of religious practices coming into conflict with state regulation is not new to this country, although throughout New Zealand’s history the most common pattern has been for these issues to be resolved by Parliament or the executive, with the courts seldom becoming involved. However, as New Zealand becomes more religiously diverse,10 it is anticipated that, as occurred in Razamjoo, the courts will be called upon to resolve these issues more often than in the past, when a more homogenous citizenry preferred to approach democratic institutions for relief from laws that burdened religious activities. When this litigation takes place, results will hinge on the approach of the courts to the interpretation of s 15 BORA.

5 See ibid [53]. One media commentator, who was sympathetic to the defence case and spoke for many others in the public arena, characterised what was at stake in Razamjoo thus: “It’s taken us centuries to push superstition out to the fringes of the secular state, and those who’d see that progress halted or wound back should be held to account.” F MacDonald “Enough is enough of this fruitcake fundamentalism” Sunday Star-Times (24 October 2004).

6 One legal commentator, speaking of the more advanced debate in Europe over the integration of Muslims within the Christian, or post-Christian, cultures of Western Europe, describes the new situation in this way: “Throughout Europe, the emergence of Islam has opened the file – until very recently considered ‘case closed’ – on the relationship between religion and the state.” Jocelyne Cesari “Introduction” in J Cesari & S McLoughlin (eds) European Muslims and the Secular State (Ashgate, Aldershot, 2005) 1, 2; see also Jeremy Waldron & Melissa Williams “Introduction” in J Waldron & M Williams (eds) Toleration and its limits (New York University Press, New York, 2008) 1, 2-3.

7 See Employment Division, Department of Human Resources of Oregon v Smith 494 US 872 (1990) (in which members of the Native American Church requested they be allowed to ingest a hallucinogenic substance in a sacramental ceremony, contrary to Oregon state criminal law).

8 See, eg, R (on the application of Begum) v Head Teacher and Governors of Denbigh High School [2007] 1 AC 100 (HL) (in which a Muslim girl sought the overturning of a school’s decision to prevent her from wearing a religious cloak, or jilbab); and Multani v Commission Scolaire Marguerite-Bourgeoys [2006] 1 SCR 256 (SCC) (in which a Sikh boy wished to wear a ceremonial dagger, or kirpan, in contravention of school safety rules).

9 See, eg, R (on the application of Suryananda as a representative of the Community of the Many Names of God) v Welsh Ministers [2007] EWHC 1736 (Admin) (in which the owners of a Hindu temple sought to prevent the slaughter of their “temple bullock” by public authorities when it tested positive for bovine tuberculosis).

10 For commentary on the likely effects of increases in religious diversity in New Zealand on the future litigation of s 15, see section 3 of this chapter.
1. Introduction

In this thesis, I will explore what s 15 BORA, to use Judge Moore’s words, requires in the “interests of justice” in this country. Although BORA was enacted in 1990, there has been little guidance in the intervening years from the courts, or from other branches of government, as to what the proper delineation of the scope of the right to manifest religious belief, as affirmed by s 15, should be. The text of s 15 is far from clear on its face, and, as described below, there are at least two competing interpretations as to how the boundaries of the right should be drawn. In this thesis I will advocate one of these interpretations, and set out the theoretical basis for determining the extent to which individuals should be able to gain exemptions from laws that impinge upon their right to manifest their religious beliefs in worship, observance, practice and teaching. In doing this, I will also allocate discrete, though complementary, roles for the courts and Parliament in making these determinations.

1.1 The scope of section 15 and the preference for formal neutrality

Ascertaining the “scope” of the relevant right in a BORA adjudication matters a great deal. In a typical judgment involving an alleged conflict between a BORA right and another law, the courts will engage in a two-stage analysis. The first of these is to determine whether a right is implicated at all. If it is not, then it will be said that a particular activity does not fall within the ambit of the right, and a rights claim will fail at the outset. If, however, it is determined that the activity falls within the protective scope of a BORA right, the courts will then move on to the second stage and assess whether any interference with the activity is proportionate to the aims sought by the law.

11 It is worth noting that, at the time of BORA’s enactment, scepticism about its utility was rife, with one opposition MP deriding it as a “Clayton’s Bill of Rights” (a reference to a beverage at the time that mimicked alcoholic properties – advertised as the “drink you have when you’re not having a drink”) and legislating by “bumper sticker”; (1989) 502 NZPD 13043 (Doug Graham). These remarks stemmed primarily from the fact that the original proposal for a bill of rights advocated a supreme law document that could not be easily amended and would empower courts to strike down legislation. At the time of Graham’s remarks, this model had been rejected in favour of an unentrenched, or “statutory”, instrument that explicitly disabled courts from doing this, and which could easily be overridden by ordinary legislation. For the legislative history of BORA, see Paul Rishworth “The Birth and Rebirth of the Bill of Rights” in G Huscroft & P Rishworth (eds) Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (Brooker’s, Wellington, 1993) ch 1. The subsequent history of BORA indicates that early derogatory comments as to its potency were misplaced, in large part because the courts have taken seriously their new mandate in BORA to scrutinise closely legislation and the actions of the executive branch of government for breaches of the Act. BORA is now described in the leading constitutional text as “one of the major legal developments of the modern era” (Philip Joseph Constitutional and Administrative Law in New Zealand (3rd ed, Brookers, Wellington, 2007), 1140) and has spawned two large specialist texts that catalogue its impact in the courts and in other branches of government; see Paul Rishworth, Grant Huscroft, Scott Optican, & Richard Mahoney The New Zealand Bill of Rights (Oxford University Press, Auckland, 2003), and Andrew Butler & Petra Butler The New Zealand Bill of Rights Act: A Commentary (LexisNexis NZ Ltd, Wellington, 2005). For a concise summary of BORA’s impact and operative features, written by a current member of the New Zealand Court of Appeal, see Justice Susan Glazebrook “The New Zealand Bill of Rights Act 1990: its operation and effectiveness” (Speech delivered at South Australian State Legal Convention, 22 July 2004); available at: <www.courtsnz.govt.nz/speechpapers/Speech22-07-2004.pdf?searchterm=glazebrook+speech+bill+>.  

12 As will be discussed in Chapter 4, it is my position that the decision in Razamjoo, as well as the other rare case law involving s 15, leaves unclear the precise scope of the provision.

13 For an espousal of this approach (as opposed to other techniques where rights are limited at the definitional, or first, stage of BORA analysis), see Andrew Butler & Petra Butler The New Zealand Bill of Rights Act: A Commentary (LexisNexis NZ Ltd, Wellington, 2005) (“Butler & Butler NZBORA Commentary”) ch 6. The two-stage method also appears to be favoured by the courts in recent years; see, eg, Hopkinson v Police [2004] 3 NZLR 704 (HC), and R v Hansen [2007] 3 NZLR 1 (SC).

14 Section 5 BORA informs this enquiry: “Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
A finding that a right is being unreasonably infringed may have consequences. Under the BORA framework, and consonant with the fundamental principle of our constitution that Parliament is sovereign, it is not possible for a New Zealand court to “strike down” legislation that fails this test. However, it is possible for a court to declare that the legislation is inconsistent with BORA, or to reinterpret (or “read down”) the rights-infringing law so that it no longer interferes with the right. This interpretive function of the courts is potentially a very powerful tool. For this reason, it is important to be clear from the beginning about when a court is, or is not, empowered to craft an exemption from the operation of a law, or issue a declaration of inconsistency, in favour of a religious claimant.

As stated above, this thesis will focus on two rival versions of how the scope of the right to manifest religious belief should be drawn by a court. One is considerably narrower than the other. The first of these, which I shall call the “substantive protection”, or “substantive neutrality”, reading of s 15, is that the prima facie ambit of the right is virtually limitless. If a religious claimant can prove that her religion requires (or forbids) a certain activity, then s 15 will be engaged and the state will be required to justify any imposition it wishes to place on that (in)activity, even if the burden is created by a law that does not single out religion unfairly and is generally applicable to all individuals.

The second candidate for the scope of s 15, which I shall name the “Equal Regard”, or “non-discrimination”, reading, is that the state will only have to justify an interference with the...
1. Introduction

conduct of a religious claimant if this person can show that the burden is imposed in a discriminatory manner. In other words, if the claimant can demonstrate that the prohibited religious activity in which she wishes to engage is in fact permitted for others who act in the same way for secular, or other religious, reasons, then the courts will consider using one of the remedies open to them to correct the inequality. If, on the other hand, the state can respond that the burden applies equally to all other similarly situated persons, then the state will not have to justify its imposition of the burden. When the latter circumstances are present, there is no legally relevant interference with the right, and so the courts will desist from conducting any further analysis under the proportionality test laid out in s 5 BORA. The rights claimant will therefore fail at the first stage and an exemption from the impugned law will not be legally required.

I will now give an example that illustrates the implications of these two readings of s 15, and which is a possible modern incarnation of Locke’s hypothetical concerning Meliboeus that is quoted at the start of this chapter. Let us suppose that a political party which promotes animal rights has gained the balance of power in Parliament and has secured the enactment of a law prohibiting the killing of an animal without first using electronic stunning devices that render the creature insensate before it is killed. The legislation, which contains in its wording no mention of religion, is designed so that all killing of animals, whether for hunting, sport, consumption, or any other purpose, is illegal, unless it is done in the stipulated manner. If an individual then claims that his right to practise his religion is infringed by the law, because, say, the scriptures of his faith prescribe that, when an animal is slaughtered for food in a sacrificial ceremony, the animal must be fully conscious when it is killed, this person may be able to succeed in getting an exemption from the law under the substantive protection reading of s 15. A court that is confronted by this issue might assess from the evidence before it that the law interferes with this right, and that the interest of society in preventing the suffering of animals does not outweigh the right of the claimant to conduct this particular ritual of his religion. Thus, having applied the substantive protection reading of s 15 and found in favour of the claimant, the court might move on to grant an exemption to the law.

By contrast, a court that applies the second, or Equal Regard, reading of the scope of s 15 may agree that the person’s right to exercise his religion is engaged by the ban but ultimately will deduce that no legally relevant interference has occurred with the right. This is before it even attempts to balance the competing interests at stake under s 5 BORA, an enquiry that is a necessary corollary of the substantive protection reading once a prima facie interference with the right has been identified. The reason for this is that the court will halt any further investigation into the matter when it observes that the prohibition captures all other similarly situated groups or individuals (such as hunters, dog fighting rings, meat processing businesses, and all other persons and groups that may have previously killed animals for secular or religious reasons without using electronic stunning). The court will conclude, similarly to Locke in 1689, that the law is not, as such, prohibiting religious sacrifice, but rather is prohibiting the inhumane slaughter of animals. The religious group will lose the case, but could conduct an analysis under the proportionality test laid out in s 5 BORA.

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Conduct” (1994) 61 U Chi L Rev 1245; Christopher Eisgruber & Lawrence Sager “Equal Regard” in S Feldman (ed) Law & Religion: A Critical Anthology (New York University Press, New York, 2000) ch 11; and, for the most recent and fullest exposition of their thesis, Christopher Eisgruber & Lawrence Sager Religious Freedom and the Constitution (Cambridge, Harvard University Press, 2007). In recent years, the authors have favoured the term “Equal Liberty” as the catchall label for their theory. I prefer to use here the earlier term of Equal Regard, in part because the authors have retained this phraseology to describe the proper meaning of the Free Exercise Clause, which is the corresponding US provision to s 15 BORA.
perhaps take up its opportunity to enter the political process and lobby for an amendment to the law.

In this thesis I contend that the second, narrower, reading of the scope of s 15 is the better path for the courts to take in this country.

I would like to pause here to discuss what my preference for the Equal Regard reading of s 15 means for the broader question of the structuring of the religion-state relationship in this country, and in particular to consider what the principle implies with regard to the term “neutrality”. The concept of neutrality is one of a cluster of expressions that are employed by theorists as tools for advocating how government should orient itself to its citizens. It is probably true that most consider it axiomatic that, in a liberal democratic state, government should be “neutral” towards all forms of individual belief. However, as I shall now explain, “neutrality” is a term that must be carefully defined in order for it to be a practical governing principle in explaining or resolving religious freedom issues.

As long ago as 1914, the Chief Justice of the New Zealand Supreme Court, Sir Robert Stout, gave his views on the proper orientation of the state towards religion in an extra-judicial speech that endorses a liberal theory of neutrality in terms that resemble formulations propounded by modern liberal theorists:

To say that the State has a right to select one religion and teach its creed because it is the religion of the majority, is to declare it to be the duty of the State to propagate the religious experiences of only one section of the people. That would not be ‘the Government of the people for the people,’ but a Government for part of the people…. Hitherto those who have been what are called liberals and progressiveists have recognised that there are varieties of religious experiences, and that whatever the beliefs of citizens may be, all must have equal rights and equal privileges ‘before the law’. Make one class outcasts because of their race or religion, and you banish freedom and

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22 Other models, some of which overlap, or approach the issue from different vantage points, include: separationism, secularism, Erastianism, and pluralism. As is explained here in the context of neutrality, all these terms need to be given detailed content if they are to provide meaningful illumination of religious freedom issues. For discussion of the relative merits of the models listed here, as well as others, see “Models of Religion-State Relations” in Rex Ahdar & Ian Leigh Religious Freedom in the Liberal State (Oxford University Press, Oxford, 2005) (“Ahdar & Leigh Religious Freedom in the Liberal State”), ch 3.

23 I assume here that New Zealand is a liberal democratic state; ie, that it is a polity where government is in important respects limited by rules, such as laws requiring periodic general elections, which “government must acknowledge and respect and which…may be invoked against government”. John Gray Liberalism (Open University Press, Milton Keynes, 1986) 73. New Zealand undoubtedly conforms to this description in many respects; see, eg, Fitzgerald v Muldoon [1976] 2 NZLR 615.

24 Not everyone will subscribe to this view, of course. For example, the Destiny Church, a New Zealand-based Pentecostal organisation, has argued that “Christian-based nations”, such as New Zealand, should not afford “alternate or foreign” religions equal status to Christianity, and that the activities of these faiths should be restricted. Simon Collins “Lockout sparks unholy row” New Zealand Herald (29 May 2007).

25 Robert Stout “Religion and the State” (Speech delivered at the Unitarian Free Church, Wellington, 4 January 1914) 4-5 (emphasis added). Ahdar perceptively compares Stout’s words to similar statements by modern legal philosophers; see Rex Ahdar Worlds Colliding: Conservative Christians and the Law (Ashgate, Aldershot, 2001) 79, quoting and comparing Stout’s speech with Ronald Dworkin “Liberalism” in S Hampshire (ed) Public and Private Morality (Cambridge University Press, New York, 1978) 127: “[G]overnment must be neutral on what might be called the question of the good life…political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or powerful group.” For a similar statement, see Joseph Raz The Morality of Freedom (Oxford University Press, Oxford, 1988) 110.
To make this statement, however, begs the question of how, precisely, one is to gauge when the state’s actions towards religion qualify as being truly neutral. “Neutrality” can mean very different things to different people, and these differences can have significant downstream effects when applied to religious freedom issues. The distinction between “formal” and “substantive” neutrality is a useful way of categorising these differences. It is also an important distinction to make in this thesis, because the choice of the Equal Regard reading of s 15 is also, implicitly, a preference for a state that is held to a standard of formal rather than substantive neutrality in its relationship with religion.

The fictional law above containing an across-the-board prohibition of the inhumane killing of animals is a classic example of a “formally neutral” rule. This is because it is completely “religion-blind” in its terminology and in its reach. As prominent US legal commentator Douglas Laycock describes this conception of neutrality, 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”. According to one plausible reading of Stout’s definition of neutrality, therefore, the law is sufficiently neutral.

On the other hand, it could be said that the law is not “substantively neutral”. This is because in its operation (as opposed to its literal intent) it will have the effect of incentivising persons regarding their religious beliefs. A person who wishes to engage in religious animal sacrifice may be persuaded by the law to alter his beliefs, or even change his religion, in order to comply with the prohibition. The religious group itself may decide collectively that it must revise its doctrines to conform to the law; or perhaps the law will cause a schism, with a group of “fundamentalist” adherents splitting off from the main body of the religion in order to maintain their adherence to what they consider to be a non-negotiable tenet of their faith. A law that has this effect on individuals, and the groups to which they belong, is arguably not neutral under Stout’s definition of the term, as it has a real, albeit indirect, impact on the group’s ability to practise its religion and on the individual choices of the group’s members as to the outward expression of their personal religious beliefs. As Michael McConnell, one of the foremost expositors of the substantive neutrality reading of the Free Exercise Clause has

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26 Consider also the judicial statement by Stout, in which, as Chief Justice of the Supreme Court, he invalidated a by-law that prohibited the playing of golf on Sundays in town belt reserves, because it was designed to enforce Sunday religious worship: “Considering that the State is neutral in religion, is secular, and that the State has provided for Sunday observance only so far as prohibiting work in public or in shops, &c., is concerned, and not prohibiting games, it cannot be said that this is a reasonable by-law.” *Doyle v Whitehead* [1917] NZLR 308, 314.


30 A classic example of this occurring was the schism in the Mormon Church in the 19th century when a group of fundamentalist polygamists left the main church after it renounced polygamy in 1890 in the face of a “formally neutral” anti-polygamy law. See Thomas Berg “Can Religious Liberty Be Protected as Equality?” (2007) 85 Tex L Rev 1185, 1199.
argued, the crucial enquiry should be to ask whether governmental actions – regardless of their “formal” intentions – have had an unjustified effect on the “previously existing religious mix”.\(^{31}\) The formally neutral law indirectly banning religious animal sacrifice undeniably alters the prior “religious mix”, and so, in order for the law to preserve substantive neutrality between the state and religion, it may be necessary for it to contain an exemption allowing the group to engage in the religious activity of its choice.

The non-discrimination reading of s 15 is blind to claims based on substantive neutrality, whereas the substantive protection reading, as the term is intended to suggest, can in some cases\(^{32}\) result in court-granted exemptions to formally neutral laws in a way that recognises a degree of state neutrality in the substantive sense. This version of neutrality contrasts starkly with the vision of John Locke, whose regime of toleration was satisfied as long as the state acted for reasons other than the persecution or promotion of religious belief (and so laws passed, say, for economic or public health purposes were considered sufficient under Locke’s schema, even if they indirectly interfered with religious practices). Rather, it accords more with the conception of neutrality advanced by philosophers who consider human autonomy to be the prime benchmark for assessing government actions. Prominent among these was John Stuart Mill, who regarded the fostering of diversity in human expression and action in order to maximise conditions for finding truth in human existence as being a core aim of the liberal/neutral state.\(^{33}\)

For Mill, the effects of legislation or other state action on religious activities were just as important as the reasons for these actions, and he believed that no genuinely liberal state should ignore these effects, insofar as they impacted on people’s autonomous search for the truth, without good reason.\(^{34}\) Mill, therefore, was a seminal protagonist of the substantive conception of neutrality.\(^{35}\) Locke, on the other hand, did not care (or at least considered that the state should not be in the business of caring) what the downstream effects of laws would have on religious autonomy, provided that the state’s motives for enacting its laws were “pure” and not based on enforcing religious doctrine per se.\(^{36}\)

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\(^{31}\) Michael McConnell “Accommodation of Religion” (1985) Sup Ct Rev 1, 39. The contribution of substantive neutrality theory to the debate over the meaning of the Free Exercise Clause is discussed in more detail in Chapter 2 of this thesis.

\(^{32}\) I say “in some cases” because a court that undertakes the balancing test envisaged under the substantive protection reading of s 15 may determine that the interference with the right is, all things considered, justified.


\(^{34}\) Famously, Mill argued that “legal penalties” against the private conduct of individuals were only justified when these were addressed to preventing “harm to others”. Ibid 14. For discussion of the contrast between Millian and Lockean neutrality and the importance of distinguishing between the two, see Waldron “Locke: toleration”, above n 27, 103-107; and Chin Liew Ten “Secularism and its Limits” in M Heng Siam-heng & CL Ten (eds) State and Secularism: Some Asian Perspectives (World Scientific, Singapore, 2010), ch 2.

\(^{35}\) A modern proponent of the fostering of autonomy as the main justification for religious freedom is Joseph Raz, who, in distinctly non-Lockean terms, describes the value of autonomy thus: “Autonomy is exercised through choice, and choice requires a variety of options to choose from. To satisfy the conditions of the adequacy of the range of options the options available must differ in respects which may rationally affect choice. If all the choices in life are like the choice between two identical-looking cherries from a fruit bowl, then that life is not autonomous. Choices are guided by reasons and to present the chooser with an adequate variety there must be a difference between the reasons for the different options.” Raz The Morality of Freedom, above n 25, 398-399.

\(^{36}\) Locke did, however, consider that laws directly enforcing religious doctrine had an unacceptable effect on religious autonomy (for examples of laws of this type, see below, n 40). He came to this view from both a Christian theological and secular political perspective on the ineffectiveness of enforcing religious faith through the coercive arms of the state. Regarding the former, he believed that true Christian faith was the product of a voluntary act of human free will. As to the latter, he considered it to be impossible, as a practical matter, for
At first glance, the Equal Regard principle, which confines the protective ambit of s 15 to judicial scrutiny of state action that is not formally neutral, appears a harsh rule for religious minorities, and one that places a very slender burden on the legislative organs of the state. In the aftermath of a failed litigation where a court has applied this reading of s 15 and found no relevant interference with the right, the only route open to religious claimants will be to approach Parliament for an exemption. In this forum, non-mainstream religious groups might struggle to prevail, especially if, as may be expected, the legislature is dominated by citizens adhering to the country’s mainstream religions (or to no religion) who may be ignorant of, or even hostile to, their beliefs. Indeed, in reaction to the current state of the law in the US, where, since the watershed case of Employment Division, Department of Human Resources of Oregon v Smith, the courts have applied the formal neutrality standard to constitutional claims of religious “free exercise”, Laycock has criticised the rule as a “move to majoritarianism”, and as a “legal framework for persecution”. This is because the rule essentially instructs courts to ignore any incidental burdens on religious belief enacted by a legislative majority in the name of a (in Laycock’s view) severely, and inappropriately, attenuated version of neutrality. This criticism is particularly telling in the modern era, where it is rare for lawmakers to target religious conduct in direct terms, and where it is more common for such conduct to be burdened by laws that are made without giving any thought at all, or at best indifference, to their potential impact on minority religious beliefs. The substantive protection reading of s 15 government to change internal religious belief by coercive means. Moreover, he considered that civil strife would result from using the state to enforce uniformity in religious matters, as was clearly observable in the religious wars preceding the publication of his main statement on religious toleration in 1689: “It is…the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, on account of religion.” John Locke A Letter Concerning Toleration, above n 1, 52.

37 494 US 872 (1990) (“Smith”). Smith supplanted a line of cases, which read the First Amendment as requiring a degree of substantive neutrality on the part of government. This reading had been in existence for nearly 30 years; see Sherbert v Verner 374 US 398 (1963).

38 The First Amendment of the US Constitution reads in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…”. The substantive protection reading of s 15 would breach this standard, as it would be impermissibly using “religion as a category”. This type of statute was, however, common in early-modern English history. Consider, eg: the Conventicle Act 1664, 16 Car 2 (Eng), c 4 (making it unlawful to attend a non-Anglican gathering where more than 5 persons are present); the Second Test Act 1678, 30 Car 2 (Eng), c 1 (preventing Catholics from sitting in the English Parliament); and the Act of Settlement 1700, 12 & 13 Will 3 (Eng), c 2, ss 1-2 (prohibiting the Monarch from converting to Catholicism or marrying a Catholic). The last of these is still in force in New Zealand (where the British Monarch remains head of state), by virtue of the Imperial Laws Application Act 1988, sch 1.

39 Laws that do target religious practices directly will of course also fail the formal neutrality test. For example, a humane slaughter law that banned in its terms the “slaughter of animals according to the Jewish ritual of sechita” would breach this standard, as it would be impermissibly using “religion as a category”. This type of statute was, however, common in early-modern English history. Consider, eg: the Conventicle Act 1664, 16 Car 2 (Eng), c 4 (making it unlawful to attend a non-Anglican gathering where more than 5 persons are present); the Second Test Act 1678, 30 Car 2 (Eng), c 1 (preventing Catholics from sitting in the English Parliament); and the Act of Settlement 1700, 12 & 13 Will 3 (Eng), c 2, ss 1-2 (prohibiting the Monarch from converting to Catholicism or marrying a Catholic). The last of these is still in force in New Zealand (where the British Monarch remains head of state), by virtue of the Imperial Laws Application Act 1988, sch 1.

40 This problem is compounded by the fact that the modern state has expanded its reach into many facets of human life. In the distant past, when the state was less involved in matters such as health, housing, education and employment, a regime of formal neutrality might have placed fewer burdens on religious individuals, as much of
is more sensitive to this reality. One might therefore ask that, if s 15 is to be construed as only preserving a right to a formally neutral state in religious matters, then what purpose does it serve? Surely a primary purpose of bills of rights is to provide meaningful protection in the courts for “discrete and insular minorities”, which, by their nature, can exert very little leverage on lawmakers who are naturally more attuned to the majoritarian preferences of their constituencies?

My response is, in part, that in the real world it is rare for laws to be made without any exceptions and that, as a result, the non-discrimination reading of s 15 has great potential to protect religious practices in the New Zealand courts, as it has done in the US, contrary to many expectations, since the *Smith* decision ushered in the era of formal neutrality in that country in 1990.

To illustrate how this might be so, consider a variation on the fictional law outlined above that bans the killing of animals without prior electronic stunning. Let us suppose that the pure version of the statute does not survive intact and at the third reading of the Bill an exemption is made to mitigate the law’s effect on farmers, who have slaughtered animals for their own consumption for many years, if not millennia. A powerful farming lobby group claims in a petition to Parliament (which is delivered, say, by a convoy of tractors that blockades the entrance to Parliament grounds) that it is unreasonable to expect farmers, many of whom are small and impecunious landholders, to purchase expensive electronic stunning equipment for slaughtering small numbers of animals for their personal consumption. In order to secure its passage, the party that introduced the Bill agrees to a compromise and allows an exemption for persons who possess livestock for commercial purposes to slaughter small numbers of their own animals for food without using stunning devices.

In a regime of formal neutrality this exemption could have a major impact in the judicial setting. A court that is asked to consider whether the altered law is in breach of s 15 is likely to conclude that it is not formally neutral, because, to use Laycock’s definition, “religious and secular examples of the same phenomenon” are no longer being treated the same. Because the law now allows secular killings without the prior use of electronic stunning in some cases, a court might say that the law is “underinclusive”, or not “generally applicable”, as it fails to ban all conduct that is contrary to the purpose of the law (the prevention of cruelty to animals). The failure to exempt religious killings that are analogous to secular killings on a farm could be analysed as a prima facie failure of Equal Regard, or a discriminatory burden on the religious beliefs of an individual or group seeking an exemption, thus amounting to a legally relevant interference with s 15. If a court were to make this determination, it would be problematic, as a matter of logic, for the state to argue in the second stage of BORA analysis that the law is nonetheless a reasonable limit on the right to manifest religious belief. This is because it would be difficult for the state to prove that the law’s (indirect) ban on religious

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43 *US v Carolene Products Co* (1938) 304 US 144, n 4 (per Stone J). The argument for judicial restraint in scrutinising governmental actions and legislation should be weaker, according to Justice Stone in the famous footnote 4 of this case, when these actions burden politically powerless minority groups. For an equivalent statement by the New Zealand Supreme Court, see *R v Hansen* [2007] 3 NZLR 1, [107].
sacrifice is “demonstrably justified” under s 5 BORA, when it allows an identical activity (from the point of view of animal cruelty) to go ahead unmolested by the state. A court that found the burden to be an unreasonable one might then, indeed it must, address whether the law can be read down so that it does not apply to the religious group in question, with the possible result being that the religious group could continue to engage in its cherished ritual. Thus, to return again to Locke, if the state allows the farmer Meliboeus in his bucolic idyll to “kill his calf at home” and “burn any part of it that he thinks fit”, then the state must also allow members of unfamiliar religious sects to kill it at a “religious meeting”. “And thus what may be spent on a feast may be spent on a sacrifice.”

In this way, a regime of Equal Regard, with an assiduously policed doctrine of formal neutrality at its heart, could provide – perhaps counterintuitively – positive results for “discrete and insular” religious groups. As demonstrated, this will particularly be the case when minorities can point to analogous legislated exemptions for members of mainstream secular or religious groups that have been able to gain accommodations for their activities, thanks to their greater ability to influence parliamentary processes.

These exemptions will act as a tripwire for Equal Regard in the courts. In my view, a legal regime that permits court-granted exemptions for minorities by tying them to equivalent legislated exemptions for mainstream cultural practices could provide a sufficient mechanism for protecting non-mainstream religious cultures. Thus, although the reading of s 15 that I advance in this thesis may appear on its face to be an insensitive one from the point of view of religious minorities, I anticipate that its application will not, as some might argue, provide a green light for the unconstrained secularisation of the private and public sphere in New Zealand. As Justice Jackson of the US Supreme Court once wrote: “[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that

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44 To put it another way, it might be said that the secular exemption fatally “undermines” the state’s asserted purposes for the law.

45 Section 6 BORA requires courts to give a BORA-friendly reading to statutes that are adjudged to infringe a right in an unreasonable manner, with the caveat that this will be done only where “an enactment can be given” such a reading. There is much discussion in the literature as to how far a New Zealand court “can” reinterpret enactments, especially if this might thwart the intention of Parliament, or do violence to the language of a statute. See, eg, Kris Gledhill “The Interpretative Obligation: the Duty to Do What is Possible” (2008) NZ Law Review 283. Recent case law suggests that the New Zealand courts are less bold in this respect than those in the UK, where courts exercise a similar jurisdiction under s 3(1) Human Rights Act 1998 (UK). Compare R v Hansen [2007] 3 NZLR 1 (SC) with R v Lambert [2002] 2 AC 545 (HL). For further discussion of this issue, see Chapter 5.

46 Or, alternatively, where a court is unable to read down a law, it may issue a declaration that the law is inconsistent with s 15. This will not immediately assist the religious claimant who instigated the litigation, but such a declaration may motivate Parliament to consider making a legislative exemption. As already stated (see n 17 above), the New Zealand courts have not as yet made any of these declarations, so it is uncertain what effect they will have on the legislature. Lord Hoffmann, for his part, considers (in the UK context, where the Human Rights Act 1998 (UK) specifically authorises such declarations, and where they have become commonplace) that: “If the courts make a declaration of incompatibility, the political pressure upon the government and Parliament to bring the law into line will be hard to resist”. Rt Hon Lord Hoffmann “Human Rights and the House of Lords” (1999) 62 MLR 159, 160. This may explain why the courts in this country – which are extremely cautious when it comes to constraining Parliament’s ability to act – have not chosen to issue a declaration of this sort, absent a specific parliamentary grant of this power in BORA.

47 For the sake of brevity, I have spoken hitherto solely of legislated burdens on religious activities. The analysis applies equally to other state-imposed burdens: eg, those of a court applying a common law rule, or the decisions of school boards and other administrative bodies and persons who have been empowered to exercise authority over citizens.
the principles of law which officials would impose upon a minority must be imposed generally."

1.2 Substantive neutrality and the role of Parliament

As indicated above, I will argue in this thesis that religious manifestation claims should be able to gain traction in the courts if persons pursuing such claims can persuade a judge that a law which impacts on their external conduct offends the principle of Equal Regard. In doing so, I reject the substantive protection reading of s 15, at least insofar as it ought to be a principle guiding court-granted exemptions. Given that BORA has often been described as a "parliamentary Bill of Rights", what then is the appropriate role for Parliament in a regime of Equal Regard?

I envisage that residual questions (ie, instances where religious exemption claims have failed in the courts) will be the preserve of Parliament and politics generally. Where, for example, a court dismisses a claim under s 15 because a law satisfies the requirements of formal neutrality, it will remain open for Parliament to consider granting an exemption, should it be minded to do so. It may decide that the operation of a formally neutral law is too harsh on a religious minority, because, say, it intrudes too greatly on a core ritual of the religion. It may calculate that no significant harm will be wrought on the aims of the law if it is qualified in its operation, perhaps because the group is very small or exists in isolation from the rest of society. Having made these assessments, which resemble those of a court applying a substantive protection reading of s 15 (including assessments that take into account the Millian desire to foster a diverse populace in an open-minded search for "truth"), it may then decide to craft an exemption that preserves the right to manifest religious belief in a way which satisfies a broader reading of s 15 that takes into account considerations of substantive neutrality.

Hence, the Equal Regard principle divides the responsibilities of the courts and the legislature into two complementary components. The courts will police formal neutrality, and thereby decide whether cases brought before them concerning religious conduct exemptions are legal or political matters. And where the courts determine that a religious litigant should fail, because he or she is asking for an exemption from a generally applicable law, Parliament will turn its mind, in its residual function, to correcting any perceived injustice as a matter of politics. In a sense, therefore, the guarantee contained in s 15 might usefully be thought of as speaking differently to the two institutions that are charged with implementing it, with the courts focusing exclusively on the core, non-discrimination, value of the right, and with the

48 Railway Express Agency Inc v New York (1949) 336 US 106, 112. Jackson J was speaking in the context of the equal application of laws, though there is an essential affinity in these words with the formal neutrality reading of s 15. Jackson J’s statement is noted for similar effect by the UK House of Lords in a case concerning the right to personal liberty; see A v Secretary of State for the Home Dept [2005] 2 AC 68 (HL), [46].

49 This description was used most famously by the former Prime Minister, Geoffrey Palmer, in his introductory speech for the legislation; (1989) 502 NZPD 13039. Certain provisions of BORA are expressly directed at Parliament; see, eg, s 3(a), stating that the Bill of Rights applies only to acts done by the "legislative, executive, or judicial branches" of government; and s 7, which requires the Attorney-General to report to Parliament whether any prospective legislation “appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights”. These provisions, read alongside s 4, collectively indicate that Parliament was intended to be a central actor in implementing the rights contained in BORA.

50 In many instances, of course, these issues will never be litigated, and Parliament will be the “court of first instance” for religious manifestation claims. This, I suggest, will particularly be the case with “mainstream” Christian religious groups, who may judge that they will get a sympathetic hearing in a legislature that has grown accustomed to dealing with their claims for exemptions over many decades, as occurred recently with the proposed exemption for Communion wine in prisons; see text accompanying ns 55-59 below.
1. Introduction

legislature exercising a wider brief, one that embraces a more substantive conception of religious freedom.

It is important to note, however, that in the overall political theory of Equal Regard which I sketch in the paragraph above, it is not strictly true that Parliament will be completely free to enact exemptions reflecting a substantively neutral conception of s 15. In fact, if the legislature decides that a formally neutral rule needs to be qualified due to its deleterious effects in the substantive neutrality sense, it will nevertheless need to draft the subsequent law alleviating the burden on a religious group or person with its eyes firmly fixed on the principle of Equal Regard.

To show how this might work, let us return once more to the inhumane slaughter law above (in its pure form with no exceptions, not even for farmers). Imagine that a religious claimant, who is a member of, for example, the Santeria religion, has failed in a court action to gain an exemption, because the court has ruled that the law is formally neutral. Let us say the group is subsequently successful in persuading Parliament to amend the law. In drafting the exemption, it will be essential to ensure that the burden on the Santeria Church is lifted in a manner that does not itself create new burdens on other religious groups, or on third parties who may be affected by an exemption. If, for example, the exemption is phrased with an amending section that reads, “The prohibition on slaughter without using the stipulated electronic stunning devices shall not apply to the adherents of the Santeria religion”, this will potentially create difficulties under a regime of Equal Regard. This is because it may discriminate against other religionists who also wish to engage in ritualistic animal slaughter – for example, members of the Jewish and Muslim faiths. If these groups are not also accommodated, a Jewish or Muslim organisation will have a good case for saying that the law is not formally neutral, and the amended law will therefore be vulnerable to attack in the courts.

Due to this consideration, it will be desirable for Parliament, while evincing solicitude for the spirit of the substantive protection reading of s 15, to express itself in amending legislation in a way that accords with Equal Regard. A legislated exemption should therefore be expressed broadly and not just refer to the members of the particular religion that was able to mobilise itself sufficiently to move Parliament to act. To do otherwise might result in the legislature,

51 I note in passing Jeremy Waldron’s proposition that a theory of rights, in order to be a “complete political theory”, must also advance a “theory of authority” (ie, rules as to who ultimately is able to decide what conception of a particular right should prevail). The Equal Regard principle, in its distribution between Parliament and the courts of the responsibility for implementing s 15, is intended to meet this requirement. See Jeremy Waldron “A Right-Based Critique of Constitutional Rights” (1993) 13 Oxford J Legal Stud 18, 31-33.


53 It is of course true that, under the Westminster system of government prevailing in New Zealand, Parliament can revise, endorse, ignore, or reverse any decision of the courts through legislation, and it is therefore not accurate, as a matter of constitutional law, to say that it is “necessary” for Parliament to legislate in accordance with Equal Regard. Section 4 BORA affirms this fact. In this thesis I assume that Parliament should (not must) engage with s 15 in a principled manner. But see Claudia Geiringer “The Dead Hand of the Bill of Rights?” (2007) 11 Otago LR 389, where she lays out a tentative argument that Parliament may be bound by BORA to enact legislation that is consistent with the rights in BORA. Compare with Selena Mize “Resolving Cases of Conflicting Rights under the New Zealand Bill of Rights Act” (2006) 22 NZULR 50: “…Parliament can essentially do anything it pleases in resolving situations where rights compete.”
contrary to Stout’s injunction, “propagat[ing] the religious experiences of only one section of the people”.  

As it happens, this already appears to be the practice of the legislature in this country. A recent illustration of the Equal Regard principle operating in the legislative setting is the current exemption for the consumption of wine at religious ceremonies in prisons. In April 2007, a Catholic priest was prevented from using wine to celebrate Mass with the inmates of an Auckland corrections facility, because the Corrections Act 2004 contained an absolute ban on taking alcohol into prisons. In response to the resultant outcry, an exemption was quickly formulated and introduced into Parliament to allow for small amounts of wine to be used in the Christian rites of “the Eucharist, Holy Communion, Mass, or Communion”. When the amending Bill was reported back to Parliament, however, the Law and Order Committee recommended that the exemption be augmented so that wine could be used in “both Christian and non-Christian ceremonies”. Accordingly, the report advised that the Corrections Act be amended not only with a dispensation for the specific Christian rituals mentioned above but that it also contain relief for the adherents of any other religions that use alcohol in their sacraments. A similar, generally phrased exemption, it is suggested, would be appropriate for the inhumane slaughter amendment sought by the Santeria Church.

This type of legislation, where an exemption is initiated at the behest of one (often mainstream) religious group, but crafted so that all other religious, and, where appropriate, secular, groups will benefit from a sort of “slipstreaming” effect, is a phenomenon that is repeated throughout New Zealand history. The consistent pattern of these non-discriminatory legislated exemptions (which I shall name the “legisprudence” of Equal Regard), due to their longstanding practice both before and after the enactment of BORA, will, moreover, be held up in Chapter 3 of this thesis as powerful evidence in favour of the Equal Regard reading of s 15.

2. Hypothesis and structure of this thesis

2.1 Two schools of interpretation in the global “free exercise” jurisprudence

It is not sufficient, of course, to argue for the non-discrimination reading of s 15 merely by explaining how it works, or by illustrating its potential, which is what I have attempted to do in
the rudimentary outline of the operation of the Equal Regard principle above. It is vital to supplement this with an exposition of why it is a more satisfactory reading of s 15 than the substantive protection principle, and to do so in a way that is convincing in the context of the New Zealand constitution as a whole.

The starting point for ascertaining the meaning of any enacted law, including those protecting fundamental rights, is the actual text of the provision in question. Like most liberty rights, however, the terms used in s 15 represent an open-textured guarantee that gives no obvious clues as to the finer points of its interpretation. That said, it must be acknowledged that a preliminary look at the text of s 15 yields the impression that the provision envisages the substantive protection reading. It does not say, for example, that every person has the right to manifest his or her religious beliefs “without discrimination”. Instead, the protection is expressed as a broad liberty right, which, according to s 5 BORA, should not be infringed unreasonably. Moreover, the international treaty from which the text of s 15 BORA was drawn, the International Covenant on Civil and Political Rights (“ICCPR”), has never been interpreted by the United Nations body in charge of overseeing its implementation as requiring of states parties that they simply need to enforce a regime of formal neutrality in order to comply with the document. Indeed, its text, like s 15, more naturally invites the opposite interpretation. As international law scholar, Malcolm Evans, points out:

61 Although these factors, as well as the extensive historical record of legislated exemptions which follow a pattern that accords with Equal Regard, will certainly be recruited in this thesis as significant support for the non-discrimination reading of s 15.

62 See Interpretation Act 1999, s 5(1): “The meaning of an enactment must be ascertained from its text and in the light of its purpose.” In the case law involving BORA rights, the courts have held that the explicit words of BORA rights must prevail over all other interpretive techniques. See, eg, BHP NZ Steel Ltd v O’Dea (1997) 4 HRNZ 456 (HC), 470.

63 This is to be compared with many of the other substantive rights contained in BORA, which are more specific and less open to disputed interpretations: see, eg: s 18(2), which provides that “Every New Zealand citizen has the right to enter New Zealand”; and s 24(e), which stipulates that persons charged with an offence have a right to “trial by jury” when the “penalty for the offence is or includes imprisonment for more than 3 months”.

64 Section 5 BORA was based on the equivalent provision in s 1 of the Canadian Charter of Rights and Freedoms, Part I Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK) (“Canadian Charter”). Section 1 of the Charter provides: “The Canadian Charter…guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. See A Bill of Rights for New Zealand: A White Paper (Government Printer, Wellington, 1985), (1985) AJHR A6, (“White Paper”) [10.26].


66 The UN Human Rights Committee (“HRC”) is charged, under Part IV ICCPR, with monitoring state compliance with the treaty. Its jurisprudence has never explicitly endorsed (nor has it rejected) the Equal Regard reading of Art 18.

67 Malcolm Evans “The United Nations and Freedom of Religion: The Work of the Human Rights Committee” in R Ahdar (ed) Law and Religion (Ashgate, Burlington, 2000) 35, 37 (emphasis added). It might be said that the Canadian and British courts, both of which apply the substantive protection reading, do so in part because these countries are both parties to the ICCPR. See also Gedicks’ comparison of Art 9 of the European Convention on Human Rights and Fundamental Freedoms ((4 November 1950) 213 UNTS 221 (“European Convention” or “ECHR”)), which is expressed in similar terms to Art 18 ICCPR, with the First Amendment; Frederick Mark Gedicks “Religious Exemptions, Formal Neutrality and Laïcité” (2006) 13 Ind J Global Legal Stud 473, 477-478. Gedicks notes that the US Supreme Court, during the era from 1963-1990 when it applied the substantive protection reading, was in line with the “syntax” of the ECHR, which, like the ICCPR, “state[s] a general definition of the freedom of religion, and then describe[s] activities that fall outside the definition of religious freedom, and circumstances under which government may properly limit that liberty”. Ibid 477. Gedicks goes on...
Article 18(1) sets out an absolute right to freedom of thought, conscience and religion before articulating two particular aspects of this freedom: the freedom to have or adopt a religion or belief and the freedom to manifest a religion or belief in a number of ways. Article 18(3) then sets out the grounds on which the freedom to manifest a religion or belief may be restricted.

The implication of Evans’ straightforward reading of Art 18 ICCPR (and, by implication, s 15) is that the non-discrimination principle ought perhaps to be regarded as only one aspect, albeit an important one, of the right. Returning once more to Mill, Art 18(3) provides, among other permissible limitations on the right, that measures protecting the “fundamental rights and freedoms of others” may be an acceptable reason for government to impinge upon the right under the ICCPR scheme. This ground of limitation accords with Mill’s harm principle, which is the only fetter on his broad advocacy for protection of human autonomy. This principle, as has already been noted, is contained within the substantive neutrality conception of s 15. For this thesis to argue, as it essentially does, that the Equal Regard principle is the only value that is legally protected by s 15, it will therefore be necessary to overcome the basic textual hurdles present both in s 15 itself, and in its parent article in the ICCPR.

A partial response to this difficulty is to say that in all comparable jurisdictions where religious free exercise issues have been litigated, the underlying constitutional texts have rarely been determinative of results, or indeed of judicial analysis. A case in point is the Free Exercise Clause of the First Amendment to the US Constitution. Ratified in 1791, this provision, which appears to describe the right in spare terms admitting on their face no abridgement, even by formally neutral laws (“Congress shall make no law...prohibiting the free exercise [of religion]”), has been through a number of interpretive phases that cannot be easily explained by its wording. In the final two of these eras, the US Supreme Court has swung from interpreting the Free Exercise Clause as providing, at least in theory, substantive protection (1963–1990), to reading the provision as guaranteeing no more than formal neutrality (1990 to the present). By contrast, in Canada, which has a much younger bill of rights, s 2(a) of that document (which also contains a sparsely phrased command: “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion”) has been construed consistently by the Supreme Court of Canada as mandating a substantive protection reading. In Syndicat Northcrest v Amselem, for example, the Court held that a formally neutral rule banning the placing of structures on the balconies of an apartment building amounted to a prima facie...
interference with one building occupant’s right to manifest his religious beliefs, as he wished to erect a religious symbol on his patio. The Court went on to apply a balancing test, as s 1 of the Charter requires once a breach of the right has been adjudged to have taken place, and found in favour of the religious claimant.

The substantive protection reading is also normal practice in the respective courts of the UK and South Africa, where, like Canada, the underlying constitutional provisions appear to envisage, or even to require, that balancing tests be undertaken whenever the right to manifest religious belief is infringed. Furthermore, in the international law arena, the UN Human Rights Committee appears to take the view that the substantive protection reading is required when interpreting the religious manifestation provision in the ICCPR. The European human rights organs, however, have taken an inconsistent approach, sometimes holding that formally neutral rules should be upheld against religious claimants and that no prima facie breach of religious freedom should be considered to have occurred in such cases, while finding in other instances that generally applicable laws can amount to a violation of the religious manifestation protection contained in Art 9 of the European Convention on Human Rights.

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73 Like s 5 BORA, s 1 of the Canadian Charter expressly provides for a proportionality analysis of limitations on rights. The US Bill of Rights has no such stand-alone limitations provision, but the courts have inferred qualifications on the right to the free exercise of religion as a matter of necessity: “[T]he [Free Exercise Clause] embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” Cantwell v Connecticut (1940) 310 US 296, 303-304.
74 See, eg, Christian Education South Africa v Minister of Education (2000) (10) BCLR 1051 (CCSA), and R (Williamson and others) v Secretary of State for Education and Employment [2005] 2 AC 246 (HL). In these cases, the Constitutional Court of South Africa and the UK House of Lords considered whether formally neutral statutory bans on the use of corporal punishment in schools infringed the religious freedom protections in force in the respective countries. Both courts determined that the laws constituted a prima facie infringement of the rights of certain religionists who considered the physical chastisement of their children in schools to be an aspect of their parental religious duties. However, both courts also found, having conducted balancing tests, that the prohibitions were reasonable.
75 See, especially, s 36(1) of the South African Bill of Rights, which provides that the rights contained in it may be limited “only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…” (Emphasis added). This limitation provision implies that even laws of “general application” may not survive scrutiny if they are adjudged unreasonable in other respects.
76 See, eg, K Singh Bhinder v Canada Communication No 208/1986, UN Doc CCPR/C/37/D/208/1986 (28 November 1989). Here, the Committee endorsed a formally neutral law requiring hard hats to be worn by federal workers as a reasonable limitation on the right to manifest religious belief under Art 18 ICCPR, implicitly deciding that a prima facie infringement on the right had taken place. The religious claimant wished to wear a turban, as commanded by his Sikh faith.
77 See, eg, C v United Kingdom (1983) App No 10358/83, 37 Eur Comm’n HR, DR 142 (admissibility decision). In this decision, a group of Quakers sought an exemption from a formally neutral law requiring the payment of taxes, on the grounds that some monies would thereby go to supporting the military, and so offend their pacifist beliefs. In holding that no prima facie interference with Art 9 of the European Convention on Human Rights had taken place, the Commission stated, inter alia, (at p 147): “…Article 9 does not confer on the applicant the right to refuse, on the basis of his convictions, to abide by legislation…which applies neutrally and generally in the public square…”
78 See, eg, Chappell v United Kingdom (1987) App No 12587/86, 53 Eur Comm’n HR, DR 241 (admissibility decision). Here, it was found that formally neutral regulations closing Stonehenge to the public were a prima facie limitation on the right of Druids, who wished to manifest their religious beliefs by visiting the monument during the solstice. For discussion of the inconsistency of the European approach, see Carolyn Evans Freedom of Religion under the European Convention on Human Rights (Oxford University Press, Oxford, 2001) 179-186, where the writer notes that the European Court of Human Rights is “yet to clarify its position on general and neutral laws in the Article 9 context”. And see Stephanos Stavros “Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from across the Pond” (1997) 6 EHRLR 607.
Opinion on this matter is therefore divided into two schools. To summarise, the jurisprudence discloses some support for the Equal Regard principle (principally in the US, and also in some of the Strasbourg decisions), but a preference in the majority of jurisdictions for the substantive protection reading (namely Canada, the UK, South Africa, the Human Rights Committee, and in some of the Strasbourg case law). The division does not, however, conform neatly between jurisdictions that enforce instruments which contain explicit limitations provisions and those that do not, as evidenced by the convergence in the approaches of the US and some of the Strasbourg case law on this point. The picture is confounded further by the fact that the UK jurisprudence interprets the same instrument (ie, Art 9 of the European Convention) as the Strasbourg courts, and yet there is some divergence between the two jurisdictions on the issue of whether formally neutral laws can be adjudged as amounting to a prima facie interference with religious practices. I tentatively conclude, therefore, on this threshold objection to the non-discrimination reading of s 15, that the text of the provision is not likely to be determinative of the issue in this country, although I concede that the substantive neutrality reading has a head start as a purely textual matter. Given that I have already recorded my preference for the Equal Regard reading of s 15, on what basis, then, do I consider this to be the appropriate interpretive solution for this issue in New Zealand?

The New Zealand courts have not as yet essayed a definitive treatment of the content of s 15 that aligns the provision with either of the two approaches summarised above on the matter of formally neutral laws. Recourse to the indigenous travaux préparatoires of s 15 is unavailing on the issue. The parliamentary debates at the time of BORA’s enactment were, it is fair to say, desultory, and provided little detailed discussion of the content of any of the rights contained in the document. More considered reflections on s 15 in the committee reports

Stavros opines, for reasons overlapping with those advanced in this thesis regarding s 15, that the US regime of formal neutrality should be adopted in the Strasbourg jurisprudence on Art 9. But see R v Taylor (Paul) [2001] EWCA Crim 2236 (“Taylor”), where the English Court of Appeal refused to entertain an Art 9 ECHR proportionality enquiry in a criminal conviction for cannabis possession by a Rastafarian. In doing so the Court explicitly endorsed the prosecution’s reliance on the US case of Smith, above n 37, in which the formal neutrality reading of the Free Exercise Clause was introduced. See Taylor at [22]-[23] & [32].

The European Convention is incorporated into British law by the Human Rights Act 1998 (UK), s 1 & sch 1. This is to be compared to Australian jurisprudence concerning the religious freedom protection guarantee in the federal Constitution, where the wording of the relevant provision was found to be highly probative in according the right to religious free exercise a formal neutrality construction. See discussion in Chapter 3, accompanying ns 502-504.

New Zealand legal commentator, Paul Rishworth, appears to consider the words contained in the text of s 15 (and the provision in the ICCPR on which it is based) as mandating the substantive protection reading. Hence, he specifically disfavours the US approach that is advocated in this thesis. See Paul Rishworth, Grant Huscroft, Scott Optican, & Richard Mahoney The New Zealand Bill of Rights (Oxford University Press, Auckland, 2003) (“Rishworth et al”) 296-297. It should be added, however, that his discussion of this point is brief, and does not address any of the arguments put forward in this study in support of the Equal Regard reading of s 15. For a refinement of Rishworth’s views, see Paul Rishworth “The Religion Clauses of the New Zealand Bill of Rights” (2007) NZ Law Review 631 (“Rishworth ‘Religion Clauses’”), in which he advances a reading of BORA’s religious freedom protections that incorporates the Equal Regard reading (and acknowledges the US origins of the theory), but in which he nevertheless does not discount the possibility of courts according the substantive protection reading to s 15 BORA.

Regarding international law materials, I will argue in Chapter 3 that the ICCPR is, all things considered, silent on the matter of court-granted exemptions to formally neutral laws. This will be a significant finding, because the Covenant can sometimes be a decisive external interpretive tool in BORA adjudications, as indicated in the long title of BORA, at recital (b), where it is stated that one of the purposes for its enactment was to “affirm New Zealand’s commitment” to the ICCPR.

The predominant theme of the BORA debate in Parliament concerned whether the final, unentrenched, version was worth enacting. Most MPs seemed to believe that this document would merely preserve the status quo, with
prior to enactment, as well as in the White Paper that recommended the enactment of the original, supreme law, version of BORA, are silent, or at best ambiguous, on the issue.

In instances where the courts are asked to break new ground in determining the content of rights in the face of conflicting (or silent) interpretive sources, it is customary, as in most jurisdictions that have young bills of rights, for the courts of this country to have regard to the judicial treatment of equivalent human rights protections in comparable jurisdictions. This returns us once again to the divided overseas case law on the point at issue in this thesis. In New Zealand BORA jurisprudence, there is a strong tendency to favour Canadian approaches for assessing the propriety of limitations on rights. However, in ascertaining the appropriate content of rights, the courts have been noticeably eclectic in their resort to foreign decisions, with approaches drawn from the decisions of the US, Canadian and Strasbourg courts being especially prominent. In some cases, a hybrid of US jurisprudence concerning the content of rights and Canadian case law on limitations on rights is observable. It is in fact to this last pattern that I consider the judicial resolution of the meaning of s 15 should conform.

the legislature continuing to dominate the field of human rights, due to the doctrine of parliamentary supremacy, and the courts having a marginal interpretive role based on relatively weak common law canons of statutory construction. As a result, very little discussion was had on the actual content of individual rights. See Butler & Butler NZBORA Commentary, above n 13, [4.9.1].

As McCrudden observes: “More recently made constitutions are more likely to be thought to require recourse to foreign jurisprudence”, especially where there is a “vacuum left by the temporary absence of (preferred) indigenous jurisprudence”. Christopher McCrudden “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” (2000) 20 Oxford J Legal Stud 499, 523.


See, eg, Brookerv Police [2007] 3 NZLR 91 (SC), [12], where Elias CJ cites Terminiello v City of Chicago 337 US 1 (1949), as an aid to defining the content of the right to freedom of expression in s 14 BORA; and Hopkinson v Police [2004] 3 NZLR 704 (HC), referring to Texas v Johnson 491 US 397 (1989) in determining non-verbal conduct to be within the scope of s 14.


See, eg, Taunoa v Attorney-General [2008] 1 NZLR 429 (SC), [156], where the Supreme Court notes that European jurisprudence on Art 3 of the European Convention “capture[s] the flavour” of the right protected in s 23(5) BORA for persons deprived of liberty (in this case prison inmates) to be treated “with humanity”; see ibid, where the Court refers to Kudla v Poland [2000] ECHR 512, and McFeeley v United Kingdom [1980] 3 ECHR 161.

The White Paper that accompanied the 1985 proposal for the Bill of Rights drew heavily on the language, and surrounding case law, of the human rights documents in these jurisdictions. This has been taken as an implicit invitation to the courts to refer to comparative jurisprudence as an aid to fix the content of rights. See discussion in Butler & Butler NZBORA Commentary, above n 13, [4.6.1]-[4.7.3].

See, eg, Hopkinson v Police [2004] 3 NZLR 704 (HC). In some cases the courts refer to the ICCPR for ascertaining the content of rights, but adopt Canadian methods for assessing limitations on rights. Controversially, this has occurred even when the relevant ICCPR right is expressed in absolute terms permitting no limitations. See R v Hansen [2007] 3 NZLR 1 (SC), where the majority of the Court employ the limitations test in R v Oakes to assess whether a legislated limit on the right to the presumption of innocence in s 25(c) BORA is reasonable. Art 14(2) ICCPR permits no derogations from this protection, as noted pointedly by Elias CJ in her concurring judgment; ibid [36]-[38].
2.2 Hypothesis

As presaged above, I hypothesise that the approach of the US courts to the Free Exercise Clause of the First Amendment should also be the controlling interpretive principle for determining the scope of the right contained in s 15 BORA.\(^{93}\) I advance three principal reasons why this should be so.

First, I will argue that the Equal Regard reading provides a good “fit” with the legal tradition of resolving religion-state issues in this country, as is reflected in the record of legislated exemptions (or “legisprudence”) both before and after the enactment of BORA, and is exemplified in the communion wine accommodation for all religious groups that is discussed above.\(^{94}\) This in turn, it will be pointed out, reflects certain guarantees made at the founding of New Zealand on the subject of religious equality that anticipate and inform the legisprudence of Equal Regard. Moreover, this record will, it is hoped, answer the question implicitly posed above concerning which version of neutrality Sir Robert Stout had in mind in his speech in 1914. I believe that this Scottish-born former Prime Minister and Chief Justice advanced – both through his words and actions – a distinctly Lockean conception of religious freedom. Accordingly, the impact he made in his various public roles on the legisprudence of Equal Regard will be described in some detail as part of this first argument.

Furthermore, it will be argued that the non-discrimination principle has considerable resonance with the underlying New Zealand constitutional and societal culture vis-à-vis fundamental rights, which, broadly speaking, favours equality over liberty. In the corresponding US culture, where, perhaps, many citizens believe that certain liberty rights are an “inalienable” endowment from their “Creator”, or from the “Law of Nature”,\(^{95}\) which the US Constitution has expressly forbidden government from disturbing, Equal Regard has had a more difficult road to hoe, and has accordingly met with fierce academic and judicial criticism in that country. In New Zealand, with its long tradition of strong central government presiding over a non-federal state with no “written” constitutional guarantees of fundamental rights,\(^{96}\) and with its...
prime cultural value being one of egalitarianism (with its flipside – uniformity), it is probably accurate to say that no such culture has ever existed. For this reason, Equal Regard may even be a more convincing explanation of the underlying purposes that s 15 was meant to protect when it was enacted in 1990 than it is of the First Amendment of the US Constitution from which it was spawned.

This first argument will provide the strongest link to the text of s 15, and will therefore be my firmest legal justification for the transplant of the US Equal Regard jurisprudence into the New Zealand setting. Once the text of a BORA right has been held to be indeterminate in construing the content of a right, the practice of the courts in this country is to launch a wide-ranging enquiry into the “purpose” that the right was meant to protect. In this enquiry, it will be suggested that principles which can be discerned from longstanding legislative practice, and associated documents from the founding of this country, are highly relevant. In short, it will be contended that s 15 ought to be construed as a symbol of the “deep structure” of historical religious freedom protection in this country, which arguably ought to take precedence over formulations in other countries where different historical and cultural assumptions are in play. This type of interpretation, which is perhaps of limited use in interpreting truly revolutionary bills of rights (ie, instruments whose purpose is to repudiate the injustices perpetrated by political regimes that were in power immediately preceding their ratification), will be especially important in construing BORA, which was enacted at a time of relative tranquillity and was, in my view, not intended to transform the constitutional and social landscape. I will accordingly argue that BORA is best described as “affirmatory” of the New Zealand past, rather than one that is forward-looking, or “amendatory”, in nature.

I make no apology for the inherently conservative reading of s 15 that I advance here. The Equal Regard principle, it will be suggested, enshrines all that is best about the historical conception of religious freedom in New Zealand, and s 15 does no more, and no less, than

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statutes, common law (including the royal prerogative) developed in both the United Kingdom and New Zealand courts, and nonjusticiable constitutional conventions.” Ibid 274.

97 See Michael Taggart “The New Zealandness of New Zealand Public Law” (2004) 15 PLR 81, 86: “One downside to the much-vaunted egalitarian ethic has been a dislike or intolerance of those that stand out or up – so-called ‘tall poppies’, that get cut down to size.”

98 Compare the phrases quoted in the text above (accompanying n 95), which embodied the philosophical understanding of the American founders in the Declaration of Independence 1776 that government is to be limited in its functions, and depends on the consent of the governed for its continuation, with the following statements, addressed to the United Nations by a New Zealand legal academic (representing the New Zealand government) in 1946: “There is no special right known to English law of freedom of religion”; and, quoting Herbert v Allsop (1941) NZLR 370, 374: “‘[T]he…law recognizes that the Legislature is supreme and the Legislature can…modify and suspend what are sometimes called the fundamental rights of the individual’, and that, in any case, it is the ‘State’ itself that ‘confers these fundamental rights’”. Professor RO McGechan, Professor of Constitutional Law, Victoria University College, Wellington “Human Rights in New Zealand” in United Nations Yearbook on Human Rights for 1946 (UN, New York, 1947) 208, 208 & 210.

99 Butler and Butler note that the “fundamental principle of BORA interpretation is that it is to be interpreted purposively”. Butler & Butler NZBORA Commentary, above n 13, [4.2.1]. See also Rishworth et al, above n 82, 44-45. This technique, which is also the primary mode of analysis in Canadian Charter interpretation, has been adopted by the New Zealand courts as standard practice in BORA cases. See, eg, Ministry of Transport v Noort [1992] 3 NZLR 260 (CA), 277.

100 As will be discussed further in Chapter 3, the rare case law existing prior to BORA’s enactment also illustrates that the New Zealand courts’ main preoccupation towards religious freedom issues was to monitor equality.

101 The South African Bill of Rights is a classic amendatory document, as one of its clear purposes was to help institute a new social order after the ending of Apartheid. See discussion of the affirmatory-amendatory distinction in Justice Antonin Scalia “The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?” in G Huscroft & P Rishworth (eds) Litigating Rights: Perspectives from Domestic and International Law (Hart Publishing, Oxford, 2002) 19; and Rishworth et al, above n 82, 31-32.
affirm this record. For the courts instead to accord s 15 the substantive neutrality reading could, in my view, “overshoot the actual purpose of the right”, and may give insufficient weight to the appropriate “philosophic and historical” context in which the right was adopted by the New Zealand people through their Parliament. Thus, although the substantive neutrality approach which is favoured in jurisdictions that have considerable affinity with New Zealand, either through historical links (eg, the UK), or by their similarly structured rights guarantees (eg, Canada), may be viable in this country as well, the historical record in New Zealand may well be more in tune with the Lockean formula for protecting religious freedom.

My second argument will relate more to pragmatic and institutional concerns as to the competence of secular courts in adjudicating religious issues, and independently reinforces the historical argument outlined above. It will be contended that the substantive protection principle, with its concomitant insistence that courts must subject all regulatory burdens on religious practices to a balancing test, is a flawed mechanism when applied to issues of religious free exercise. This is because, as the US courts discovered during the substantive neutrality era of 1963–1990, it requires courts to balance incommensurable values: the secular interests of the state, against (what some might say are) the irrational dictates of religious beliefs. As a result, judges will inevitably make arbitrary, results-driven, and inconsistent decisions about where the line should be drawn in conflicts of this type. In Chapter 2, my analysis of the three-decade-long substantive neutrality era in the US will illustrate how this inconsistency became rife in the related jurisprudence. A particular defect of the substantive neutrality methodology, it will be argued, is that it results in favourable treatment for religious traditions that are more familiar to judges, because of the ad hoc nature of the balancing enquiry. In religiously diverse immigrant societies, as many Western liberal democracies now indubitably are, this is a serious flaw, as most judges tend to be appointed from a small pool of lawyers who hail from elite segments of the majority culture, and who are naturally inclined to harbour unprincipled predispositions as to which religious activities deserve constitutional protection, and which do not. For judges to engage in enquiries as to the centrality of religious conduct within foreign belief systems, and then to weigh the perceived burden on these activities against state regulatory goals of varying importance, is an extremely delicate, and perhaps impossible task. The Equal Regard reading, by contrast, does not ask judges to make such assessments: in fact, it forbids it. Instead, as demonstrated in the inhumane slaughter law above, judges will be required to perform the (relatively) simple, and essentially secular, task of assessing whether unexempted religious conduct and exempted secular (or other religious) conduct exact analogous costs on asserted governmental interests expressed in laws that are subjected to a s 15 challenge.

I will not pretend that this task will always be straightforward (although in many cases it will be), but I will suggest that it is a more suitable task for secular courts to attempt than that

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102 R v Big M Drug Mart Ltd [1985] 1 SCR 295 (SCC), 344.
103 Ibid. See also the similar statement by Richardson J in R v Jefferies [1994] 1 NZLR 290 (CA), 299, where he notes that BORA rights are to be understood in their “historical, social and legal context”.
104 It will also be argued in Chapter 3, that, even if one prefers the substantive protection reading in light of historical and philosophical enquiry into the zone of activity that s 15 should protect, the institutional argument may well be strong enough on its own to displace that meaning.
105 Recourse will also be had to jurisprudence in the UK and Europe, where threshold enquiries as to whether a religious activity should qualify for protection under the European Convention before a balancing exercise is undertaken present their own special difficulties.
106 The substantive protection approach, by contrast, requires courts, inter alia, to assess the importance, or centrality, of religious practices within the worldview of an infinite number of faith groups. This, I will argue, is an inherently non-secular task that the courts are not equipped to undertake.
which is envisaged by the substantive protection approach. And where the courts determine that the Equal Regard principle does not require an exemption from a law, the matter will then move to Parliament, which, it will be argued, is a more appropriate forum for debating the inherently polycentric issues concerning exemptions from formally neutral laws that burden religious practices.

This second argument acknowledges, at base, the fact that Equal Regard treats with more respect the principle of the separation of powers between the judicial and legislative branches of government. It leaves relatively untouched legislative choices on difficult moral issues, something that is clearly contemplated in BORA itself, and merely asks the courts to enquire as to whether lawmakers have been even-handed in these choices. In this way, it respects the position of Parliament at the apex of the New Zealand constitution with the courts playing a subsidiary, albeit important, role. In clarifying the respective roles of Parliament and the courts vis-à-vis s 15, moreover, Equal Regard will have the ancillary benefit of providing citizens with a bright line rule concerning which of the two institutions is the appropriate forum for airing their grievances. The substantive protection principle, on the other hand, is much less clear cut, and invites religious claimants to approach the courts in cases where their claims will be difficult to make out, even under this ostensibly more generous reading of s 15.

My third argument will be, essentially, that the Equal Regard principle works, and is a coherent theory that has discernible limits. In proving this, recourse will be had to the burgeoning post-\textit{Smith} jurisprudence in the US, in which the details of the Equal Regard principle have been worked through in concrete cases. This analysis will show that the Equal Regard reading of s 15 could provide a powerful, and workable, device for protecting religious minorities in this country, contrary to predicted allegations that a regime of formal neutrality would provide anaemic protection, and would be merely a mechanism for the secularisation of society. The discussion will also explain, once again by examination of the US case law, where the outer limits of Equal Regard should lie, and thereby where politics begins.

I will also defend Equal Regard against attack. Some strong criticisms of the principle have already been voiced in the US, and will be discussed, insofar as they have traction in the New Zealand constitutional context. I shall also anticipate and respond to critiques of Equal Regard that are unique to the New Zealand environment. I will conclude that none of the supposed defects of the Equal Regard principle is sufficient to dislodge it from being the preferred solution to determining religious manifestation issues in the courts of this country.

\textsuperscript{107} Section 4 BORA, which preserves parliamentary sovereignty, can plausibly be read as a message to the courts that the drafters of the document envisaged Parliament as being the prime guarantor of human rights in this country, and that the courts ought to exercise caution when considering whether or not they should defer to democratic choices vis-à-vis religious freedom.

\textsuperscript{108} An additional advantage will be that when religious minorities ask for relief in the courts, they will not be asking for special dispensation as a group that is separate from mainstream society, but rather will be asking to be treated the same as other members of the political community (or, as Stout put it, they will be asking for “equal rights and equal privileges ‘before the law’”).

\textsuperscript{109} I use the word “ostensibly” here, because, as will be pointed out in Chapter 2, empirical studies in the US have shown that the rate of successful court challenges by religious minority groups has actually increased since the substantive protection reading of the First Amendment was abandoned in the \textit{Smith} decision in 1990.
2.3 Structure of this thesis

The hypothesis laid out above will, it is hoped, be proven – at least at the level of principle – in Chapters 2 and 3 of this thesis. Chapter 2 will be devoted exclusively to the abandoned US experiment in substantive protection for religious activities. It will investigate why and how the US Supreme Court chose in 1990 instead to accord a formal neutrality reading to the Free Exercise Clause of the First Amendment. This chapter will provide a key resource for the discussion in Chapter 3, where I affirmatively answer the question as to whether the New Zealand judiciary ought to travel the same interpretive route as the US courts in construing s 15.

The remaining chapters of this study will demonstrate, through a series of case studies, how Equal Regard could provide positive results for religious individuals seeking justice in the New Zealand courts. In doing so, these chapters will also be, in effect, a practical rejoinder to anticipated criticisms that the principle is not a plausible reading of s 15, and would render the provision a dead letter.

In Chapter 4, I will consider Police v Razamjoo, the case that is described in the opening paragraphs of this thesis. Razamjoo is one of the rare domestic cases in which s 15 has received a thorough judicial treatment touching on the actual content of the right to manifest religious belief. It will be recalled that in Razamjoo, two Muslim women invoked s 15 when they refused to remove their face-covering veils while testifying as prosecution witnesses in a criminal trial at the Auckland District Court in 2004. Defence counsel objected that to allow them to do so would inhibit cross-examination of the witnesses and so violate the defendant’s right to a fair trial. The two women were partially successful in their s 15 claim, with the judge insisting they remove the garment, but allowing them to testify behind a screen, so that only the judge and counsel could observe their faces. The Razamjoo decision, it will be noted, appears at first blush to be an endorsement of the substantive protection reading of s 15. In this chapter, however, I shall argue that the case was decided implicitly under the Equal Regard principle. I will also illustrate how court decisions relating to religious manifestation issues both prior and subsequent to the enactment of BORA arguably conform to the theory of religious freedom advocated in this thesis.

In Chapters 5 and 6, I speculate on how Equal Regard could resolve certain hypothetical court cases. The purpose of these chapters is to show how the principle could assist in providing answers to issues that have perplexed courts and legislatures overseas and which have not yet arisen for judicial consideration here. It is interesting to speculate on why there has been so little litigation involving s 15, given that BORA has been on the statute books for almost 20 years. In part, this has perhaps been a result of the relatively small number of non-Christian religionists residing in New Zealand, although, as noted below (see text accompanying ns 117-120), the demography is beginning to change. Some reasons for the lack of litigation include: the generally non-litigious nature of New Zealand society; a cultural and historical preference for resolving human rights issues through Parliament, or by consensus within a relatively homogenous civil society; and the reluctance of the legal materials used in this study (legal and otherwise) are those available as at 31 December 2010. For footnoting and other aspects of legal writing style, I adopt Paul Myburgh Legal Research & Writing Guide (Auckland University Law School, Auckland, 2003).
female circumcision and will demonstrate how the non-discrimination reading of s 15 could be deployed to create a limited exemption for that practice. It will be argued that the statute enacted in 1995 banning the custom in New Zealand may be defective in some respects when viewed through the lens of Equal Regard. The chapter will then build on this conclusion by outlining the contours of a hypothetical prosecution of Muslim parents and a surgeon who have been charged under this legislation. This discussion will show how a New Zealand court, applying Equal Regard, might set about resolving the defect that is apparent in the statute.

Finally, in Chapter 6, I shall consider how a court applying the non-discrimination reading of s 15 might react to the decision of a school board to refuse admission to a Muslim student who wishes to wear religious apparel that conflicts with the school’s dress code.

These final two chapters will be crucial expositions of how Equal Regard could be implemented in New Zealand. Between the idea and the reality of transplanting foreign conceptions of fundamental rights into the New Zealand scene falls the shadow of parliamentary supremacy and the associated deference of courts in this country to Parliament’s choices as to where the line should be drawn (and who should draw it) in all matters concerning human rights. In the case of female genital mutilation, Parliament has created a clear statutory command that the practice is not to be tolerated in this country. Regarding religious attire in schools, the legislature has made it similarly clear that democratically elected school boards are the bodies that are to decide this issue. In the US, where the Equal Regard principle has been applied since the Smith decision in 1990, the courts are empowered to strike down (or sever rights-offending applications of) statutes as part of their powerful judicial review function. In New Zealand, by contrast, the judiciary is explicitly instructed to enforce the positive law of the legislature, and its delegates, regardless of the impact this law may have on human rights. These chapters will explain how the courts, principally by using the interpretive powers allocated to them under s 6 BORA, could navigate through the parliamentary sovereignty “problem”, while remaining true to their proper constitutional role.

3. A note on the case studies: The new Islamic presence and the increasing importance of finding the “just bounds” of s 15

The reader will have noted that the case studies in this thesis all concern persons, both real and hypothetical, who assert through the courts that external manifestations of their personal Islamic beliefs ought to be accommodated in the face of contrary laws. While the Equal Regard reading of s 15 is by its very nature applicable to all religious free exercise claims by all religious, and on occasion secular, individuals, the choice of Islam as a theme of this study seems to me an appropriate one. It reflects several trends, all of which point to a fair likelihood that a good deal of the future litigation of s 15 will involve adherents to this faith.

First, the demographic presence of this religion in New Zealand may be approaching a critical mass that will encourage its followers to be more assertive in pursuing their legal rights. Since immigration laws were liberalised in the mid-1980s, there has been an influx of persons profession to engage with matters concerning religious freedom, due to the relative novelty of the issue as a legally enforceable right in this country. See further, Paul Rishworth “Religion Clauses”, above n 82, 636.

114 See Crimes Act 1961, s 204A-204B.
115 See Education Act 1989, ss 72 & 75.
116 See ns 18 & 19 and accompanying text above.
117 Prior to the Immigration Act 1987, which relaxed entry criteria, New Zealand had pursued a de facto policy of encouraging immigration from the “White” countries of Northern Europe, in particular the UK. See Vince Marotta “The Ambivalence of Borders: The Bicultural and the Multicultural” in J Docker & G Fischer (eds) Race, Colour
from non-Western countries that is unprecedented at any time in our history. As a result, the number of Muslims living here has increased exponentially, with current estimates being that between 36,000-50,000 persons of this faith now reside in the country.\textsuperscript{118} These numbers, while still amounting to a relatively small minority within the population of 4 million,\textsuperscript{119} constitute a distinct and permanent island of foreign religiosity that stands out against the nation’s predominantly Anglo-Christian heritage and the generally secularising trend of modern mainstream society.\textsuperscript{120} As overseas experience indicates,\textsuperscript{121} it is reasonable to expect that the resultant clash of worldviews,\textsuperscript{122} which is exacerbated by deepening insecurities within the New Zealand “host” society resulting from the forces of globalisation and fears of fundamentalist terrorism,\textsuperscript{123} is likely to lead to litigation or other conflict in this country.\textsuperscript{124}
Second, the Muslim faith is indubitably not an “inner religion”. Islam demands not only orthodoxy in belief, but also requires of its followers public displays of belief (or orthopraxy), concerning, for example, days of worship, forms of dress and diet that are out of step with Western laws and customs. The Razamjoo case is a classic example of this clash, and is perhaps a harbinger of more conflicts to come. Regarding the public nature of Muslim religious practices, Islam differs markedly in this respect from the generally privatised nature of Christian belief in the modern West, where, since the religious wars in 17th century Europe, religion has been gradually cabined off from the political and public realm in the face of modernity, advances in scientific understanding, and the associated political ideology of liberalism. The impact of the demographic picture sketched here is further enhanced by the fact that many recent immigrants to New Zealand come from countries where no such “Enlightenment” has taken place and where the notion of a secular state, which most in the West consider to be a sine qua non of liberal government, is a foreign concept.

Third, and related to the points made above, some Muslim religious beliefs have the potential to conflict with modern liberal norms, some of which are expressed in legislation and in international human rights documents. One such norm is the increasing desire of Western governments, in line with commitments to UN treaties, to ensure female equality at all levels of society. For example, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), to which New Zealand is a party, records in Art 2(f) that all states parties agree to:

Pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

The three case studies in this thesis all involve Islamic religious practices that arguably conflict with this norm. In Razamjoo, urged by defence counsel to insist that Mrs Salim unveiled her

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128 Prior to 1987, most Muslim immigrants to New Zealand came from Fiji or India, both of which are states with democratic histories and strong secular credentials. Recent arrivals have come from Middle Eastern or African countries (such as Somalia, Egypt and Afghanistan) where Islamic law is enshrined in constitutional texts and enforced in the courts or by other elements in civil society.


130 UN Doc A/34/46, entered into force 3 September 1981 (acceded to by New Zealand in 1985).

131 For a strong argument that religious freedom should not be an acceptable defence for cultural practices that enforce patriarchal social control (including female circumcision and compulsory dress codes), see Frances Raday “Culture, religion, and gender” (2003) 1 Intl J Constitutional Law 663; and Susan Moller Olkin “Is
face to everyone in the courtroom on the basis that the burqa was a discriminatory practice enforced on women by a primitive male-dominated culture, Judge Moore stated that it was not his function to “put the world to rights”. He preferred to allow the process of gradual social change within Muslim society itself to “fix” any gender equality issues inherent in the practice. Behind his words, perhaps, was the thought that Mrs Salim was an adult and free to change her religion as she wished, leading the judge to decide that a secular court should not impose its views on the matter. This relaxed stance is to be contrasted with other opinions regarding the place of the burqa within Western societies. Take the statement of the French President Nicholas Sarkozy in a speech to the French Parliament in 2009, in which he inveighed against the garment, claiming that it is not a “religious symbol, but a sign of subservience and debasement. I want to say solemnly, the burqa is not welcome in France. In our country, we can’t accept women prisoners behind a screen, cut off from all social life, deprived of all identity. That’s not our idea of freedom.”

Clearly, different views can be taken on the matter, and the problem becomes more fraught when children are involved, or when the religious practices in question are more intrusive than veiling and there is a suspicion of intra-religious group coercion. For example, female circumcision is an irreversible procedure (at least in its extreme forms) that is commonly practised on very young children, and which some say is a tool of patriarchal social control that renders the practice a discriminatory custom that is contemplated within the injunction in Art 2(f) CEDAW. Similarly, the supposed imposition of Islamic dress requirements on children by their families may entail its own problems when courts are asked to recognise individual student autonomy in religious activities in public schools.

The coming to light of customary religious practices that raise concerns relating to gender inequality when viewed from the perspective of liberal cultural expectations is not new in this country, but when religious freedom is asserted as a defence against the demands of the liberal state by immigrants from non-Western countries, the issues intensify in proportion to their novelty. Viewed from a human rights perspective, these issues can be unpacked to reveal...
1. Introduction

... a morass of “conflicting rights”\textsuperscript{138} that are difficult to reconcile in a principled manner. In the case of female circumcision, on the one hand there is the right of religious and cultural minority groups to manage their own affairs;\textsuperscript{139} the right of parents to direct their children’s religious upbringing;\textsuperscript{140} the right of children themselves to engage in the religion of their choice as they become more mature;\textsuperscript{141} and the right to sexual equality.\textsuperscript{142} On the other side of the ledger lies the right of children to be free from dangerous cultural practices;\textsuperscript{143} the right to sexual equality;\textsuperscript{144} possibly the right to be free from torture,\textsuperscript{145} or even the right to life.\textsuperscript{146} These will not be easy matters to resolve when they are inevitably brought before a judicial setting. Moreover, courts that seek to apply the balancing test envisaged in the substantive neutrality reading of \textsection{15} will, in my view, have to struggle mightily to formulate principled responses to the cacophony of conflicting rights arguments brought before them.

The gender-related issues discussed above typify the way in which attitudes in New Zealand society towards minority religious beliefs have changed considerably in recent years. In previous eras, religion in New Zealand was perhaps regarded as a “good thing”, something worthy of protection by the liberal state.\textsuperscript{147} Indeed, the New Zealand statute book is replete with exemptions for religious believers, even during the era when government policy towards social behaviour, particularly that of new immigrants and indigenous Maori, was characterised as being one of assimilation.\textsuperscript{148} As stated in the introduction to this chapter, Parliament was the main forum for religious persons seeking relief from legal burdens. To be sure, in some instances minority religionists have clearly been affected adversely, sometimes intentionally so, by legislation,\textsuperscript{149} but in many cases claims for legislative accommodation have been successful. To give some examples, there have been statutory exemptions for: conscientious objection to military service;\textsuperscript{150} persons wishing to partake of sacramental wine in the face of the proposed (but never enacted) prohibition of alcoholic beverages in the early 20th century;\textsuperscript{151} medical...

\textsuperscript{139} See BORA, ss 15 & 20; and ICCPR, Arts 18 & 27.
\textsuperscript{140} See ICCPR, Art 18(4).
\textsuperscript{142} ICCPR, Art 2(1); UNCROC, Art 2(1); BORA, s 17. For instance, Muslim practitioners of female circumcision (which is banned by Crimes Act 1961, ss 204A-204B) may consider the continued societal and legal acquiescence regarding the practice of male circumcision by, for example, Jewish New Zealanders, to be discriminatory towards Muslims both on the grounds of religion and gender. For further discussion, see Chapter 5 of this thesis.
\textsuperscript{143} UNCROC, Art 24(3); CEDAW, Arts 2(f) & 5.
\textsuperscript{144} See provision cited in n 130 above. Note that a confounding aspect of legal discourse concerning cultural practices that have gender equality implications is that proponents of competing resolutions for controversies in this area will often both invoke equality norms in their arguments. See Kent Greenawalt \textit{Religion and the Constitution: Free Exercise and Fairness} (Princeton University Press, New Jersey, 2006) 5.
\textsuperscript{145} ICCPR, Art 7; BORA, s 9.
\textsuperscript{146} ICCPR, Art 6; BORA, s 8.
\textsuperscript{147} For a similar observation on the historical record in the UK, see Julian Rivers “Law, Religion and Gender Equality” (2007) Ecc LJ 24, 33.
\textsuperscript{148} See Michael Fletcher “Migrant Settlement: A review of the literature and its relevance to New Zealand” (Report commissioned by the New Zealand Immigration Service, 1999) 6-7; Smits, above n 117, 27; and Andrew Sharp \textit{Justice and the Maori} (2nd ed, Oxford University Press, Auckland, 1997) 188-189.
\textsuperscript{149} See, eg, Tohunga Suppression Act 1908, which outlawed the activities of traditional Maori religious leaders; and the banning of the Jehovah’s Witness organisation during World War II by government proclamation under reg 2A(3)(e) Public Safety Emergency Regulations, 1940 Amendment No 1 (1940/122).
\textsuperscript{150} See, eg, Defence Act 1909, s 92(1).
\textsuperscript{151} See Licensing Amendment Act 1910, s 62(2).
staff who refuse on conscience grounds to take part in abortion procedures;\textsuperscript{152} and workers who object for religious reasons to belonging to trade unions.\textsuperscript{153} Also, religious organisations are exempt from some tax burdens;\textsuperscript{154} and the Human Rights Act 1993 exempts religious institutions from appointing clergy from all genders and sexual orientations.\textsuperscript{155} The executive has also played its part in this record of general solicitude for religious belief. During World War II, for example, Clarence Beeby, the Director of Education, endorsed the decision of the Taranaki Education Board to allow the children of Jehovah’s Witness parents to forgo flag saluting ceremonies at schools.\textsuperscript{156} In an open letter resolving the matter, Beeby declared that he considered the children to come within a statutory exemption on the grounds of conscience from the teaching of “history”.\textsuperscript{157} This deft administrative move, which was made in the face of considerable community hostility against this religious group, reflected well an earlier pre-War statement by the Director in which he played down the role of children generally in fostering war-time unity: “If the price of winning the war were to fill our children’s minds with lies and hatred, it would be better that we should lose, for it is futile to conquer the spirit of Nazism without if we yield to it within.”\textsuperscript{158}

The record above attests to a number of things about New Zealand’s past treatment of religious diversity. First, the general lack of litigation historically in matters of religious freedom did not necessarily signify a lack of religious freedom itself.\textsuperscript{159} Indeed, it is fair to say that the successive generations of elected representatives and officials occupying Parliament and the executive in this country have been at least as vigilant in protecting religious minorities as other countries that traditionally have empowered courts to enforce supreme law human rights documents.\textsuperscript{160} Second, it indicates a high degree of societal acceptance of the practice of exempting religious persons from otherwise generally imposed social duties. In fact, far from seeing democracy as being equated with majority rule, some consider that legislated concessions for minority groups are a quintessential element of the New Zealand conception of

\textsuperscript{152} Contraception, Sterilisation, and Abortion Act 1977, s 46.
\textsuperscript{153} Industrial Relations Act 1973, ss 105-112B; see also Employment Relations Act 2000, ss 23-24, which, in the post-compulsory unionism era, provides exemptions on religious grounds for some employers from inspections of their workplaces by unions.
\textsuperscript{154} See, eg, Stamp and Cheque Duties Act 1971, s 18(c).
\textsuperscript{155} Human Rights Act 1993, ss 28 & 39.
\textsuperscript{156} School boards were empowered to make by-laws to this end under the Education Act 1932-33, s 2. Jehovah’s Witnesses object to flag saluting, as they believe it amounts to an idolatrous act forbidden by the Second Commandment.
\textsuperscript{157} Report of letter to Taranaki Education Board from GE Overton, on behalf of National Director of Education CF Beeby National Education (New Zealand Educational Institute, Wellington, 3 February 1941) 30. See Education Act 1877, s 84(1), and the subsequent Education Act 1932-33, s 56(3), which list history as a compulsory subject, but with an exemption for the children of objecting parents. This “conscience clause” was inserted in the 1877 enactment, as it was believed that history was susceptible to being taught with a sectarian bias. See Ian Breward Godless Schools? A study in Protestant reactions to the Education Act of 1877 (Presbyterian Bookroom, Christchurch, 1967) 16.
\textsuperscript{158} Department of Education “Message from the Director” Education Gazette (Wellington, 2 October 1939); quoted in CE Beeby The Biography of an Idea: Beeby on Education (New Zealand Council for Educational Research, Wellington, 1992) 129. In fact, Beeby wrote this statement on behalf of the previous Director.
\textsuperscript{159} See Paul Rishworth “Religion Clauses”, above n 82, 632.
\textsuperscript{160} In some cases, the New Zealand record discloses a better performance. The year before Beeby’s decision, the US Supreme Court rejected a very similar claim under the First Amendment. See Minersville v Gobitis 310 US 586 (1940). In this case, Justice Frankfurter considered the inclusion of children in nationalistic rituals to contribute to “an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security”. Ibid 595. See also Grant Huscroft and Paul Rishworth “‘You Say Want a Revolution’: Bills of Rights in the Age of Human Rights” in D Dyzenhaus, M Hunt & G Huscroft (eds) A Simple Common Lawyer: Essays in Honour of Michael Taggart (Hart, Oxford, 2009) 123, 140, where the writers catalogue instances where rights protection in New Zealand has generally kept pace with countries that have supreme law bills of rights.
a liberal democratic state. This certainly was the view of one anonymous author in 1966, who wrote:

In New Zealand the leaders of the State do accept the principle that they have moral obligations in the framing and enforcement of the laws. Consequently, many religious systems are often protected by general ‘conscience’ clauses which are inserted in some particularly contentious legislation. It is felt that this is no more than they are entitled to expect, and the success of this policy of toleration – if it can properly be called a policy – is borne out by the complete absence of schism in the community as a whole.

For the reasons outlined above, however, this benign acquiescence can no longer be assumed. Whereas the exemption for Jehovah’s Witness children may have been seen at the time as a sensible solution to the issue of flag saluting in schools during the war, the more natural modern response to the issue of whether religiously motivated persons ought to be permitted to practise their religions in public, or indeed in private, may be to ask: Are the practices truly voluntary? Do they embody the discriminatory norms of illiberal societies? Hence, what may once have been seen as a relatively simple question as to whether a niche for religious autonomy should be preserved in the face of some state policy, now becomes a question of whether religious practices that “violate” other human rights should be tolerated, with the religious aspect often being cast by the liberal state as the natural enemy of other, more “modern”, human rights values. This new paradigm in mainstream attitudes to the public profession of religious faith is exemplified in the following words of Lord Walker of Gestingthorpe at the House of Lords, speaking on the subject of religious attitudes to homosexuality:

The enactment of the 2004 [Civil Partnership] Act was possible only because of the profound cultural change which has occurred in most of Europe, within the last two generations, in attitudes towards homosexuality…. [T]wo generations is not a long time in which to change prejudices which have been deeply ingrained for many centuries. In Europe, where the Christian religion has provided the cultural matrix for two thousand years, male homosexual activity was regarded as a grave sin, at one time punishable as a form of heresy; it was also a capital crime under the secular law of many European countries; other world religions also condemned it, and many still do.

As is surely implied in his Lordship’s speech, Islam is likely to be a key battleground in litigation involving the cherished projects of liberalism in post-Christian Western states and the minority religionists who do not “sign up” to these projects. Nowhere perhaps is this clash more evident than in a 2003 European Court of Human Rights case concerning Turkey, in which the Court considered the decision of that country’s Constitutional Court to dissolve a political party that had recently enjoyed electoral success, and which had advocated the

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164 M v Secretary of State for Work and Pensions [2006] 2 AC 91, 123; cited in Rivers, above n 147, 34.
165 The primary Islamic text expressly forbids homosexual conduct. See Qur’an, surah 4:16 & 7:80-84; see discussion in CTR Hewer Understanding Islam: an introduction (Fortress Press, Minneapolis, 2006) 134; and for a New Zealand controversy concerning this belief, see E Watt “Fury at mosque visit by ‘raging homosexual’ MP” Sunday Star-Times (24 July 2005).
nationwide adoption of Sharia law. In endorsing this decision, the Court stated that Islamic religious law, as embodied in the Sharia, was incompatible with the Convention’s inherent commitment to democracy and respect for human rights:

It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts…. In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.

Like many other places in the Western world, questions pertaining to multiculturalism within the new post-Christian “cultural matrix” are beginning to be posed more often in this country. The New Zealand Bill of Rights Act 1990, with its commitments to religious and cultural freedom, is the main legal expression of the principle of multiculturalism in the nation and is likely to provide the legal locus of the debate in the years ahead. John Locke wrote in 1689 that it was necessary – after a long period of civil and inter-state war in Europe which had often been inspired by intractable differences among religious believers – to distinguish the “just bounds” between civil government and religion. He offered a solution that I believe is equally apt for today’s increasingly multicultural society, and one that resonates with this country’s own traditions in dealing with religious freedom. I acknowledge that Equal Regard is just one of many theories that could be used to give life to the protection contained in s 15 BORA. In this thesis I will endeavour to explain why it is the best one.

167 All of the Muslim practices discussed in this thesis constitute, at least arguably, conduct either required or permitted under Islamic Sharia law. Sharia includes the primary Islamic text, the Qur’an (the revealed word of Allah to the Prophet Mohammed), as well as other secondary texts known collectively as the Sunna or Hadith (a compendium of the Prophet’s own sayings and deeds, as transcribed by others). For a basic description of the Sharia, see, generally, Annemarie Schimmel Islam: an introduction (State University of New York Press, Albany, 2002).

168 Refah Partisi (Welfare Party) and others v Turkey (2003) 37 EHRR 1, [123].

169 Locke was writing in the wake of the English Civil war in the 1640s, which saw the Puritan-dominated Parliament locked in combat with Anglican Royalists for control of the state. Estimates of casualties during this conflict run to 3.7% of the population (some 190,000 people). See Charles Carlton Going to the Wars: The Experience of the British Civil Wars, 1638-1651 (Routledge, New York, 1992) 340. In Europe as a whole, it is estimated that some two-thirds of its inhabitants perished during the Thirty Years War, in which political and religious power struggles completely altered the shape of the Continent. See Ronald Asch The Thirty Years War: the Holy Roman Empire and Europe, 1618-48 (Macmillan, London, 1997) 17. For a concise summary of the religious wars (and their causes) in Europe following the Protestant Reformation of the 16th and 17th centuries, see Douglas Laycock “Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century” (1996) 80 Minn L Rev 1047, 1049-1066; and for assessment of the impact of these conflicts on Locke’s thought, see Susan Mendus and John Horton “Locke and Toleration” in J Horton & S Mendus (eds) John Locke: A Letter Concerning Toleration in Focus (Routledge, New York, 1991) 1-12.

170 John Locke A Letter Concerning Toleration, above n 1, 17.
Chapter 2

1. Introduction

In the next two chapters, I propose to explain why the Equal Regard reading of s 15 BORA is – when compared to other, apparently more generous, readings of the text – the most appropriate interpretive choice for the New Zealand courts when they are confronted with religious free exercise claims brought under this provision. First, in this chapter I shall relate the circumstances in which the US courts gradually shrank from applying a substantive liberty reading to the equivalent religious free exercise provision in the US Constitution. This process took some thirty years to work itself out and affords observers a salutary example of how courts can experience severe difficulties and expose themselves to much criticism if they attempt to administer a regime of substantive protection for religious individuals seeking shelter against generally applicable laws burdening their activities. Then, in Chapter 3, I shall ask whether the factors that led to the collapse of the substantive protection regime in the US ought to caution against an attempt at a similar enterprise by the courts in this country. I will conclude that, despite differences in legal culture and in the texts of the two countries’ respective religious free exercise provisions, the lessons we can glean from the failed attempt to enforce a substantive neutrality regime in the US have equal force in the New Zealand setting and that the courts in this country ought therefore to adopt what is now the preferred doctrinal solution to this issue in America.

1.1 The United States Supreme Court “overturns” three decades of Free Exercise Clause jurisprudence

In 1990, the US Supreme Court turned on its head what was generally understood to be its own prior doctrine concerning the right under the federal Constitution to the “free exercise” of religion.¹ For more than a century, in one guise or another, the Court had been grappling with the issue of whether the right contained in the First Amendment encompassed a liberty right that sometimes required government to exempt religious believers from compliance with general laws, or whether it merely expressed a right to equal treatment.² In Employment Division, Department of Human Resources of Oregon v Smith,³ a majority of the Justices of the

¹ The First Amendment of the US Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” The phrases in italics are commonly referred to as the “Religion Clauses” (or the “Establishment and Free Exercise Clauses”) of the First Amendment. The First Amendment achieved ratification in 1791, after it was approved by two-thirds of both Houses of Congress and three-quarters of the original states of the new union (with formal ratification occurring on 15 December 1791, when Virginia became the eleventh state to approve the document). It was one of 10 other amendments to the original Constitution (adopted in 1787) that are known collectively as the US “Bill of Rights”. See Gerard Bradley Church-State Relationships in America (Greenwood, New York, 1987) 69-120; and Douglas Laycock “Text, Intent, and the Religion Clauses” (1989) 4 Notre Dame J L Ethics & Pub Pol’y 683 (“Laycock ‘Text, Intent’”), 689.

² McConnell describes this critical issue as one that has “trouble[d] and divide[d] the legal system” for more than two centuries. See Michael McConnell “The Origins and Historical Understanding of Free Exercise of Religion” (1990) 103 Harv L Rev 1409 (“McConnell ‘Origins’”), 1411; and see James M Oleske “Undue Burdens and the Free Exercise of Religion: Reworking a ‘Jurisprudence of Doubt’” (1997) 85 Geo LJ 751 (“Oleske ‘Jurisprudence of Doubt’”), where the author describes the matter as a focus for “profound disagreement”.

Court opted for the latter interpretation in the face of almost thirty years of doctrine that seemed to enforce the former approach.

The *Smith* litigation involved two drug rehabilitation counsellors at a private organisation in Oregon who sought relief from the courts after being dismissed from their jobs for ingesting the hallucinogenic substance peyote at a religious ceremony of the Native American Church.\(^4\) The two men then applied to a state board for unemployment insurance, but this was refused on the grounds that they had been discharged for misconduct related to their work, owing to peyote being a proscribed substance under Oregon state criminal law. The men challenged the decision, and at state appellate court level they succeeded in their claim that their rights had been violated. Applying what it thought was the correct reading of extant US Supreme Court First Amendment case law, the Oregon Supreme Court held that denying the men unemployment insurance in these circumstances was an unconstitutional burden on their religious activities.\(^5\)

The template for the Oregon Court’s reasoning was the 1963 US Supreme Court decision of *Sherbert v Verner*,\(^6\) in which the Court had established a new method for analysing free exercise claims that appeared to depart significantly from its previous jurisprudence. Whereas prior holdings had found that government was free to regulate external religious activities (as opposed to internal religious beliefs) as long as the regulation bore a rational relationship to some arguable state interest\(^7\) and was not directly targeted at religion,\(^8\) the *Sherbert* Court, borrowing from free speech and freedom of association jurisprudence, imported a new “compelling interest” test into Free Exercise Clause analysis.\(^9\) Under this test, government would have to meet a far higher standard of justification for laws that burdened religious activities, even, it seemed, where these laws impinged on religious actions only indirectly and

\(^{4}\) Peyote is a small spineless cactus, which grows in the wild in Texas and Mexico. When eaten, it produces an hallucinogenic state. Its first recorded religious use was in 1560 in Mexico, from where its use spread to North America. It now plays a central sacramental role in numerous Native American tribes. For a book-length account of the *Smith* litigation, see Garrett Epps *To an Unknown God: Religious Freedom on Trial* (St Martin’s Press, New York, 2001) (“Epps Unknown God”; for the origins of Peyotism, see ibid 59-62; and *People v Woody* 394 P2d 813, 816-817 (1965) (Supreme Court of California) (“Woody”).

\(^{5}\) *Smith v Employment Div, Dept of Human Resources* 721 P2d 445 (1986) (Supreme Court of Oregon); affirmed on remand in 763 2Pd 146 (1988).


\(^{7}\) This standard of review is known as the “rational basis” test. It entails a minimal degree of scrutiny by the courts into governmental regulation. For a classic statement of the test, see *McGowan v Maryland* 366 US 420, 425-426 (1961), in which the Supreme Court rejected an objection based on the Equal Protection Clause of the US Bill of Rights to state laws forbidding certain commercial activities on the Christian Sabbath: “The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”

\(^{8}\) See, eg, *Reynolds v United States* 98 US 145 (1878), in which the Supreme Court upheld a generally applicable federal law outlawing polygamy against a Mormon who considered that his religion required the practice: “Congress was deprived legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.” Ibid 164 (per Waite CJ); and see *Minersville School Dist Bd of Ed v Gobitis* 310 US 586, 594-595 (1940).

\(^{9}\) *Sherbert*, above n 6, 406-407. This mode of analysis is part of the “strict scrutiny” test. When this test is invoked by courts to scrutinise a governmental measure, the results almost always go against government, as opposed to the rational basis test, which permits a very wide latitude for the state in legislating policy goals. As one legal commentator famously described it, this standard of review is “‘strict’ in theory and fatal in fact”. Gerald Gunther “The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection” (1972) 86 Harv L Rev 1, 8.
applied to all citizens.

As with the two drug counsellors, Sherbert concerned an unemployment insurance matter where financial help had been refused to a religious claimant. Adell Sherbert’s First Amendment complaint was based on the fact that she had been dismissed for declining work on Saturdays, which was her Sabbath. The relevant body administering the insurance fund decided that she had not demonstrated “good cause” for her refusal to work on Saturdays. Finding that this decision significantly burdened the woman’s sincere religious beliefs, the Sherbert Court went on to hold that the state’s reasons for withholding payment were not compelling. The government had contended that to allow the woman and other similar claimants to receive moneys would render the state’s administration of its social security fund prone to fraudulent claims and would be a financial drain. The Court did not find this state interest at all convincing, and ordered that payments should ensue.

The Sherbert decision had implications that reached far beyond the relatively banal issue of unemployment insurance in South Carolina. As legal commentator Professor Michael McConnell pointed out in 1990, the case “created the potential for challenges by religious groups and individual believers to a wide range of laws that conflict with the tenets of their faiths, because such laws impose penalties either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct”. It was thus open to courts around the US from 1963 to subject all laws that impeded religious practices, whether directly or indirectly, to a level of scrutiny that had never before been exacted during the history of judicial enforcement of the Free Exercise Clause. And in cases where laws that were otherwise neutral with respect to religion and generally applicable to all other citizenry nevertheless failed the compelling interest test, the courts would be in a position, at least in theory, to carve exemptions from the impugned laws for the benefit of religiously motivated claimants.

In dealing with the two drug counsellors’ constitutional complaint, the Oregon Supreme Court

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10 As required by South Carolina Unemployment Compensation Act, SC Code, Tit 68, ss 68-1 to 68-114(3).
11 Justice Brennan characterised the refusal to provide financial aid in these circumstances as putting the “same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship”. Sherbert, above n 6, 404.
12 Ibid 407. Moreover, even if the Court had considered the state’s justifications for withholding payment to have sufficient validity, it would have nevertheless been necessary for the state to show that “no alternative forms of regulation would combat such abuses without infringing First Amendment rights”. Ibid.
14 See Leo Pfeffer “The Supremacy of Free Exercise” (1973) 61 Geo LJ 1115, 1139, where the writer describes Sherbert as the “turning point” in Free Exercise Clause doctrine. Prior to Sherbert, successful Free Exercise Clause claims had been made in conjunction with other rights recognised in the Constitution, in particular the right to free speech. See, eg, Cantwell v Connecticut 310 US 296 (1940) (“Cantwell”) (in which the Court invalidated under the Free Exercise and Free Speech Clauses a licensing system that was used by public officials to ban the proselytising activities of Jehovah’s Witnesses). Sherbert was the first case in which the Free Exercise Clause stood alone as the basis of a successful constitutional complaint, which explains its significance. On the importance of Sherbert, see also Stephen Pepper “The Conundrum of the Free Exercise Clause – Some Reflections on Recent Cases” (1982) 9 N Ky L Rev 265 (“Pepper ‘Conundrum’”) 266; and Kent Greenawalt Religion and the Constitution: Free Exercise and Fairness (Princeton University Press, New Jersey, 2006) (“Greenawalt ‘Free Exercise and Fairness’”) 29-30.
15 Note that non-discriminatory laws were never “struck down” under the Sherbert test, but rather continued to apply in all cases, except with respect to the exempted class of religiously motivated persons. See McConnell “Origins”, above n 2, 1418.
readily took the Sherbert test at face value and held that their First Amendment rights had been infringed. Under the two-part balancing test introduced in Sherbert, the Oregon Court found, first, that the refusal to grant insurance payments had a serious impact on the two men’s religious beliefs; and, second, that the state’s proffered justifications for doing so were not sufficiently compelling to outweigh this religious interest, principally for the same reason that the Supreme Court had given in Sherbert (ie, that it was spurious for the state to argue that paying the two men would undermine the welfare fund due to the potential for fraudulent religious claims). The state of Oregon then appealed to the US Supreme Court.

When asked to affirm the Oregon Supreme Court’s finding, a 5 to 4 majority of the US Supreme Court, to the consternation of many – in the Court’s minority, in the world of politics, and throughout much of academia – refused to apply its own test in Sherbert to the facts in Smith, and ultimately reversed the lower court decision. Writing for the majority, Justice Antonin Scalia felt able to declare that, despite Sherbert, the Court had “never held” that an “individual’s religious beliefs excuse[d] him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”. Relying on jurisprudence that pre-dated Sherbert, and which the minority on the Court considered to have been displaced by the 1963 decision, he went on to state that the constitutional ban on “prohibiting the free exercise [of religion]” did not provide protection for religious claimants who wished to act in contravention of neutral and generally applicable laws. The criminal statute that contained an across the board prohibition of the possession of peyote in Oregon, and which clearly had not been enacted with anti-religious hostility, was such a law. No balancing test was therefore required, with the result that the two drug counsellors had no actionable claim before the Court.

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16 As had many other lower court decisions that followed the Sherbert precedent to create religious exemptions from general laws: see, eg, In Re Jenison 120 NW 2d 520 (1963) (Minnesota Supreme Court excusing from jury service a woman who objected on Christian grounds to judging others); People v Woody, above n 4, (Supreme Court of California exempting Native American Church members from state criminal prohibition of peyote); and Founding Church of Scientology v United States 409 F 2d 1146 (1969) (Court of Appeals for the District of Columbia disapplying product labelling laws for certain ritualistic items used by Church of Scientology).

17 The balancing test in Sherbert is summarised in Notes “Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities” (1980) 90 Yale LJ 350 (“Notes ‘A Model of Competing Authorities’”), 355: “A court faced with a claim for a religion-based exemption from a government regulation will first consider the sincerity of the religious claim being advanced and the degree to which the challenged regulation interferes with vital religious practice or belief. It will then weigh, on the other side of the balance, the importance of the secular value underlying the rule, the impact of an exemption on the regulatory scheme, and the availability of a less restrictive alternative.” (Footnotes omitted).

18 Smith v Employment Div, Dept of Human Resources 721 P2d 445, 451 (1986). The fact that the two men were fired for engaging in a felony (which was never prosecuted) was not deemed relevant to the statute regulating the fund.

19 As well as a series of its own cases during the 1963-1990 period that applied Sherbert. See, especially, Wisconsin v Yoder 406 US 205 (1972) (“Yoder”), where the Court held that a generally applicable state law requiring school attendance burdened the beliefs of parents in the Amish community who did not wish to send their children to school after the age of 14. In this case the Court held that, although compulsory schooling served several important state interests (eg, preparing children for participation in civil society), these were not, in the Court’s view, sufficiently important to override the parental religious right.

20 Smith, above n 3, 878-879. Note that the Supreme Court recast the constitutional question under consideration by asking whether the criminal statute that prohibited peyote possession offended the Free Exercise Clause. In the lower courts, this question was not initially considered, as no conviction of the two men had ever been sought. The US Supreme Court directed the Oregon Supreme Court on remand to adjudge whether Oregon law would consider peyote use in these circumstances to be an illegal act. The Oregon Court replied that applying the law to the two drug counsellors would offend the federal Free Exercise Clause. The US Supreme Court therefore addressed this issue. See discussion of the exchange between the two courts on this procedural matter in Epps Unknown God, above n 4, 179-183; and Michael McConnell “Free Exercise Revisionism and the Smith Decision” (1990) 57 U Chi L Rev 1109 (“McConnell ‘Free Exercise Revisionism’”), 1111-1112.

21 Smith, above n 3, 882.
According to Scalia J, to subject the Oregon law to a balancing enquiry that might result in a court-ordered exemption would be “courting anarchy”\(^\text{22}\) in a society as religiously diverse as the US and where pervasive non-discriminatory state regulation could conceivably be open to an infinite array of challenges.\(^\text{23}\) He then invited the respondents in the case, and others like them, to approach their political representatives for relief from what was in the Court’s view a non-discriminatory law, and which by virtue of that fact alone could not offend the Constitution.\(^\text{24}\)

Thus, the regime of substantive protection for religiously motivated behaviour that had “appeared”\(^\text{25}\) to hold sway in the US since 1963 was revised in favour of a much narrower system of legal protection against laws that actually discriminated against religion. The Court, it seemed, had wound the clock back 50 years to a time when minority religionists seeking relief from laws made by majoritarian institutions had no forum in which to press their claims, except to these same institutions. Notable in the Scalia opinion was his reliance on the notorious wartime decision of \textit{Gobitis}.\(^\text{26}\) In this case, the father of Jehovah’s Witness children had asked the Court on their behalf for exemption from a daily requirement of all children at their school that they salute the American flag, because an act of obeisance of this sort to an earthly authority conflicted with their religious beliefs.\(^\text{27}\) Justice Frankfurter denied the Court was bound to assist in this First Amendment claim, stating the simple rule, revived by Scalia J in 1990, that: “[C]onscientious scruples [do not relieve] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.”\(^\text{28}\) Scalia J took direct succour from \textit{Gobitis},\(^\text{29}\) even though the standard view of First Amendment history was that \textit{Gobitis} had had disastrous consequences,\(^\text{30}\) and had in any case been expressly overruled by

\(^{22}\) Ibid 888.

\(^{23}\) Ibid 888-889. Scalia J explained that, in his view, the compelling interest test would, if applied consistently, require the same degree of “‘compelling state interest’ to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church”. Ibid 887.

\(^{24}\) Ibid 890.

\(^{25}\) This is the curious manner in which the \textit{Sherbert} regime was described by one Judge Samuel Alito, who now sits on the Supreme Court, but had occasion to summarise the evolution of Free Exercise Clause doctrine when he was a judge on the Court of Appeals for the Third Circuit in \textit{Fraternal Order of Police v Newark} 170 F 3d 359, 361 (3rd Cir) (1999) (“\textit{Newark}”). “For many years, the Supreme Court \textit{appeared} to interpret the free exercise clause as requiring the government to make religious exemptions from neutral, generally applicable laws that have the incidental effect of substantially burdening religious conduct.” (Emphasis added). Even the author of the \textit{Smith} decision, Scalia J, apparently believed at one point that the substantive protection interpretation of the clause in fact existed; see \textit{Edwards v Aguillard} 482 US 578, 617 (1987) (“\textit{Aguillard}”) (per Scalia J, dissenting): “[W]e have held that intentional governmental advancement of religion is sometimes required by the Free Exercise Clause. For example, in \textit{Hobbie}; \textit{Thomas}; \textit{Yoder}; and \textit{Sherbert}, we held that in some circumstances States must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations.” (Full case citations omitted).

\(^{26}\) \textit{Minersville School Dist Bd of Ed v Gobitis} 310 US 586 (1940) (“\textit{Gobitis}”). Scalia J also cited the 19th century case, \textit{Reynolds}, above n 8, which is cited in \textit{Smith} as establishing the basic proposition (ie, that the Free Exercise Clause does not afford protection to the actions of religious believers in the face of general laws) upheld by Frankfurter J in \textit{Gobitis}. See \textit{Smith}, above n 3, 879, 882 & 885.

\(^{27}\) Jehovah’s Witnesses consider flag saluting to be an idolatrous act, forbidden by the Second Commandment. For a description of their doctrines, see William Kaplan \textit{State and Salvation: The Jehovah’s Witnesses and Their Fight for Civil Rights} (University of Toronto Press, Toronto, 1989) (“\textit{Kaplan State and Salvation}”), ch 1.

\(^{28}\) \textit{Gobitis}, above n 26, 594.

\(^{29}\) \textit{Smith}, above n 3, 879, citing with approval Frankfurter J’s words, quoted above, in \textit{Gobitis}.

\(^{30}\) Immediately after the decision in \textit{Gobitis}, Jehovah’s Witnesses were subjected throughout the US to large-scale mob violence as well as state-sanctioned removal of children from their families for re-education, due to their perceived disloyalty during World War II. See Kaplan \textit{State and Salvation}, above n 27, 56, where the author claims that the \textit{Gobitis} decision was the “proximate cause” of this outbreak of civil unrest. See also Martha Nussbaum \textit{Liberty of Conscience: In Defense of America’s Tradition of Religious Equality} (Basic Books, New York, 2008) (“\textit{Nussbaum Liberty of Conscience}”) 211-212.
the Supreme Court three years later in West Virginia Board of Education v Barnette, a decision involving virtually identical facts and which is widely celebrated as one of the Court’s finest moments. In Barnette, Justice Jackson had vindicated the First Amendment complaint of similarly situated Jehovah’s Witness school children, and in doing so had crafted some of the more memorable phrases in the history of the Court, declaring, for example, that: The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In the later case, therefore, it seemed that majoritarian institutions, such as the school boards and state legislatures in the wartime US that required daily flag salutes of children in schools, were not as free as had formerly been supposed when trenching on “freedom of worship” and other civil liberties. The liberal position of the majority in Barnette had major downstream effects in the case law, which, contrary to the view of the majority on the Smith Court, tended to indicate that the Sherbert era did in fact create a zone of substantive protection for religious activities, and not merely a right to equal treatment. The clearest example of this position was the Supreme Court’s 1972 decision in Yoder, in which the Court declared (seemingly) unambiguously: “There are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.” How, then, did Scalia J perform the jurisprudential sleight of hand involved in preferring Gobitis to Barnette, Sherbert and Yoder as a controlling precedent in Smith? This chapter will attempt to isolate and explain his reasons for doing so.

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31 319 US 624 (1943) (“Barnette”).
33 Barnette, above n 31, 638.
34 The requirement to salute the flag (and to recite a pledge of allegiance to the nation) in Gobitis was issued by a local school board; in Barnette, the West Virginia state legislature – inspired in part by the decision in Gobitis and the patriotic fervour it unleashed – passed a statute requiring schools to engage in “fostering and perpetuating the ideals, principles and spirit of Americanism”. In reliance on this, the state board of education adopted a resolution requiring patriotic exercises identical to those that the Court had endorsed in Gobitis.
35 Yoder, above n 19, 220 (per Burger CJ). The Yoder Court cited, inter alia, Barnette and Sherbert as authority for excluding the children of Amish parents from attending school from the age of 14, despite a generally applicable state law that required attendance beyond this age. See also Lynch v Donnelly 465 US 668, 673 (1984): “[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”
36 And the 19th century case of Reynolds, which is followed in Gobitis, above n 26, 594-595. Like Gobitis, Reynolds attracted some notoriety due to certain statements made in Waite CJ’s opinion for the Court in relation to the criminalised practice of polygamy (which was the basis of the Free Exercise Clause claim by the Mormon petitioners): “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.” Reynolds, above n 8, 164.
38 The meaning of the Free Exercise Clause has been the subject of intense debate in the US for many years. The discussion that follows here is very much my own “take” on the associated legal history of the provision. I note in advance the observation by two US legal commentators that foreign comparative scholars have often “produced both caricatures and characteristically optimistic assessments of [the American experiment in religious liberty].
2. Two primary areas of tension in First Amendment jurisprudence during the Sherbert era (1963-1990)

The Smith decision was the final playing out of tensions in Religion Clause jurisprudence that had attracted adverse comment, and even ridicule, both in the Supreme Court and in the academy, since the emergence of the stricter regime for judicial enforcement of the Free Exercise Clause was announced in Sherbert. These areas of debate primarily manifested themselves during the Sherbert era in two “jurisprudentially distinct” forms. As will become apparent in my analysis, it is important when teasing out the rationale behind Smith to distinguish these two sources of tension and to ask which of the two (if not both) drove the Court to abandon the substantive neutrality reading of the Free Exercise Clause in 1990. We shall now consider these in turn, before proceeding to analyse the majority opinion in Smith.

2.1 Exempting religious believers from general laws unfairly privileges religious believers over persons pursuing non-religious life projects

The first tension related to the substantive issue of how much conduct the Free Exercise Clause itself was designed to protect. Did it merely stipulate that government must treat religionists even-handedly, with the result that general laws serving some permissible secular purpose, but incidentally impeding religious practices, would receive only the non-intrusive judicial scrutiny required by the rational basis test (the position in Reynolds and Gobitis that was resurrected in Smith)? Or did it encompass all religious activity, thus creating a presumptive right for religiously motivated citizens to challenge the otherwise non-discriminatory laws of the state – a presumption that could only be rebutted if the state could assert a compelling interest in upholding these laws in every case (the official position in the Sherbert-Yoder era)? These two readings of the substantive scope of the provision clearly had significant consequences as to the degree of scrutiny triggered in the courts when they were engaged, and therefore provided a battleground for much scholarly debate and some dissonance on the Court. Although the text of

Not all is so simple, nor so well, as it might appear from afar”. John Witte Jr & M Christian Green “The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles” in JD van der Vyver & J Witte Jr (eds) Religious Human Rights in Global Perspective: Legal Perspectives (Martinus Nijhoff, The Hague, 1996) 497, 557. I accept that the account I provide here is probably susceptible to these charges, but hope that it is nevertheless an accurate one, in the way that caricatures sometimes are.

Some typical comments about case law in the “Religion Clauses” field included descriptions of it as being a “maze” (Aguillard, above n 25, 636 (Scalia J, dissenting)), as being in “significant disarray” (Pepper “Conundrum”, above n 14, 303), and as being based on theory derived from “Alice’s Adventures in Wonderland” (Philip Kurland “The Religion Clauses and the Burger Court” (1984) 34 Cath U L Rev 1, 10). But see Greenawalt Free Exercise and Fairness, above n 14, 1-2, where the author, who disapproves of the Smith decision, depicts the vagaries of the jurisprudence as “rich”, and criticises legal and political theorists who strain to articulate overarching principles in an area of the law that is appropriately sensitive to context.

McConnell “Origins”, above n 2, 1420.

A third, and potentially crucial, area of debate remained relatively dormant until the flurry of academic commentary that occurred in the aftermath of Smith. This was the issue of whether the Free Exercise Clause ought to be interpreted in light of the meaning attributed to it by those in the founding generation of the American republic who drafted and enacted it. The “original meaning” of the clause received no attention in Smith and for that reason we defer consideration of this interpretive factor until we assess its impact in the case of City of Boerne v Flores 521 US 507 (1997) (“Boerne”) in Chapter 3 of this thesis.

The rational basis test, it will be recalled (see n 7 above), presumes that state regulation indirectly interfering with religious free exercise is constitutional, whereas the compelling interest test reverses this presumption and requires the state to prove that the impugned law is essential to effect a governmental interest of the “highest order” that cannot be “otherwise served” by a less rights-infringing measure, as stated in Yoder, above n 19, 215 (per Burger CJ).
the Free Exercise Clause on its face appeared to single out religion for favourable treatment of the latter variety, and, as we shall see below, several statements of the Court in the Sherbert era appeared to make it clear that the provision was to be read as such, one strand of the modern debate on the issue has constantly criticised this position.

The basic line of attack was that the Free Exercise Clause, as interpreted in the Sherbert-Yoder line of cases, constituted unfair favouritism towards religious believers as compared to those adhering to non-religious belief systems, and therefore should not be read in this way. This contention was not necessarily predicated on any reading of the text (or history) of the clause, but rather looked towards arguments in normative liberal political philosophy relating to the fundamental rule of law principle that all citizens should be equally subject to the same corpus of laws, and that favourable, or unfavourable, treatment should not be meted out to specific classes of persons. As stated by the legal philosopher Geoffrey Walker in his 12-point typology of the rule of law:

The equality principle is the main basis for protecting the general interest against inroads by pressure groups and other general interests. It restrains, or should restrain, a legislature from enacting bills of attainder or other laws which unilaterally benefit or injure particular individuals or groups.

Although Walker was referring explicitly to legislatures in their lawmaking capacity, it might also be said that the same principle should apply in the court setting. After all, the courts and legislatures of any given polity operate, by definition, within the same constitutional regime and, therefore, as a general rule, should be constrained by the same boundaries of lawmaking. As a result of this basic liberal democratic principle, it became arguable during the Sherbert era that the judiciary ought to be “restrained” from interpreting the Free Exercise Clause to mean that religious believers (as opposed to the non-religious) could in some cases obtain dispensation from the equal application of non-discriminatory statutes. To do so, it might be

43 Although one interpretation of the text (and also, as we shall see, one school of thought on the historical meaning of the Free Exercise Clause) plausibly argues that it refers only to laws that specifically target (or “prohibit”) religion does in fact fit with this line of argument. One of the foremost expositors of the contention that court-granted exemptions to general laws unfairly favour religious believers notes that reference to “religion” in the First Amendment “reflects the fact that religious groups had often been persecuted and therefore needed special protection. The text, in short, is consistent with protecting religion from discrimination; it does not compel discrimination in favour of religion”. William Marshall “Correspondence on Free Exercise Revisionism; In Defense of Smith and Free Exercise Revisionism” (1991) 58 U Chi L Rev 308 (“Marshall ‘In Defense of Smith’”), 325. See also Ellis West “The Case Against a Right to Religion-Based Exemptions” (1989) 4 Notre Dame J L Ethics & Pub Pol’y 591 (“West ‘Case Against Exemptions’”), 638, where the author, like Marshall, grounds his reading of the Free Exercise Clause primarily on considerations of fairness and administrability, rather than on any reading of the text based on history or linguistics.

44 Geoffrey de Q Walker The Rule of Law: Foundation of Constitutional Democracy (Melbourne University Press, Carlton, 1988) (“Walker Rule of Law”) 25. See also Albert V Dicey Introduction to the Study of the Law of the Constitution (8th ed, Macmillan, London, 1927) 114: “[W]e mean…when we speak of the ‘rule of law’…not only that with us no man is above the law, but…that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm”; and FA Hayek The Constitution of Liberty (University of Chicago Press, Chicago, 1960) 150, 208: “Law in its ideal form might be described as a ‘once and for all’ command that is directed to unknown people….The general, abstract rules…are…essentially long-term measures, referring to yet unknown cases and containing no references to particular persons, places or objects.”

45 Some commentators argue that not only the judiciary but also the legislative branch of government ought to be enjoined from exempting religious believers from burdens placed on all citizens. See text below accompanying ns 84-86.

46 See Kent Greenawalt Religion and the Constitution: Establishment and Fairness (Princeton University Press, Princeton, 2008) (“Greenawalt Establishment and Fairness”) 304, where the author notes that, although the Diceyan prescription (which is regarded as the classic statement of Walker’s similar stipulation noted above) that
argued, would amount to the courts “unilaterally benefit[ing]…particular individuals or groups”.

Indeed, this was the opinion of one school of thought that was critical of the Sherbert-era jurisprudence. For example, political theorist Professor Ellis West and legal commentator Professor William Marshall have both argued cogently that this consideration of fairness to non-religious persons counted strongly against court-ordered exemptions from general laws for specific religious individuals or groups.\(^47\) West’s contention was that it was patently unfair that religious believers who won in court under Sherbert-era doctrine would consequently not be “required to do or refrain from doing something that others are required to do or not to do”.\(^48\)

Moreover, continued West, the discrimination inherent in court-granted exemptions was intensified if a burden, such as paying taxes, or participation in other public duties,\(^49\) was lifted from a successful religious litigant and thereby passed on to other people, who in some instances might have equally deep, albeit non-religious, reasons for disobeying the law.\(^50\)

The unfairness was easily identified in the exemption jurisprudence itself, where leading opinions of the Court openly expressed the view that Free Exercise Clause accommodations were available only to religious believers, and not to those who objected to a law’s operation because of political, philosophical, or other non-religious reasons. For example, the Yoder Court, when it found in favour of Amish parents who wished their children to be exempt from compulsory school attendance laws, explicitly cabin ed the availability of the exemption to persons adhering to religious belief systems:\(^51\)

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\(^{47}\) West “Case Against Exemptions”, above n 43, 600-603; Marshall “In Defense of Smith”, above n 43, 319; “Granting exemptions only to religious claimants promotes…inequality: a constitutional preference for religious over non-religious belief systems.” See also: Notes “A Model of Competing Authorities”, above n 23, 356; and Mark Tushnet “‘Of Church and State and the Supreme Court’: Kurland Revisited” (1989) Sup Ct Rev 373 (“Tushnet ‘Kurland Revisited’”), 380. Closely related to the equality concern is the rule of law objection that exemptions effectively give religious believers “license to violate the laws with impunity”. Philip Kurland “The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court” (1978) 24 Vill L Rev 3, 16 (“Kurland ‘Irrelevance of the Constitution’”). Kurland further objects that there has never been any explanation of why the courts should be able to grant exemptions, comparing this ability to the ancient royal prerogative of dispensation, whereby the Crown could exempt individuals from conforming to the laws of Parliament – a power repugnant to the rule of law which was abolished by the English Bill of Rights (1689, 1 Will & Mar Sess 2 (Eng), c 2). Ibid 17.

\(^{48}\) West “Case Against Exemptions”, above n 43, 601.

\(^{49}\) Such as participation in war. Laycock frames the inequality argument nicely with respect to the military draft: “[I]f ten thousand conscientious objectors are exempt, then ten thousand others must serve. All nonobjectors are exposed to a greater risk of selection, in part because of their religion…”. Douglas Laycock “Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy” (1981) 81 Colum L Rev 1373 (“Laycock ‘General Theory’”), 1415.

\(^{50}\) West “Case Against Exemptions”, above n 43, 601; and see Christopher Eisgruber and Lawrence Sager “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct” (1994) 61 U Chi L Rev 1245 (“Eisgruber & Sager ‘Vulnerability of Conscience’”), 1255, where the authors complain that granting exemptions only to religious believers unfairly “privileges religious commitments over other deep commitments that persons have”.

\(^{51}\) Yoder, above n 19, 215-216 (per Burger CJ) (emphasis added). See also Thomas, above n 37, 713, where the Court held that an exemption from unemployment insurance requirements would be extended to a person who objected to working in an armaments factory for religious reasons, but that a similar dispensation would not be granted to a claim based on “personal philosophical choice”.
A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief…. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

The position of Burger CJ in Yoder that the Free Exercise Clause did not protect adherents to non-religious belief systems seemed quaintly removed from modern life by its reference to the long-dead and enigmatic Thoreau. However, more mundane examples illustrate the bite in the discrimination-based criticism of the Sherbert-era jurisprudence regarding which actions qualified as being truly religious for the purposes of Free Exercise Clause adjudication. Using the ruling in Sherbert as a starting point for considering this issue, one could ask whether it would be fair for a court to exempt a religious person from unemployment insurance regulations regarding availability for Saturday work (as the Court did for the Seventh Day Adventist beliefs of Adell Sherbert), but not, say, a non-custodial father who lost his job because the terms of his marital dissolution meant that he could only visit his children on Saturdays? Or would it be fair if a church and a non-religious organisation both wanted to open a homeless shelter in an area where zoning laws banned this activity, but only the church was successful in gaining an exemption, thanks to an appeal to the Free Exercise Clause? These unattractive distinctions gave increased impetus to the moral argument, based on general liberal political theory, against exemptions from general laws for religious believers.

The first major Free Exercise case, Reynolds, made much the same equality-based contention, albeit one suited to a more religious era. In Reynolds, the Court rejected a challenge made by

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52 Justice Douglas in dissent objects to Burger CJ’s exclusion of non-religious persons from Free Exercise Clause protection, referring to jurisprudence on conscientious objection to military service in which non-religious objectors successfully gained exclusion from the draft. In United States v Seeger 380 US 163, 176 (1965) (cited in Yoder, above n 19, 248, per Douglas J), the Court provided a definition of “religion” that appeared much broader than Burger CJ’s in Yoder: “A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the [statutory exemption to military service] comes within the statutory definition.”

53 Henry David Thoreau (1817-1862) achieved international fame for his transcendentalist beliefs, and for the urging in his writings of civil disobedience to unjust government. Thoreau famously lived in isolation for 2 years at Walden Pond, where, similarly to the asceticism of the Amish (though without any reliance on traditional religious dogma), he wished to “whittle life down to its bare essence by discarding all that was superfluous and burdensome”. See Bryan-Paul Frost “Religion, Nature, and Disobedience in the Thought of Ralph Waldo Emerson and Henry David Thoreau” in B Frost & J Sikkenga (eds) History of American Political Thought (Lexington, New York, 2003) 355, 365.

54 For this example, and others, see Frederick Mark Gedicks “An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions” (1998) 20 U Ark Little Rock LJ 555 (“Gedicks ‘Regrettable Indefensibility’”), 555-556. See also Eissgruber & Sager “Vulnerability of Conscience”, above n 50, 1255, where the authors ask whether it would be fair for an artist who does his best work in an altered state of consciousness, “like Coleridge”, ought to be prevented from consuming peyote, whereas a religious believer might gain an exemption from anti-drug laws under the substantive neutrality reading of the Free Exercise Clause.

55 Gedicks “Regrettable Indefensibility”, above n 54, 555.

56 Note that Reynolds was decided in 1878, long before the Supreme Court determined that the Free Exercise Clause, which was originally applicable only to the federal government, was applicable to the states. It was not until 1940 that the Court extended the free exercise guarantee to the states in Cantwell v Connecticut 310 US 296, 303 (1940). The Court was able to rule on the Reynolds case because Utah was at the time a federal Territory and therefore under the sway of federal law, including the First Amendment of the federal Constitution; see Reynolds, above n 8, 162; and McConnell “Origins”, above n 2, 1478. And see n 68 below for discussion of the “doctrine of
Mormon religionists to a general law prohibiting polygamy, and used the unfairness objection as one of the reasons for its decision. Waite CJ argued, in terms that presaged the discrimination argument of West and other scholars making similar claims, such as Marshall, that:

[T]he only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free.

One of the weaknesses of Brennan J’s analysis in Sherbert was that, like Waite CJ, he did not consider the unfairness inherent in privileging specific religious believers to the disadvantage of those adhering to no religion. This omission opened the Sherbert-Yoder doctrine to attack on these grounds in the more secular times of the late 20th century. On the modern Court the equality objection has consistently been the position of Justice Stevens, both during and after the Sherbert era. Consequently, Stevens J, along with the school of academic thought that shared his views, believed that the Free Exercise Clause ought to be read as containing merely a guarantee of freedom against discriminatory laws, not a presumption of unconstitutionality against any laws that indirectly burdened religious believers.

Another strong argument against the Sherbert-Yoder line of cases, and one which reinforced the discrimination charge, was that it offended the requirement of government neutrality.

57 Reynolds, above n 8, 166. Note that the Reynolds Court did not consider the possibility that persons subscribing to no particular religious belief might also suffer discrimination if Mormons were permitted to engage in polygamy. This can be attributed, unsurprisingly perhaps, to the prevalent 19th century belief that the Religion Clauses were unashamedly designed to protect religionists alone, preferably of Christian denominations. As the Court itself announced in 1892: “We are a Christian people, and the morality of the country is deeply engrained upon Christianity.” Church of the Holy Trinity v United States 143 US 457, 471 (1892); quoting People v Ruggles 8 Johns 290, 295 (1811) (Supreme Court of New York); see also Late Corporation of Latter-Day Saints v United States 136 US 1, 49 (1890), in which the Court upheld the decision of the government to dissolve the Mormon Church and to confiscate much of its property, because it did not officially renounce polygamy after the Reynolds decision: “The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.”

58 Rather, he simply asserted that the “recognition of the appellant’s right to unemployment benefits under the state statute” did not “serve to abridge any other person’s religious liberties”. Sherbert, above n 6, 409. Note also that Brennan J distinguished the rule in Reynolds by means of a cursory aside, on the basis that it dealt with conduct (ie, polygamy) that posed a “substantial threat to public safety, peace or order”, and that the complainant in Sherbert, who had a harmless objection to working on Saturdays, did not wish to engage in conduct of this sort. Ibid 403.

59 Justices Harlan and White voiced similar concerns in dissent in Sherbert, but were no longer on the Court when the exemptions doctrine was revised in Smith. In Sherbert, Harlan J adverted to this possibility: “The State, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated.” Ibid 422 (per Harlan and White JJ, dissenting) (emphasis in original). For a similar observation, see Welsh v United States 398 US 333, 356 (1970) (per Harlan J, concurring).

60 See United States v Lee 455 US 252, 263, & n 3 (1982) (“Lee”) (per Stevens J, concurring), where Stevens J cites the Reynolds principle with approval and says it is preferable to the substantive neutrality mode of analysis employed by the Court in Lee. And see Boerne, above n 41, 537, where Stevens J objects to a challenge to a city zoning law banning the alteration of historic buildings owned by a Catholic organisation in these terms: “If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure.”
towards religion dictated by the Establishment Clause, and that the Court’s doctrine interpreting the two clauses was therefore at war with itself.

The Religion Clauses of the US Constitution are unusual in that they contain two, seemingly contrary, commands within the same sentence of the First Amendment. On the one hand, the Establishment Clause appears to prevent the state from endorsing any religious beliefs (“Congress shall make no law respecting an establishment of religion, …”); while on the other, the Free Exercise Clause seems to require government not to inhibit the religiously motivated actions of citizens (“…or prohibiting the free exercise thereof”). The original purpose of the Establishment Clause was to place a structural limit on government in order to avoid the conflicts that had arisen from the shifting allegiances and rivalries of ecclesiastical and secular authorities in Europe after the Protestant Reformation, when the universal authority of the Catholic Church in that continent was shattered. Justice Hugo Black explained well the type of historical relationship between religion and the state that the Establishment Clause sought chiefly to prevent, in the first modern Supreme Court case concerning the clause, *Everson v Board of Education*, in 1947.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.

The founding generation of the US did not want to repeat the errors of the recent past in Europe. The key to achieving this, some thought, was to keep the secular and ecclesiastical realms separate, in order that control of the new federal government would not be viewed as a prize to “fight for” in the minds of religious groups existing in the new society. Hence, the

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63 *Everson v Board of Education* 330 US 1, 8-9 (1947) (“Everson”).

64 They were also concerned about analogous problems in the colonies preceding the American Revolution, where state establishments of religions inflicted similar suffering on religious dissenters, such as the hanging of four Quakers who had defied expulsion orders based on “anti-Quaker legislation” in the Puritan-governed colony of Massachusetts in the period 1658-1661. See Thomas Curry *The First Freedoms: Church and State in America to the Passage of the First Amendment* (Oxford University Press, Oxford, 1986) 22.


66 See Greenawalt *Establishment and Fairness*, above n 46, 11. Another view that informs Establishment Clause interpretation, often associated with the founder of the Rhode Island colony, Roger Williams (1603-1683), was
one object of the clause that all agreed on (and all modern-day contributors to the debate continue to agree on) was that it included an injunction against the setting up of a national church in the United States. As Greenawalt has explained, there is no doubt that the American founders who called for the de-coupling of religion from civil authority meant to end “anything like traditional establishments of religion, with a single state religion being imposed or favored”. The more difficult question, continued Greenawalt, was whether “more gentle and generic forms of state support for religion could be countenanced”. The modern jurisprudence of the Court has in fact held that these “gentler” forms of establishment were in many cases just as impermissible as the formal setting up of a national church. For example, while it might seem harmless to some for a local government body to assist in the erection of a Christian nativity scene on public property during the Christmas season, or for an education board to provide maps to private religious schools alongside state schools, or for a non-sectarian prayer to be given at a public school graduation, these types of government actions were regularly invalidated by the Court during and after the Sherbert era as being constitutionally impermissible establishments of the religions in question (or of religion in

that by keeping religion and the state separate, religion itself would flourish, free from worldly contamination. See Mark Howe The Garden and the Wilderness (University of Chicago Press, Chicago, 1965) 6; and Nussbaum Liberty of Conscience, above n 30, 41.

Such as the established Anglican Church in England, and the theocratic Islamic regime in modern-day Iran. The decision of the American founders not to create a national religion during the constitution-making period of 1787-1791 was an unprecedented and epoch-making event. See Perez Zagorin How the Idea of Religious Toleration Came to the West (Princeton University Press, Princeton, 2003) (“Zagorin Religious Tolerance”) 304. The standard view for the “fourteen hundred years” of various types of governments in Western Christendom preceding the US Constitution had been that the “stability of the social order and the safety of the state demanded the religious solidarity of all the people in one church”, with the corollary that a union of one church and the civil government in any given nation was essential for civil order. Winfred E Garrison “Characteristics of American Organized Religion” (1948) Annals Am Acad Pol & Soc Sci, vol 256, 14, 17; cited in Sydney Mead The Lively Experiment: The Shaping of Christianity in America (Harper & Row, New York, 1963) 60. For a depiction of how attempts to enforce religious uniformity helped bring about the English Civil War, see Conrad Russell The Causes of the English Civil War (Clarendon, Oxford, 1990) ch 3.

Initially, the Establishment Clause was intended to prevent the national government (ie, Congress and the federal Executive) from setting up a state church or otherwise favouring a single religion (or from interfering with any of the established churches that continued to exist in the individual states, even after the Bill of Rights was ratified). See Greenawalt Establishment and Fairness, above n 46, 18-26. However, due to the “doctrine of incorporation”, most of the liberty guarantees contained in the Bill of Rights were held by the modern Supreme Court to be applicable to the states, by virtue of the Due Process Clause of the Fourteenth Amendment. This provision, which was enacted in 1868 after the Civil War, reads in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”. The Court declared in 1947 that the Establishment Clause was applicable to state governments in Everson, above n 63, 15. See Greenawalt Establishment and Fairness, above n 46, 33-38. Note that the Free Exercise Clause, which also was initially a bar only on Federal government action, was similarly “incorporated” in Cantwell v Connecticut 310 US 296, 303 (1940).

Greenawalt Establishment and Fairness, above n 46, 23. The Everson Court was very clear about this: “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.” Everson, above n 63, 15. See also Walz v Tax Commission of City of New York Walz 397 US 664, 667 (1970) (“Walz”): “[T]o the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”

2. Lessons from America

The fact that the Establishment Clause was interpreted to prevent more than a bald establishment of a national religion, and included within its purview many state practices that had a direct bearing on the individual rights and daily lives of citizens, meant that the clause was often at issue in cases that on their face seemed, at least arguably, more suited to resolution under the Free Exercise Clause. Indeed, in some litigation both clauses were deemed relevant to judicial treatment. For this reason, it became a concern to some that the two clauses were being interpreted at cross-purposes.

We now turn to consider more closely the modern relationship between the two Religion Clauses, and the claims of some that the Court’s methods for analysing the validity of government actions that might have the effect of “establishing” religion sat uncomfortably alongside the Sherbert-Yoder doctrine. For example, in Everson the Court addressed the question of whether a state programme that subsidised school bus services would, if extended to children travelling to private religious schools, constitute governmental entanglement in the religious mission of the schools and thus violate the Establishment Clause. Justice Black, who wrote the controlling opinion of a closely divided Court, found that the bus subsidy was not a forbidden establishment of religion. In his view, granting state funds to all children to use school buses, some of whom would use the money to travel to religious schools, was analogous to providing fire or police services for all citizens. Nobody seriously advocated depriving religious institutions of fire and police protection, both of which, like bus services, were in any case sufficiently peripheral to the religious mission of the schools in question that they could not sensibly be regarded as involving the state in this mission.

In endorsing the bus subsidy, Black J stated that the Establishment Clause required the “state to be neutral in its relations with religious believers and nonbelievers”, and that “[s]tate power is no more to be used so as to handicap religions, than it is to favour them”. Moreover, Black J continued, a state “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of

71 See: Allegheny County v ACLU 492 US 573 (1989) (declaring unconstitutional the display of a Christian crèche in a county court-house); Meek v Pittenger 421 US 349 (1975) (invalidating the provision of maps and other materials to religious schools); and Lee v Weisman 505 US 577 (1992) (holding that officials at a public junior high school could not ask a clergyman to lead prayers as part of a graduation ceremony).
72 See, eg, Zorach v Clauson 343 US 306 (1952), in which the Court held that a state programme allowing for children to be released from school to receive religious instruction, but requiring other students of different (or no) religious persuasion to remain on the school grounds did not violate the Establishment Clause or interfere with the free exercise of religion of any students. See also Walz, above n 69 (in which the Court upheld a property tax exemption statute for religious houses of worship after consideration of both Religion Clauses). And see the companion cases of Smith v Bd of School Commissioners 827 F2d 684 (11th Cir) (1987) and Mozart v Hawkins Bd of Education 827 F2d 1058 (6th Cir) (1987), in which two sets of conservative Christian parents in different states challenged the contents of school readers. In the former case, the parents failed in their claim to have certain textbooks banned from schools because they tended to “establish” the religion of “secular humanism”, due to their promotion of, inter alia, moral relativism. In the latter a related, and also unsuccessful, claim was brought under the Free Exercise Clause to have children excused from classes in which they were required to read textbooks promoting secular values, such as feminism and evolution. As Rishworth explains: “A government which studiously avoids religious matters in order to avoid establishing religion may end up by so failing to accommodate religious belief that it breaches the Free Exercise Clause. The [US] courts have long struggled with this tension.” Paul Rishworth “Coming Conflicts over Freedom of Religion” in G Huscroft & P Rishworth (eds) Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (Brooker’s, Wellington, 1995) 225, 232.
73 Everson, above n 63.
74 Ibid 17.
75 Ibid 18 (per Black J).
their faith, or lack of it, from receiving the benefits of public welfare legislation." Many commentators seized on the apparent contradiction in this statement when viewed alongside the Sherbert-era jurisprudence on exemptions, arguing that the Court’s tests for assessing whether government had “established” religion, which had as one of their goals the achievement of parity between religion and non-religion, ought also to forbid many, if not all, instances of governmental accommodation of religious practices under the Free Exercise Clause, due to their discriminatory effects on non-believers. Thus, a decision to excuse Seventh Day Adventists from working on Saturdays, but not to make similar dispensation for non-custodial fathers who could only see their children on Saturdays, or even people who wanted to watch Saturday sports on television, arguably discriminated against non-custodial fathers and TV-watchers on the basis of their “lack of” religious belief.

Because of this discordance in the jurisprudence, some have contended that the results in Sherbert and Yoder, if reappraised through the lens of Establishment Clause doctrine, would clearly violate that clause. Others have pointed out, relatedly, that the success or failure of litigation under the clauses might depend on an arbitrary threshold decision by the courts on whether the claim is “labelled” as a Free Exercise or Establishment Clause challenge. The Court has itself acknowledged the “tension” between the clauses caused by its own

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76 Ibid 17. (Emphasis added). See also Epperson v Arkansas 393 US 97, 104 (1968) (striking down a state law that forbade the teaching of evolution on Establishment Clause grounds, because it had no secular purpose, but rather was motivated by the “fundamentalist sectarian conviction” of many citizens). In this case, the Court stated that: “The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.” (Emphasis added).

77 A different goal, which was to gain currency on the Court in the 1960s and 1970s, was that the clause required a “strict separation” of church and state, which on occasion overrode the equality concerns that saved the bus subsidy for children travelling to religious schools in Everson.


79 See, eg, Walter Berns The First Amendment and the Future of American Democracy (Basic Books, New York, 1976) (“Berns The First Amendment”) 38: “[I]t can be said that the Old Order Amish is now an established religion of the United States (insofar as they alone are exempt from the operation of [Wisconsin’s compulsory schooling] law).” See also Kurland “Irrelevance of the Constitution”, above n 47, 17, where he argued that Yoder was inconsistent with the so-called “Lemon test”, which was established by the Court as a means for assessing alleged Establishment Clause violations by government. In Lemon v Kurtzman 403 US 602 (1971) (“Lemon”), the Court struck down a state subsidy of private religious school teachers’ salaries, and laid out a 3-pronged test for all claims under the clause. The test read: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion…; finally, the statute must not foster “an excessive government entanglement with religion.” Ibid 612-613 (internal citations omitted). Kurland contended that the exemption granted to the Amish in Yoder would surely fail this test, as it undeniably “advanced” the religious beliefs of the Amish.

80 Kurland “Irrelevance of the Constitution”, above n 47, 15 (criticising Yoder in this respect); and Michael McConnell “The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?” (1988) 32 Cath Law 187 (“McConnell ‘Religion Clauses’”), 195-196 (criticising Sherbert). Some have claimed that this labelling process is legitimate, and that there is no difficulty in interpreting the two clauses separately; see Nowak & Rotunda Constitutional Law, above n 61, 1408. Others have argued that the discordance between the Religion Clauses can be explained as merely demonstrating a “quid pro quo” for religion; ie, that the special disability for religion mandated by the Establishment Clause is made up for by the special benefits available to it in the Free Exercise Clause. See Abner Greene “The Political Balance of the Religion Clauses” (1993) 102 Yale LJ 1611; and Stephen Pepper “Taking the Free Exercise Clause Seriously” (1986) BYUL Rev 299, 306 (“Pepper ‘Taking Free Exercise Seriously’”).
jurisprudence, although it has never explained itself in much detail on this count. At most, it has on some occasions acknowledged the conundrum, before asserting that it presents no difficulties, or has even created metaphorical devices to cover up the problem, such as the observation in *Walz v Tax Commission of City of New York* that the tension in that case reflected no more than the natural “play in the joints” between the two clauses. Some legal commentators who became dissatisfied with this state of affairs argued that, in order to maintain integrity between the Religion Clauses, the Free Exercise Clause ought to be read as merely imposing a requirement of equal treatment towards religionists, banning laws that overtly targeted religious activities, but requiring nothing more than this. Such a readjustment, the argument went, would align the clause with the non-discrimination imperative outlined by Black J in *Everson*.

The purest version of this integrated approach to interpretation of both clauses was that espoused by First Amendment scholar Philip Kurland in the early 1960s. Kurland believed that exemptions should never be granted to religious believers, whether by the mechanism of court-granted exemptions to general laws, such as in *Yoder*, or, more controversially, by legislation. Kurland stated his simple formula in these terms:

> The thesis that is stated here as the proper construction of the religion clauses is that the [Free Exercise and Establishment] clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.

Kurland’s view, which has become known as the “strict neutrality” position, had a number of virtues. First, it had the advantage of aligning itself wholly with the rule of law statement by Walker, quoted above, in that it regarded legislatures and courts as operating in the same legal system and therefore bound by identical constitutional constraints. Another virtue was that it provided a predictable, and easily administrable, doctrinal response to the problem of resolving the clash between the two Religion Clauses. This was because it read both clauses as simply prohibiting discrimination against religion and thus obviated the need for conducting the difficult balancing analysis mandated by *Sherbert* for assessing non-discriminatory laws that burdened religion indirectly. Finally, it also plausibly gave voice to the central concern of the founding generation to avoid direct acts of governmental persecution of religious groups who did not have strong political representation. As long as the state crafted laws that burdened, or benefited, all citizens equally, these laws would survive Religion Clause scrutiny.

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81 See *Yoder*, above n 19, 234-235, n 22; *Walz*, above n 69, 668-670; *Sherbert*, above n 6, 409; and *Thomas*, above n 37, 719.

82 Justice Scalia has candidly acknowledged that this difficulty was never squarely addressed by the Court during the *Sherbert* era: “We have not yet come close to reconciling [the Lemon test with] our Free Exercise cases, and typically we do not really try.” *Aguillard*, above n 25, 617 (1987) (per Scalia J, dissenting).

83 See *Walz*, above n 69, 669; and, for a mixed metaphor, ibid 672: “[W]e have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.” See also *County of Allegheny v ACLU* 492 US 573, 661 (1989) (per Kennedy J).


85 The strict neutrality interpretation has its modern adherents; see Tushnet “Kurland Revisited”, above n 47.

86 See text accompanying n 44 above.

87 Kurland “Of Church and State”, above n 84, 10.
Kurland’s position was undoubtedly a harsh one from the perspective of religionists wishing to invoke Free Exercise Clause protection against general laws, because it removed even the possibility that religionists could receive dispensation in legislatures.\(^88\) However, with respect to the Establishment Clause it had the opposite effect in many cases, as it would allow religious groups running, for example, schools, to benefit from general aid programmes targeted at all similar institutions, regardless of their religious or secular underpinnings. Under the “strict separationist” doctrine that dominated the Court’s Establishment Clause decisions during the Sherbert era,\(^89\) the courts regularly struck down aid of this sort, because, even though it was even-handed in its application, it was nonetheless adjudged as impermissibly advancing religion, or “entangling” government in religious matters, and therefore violated the Establishment Clause.\(^90\) Under Kurland’s formula, many of these programmes would have survived constitutional scrutiny. Kurland believed that only laws explicitly promoting or singling out religion for benefits (eg, providing for prayers to be read in public schools, or mandating that state education funds be channelled only to Christian schools), or banning specific religious practices (eg, expressly prohibiting the Catholic Mass) would be struck down.

Despite its attractions, however, the courts have never endorsed Kurland’s formula,\(^91\) and most academic proponents of formal neutrality have restricted their views to opposing only court-
ordered exemptions for religious believers. Nevertheless, the doctrinal purity of Kurland’s stance has meant it remains relevant to the debate, because legal and political commentators often invoke it as a starting point for discussion of neutrality-based theories of the Religion Clauses, if only to reject it in favour of more generous theories promoting the Free Exercise Clause as a substantive liberty right that is enforceable in the courts.

In light of the arguments above, what basis, then, could there be for interpreting the Free Exercise Clause as preferring religious claimants to the non-religious? Commentators who supported the Sherbert doctrine adopted several strategies to this end. Professor Douglas Laycock, for example, made a simple case for this based on the actual text of the Religion Clauses, which on their face single out religion for special treatment:  

For whatever reason, the Constitution does give special protection to liberty in the domain of religion, and we cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor. ‘Because the Constitution says so, and because all our liberties depend on maintaining the authority of the Constitution’s guarantees,’ should be sufficient reason to vigorously protect religious liberty.

The argument from the text was a powerful one, and doubtless provided the textual hook for the emergence of the Sherbert doctrine in 1963. For scholars like Kurland who argued that the Religion Clauses forbade religious classifications by the courts or by legislatures, the fact that the First Amendment itself provided a religious classification cut awkwardly across their claims.

In his own textual defence of the substantive neutrality reading of the Free Exercise Clause, McConnell argued that the phrase “free exercise of religion” naturally lent itself to the meaning attributed to it by the Sherbert-era courts. After all, the use of the word “exercise” connoted actions (and not merely beliefs or religious speech) and the word “free” implied an absence of legal restraint, not merely a freedom from discrimination. Moreover, continued McConnell,
the verb “prohibit” was amenable to the meaning that it referred to all laws that burdened religion, whether or not they were intended to do so. \(^{97}\) Hence, a law that banned all consumption of alcohol would fall within the class of impermissible state regulation as comfortably as a law that expressly banned the use of wine in Christian communion ceremonies. Both had the effect of “prohibiting” religious activity. Finally, argued McConnell, echoing Laycock, criticism that the Sherbert doctrine unfairly favoured religious believers could not bypass the undeniable presence of “religion” in the text. This fact could reasonably be construed (and was, as we have seen in Burger CJ’s Yoder opinion) as mandating the kind of “favouritism toward religion” under which those acting from religious motivations would have greater freedom than those acting “in accordance with non-religious norms”\(^{98}\).

The essential problem with this textualist case for the Sherbert doctrine, however, was that arguments on the other side were equally plausible (ie, that the verb “prohibit” merely protected religionists from discriminatory laws), \(^{99}\) thus rendering the whole jurisprudential edifice vulnerable to attack on other grounds, such as the discrimination argument detailed above.

Scholars in favour of court-ordered exemptions to general laws naturally pointed to overt statements in the jurisprudence supporting their view that religion was “special”. For example, McConnell cited the First Amendment cases of Zorach v Claussen, \(^{100}\) Gillette v United States, \(^{101}\) Sherbert, Yoder and Thomas, as evidence of the Court consistently treating "religiously grounded moral objections as worthy of greater consideration" than “secular moral systems”. \(^{102}\) The first of these cases was, however, problematic, and for the reasons that follow, cast doubt over the persuasive power of the other decisions cited by McConnell, which were issued in the same era within an intellectual, social and legal climate that almost took it for granted that religion was, in fact, special.

In Zorach, Justice Douglas upheld a programme whereby students in public schools were excused from mandatory attendance requirements to attend religious instruction outside school premises, with those not attending being required to remain in school. In defending this “released time” programme from attack under the Establishment Clause, Douglas J stated, inter alia: “We are a religious people whose institutions presuppose a Supreme Being”. \(^{103}\) As

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\(^{97}\) For McConnell’s textualist arguments, see ibid 1114-1116. See also, in similar vein, Laycock “Text, Intent”, above n 1, 687-688.


\(^{99}\) See West “Case Against Exemptions”, above n 43, 621-622; Marshall “In Defense of Smith”, above n 43, 325; and Gedicks “Regrettable Indefensibility”, above n 54, 560 (footnotes omitted): “The textualist argument for religious exemptions is particularly problematic. The appearance of ‘prohibit’ in the Free Exercise Clause suggests as much the anti-discrimination meaning given the clause by Employment Division v. Smith as it does the exemption doctrine imposed by Sherbert v. Verner and Wisconsin v. Yoder.”

\(^{100}\) 343 US 306 (1952) (“Zorach”) (in which the Court validated a programme whereby students were excused to attend religious instruction off-site, but non-religious students were required to remain on school premises).

\(^{101}\) 401 US 437 (1971) (in which the Court rejected an Establishment Clause challenge by person objecting to participating in a particular war on non-religious ethical grounds)


\(^{103}\) Zorach, above n 100, 313-314. Douglas J also distinguished a previous case in which the Court invalidated religious instruction on the grounds that in Zorach the instruction occurred outside school premises, whereas in
Gedicks has pointed out, this justification for special treatment of religion may well have been an acceptable contribution to a “normative conception of church and state” law in 1952 (when *Zorach* was decided), but it is no longer one “widely held by the judges, lawyers, academics and other professionals who make up the [current] legal community in the United States”.104 The attack by scholars such as West and Marshall on religious exemptions on the grounds that they unfairly privileged religious believers over non-believers, which began to gain momentum in the 1980s, fed off changes in US public culture – in particular the increasing secularisation of public discourse and society generally105 – and was accordingly dismissive of scholars who relied on and attempted to perpetuate Court precedents issued in a more religious era.106

For McConnell, however, the religious justification that animated Douglas J in *Zorach* was still pertinent, for the simple reason that, when the Free Exercise Clause was enacted in 1791, it was intended to reflect at “its very core” the “theological position”, held by many in the founding generation, that “God is Sovereign” and that the state was a “subordinate authority”.107 For those, like West and Marshall, who preferred to interpret the clause in light of contemporary conditions, this was an unavailing position for McConnell to take in the modern secular cultural milieu.108 Gedicks, for his part, albeit more reluctantly than West and

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104 Gedicks “Regrettable Indefensibility”, above n 54, 558.
105 There is a vast sociological literature regarding the secularisation of the Western world. This literature was a response in part to the falling off of membership in traditional religious organisations in the latter half of the 20th century, but involved wider social and political considerations as well. In one recent description of the phenomenon, which has relevance to questions of whether religious justifications can ever support a legal argument in favour of the *Sherbert* doctrine today, Charles Taylor claims that the new “secularity” consists in part of the fact that, “whereas the political organization of all pre-modern societies was in some way connected to, based on, guaranteed by some faith in, or adherence to God, or some notion of ultimate reality, the modern Western state is free from this connection. Churches are now separate from political structures…. The political society is seen as that of believers (of all stripes) and non-believers alike”. Charles Taylor *A Secular Age* (Harvard University Press, Massachusetts, 2007) 1; and see Frederick Mark Gedicks “Religious Exemptions, Formal Neutrality, and *Làïcité*” (2005) 13 Ind J Global Legal Stud 473 (“Gedicks ‘Religious Exemptions’”), 478-484. Authors such as West and Marshall operate within this new secular paradigm, and cannot accept justifications for the *Sherbert* doctrine that rely on religious pre-suppositions, even though the conception of religious freedom created by the founding generation was undoubtedly informed by the then prevailing Protestant consensus on religious toleration.
106 To place the *Zorach* decision in context, two years after it was issued the US Congress included the phrase “Under God” in the pledge of allegiance, in large part to distinguish the US during the Cold War from the “Godless” Soviet Union; see Thomas Berg *The State and Religion* (West Group, Minnesota, 1998) (“Berg State and Religion”) 65. This phrase has been under an Establishment Clause-based attack in the more secular 2000s, both through an ultimately unsuccessful litigation (*Elk Grove Unified School Dist v Newdow* 542 US 1 (2004)) and also in the academy; see, eg, Isaac Kramnick & R Laurence Moore *The Godless Constitution: A Moral Defense of the Secular State* (Norton & Company, New York, 2005) 196.
107 McConnell “Free Exercise Revisionism”, above n 20, 1152. McConnell continues: “To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like ‘God’ that could have a superior claim on the allegiance of the citizens….”. McConnell’s theological stance is grounded in his preferred “originalist” method of constitutional interpretation, whereby the meaning attributed to the Constitution today should be rooted in what the founding generation (which was comprised of many devout, mainly Protestant, religiously) actually believed it meant.
108 McConnell attempts to downplay the theological position in which the temporal state is subordinate to a higher authority by tying his theory to modern liberal notions of a limited state, a concept that has secular credentials supposedly independent of any religious premises. McConnell therefore argued in addition to his claim that God was “Sovereign” that it also “reflected a political theory: that government is a subordinate association. The theological and political positions are connected. To recognize the sovereignty of God is to recognize a plurality of authorities and to impress upon government the need for humility and restraint”. McConnell “Free Exercise Revisionism”, above n 20, 1152; see also Michael McConnell “‘God is Dead and We Have Killed Him!’ Freedom of Religion in the Post-modern Age” (1993) BYUL Rev 163, 168-169: “While theological in its origin, the two-
Marshall, noted that theological positions of the sort advanced in Zorach, and by implication in McConnell’s writings, “have an anachronistic flavor, failing to persuade as they once did, because history has undermined the acceptability of their premises”.

In response to the new socio-legal climate, legal commentator Douglas Laycock articulated a more intellectually “agnostic” argument in favour of the position taken in the Sherbert-Yoder line of cases. Laycock recognised that “explanations of religious liberty based on beliefs about religion cannot possibly persuade persons who do not hold the same religious beliefs.” He therefore sought to deal with the problem of finding adequate justification for these decisions’ special solicitude for religious believers by making arguments that were “equally accessible to believers and non-believers”. Central to Laycock’s advocacy of special constitutional protection for religion was a basic plea for religious autonomy and a more general instrumental argument to preserve civil peace:

[B]eliefs about religion are often of extraordinary importance to the individual – important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for. This is why governmental efforts [in Europe and the early American colonies] had been such bloody failures. [And] this is also an independent reason to leave religion to the people who care about it most, which is to say, to each individual and to the groups that individuals voluntarily form or join.

As can be seen in this quotation, Laycock’s formula contained two components, one based on autonomy and the other on securing civil peace. We shall consider first the autonomy rationale. Like Laycock, many scholars have sought to locate a theory of religious freedom within the general liberal concern for individual choice in ordering one’s own life free of governmental intrusion. The difficulty with justificatory arguments like these, however, was that they raised the question of why a personal religious choice should be “given more weight than any
other freely chosen life path?" Or, more specifically, of why someone’s “pursuit of a particular religious path” should be distinguished from “another’s to pursue a life of, say, literature or music or sport?” The underlying rationale for liberal theories of autonomy is that the “process of choice” is what is being protected, with the object of that choice, whether it is religion, sport, sexual activity, fashion, or whatever, being irrelevant. As John Garvey has observed, however, a person relying on the autonomy rationale to justify a free exercise claim to, say, wear a yarmulke at his place of work for religious reasons, would have great difficulty in distinguishing his claim from another person who wanted to wear a cowboy hat out of a personal fashion preference. Although the request to wear a yarmulke might seem intuitively stronger to many people, the liberal autonomy argument, focusing as it does on the act (as opposed to the object) of choice, might struggle to tell the two claims apart. Thus, if the liberal autonomy justification was to be regarded as the prime value behind the Free Exercise Clause, there was a danger that it could have the effect of subsuming religious practices within a “more general protection for individual autonomy and choice”, thus robbing the clause of any special meaning at all.

In the Zorach era, a retort to this objection could have been that for the state to require a religious individual to abandon his way of life might cause a form of “external, extra-temporal compulsion quite unlike other forms of compulsion”. Traditional religious believers, unlike those pursuing secular goals out of choice, believe they are in many cases subject to what might be termed extra-temporal punishment if they choose to obey secular laws instead of the core tenets of their religion. While perhaps intuitively compelling, this argument surely relies too heavily on religious assumptions in order for it to pass muster in what Conor Gearty has called the “progressive secular circles that make today’s philosophical weather”. In fact,

\[\text{\textsuperscript{114}}\text{ Tom Lewis “What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation” (2007) 56 ICLQ 395, 403.}\]


\[\text{\textsuperscript{117}}\text{ Ahdar & Leigh Religious Freedom in the Liberal State, above n 115, 60; and see Garvey “Free Exercise Values”, above n 115, 791}\]

\[\text{\textsuperscript{118}}\text{ Greenawalt suggests that the “overinclusiveness” of the autonomy rationale may not be fatal to its use as a justification for special treatment for religionists vis-à-vis other persons pursuing non-religious life choices and bases his position in part on the textual presence of “religion” in the First Amendment. See Greenawalt Establishment and Fairness, above n 46, 486-487.}\]

\[\text{\textsuperscript{119}}\text{ Ibid 34; and see McConnell “Response to the Critics”, above n 98, 717: “Accommodations…reflect…respect for the conflict between temporal and spiritual authority in which the minority finds itself.” (Emphasis in original).}\]

\[\text{\textsuperscript{120}}\text{ Steven D Smith opines that the continuing public and judicial acceptance of religious freedom as a special category of human activity needing protection depends, as much as anything, on a general societal intuition that it remains worth doing, or on the “fact that people still believe in special treatment for religion, even if that belief cannot (or can no longer) be supported with any very satisfying justifications”. Smith “Discourse in the Dusk”, above n 109, 1904.}\]

it resembles closely McConnell’s basic premise that the state ought, except in extreme cases, to be subordinate to the heavenly sphere. In response to arguments that religious believers were subject to unique moral conflicts, Marshall asserted that these claims were unpersuasive, arguing that the violation of deeply held ethical or political principles could cause as much “psychic harm” to a believer as would a “violation of a religious tenet, even if the latter is believed to have extra-temporal effect.” A person required, for example, to fight in a war to which he objected on moral or political grounds, argued Marshall, may suffer equal mental harm as someone who objected to all wars and was the member of an historic “peace church”. Moreover, the extra-temporal belief rationale, continued Marshall, was hopelessly overbroad, because not all religious beliefs were theistic, and in any case, many adherents to theistic belief systems acted not so much according to divine revelation, or out of fear of retribution in the after-life, but out of their own idiosyncratic preferences as to religious custom.

Perhaps sensing the critique of scholars like Marshall to the religious autonomy argument, Laycock had the tactical sense to finesse the possibly unavoidable theological underpinnings of the religious autonomy argument by tying it closely to the indubitably secular rationale of civil

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122 The “Two Kingdoms” thesis, from which McConnell draws support in his writings, was developed by early Christian writers, such as Augustine, in an attempt to delineate the proper bounds between the civil and religious authorities that competed for power in Europe during the Middle Ages and into the modern era. At times, the Dual Authorities theory (as it is also known) maintained that ecclesiastical powers held the upper hand in certain areas; whereas under Locke’s formulation the civil power had untrammeled ultimate authority. For discussion of developments in this area of religio-political thought, see Ahdar & Leigh Religious Freedom in the Liberal State, above n 115, 34; and Brian Tierney “Religious Rights: An Historical Perspective” in Religious Human Rights in Global Perspective: Religious Perspectives (Martinus Nijhoff, The Hague, 1996) 17.


124 William Marshall “The Case Against the Constitutionally Compelled Free Exercise Exemption” (1990) 40 Case W Res 357, 383. Similarly, Gedicks can see no difference between the harm suffered by a black lawyer forced to represent a racist to that suffered by a Roman Catholic who might be required to represent a teenager seeking an abortion. Gedicks “Regrettable Indefensibility”, above n 54, 562.

125 Marshall gives Taoism and Buddhism as examples of non-theistic religions with a strong presence in the US.

126 Laycock had the tactical sense to finesse the possibly unavoidable theological underpinnings of the religious autonomy argument by tying it closely to the indubitably secular rationale of civil

127 This may explain why McConnell is reluctant to employ rationales based on modern normative liberal principles, such as the autonomy argument: “I do not believe that constitutional principles should be chosen on the basis of our own normative judgments, divorced from constitutional text and tradition.” McConnell “Free Exercise Revisionism”, above n 20, 1153. See also Christopher Eisgruber and Lawrence Sager “Equal Regard” in Stephen Feldman (ed) Law & Religion: A Critical Anthology (New York University Press, New York, 2000) 200, 217, where the authors argue that McConnell’s arguments in support of the substantive neutrality reading based on text and history implicitly acknowledge the impossibility of formulating modern normative arguments that can overcome “antifavouritism principles”.

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He noted, for example, that religionists were prepared to “die for” their beliefs (which was perhaps a proxy for the “extra-temporal consequences” argument) but did not say that this in itself was a justification for according them greater freedom than non-religious persons. He was more concerned about what this willingness to die might mean for social order, that religionists who were forced to obey laws that violated their conscience might have no choice but to “fight for” control of government. Like all the rationales for religious freedom that attempted to tap into modern liberal ideas that support human freedom generally, however, this justification also suffered from the fact that it did not apply exclusively to religious believers. As Gedicks observed, the most violent disruptions to civil order in recent American history occurred in the 1960s during protests against racial segregation and the Vietnam War, unrest that was not inspired necessarily by religious activism. In any event, the instrumentalist nature of the argument from civil peace also worked against it, because unlike the anarchy that reigned at times in post-Reformation Europe, most challenges to governmental regulation in modern-day America were mounted by marginal religious groups, who were unlikely to disrupt the social order if they were not accommodated. On the contrary, these groups could be easily suppressed by government “without any threat to social order”, thus making the civil peace argument unpersuasive in the modern era.

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128 See text above accompanying n 112. See also Greenawalt’s endorsement of Laycock’s strategy of advancing multiple justifications to support the strong protection of religious liberty in the Sherbert era; Greenawalt Establishment and Fairness, above n 46, 487: “Because justifications for important legal norms are typically multiple, not single, a failure of coverage of any one justification need not destroy its relevance.”

129 Another liberal argument advanced with particular enthusiasm by church-state scholar Stephen Carter was that religious groups provided vital “intermediate communities” which created a haven for individuals against the all-powerful state. See Carter Culture of Disbelief, above n 121, 35-37; see also McConnell “Accommodation of Religion”, above n 102, 17-18. These groups also performed the function of criticising prevailing social norms that might otherwise go unexamined. Once again, however, Marshall dismissed this contention with the argument that “both non-religious and religious groups further the values of pluralism by fostering diversity within society”. Marshall “In Defense of Smith”, above n 43, 321.

130 Gedicks “Regrettable Indefensibility”, above n 54, 564; and see West “Case Against Exemptions”, above n 43, 615.

131 Dworkin has criticised arguments of this sort that seek to justify human freedoms, because they rely on policy considerations rather than principle, and so are vulnerable to being overridden if the state can perceive other policy goals that are more important. See Ronald Dworkin Taking Rights Seriously (Duckworth, London, 1977) 90-100; see also Carolyn Evans Freedom of Religion under the European Convention on Human Rights (Oxford University Press, Oxford, 2001) 23: “If there are pragmatic reasons for ceasing to practice religious tolerance, then the argument in favour of it is significantly weakened.” Perez Zagorin has explained how civil peace rationales consistently failed to maintain a permanent religious peace in European history. For example, at the Peace of Augsburg in 1555, the Princes or rulers of some 350 separate polities in the Holy Roman Empire were granted the power to choose the religion of their territory, with private religious observances contrary to the prevailing religion permitted, and dissenters being granted the option to emigrate. However, the Thirty Years War broke out in 1618 after a Protestant rebellion in Bohemia, eventually engulfing much of Europe. Zagorin attributes the failure of this treaty to continued mutual antagonism between dissenting Protestant sects, and their Protestant and Catholic rulers. The Augsburg treaty failed, according to Zagorin, because it was merely a product of temporary exhaustion from earlier religious wars and not the result of a more principled acceptance of religious toleration born of a “belief in and commitment to toleration as something inherently good and valuable”. See Zagorin Religious Toleration, above n 67; and Witte Religion and the American Constitutional Experiment, above n 70, 10-11.

132 For a general description of the conflict surrounding the Protestant Reformation in 16th and 17th century Europe, see Zagorin Religious Toleration, above n 67, ch 1.

At base, therefore, the main justification for the special privilege granted to religion in the Free Exercise Clause was that it plausibly gave meaning to the text, and that this was indisputably how it had been interpreted in the jurisprudence that brought the doctrine to life in the 1960s. Searches for justifications for the Sherbert doctrine that sought to locate it in non-religious arguments that had traction in the less religious era of the late 20th century were, as we have seen, all defective for one reason or another, at least in the eyes of modern political and legal theorists who denied the special position of religion in the Constitution or in society generally. Many scholars still argue that religion is more worthy of protection than other individual pursuits.134 It is uncontroversible that the founding generation enacted the Free Exercise Clause because many of them also thought this,135 but whether that historical fact was admissible in the modern era, has, in the view of those espousing formal neutrality theories of the meaning of the Free Exercise Clause, become moot.136

This special concern for religious believers was evident in Sherbert itself. Brennan J unquestioningly acknowledged the source of divine compulsion in Adell Sherbert’s refusal to work on the Sabbath when he stated that the subsequent refusal to extend unemployment insurance to her placed the “same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”137 In his concurring judgment, however, Justice Stewart commented that the result in the case appeared to favour religious over secular reasons for avoiding Saturday work,138 thus anticipating concerns expressed by West, Marshall and others years later. In carving out an exemption for Sherbert, Brennan J acknowledged that it could be argued he was thereby “establishing” the religion of Seventh Day Adventism in South Carolina, but he dismissed this complaint in the following terms: “[T]he extension of unemployment benefits to Sabbatarians…reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.”139

134 For John Garvey, this was reason alone to continue the Sherbert-era exemption cases: “[T]he religious justification is the only convincing explanation for the split-level character of free exercise law. Sometimes religious believers and nonbelievers are treated alike, but sometimes the law protects only religious believers. This is not something that we can explain by appeals to consent and fairness. It violates the canon of reciprocity. The only convincing explanation for such a rule is that the law thinks that religion is a good thing.” Garvey “Anti-Liberal Argument”, above n 133, 291. Garvey’s position, unsurprisingly, has had its critics; see, especially, Larry Alexander “Good God, Garvey!”, above n 126.

135 See Garvey “Anti-Liberal Argument”, above n 133, 291; and, generally, McConnell “Origins”, above n 2. For example, James Madison (who sponsored the Bill of Rights through Congress) spoke of the need to protect religious believers in these terms: “The religion of every man must be left to the conviction and conscience of every man…. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation to the claims of Civil Society.” Madison “Memorial and Remonstrance”, 1875, above n 112.

136 As Ahdar and Leigh explain, the true justification for special treatment of religion that is implicit in doctrine underlying expansive legal protection for religiousists, typified by the Sherbert era, “tests upon certain critical assumptions. Historically, these premises or presuppositions were embedded in a theistic, specifically Christian, worldview. In the pluralistic, postmodern twenty-first century, this worldview is hardly ascendant and hence these assumptions are highly contestable.” Ahdar & Leigh Religious Freedom in the Liberal State, above n 115, 62.

137 Sherbert, above n 6, 404.

138 Ibid 416: “[T]he Court…holds that the State must prefer a religious over a secular ground for being unavailable for work.” As an example of a deeply held secular reason for resigning from Saturday work, Stewart J refers to a woman who must forgo unemployment insurance because she could not get a baby-sitter for her child on Saturdays.

139 Ibid 409. See also Yoder, above n 19, 220 (per Burger CJ): “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.”
Justice Brennan’s formulation of “neutrality” provided a key precedential basis for those who argued that the proper way to understand that concept was through the rubric of “substantive”, as opposed to “formal” (or “strict”), neutrality. As we saw in Chapter 1, the basic premise behind the substantive neutrality theory is that it conceives of the primary principle underlying the Religion Clauses as being a directive to preserve, as much as possible, an individual’s choice in the religious way of life she wishes to lead, as unaffected by government regulation as possible. Thus, while a law prohibiting all consumption of alcohol with no exceptions is neutral towards religion in the formal sense, it fails the test of substantive neutrality in that it has an undoubted effect on the choice of religious adherents, who believe in the sacramental use of wine, to pursue the good life in their own way. The formally neutral ban on all liquor consumption therefore has the defect, in the view of substantive neutrality theorists, of “incentivising” their religious choices. This reading of the Free Exercise Clause immaculately translates into the discourse on neutrality the principle articulated in Sherbert and Yoder by, respectively, Brennan J and Burger CJ. However, as we have seen above, it is open to attack in that it relies on the value of individual autonomy or choice, coupled with a preference for religious choice over disfavoured secular motivations. As those espousing the inherently secular formal neutrality reading of the Free Exercise Clause have attested in their rebuttal of this value’s explanatory power, arguments based on personal autonomy cannot be regarded as being a monopoly of persons ordering their lives along religious, as opposed to non-religious, lines.

As a final response to those advocating the non-discrimination reading of the Free Exercise Clause, those in favour of construing the clause as creating a broad liberty right pointed out that the Court’s jurisprudence in the post-Yoder era accorded solicitude not only to those beliefs that were indubitably religious in origin (in the traditional sense, such as activities based on the established dogma, teachings, or scriptures of well-known religious organisations), but also to those which were “religion-like” in their importance to the individuals concerned, thus undermining the discrimination challenge led by West, Marshall, Stevens J, and others. Stephen Monsma, for example, cast the net very wide in this respect, claiming that Free Exercise Clause protection should be extended to “secular belief structures that serve as functional equivalents in the lives of their adherents as religious belief structures do in the lives of the devout.” Hence, persons holding deeply held moral beliefs that were analogous to

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141 See text accompanying ns 29-31 in Chapter 1.

142 Viewed from the Establishment Clause angle, for the government to exempt the use of alcohol in religious ceremonies does not “establish” the religion in question, as an exemption would be highly unlikely to induce a person who “is not already religiously motivated to do so”, to attend such ceremonies. Laycock “Substantive Neutrality Revisited”, above n 140, 55; and see McConnell “Religion Clauses”, above n 80, 198.

143 See Gedicks “Regrettable Indefensibility”, above n 54, 571, referring to the writings of Laycock and McConnell: “One sees the pull of the egalitarian norm even in the work of those who support exemptions.”

144 Monsma “Substantive Neutrality”, above n 93, 29. Monsma would exclude from protection “purely individual, episodic beliefs and practices…that do not structure one’s system of values or view of life”. Ibid. Monsma, with a view to the Sherbert exemption to a Saturday Sabbatarian, claimed that the exemption would not be available to a person who simply liked to play golf on Saturday, or, to use the example given by Stewart J in Sherbert, above n 6, 415, someone who wanted to watch Saturday sport on television. Whether Monsma would extend protection to non-custodial fathers who wished to be with their children on Saturdays (the hypothetical posited by Gedicks; see n 54 above and accompanying text) is unclear. See also Laycock “Religious Liberty”, above n 65, 326-327; and McConnell “Accommodation of Religion”, above n 102, 36.
religious beliefs potentially would come within the definitional ambit of the Free Exercise Clause. Applying this principle, McConnell argued that the problematic exemption that was given expressly by the Zorach Court to children attending out-of-school Christian instruction ought to be dealt with, not by abolishing the Sherbert doctrine, but by providing a similar exemption, or “other attractive alternatives”, to non-religious children in order to “neutralize” the discriminatory effects of the 1952 decision. This “flattening out” of the class of persons eligible for relief was perhaps an effective rejoinder to the Establishment Clause and equality-based concerns of those criticising the Sherbert doctrine.

Indeed, decisions of the Court after Yoder appeared to lower the Court’s threshold requirements for persons wishing to establish a claim as being genuinely religious in order to warrant constitutional protection. In Frazee v Illinois Dept of Employment Security, for example, the Court allowed the initially rejected unemployment insurance claim of a person who refused an offer of Sunday employment, because, “as a Christian,” he could not work on that day. The individual did not belong to an established religious group, as had the complainants in Sherbert and Yoder; and his claim was one that many millions of persons in the US could have made, based on generic notions of Christian spirituality and teachings that had permeated much of society. In order to make a prima facie claim under the Free Exercise Clause, however, all that the claimant was required to demonstrate to the Court was that he held this belief sincerely, and ultimately he succeeded in his claim. This decision was to be contrasted with Yoder, where Burger CJ had stated that the successful Amish parents in that case who did not wish their children to attend school were “[a]ided” in their First Amendment complaint by a “history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society.” It seems likely that a person

145 The prime exhibits of this shift in the definition of religion for constitutional purposes were the Vietnam era draft cases (although these pre-date Yoder, they have never been overruled and ought therefore to be read alongside the post-Yoder expansion of protected categories of persons). In United States v Seeger 380 US 163 (1965) (“Seeger”), the Court reinterpreted the federal statute permitting men to assert conscientious objector status. The statute provided that men could avoid service if their pacifism derived from “religious training or belief”, which was defined as: “[A]n individual’s belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views, or a merely personal moral code.” In Seeger, the individual concerned objected to service on personal moral grounds, but was found nevertheless to fall within the statute’s definition of religious belief, because he maintained a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption”. Ibid 176. See discussion of the Seeger line of cases in Laycock “Religious Liberty”, above n 65, 331.

146 McConnell “Accommodation of Religion”, above n 102, 36.

147 489 US 829 (1989) (“Frazee”). This case, which was very similar to Sherbert, involved a complaint that refusal to provide unemployment insurance to a person who declined employment which required him to work on Sundays violated the Free Exercise Clause.

148 The Court in Frazee was satisfied that the claimant’s refusal to work was based on a “sincerely held religious belief”, and was not concerned that it was the product of a “personal professed religious belief”. Ibid 833-834. (The lower court had found, erroneously, that, since the claimant did not belong to an established church, his belief could not be construed as “religious” for Free Exercise Clause purposes). The claimant in Frazee then went on to succeed in his case under strict scrutiny analysis.

149 Yoder, above n 19, 235. Burger CJ also claimed that to ask the Amish to attend school until the age of 16 would threaten the Amish way of life to the point of extinction, and thereby invaded a practice “central to their faith”, as it would expose children to the ways of the modern outside world and might contribute to a break-up of the community. Ibid 210, 212, 218-219, 235. Prior to cases such as Frazee and Thomas, the ruling of the Yoder court summarised above had been used in lower courts to dismiss free exercise claims as being insufficiently “religious”. For example, in Sequoyah v Tennessee Valley Authority 620 F2d 1159 (6th Cir) (1980), a federal court held that a government decision to build a dam lake that would flood sacred sites of the Cherokee nation did not impinge upon the claimant tribe’s religious beliefs, because (distinguishing Yoder) the claimant had not established on the record that the sites were central or indispensable to “Cherokee religious observances” (ibid
belonging to a less organised or long-standing faith would have failed if they had brought a claim analogous to the Amish parents in *Yoder*. Indeed, in *Yoder*, Burger CJ made it clear that the “few other religious groups or sects” could have succeeded in that case. With newer cases like *Frazee* and also the military draft cases, such as *Seeger*, in which non-religious objectors to participating in war were accommodated by the Court, the perceived bias in favour of established religious groups that had attracted the criticism of scholars like West and Marshall appeared significantly diminished.

The difficulty with this shift in approach, however, was that by including “non-religious” activities within the definitional purview of “religion” as a tactical concession to the secularist attack on *Yoder* and *Sherbert*, the pro-substantive neutrality scholars risked making the doctrine unwieldy, or, as Ahdar and Leigh put it, vulnerable to being “swamped” by the claims of persons from non-traditional belief systems. As Gedicks has observed, the post-*Yoder* relaxation by the Court of the threshold question of religiosity meant that an avalanche of claims could potentially be brought before the courts against a huge variety of governmental programmes that incidentally burdened “religion”. In the case of *Lee*, for example, the Court rejected a complaint from an Amish group wishing to repeat the success of their fellow religionists ten years previously in *Yoder*. In *Lee*, a free exercise claim was made against having to pay social security employment tax, because the Amish claimants did not intend to avail themselves of any social security benefits, it being a component of their religious belief system to take care of their own people without governmental help. At first glance the Amish case appeared a good one, as it resembled closely their claim in *Yoder* in some important respects. However, asking government to exempt their children from school (presumably a dispensation few other groups in society would request) and giving them a tax exemption (which would arouse the envy of many other taxpayers) turned out to be qualitatively different requests in the eyes of the Court. Moreover, sensing that to allow the Amish free exercise complaint in *Lee* would lead to a multitude of different claims against the tax system from other religious groups (and possibly secular groups asserting religion-like beliefs), the Court

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150 *Yoder*, above n 19, 236.
151 See also *Thomas*, above n 37, a 1981 case in which the Court accepted a claimant’s sincere, subjective belief that his adherence to the Jehovah’s Witness faith prevented him from working in a section of an armaments factory devoted to making tank turrets. This was despite the fact that other co-workers, also Jehovah’s Witnesses, did not consider such employment to contravene the dictates of their religion. In response to arguments that the claimant’s beliefs were too idiosyncratic to merit protection, the Court replied: “[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.” *Ibid* 715-716.
152 See discussion of *Seeger* in n 145 above.
153 Ahdar & Leigh *Religious Freedom in the Liberal State*, above n 115, 60. This was the position of West, who argued that the broadening of the definition of religion in the post-*Yoder* era meant that Free Exercise Clause doctrine ought to be narrowed to provide merely equal protection to religious believers. West ignored the possibility that the Court’s wider definitional stance towards religion could be viewed as reducing the dangers of discrimination under the *Sherbert* doctrine. West “Case Against Exemptions”, above n 43, 598-599.
154 Gedicks “Religious Exemptions”, above n 105, 481-484. See also Tushnet “Kurland Revisited”, above n 47, 378-379.
155 In *Yoder*, the Amish claimants had contended that compulsory schooling was unnecessary for their children, as they lived in isolated agrarian communities, they had no need of advanced mainstream education, and therefore an accommodation would impose no costs on the wider society. Similarly, in *Lee* the Amish argued that the fact they would never draw on the social security fund undermined any compelling interest on the part of government to levy the tax in the first place.
rejected their complaint, stating, as part of its analysis of the governmental interest at stake: “It would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.” In Yoder, the Court had staunched the possibility of a similar flood of free exercise claims by emphasising the antiquity of the Amish belief system and the centrality of the religious practices that compulsory schooling would affect, and by concluding that the case at bar presented a “close” question. In view of its emphasis on the centrality of the Amish practice at stake in Yoder, the Court might therefore have elected to reject the claim for exemption from the tax system on the basis that the religious activity under analysis in Lee was relatively peripheral to the group’s survival. Because of precedents subsequent to Yoder that appeared to expand potential claims at the threshold test of religiosity, however, this method of reducing the number of potential claims under the Free Exercise Clause was virtually closed off to the Court. Instead, the Lee Court was forced to find that a compelling interest in a uniform tax system overrode the Amish religious complaint, even though it was surely arguable that this governmental interest was broadly analogous in strength to the state’s interest in educating its citizens, which was found not to be sufficient to overcome the religious activity at issue in Yoder.

The Lee decision in 1982 reflected increasing pressure on the Sherbert doctrine since the Court established more relaxed standards for prima facie Free Exercise Clause protection in the post-Yoder era. This had a flow-on effect on the second prong of the Sherbert formula, which required the courts to subject claims that had been successful at the first stage of the Sherbert test to the compelling state interest enquiry. This test, which will be discussed further below, placed an extremely high burden on government to justify any intrusions on religious activities. Given that the Court had signalled in the 1980s that it would no longer reject claims for being insufficiently “religious”, the compelling interest mechanism was consequently put under great strain in the years immediately preceding Smith. Despite the apparently high burden placed on government by the strict scrutiny standard, however, the Court refused exemptions in virtually all cases brought before it. We turn now to consider the problems this test (and, as we shall see, attempts to avoid applying it) engendered in the Court, and how these factors provided a powerful incentive for the Court formally to overturn the substantive neutrality regime in 1990.

2.2 The “balancing” analysis entailed in the substantive neutrality regime is flawed

The second source of tension in the Sherbert-Yoder era was institutional in nature, and looked towards the implications of separation of powers principles regarding which branch of

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156 Lee, above n 60, 259-260.
157 Yoder, above n 19, 240. Some have commented that the Yoder Court framed its opinion in a way that virtually the only group that would be eligible for the exemption was the Amish themselves, and that Burger CJ was intent on avoiding the possibility of a similar claim being made by new-age “hippies”. See Gedicks “Religious Exemptions”, above n 105, 483; and Pepper “Conundrum”, above n 14, 301.
158 See ibid 285. As we shall see below, however, the threshold consideration of religiosity made something of a comeback in the 1980s through the development of the “substantial burden” concept.
159 In Lee, the Court accepted (somewhat controversially, given its decision in Yoder) that uniform levying of taxes was a sufficiently important governmental interest to override the Amish religious claim.
160 During the Sherbert era the only successful claims in the Supreme Court were the line of cases involving unemployment insurance (the so-called “Sherbert Quartet” of Sherbert, Hobbie, Thomas, and Frazee) and the solitary non-employment insurance case of Yoder, concerning compulsory schooling. All other cases failed. Some authors suggest the broadening of the scope of religiosity was a significant factor in the scarcity of successful claims in the Court, as the Justices became concerned about encouraging an unmanageable flurry of free exercise complaints; see, eg, Dallin Oaks Religious Freedom and the Supreme Court (Ethics and Public Policy Center, Washington DC, 1981) 118-119, cited in West “Case Against Exemptions”, above n 43, n 37; and Gedicks “Religious Exemptions”, above n 105, 484.
government ought to be in charge of enforcing the Free Exercise Clause. 161 This area of debate raised considerations that were conceptually independent of the substantive enquiry into what the Free Exercise Clause actually meant. Thus, even if one were prepared to grant that the Constitution sometimes required (or permitted) exemptions for religious believers from laws that applied to all other citizens, there was nevertheless a concern that courts of law were an inappropriate forum for adjudicating on the decidedly polycentric issues involved in balancing the competing interests at stake. 162 Legislatures, with their greater resources of fact-finding, ability to devote longer time to debate and to receive public input, and their (relatedly) stronger democratic credentials, were, according to this line of argument, more suitable venues for making decisions of this sort. 163 This was to be compared with a non-elected judiciary that was less well placed, because of the adversarial nature of the courtroom and the narrowness of the fact situations brought before courts, to make difficult policy choices that had great potential to affect the lives of people not directly involved in any given court proceeding. 164

The jurisprudence of the Sherbert era disclosed vividly the difficulties of balancing the right to religious free exercise with the countervailing secular policy goals of government. Non-US comparative scholars, lawyers and judges interpreting relatively new bills of rights and who seek to advocate for, or construct, a consistent and principled body of case law around the right to manifest religious belief can learn a lot from the many quandaries that exercised the minds of the Justices of the US Supreme Court in this era. It is my position that the unpredictability and lack of administrability of the balancing test set in motion by Brennan J in 1963 was the prime (and, possibly, the sole) cause of the collapse of the doctrine in 1990.

The balancing test that developed in the Sherbert era was a necessary by-product of enforcing a substantive neutrality regime in the courts. As the Court observed in Cantwell: “[T]he [First] Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” 165 As has always been acknowledged by supporters of the substantive neutrality regime, the protection of the Free Exercise Clause could not be extended to all religious activities. 166 None argued, for example, that the Hindu practice of sati, or widow burning, 167 ought to receive any constitutional protection. The balancing test was

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161 See McConnell “Origins”, above n 2, 1420.
162 Hence, whereas, for example, Bradley and Laycock both agree that religious believers ought to be excused from the incidence of secular laws in some instances, the former argues strongly that only legislatures should make this determination, whereas the latter contends, equally forcefully, that courts should, in some cases, remedy situations where legislatures have failed to grant religious exemptions. Compare Bradley “Siren Song of Liberalism”, above n 88, 262, with Laycock “Religious Liberty” above n 65, 317.
163 For a strong argument against judicial review generally, and which is based on, among other things, the greater legitimacy of democratically elected legislatures when deciding thorny moral issues pertaining to human rights, see Jeremy Waldron The Dignity of Legislation (Cambridge University Press, Massachusetts, 1999); and Jeremy Waldron “The Core of the Case against Judicial Review” (2006) 115 Yale LJ 1346.
164 Laycock, in contrast to the writings of Waldron, cited in n 163 above, argues that legislatures are in fact less well-suited than courts to treat small religious minorities fairly: “[Legislators] are free to reflect majority prejudices, to respond to the squeakiest wheel among minorities, to trade votes and make compromises, and to ignore problems that have no votes in them.” Douglas Laycock “The Remnants of Free Exercise” (1990) Sup Ct Rev 1 (“Laycock ‘Remnants’”), 15.
165 Cantwell, above n 14, 303-304. The “freedom to believe” whatever one chooses, was, unsurprisingly, held to survive the restatement of free exercise law in Smith. See Smith, above n 3, 877.
166 McConnell, for example, has argued for a “broad interpretation” of the Free Exercise Clause, “under which it would provide maximum freedom for religious practice consistent with demands of public order”. McConnell “Free Exercise Revisionism”, above n 20, 1111 (emphasis added).
167 See The Commission of Sati (Prevention) Act 1987 (India), which banned the Hindu practice of voluntary or forced immolation of widows on their deceased husbands’ funeral pyres. In Reynolds, the Supreme Court listed
designed to reject claims of this sort in a principled way while avoiding the harshness of the Reynolds-Gobitis era, in which virtually no protection was given to religious activities conflicting with general laws.168

The problem with the various issues brought before the US courts between 1963 and 1990, however, was that few involved religious practices which were as obviously beyond the pale as sati; rather, they tended to involve relatively harmless activities, or preferences not to act at all.169 Also, the government regulation subjected to scrutiny in the modern era was not in all cases of obvious importance for the “protection of society”. Laws or administrative decisions requiring, for example, payment of social security taxes,170 or the reading of certain textbooks in compulsory school curricula,171 patently were not as vital to maintaining social order as the legislated ban on murder or suicide that, in effect, prohibited sati. Moreover, while many of the claims made during the Sherbert era arguably existed at the periphery, relatively speaking, of claimants’ belief systems,172 the relaxing of the judicial test for religiosity as the jurisprudence developed meant that they could not easily be rejected for this reason.173 As a result, the cases generated very close legal questions on which persons of good faith could reasonably differ. These differences on the Court itself were considerable, and the disparities in the application of the balancing test amongst the Justices created a jurisprudential quagmire that resulted in great uncertainty, not only on the Court,174 but also in the lower courts and other branches of government that were bound by its interpretation of the Constitution.175 In its formulation and subsequent management of the test, the Court was accused of many things, including producing “inconsistent and unprincipled”,176 religiously biased,177 unpredictable178 and

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*sati* as an activity legally analogous to polygamy, and which ought not to be immune from state regulation. *Reynolds*, above n 8, 166.

168 Recall that the Reynolds regime only afforded protection to religious beliefs. Regulations that conflicted with religious activities, and were enacted to further a secular purpose, were subjected merely to rational basis review.

169 See, eg, *Bowen v Roy* 476 US 693 (1986) (“Roy”), where the parents of a child objected to her being assigned a social security number, as it would, according to their Native American beliefs, “rob the spirit” of the child.

170 In *Lee* the Amish claimants wished to avoid paying social security tax, justifying this in part by the fact that their religion forbade them from receiving governmental payouts in the event of need.

171 In *Mozert v Hawkins Bd of Education* 827 F2d 1058 (6th Cir) (1987), self-described born-again Christian parents wished to have their children exempt from reading certain school texts because they exposed them to ideas contrary to their religious beliefs.

172 Or so it would seem from the vantage point of persons adhering to religious systems containing a clear demarcation between the sacred and secular spheres of life. In the case of indigenous religions, or, say, the conservative versions of the Christian, Jewish and Islamic faiths, the members of which strive to live their entire lives according to religious precepts, no such lines exist. With respect to the all-encompassing nature of Islamic beliefs, see Chapter 1, section 3.


174 To give one example of the divisions on the Court, in *Jensen v Quaring* 472 US 478 (1985) a 4-4 tie amongst the Justices (with the ninth Justice not participating) meant that the Court was unable to decide the case. This no-result affirmed by default the decision of the lower court in *Quaring v Peterson* 728 F2d 1121 (8th Cir) (1984), in which a woman made a successful free exercise challenge to a state requirement for her photograph to be on her driver’s license. This requirement violated her Christian beliefs, based on the Second Commandment’s proscription of the making of “graven images or likenesses”.

175 McConnell is sanguine about the unpredictability of the test, saying that its principal virtue was to secure a serious hearing for religiousists seeking exemptions from administrative officials and legislatures. And in any case the Court used the substantive neutrality model very cautiously, finding in favour of religious claimants on only one occasion (ie, *Yoder*) outside the field of unemployment insurance. See McConnell “Free Exercise Revisionism”, above n 20, 1109-1110.

176 Notes “A Model of Competing Authorities”, above n 17, 355-356.


178 West “Case Against Exemptions”, above n 43, 598.
results-driven\textsuperscript{179} decisions, which led, in the view of many, to a failure of the method both in terms of “theory and practice”.\textsuperscript{180}

Let us now consider some of the key areas of confusion engendered by the Sherbert test. First of all, it is necessary to set out what the test required of government. One legal commentator usefully described the two-part formula in the following way:\textsuperscript{181}

A court faced with a claim for a religion-based exemption from a government regulation will [1] first consider the sincerity of the religious claim being advanced and the degree to which the challenged regulation interferes with vital religious practice or belief. It will then [2] weigh, on the other side of the balance, the importance of the secular value underlying the rule, the impact of an exemption on the regulatory scheme, and the availability of a less restrictive alternative.

As Ellis West has observed, simple glosses of this sort tended to obscure the “‘multivariate nature of the interests on each side’”.\textsuperscript{182} What the summary did not indicate was precisely how much weight judges in the Sherbert era were to attach to each part of the test and how they were to be “balanced” against one another. In the view of some, the essential elasticity of the test meant that judges were able to take into account “whatever…they want[ed] to put into the balance”\textsuperscript{183} in a results-driven path towards conclusions that were arguably grounded in prejudiced and unarticulated presuppositions as to which religious practices were worthy of constitutional protection.

A factor that further exacerbated the balancing problem related to the test for assessing the “importance of the secular value” underpinning laws that had been adjudged in the first part of the analysis as “interfer[ing] with” the activities of “sincere” religious claimants.\textsuperscript{184} In Sherbert, Brennan J imported the “strict scrutiny” test from First Amendment jurisprudence pertaining to freedom of speech and freedom of association for this purpose.\textsuperscript{185} As we have seen, this test required government to show a compelling interest in upholding impugned laws that could not be achieved by any less restrictive alternative measures. When compared to other standards of scrutiny, such as “intermediate” scrutiny,\textsuperscript{186} or the extremely deferential rational basis test,\textsuperscript{187}

\textsuperscript{179} Tushnet “Constitution of Religion”, above n 177, 631.
\textsuperscript{180} Notes “A Model of Competing Authorities”, above n 17, 356.
\textsuperscript{181} Ibid 355. The formula condenses the holdings of numerous cases from the substantive neutrality era, including Yoder and Sherbert and a raft of lower court decisions that had teased out the doctrine’s finer implications. See ibid, ns 33-37. See also Nowak & Rotunda Constitutional Law, above n 61, 1476-1477; and, for a judicial gloss, see Hernandez v Commissioner of Internal Revenue 490 US 680, 699 (1989) (per Marshall J): “The free exercise enquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling interest justifies the burden.”
\textsuperscript{182} West “Case Against Exemptions”, above n 43, 597; quoting Laycock “General Theory”, above n 49, 1374.
\textsuperscript{183} See Tushnet “Constitution of Religion”, above n 177, 631.
\textsuperscript{185} In Sherbert, Brennan J cited, among other cases, NAACP v Button 371 US 415 (1963) (a decision on freedom of speech) as authority for applying the compelling interest requirement; see Sherbert, above n 6, 403; and, for the less restrictive means component, among other cases, Shelton v Tucker 364 US 479 (1960) (concerning freedom of association), Martin v Struthers 319 US 141 (1943) and Schneider v New Jersey 308 US 147 (1939) (with the latter two cases involving freedom of speech and press with respect to the distribution of religious literature); see Sherbert, above 6, 407-408.
\textsuperscript{186} See Craig v Boren 429 US 190 (1976), in which the Court struck down age-sex differentials in regard to the sale of liquor, based on the Equal Protection Clause of the Fourteenth Amendment, and in so doing defined an “intermediate” standard of review: “To withstand constitutional challenge, classifications by gender must serve
the compelling interest test created a very high hurdle, at least in theory, for government to overcome. The use of strict scrutiny in protecting such fundamental democratic rights as freedom of speech was easily justifiable in striking down laws deemed to frustrate the detriment of the democratic process. Applying it to Free Exercise Clause claims was, by contrast, more difficult to justify, as religious claimants in many cases were seeking to engage in activities that were motivated by norms external to the wider society’s value system. Moreover, as we have seen, when they succeeded in their claims, the fruits of victory were not available to all citizens (as was the case in freedom of speech and association claims) but merely to adherents of the faiths that won in court, or to followers of closely analogous religious groups. For this reason, amongst others, it became problematic for judges to apply the test consistently.

In response to these difficulties, the courts developed a number of “gatekeeper” mechanisms en route to upholding almost every claim brought before them. It was these devices that drew the strongest criticisms in academia and from dissenting voices on the Supreme Court. This was in large part because they seemed to be created with the sole purpose of avoiding the task (by rejecting many claims at the first stage of the Sherbert test) of squarely addressing the (admittedly) challenging issue of whether the laws in question were in furtherance of compelling state interests and had been crafted so as to impair the right as minimally as possible. The mechanisms so deployed were also open to the charge of being applied selectively and inconsistently, as evidenced by perplexing deviations in outcome between substantially similar cases. The resulting disarray created considerable uncertainty for litigants important governmental objectives and must be substantially related to achievement of those objectives.” Ibid 197 (per Brennan J).

See above n 7 for the description of the rational basis test.


And in race equality cases under the Fourteenth Amendment; see, eg, Palmore v Sidoti 466 US 429 (1984), and Regents of University of California v Bakke 438 US 265, 299 (1978), in which Justice Powell declared that when governmental decisions “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest”.

See Eisgruber & Sager “Vulnerability of Conscience”, above n 50, 1250-1252, where the authors discuss the “two great paradigms [of modern constitutional law]: the right of free expression and the right of African Americans to equal protection”. See also Notes “A Model of Competing Authorities”, above n 17, 350. Of course, the decision to include the Religion Clauses in the Bill of Rights indicated that the document’s framers considered protection of religious freedom to be an internal norm of society. However, the doctrine in Smith that displaced the substantive neutrality regime is arguably an adequate reflection of the framers’ original choice in the matter.


Of the 17 free exercise claims brought before it during the Sherbert era, only 4 succeeded. Of these, three were unemployment insurance claims involving facts virtually identical to Sherbert. The fourth success was that of Yoder, although the Court crafted its decision so narrowly that it appeared to have little application outside the facts of the case and the Amish communities that could benefit from it. As Burger CJ stated, “probably few other religious groups or sects could make” such a “convincing showing” in requesting entitlement to an exemption from compulsory school attendance laws. Yoder, above n 19, 235-236.

Lupu describes the “gatekeeper” doctrines as functioning to “increase the likelihood of failure at the prima facie stage [of the Sherbert test], and thereby to reduce the number of claims that must be afforded the [strict scrutiny] inquiry demanded by the free exercise clause”. Lupu “Problem of Burdens”, above n 191, 935.
and for judges on the lower courts who sought to apply the Sherbert doctrine correctly, and thus brought the jurisprudence into disrepute. I shall now consider how some of these gatekeeper, or “filter”, mechanisms operated in practice, beginning with consideration of alleged judicial manipulation of the prima facie stage of the Sherbert test.

(a) “A court faced with a claim for a religion-based exemption from a government regulation will [1] first consider the sincerity of the religious claim being advanced and the degree to which the challenged regulation interferes with vital religious practice or belief…”

Once the Supreme Court had determined, after a series of cases spanning the 1960s and 1980s, that a basic showing of religiosity, or comparable secular belief occupying “in the life of its possessor a place parallel to that filled by …God” could qualify a sincere religious claimant for serious Free Exercise Clause analysis, it might have seemed that there was nowhere else for judicial analysis to go but to the compelling interest test mandated by the second limb of the Sherbert test. In a series of cases, however, the US courts developed a strand of jurisprudence that created a formidable barrier to claimants wishing to invoke the strict scrutiny enquiry, one which effectively rolled back the more relaxed test of religiosity introduced by the Court in the early 1980s.

The new strategy was to find that, although a claimant had a sincere, subjective, belief that certain religiously motivated conduct was necessary and that it had suffered some detriment at the hands of a governmental law or practice, the impugned regulation nonetheless did not, ipso facto, amount to a constitutionally “cognizable” burden on the religious activity in question. The high water mark of this filtering methodology was the 1988 case of Lyng v Northwest Indian Cemetery Association. In Lyng, the Court acknowledged that the proposed building of a logging road and related timber harvesting on federal land in California, which would impinge upon the sacred sites of certain Native American tribes, could have “devastating effects on traditional Indian religious practices”. However, in virtually the same breath the

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195 Seeger, above n 145, 176. See also Torasco v Watkins 367 US 488, n 11 (1961), in which the Court declared “Ethical Culture” and “Secular Humanism” to be “religions” for First Amendment purposes.

196 The enquiry into sincerity was a factual one, and, since cases like Thomas and Frazee, was easily satisfied by claimants who merely needed to assert a sincere personal belief in a plausibly “religious” activity. Courts would, however, reject claims that were “so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause”. Thomas, above n 37, 715. See, eg, State v Hodges 695 SW 2d 171, 173 (1985) (Supreme Court of Tennessee), in which Fones J, citing Thomas, did not accept that the appearance of a defendant in court dressed as a “chicken”, which the man described as his “spiritual attire” for court appearances, was entitled to free exercise protection.

197 For discussion of the new “burden” analysis, see Kamenshine “Scrapping Strict Review”, above n 173, 149: “[G]iven the strict review standard there is a strong incentive to find the burden on religious believers too small in cases where the Court otherwise would have difficulty sustaining the regulation.” See also Nowak & Rotunda Constitutional Law, above n 61, 1477; Pepper “Conundrum”, above n 14, 277; Notes “A Model of Competing Authorities”, above n 17, 361; James Ryan “Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment” (1992) 78 Va L Rev 1407 (“Ryan ‘Iconoclastic Assessment’”), 1414-1415; Berg State and Religion, above n 106, 99-102; and, generally, Lupu “Problem of Burdens”, above n 191.


199 The Court relied in this assessment on an impact report commissioned by the US Forest Service to evaluate the effect of the road on local Indian religious rites. The lower federal court had concluded, on the basis of this report, that the “proposed government operations would virtually destroy the . . . Indians’ ability to practice their religion”. Northwest Indian Cemetery Protective Assn v Peterson 795 F2d 688, 692 (9th Cir) (1986); cited in Lyng, above n 198, 464.
Court declared that the “Constitution simply does not provide a principle that could justify upholding [the Indian claimants’] religious claims.” Writing for the majority, Justice O’Connor arrived at this (in the words of the strongly dissenting Brennan J) “astonishing” conclusion by making a distinction between burdens on religionists that actually coerced activity in contradiction of their religious beliefs, and those which required government to rearrange its own internal practices to comport with the “spiritual development” of some of its citizens. As O’Connor J would go on to explain, the former type of burden would receive strict scrutiny, but the latter would not, and accordingly the Indian claimants in Lyng lost their case.

Justice O’Connor derived this principle from the case of Roy, which was decided two years previously. In Roy, a plurality of the Court argued that the request of Indian parents that the government not use a social security number for their child, as doing so would “rob [her of her] spirit,” was an unacceptable imposition on government’s internal processes and therefore could not be regarded as a constitutionally relevant burden on their religious conduct. Requiring government to do this, maintained Burger CJ, in an opinion that signalled a personal change of heart since his emphatically “pro-religion” decision in Yoder, would be the equivalent of allowing private religious citizens to determine the “size or color of the Government’s filing cabinets.” Burger CJ went on to explain that the situation in Roy was distinguishable from the Sherbert line of unemployment cases, because in those decisions the government action under consideration involved the state in a “mechanism for individualized exemptions” under the “good cause” standard mandated by the relevant statutes. For government to withhold a religious exemption in those cases, when a non-religious applicant might succeed in showing “good cause” to refuse work, would have suggested a “discriminatory intent” against religionists who made analogous claims. This predicament was not present on the agreed facts in Roy. Citing a concurring judgment of Douglas J in Sherbert, Burger CJ stated, with obvious reference to his reading of the fact situation in Roy, that: “[The] Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.” Hence, the Roy plurality advocated a more deferential standard of review of this type of government action under consideration, and found against the parents in that case.

In Lyng, O’Connor J extrapolated the Roy plurality position to the case at bar, declaring that the “building of a road or the harvesting of timber on publicly owned land” could not

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200 Ibid 451-452.
201 Ibid 458 (per Brennan J, dissenting).
203 Roy, above n 169, 696. The child’s father based this belief on consultations with an Abenaki tribal chief.
204 Ibid 700. As a warning against a floodgates effect should the compelling interest test be used in every instance of government activity that offends against religious beliefs, Burger CJ also formulated the hypothetical case of a person adhering to Norse mythology raising an objection to filing a tax return on a “Wednesday (Woden’s day)”. Ibid n 17.
205 Ibid 708. See text above accompanying ns 10-12 for discussion of the statute under review in Sherbert.
206 Ibid. Thus, strict scrutiny was still appropriate in the Sherbert line of cases, as it was in Yoder, in which school attendance was compelled under threat of criminal penalties.
207 Ibid 700; citing Sherbert, above n 6, 412 (per Douglas J, concurring). The facts in Sherbert were also distinguished on the basis that withholding unemployment insurance compelled the claimant in the case to choose between honouring her Sabbath and benefiting from the unemployment insurance fund.
208 The Roy plurality cast the standard of review for cases such as this in this way: “Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.” Ibid 707-708 (per Burger CJ).
“meaningfully be distinguished from the use of a Social Security number in Roy”. In addition to her reliance on this case, O’Connor J made a claim based on the text of the Free Exercise Clause, in which she asserted that the gerund “prohibiting” in the provision supported her reading of the clause and that it only protected against discriminatory, or coercive, prohibitions of religiously motivated action or inaction, something which, as in Roy, was not present in the facts.210 She also distinguished Sherbert and Yoder. In Sherbert, observed O’Connor J, the complainant was effectively being required to pay a fine (analogised to foregoing unemployment insurance) in exchange for observing her Sabbath.211 Similarly, in Yoder, the Amish parents were required, on pain of criminal sanction, to send their children to school, contrary to their religious beliefs.212 In Lyng, no government-mandated coercion of the types present in Sherbert and Yoder could, in the opinion of O’Connor J, be said to have occurred. Hence, because a five-Justice majority on the Court had found that the religious activity in question had not even been “burdened” according to the new technical legal meaning of that term, the Indian complainants lost their case at the prima facie stage of the Sherbert enquiry, and the government was not required to justify its logging road under the strict scrutiny standard.

In dissent, Brennan J pointed out what would have doubtless seemed apparent to many non-legal observers of the case that it was “cruelly surreal” of the Court to consider that a government action which would “virtually destroy” a religion was not thereby a “burden” on the religion.214 He poured special scorn on the equivalency attributed by the Lyng majority to the building of roads, which had obvious “substantial external effects”, and decisions as to governmental information storage and the purchase of office furniture (the “internal” actions discussed in Roy).215 For Brennan J, the appropriate enquiry under Free Exercise Clause cases was to ask whether the religious practice that was being affected was “central” to the religion in question, and, if it was, to apply strict scrutiny.216 It was irrelevant in his view to assess the source of the imposition on religious activity (ie, whether it was an internal or external government action), as the majority had done in Lyng. Because of this faulty view of the Free Exercise Clause, Brennan J believed that the government had not satisfied the exacting standard of strict scrutiny.

209 Lyng, above n 198, 449. See discussion of the transmission of the burden concept from the Roy plurality to a 5-Justice majority in Lyng in Lupu “Problem of Burdens”, above n 191, 944-945; and Ryan “Iconoclastic Assessment”, above n 197, 1415.
210 Lyng, above n 198, 451. In dissent, Brennan J disputed O’Connor J’s textual argument, saying that dictionary definitions of “prohibit” appeared to encompass a broader range of governmental activity than the majority would allow. Ibid n 4 (per Brennan J, dissenting).
211 Ibid 450 (per O’Connor J).
212 Ibid 456-457.
213 Lupu traces the burden methodology to the 1961 case of Braunfeld v Brown 366 US 599 (1961) (“Braunfeld”) (see Lupu “Problem of Burdens”, above n 191, 939-940), in which the Court questioned the significance of the burden on Jewish retailers caused by compulsory Sunday closing laws. The retailers were forced, because of their worship on the Saturday Sabbath, to close two days a week, instead of one: “[T]he Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law’s effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution.” Braunfeld, at 605 (per Warren CJ). Unlike O’Connor J in Lyng, however, the Braunfeld Court went on to ask whether the state of Pennsylvania ought to have accommodated the Jewish claimants, but concluded that the government’s interest in maintaining a uniform day of rest outweighed the religious claim.
214 Lyng, above n 198, 472 (per Brennan J, dissenting).
215 Ibid 470-471.
216 Ibid 474-475. In Brennan J’s view, the record amply disclosed that a central Indian religious practice had been burdened, and the government had offered no evidence as to whether the construction of the road was in furtherance of a compelling interest.
Exercise Clause, the only protection granted to the claimants in this case, was, in Brennan J’s opinion, the “right to believe that their religion will be destroyed”.217

In this way the “burden” enquiry enabled the courts in the latter period of the Sherbert era to reject many hard cases at the prima facie stage of analysis that would otherwise have triggered difficult strict scrutiny enquiries into governmental policy.218 The unattractive consequence of this filtering mechanism was that it had a major impact on groups whose lives were pervasively religious and were likely to come into conflict with governmental regulation that was, by contrast, unlikely to inconvenience mainstream religions, which typically confined their religious activities to the private sphere and engaged in collective worship on prescribed and temporally confined occasions.219 As Brennan J explained in Lyng:220

> [F]or Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life ‘is in reality an exercise which forces Indian concepts into non-Indian categories’…In marked contrast to traditional western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths – the mainstay of western religions – play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation.

Brennan J’s observation was directed specifically at Native American communities. However, the import of the Roy doctrine was transferable to certain conservative Christian faiths that, similar to the Indian claimants in Roy and Lyng, did not recognise any boundary between the sacred and the secular spheres of life.221

To illustrate, in another case that occurred in the years between Roy and Lyng the burden concept was determinative in a Free Exercise Clause complaint by a group of self-described born-again Christian parents regarding a series of readers at a public school that, in their opinion, exposed their children to ideas repugnant to their faith.


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217 Ibid 477.
218 See also Bob Jones University v United States 461 US 574 (1983) (“Bob Jones University”), in which the Court withheld tax-exempt status from a private religious college that banned inter-racial dating. As in Lyng, the Court conceded the “substantial impact” the withdrawal of funds would have on the operation of private schools with policies of this sort, but claimed that denial of tax-exempt status would not, as such, “prevent those schools from observing their religious tenets”. Ibid 604. Although the Court went on to subject the government policy to strict scrutiny analysis, it is hard not to conclude that the findings as to burden made it easier for the Court to conclude that the state had a compelling interest in stamping out racial prejudice. And see Tony and Susan Alamo Foundation v Secretary of Labor 471 US 290, 304-305 (1985), where the Court held that imposing a minimum wage requirement did not burden religious believers who refused to accept wages.
219 Moreover, legislative majorities and executive agencies were unlikely in the first place to craft laws and policies that contravened the beliefs of mainstream religious believers, who had sufficient political representation to prevent this from occurring.
220 Lyng, above n 198, 459-460.
221 See Lupu “Problem of Burdens”, above n 191, 946 & 964: “The adherents of many religions that call for strict adherence to a behavioral code – for example, Orthodox Judaism, various fundamentalist sects of Christianity, and conservative Islam sects – may find themselves in constant conflict with the changing norms and practices advanced by government.”
among other things, equal gender roles, the religions of Hinduism and “Satanism”, communism, “false” ideas about the nature of death, magic, the use of imagination, “futuristic supernaturalism”, and evolution, was not sufficient to constitute a constitutionally significant burden on their concededly sincere religious beliefs.223

For Vicki Frost, a mother of four of the children attending the Tennessee school, the mere fact that these subjects were in the textbooks offended her fundamentalist Christian beliefs. For example, she considered that the teaching of “imagination” (in a section of one of the readers called “Seeing Beneath the Surface”) was an “occult” practice that impermissibly required her children to use their “imagination beyond the limitation of scriptural authority”.224 For Frost, since the “word of God” contained in the “Christian Bible” amounted to the “totality” of her beliefs, it was unacceptable for her children to be exposed to any conflicting conceptions of reality.225 The solution for Frost was either to provide an opt-out and alternative readers for her children, or for the school to issue a statement that the ideas contained in the readers were “incorrect” and that the “plaintiffs’ views” were the “correct ones”.226

The Court disagreed. In its view, the fact that the children were merely required to read the books and discuss them was not a substantial imposition on their religious beliefs. This meant that the free exercise claim, as in Roy (and in the later case of Lyng), failed at the prima facie stage of the Sherbert test. In the Court’s view, something more was needed to trigger strict scrutiny analysis. If, for example, the children had been obliged to affirm the truth of what they read, and not merely to discuss the content of the readers with other students, the case might have proceeded beyond the burden enquiry.227 The Court cited jurisprudence to this effect, including the wartime flag salute case of Barnette, in which the requirement that Jehovah’s Witness school children recite the pledge of allegiance and salute the US flag was held by the Supreme Court to violate the First Amendment.228 In Mozert, by contrast, Lively J was not prepared to equate the mere “exposure” of Christian students to ideas that were antipathetic to their faith with the patriotic exercises that were scrutinised in Barnette, and which actually forced public school students to act on and affirm beliefs they did not hold.229

Lively J gained further support for his position from Burger CJ’s reliance in Roy on Douglas J’s concurrence in Sherbert, quoted above,230 and the principle contained therein that the Free Exercise Clause could not be used to force government to alter its internal activities, such as the creation of public school curricula; rather, the clause was intended simply to prevent government from requiring of its citizens that they behave in certain ways. The complainants in

223 See Mozert, above n 222, 1061-1062, in which Judge Lively lists examples from the “seventeen categories” of offensive material identified by the complainant parents, after more than 200 hours of analysis by one of their number of the “Holt series” of readers. Some of these findings were perhaps questionable, such as the inference from the presence of the word “comrade” in one of the readers as being an endorsement of communism. For a summary of the religious claimants’ objections, see Nussbaum Liberty of Conscience, above n 30, 330.
224 Mozert, above n 222, 1062.
225 Ibid 1061.
226 Ibid 1062. Frost and another parent, Bob Mozert, made this request.
227 As Lively J explains in ibid 1064: “Proof that an objecting student was required to participate beyond reading and discussing assigned materials, or was disciplined for disputing assigned materials, might well implicate the Free Exercise Clause because the element of compulsion would then be present. But this was not the case either as pled or proved.” (Emphasis in original).
228 See discussion of Barnette in the text above accompanying ns 31-36.
229 Mozert, above n 222, 1066; citing Barnette, above n 31, 631 (per Jackson J): “Here, …we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.”
230 See text above accompanying n 207.
Barnette (and, by extension, Sherbert, where the claimant was effectively being asked to pay a fine or forego her Sabbath) had thus been coerced to act in ways that the children in Mozart were not.

The last significant objection by the parents in Mozart was that the element of compulsion inherent in exposure to the readers was analogous to the Amish predicament in Yoder. In Yoder, it will be recalled, the Amish parents were required by Wisconsin state law to send their children to school until the age of 16. In Mozart, the parents were similarly required by state law to have their children educated. Lively J conceded that Yoder was the “nearest helpful precedent”, but distinguished the two cases on the grounds that:

Yoder was decided in large part on the impossibility of reconciling the goals of public education with the religious requirement of the Amish that their children be prepared for life in a separated community. As the Court noted, the requirement of school attendance to age 16 posed a “very real threat of undermining the Amish community and religious practice as they exist today…”. No such threat exists in the present case.

From this quotation it can be seen that the prima facie requirement of “centrality”, or proof that a religious practice was important for the survival of a religious community, had been transmogrified by the Mozart Court into an argument supporting its finding that no legally relevant “burden” had been imposed on the religious claimants. It was, however, surely problematic for Lively J to rely on Yoder in this way. Recall that in Frazee the claimant satisfied the prima facie enquiry under Sherbert merely by asserting, without belonging to a religious group as such, a “personal professed religious belief” that he could not work on Sundays. Also, in Thomas the Court had dismissed claims that a religious objection to fabricating tank turrets was not in fact required by the faith of the claimant in that case by stating that: “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”; and that: “Courts are not arbiters of scriptural interpretation.” No proof of imminent danger to the continued practising of the religion in question was seriously at issue in those cases. To hold that the religious beliefs of the parents in Mozart were not severely compromised, therefore, appeared to fly in the face of this line of Supreme Court authority. The Mozart decision seemed to come uncomfortably close to telling the claimants that their religious beliefs were not important, or “central” enough, to merit free exercise consideration.

Furthermore, the Mozart decision also seemed awkward when compared, for example, with Lee, an earlier case where the Supreme Court readily assumed that a social security tax imposed on an Amish group constituted a burden on that faith, even though it was surely implausible that the continued levying of such a tax would thereby threaten the existence of the Amish community. Mozart is an excellent illustration, therefore, of the tendency of judges in

231 Mozert, above n 222, 1067; quoting Yoder, above n 19, 218.
232 Frazee, above n 147, 833–834.
233 Thomas, above n 37, 714 & 716.
234 See Lee, above n 60, 257, and discussion in Pepper “Conundrum”, above n 14, 299: “There is no reason to think that payment of social security taxes might subvert the existence of the Amish as a distinct cultural group.” In Lee, the government attempted to argue that payment of the tax would not “threaten the integrity of the Amish religious belief or observance”. Lee, above n 60, 257. The Court, however, would not entertain this argument, as it was outside the “‘judicial function and judicial competence’… to determine whether [the Amish claimants] or the Government has the proper interpretation of the Amish faith; ‘[courts] are not arbiters of scriptural interpretation.’” Ibid, citing Thomas, above n 37, 716. Note, however, that the Court accepted that the tax was justified by the “overriding governmental interest” (ibid 257) of forestalling an anticipated flood of exemption claims from other religious objectors to the tax system.
the later years of the *Sherbert* era to pick and choose precedent to arrive at arguably predetermined conclusions by using the elastic requirement of burden, and, where necessary, certain aspects of the *Yoder* decision (which has never been expressly overruled) emphasising the importance of centrality to the prima facie enquiry under the *Sherbert* test, even though this threshold device had been, apparently, discredited by numerous Supreme Court decisions, and in fact was explicitly rejected a year later in *Lyng*.  

One might respond to this criticism of judicial doctrine in the *Sherbert* era by interjecting that it was necessary to draw a line somewhere at the prima facie stage of analysis in order to weed out de minimis infringements on religious behaviour that threatened to make judging, not to mention governing, unmanageable. As Professor Ira Lupu has explained, the courts became palpably wary of granting exemptions during the latter stages of the substantive neutrality era, because: “Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption claims from religious deviants of every stripe”. The burden requirement was an attempt to create a principled response to this feared parade of horribles. The concern clearly was not just imagined; indeed, it is possible to feel considerable sympathy for the government side of the argument in *Lyng* and *Mozert*. Administration of government-owned land and of the education system might have become extremely fraught had the complainants won either of those cases. That said, a quick look at the actual imposition of the burden requirement over time suggested, as was pointed out by many scholars critical of the jurisprudence, that it was used unevenly across jurisdictions and reflected in many instances, consciously or not, prejudice against non-mainstream religious groups.

In *Lyng*, for example, the majority on the Supreme Court, unlike the federal court in *Mozert*, did not even consider its own *Yoder* precedent and Burger CJ’s attachment therein of great weight to the fact that the statute in that case posed a “real threat” to the continued survival of the Amish community in question, something that surely could have assisted the Indian case in *Lyng*, given that the planned logging road would cause significant disruption to, if not destruction of, their religious rituals. Instead, O’Connor J stated, in response to Brennan J’s advocacy of a *Yoder*-like enquiry into the centrality of the Indian practice, that this would draw the Court into impermissible enquires into the religious beliefs of all future free exercise claimants, requiring the Court on some occasions to hold that “some religious adherents misunderstand [the centrality of] their own religious beliefs”. A year later, however, the Court felt able to declare, in *Hernandez v Commissioner of Internal Revenue*, that the religious burden suffered by the Church of Scientology claimants in that tax case was less central than the Amish practice at stake in *Lee*, because in the latter case the “claimed [tax-related] exemption stemmed from a specific doctrinal obligation not to pay taxes”. Inconsistent reasonings such as these seemed to indicate that the *Yoder* precedent would be resorted to by judges only when it suited their (obviously unstated) personal preferences as to the results in the cases.

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235 See text below accompanying n 238.
236 See, eg, Kamenshine “Scraping Strict Review”, above n 173, 149; and Ryan “Iconoclastic Assessment”, above n 197, 1427-1428.
237 Lupu “Problem of Burdens”, above n 191, 947.
239 490 US 680 (1989) ("*Hernandez*”). It must be acknowledged that O’Connor J dissented from this decision.
Examples of inconsistency in imposing the burden/centrality requirement of the type identified above in *Mozert* abounded in the lower courts during the final fitful years of the *Sherbert* doctrine. In the field of urban planning regulation, for example, a claim by a Jewish group in 1975 to have certain zoning laws waived to allow them to occupy buildings in a residential area for the purposes of, inter alia, worship services, was upheld by the Court of Appeals of New York. Applying (a perhaps 1970s version of) *Sherbert* and *Yoder*, the Court found that the ordinances of the Village of Roslyn Harbor requiring all religious structures located in residential areas to be set back from adjacent properties by a certain distance (a stipulation that was intended to address concerns as to traffic noise and detrimental impact on neighbouring property values caused by religious buildings) violated the Free Exercise Clause when applied to the wishes of the Jewish community in this case. In finding for the Jewish complainants, Fuchsberg J stated resoundingly: “[W]here an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former.” The “burden” on the Jewish claimants’ religious activities was taken for granted in this case. Eight years later, however, the Court of Appeals for the Sixth Circuit found that a very similar free exercise complaint against a refusal of zoning approval to build a house of worship did not even implicate Free Exercise Clause concerns. Employing an identical analysis to that used by the same court in *Mozert* three years later (and anticipating O’Connor J’s focus on coercion in *Lyng*), the Court in *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc v City of Lakewood* found against the Jehovah’s Witness claimants. First, it held, remarkably, that the building of a house of worship was not a “ritual, ‘fundamental tenet’ or ‘cardinal principle’” of the Jehovah’s Witness faith. And, second, it found that the alleged burden on the religious claimants did not in any case rise to the same level of coercion as had occurred in *Sherbert* and *Yoder*.

Religion Clauses scholar Leo Pfeffer, writing in 1984 on the incongruities in these (and other) zoning decisions, speculated that the difference between outcomes in *Lakewood* and *Roslyn Harbor* might be explained by simple prejudice, and that “memories of the Holocaust suffered by European Jewry under Nazism still haunt the American conscience, including that of the judiciary, while the comparatively minor sufferings of Jehovah’s Witnesses do not”.

It might be possible to consider the outcomes of the “burden” jurisprudence cases in isolation as fairly unremarkable, a product perhaps of a cautious and pragmatic judiciary not wishing to overturn the decisions of democratic institutions. When viewed from a distance, however, something deeply disturbing appeared to be at work. Legal realist scholar Mark Tushnet...
observed that, notwithstanding the success of some non-mainstream religionists in the lower courts, the “pattern of the [Supreme] Court’s results in mandatory accommodation [was] troubling because, put bluntly, the pattern is that sometimes Christians win but non-Christians never do”. Indeed, the only claimants to taste success in the Supreme Court were the Amish (in *Yoder*), Seventh Day Adventists (in *Sherbert* and *Hobbie*), Jehovah’s Witnesses (in *Thomas*) and the non-religiously affiliated “Christian” in *Frazee*. All other claims failed – with prominent examples in the jurisprudence being the Indian complainants in *Lyng*, Jews in the military seeking an exemption to wear a yarmulke in non-combat environments, Scientologists seeking a tax exemption that many other faiths enjoyed, and Muslim prisoners requesting permission to attend religious services on Fridays, the Islamic near-equivalent of the Christian Sabbath.

As an explanation for these results, Tushnet detected traces of a discriminatory posture against unfamiliar or foreign religions in the language of various Court decisions in the *Sherbert* era. Most obvious was Burger CJ’s opinion in *Yoder*, in which he extolled the hard-working agrarian lifestyle of the Amish against arguments by the state of Wisconsin that to exempt them from school would “foster ignorance”:

> [T]he Amish community has been a highly successful social unit within our society, even if apart from the conventional ‘mainstream’. Its members are productive and law-abiding members of our society; they reject public welfare in its usual modern forms.

Tushnet suggested that this comment showed the Court had a tendency to eulogise those faiths that it deemed “good” religions and to ignore the claims of those that did not fit basic Protestant modes of existence, or were deemed otherwise hostile to the goals of wider

(2007) 22 NZULR 565, 566 (emphasis added). Palmer, a New Zealand academic writing on the cultural underpinnings of the New Zealand constitution, cites the work of Llewellyn to advance his own thesis (at 566); eg, Karl N Llewellyn “The Constitution as an Institution” (1934) 34 Columbia Law Review 1, 17, n 30: “Some institutions – for instance, our present [US] Constitution – have found words and rules serving them as midwife or even as ancestor; but in the main it is action which comes first.”Modern legal realists, such as Tushnet, analysed Religion Clause jurisprudence in the Llewellyn tradition by candidly isolating the true reasons behind the decisions of the *Sherbert* era and found that the various doctrines, such as the sincerity and burden requirements, were mere window-dressings for (possibly unwitting) covert acts of discrimination against unfamiliar, anti-social, or threatening religious groups.

Tushnet “Kurland Revisited”, above n 47, 38; and Ronald Krotoszynski “If Judges were Angels: Religious Liberty, Free Exercise, and the (Underappreciated) Merits of Smith” (2008) 102 NWULR 1189 (“Krotoszynski ‘If Judges were Angels’”), 1220-1235. But see Laycock “Remnants”, above n 164, 14.

A legal realist might argue that the success of the (non-Christian) Jewish claimants in *Roslyn Harbor* was attributable to the demographic presence in New York state of persons from that faith. According to US statistics, the nationwide affiliation to Judaism is put at 2%, while in New York state this figure rises to a significantly larger 6%. See The Pew Forum on Religion and Public Life “U.S. Religious Landscape Survey”; available at: www.religions.pewforum.org/affiliations>.


To be sure, many Christian claims failed as well, as McConnell points out in his critique of Tushnet’s discrimination charge; see McConnell “Free Exercise Revisionism”, above n 20, n 118: “I do not share [Tushnet’s] diagnosis. It would be more accurate to state that non-Christians never win, and Christians almost never win, either. The insensitivity about which Tushnet complains is virtually indiscriminate, suggesting not so much a preference for mainstream religions as a blindness toward nonsecular concerns.” McConnell’s comments are surely accurate, but the complete failure of non-Christian claimants in the Supreme Court was nevertheless undeniable.

Tushnet “Kurland Revisited”, above n 47, 382.

*Yoder*, above n 19, 222; quoted in Tushnet “Kurland Revisited”, above n 47, 381.

Ibid 382. The Court’s “soft spot” for the ascetic ways of the Amish is noted by many commentators; see, eg, Krotoszynski “If Judges were Angels”, above n 247, 1226: “Chief Justice Burger’s majority opinion in *Yoder* is a
society.\textsuperscript{255} Similarly, Tushnet identified ipse dixit comments in \textit{Frazee} by Justice White that the sincerity of the religious claimant in that case was easy to assess, because “claims by Christians that their religion forbids Sunday work cannot be deemed bizarre or incredible”.\textsuperscript{256} In Tushnet’s view, remarks like these pointed towards a subtle, but deeply embedded, ethnocentrism amongst the Justices. These comments and others like them stood out against judicial expressions of scepticism, or findings of “no cognizable burden”, regarding claims by non-Christian, or unorthodox Christian, believers relating to religious activities that were not “readily understandable by those adherents of mainstream religion who are likely to administer the mandatory accommodation doctrine”.\textsuperscript{257} Tushnet regarded the inherent insensitivity of judges to unorthodox claims as endemic to the whole \textit{Sherbert} process, and that the bias “may affect not just the determination of sincerity but also the application of the balancing test” as a whole.\textsuperscript{258}

Favouritism of this sort was arguably in contravention of the Establishment Clause imperative that the state should not benefit “good” religious groups at the expense of others, and should in any case not become entangled in questions as to the relative centrality of religious practices between different faiths.\textsuperscript{259} In \textit{Larson v Valente}, for example, the Court emphatically declared that the “clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”\textsuperscript{260} The application of the burden requirement, and occasional reliance on subjective judicial pronouncements on the centrality, or lack thereof, of religiously unorthodox free exercise claimants, seemed to involve the Court in expressing preferences that breached this principle.

In light of these observations, many distinctions between religions in the “burden” jurisprudence appeared questionable. For example, the possible loss of unemployment benefits over a 26-week period for the Christian Sabbatarian claimant in \textit{Sherbert}, when compared with the deprivation of Muslim prisoners wishing to observe their Friday “Sabbath” in \textit{O’Lone}, the destruction of site-specific sacred Indian land in \textit{Lyng}, the loss of public education for the portrait of unselfconscious ethnocentrism”; and Mark Tushnet “New Directions in Religious Liberty: The Rhetoric of Free Exercise Discourse” (1993) BYUL 117, 134. Many consider it to be evidence of an impermissible preference for religions sharing the Amish qualities of hard work and longevity to the disadvantage of other groups in society. See, eg, Steven D Smith “Wisconsin v. \textit{Yoder} and the Unprincipled Approach to Religious Freedom” (1996) 25 Cap UL Rev 805, 807: “The \textit{Yoder} opinion doubly violates the neutrality requirement, discriminating both between religion and nonreligion and among religions.”

\textsuperscript{255} In another piece, Tushnet has observed that successful claimants in the \textit{Sherbert} era often belonged to small faiths that were “socially insignificant”, and that exemptions were given “if doing so has no socially significant consequences but not if it does”. Tushnet “Constitution of Religion”, above n 177, 638-639; see also Philip Kurland “The Supreme Court, Compulsory Education, and the First Amendment’s Religion Clauses” (1973) 75 W Va L Rev 213, 243. Hence, the statistically insignificant and socially isolated Amish claimants in \textit{Yoder} (and the numerically insignificant Seventh Day Adventists in \textit{Sherbert}) were more likely to succeed (and did) than the numerically large born-again Christians, who unsuccessfully sought to rewrite public school curricula in \textit{Mozert}. Note that the Amish constitute a small percentage of the 0.3% of US adult citizens belonging to the Anabaptist tradition, whereas evangelical Christians, to which grouping the \textit{Mozert} claimants belonged, make up some 26% of the population. See The Pew Forum on Religion and Public Life “U.S. Religious Landscape Survey”, available at: <religions.pewforum.org/affiliations>.

\textsuperscript{256} \textit{Frazee}, above n 147, n 2 (per White J). \textsuperscript{257} Tushnet “Kurland Revisited”, above n 47, 382. \textsuperscript{258} Ibid 382-383: “[T]he less familiar the claim is – that is, the less connected to the kinds of worship that the Justices of the Supreme Court are accustomed to – the less likely it is that they will regard infringements on those forms of worship as really serious.” See also West “Case Against Exemptions”, above n 43, 607.

\textsuperscript{259} This was a special concern of West; see ibid, 609-610; and see Notes “A Model of Competing Authorities”, above n 17, 359; and Marshall “In Defense of \textit{Smith}”, above n 43, 310-311. \textsuperscript{260} 456 US 228, 244 (1982). In this case the Court struck down discriminatory ordinances that regulated religious groups that solicited more than 50% of their funds from non-members.
children of the born-again Christian Mozart claimants, and the questioning of the “centrality” of the Scientologist claimants’ beliefs in Hernandez, looked incongruous, not to say invidious. In a sense, therefore, the concerns expressed earlier in this chapter about the discriminatory effects of the substantive neutrality era vis-à-vis non-religious believers were repeated by the creation of unprincipled distinctions between religious believers through the operation of the balancing test.

Some of the inconsistencies highlighted above can be explained, perhaps, by the flexible nature of the compelling interest component of the Sherbert test. As Greenawalt has explained: “In reality, the courts consider burden in light of government interest and government interest in light of burden, striking a kind of balance.” For example, the relatively light burden on the religious activities of the successful claimant in Sherbert might be explained by the fact that the governmental interest in that case (the need to avoid fraudulent religious claims on the unemployment insurance fund, something that was never proven to be a real risk) was also relatively weak, whereas, the interest of the government in enforcing a uniform day of rest in Braunfeld, and uniform tax laws in the cases of Lee and Hernandez, or in the maintenance of order in prisons and the military (the contexts considered in O’Lone and Goldman) was, arguably, rather stronger.

Having said that, it became apparent in the late Sherbert era that investigations into “burden” often had the effect of predetermining results in the application of the compelling interest test. Indeed, as legal commentator James Ryan perceptibly observed, claimants at this time were often caught in an unfortunate “Catch-22” predicament. In the cases where claimants were able to establish a burden on their religious conduct, because the law or practice interfering with their belief had the effect of affirmatively prohibiting conduct (the definition of “prohibiting” advanced by O’Connor J in Lyng), the government was often able easily to discharge the compelling interest test. This was because many laws that actually coerced religious activity in such a way were also likely to be in furtherance of important state policies. To illustrate this dilemma for free exercise complainants, Ryan referred to the case of Messiah Baptist Church v County of Jefferson, a zoning law decision in which the Court of Appeals for the Tenth Circuit held, as the Sixth Circuit had done in Lakewood, that refusal of planning permission to build a church imposed no “burden” on the Baptist group’s religious beliefs. The Court noted, as an important component of its no burden finding, that it was not a case “where the church must choose between criminal penalties…and its religious benefits”.

However, Ryan hypothesised that, even if Messiah Baptist had involved criminal penalties, it would likely have been a formality for the government to prove that it had a compelling interest in

261 See discussion of Hernandez above, in text accompanying ns 239-240.
262 See section 2.1 above.
263 Greenawalt Free Exercise and Fairness, above n 14, 202.
264 See Pepper “Conundrum”, above n 14, 277: “[M]inimal scrutiny of the extent of the invasion of Sherbert’s belief may be premised on the fact that only a threshold invasion was necessary to overbalance the State’s weak interest.”
265 In Braunfeld, the burden on the religious claimants (the fact that they had to close their shop on two days a week, as their Sabbath fell on a day other than Sunday) seemed considerably greater than in Sherbert. However, the need for a single day of rest weighed decisively against the religious claim in that case; see Pepper “Conundrum”, above n 14, n 60.
266 See Ryan “Iconoclastic Assessment”, above n 197, 1416-1417 & 1422.
268 Messiah Baptist, above n 267, 825-826 (emphasis added).
2. Lessons from America

enforcing them.\textsuperscript{269} As Ryan explained: “When faced with a meritorious claim in which the government’s interest was not very compelling, courts often found that no burden existed. And when the burden was obvious, as when the practice was criminally prohibited, courts often relied on the cause of the burden itself to demonstrate the state’s compelling interest.”\textsuperscript{270} Ryan’s observation, backed by his empirical research of the case law, mirrored Tushnet’s concern that findings in the initial stage of the \textit{Sherbert} test regarding centrality/religiosity and burden, which were arguably the product of discrimination or indifference towards the religions under examination, had the potential to predetermine the rest of the balancing process. Under these circumstances it was probably more accurate to say that no real balancing occurred at all.

To conclude on our analysis of the prima facie stage of the \textit{Sherbert} test, it is important finally to note that a majority on the Supreme Court itself eventually seemed to lose faith in the gatekeeper mechanism of “burden”. Compounding the discrepancies of the \textit{Sherbert} jurisprudence as it neared termination in 1990 was the rejection, in the 1987 case of \textit{Hobbie}, of the internal-external government action distinction that was relied on heavily in \textit{Roy} and \textit{Mozert}, and subsequently in \textit{Lyng}. In \textit{Hobbie}, which was another variant on the \textit{Sherbert}-\textit{Thomas}-\textit{Frazee} strand of unemployment insurance jurisprudence, a majority of the Court dismissed the government’s argument that \textit{Roy} should be the dominant authority for determining the \textit{Sherbert} line of free exercise cases.\textsuperscript{271} Citing O’Connor J’s rejection of the doctrine in her concurring opinion in \textit{Roy},\textsuperscript{272} the Court appeared to dispense with the \textit{Roy} plurality’s holding “\textit{in toto}”.\textsuperscript{273} The following year, however, O’Connor J relied almost totally on the \textit{Roy} methodology in disposing of the Indian claim in \textit{Lyng}. Vacillations of this sort, which were the product of shifting majorities on the Court fighting for control over doctrine, threw much of the burden jurisprudence of the 1980s into doubt, and the resulting unpredictability of results in the area left many observers of Court doctrine completely at sea.\textsuperscript{274}

As we shall now see, the judicial framing of the compelling interest enquiry also presented its own unique challenges and provided yet another mechanism for judges to reject hard cases, even when the burden analysis was not determinative and it seemed the government’s interest in upholding laws against religious believers was fairly weak. Let us now turn to consider how

\textsuperscript{269} Ryan refers also to a polygamy case (\textit{Potter v Murray City} 760 F2d 1065 (10th Cir) (1985)), in which a free exercise claim failed, due to the government’s compelling interest in enforcing criminal legislation banning that practice, even though it was not disputed that the claimant’s religious beliefs had been burdened. Ibid. In Ryan’s view, this indicated that even if the claimants in \textit{Messiah Baptist} had satisfied the burden enquiry by hypothetically pointing to a criminal prohibition of their activity, they would still have lost. See Ryan “Iconoclastic Assessment”, above n 197, n 89.

\textsuperscript{270} Ibid 1422.

\textsuperscript{271} \textit{Hobbie}, above n 37, 141-143. The reliance on the \textit{Roy} plurality’s internal-external government practices doctrine in \textit{Lyng} and \textit{Mozert}, was in any case dubious even before \textit{Hobbie} discounted it from Free Exercise Clause analysis in 1989, because a five member majority of the \textit{Roy} Court had also rejected it; see \textit{Roy}, above n 169, 715-716 (per Blackmun J), 727-728 (per O’Connor, Brennan and Marshall JJ), & 733 (per White J).

\textsuperscript{272} “‘[The \textit{Roy} plurality’s] test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides.’” \textit{Hobbie}, above n 37, 141-142 (per Marshall J), quoting \textit{Roy}, above n 169, 727 (per O’Connor J, concurring).

\textsuperscript{273} As noted critically by the concurrence of Powell J in \textit{Hobbie}, above n 37, 147.

that stage of the Sherbert-Yoder regime fared in the years leading up to the Smith decision in 1990.

(b) “…[The Court] will then [2] weigh, on the other side of the balance, the importance of the secular value underlying the rule, the impact of an exemption on the regulatory scheme, and the availability of a less restrictive alternative.”

Many commentators, on both sides of the substantive/formal neutrality divide, wrote critically on the application of the compelling interest test in the Court.275 A recurring complaint was that, as we saw in Ryan’s critique above, even if a religious claimant managed to survive the burden enquiry reasonably unscathed and thus reached the strict scrutiny part of the Sherbert test, this did not automatically mean that free exercise claims succeeded in the manner that racial equality claims almost always did once the test was invoked in that area of constitutional law.276 One crucial area of debate surrounding this part of the test regarded how to balance the governmental and religious interests in a meaningful way when strict scrutiny was in fact triggered. Two conflicting methodologies stood out, and the choice of either one was effectively determinative in the cases that came before the courts. In the final decade of the Sherbert era, the courts began exclusively to choose the methodology less favourable to religious claimants, thereby inviting the charge that the judiciary was involved in covert manipulation of the compelling interest test in much the same way that it utilised the burden analysis to the disadvantage of unfamiliar or unpopular religious groups.

In the early years of the Sherbert test, the Court established a firm method for balancing the two interests that worked to the advantage of religious claimants. In Yoder, for example, instead of engaging in the extremely abstract task of weighing the importance for the state of educating its citizens against the right of Amish religionists to opt out of compulsory education, the Court instead assessed the state’s particularised interest in requiring schooling specifically for Amish children from the age of 14 to 16, which was, in the Yoder Court’s words, the “brief additional period”277 required by the state that the Amish, who allowed their children to avoid until 14 years of age, wished their children to avoid. Burger CJ explained the test in this way:278

> Where fundamental claims of religious freedom are at stake…we cannot accept [the State’s broader interest in its system of compulsory education]…; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

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276 As McConnell explains: “In an area of law where a genuine ‘compelling interest’ test has been applied, intentional discrimination against a racial minority, no such interest has been discovered in almost half a century.” McConnell “Free Exercise Revisionism”, above n 20, 1127. It should be added that strict scrutiny analysis of racial equality claims under the Equal Protection Clause was ordinarily employed only when government laws or practices were held intentionally to discriminate against racial minorities. See, eg, Washington v Davis 426 US 229 (1976), in which the Court refused to invalidate an employment literacy test that African Americans traditionally struggled to master, stating that the “basic equal protection principle [was] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”. Ibid 240. By contrast, strict scrutiny was theoretically invoked under the Free Exercise Clause even in cases where no direct or intentional burden was placed on religious believers.

277 Yoder, above n 19, 225.

278 Ibid 221 (emphasis added).
Unsurprisingly, given that the Amish children would thereafter live exclusively in an isolated agrarian community where they would learn all the skills they needed for survival in that community, and would not ever be a burden on wider society, the Court found that the state’s asserted interest in educating its populace (ie, to prepare them to “participate effectively and intelligently in our democratic process”279) did not weigh decisively against the religious interest, and the Amish claim therefore prevailed. In similar vein, generalised fears of the state of South Carolina that to allow Adell Sherbert’s claim would be a drain on the unemployment insurance fund were rejected by the Court in 1963, due to a lack of evidence showing this was a real risk. The Sherbert Court, moreover, included in its analysis the fact that a mere 150 persons belonging to the Seventh Day Adventist church lived in the relevant geographical location, and of that group only the claimant and one other fellow Sabbatarian were unable to find non-Saturday employment.280 To grant an exemption in that case was accordingly not adjudged as likely to create an enormous administrative or financial burden on the unemployment insurance fund. According to Sherbert and Yoder, therefore, speculative concerns of a general sort were not to be factored in to the weighting of the government interest. The actual impact of an exemption to the claimant and his religious group on the governmental interest was all that counted.281

Scholars opposed to the substantive neutrality conception of the Free Exercise Clause found much to dislike in the Sherbert-Yoder methodology. Marshall argued persuasively that the balancing process articulated in these cases inevitably “underestimate[ed] the strength of the countervailing state interest”, as the reasons behind much regulation “will seldom seriously be threatened if only a few persons seek exemption from it”.282 Marshall illustrated the intrinsic leniency in the Sherbert-Yoder formula by way of analogy with an anti-pollution law: if one factory were given an exemption from environmental safety laws, it would be unlikely to threaten the state’s interest in protecting air quality under the Sherbert-Yoder analysis. Marshall went on to quip that the balancing methodology advanced by the court in Sherbert and Yoder was rather like asking whether one “particular straw is the one that breaks the camel’s back”.283

In light of the Court’s formulations of the balancing methodology subsequent to Yoder, however, Marshall’s concerns became moot, if not overblown. In a series of cases in the 1980s, the Court withdrew from its highly particularised analysis that was weighted favourably towards religious claimants. In the 1981 case of Lee, for example, an Amish employer objected to paying social security taxes for the benefit of his exclusively Amish employees on the grounds that it conflicted with the community’s asserted religious belief that accepting governmental payouts under any circumstances was forbidden. Instead of following the finely calibrated analysis laid out in Yoder (ie, by asking whether an exemption specifically for the Amish employers of Amish employees who lived in a religious community that took care of its own and would never draw on the social security fund would pose a risk to the viability of the fund), the Court instead framed the government’s interest in a totally different way.

279 Ibid 225.
280 Sherbert, above n 6, n 2.
281 For glosses on the religion-friendly compelling interest calculation in the early Sherbert era, see Clark “Guidelines”, above n 184, 330-331; and Pepper “Conundrum”, above n 14, 289: “[T]he effect of the Sherbert-Yoder revolution is solely to require that the state interest be measured in a realistic way, that it not be inflated and measured at some general level not actually threatened by the religious conduct in question.”
283 Ibid 312.
In a majority opinion authored by Burger CJ, the Court found that there was no difference between those employing only workers belonging to the same faith and those employing others. This would have been the equivalent of the Yoder Court saying that the interest of the state in educating non-Amish children was identical to its interest in educating Amish children. The Court also saw no difference between the social security tax and general income taxes, and speculated that if an exemption were granted to the Amish in Lee, doing so would open up the entire tax system to a myriad of religion-based claims – such as a request from those religiously opposed to war having their income tax bill reduced by an amount calculated as a percentage of the bill directed by government to military expenditure.

Regarding the governmental interest itself, this hardly appeared compelling, as an exemption already existed in the social security regime for the self-employed. Moreover, the government provided no evidence of any potential problems that would be caused by exempting the actual claimant in the case and those similarly situated. Despite this, the generalised reframing of the governmental interest, which took into account a feared floodgates effect of similar claims proved dispositive. These speculative factors, which had been rejected out of hand in Sherbert and Yoder, led inevitably to the Court’s central finding on its way to rejecting the Amish claim: “The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”

In his concurring judgment in Lee, Stevens J excoriated the majority’s purported reliance on the compelling interest test as set out in Yoder, claiming that, as a “matter of administration” it would have been simple to exempt the Amish claimants, as the government already did this for self-employed Amish. And he pointed out that their refusal to rely on the tax in the event of need would mean that the exemption would entail no costs and might even create a net financial benefit for the state. For Stevens J, the claim in Yoder and the case at bar were legally identical and, if the Court were being true to its own precedents, demanded the same result. He surmised that the standard actually being applied by the Court more closely resembled the deferential standards applied in the pre-Sherbert cases, such as the 1878 Reynolds case, in which the mere existence of a law banning polygamy was reason enough to justify interference with religiously motivated conduct.

In writing the majority opinion, it is also worth noting that Burger CJ also appeared to doubt whether he was applying the compelling interest test in this case, for, even though he cited Sherbert and Yoder as authorities, he nevertheless claimed that the state could discharge its burden by establishing, not a “compelling”, but rather an “overriding” governmental interest in upholding the impugned law. This language appeared to point to a lower standard and fitted better with the level of review actually employed in the case.

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284 Lee, above n 60, 261: “Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.”

285 For a critical comparison of the differing analyses employed by the very same Burger CJ in Yoder and Lee, see Krotoszynski “If Judges were Angels”, above n 247; and Pepper “Conundrum”, above n 14, 299-301.

286 Lee, above n 60, 260.

287 Ibid.

288 Ibid 262 (per Stevens J, concurring). Stevens J supported the result in the case, as he rejected the existence of a special right of exemption under the Free Exercise Clause for religionists in any circumstances.

289 Ibid n 3: “I believe, however, that a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes (or proscribes) better explains most of this Court’s holdings than does the standard articulated by the Court today.” Curiously, Burger CJ cited Reynolds and Sherbert and Yoder as controlling authorities for his decision. Ibid 257-258.

290 Ibid 257.
This reversal of emphasis in the compelling interest test, which had the effect of inflating the governmental interest every time it was applied, signalled, in the view of some, the death of the *Sherbert-Yoder* doctrine. Under the new *Lee* formula, remarked Laycock, “few claims of conscientious objection would ever be allowed”. Pepper similarly made the claim in a 1982 article that: “*Lee* may be read as the end of the *Sherbert-Yoder* revolution; a return to no effective independent role for the Free Exercise Clause.” Like Stevens J, Pepper saw in the Court’s analysis a return to the pre-*Sherbert*-era case law in which general governmental interests, if they were subjected to any scrutiny at all, were routinely accepted as sufficient in rejecting free exercise claims. Pepper’s and Laycock’s predictions were indeed later borne out by a number of tax cases expressly following the new methodology in *Lee*, with all of them finding against religious claimants by framing the governmental interest in a highly generalised way that was stacked in favour of the state’s general regulatory goals.

Pepper speculated that the inflation of the governmental interest in *Lee* may have been specific to tax cases and might have no wider application. Later decisions, however, indicated that the Court was reluctant to impose the compelling interest test in other circumstances as well. In *Goldman* and *O’Lone*, for example, the Court rejected claims for religious exemption from, respectively, military regulations mandating uniform dress standards that prevented a Jewish Air Force officer from wearing a yarmulke in non-combat situations, and prison governance decisions effectively preventing Muslim prisoners from attending Friday religious observances. In these cases, the Court refused to apply the compelling interest test at all, and instead framed a new, deferential, standard of review that was, in its view, necessary to recognise the confined nature of military and prison environments. In *O’Lone*, for example, the Court analysed the governmental interest by asking whether the decision of prison authorities in that case not to allow Muslim prisoners to return indoors from outdoor work programmes to perform important worship services was “reasonably related to legitimate penological objectives”. Under this standard it was a reasonably easy step for the Court to accept the prison authority’s contention that allowing Muslim prisoners to return to a building under guard was administratively troublesome and created a security risk. And, in any case, demonstrating the Court’s scepticism for non-Christian religious practices, Chief Justice Rehnquist found that the Muslim practice of communal Friday worship (*Jumu’ah*) was not an essential religious exercise, even though evidence had been adduced that the Islamic worship service occupied within that faith a role analogous to the Catholic Mass.

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291 Laycock “Survey”, above n 275, 431.
292 Pepper “Conundrum”, above n 14, 301: “*Lee* may be read as the end of the *Sherbert-Yoder* revolution”.
293 Pepper cites the 1961 case of *Braunfeld* (in which the Court refused to allow an exemption for Jewish traders from Sunday closing laws on the basis that an exemption would cause administrative and policing difficulties), and *Prince v Massachusetts* 321 US 158 (1944) (in which the Court rejected a claim for an exemption from child labour laws by a Jehovah’s Witness parent who wished her children to assist in delivering religious literature). Pepper “Conundrum”, above n 14, 300-301.
294 See, eg, *Hernandez*, above n 239, and *Bob Jones University*, above n 218, both cases involving tax issues in which the governmental interest was framed generally as a crucial step towards rejecting free exercise claims.
295 Pepper “Conundrum”, above n 14, 301; see also Lupu “Problem of Burdens”, above n 191, n 6.
296 *O’Lone*, above n 250, 353 (per Rehnquist CJ); for a similar standard applied in the military context, see *Goldman*, above n 249, 510, in which Rehnquist CJ accepted that a rule banning visible religious insignia among Air Force personnel, which prevented a Jewish officer from wearing a yarmulke “reasonably and evenhandedly regulate[d] dress in the interest of the military’s perceived need for uniformity”.
297 The Court also mentioned the need for judges not to second-guess decisions made by persons specially trained and experienced in managing the prison environment. *O’Lone*, above n 250, 353.
298 Ibid 360 (per Brennan J, dissenting). This is to be compared with the Jewish claimant in *Goldman*, whose belief in the necessity of wearing a yarmulke was never questioned by the Court.
As with the burden analysis discussed above, the new method for framing the governmental interest was probably a reaction to the broadening of the definitional ambit of religion that occurred at around the same time. Also like the burden analysis, one can feel some sympathy for the judges seeking to apply the compelling interest test. Comparing the indubitably incommensurable values of highly personal religious beliefs with secular state policy goals was a difficult task to say the least. Unfortunately, the binary choice between the earlier religion-sensitive Sherbert-Yoder formula and the later state-friendly analysis in Lee “virtually determine[d] the result” in many cases, leading to accusations that the balancing test was being manipulated according to the end results favoured by judges. Perhaps the best example of this occurring was in the 1989 case of Hernandez. In this case, the Court was asked to consider whether the decision of the US Inland Revenue Service (“IRS”) to withdraw charitable donation status to moneys paid by Scientology church members for personal “auditing” sessions violated the Free Exercise Clause. Justice Marshall, in his majority opinion finding against the Scientologist claim, began by expressing great scepticism as to whether the religious practice under examination merited any free exercise protection at all: “Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically”. This preliminary finding contrasted starkly with the decision in Lee, where the Amish claimants at least succeeded at the prima facie stage of analysis in their claim that paying social security taxes violated their religious beliefs. The Court then went on to declare that the auditing payments did not qualify for tax deduction status because they were not true donations, and were in fact part of a “quin pro quo exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions”. Marshall J concluded, applying Lee, that even if the IRS policy placed a constitutionally relevant burden on the claimants’ religious beliefs, this was “justified by the ‘broad public interest in maintaining a sound tax system’”. In a strong dissent, O’Connor J ignored the majority’s findings that the Scientologist religious practices were not burdened by the withdrawal of the tax deduction. Instead, she focused on the discriminatory nature of the IRS decision, noting that tax deductions were allowed for similar “quin pro quo” arrangements in other religions, such as tithes for Mormons, pew rents for Christians and Jews, as well as Mass stipends paid by Catholic worshippers. O’Connor J concluded that there was “no discernible reason why there is a more rigid connection between payment and services in the religious practices of Scientology than in the religious practices of

299 The Lee case was decided in 1982, a year after the Court relaxed the threshold test for religiosity in Thomas. See discussion in text above accompanying ns 232-233.
300 Laycock “Survey”, above n 275, 429.
301 Auditing sessions were described by the Court as follows: “Auditing involves a one-to-one encounter between a participant (known as a ‘preclear’) and a Church official (known as an ‘auditor’). An electronic device, the E-meter, helps the auditor identify the preclear’s areas of spiritual difficulty by measuring skin responses during a question and answer session.” Hernandez, above n 239, 684-685. Another practice, also subject to the IRS withdrawal of charitable donation status, was known as “training”, in which participants received teachings in the tenets of the religion in order to become auditors and to gain spiritual advancement. Ibid 685. For further description of Scientologist practices and their hostile reception in the US, see Pfeffer Religion and the Burger Court, above n 194, 224-228.
302 Hernandez, above n 239, 699.
303 Ibid 691. (Emphasis in original).
304 Ibid 699; quoting Lee, above n 60, 260.
305 Ibid 708-709 (per O’Connor J, dissenting). The majority affected not to know about these comparable reciprocal arrangements; see ibid 702.
the faiths described above”, and therefore declared that the Scientologists should have won their case.  

As the Hernandez decision amply demonstrated, critiques expressing the view that “strict scrutiny” was applied selectively by judges during the Sherbert era to arrive at “congenial results” favouring “preferred religions” like the Amish were difficult to deny. Indeed, it was arguable, given O’Connor J’s revealing comparisons with other religions favoured by the IRS, that the compelling interest test in Hernandez was effectively used as a cloak to obscure the discriminatory governmental practice in that case. Unlike the other laws and governmental decisions in the case law analysed in this section, the administrative decision in Hernandez palpably did not even have the virtue of being a generally applicable and religiously neutral law.

Mark Tushnet further derided the compelling interest test by describing the unseemly advocacy of claimants urging courts (on the basis of Sherbert and Yoder) to agree that their religious conduct had trivial social consequences and could be safely accommodated, while on the other side the government typically urged judges, first, to cast a sceptical eye on the issue of whether any relevant burden was imposed on religious claimants, and, second, to weigh into the balance the cumulative impact any given exemption might create, no matter how trivial the actual costs of accommodating the specific claimant would be for government. Hernandez illustrated with a vengeance how the Sherbert doctrine could be manipulated to avoid the real issues. Results in the wider jurisprudence showed over time that whichever of the two sides prevailed in the essentially rhetorical exercise of pre-loading the balancing analysis would in all probability prevail. Because of the unpredictable results emanating from the test, which were in part arguably a product of judicial predilection for some religions that fed into the test and not others, Tushnet, and other opponents of court-ordered exemptions, such as West and Marshall, concluded that the balancing analysis was irrevocably flawed.

Tushnet’s conclusion, it must be noted, was not the preserve only of those arguing for something like a formal neutrality reading of the Free Exercise Clause. Unlike the interpretive objection (based on the actual meaning of the Free Exercise Clause, and discussed in section 2.1 above) that the Sherbert doctrine unfairly discriminated between religious and non-religious believers, even proponents of substantive neutrality frankly acknowledged that the balancing test had been applied unevenly and had generated a degree of uncertainty that was an unacceptable blight on the judicial process. McConnell, for example, conceded that the inconsistent way the balancing test had been handled during the Sherbert era involved the courts, and government, in taking impermissible stands on essentially religious questions.

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306 Ibid 710. O’Connor J argued that the IRS policy violated the Establishment Clause prohibition on the favouring of certain religious beliefs above others. Ibid 713. Note that O’Connor did not reach the issue of whether the IRS policy could be justified, because, unlike infringements of free exercise rights, Establishment Clause violations, once established, can never be overcome by compelling state interests.

307 Krotoszynski “If Judges were Angels”, above n 247, 1231. Krotoszynski offers a powerful critique of the Hernandez decision; see ibid 1232-1233, concluding that: “[M]any people in the United States (and evidently on the Supreme Court and at the IRS) do not view the Church of Scientology as a legitimate religion and are unwilling to treat it at parity with Methodism, Judaism, or Roman Catholicism.” Ibid 1233.

308 The rule was created by the IRS, interpreting section 170 of the Internal Revenue Code of 1954, 26 USC, which permitted taxpayers to deduct “charitable contributions” to religious entities. The IRS considered the business-like nature of payments by Scientologists for auditing services meant they ought not to be construed as charitable gifts.


He also acknowledged that the compelling interest test could not be applied rigorously in all circumstances, because, unlike racial equality jurisprudence, the strict scrutiny analysis in Free Exercise Clause cases was nominally applied in all instances where religious practices were indirectly burdened, often in circumstances that did not involve major invasions of religious liberty.

Where McConnell and scholars like Tushnet disagreed, however, was on the issue of how to deal with the problem. We shall now consider briefly the various proposals in the US academy for dealing with the Sherbert-Yoder legacy, before analysing Smith and assessing which of these prescriptions won the day in the Supreme Court.

2.3 Proffered solutions for resolving the tensions in the Sherbert-era jurisprudence

2.3.1 Strict neutrality

Tushnet argued that the Religion Clauses should be interpreted as expressing a single idea: that religion could not be favoured, or disfavoured, either by courts or legislatures. The Free Exercise Clause was to be regarded simply as providing an anti-discrimination guarantee, not a liberty right. Courts could only address laws that discriminated against religious activities; laws that were generally applicable to all citizens ought not to be subject to Free Exercise Clause analysis. Legislators were to make laws that were religion-blind. Statutes containing religious exemptions were unacceptable from the Establishment Clause perspective, because they “necessarily ‘send a message’ that exercises of religion are approved.”

Moreover, he believed it was necessary to reject the Sherbert regime of substantive neutrality, because courts could not administer the test in a consistent, unbiased, manner. The case law was rife with covert, or inadvertent, manipulations of the balancing test that resulted in unacceptable distinctions between religious believers, and the non-religious. This doctrinal solution, first offered by Kurland in the 1960s, would free judges to make decisions untainted by these problems and thereby restore predictability to the jurisprudence.

2.3.2 Formal neutrality

Proponents of formal neutrality, most prominently West and Marshall, considered that the courts should not be empowered to craft exemptions from general laws. This was because the Free Exercise Clause, properly interpreted, contained only a guarantee of equality, which prevented the direct targeting of religious believers. The verb “prohibiting” was plausibly read

311 Analysis under the Equal Protection Clause did not consider indirect burdens on racial groups to trigger strict scrutiny. Only laws and practices that intentionally discriminated attracted that level of enquiry; hence, the high success rate of complaints in that area of law once strict scrutiny was invoked. See text above, n 276.
312 See McConnell “Free Exercise Revisionism”, above n 20, 1110 (emphasis added), where he acknowledged that, “at the Supreme Court level, the free exercise compelling interest test was a Potemkin doctrine”, despite “some very powerful claims”. The use of the word “some” implicitly conceded that there existed claims before the Court that were less meritorious than others, despite the Sherbert test’s theoretical invocation of the compelling interest test in all cases.
313 “Strict” and “formal” neutrality are often used interchangeably in the literature. In this thesis, I distinguish the terms to aid analysis, with the former banning both court and legislative exemptions, and the latter only prohibiting court-ordered exemptions.
315 It might be added that Tushnet appeared puzzlingly faint-hearted at times: “The difficulty is that it is hard to see why a legislature cannot be nice to believers at least to the extent of exempting them from severe burdens.” Tushnet “Constitution of Religion”, above n 177, 630.
this way. To interpret it in a manner that favoured religious believers, as the courts had done in the Sherbert era, discriminated against non-believers and therefore offended other constitutional values, such as the Establishment Clause. Arguments that religious believers and groups should be favoured based on theories of religious autonomy and the like were unavailing, because in the more secular modern era, non-religious believers, who did not come within the definitional ambit of the Free Exercise Clause, had equally important life projects to pursue. Moreover, like Tushnet, opponents of court-ordered exemptions considered that the balancing test had been administered in an unacceptably ad hoc manner, favouring some religious believers over others. It was better to pass the responsibility of granting exemptions to the legislative branch. Legislatures could grant exemptions as a matter of “practicality and expediency”, free of the need to observe “doctrinal symmetry”, as was required in the court setting. As the case law demonstrated, the courts had failed to achieve a tolerable level of doctrinal symmetry in the Sherbert era.

2.3.3 The status quo: substantive neutrality

As might be expected, substantive neutrality theorists opposed the new direction in analysis and the diagnosis of those espousing theories of formal and strict neutrality. McConnell contended that, just because the Sherbert test was difficult to administer and had indisputably resulted in arbitrariness, thanks to the way judicial balancing had been carried out, this did not mean it should be rejected. As a textual matter, to say that “prohibiting” “free exercise” only protected against discrimination ignored the basic fact that even general laws clearly prohibited religionists from acting on their beliefs. Douglas Laycock supported McConnell’s view, adding that the clause protected religious autonomy, helped maintain social harmony, and protected religious groups from direct state control. Claims by scholars such as West and Marshall that non-religious believers had the same needs in this regard as religionists were rendered moot by more permissive recent decisions of the Court as to the threshold requirements of religiosity. Hence, these scholars argued for the status quo, although they suggested certain adjustments in approach by the judiciary to address the undisputed confusion surrounding the maintenance of the doctrine in the courts.

It was McConnell’s and Laycock’s view that the Sherbert test should be focused on a categorical analysis of the asserted religious conduct, one which took into account the social significance of these actions. Where allowing an accommodation for a religious practice would have the effect of burdening non-exempted persons unduly, or of providing incentives for the non-exempted to feign the religious belief in question, then a religious exemption might not be required. However, when no significant costs or inducements were imposed on non-believers, then a genuine compelling interest test should be applied, asking whether the

317 McConnell “Free Exercise Revisionism” above n 20, 1144.
318 See ibid, 1144-4952; McConnell “Accommodation of Religion”, above n 102, 34-41; Laycock “Remnants”, above n 164, 33. It should be noted that some of these articles were published in the wake of Smith, as part of the authors’ campaign to reinstitute the Sherbert test after its demise in that case.
320 As has been explained (see text accompanying ns 29-31 in Chapter 1), exemptions of this sort had the unacceptable effect of influencing people’s choices to adopt a religion, thus contravening the principles of substantive neutrality.
burdened activity actually threatened the “peace and safety” of the state.\footnote{McConnell “Free Exercise Revisionism” above n 20, 1128; see also Pepper “Conundrum”, above n 14, 289, where the writer similarly suggests a realistic assessment of the governmental interest: “[I]s there a real, tangible (palpable, concrete, measurable), non-speculative, nontrivial injury to a legitimate, substantial state interest.”} If it did not, then asserted state interests ought to be treated with great scepticism, in contrast to the tendency of the Court to inflate the governmental interest at stake, or to seek refuge in artificial constructs such as the no burden analysis in \textit{Lyng}, towards the end of the \textit{Sherbert} era. To illustrate, McConnell argued that the Amish exemption in \textit{Lee} should have been granted, because it caused no injury to those not belonging to the religion and provided no incentive for others to join the religion.\footnote{Ibid 1145. For similar reasons, Kent Greenawalt also takes the view that it was unnecessary to dismantle the \textit{Sherbert}-era formula and expresses doubts that the “administrative problems” asserted by the \textit{Smith} Court were as overwhelming as Scalia J claimed. See Greenawalt \textit{Free Exercise and Fairness}, above n 14, 82.} Conversely, were it not for the discriminatory element in \textit{Hernandez}, McConnell explained that an exemption for the Scientologists would not have been required in that case, because granting them a tax deduction would leave them “better off, relative to non-believers”\footnote{For analysis of \textit{Lyng}, including Brennan J’s dissent, see text above accompanying ns 201-221.}. This would go against the principle that exemptions ought not to burden non-believers, or to induce non-believers to feign religious belief in order to gain the exemption. In this way, argued McConnell, most of the “free-wheeling” balancing of incommensurable values that had plagued free exercise jurisprudence would not take place at all, “because all the relevant factors are ones of kind rather than of degree”.\footnote{See McConnell “Accommodation of Religion”, above n 102, 39; and Douglas Laycock “Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause” (2006) 81 Notre Dame L Rev 1793, 1838-1839. This has consistently been the position of the Court; see \textit{Texas Monthly v Bullock} 489 US 1, 11 (1989).}

This view differed from others within the substantive neutrality fold, such as Brennan J, who in his dissent in \textit{Lyng} argued that strict scrutiny should be applied whenever a law burdened a \textit{central} religious practice.\footnote{West “Case Against Exemptions”, above n 43, 634-636.} Brennan J’s formula ignored the social significance of any given exemptions, except perhaps to factor it in when assessing the governmental interest. The approach of McConnell and Laycock, who understood well the impossibility of a court gainsaying a religious believer’s assertion that her religious practice was “central”, offered a more nuanced framing of the religious issue at stake. Similarly, McConnell and others sharing his views supported the continuation of legislated exemptions, arguing that they should be written broadly, encompassing both religious and non-religious believers where appropriate,\footnote{Laycock “Remnants”, above n 164, 15; see also McConnell “Free Exercise Revisionism” above n 20, 1136; Pepper “Taking Free Exercise Seriously”, above n 80, 312-316.} as was also the position of formal neutrality advocate, Ellis West.\footnote{\textit{Hernandez} is discussed in the text above, accompanying ns 239-240.} Indeed, in a sense, the real dispute between the formal neutrality and substantive neutrality scholars was who should decide when an accommodation was necessary: legislatures and/or courts? In Laycock’s view, legislators could be trusted to accommodate mainstream religious believers but not non-mainstream religionists, who had little political power. Allowing “discrete and insular minorities” a day in court thus equalised their chances alongside majority religionists in a meaningful, or substantively neutral, way.\footnote{McConnell “Free Exercise Revisionism”, above n 20, 1147.}

Other supporters of substantive neutrality proposed that a lesser burden be placed on government, which would be more in line with the reality of the later period in the \textit{Sherbert}
Robert Kamenshine suggested that an intermediate standard of review should be applied to cases where general laws conflicted with religious conduct, with strict scrutiny being employed only when discrimination was present, as in fact had arguably occurred in *Sherbert* itself. Kamenshine noted that the lesser standard which was unsuccessfully introduced by a plurality of the *Roy* Court to analyse a generally applicable law that arguably burdened an Indian religious belief resembled a similar formula in free speech cases concerning laws that had an indirect burden on speech-related conduct. In *United States v O'Brien*, a protester who had burned his draft card in front of a crowd to communicate his opposition to the Vietnam War was prosecuted under a law prohibiting the knowing destruction of draft cards. In upholding his conviction, the Supreme Court stated the following standard:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Kamenshine opined that this formula more accurately reflected the standard actually imposed by the Court in many of its free exercise cases. Its adoption, he continued, would also have the benefit of aligning the review standards of free exercise cases with similar free expression cases concerning non-verbal speech, and thus remove a puzzling inconsistency between judicial enforcement of the two rights.

In 1989, therefore, when the Court heard argument on *Smith*, many interpretive avenues lay open to it. *Smith* was an ideal vehicle for a full restatement of Free Exercise Clause law, as it presented a claim separate from the unemployment insurance, tax, “internal government jurisprudence.”

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331 The *Roy* plurality framed the standard thus: The *Roy* plurality cast the standard of review for cases such as this in this way: “Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.” *Roy*, above n 169, 707-708 (per Burger CJ). Recall that a majority of the Court in *Hobbie* had subsequently rejected the standard enunciated in *Roy*. See text above accompanying ns 271-273.


333 Ibid. See, eg, *Jimmy Swaggart Ministries v Bd of Equalization of California* 493 US 378 (1990) (“Swaggart”), a free exercise case with freedom of speech implications. In *Swaggart*, the Court rejected a free exercise challenge to a sales tax regulation by a group that did not wish to pay taxes related to its distribution of religious literature. On the way to rejecting the challenge, the Court avoided the strict scrutiny enquiry by holding that there was no burden on the religious activities of the group and that there was “no evidence in this case that collection and payment of the tax violates appellant’s sincere religious beliefs”. Ibid 391. Cases like these would be simpler for the courts to deal with if the intermediate standard in *O'Brien* were applied, as it would allow the courts to avoid making value judgments on the content of religious groups’ beliefs, in order to avoid the strict scrutiny enquiry, as arguably occurred in *Swaggart*.

334 In my summary, I have not included all scholarly prescriptions for the *Sherbert* problem, due to the huge variety on offer. For discussion of the varying solutions provided in the academy, see, generally, McConnell “Response to the Critics”, above n 103.
activities”, and prison and military cases that it had consented to hear in the previous decades, and which had created a jurisprudence that pointed in different directions that were prone to different interpretations by the judges and lawyers who struggled to make sense of it.

What nobody expected was that the opinion authored by Scalia J would amount not just to a refinement of one area of the law (a generally applicable criminal prohibition that had the effect of banning a central religious rite), but rather would wreak the complete destruction of the Sherbert test. We now move on to consideration of this landmark case.

3. The Smith decision

The Smith litigation, it will be recalled, concerned a claim for unemployment insurance by two drug counsellors who had been fired from their jobs for taking part in religious ceremonies of the Native American Church, at which they had consumed the criminally proscribed drug peyote. In court, the state of Oregon contended that the need to prevent the use of dangerous drugs was a compelling reason to criminalise peyote, and this also justified the state’s decision not to grant the two men unemployment insurance. In a 6 to 3 decision, the Court held that the two men had no right under the Free Exercise Clause to consume the drug under any circumstances, even in a central religious ritual of their faith, and the two men lost their case.

Four of the nine Justices on the Court considered the merits of Oregon’s claim that the prohibition on peyote use was justified, although there was a 3 to 1 split on this issue. Justice O’Connor, who concurred in the eventual result in the case, found that the state had established a compelling reason for banning the drug in all instances. O’Connor J began her opinion by holding that the law burdened the religious claimants’ beliefs, stating that a general criminal law outlawing conduct was clearly “more burdensome” – as it attracted a criminal penalty and effected an outright prohibition of the conduct in question – than the neutral civil statutes that were at issue in cases such as Roy, Lee and Frazee.

However, in the remainder of her opinion she employed the state-friendly calculation of the governmental interest that virtually determined the result in Lee.

In O’Connor J’s view, to exempt even “one person” from the prohibition on peyote would endanger the state’s generalised goals of preventing physical harm to its citizens and of halting the traffic of illegal substances. Uniform application of the ban was, she considered, “essential” to the state’s asserted interests. The fact that peyote use was a core ritual of the Native American faith was, in her view, irrelevant. Previous holdings of the Court had found that it was not within the “judicial ken” to make assessments of this sort, as they would involve judges in constitutionally impermissible, and practically impossible, determinations on religious matters.

Accordingly, she held that the state had satisfied the compelling interest component of the Sherbert test.

338 The Smith decision is widely recounted in the literature. For good descriptive accounts, see, eg, Kenneth Marin “Note: Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise” (1991) 40 Am UL Rev 1431 (in which the author strongly criticises the decision); and Ernest P Fronzuto III “Comment: An Endorsement for the Test of General Applicability: Smith II, Justice Scalia, and the Conflict between Neutral Laws and the Free Exercise of Religion” (1996) 6 Seton Hall Const LJ 713 (where the author praises the decision).

339 Smith, above n 3, 898-899 (per O’Connor J, concurring)

340 Ibid 905, quoting Lee, above n 60, 259: “[T]he critical question in this case is whether exempting respondents from the State’s general criminal prohibition ‘will unduly interfere with fulfillment of the governmental interest.””

341 Ibid 905.

342 Ibid 906; quoting Hernandez, above n 239, 699.

343 Ibid 906-907.

344 Ibid 907.
Justice Blackmun, who wrote for the dissent in *Smith*, formulated the governmental interest differently, and employed a religion-friendly methodology that was very similar to that used by Burger CJ in *Yoder*. He explained that it was “not the State’s broad interest in fighting the critical ‘war on drugs’ that must be weighed against respondents’ claim, but the State’s narrow interest in refusing to make an exception for the religious, ceremonial use of peyote”. He noted that many states, as well as the federal government, actually had statutory exemptions for religious peyote use, which undercut the state of Oregon’s assertion that controlling the substance was an extremely high priority. The state, in any event, had virtually never attempted to enforce the criminal prohibition on peyote. Furthermore, the Native American Church tightly controlled the use of the drug, only permitting its consumption at special ritualised events. In fact, there was evidence that the ceremonial use of peyote in these circumstances was conducive to ridding the Native American population of the dangerous effects of other drugs, such as alcohol, the use of which was strongly discouraged by the Church. In any case, continued Blackmun J, the drug was extremely bitter when ingested, often inducing vomiting, which suggested it was not likely to become a major player in the illegal drugs industry, or to attract non-religious, recreational drug users. When weighed against the “severe impact” of the law on a vital religious ritual of the Native American religion, it could not be said that the state’s asserted interest in preventing the use of the drug in this specific context was at all compelling. Accordingly, he declared that the law violated the Free Exercise Clause.

Instead of addressing the issue of whether the state of Oregon had a compelling interest in banning peyote, Scalia J instead dramatically narrowed the doctrinal foundation for adjudicating Free Exercise Clause cases. Writing for the majority, he held that the Free Exercise Clause provided no actionable claim for a person objecting to a “valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes)” since the criminal law banning possession of peyote was a religion-blind, across-the-board prohibition, the two drug counsellors’ constitutional complaint fell outside this categorical enquiry, and therefore it was not necessary to consider whether the state had a strong reason for banning the religious use of peyote. The *Smith* Court declared therefore that it would only apply strict scrutiny in circumstances where there was an identifiable breach of equal treatment towards religious believers. Hence, if the Oregon law on its face had prohibited the “use of peyote in religious rituals”, or had allowed its use in other contexts, this would have been unacceptable under the new doctrine: laws that banned a religious activity purely because of its religious motivation would infringe the free exercise guarantee. Laws that banned the same conduct for everyone, regardless of their motivation,

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345 Ibid 909-910 (per Blackmun J, dissenting); citing, among other cases, *Yoder*, above n 19, 221.
346 Ibid.
347 Ibid 913. Blackmun J lists 23 states that had statutory or “judicially crafted” exemptions for religious use of peyote.
348 Ibid 911.
349 Ibid 911.
350 Ibid 914-916.
351 Ibid 913-914, & 916.
352 Ibid 919.
353 Ibid 879; quoting and approving the concurring judgment of Stevens J in *Lee*, above n 60, 263, n 3 (per Stevens J, concurring).
354 See *Smith*, above n 3, 877-878: “It would be true, we think (though no case of ours has involved the point), that 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. It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that are to be used for worship purposes,’ or to prohibit bowing down before a golden calf.”
including religious motivation, would not. The two men accordingly lost their case, and as a result were unable to collect unemployment insurance, having legitimately been dismissed for misconduct related to their work.

At the start of this chapter, I asked two questions regarding the outcome in Smith. The first of these was: how, in light of the indisputable presence in the Sherbert-era jurisprudence of holdings to the effect that incidental burdens on religious conduct were to be adjudged under the compelling interest standard, did Scalia J manage to avoid applying this standard in Smith? And, second: on what normative basis, if any, did Scalia J decide that the Free Exercise Clause ought not to be read in this way? In our discussion we focused on two tensions regarding this issue that were intensely debated in the literature. The first regarded the substantive meaning of the Free Exercise Clause, and involved arguments by those advocating an equality reading of the clause. Those maintaining this view argued, in effect, that Sherbert and Yoder were wrongly decided, because these holdings unfairly privileged religious believers over non-religious persons engaging in similar activities. The second concern was that, even if the clause could plausibly be read as creating a special liberty right for religionists, the balancing analysis was impossible for the courts to administer, because it was inherently prone to manipulation and judicial favouritism in favour of mainstream religious believers. Those supporting the substantive protection reading claimed that the concern over the balancing test was overstated, whereas those espousing formal neutrality readings of the Free Exercise Clause argued that this reason strongly supported their preferred construal of the text.

Justice Scalia gave two reasons for his decision. He explained, controversially, that the Court’s preferred interpretation of the Free Exercise Clause in Smith was justified as a matter of precedent, and also because it addressed concerns relating to judicial restraint in enforcing the provision. We shall consider first his arguments regarding the Court’s prior decisions.

As an opening gambit, the Court maintained that the “vast” majority of its decisions, extending back to the 19th century case of Reynolds, had extended no protection to free exercise claims against general laws. Concerning the inconvenient existence of precedents such as Sherbert and Yoder, Scalia J resorted to ingenious distinctions of these cases that in effect revived the older precedents of Reynolds and Gobitis, both of which had applied formally neutral readings of the Free Exercise Clause to the cases at bar, thereby finding against religious claimants who had challenged general laws. The Smith Court distinguished Yoder on the grounds that it was a “pure” free exercise case. Rather, it involved a “hybrid” claim: that is, a free exercise right combined with another constitutional claim, which, in Yoder, was the “right of parents…to direct the educational upbringing of their children.” Similarly, the awkward decision of Barnette, the flag salute case in which the Court had upheld the right of Jehovah’s

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355 Ibid 885. More dubiously, the Court argued that in recent cases it had employed the compelling interest test merely to “analyze” the free exercise claims, and that in any case it had found against the claimants. Ibid 884-885. O’Connor J excoriated this reading of the precedents, which clearly employed the Sherbert-Yoder standard: “That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.” Ibid 896-897 (per O’Connor J, concurring). See also Blackmun J’s dissent, at ibid 908, in which he endorses O’Connor J’s criticism of the majority’s “mischaracterizing” of the Court’s precedents.

356 Ibid 881. This “parental right” right had been recognised in Pierce v Society of Sisters 268 US 510 (1925); cited in Smith, above n 3, 881. In Pierce, the Court had located the “substantive” liberty of parents in the Due Process Clause of the Bill of Rights to direct the educational upbringing of their children, and therefore had struck down a law requiring attendance at public rather than private schools. See Nowak & Rotunda Constitutional Law, above n 61, 916.
Witness children to abstain from patriotic exercises at school, and which had expressly overruled the 1941 case of *Gobitis*, was distinguished because it was a “hybrid” of free exercise and free speech rights. The children in *Barnette* had succeeded, in Scalia J’s view, not only because their free exercise rights had been infringed, but also because the school decision to make them salute the US flag and recite the pledge of allegiance contravened the Court’s prohibition on “compelled expression”. In effect, *Barnette* was henceforth properly to be construed as a free expression case with religious overtones, and its precedential value for claims based solely on the Free Exercise Clause was virtually nullified. Because of these distinctions, Scalia J argued that, since the constitutional complaint in *Smith* only involved a free exercise claim on its own, the prior decisions in *Gobitis* and *Reynolds*, which also dealt with “pure” free exercise claims, were controlling.

With respect to the crucial *Sherbert* precedent, which after all had appeared to usher in the era of court-granted exemptions from general laws, Scalia J contended that this case did not in fact involve a general law as such. Rather, borrowing from the analysis of the Roy plurality, he argued that the statutorily mandated standard of “good cause” for refusing available work that was examined in *Sherbert* “lent itself to individualized governmental assessments of the reasons for the relevant conduct”. Since this standard required government officials to make enquiries into the reasons for persons wishing to gain unemployment insurance after refusing offered work, and since in some cases persons might be excused from the obligation to accept work for non-religious “personal reasons”, government officials could not then “refuse to extend that system to cases of ‘religious hardship’ without compelling reason”. In this way, *Sherbert* was recast as a decision concerning religious discrimination, and the use of the compelling interest test was therefore justified in that case, and in the line of unemployment insurance cases that closely followed it, purely because of the potential for discrimination inherent in the statutory schemes under review.

The soundness of the majority’s approach to the Court’s own precedents was strongly criticised by the minority. Regarding the “hybrid” rights finding, O’Connor J, who categorically rejected the Court’s restatement of free exercise doctrine, recited the express words of Burger CJ in *Yoder*, in which he declared that: “[T]here are areas of conduct protected by the Free exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.” Accordingly, she stated with some justification that there was “no denying” that *Yoder*, and many other cases, “expressly relied on the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.” Accordingly, she stated with some justification that there was “no denying” that *Yoder*, and many other cases, “expressly relied on the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.”

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357 Ibid 882.
358 It should be noted that, although the *Gobitis* Court had erroneously not taken into account the free expression concerns of the claimants in that case (as was established in *Barnette*, which overturned *Gobitis* largely on these grounds), Scalia J considered that its statement of the rule for determining “pure” free exercise claims, which Frankfurter J derived from *Reynolds*, was correct.
359 Scalia J cites *Roy* for this proposition at ibid 883-884. See discussion of *Roy* in text above accompanying ns 203-208.
360 Ibid 884.
361 Ibid. McConnell criticises this distinction on its merits, pointing out that in many cases government administers legislation involving systems of “individualized assessments”, such as decisions to build roads (considered in *Lyng*), and decisions on whether to allow prisoners to be excused for work duties (considered in *O’Lone*). Hence, this distinction of *Sherbert* was not, in McConnell’s view, coherent. McConnell “Free Exercise Revisionism”, above n 20, 1123-1124. See also Laycock “Remnants”, above n 164, 148.
362 The dissenting Justices in *Smith* fully supported O’Connor J’s attack on the majority’s rejection of the *Sherbert* doctrine. See ibid 907-909 (per Blackmun J, dissenting).
363 Ibid 896 (emphasis in original); quoting *Yoder*, above n 19, 234 (per Burger CJ).
Exercise Clause” and could not plausibly be regarded as “hybrid” cases.\(^{364}\) O’Connor J also questioned the majority’s distinction of Sherbert, which had unequivocally been relied on in a long line of subsequent free exercise decisions where the compelling interest test was employed to scrutinise generally applicable laws that impacted indirectly on religious conduct.\(^{365}\) Indeed, looking more closely at Sherbert itself, the majority’s re-characterisation of that case as a discrimination matter was doubly questionable, as it seemed to contradict Brennan J’s clear position in Sherbert, where he stated that the presence of discriminatory factors in the relevant legislation merely “compounded” the “unconstitutionality” of the disqualification of Adell Sherbert from unemployment insurance.\(^{366}\)

Despite compelling protestations to the contrary,\(^{367}\) however, a five-Justice majority of the Court agreed with Scalia J’s “refinement” of the Sherbert-Yoder-era precedents, and declared that: “We have never held that an individual’s beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”\(^{368}\) And so, the long-dormant decisions of Reynolds and Gobitis were restored to primacy in Free Exercise Clause doctrine after the 27-year experiment in court-ordered exemptions that Sherbert had “purported”\(^{369}\) to initiate in 1963.

Having stripped away the seemingly contrary body of precedent, Scalia J went on to find that the facts in Smith did not disclose discrimination in the criminal prohibition of peyote,\(^{370}\) and

\(^{364}\) Ibid 896. In the academy, the criticism of the “hybrid” doctrine was especially forthright. McConnell pointed out that the Yoder Court had expressly stated that parents did not have a right, independent of the Free Exercise Clause, to “violate the compulsory education laws for nonreligious reasons”, thus making it nonsensical for Scalia J to claim that a combination of the two rights won the day in Yoder. McConnell “Free Exercise Revisionism”, above n 20, 1121; citing Yoder, above n 19, 215-216. See also Nussbaum Liberty of Conscience, above n 30, 154. Regarding the hybrid category generally, see Berg State and Religion, above n 106, 110-111, in which the author explains the perplexing nature of the hybrid doctrine: “If the other constitutional right (speech, association, property) is valid on its own, it is unclear what the free exercise interest adds; but if the other is not valid, it is unclear why two invalid constitutional claims should add up to a valid one.” See also Souter J’s comments on the hybrid doctrine in v City of Hialeah 508 US 520, 566-567 (1993) (per Souter J, concurring). Some commentators have suggested that the hybrid doctrine was invented opportunistically in order to avoid overruling Yoder; McConnell “Free Exercise Revisionism”, above n 20, 1121-1122.

\(^{365}\) Ibid 894-895; citing, among other cases, Yoder, Thomas, Hobbie, Roy, Lee and Hernandez.

\(^{366}\) Sherbert, above n 6, 406 (per Brennan J). See also the dissenting opinion of Harlan J, who had no doubt that the Sherbert decision created a new regime of substantive protection for religious conduct under the Free Exercise Clause. He regarded (disapprovingly) the Sherbert decision as requiring the state to be involved in the “singling out of religious conduct for special treatment”, which could be applied beyond the “apparently narrow dimensions” of the case. Ibid 422 (Harlan J, dissenting).

\(^{367}\) The scholarly reaction to Scalia J’s use of precedent in Smith was extraordinarily hostile. Laycock described the Court’s analysis as “transparently dishonest”; Laycock “Remnants”, above n 164, 3. See also McConnell “Free Exercise Revisionism”, above n 20, 1120 (“troubling, bordering on the shocking”); and see Souter J’s observation on Smith, in Lukumi v City of Hialeah 508 US 520, 571 (1993) (per Souter J, concurring), in which he says the majority’s reasoning did not produce “a comfortable fit with settled law”. Even scholars supportive of Smith’s restatement on doctrine did not approve of its use of precedent, preferring by implication that the Court had simply overruled Yoder. See Marshall “In Defense of Smith”, above n 43, 308-309.

\(^{368}\) Smith, above n 3, 878-879.

\(^{369}\) In an extraordinary passage, Scalia J acknowledged that the Court had “purported” to apply the Sherbert test but that it had in any case found against the claimant in most cases: “Although we have sometimes purported to apply the Sherbert test…, we have always found the test satisfied, see United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971).” Ibid 883. Scalia J went on to explain that the test was a mere analytical tool, implying that the “real” test being applied was the formal neutrality rule that pre-existed the Sherbert era. Ibid 884.

\(^{370}\) Ibid 874.
he also found that there was no plausible “hybrid” case to be made. These findings meant that strict scrutiny analysis was inapposite to the case at bar. Thus, the correct doctrinal formula to be applied was that of the Court’s holdings in Reynolds and Gobitis, in which only rational basis review of the generally applicable laws under examination was applied, and the claimants in Smith therefore lost their case.

Although the Court’s patently dubious process of distinguishing its own precedents is intrinsically interesting and contributed a great deal to the decision, the real interest in the case for comparative scholarship purposes lies in Scalia J’s substantive reasons for his restrictive reading of the Free Exercise Clause.

Importantly, Scalia J did not rest his argument on any definitive reading of the text of the clause. In this respect, he made the circumspect claim that the new doctrine in Smith, which was that neutral and generally applicable laws did not “prohibit” religious free exercise, was merely a “permissible” reading of the phrase, “prohibiting the free exercise of [religion]”. Relatedly, the Court made no explicit appeal to history to justify its holding. If it had, it might have considered an important school of thought in the founding era supporting Smith. Most closely associated with the Enlightenment views of the Englishman John Locke, and transmitted to the American debate by Thomas Jefferson, an important member of the founding generation who advocated for religious freedom in the colony of Virginia, this school considered the “inalienable” right to religious freedom to be subordinate to the laws of the state in all cases. Accordingly, in his famous Letter to the Danbury Baptists, Jefferson had declared that: “Man…has no natural right in opposition to his social duties”, and that the “legislative powers of government” were free to regulate religiously motivated actions. Jefferson’s formulation appeared to support the holding in Smith, and indeed had been quoted in Reynolds as support for the basic rule that Scalia J brought back to life in 1990.

371 Ibid 882. But see McConnell “Free Exercise Revisionism”, above n 20, 1122, in which the author argues that the peyote ritual could be conceived as implicating a “colorable” free speech claim, as it communicated a religious belief, and hence ought to have satisfied the hybrid rights requirement. See also Souter J in Lakami v City of Hialeah 508 US 520, 567 (1993), in which he suggests, also with respect to the hybrid argument, that “free speech and associational rights are certainly implicated in the peyote ritual”.

372 Smith, above n 3, 878.

373 See discussion of Scalia J’s textual analysis in Greenawalt Free Exercise and Fairness, above n 14, 78, where the writer expresses surprise that the “radical departure” from prior doctrine in Smith was not supported by more decisive textual arguments. See also McConnell “Free Exercise Revisionism”, above n 20, 1114-1116, where the author notes that the Court did not “deny that the broader reading, which would require exemptions, is likewise a ‘permissible’ reading” of the clause. Ibid 1115.

374 It should be mentioned that this was virtually made inevitable by the fact that the parties in Smith, who were unaware that the Court intended to dispose of the Sherbert doctrine, accordingly made no historical arguments regarding the original meaning of the Free Exercise Clause. See Douglas Laycock “The Supreme Court’s Assault on Free Exercise, and the Amicus Brief that was Never Filed” (1990) 8 JL & Religion 99 (“Laycock ‘Amicus Brief’”), 102, noting the lack of historical argument at the Smith hearing.

375 Recall from our discussion in Chapter 1, that Locke considered laws which had been made for non-religious purposes and which applied to everyone, but which had the effect of banning religious practices, did not, technically, “prohibit” them. Hence, a law that banned the killing of cattle in order to build up cattle numbers did not “prohibit” the activity of those who wished to engage in ritual slaughter of cows. “[I]t is to be observed, that in this case the law is not made about a religious, but a political matter: nor is the sacrifice, but the slaughter of calves thereby prohibited.” John Locke A Letter Concerning Toleration (1689), reprinted in J Horton & S Mendus (eds) John Locke: A Letter Concerning Toleration in Focus (Routledge, New York, 1991) (“John Locke A Letter Concerning Toleration”) 37.

376 Jefferson “Letter to Danbury Baptists”, 1802, above n 89.

377 Reynolds, above n 8, 164.
Alternatively, the Court might have been persuaded by different views from the same time, commonly held by dissenting evangelical Christian leaders and, arguably, championed by James Madison, who played a key role in drafting the Bill of Rights. This view held, in the words of Madison, that it was the “duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him”; and that this duty was “precedent both in order of time and degree of obligation, to the claims of Civil Society”. Consequently, continued Madison, “in matters of Religion, no man’s right ought to be ‘abridged by the institution of Civil Society’.” In his influential academic article, “The Origins and Historical Understanding of Free Exercise of Religion”, which was published in 1990 just after the Smith decision, McConnell quoted the words of Madison above as plausible evidence of the founders’ true understanding of the meaning of the Free Exercise Clause at the time of its enactment. McConnell argued that the views of Madison, when placed alongside the statements of other historical figures and documents, suggested that the Free Exercise Clause may have been intended to provide a substantive liberty right that was not necessarily subservient to the conflicting laws of “Civil Society”. This formulation bore some resemblance to the doctrine applied by the courts in the Sherbert era. Unfortunately for McConnell, however, this article was published too late to assist the Smith Court, and so the decision was based on other grounds. We shall now consider these.

The overwhelming theme of Scalia J’s opinion was that courts should not be involved in the business of determining when “religious claims of varying strength should triumph over state interests of variant strength.” This concern was independent of any consideration of the actual text or history of the Free Exercise Clause. Because of the lack of any definitive statements on these matters, the opinion can thus be characterised as primarily a statement in favour of judicial restraint, or of deference to the choices made by democratic institutions and administrators acting under authority delegated by these institutions. For Scalia J, the compelling interest test mandated by Sherbert, if applied literally, would involve the courts in the unacceptable task of striking down many democratically created laws. In a country as religiously diverse as the US, and where the state was heavily involved in regulating social interaction, he continued, this would be “courting anarchy”, as it would effectively “permit[] every citizen to become a law unto himself”. To illustrate, he provided a list, or “parade of horribles”, of religiously motivated conduct which might have been allowed if the compelling interest test had been enforced literally, including “civic obligations” embodied in laws regarding animal cruelty, drug use, environmental protection, compulsory vaccination, and even traffic.

Nor did Scalia J consider that the more nuanced proportionality analysis favoured by the minority on the Smith Court would mitigate the unacceptable spectacle of the courts

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378 Madison “Memorial and Remonstrance”, 1785, above n 112. Like Jefferson’s Letter, Madison’s Memorial was a vital document in Religion Clause history, and is reproduced in full in the Supreme Court’s first modern treatment of the Establishment Clause in 1947, in Everson, above n 63, 69 (appendix).
380 I shall consider McConnell’s historical scholarship (and the writings of judges and scholars opposing it) more closely in section 2.2.2 in Chapter 3, and compare this with the New Zealand tradition in religious freedom.
381 Greenawalt Free Exercise and Fairness, above n 14, 78 (describing this concern as the “heart” of Scalia J’s opinion). See also Berg State and Religion, above n 106, 112 (“The most important argument”); and McConnell “Free Exercise Revisionism”, above n 20, 1141 (“A major theme”).
382 Smith, above n 3, 888: “If the ‘compelling interest’ test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded.”
383 Ibid.
384 Ibid 879; quoting Reynolds, above n 8, 167.
385 For the list, including related case law in which such claims were in fact rejected, see ibid 889.
determining these issues. Rather, he considered that the balancing test employed by the minority to analyse the claim before it, which required the courts to “weigh the social importance of all laws against the centrality of all religious beliefs,” was impossible to administer and led to unpredictable results, which in itself offended rule of law principles. In this respect, Scalia J’s argument mirrored many of the concerns identified in this chapter regarding the vagaries of the Sherbert-era jurisprudence.

Justice Scalia pilloried the various attempts of the minority to assess the importance of the religious belief in the case as a precursor to balancing this interest against the asserted governmental interests. Scalia J noted O’Connor J’s claim that the constitutionality of Oregon’s ban of peyote could not turn on the “centrality” of the conduct within the claimants’ belief system. In this respect, O’Connor was following well-established Court precedents that forbade enquiries of this sort, because, as we have seen, they involved the courts in making assessments of religious matters, which they were not qualified to do and which potentially could raise Establishment Clause concerns if the courts granted solicitude to some religious beliefs but not others. Scalia J pointed out, however, that O’Connor J then proceeded to do just that by finding that the criminal prohibition at issue placed a “severe burden” on a “sacrament of the Native American Church” which was “regarded as vital to respondents’ ability to practice their religion”. For O’Connor J to eschew an assessment of the “centrality” of the peyote ritual, but then to engage in exactly that enquiry by means of an assessment of “burden”, was logically inconsistent. As Scalia put it: the minority judges had “merely substituted for the question ‘How important is X to the religious adherent?’ the question ‘How great will be the harm to the religious adherent if X is taken away?’ There is no material difference.”

In any case, Scalia J observed that the only way to mount a defensible proportionality analysis in free exercise cases was in fact to assess the centrality of the religious beliefs at stake. If this were not done, then courts would be required to apply “compelling-interest scrutiny” to “generally applicable laws that regulate or prohibit any religiously motivated activity, no matter how unimportant to the claimant’s religion”. As a hypothetical example of how this would work, Scalia J explained that the balancing test employed by the minority – if it did not first engage in a (constitutionally impermissible) enquiry into the centrality of the religious beliefs at stake – would require the same “compelling interest” test to be applied to a law that indirectly impeded the “throwing of rice at church weddings” to a law impeding the “practice of getting married in church”. Hence, the minority Justices were in a double bind. The

386 Ibid 890.
387 Walker explains well the rule of law requirement that law must be certain and not prone to manipulation by those in power, including judges. “Citizens cannot orient their conduct by law if what is called law is simply a series of patternless exercises of state power.” Walker Rule of Law, above n 44, 42.
388 See text above, section 2.2.
389 Smith, above n 3, 906-907 (per O’Connor J, concurring).
390 Scalia J lists the relevant precedents at ibid 886-887, including Lee, above n 60, 263 at n 2 (per Stevens J, concurring), in which Stevens J explains that assessing the centrality of different religious activities was akin to the impermissible “business of evaluating the relative merits of differing religious claims”.
391 Ibid 903-904 (per O’Connor J, concurring).
392 Ibid 887 n 4.
393 Ibid 887.
394 Ibid (emphasis in original).
395 Ibid.
Court’s precedents on the one hand prevented an enquiry into centrality (or its near cousin, “severe burden”\textsuperscript{396}) for excellent reasons, which O’Connor J fully appreciated. (And as we have seen, the case law was littered with unprincipled judicial assertions that religious claimants’ beliefs were not sufficiently “central”, or “significantly burdened”, to merit serious free exercise analysis\textsuperscript{397}). However, at the same time it was absolutely essential to make enquiries into burden/centrality in order to avoid unpalatable conclusions when applying strict scrutiny.

Justice Scalia then went on to consider whether the centrality problem could be lessened by lowering the standard imposed on government to justify laws that indirectly burdened religious conduct to some intermediate level of scrutiny, as some had argued in the academy, and indeed the Court itself had arguably done in a de facto manner since the \textit{Lee} decision in 1982. The majority showed no interest in this solution, however, declining to “water down” the compelling interest standard.\textsuperscript{398} Although the opinion did not explain this comment further, it must have been apparent that, even under a standard of review less rigorous than strict scrutiny, it still would have been necessary to weigh the centrality of the religious beliefs in question.

For the reasons explained above, Scalia J found that the method employed by the minority in \textit{Smith} was completely unworkable. The return to the restrictive holdings of the pre-\textit{Sherbert} case law avoided all the problems that had afflicted the \textit{Sherbert} era, as it replaced the balancing test with a simple, categorical rule that was predictable and relatively simple to apply.\textsuperscript{399} Thenceforth, the problematic concepts of burden and centrality were consigned to constitutional history. In their stead, it seemed, the only prima facie enquiry into religious claims was whether the claimants were sincere, and whether their beliefs had been impeded by \textit{discriminatory} laws.

It is important to note at this point that the \textit{Smith} Court did not base its decision, at least in any direct fashion, on the complaint (discussed in section 2.1 of this chapter) championed by Professors West and Marshall that the \textit{Sherbert}-era courts interpreted the Free Exercise Clause

\textsuperscript{396} Brennan J renames the centrality enquiry, “severe impact”. Ibid 919 (per Brennan J, dissenting).

\textsuperscript{397} For example, the Hernandez Court, while nominally eschewing an enquiry into the centrality of the religious practice in question, nevertheless found that the religious group’s tenets did not forbid the activity (payment of taxes) under consideration. Compare with Lee, in which the Court held, without mounting any serious enquiry, that payment of social security taxes constituted a burden on the Amish complainants’ religious beliefs.

\textsuperscript{398} Ibid 888. One of the motivating factors behind the majority’s decision to restrict strict scrutiny to religious discrimination cases was that it aligned free exercise law with other protected freedoms, such as racial equality standards under the Equal Protection Clause, or freedom of speech, where strict scrutiny was applied to prevent content-based restrictions on speech. Ibid 885-886. The alternative (ie, to require strict scrutiny for all laws burdening religious conduct, indirectly or not) was therefore, in Scalia J’s words, a “constitutional anomaly”. Ibid 886. For a critique of this position, see Laycock “Remnants”, above n 164, 18, in which the writer notes that in free speech and free association law the Court has in fact provided special treatment; citing \textit{NAACP v Alabama} 357 US 449 (1958) and \textit{Brown v Socialist Workers ’74 Campaign Comm (Ohio)} 459 US 87 (1982) as examples of the Court “constitutionally exempt[ing] unpopular political parties and movements from statutory duties to disclose their lists of members or contributors”. For Laycock, Scalia J’s comparison with racial equality cases was simply inapt, as these involved the Equal Protection Clause, which was not a liberty right that was relevantly analogous to First Amendment rights. See also McConnell “Free Exercise Revisionism”, above n 20, 1137-1141.

\textsuperscript{399} It is worth noting that the \textit{Smith} decision coincided with a project of Scalia J’s to rid constitutional doctrine of balancing tests in as many contexts as possible, as far as precedent would allow. See Antonin Scalia “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175, in which the author catalogues his reasons for preferring clear rules of adjudication (which \textit{Smith} achieved with respect to the Free Exercise Clause), including the resulting predictability of judicial decision-making, which was attractive to him for rule of law purposes.
incorrectly by according protection only to religious, as opposed to non-religious, believers. Arguably, the Court’s contention that to allow a special right to religious exemptions would be “courting anarchy” amongst the American populace, because it would make every person’s conscience a law unto itself, expresses something of West and Marshall’s concerns. However, Scalia J made it tolerably clear that the “parade of horribles” listed in his opinion was, in the face of critical remarks by O’Connor J, “horrible” not so much because the courts might, under the guise of free exercise analysis permit “harmful” exemptions to religious believers, and religious believers alone, but rather because it would involve the courts in “regularly balancing against the importance of general laws the significance of religious practice”.

In the wake of Smith, Professor Marshall openly expressed his disappointment that the Court had not agreed with his and West’s interpretive reading of the Free Exercise Clause, even though the ultimate doctrinal solution to the free exercise problem was exactly to his liking. The Court’s silence on this matter was in part no doubt a product of its clear statement that legislative exemptions would continue to be acceptable. Justice Scalia emphatically declared at the end of his opinion:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

This affirmation of legislative solicitude towards religious believers brought to light a – perhaps fatal – flaw in the interpretive argument of West and Marshall. In an intense debate between Marshall and McConnell concerning the substantive scope of the clause, McConnell remarked pointedly that all the arguments adduced by Marshall to show that court-ordered exemptions for religious believers were contrary to the Constitution, because they displayed unfair favouritism towards religious believers and violated, for example, the Establishment Clause command that government must not endorse religion above non-religion, applied

400 See Berg State and Religion, above n 106, 113. As a practical matter, it is only fair to remark that the Smith Court heard no argument on the correct interpretation of the clause, at which time the discrimination complaint of West and Marshall might have received a hearing. See, generally, Laycock “Amicus Brief”, above n 374.

401 Smith, above n 3, 888.

402 Ibid 890.

403 Ibid 889, n 5. O’Connor J expressed the view that the social “anarchy” ascribed by Scalia J to the Sherbert regime had never in fact taken place and that the courts had quite sensibly managed the doctrine. Ibid 902 (per O’Connor J, concurring).

404 See Marshall “In Defense of Smith”, above n 43, 308-309. Tushnet also expresses satisfaction with the result in Smith. Tushnet’s main concern was with the question of judicial competence in managing the balancing analysis, a matter that the Court discussed and resolved in line with his scholarship. See Mark Tushnet “The Rhetoric of Free Exercise Discourse” (1993) BYUL Rev 117. Note, however, that in this article Tushnet appeared to withdraw from his liking for Kurland’s “strict scrutiny” solution (under which legislatures as well as courts would be forbidden to craft exemptions from general laws).

405 Smith, above n 3, 890.

406 It should be noted that, subsequent to Smith, the Oregon state legislature and the federal Congress both enacted exemptions for (“Traditional Indian”) religious users of peyote. See Oregon Rev Stat S 475.992(5) (1993); and American Indian Religious Freedom Act Amendments (1994) Pub L No 103-344, s 2, 108 Stat 3125. These accommodations were not uncommon in the wake of adverse court decisions for religious claimants. For example, regarding the federal logging road that threatened to destroy Indian religious sites in Lyng, Congress voted simply to de-fund its construction in the wake of this decision.
equally to *legislated* exemptions. Unlike Kurland, Marshall (and West) did not in fact argue that legislative accommodations were unconstitutional. McConnell suspected that this was because of the undeniable historical record of legislative exemptions stretching back to the 18th century, as well as recent case law in which the Court held that these were permissible under the Free Exercise Clause and did not necessarily raise problems with other parts of the Constitution. The *Smith* Court was also doubtless aware of its own precedents, as well as the vast number of exceptions for religious believers that existed on the statute books. Accordingly, the fact that the Court did not consider the equality-based concerns of scholars such as Marshall was scarcely surprising.

As a result, and evidently to the dissatisfaction of those advocating a more “secularist” interpretation of the Free Exercise Clause, the *Smith* Court exclusively rested its case on the reading of its precedents and the judicial restraint argument based on the palpable inadministrability of the *Sherbert* test. Given the shakiness and obvious expediency of the Court’s analysis of its own precedents, it is probably fair to say that the entire justification for the rejection of the *Sherbert* era was in fact grounded in concerns of judicial restraint, and not on any reading, based on text or history, of the Free Exercise Clause itself.

In 1993 the Court issued an opinion in which the non-discrimination reading of the Free Exercise Clause heralded by *Smith* was expressly affirmed, thus locking in the new era of interpretation which obtains to this day. In *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, the Court struck down certain by-laws created by the City of Hialeah that outlawed the ritualistic animal sacrifice practices of the Santeria Church. The city claimed that the ordinances were intended to prevent cruelty to animals and addressed public health concerns. However, since the by-laws had left untouched the broadly analogous religious practice of Jewish kosher slaughter, as well as numerous secular activities involving the killing of animals (such as hunting), the Court found that the ordinances violated the Free Exercise Clause’s injunction against governmental regulation that singled out religious practices for unfair treatment. The city was unable to provide any “compelling interest” that might have justified prohibiting only the Santeria form of slaughter, and so the ordinances were held invalid.

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408 See West “Case Against Exemptions”, above n 43, 634-636; Marshall “In defense of *Smith*”, above n 43, 323; and Bradley “Siren Song of Liberalism”, above n 88, 262.

409 McConnell refers to *Corporation of the Presiding Bishop of the Church of the Latter-Day Saints v Amos* 483 US 327 (1987) for this proposition (in which the Court upheld a legislative exemption from anti-discrimination laws for religious groups which do not wish to employ at their institutions persons from other faiths, or of no faith), and *Texas Monthly v Bullock* 489 US 1, 18 at n 8 (1989) (in which a plurality of the Court expressly stated that legislated exemptions were constitutionally sound). McConnell “Response to Marshall”, above n 407, n 12.


411 The distinguishing of the *Yoder* precedent, in particular, was hard to defend, given Burger CJ’s unequivocal reliance on the Free Exercise Clause in that case. Because it did not expressly overrule *Yoder*, the Court would have in any case found it difficult to endorse West and Marshall’s views on the correct reading of the clause. Even the *Sherbert* precedent was hard to describe as conforming to an equality reading of the Free Exercise Clause, as advocated by West and Marshall, because non-religious claimants assuredly would struggle to benefit from its holding. See McConnell “Free Exercise Clause Revisionism”, above n 20, in which the writer questions the recharacterisation of that case by the Court, and points to the case of *Wimberly v Labor and Industrial Relations Comm’n* 479 US 511 (1987), in which a worker who was unemployed on account of pregnancy was held not to be entitled to unemployment compensation.

Although questions remained as to what types of laws would in future be categorised as discriminatory,\textsuperscript{413} this case signalled the final death-knell for the \textit{Sherbert} era.\textsuperscript{414}

4. Conclusions from the analysis of the now-defunct US substantive neutrality regime

Having analysed the struggle over religious accommodations of the \textit{Sherbert} era, it is now possible to make a number of findings that will be of assistance in the central enquiry in this thesis, which is whether the construal of s 15 BORA ought to resemble that of the US Supreme Court’s current doctrinal formula for the Free Exercise Clause.

First of all, it is important to note that the \textit{Smith} decision did not hinge on the wording of the First Amendment. As we have seen, the Court was modest, to the point of ambiguity, in its conclusions in this respect.\textsuperscript{415} Because of the clear textual differences between s 15 and the Free Exercise Clause, this finding is relevant to our enquiry. Since the US Supreme Court found that either interpretation was plausible as a textual matter, arguments to the effect that differences in the two texts (including the presence of the word “prohibiting” in the US document) could justify a different reading of the New Zealand provision will be more difficult to sustain. The suitability of the \textit{Smith} precedent for informing the New Zealand debate on s 15 BORA is further enhanced, moreover, by the fact that the Court did not base its interpretation on the historical understanding of the Free Exercise Clause, thus making the decision more amenable for transplant to jurisdictions such as New Zealand, where different historical factors might arguably lead to different interpretations of constitutional free exercise protections.\textsuperscript{416}

The second lesson from the \textit{Sherbert} era was that, despite the best intentions of the judges who attempted to enforce the substantive neutrality regime, the balancing test that was created to administer it was manifestly unworkable, and prone to conscious or unconscious manipulation. This should be a salutary lesson for judges in countries with newer bills of rights who are embarking, or are considering embarking, on a project that clearly failed in the US. The fact, moreover, that the \textit{Smith} Court based its interpretation of the clause more or less exclusively\textsuperscript{417}

\textsuperscript{413} The main question (to which we shall return in Chapter 3 of this thesis when we consider more closely the contours of the Equal Regard method) was whether it was necessary, in order to prove a Free Exercise Clause violation, for lawmakers to have acted with demonstrable anti-religious animus against a religious group, or merely whether the law’s effects were discriminatory, regardless of the intentions of legislators. In \textit{Lukumi}, it was discovered that the city councillors who enacted the ban on Santeria slaughter had acted intentionally to prohibit that religious group’s activities.\textsuperscript{414} See Greenawalt \textit{Free Exercise and Fairness}, above n 14, 31, describing \textit{Lukumi} as “revealing much of what remains of judicially enforced free exercise rights”. The US Congress, in response to the deeply unpopular \textit{Smith} decision, attempted to resurrect the \textit{Sherbert} test by enacting it in statutory form. The resulting Religious Freedom Restoration Act 1993 (42 USC 2000bb-1 (a)-(b)) provided that: “[G]overnment shall not substantially burden a person’s exercise of religion” unless it first shows that “application of the burden to the person” is the “least restrictive means” of furthering a “compelling governmental interest”. This statute, however, was struck down by the Supreme Court as unconstitutional as applied to state and local governments, essentially because Congress did not have power under the Constitution to “redefine rights in a manner incompatible with the Court’s approach”; see ibid 32, where Greenawalt summarises the decision in \textit{City of Boerne v Flores} 521 US 507 (1997).\textsuperscript{415} As McConnell explains, the Court “said only that its nondiscrimination interpretation is one ‘permissible reading’” of the text. Michael McConnell “Institutions and Interpretation: A Critique of \textit{City of Boerne v. Flores}” (1997) 111 Harv L Rev 153, 189-190, quoting \textit{Smith}, above n 3, 878.\textsuperscript{416} Ibid 189. I will argue in Chapter 3, however, that New Zealand historical conditions are reasonably hospitable to the formal neutrality reading introduced in \textit{Smith}.\textsuperscript{417} As I have explained in this chapter, I agree with McConnell’s characterisation of the decision: “[T]he \textit{Smith} decision was based not on what ‘free exercise of religion’ means (either historically or normatively), but on the institutional point that ‘democratic government,’ despite its admitted inability to accord full and equal accommodation to all religious denominations, is to be ‘preferred’ to a system in which courts make highly
on the grounds of judicial competence in enforcing a substantive neutrality regime is easily transferable to the New Zealand environment, as it relies on considerations of judicial restraint that are assuredly of concern to all democratic polities that have systems of judicial review. This is regardless of whether the judicial systems in question contain supreme law constitutional documents that permit judges to strike down contrary laws, or whether they (like New Zealand and the United Kingdom, for example) contain “interpretative” or “statutory” bills of rights that permit a less dramatic scheme of judicial review.

Third, while the Smith decision had the effect of leaving questions as to whether a general law (either proposed as such, or already existing on the statute books) “prohibited” a religious practice to the democratic organs of the state, the Court nevertheless did not wish, it seemed, to send a message to legislatures that laws clearly impeding religious practices, but which were phrased in neutral terms, had no Free Exercise Clause implications simply because they were, or would be, generally applicable. Justice Scalia’s clear statement that legislated religious exemptions remained permissible, even “desirable,” left no doubt about this. The arguments by scholars such as Ellis West and William Marshall that the correct interpretation of the text of the clause ought to be informed by fully secularised notions of equality cannot answer the riposte that many legislated exemptions for religious believers continue to exist on the statute books. The interpretive vision of these scholars has never been seriously entertained by the US Supreme Court, in large part, I think, because it would require a massive judicial rethink of legislated exemptions. A project of this sort is in my view unlikely ever to be attempted by the US courts.

Finally, and related to the last point, the model for resolving religious free exercise questions in the US that was heralded in Smith is one that, in the New Zealand context where Parliament is sovereign, is perhaps rather attractive. This is because it leaves essential questions on religious freedom to democratic organs. In the US, with its strong tradition of judicial review and societally ingrained notions of “inalienable” rights and limited government, this determination was unpalatable for many brought up on these traditions, as we have seen in the impassioned scholarship of professors Laycock and McConnell. In the New Zealand context, by contrast, this tradition is relatively absent, for better or worse. The New Zealand Bill of Rights Act itself, moreover, appears to envisage a strong, perhaps primary role, for Parliament in enforcing the rights contained in it, as is reflected in its statutory status, and also in certain of its provisions which clearly envisage the continuance of the dominant New Zealand constitutional tradition of parliamentary sovereignty.

Having made these observations, we shall now turn to consider s 15 BORA itself, and more closely ask the question of whether the decision by the US Supreme Court in Smith to limit actionable claims under the Free Exercise Clause solely to complaints against laws that discriminate against religious believers, is also the right choice for the courts to make in New Zealand when they come to interpret s 15.

subjective and intrusive judgments that “weigh the social importance of all laws against the centrality of all religious beliefs.” Ibid 156 (internal citations from the Smith decision omitted). For similar conclusions, see, eg, Ira Lupu “Statutes Revolving in Constitutional Law Orbits” (1993) 79 Va L Rev 1, 59; and Greenawalt Free Exercise and Fairness, above n above n 14, 78.

418 Smith, above n 3, 890.
Chapter 3
The case for the Equal Regard reading of section 15 of the New Zealand Bill of Rights Act 1990

It is not enough to study the lessons provided by others. The lessons also have to be accepted, in full or part, and to be understood to be right for your own society.¹

1. Introduction

In this chapter, I set out my argument that the underlying purpose of s 15 BORA, insofar as it is a right that can be asserted in the New Zealand courts, should be solely to enforce an aspect of the fundamental right to equality – which I name Equal Regard.² As observed in Chapter 1, this solution to the issue of whether religiously motivated conduct ought to take precedence over general laws chimes with that advanced by John Locke more than three centuries ago. We also saw, in Chapter 2, that this approach mirrors current federal constitutional law in the US after the watershed decision of the US Supreme Court in 1990 that rejected the substantive neutrality reading of the Free Exercise Clause of the First Amendment.³ In Chapters 4 to 6 of this thesis, I shall apply the principle of formal neutrality to a series of case studies set in the New Zealand context. These chapters will work through the peculiar difficulties of enforcing rights in a constitutional regime, such as New Zealand’s, where Parliament is sovereign. Before doing that, however, it is necessary to examine whether the solution proposed by Locke, and by the US courts after a century and a half of trial and error, to defining the actual content of the right to manifest religious belief is in fact a convincing explanation for the area of conduct protected by s 15 BORA in this country.

Writing in 1996, the New Zealand jurist Robin Cooke expressed optimism that a new, post-Cold War, global “commerce” of human rights, enforced primarily by a rights-conscious judiciary with an internationalist outlook, was in the process of emerging.⁴ What Cooke did not expect, or desire, however, was that rights protection would follow a uniform path in the jurisdictions that took part in this project. For Cooke, there were:⁵

² I note at the outset that professors Eisgruber and Sager’s formulation of “Equal Regard” (a term that they coined; see Chapter 1, n 21) is based on a different normative approach to interpreting the Free Exercise Clause than that actually articulated by the US Supreme Court in Smith. As will be explained below, I shall find the US courts’ reasoning for adopting the formal neutrality reading of the clause more persuasive in the New Zealand context than that of the more radical project of Eisgruber and Sager.
⁴ Robin Cooke “The Dream of an International Common Law” in C Saunders (ed) Courts of Final Jurisdiction: The Mason Court in Australia (Federation Press, Sydney, 1996) 138 (“Cooke ‘International Common Law’”), 142-145; see also Anne-Marie Slaughter “A Global Community of Courts”(2003) Harv Int’l LJ 191, 193 (internal footnote omitted): “Constitutional courts are citing each other’s precedents on issues ranging from free speech to privacy rights to the death penalty. A Canadian constitutional court justice, noting this phenomenon, observes that unlike past legal borrowings across borders, judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue. They cite each other not as precedent, but as persuasive authority. They may also distinguish their views from the views of other courts that have considered similar problems. The result, at least in some areas such as the death penalty and privacy rights, is an emerging global jurisprudence.”
⁵ Cooke “International Common Law”, above n 4, 143.
more ways than one in which national common law systems, starting from the same roots, may justifiably go. Different chains of reasoning and weightings of values may be reasonably open.... Common denominators may be usefully sought, as long as the process is not compelled from outside and the national ethos is allowed its own weight.

As we saw in Chapter 1, the approach to interpreting the right to manifest religious belief has taken many forms across different jurisdictions, thus evidencing the divergences anticipated by Cooke and implied by Kenneth Keith in the quotation that begins this chapter. Other countries with which New Zealand shares strong affinities in its legal and social culture and history – such as Canada and the United Kingdom – have opted for the substantive neutrality principle in their interpretation of the legal right to religious free exercise. Their solutions contrast starkly with the formal neutrality regime now applied in the US. The essential question addressed in this chapter is why New Zealand should adopt the US methodology and not follow other countries that arguably have more similar traditions to our own in human rights matters.

Some legal commentators have railed against what they regard as unreflective and unprincipled adoptions by the New Zealand courts of overseas legal precedents concerning human rights guarantees, especially when judges do not give sufficient weight to New Zealand legal culture and perhaps ignore the fact that BORA was not represented by its authors as bringing about a fundamental change in the socio-legal order. For the courts to import foreign, and possibly more expansive, readings of human rights that were not envisaged by the enactors of BORA in 1990 is illegitimate according to this line of opinion. For their part, the courts themselves have exhibited awareness of the dangers involved in haphazard reliance on foreign case law. For example, Justice Ivor Richardson of the Court of Appeal has warned that before adopting, or indeed rejecting, foreign judicial constructions of rights guarantees, it is necessary for the New Zealand courts to consider the “differences in our legal and social history, differences in

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6 See text accompanying ns 69-80 in Chapter 1.
7 See, eg, James Allan, Grant Huscroft & Nessa Lynch “The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?” (2007) 11 Otago LR 433 (“Allan et al ‘Overseas Authority’”): “[O]verseas authority is not used in a principled or systematic way by New Zealand courts in interpreting the New Zealand Bill of Rights Act. The premises that justify its use are never articulated, either in general or particular terms.” The authors suggest that judges, and counsel, selectively choose overseas case law that supports their preferred resolution of cases (while ignoring the ones that do not) in a way that would be unethical when citing indigenous case law. Ibid 434, 445-446.
8 A groundbreaking case where some allege this occurred was Simpson v Attorney-General [Baigent’s Case] [1994] 3 NZLR 667 (CA) (“Baigent”). Baigent concerned an “unreasonable search or seizure” claim under s 21 BORA involving an unlawful and bad faith execution of a search warrant of private premises by the police. The Court of Appeal controversially read a public law remedies clause into BORA and awarded monetary compensation for the police malfeasance. The Court did this even though a remedies clause was deliberately omitted from BORA’s text when it was enacted in 1990 (having appeared earlier in the text in its initial form as a supreme law bill of rights). For support, the Court cited case law in jurisdictions where remedies had been awarded in similar circumstances, including the US, a Privy Council case dealing with the Constitution of Trinidad and Tobago, India, and Ireland. The “reading in” of the remedies provision was particularly troubling for some commentators, because it effectively overrode prior statutes conferring very broad immunity on Crown actions, and because it used foreign jurisprudence as a “ratchet” method for doing so. This appeared to contravene the direction in s 4 BORA that BORA was not to be used to impliedly repeal or revoke past or future legislation (hence preserving parliamentary sovereignty). For critical discussion of Baigent, see Allan et al “Overseas Authority”, above n 7, 442; and JA Smillie “The Allure of ‘Rights Talk’: Baigent’s Case in the Court of Appeal” (1994) 8 Otago LR 188. For a more positive take on the Court’s reasoning, see, generally, Michael Taggart “Tugging on Superman’s Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990” [1998] Public Law 266.
societies and cultures" as a crucial factor in assessing the persuasiveness of overseas precedent. The fundamental principle, continued Richardson J, was that: “Jurisprudence in other jurisdictions provides valuable insights but can never be determinative of New Zealand law.”

Put another way by legal commentators generally hostile to the importation of foreign conceptions of human rights guarantees, in order for such jurisprudence to carry any weight at all, it is important first to ask why it should be “taken into account, and to what end?”

In this chapter, I take it to be a general concomitant of these cautionary observations that foreign judicial resolutions of the content of specific rights guarantees should only be decisively illuminating of the proper New Zealand conception of corresponding rights when the arguments discovered therein are also available in, or at least not contradicted by, our own legal system. As one aspect of this consideration, recall that an important finding in Chapter 2 was that the text of the Free Exercise Clause was not dispositive in the Smith decision.

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9 R v Jefferies [1994] 1 NZLR 290 (CA) (“Jefferies”), 299-300. See also P Rishworth, G Huscroft, S Optican, & R Mahoney The New Zealand Bill of Rights (Oxford University Press, Auckland, 2003) (“Rishworth et al”) 66, where Rishworth explains that foreign case law is usefully considered by New Zealand courts interpreting our youthful bill of rights in order to avoid “‘re-inventing the wheel’”, and that the far greater experience of jurisdictions such as the US with its 200-year-old Bill of Rights is helpful for seeing how issues have been framed around rights, including freedom of religion. That said, Rishworth opines that foreign jurisprudence can only be “persuasive authority” and the New Zealand courts will always be free to adopt or reject foreign judicial resolutions of human rights controversies. See also Andrew Butler & Petra Butler The New Zealand Bill of Rights Act: A Commentary (LexisNexis NZ Ltd, Wellington, 2005) (“Butler & Butler NZBORA Commentary”) [4.6.4].

10 Jefferies, above n 9, 300; see also R v B [1995] 2 NZLR 172 (CA), 183 (per Richardson J), & ibid 178 (per Cooke P); Lange v Atkinson [1998] 3 NZLR 424 (CA), 467; and R v Maihi (2002) 19 CRNZ 453 (CA), 455. And see the White Paper, which recommended the passage of the original supreme law version of BORA: “[I]t is expected that the New Zealand courts will seek to develop their own constitutional tradition in response to their assessment of current values in New Zealand society as reflected in the Bill of Rights.” A Bill of Rights for New Zealand: A White Paper (Government Printer, Wellington, 1985), (1985) AJHR A6, (“White Paper”) [10.3].

11 Allan et al “Overseas Authority”, above n 7, 446. Importantly, the authors of this sceptical piece on the use of overseas authorities as an aid to determining results in BORA cases do not argue against the use of such authority tout court. Instead, they seem to be asking for a more principled and transparent use of foreign legal materials. Compare with two of the same authors’ findings in the US context; see James Allan & Grant Huscroft Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts” (2006) 43 San Diego L Rev 1, 58: “[W]e have argued that no justifications, alone or together, exist to justify American judges making use of comparative and international rights-based law to trump the American democratic process.”

12 For this principle, see Mark Tushnet “The Possibilities of Comparative Constitutional Law” (1999) Yale LJ 1225, 1307 (“Tushnet ‘Comparative Law’”): “Comparative experience is legally irrelevant unless it can connect to arguments already available within the domestic system.” On this basis, Tushnet cautiously advocates references to foreign case law by US judges interpreting the US Constitution. Tushnet’s position, however, has minimal support in the US judiciary, which has traditionally cabined its constitutional analysis to American precedents. See, eg, Stanford v Kentucky 492 US 361 (1989) (“Stanford”), where the US Supreme Court addressed the question of whether the Eighth Amendment’s prohibition of “cruel and unusual punishment” ought to bar the execution of minors. In dissent, Justice Brennan noted the fact that law and practice “generally throughout the world”—particularly in advanced industrialised societies in Western Europe—was opposed to the imposition of the death penalty to persons under 18 (the defendants in Stanford were under 18 at the time of committing capital crimes). Brennan J said that this global disavowal of the juvenile death penalty provided a “strong grounding” for his opinion declaring the death sentences imposed in Stanford to be unconstitutional. See Stanford, 390 (per Brennan J, dissenting). The majority on the Court, however, felt differently, and upheld the sentences, with Justice Scalia rejecting the international law aspect of Brennan J’s argument: “[I]t is American standards of decency that are dispositive”, and that the Court’s task was merely to discover whether the execution of minors was “accepted among our people”. Stanford, 369, n 1 (per Scalia J) (emphasis added). Regarding American resistance to foreign legal precedents, see Tushnet “Comparative Law”, 123-132; and Christopher McCrudden “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” (2000) 20 Oxford J Legal Stud 499, 510.

13 The most that Scalia J would say was that the non-discrimination reading of the Free Exercise Clause adopted in Smith was a “permissible” construal of the phrase “prohibiting the free exercise [of religion]”. See Smith, above n 3, 878.
Instead, the US Supreme Court relied almost entirely on considerations of judicial restraint that are surely also relevant to interpretation of the guarantee contained in s 15 BORA, despite its different wording.\(^{14}\) This observation makes it possible to discount a threshold objection to importing the Equal Regard method into the New Zealand setting based on textual differences between the two provisions.

Having said that, any conclusion one might be tempted to make from this finding to the effect that the text of s 15 is therefore automatically receptive to the US jurisprudence would be premature at this point. There are, of course, other factors to be considered. I take it to be my task here to make an affirmative domestic case for the Equal Regard reading of s 15 BORA, one that is, to use Cooke’s words, “not compelled from outside”, and which is resilient to attacks that for New Zealand to adopt this reading would be to betray the “national ethos”. A further complaint might be that a wholesale borrowing of the US solution would constitute a failure to honour our international obligations, thus rendering nugatory New Zealand’s commitment to protection of religious minorities. In this chapter, I will reject all these contentions. I will conclude that the motivations of the US Supreme Court in abandoning the substantive neutrality reading of the Free Exercise Clause in 1990 also have considerable purchase in the New Zealand constitutional environment, and that the benefits of the formal neutrality regime now enforced in the US in fact outweigh any advantages that could be gained by adopting the ostensibly more generous substantive neutrality readings of religious freedom provisions that are enforced elsewhere.\(^{15}\)

This chapter is divided into three operative parts. In section 2, I shall undertake a search for a plausible theoretical basis for Equal Regard in the domestic context. As a key assumption, I shall proceed on the basis that the text of s 15, as is common in generally expressed liberty rights, does not on its face categorically direct us to either the substantive or formal neutrality reading of the provision. Rather, it is best conceived as performing the totemic function of signifying a political principle that must be teased out by the courts and other government officials who are charged with interpreting the provision in a way that is sensitive to, or, to use the terminology of American constitutional scholar, Ronald Dworkin, “fits” with New Zealand constitutional history and practice.\(^{16}\)

With this in mind, I shall consider the two primary historical theories of religious freedom protection that correspond respectively to the substantive and formal neutrality conceptions of the right to religious free exercise. Again, I shall consult the American debate, which took an historical turn after the Smith decision. This debate saw proponents and opponents of the new formal neutrality regime squaring off over whether Smith could be justified as reflecting the

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\(^{14}\) See text accompanying ns 415-416 in Chapter 2. By contrast, the High Court of Australia’s interpretation of that country’s constitutional free exercise guarantee does rely significantly on the wording of the provision. Consequently, in my view, the Australian High Court’s analysis carries very little persuasive power concerning interpretation of s 15 BORA. See discussion of the Australian approach in the text below, accompanying ns 502-504.

\(^{15}\) I say “ostensibly” because it is my general position that courts which apply substantive neutrality readings of religious freedom provisions tend to devise unprincipled methodologies in rejecting free exercise claims, despite the initially generous nature of this reading. As was demonstrated in Chapter 2 with my account of the US substantive liberty regime from 1963-1990, generosity at the first stage of rights analysis only rarely led to success in the final results in the US jurisprudence. As will be referred to later in this chapter, the UK courts and the European Court of Human Rights have made similar, dubious, distinctions that belie the generosity of the substantive neutrality reading.

conception of religious freedom held by the founding generation who enacted the Free Exercise Clause. The argument over the so-called “original understanding” of the provision, which reached judicial culmination in *City of Boerne v Flores*, centred on whether the Lockean, or non-discrimination, conception of religious free exercise protection more plausibly expressed the philosophical genesis of the clause than other understandings more in line with the substantive neutrality reading, such as that arguably held by James Madison, the man who introduced the initial text of the First Amendment on the floor of the first US House of Representatives and, more than anybody else, was responsible for its enactment.

I will then assess New Zealand’s historical legacy of religious freedom protection. In this discussion, I shall traverse the nation’s core founding documents, including the Treaty of Waitangi 1840 and the New Zealand Constitution Act 1852 (UK), as well as the pertinent statute and case law that sprang from this milieu. I shall then ask whether this domestic tradition resonates more with the Lockean or the Madisonian position. I shall express the view that both traditions have been important in this country, but that there is a slight preponderance in favour of the Madisonian viewpoint. This finding will not, however, be conclusive. The final, and in my view decisive, or “tiebreaking”, argument in favour of the non-discrimination reading of s 15 will be the institutional one, paramount in Justice Scalia’s majority opinion in *Smith*, that secular courts ought not to be in the business of weighing religious beliefs against the state’s secular policy goals. This task, it will be argued, ought to be assigned to the political branches of government, with the courts playing the ancillary role of policing the requirements of Equal Regard. In particular, I will explain why it would be a gross overstatement to say that adopting the formal neutrality methodology would render s 15 BORA a dead letter. On the contrary, I will contend that alternative approaches in other countries to adjudicating religious manifestation issues carry illusory benefits for minority religionists, as was palpably the case in the era of “substantive” religious liberty in the US from 1963-1990. Then, in section 3, I shall explain how this reading of s 15 more than adequately implements New Zealand’s international law obligations under the United Nations International Covenant on Civil and Political Rights.

In section 4, I shall build on this conclusion by taking a closer look at how the formal neutrality method has been developed in the US courts in the years since its inception in the early 1990s. It will be recalled that my discussion of the US jurisprudence in Chapter 2 ended with the 1993 case of *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, in which the US Supreme Court held that certain by-laws in a Florida city offended the non-discrimination principle introduced in *Smith*, because they unfairly targeted the religious practices of one religious sect. This decision effectively made permanent the sea change in Free Exercise Clause doctrine that had occurred three years previously in *Smith*. Some have argued that the principle enunciated

17 521 US 507 (1997) (“*Boerne*”).
18 Recall that in the previous chapter, I briefly considered the rival interpretations of the Free Exercise Clause attributed in modern scholarship to Madison and Jefferson (who preferred the Lockean version); see text accompanying ns 374-380 in Chapter 2.
20 One final challenge to the holding in *Smith* occurred in *Boerne*, which was decided four years after *Lukumi*. In *Boerne*, the Court struck down a congressional attempt to restore the Sherbert test by legislation (Religious Freedom Restoration Act 1993 (107 Stat 1488, 42 USC) (“RFRA”)), holding that the statute was an illegitimate use of Congress’s power under section 5 of the Fourteenth Amendment to extend federal Bill of Rights protections to the state context. Part of the Court’s reasoning turned on its view that Congress’s attempt to enforce the Free Exercise Clause in this way was misguided in that it purported to redefine the right, contrary to the *Smith* Court’s restatement of the clause’s meaning. Thus, in striking down the law, the Court stated: “When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177, 2 L.Ed. 60 …; … as the provisions of the federal
in *Lukumi* only applied to cases of deliberate targeting of minority religious groups and therefore would provide scant protection when religious conduct was impeded by general laws that did not contain any discernible anti-religious animus. In the jurisprudence subsequent to *Lukumi*, however, a more nuanced non-discrimination principle emerged in the US courts that extended the *Smith* doctrine beyond instances of intentional repression of religious minorities, and which now provides meaningful protection for religionists at a level that approaches, and, in my view, may even surpass in terms of results, the substantive neutrality reading that was abandoned in 1990.

Finally, I will argue that the American jurisprudence affords an excellent model for the New Zealand courts. I will address concerns, such as whether the different constitutional setting in New Zealand is likely to provide a fertile terrain for the Equal Regard methodology. Having duly assigned appropriate weight to “New Zealand conditions, history, and traditions”, I will conclude that the US conception of protection for religious free exercise is apt for engrafting onto the general New Zealand framework for legal protection of human rights.

# 2. Towards the “moral reading” of section 15 BORA

In this section, I will offer a theoretical basis for the content of s 15 BORA that is responsive to the New Zealand constitutional setting. The core issue, it will be recalled, is whether the enacted legal protection encompasses a broad liberty right that religionists can assert against general laws, but which the state can rebut if it can show that the limit it wishes to place on the right is proportionate to the objects pursued by the limitation; or whether s 15 BORA merely affords a right to equal treatment, a standard that is satisfied when the state creates laws that are formally neutral. As already stated in Chapter 1, it is my belief that the latter formulation is the better choice. In this section, I will give more detailed content to my arguments supporting that conclusion.

## 2.1 Defining BORA rights: the search for purpose

The issue under debate in this thesis is not easily resolved by recourse to the domestic *travaux préparatoires* created prior to the enactment of BORA in 1990. Nor can it be answered by a literal reading of the text of s 15, which, as I explained in Chapter 1, is amenable to either of...
the interpretations considered in this thesis. As with the other “liberty” rights set out in BORA, such as the right to freedom of speech and association, s 15 is written in necessarily general terms that do not speak clearly to the governmental actors who, according to s 3 BORA, are required to interpret and abide by the boundaries set by s 15.

To deal with the inherent indeterminacy of many of the rights guarantees in BORA and with the necessity for drawing lines as to the basic scope of these rights, the courts have adopted numerous interpretive strategies that enable them to make principled distinctions between the activities that various litigants claim to be deserving of protection from state interference. The fundamental interpretive gateway for this enquiry is that BORA rights, save of course where they are expressed in clear terms, are to be interpreted purposively. This technique, as described by Justice Richardson, “focuses attention on the nature of the particular right infringed”, an enquiry that “allows for the inclusion within its scope of conduct that truly comes within that purpose and the exclusion of activity that falls outside”. The purposive approach, with its requirement that judges assess the “nature of the right” concerned, has empowered the courts to engage in a wide-ranging enquiry into the philosophical, historical, social and political context from which any given right was created. Given that many of the rights enacted in BORA pre-date the founding of this country, the purposive approach has licensed judges to delve into the “social philosophy of centuries past”, with many judgments drawing from the writings of major thinkers in the Western canon, such as Hobbes, Milton, Kant and Mill, as well as more modern political and legal commentaries within the same tradition. It has also, of course, allowed judges, when they have considered it appropriate to do so, to borrow from or build on overseas and domestic jurisprudence that has distilled the wisdom of these writers and used it to assist in the resolution of modern human rights controversies.

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26 See text accompanying n 81 in Chapter 1.
28 Section 3 provides that BORA “applies only to acts done” by the “legislative, executive, or judicial branches of the government of New Zealand”, or by “any person or body” performing public functions “conferred or imposed” on that person or body “by or pursuant to law”.
29 As I explained in Chapter 1 (see text accompanying ns 13-19), the prima facie analysis of the scope of BORA rights is a crucial step in BORA litigation. In order for a governmental limit to be assessed as to its reasonableness under s 5 BORA, it is necessary for the courts first to determine whether a right has been breached. If a court decides that a governmental action does not implicate a right, then BORA analysis ceases and rights claims will be rejected at this threshold stage.
30 For example, s 12(a) provides that every citizen over the age of 18 has the right to vote. However, even this relatively explicit provision could be subjected to purposive analysis in some cases; for example, in debates over whether prisoners over the age of 18 ought to be able to vote.
31 R v Te Kira [1993] 3 NZLR 257 (CA), 271 (per Richardson J) & 261 (per Cooke P); see also R v Mist [2006] 3 NZLR 145 (SC), [25] (per Elias CJ & Keith J).
32 Ibid; and see Noort, above n 27, 279.
34 See Justice Susan Glazebrook “The New Zealand Bill of Rights Act 1990: its operation and effectiveness” (Speech delivered at South Australian State Legal Convention, 22 July 2004) [31], where the Court of Appeal judge notes that BORA has encouraged “more argument from first principles”, citing references to Hobbes (in R v Poumako [2000] 2 NZLR 695 (CA), [75]), Bentham (in Quiller v Attorney-General [1998] 1 NZLR 523 (CA), 558), and Kant (in Re Victim X [2003] 3 NZLR 220 (HC), [51]).
Historical writings can be recruited in a number of ways. Sometimes they are used by judges to buttress their arguments regarding the rationale behind relatively explicit human rights guarantees. To illustrate, in *R v Poumako*, the Court of Appeal was asked to rule that the minimum parole period of 13 years imprisonment that a lower court had imposed on a convicted murderer offended the rule against retrospective criminal penalties in s 25(g) BORA. This was because the lower court considered itself bound by a recently enacted statute that mandated a longer sentence than the 10-year non-parole period available to judges at the time the appellant committed the offence. While all members of the Court agreed that the 13-year non-parole sentence should nonetheless stand with respect to Poumako, Justice Thomas chose to issue a very rare (albeit in a minority judgment) judicial declaration of inconsistency to the effect that the offending statute breached the absolute prohibition on retrospective criminal penalties contained in s 25(g). What is interesting for our purposes is Thomas J’s use of extraneous legal sources to add support to the remedy he regarded as appropriate in *Poumako*. Although Thomas J certainly could have limited his reliance on arguments external to the clear words of s 25(g) to the fact that the equivalent Art 15(1) of the International Covenant on Civil and Political Rights did not admit of any limitations, even in times of national emergency, he also drew support for his declaration from the long, unbroken, historical provenance of the right in positive law and in legal and political scholarship that explained the rationale for the protection. Thus, in order to emphasise the fundamental rule of law principle that it is repugnant to justice (and nonsensical from the perspective of deterrence) for persons to be convicted or sentenced for crimes which did not exist at the time of the activity in question, Thomas J quoted the statement by Thomas Hobbes, first published in 1651, that: “No law, made after a fact done, can make it a crime…. For before the law, there is no transgression of the law.” He then went on to explain the reason underlying the rule of law concern by recourse to Blackstone, who wrote in 1765:

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36 Section 25(g) provides that those charged with an offence have the “right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty”.
37 Criminal Justice Amendment Act (No 2) 1999, s 2(4) provided that persons convicted of murders committed during a “home invasion” were to receive a minimum non-parole period of 13 years, “even if the offence concerned was committed before” the date this amendment came into force. The appellant in this case had committed the murder in 1998, well before the Act became law.
38 All five members of the Court agreed that the 13-year minimum was an appropriate sentence, given the gravity of the crime, regardless of whether 13 years was the statutory minimum in force at the time of sentencing. A majority argued that the 13-year parole period ought only to apply retrospectively for the 15 days prior to the enactment of s 2(4), that being when increased penalties for crimes involving home invasion were created; see Crimes (Home Invasion) Amendment Act 1999.
39 See *Poumako*, above n 35, [107]. Recall from our discussion in Chapter 1 (at n 17) that the New Zealand courts have claimed jurisdiction (as yet to be used) to declare that acts of Parliament are inconsistent with BORA. These declarations do not have the effect of striking down the impugned legislation (which is forbidden by s 4 BORA), but rather draw Parliament’s attention to defects in said statutes with a view to their repeal or amendment.
40 See *Poumako*, above n 35, [75] in which Thomas J refers to Art 15(1). As I shall explain further below (see section 3), BORA was enacted in part to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights, with the result that ICCPR articles, and the associated international jurisprudence, are often a first port of call for judges conducting BORA analysis.
41 See Art 4(2) ICCPR.
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“[H]ere it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.”43 And then, in order to illustrate the universal adherence to the right in modern democratic cultures, the judge referred to domestic constitutions and international instruments where the right was also guaranteed,44 including the US Constitution 1787,45 the French Declaration of the Rights of Man and of the Citizen 1789,46 the Constitution of India 1949,47 the Universal Declaration of Human Rights 1948,48 and the European Convention on Human Rights 1950.49 And finally, the judge pointed to instances in New Zealand statute law, both prior to and after enactment of BORA, which demonstrated consistent legislative practice spanning several parliaments that gave recognition to the right.50 Having laid out this uniform edifice of legal sources spread across four centuries, Thomas J felt amply fortified – in the face of an extensive Crown submission that he had no authority to do so51 – to declare that the legislation was inconsistent with s 25(g) BORA.

In other instances, judges have assembled a similar array of legal sources in order to clarify broader purposes where the scope of BORA rights is less clear than in Poumako. In Lange v Atkinson and Australian Consolidated Press NZ Ltd,52 for example, the Court of Appeal was required to adjudicate on the intersection of the law on defamation and the right to freedom of expression, as affirmed by s 14 BORA.53 The case concerned a magazine article which alleged that David Lange, a former Prime Minister (and at the relevant time an MP in Parliament), did not approach his role as leader of his party and as Prime Minister seriously or in a professional manner.54 Lange sued in defamation and the defendant columnist and publisher pleaded privilege for what they argued was protected political expression. In dismissing Lange’s appeal to have this defence struck out, the Court held that a defence of qualified privilege applied to generally-published statements made about the “personal ability and willingness” of those “currently or formerly elected to Parliament and those with immediate aspirations to be members”, as long as such statements related to matters that were properly of public concern.55

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44 See Poumako, above n 35, [75].
45 Article 1, 9, cl 3, and Art 1, 10, cl 1.
46 Article 8.
47 Article 20(1).
48 Article 11(2).
49 Article 7(1).
50 See s 4(2) Criminal Justice Act 1985, and s 7 Interpretation Act 1999.
51 The Crown had dedicated a third of its submission to arguing that declarations of inconsistency were invalid in New Zealand, because, inter alia, Parliament had not expressly authorised the courts to issue such declarations, and because doing so would upset the “delicate” balance between the courts and Parliament in this country. See Poumako, above n 35, [91]; and discussion in James Allan “Moonen and McSence” (2002) NZLJ 142.
53 Section 14 provides: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”
54 For example, the article contained a cartoon depicting Lange at breakfast being served a packet named “Selective Memory Regression For Advanced Practitioners”. Other claims included the charge that he would abandon his chairing of Cabinet due to boredom, or to an inability to “sit still”, and go to the toilet, or to his office or on a recreational drive around Wellington. For a full catalogue of the claims made about Lange, see Lange v Atkinson and Australian Consolidated Press NZ Ltd [1997] 2 NZLR 22 (HC), 26-27.
55 Lange, above n 52, 428. The plaintiff appealed to the Privy Council, which remitted the case for reconsideration in light of a House of Lords judgment that was released on the same day and dealt with similar issues. The Court of Appeal maintained its position, however, albeit with some new added considerations (that were influenced by the House of Lords decision) in the test for qualified privilege in matters concerning political speech. See Lange v Atkinson [2000] 3 NZLR 385 (CA); and discussion of the Lange saga in Grant Huscroft “A Symposium on
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For the purposes of this thesis, the passages of Justice Blanchard’s judgment concerning the role of free speech in our constitutional system are instructive, because they reveal a judicial predisposition, or orientation, towards openness in political debate that made it very difficult for the former Prime Minister to prevail on the facts at hand. These passages are also significant in that they disclose a useful judicial method for calibrating the appropriate scope of BORA rights in their New Zealand context – one that I shall adopt in my discussion below of the content of s 15 BORA.

Having conducted a tour of the treatment of the right in the context of defamatory speech in other jurisdictions, Blanchard J then set about putting the “legal concept” of freedom of expression into its “wider political and social context and history”, in order that its scope be “better assessed”.56 His Honour began by recounting certain classical liberal texts, and then sought to place these conceptions of free speech within the domestic constitutional and statutory setting of the right. Blanchard J referred primarily to the “marketplace of ideas” theory, which holds that the best way to find the truth in political debate is to allow as many conflicting views as possible to be aired in public. In support, he quoted the words of John Milton, written in the midst of the English Civil War in opposition to the licensing of the press:57

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors in a free and open encounter?

And then he referred to a similar idea voiced by John Stuart Mill in the latter half of the 19th century:58

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

From these philosophical treatments of one of the core purposes animating the right to free speech,59 Blanchard J drew what he regarded as their “functional”60 lesson for future generations: that “knowledge and understanding should be enhanced by the uninhibited exercise of the freedom”, even when the content of the protected speech is controversial or erroneous.61 This acceptance of the costs of allowing uninhibited speech in the pursuance of truth in political discourse was perhaps best voiced in the late 18th century by the American...
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statesman James Madison, also quoted by Blanchard J, when he said: “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.” 62

Having laid out what might be described as an aspect of the classical prima facie scope of the right to free speech in the context of political discourse, Blanchard J then referred to the legal writings of James Fitzjames Stephen, a contemporary of Mill’s, who argued that laws banning seditious libel were anachronistic in the face of the increasing importance of freedom of political speech as a necessary concomitant of the broadening of the franchise in the 19th century. Stephen was writing in the context of ongoing parliamentary reforms that had commenced earlier that century, which incrementally enabled large swathes of the population to vote. Among these were the Representation of the People Act 1832, 63 which effectively enfranchised the middle classes, 64 and, albeit after Stephen’s time, the extension of the franchise to women in 1918. Stephen therefore contended that the unquestioned acceptance in previous eras of the idea that the ruler was “by the nature of his position presumably wise and good” and therefore ought not to be subject to popular censure that might “diminish his authority” had been replaced by a different conception of democracy. 65 Instead, the relationship had become a more contractual one in which the subject had delegated his power to the “so-called ruler”, and so the potency of arguments to the effect that the ruler ought not to be criticised by his “subjects” was thereby much reduced. 66

Moving from English sources to more direct consideration of the New Zealand polity, Blanchard J noted the fact that New Zealand, while a monarchy in form, 67 was in practice a democracy based on universal suffrage, with a government that is “responsible to Parliament and through it to the electorate and which is subject to law”. 68 Accordingly, Blanchard J felt able to say that changes in the relationship between the rulers and the governed described by Stephen had been recognised for some time in this country’s constitutional arrangements. 69


63 This epochal statute is better known as the Reform Act 1832.

64 See also Representation of the People Act 1867 (extending franchise to urban workers), and Representation of the People Act 1884 (extending franchise to agricultural workers).


66 Lange, above n 52, 460-462; quoting Sir James Fitzjames Stephen A History of the Criminal Law of England (Macmillan, London, 1883) Vol 2, 299-300, & 376. Blanchard J also refers to the writings of AV Dicey, where the 19th century constitutional theorist notes that, despite the seat of legal sovereignty being held unreservedly by Parliament, this was balanced by the political sovereignty of the electors, in part because of their exercise of the ballot at regular intervals and the ability of public opinion to influence law-makers between elections. See ibid; citing AV Dicey Introduction to the Study of the Law of the Constitution (1885, 10th ed 1959) 75-85.

67 Blanchard J describes New Zealand as a “constitutional monarchy”. Ibid. Whereas the Queen’s representative in New Zealand retains a number of considerable powers (eg, appointing ministers, assenting to Bills, dissolving Parliament), the Governor-General in fact exercises these only on the advice of democratically elected officials as a matter of constitutional convention and law. See Geoffrey Palmer and Matthew Palmer Bridled Power: New Zealand’s Constitution and Government (4th ed, Oxford University Press, Auckland, 2004) ch 4.

68 Ibid 463.

69 Ibid. Blanchard J did not recount the evolution of the New Zealand democratic arrangements in detail from the beginning of European settlement. In this regard, he could have referred to: the virtual autocratic rule of colonial governors from 1840 (subject to Imperial supervision), the creation of the first elected legislative body by the New Zealand Constitution Act 1852 (UK) (whose laws were subject to invalidation in the face of Imperial statutes by dint of the repugnancy clause in the Act), the introduction of responsible government in 1856, extension of the
Within this environment, the judge then recounted statutory changes in the latter part of the 20th century that had further enhanced voter representation and made government more open. In particular, the move from First Past the Post elections to a system of proportional representation after a referendum in 1993, and the Official Information Act 1982, which replaced the presumptively restrictive Official Secrets Act 1951, were recalled. Further statutory recognition of an improving climate of openness was reflected in the repeal by the Defamation Act 1992 of the offence of criminal libel, which had been on the statute books since the Criminal Code Act 1893, and of certain offences relating to the publishing of untrue matters intended to influence voters during elections campaigns, which had existed for much of the 20th century. And finally, the judge recalled BORA itself, with its affirmations of the right to vote and to be a candidate for office in s 12, and of the right to freedom of expression in s 14.  

From this snapshot of the relevant constitutional and statutory setting, the judge inferred that the “capacities of those who have or aspire to elected parliamentary and governmental positions are plainly of great importance”. Consequently, the Court felt emboldened to make a substantial change to the law of defamation in New Zealand. Whereas truth and honest opinion were previously the only available defences to suits instigated by political figures in this area, false statements about politicians could now be widely published, so long as they did not breach the statutory malice provision in the Defamation Act 1992, and were not caught by other restrictions related primarily to the timing and circumstances of publication, as listed by the Court in *Lange*. As one commentator put it, this change signalled the development of a “mature democracy”, which was reflected in the enshrinement of the value of free speech in legislation. 

As I have already indicated, the importance of the judicial technique on display in *Poumako* and *Lange* for the purposes of this thesis is that it shows how BORA rights can be interpreted by recourse to elucidations of first principles in historical writings and to related observations on the nature of the New Zealand polity; and that these insights can gain more particularised form by way of analysis of changes in statute law, where that statute law touches on the right in question in different ways over time. In this way, judges can assess whether the general
constitutional weather, so to speak, is favourable to expansions (or, presumably, to contractions) of the scope of rights, perhaps similar to the way that scientists examine ice cores and tree rings in order to calculate past fluctuations in the climate and to make prescriptions for remedial actions into the future. Thus, judicial decisions that were made before the trends identified by Blanchard J, and which were more protective of political figures’ reputations, were superseded in *Lange* by way of analogy with extant statutes within the field of electoral and free speech law and in line with judicially perceived changes in political and social culture that required the common law tort of defamation to respond to the greater openness in political discussion.

Sir Kenneth Keith, formerly a judge on the New Zealand Supreme Court but now on the International Court of Justice, has explained in an extra-judicial lecture that the use of legal history of this sort can help inform decisions that constitute substantial departures from (or, indeed, substantial retentions of) settled law, and by so doing lend moral and intellectual heft to judicial decisions that might otherwise be vulnerable to criticism, or even to overturning by Parliament. Hence, in his speech, Keith impressed on lawyers the “importance of having regard to the historical context from which the law comes. That history may show that the law is no longer justified or may explain its particular features or may justify it.” The decision in *Lange*, when compared with restrictive judicial treatments of the right to freedom of expression in the past, ought perhaps to be regarded as an example of this happening, with BORA acting as a conduit for the process.

The *Lange* decision has in fact attracted criticism, with some decrying it as evidence of nascent judicial activism, while others say it relegates BORA to a very minimal role. In the former category is the visiting American scholar Robert Nagel, who detected in Blanchard J’s appeal to philosophers of centuries’ past the sign of a worrying trend towards a species of judge-made law that usurps the role of the legislature in important areas of social policy. For Nagel, judicial philosophising of this sort, which is potentially a device used by activist judges to shore up unprincipled and anti-democratic departures from settled law, was a major

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*Commentaries* (Butterworths, Wellington, 2001) 77 (“Keith ‘Sources of Law’”), 87-89, where Keith recommends considering the statute book “as a whole” as an interpretive method, on the basis that Parliament presumably is “using principles and language in a broadly consistent way” throughout the corpus of statute law.

77 Among other cases, Blanchard J refers to *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA), where the Court of Appeal rejected a defence that a defamatory statement regarding a minister of the Crown published by a newspaper was in the public interest. The Court stated in 1960 (at 83) that: “[T]here is no principle of law…which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest.” Blanchard J questioned the applicability of this case to the modern BORA era, especially given that the new statutory affirmations in favour of openness in political discourse listed in *Lange* did not exist at the time, and because the 1960 Court did not consider the claim for privilege in the “wider constitutional context just mentioned”. See *Lange*, above n 52, 465.

78 KJ Keith “1883 to 2008: Law and Legal Education Then and Now” (2009) NZ Law Review 69, 72 (emphasis in original). See also Jonathan Clark *Our Shadowed Present: Modernism, Postmodernism and History* (Atlantic Books, London, 2003) 14: “Obviously, the problems we face are historically structured: only by knowing the story so far can we have any idea of what to do next. On the other hand, we address the past in order to escape from it.”

79 For a chronicling of the gradual coming to pre-eminence of the right to freedom of expression in the domestic case law, see Andrew Geddis “The State of Freedom of Expression in New Zealand: An admittedly eclectic overview” (2008) 11 Otago LR 657 (“Geddis ‘Eclectic Overview’”).

contributing factor to the “culture wars” that disfigured democratic politics in the US in the last decades of the 20th century.\textsuperscript{81}

While there is doubtless some wisdom in these words, Blanchard J’s careful tying of the sentiments voiced by Milton, Mill, Madison and Stephen to real facts in the New Zealand constitutional landscape surely shows that Nagel’s warning is exaggerated, at least in the context of this case. In contrast to Nagel, local commentators have implied in their commentary on \textit{Lange} that the use of s 14 BORA merely as a statutory affirmation of other incremental changes in the statute and common law touching on freedom of speech is to give BORA a subsidiary role unbefitting of its “constitutional” status.\textsuperscript{82} In my view, however, this mediating, as opposed to revolutionary, role is well suited to the statutory status of BORA, as is perhaps contemplated by the relatively unambitious declaration of intent in s 2 BORA, which states simply that the “rights and freedoms contained in this Bill of Rights are affirmed”.\textsuperscript{83} The use of non-BORA statutes to adduce the meaning of BORA itself, is, I suggest, entirely appropriate, especially in this country, where legislation is the supreme form of law in the land.\textsuperscript{84} It is also worth noting in any case that in the US, which does have a supreme law constitution, it is common for the courts to construe the meaning of constitutional provisions from surveying how successive Congresses have legislated over time in ways that touch on the meaning of rights.\textsuperscript{85}

We now leave our discussion of one methodology used by judges to orient themselves to the task of assessing the scope of BORA rights that have received more than a modicum of attention in the courts. As Crown prosecutor John Pike remarked in a paper given on the 17th anniversary of the relatively youthful BORA in 2007, many of the “fundamental concepts” in that document still “remain in a state of flux”.\textsuperscript{86} I now turn to examine one of these: the scope of the right to manifest religious belief.

\textbf{2.2 Defining s 15 BORA}

\textbf{2.2.1 The two interpretations…}

As already related, there are two alternative candidates for the “purpose” of s 15 BORA – one that treats the guarantee as providing a substantive liberty right and the other as securing

\textsuperscript{81}The most dramatic instance of this, in Nagel’s view, was the US Supreme Court’s inference of privacy and autonomy rights from the Due Process Clause of the US Bill of Rights in cases such as \textit{Roe v Wade} 410 US 113 (1973) (legalising abortion) and \textit{Griswold v Connecticut} 381 US 479 (1965) (legalising contraceptives), in which the Court substituted its views on these issues for the views of the majority in state legislatures. See ibid 105-109.

\textsuperscript{82}See Simon Mount “Freedom of expression and the administration of justice: To gag or not to gag?” in G Illingworth (Chair) \textit{Using the Bill of Rights in Civil and Criminal Litigation} (NZ Law Society Seminar, July 2008) 55, 59: “\textit{Lange} v Atkinson…was not conceptualised as a result required by the Bill of Rights so much as a result supported by it.” See also Geddis “Eclectic Overview”, above n 74, 661.

\textsuperscript{83}See also the statement of Richardson J that s 2 reflects the fact that BORA is “declaratory of existing rights”, and that the document was therefore “evolutionary not revolutionary in its approach. It draws together but does not create new human rights”. Hence, in order to understand the purpose of a BORA right, Richardson J believed it was vital to understand its “historical…context”. \textit{Jefferies}, above n 9, 299.

\textsuperscript{84}See also Burrows \textit{Statute Law}, above n 27, 25: “There is no higher law in New Zealand than an Act of Parliament.”

\textsuperscript{85}See Lackland Bloom \textit{Methods of Interpretation: How the Supreme Court Reads the Constitution} (Oxford University Press, New York, 2009) (“Bloom \textit{Methods of Interpretation}”) ch 5. For a notorious example, the Supreme Court upheld a statute banning homosexual sodomy in the face of a challenge under the Due Process Clause guarantee of privacy in part because laws criminalising it were commonplace at the time of the founding. See \textit{Bowers v Hardwick} 505 US 833, 847-848 (1986); but see \textit{Lawrence v Texas} 539 US 558 (2003), where \textit{Bowers v Hardwick} was overruled and its use of history described as “overstated” (at 571).

\textsuperscript{86}Pike “BORA: Prosecution Perspective”, above n 33, [54].
merely the right to a formally neutral state in religious matters. In Chapter 2, we saw that different members of the US Supreme Court and the academy lined up behind these two opposing conceptions of the right to manifest religious belief, with the formal neutrality reading of the Free Exercise Clause carrying the day in 1990 in a 5-4 decision by the Court in *Smith*. Exactly the same arguments that animated the American debate can be, and have been, made in this country by academic writers regarding s 15 BORA.

James Little contends that to give religionists the benefit of the substantive neutrality reading of s 15 is unjust in truly liberal democratic politics, where the heterogeneous religious, non-religious and irreligious worldviews held by the citizenry are all jostling for space in the face of the powerful and all-pervasive apparatus of the modern state. Borrowing heavily from the writings of the US academics which I discussed at length in Chapter 2, Little’s primary argument is that the substantive neutrality construal of s 15 unfairly privileges religious actors over non-religious persons who may wish to engage in the same activities but will be precluded from invoking s 15 under this reading of the text. Little’s contention hinges on the fact that the only viable rationale for creating religious conduct exemptions in an era where political discourse is necessarily framed in secular terms is that it is necessary to protect personal autonomy and to foster a diverse populace, free from majoritarian coercion. The trouble with reasons such as these, in Little’s view, is that they can be asserted by non-religious persons as well as religious ones. Arguments to the effect that religion is “special” and that religionists may suffer from peculiar hardships, such as fears of extra-temporal punishment, and are therefore entitled to the “preferential treatment” that would be available to them in a substantive neutrality regime, cannot be “defended in modern times”.

To illustrate the point, Little sets out certain hypothetical comparisons. For example, he describes the dilemma of two persons wishing to open a soup kitchen for the needy from their homes. Both are prevented from doing so by zoning regulations that prevent this activity in residential areas. One of these persons is motivated by a calling from her God to treat those less fortunate than her as she would treat her own, while the other is motivated simply by a humanitarian concern for her fellow human beings. In another hypothetical, Little tells the story of a woman wishing to be granted unemployment insurance benefits when she quits a job requiring her to work on her Saturday Sabbath, and contrasts this with a non-custodial parent who quits his job because he wants to visit his children on Saturdays. Under the substantive protection reading of s 15, the former persons in these two examples would have a prima facie case for an exemption from the zoning and unemployment insurance laws, but the latter persons would not. For Little, requiring an exemption in the former but not in the latter instances effectively requires the disadvantaged non-religious claimants to undergo a test of

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88 See Chapter 2, section 2.1.
89 Ibid 115; quoting William Marshall “In Defense of *Smith* and Free Exercise Revisionism” (1991) 58 U Chi L Rev 308, 321: “The violation of deeply held moral or political principles may cause as much psychic harm to the believer as would a violation of a religious tenet, even if the latter is believed to have extra-temporal effect.”
90 Ibid 117.
92 Ibid 115; the example is based on *Sherbert v Verner* 374 US 398 (1963); see also William Marshall “The Case Against the Constitutionally Compelled Free Exercise Exemption” (1990) 40 Case W Res 357, 383.
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religious orthodoxy, and thereby devalues the strong personal moral beliefs behind their claims.  

According to Little, it is no more the function of the state to adjust its policies to accommodate the personal preferences of religionists than it is for the state to accommodate rapists or paedophiles who are inconvenienced by laws against rape and paedophilia. To do so would conflict with the “foundation principle of modern politics: equality of treatment”. In keeping with these arguments from “normative political theory”, Little prescribes that s 15 ought only to be read as providing a right to non-discrimination, or to a formally neutral state in religious matters. His argument is perhaps best summed up by the gloss provided by US law professors Lawrence Sager and Christopher Eisgruber of their preferred reading of the Free Exercise Clause, where they contend that, “in the name of equality”, no persons should be “devalued on account of the spiritual foundations of their important commitments and projects”.  

As a secondary argument in favour of the non-discrimination reading of s 15, Little contends that the balancing test mandated by the substantive protection reading of s 15 is an “arbitrary, illegitimate and unfair” methodology. He explains this with many of the arguments against balancing that I recounted in my survey of the American debate in Chapter 2. Essentially, Little points out that the balancing process requires courts to engage in the inherently subjective process of deciding whether an impugned governmental law or practice unjustifiably “burdens” a “central” rite of the religion in question. The unpredictability of answers to this question, which requires courts to make detailed assessments of the tenets of religious believers – an activity which, in any case, ill-befits the secular nature of courts – has led to charges that the courts will inevitably favour religious claimants who engage in the relatively familiar practices of mainstream sects. Finally, he argues that the second part of the balancing test, in which the courts must ask whether government has good reasons to burden religious activities with general laws, involves the courts in second-guessing the choices of legislatures, which, because of their democratic credentials, have more legitimacy to engage in this enquiry than non-elected judges. In Little’s view, therefore, holding states to a simple standard of formal neutrality in their dealings with religionists would be a far simpler and

94 Ibid 117; citing Eisgruber & Sager Religious Freedom, above n 92, 11: “The special protection interpretation of s 15 thus differentiates between the rights of individuals on the basis of the particular foundation of their personal beliefs and commitments.”

Little refers approvingly to Brian Barry’s argument that all laws regulating personal conduct are in fact intended to create unequal burdens and that religionists should accept the imposition of the law in the same way all other citizens (such as rapists, paedophiles and drug users) have to. Ibid 113; citing Brian Barry Culture and Equality: An Egalitarian Critique of Multiculturalism (Harvard University Press, Cambridge, 2001) 34.

96 Ibid 117.

97 Ibid 111.

98 Eisgruber & Sager Religious Freedom, above n 92, 52. See also Little “Religious Exemptions and BORA”, above n 87, 117, where, invoking similar language to Eisgruber and Sager, he decries the fact that the “special protection interpretation of s. 15...differentiates between the rights of individuals on the basis of the particular foundation of their personal beliefs and commitments”.

99 Little “Religious Exemptions and BORA”, above n 87, 118-122. Little describes the balancing approach thus: “[I]t requires that courts balance the burden a law imposes on an individual’s practice with the interest of the state in imposing that burden.”

100 See Chapter 2, section 2.2 (and section 3 where I explain that this complaint was the main reason why the US Supreme Court chose to abandon substantive neutrality analysis in Smith).

101 Little “Religious Exemptions and BORA”, above n 87, 119-120.

102 Ibid 120. For support, Little cites US academics William Marshall and Ellis West, who, with some justification, criticise the Sherbert-era jurisprudence for this flaw, and whose views I summarise in Chapter 2, section 2.2.

103 Ibid 120-122.
mechanical standard for the courts to apply and would not involve them in the controversial practice of re-drawing substantive legislative policy.

For Little, it follows from these two arguments that the purpose of the right to manifest religious belief in s 15 BORA should merely be to protect minority religionists from discriminatory laws enacted by hostile or indifferent majorities, and not to give them a presumptive right to exemptions from laws that everybody else is required to obey.

On the other side of the debate is Professor Paul Rishworth, who begins his discussion of this issue by observing that the motivation of the founders of the US republic in writing their Religion Clauses was to avoid the sectarian strife that they had left behind in Europe, and to protect churches from the “worldly corruption” of the state, and vice versa.\textsuperscript{104} These reasons, although mixed with a pragmatic political desire to preserve civil peace, were to an extent religious in nature and (as I shall explain below) were the product of the thinking of a more religious people in a more religious time.\textsuperscript{105} By contrast, Rishworth explains that it is hard to describe the religious freedom protections in BORA as being intended to prevent religious strife or to prevent the undue influence of religion on public life in New Zealand. Both of these concerns were not prevalent in 1990 when BORA was enacted and are increasingly remote possibilities in modern New Zealand life.\textsuperscript{106} Hence, the secular rationales outlined above (ie, protection of religious autonomy and diversity as a good in itself from the imposition of state-induced uniformity) are now the only plausible purposes for which we should regard the religious freedom protections in BORA as being created.\textsuperscript{107}

Like Little, Rishworth acknowledges the “tension” involved in privileging religious believers on the grounds of personal autonomy in modern secularised societies, where religious belief is declining and in any case is perhaps no longer regarded as distinct from other individual preferences or life choices.\textsuperscript{108} However, for Rishworth the mere semantic presence in s 15 of the guarantee to persons wishing to manifest their “religion or belief” could justify the provision being read as requiring that courts accord religionists this privilege, as opposed to those wishing to engage in actions motivated by mere non-religious “thought” or “conscience”.\textsuperscript{109} This legislated command to courts cannot simply be ignored and is perhaps strong enough to rebut Little’s (non-text-based) arguments drawn from a highly secularised strand of American political theory. The strength of Rishworth’s position, which resembles that


\textsuperscript{105} See ibid; and Rishworth et al, above n 9, 279: “In the generally religious worldview of eighteenth-century American society, religion involved duties to a sovereign greater than the state and was rightly to be protected from the corrosive influence of the state, just as the state itself ought to be protected from the manipulative influence of corruption in religion.”

\textsuperscript{106} Rishworth “Coming Conflicts”, above n 104, 231.

\textsuperscript{107} Ibid.

\textsuperscript{108} Ibid 232.

\textsuperscript{109} Ibid. Section 13 BORA provides protection for freedom of “thought, conscience, religion, and belief”, which are regarded as being part of the internal aspect of the right, and which cannot be abridged by the state for any reason (see Rishworth et al, above n 9, 285). Section 15 provides for the manifestation of “religion or belief”, which connotes protection for the external conduct of religious (and religion-like) beliefs, not for mere conduct based on the much wider category of “thought”, which is said to be protected by other guarantees in BORA, such as s 14 (freedom of expression), 17 (freedom of association), and 19 (freedom from discrimination on the grounds of political opinion).
of prominent US scholar Douglas Laycock,\(^\text{110}\) is that it is tied closely to the patently religion-friendly text of BORA, which, anachronistic or not in the modern era, undeniably exists on the statute books (and in New Zealand’s case was enacted as recently as 1990). Moreover, regarding the balancing analysis castigated by Little, Rishworth again makes a textual argument, claiming that the proportionality analysis mandated in the substantive protection methodology is simply required by s 15 BORA’s parent Art 18 in the ICCPR.\(^\text{111}\)

For Rishworth, then, s 15 is best read as requiring the state to adopt a position of “equal concern and respect”\(^\text{112}\) for minority religious believers, which sometimes will require that the majority treats them differently to other citizens,\(^\text{113}\) with the courts playing a crucial role in mediating conflicts that occur by applying substantive neutrality analysis to general laws impeding religious conduct. Little’s answer, by contrast, is to translate the provision as creating a blunter standard of formal neutrality, or of equal treatment simpliciter.

My response to these two different views is that they are both compelling on their own terms. But which is correct? As I have explained in Chapter 1,\(^\text{114}\) it is my position that these apparently warring candidates for the “purpose” of s 15 do not necessarily conflict if one considers that they speak differently to the two primary institutions charged with interpreting BORA rights: the legislature and the judiciary – with the former being the forum that applies the substantive protection reading advanced by Rishworth, and the latter the formal neutrality analysis put forward by Little (although, as I shall explain below, I disagree with Little’s primary normative reason for why this should be so).

My argument for this two-tiered institutional solution to interpreting s 15 is as follows. First, an analysis akin to that of Blanchard J above in Lange of the religious freedom tradition in this country discloses a record whereby the legislature has in fact shown solicitude towards claims for religious conduct exemptions in the face of general laws. It is therefore reasonable to infer from this tradition of “legisprudence” that s 15 BORA ought to be read as transferring part of this responsibility to the courts, despite Little’s claims that this favouring of religion is normatively insupportable. Little’s normative argument, as I shall demonstrate, is not backed up by reality (either past or present) in the legislative record in this country, and is in any event conceptually flawed as a matter of logic flowing from the semantic presence of “religion” in s 15 itself. However, as I endeavoured to show in Chapter 2 with my cataloguing of the failure of the US courts to administer the Sherbert-era substantive neutrality regime fairly or consistently, Little’s secondary argument that the courts are not competent to adjudicate on religious free exercise issues is, I believe, ultimately compelling and is sufficient on its own to limit the courts’ role in enforcing s 15 to policing a relatively mechanical standard of formal neutrality. I look first at the historical conception of religious freedom in this country.

\(^\text{110}\) See Douglas Laycock “Religious Liberty as Liberty” (1996) 7 J Contemp Legal Issues 313 314; and see my discussion of Laycock’s position in Chapter 2, text accompanying ns 94-128.

\(^\text{111}\) See Rishworth et al, above n 9, 297. I shall dispute the inference that Art 18 requires courts to engage in proportionality analysis of burdens imposed by general laws on religious practice in section 3 below.

\(^\text{112}\) See Dworkin Taking Rights Seriously, above n 22, 272-273.

\(^\text{113}\) See ibid 227 (emphasis in original), where Dworkin describes the right to “treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else”. Rishworth makes an argument in this Dworkinian tradition in his article “The Religion Clauses of the New Zealand Bill of Rights” (2007) NZ Law Review 631 (“Rishworth ‘Religion Clauses’”), in which he advances a reading of BORA’s religious freedom protections that incorporates much of the import of the Equal Regard reading of s 15 (and acknowledges the US origins of the theory), but in which he nevertheless does not discount the possibility of courts according the substantive protection reading to s 15 BORA.

\(^\text{114}\) See section 1.2 in Chapter 1.
2.2.2 Why history compels the substantive neutrality reading of section 15...

But equally it is assumed, especially by such libertarians as Locke and Mill in England...that there ought to exist a certain minimum area of personal freedom which must on no account be violated, for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or sacred.\textsuperscript{115}

I begin my consideration of the domestic historical provenance of s 15 BORA with the 1999 case of \textit{Mendelssohn v Attorney-General}.\textsuperscript{116} Although a New Zealand court has never squarely addressed the issue under debate in this thesis, the methodology employed by Justice Keith in \textit{Mendelssohn} – which resembles the enquiry into first principles of Blanchard J in \textit{Lange} – is helpful in framing my historical analysis of the scope of s 15.

The appellant in \textit{Mendelssohn}, who was a leading member of the “New Age” Centrepoint religion, complained that the Attorney-General had not acted sufficiently to protect the religious freedom of the group. Mendelssohn argued this was positively required by the religious protections in BORA.\textsuperscript{117} The group had experienced great difficulties in the wake of the conviction and imprisonment in the early 1990s of its founder and guru Bert Potter for drug offences and sex crimes committed against minors living at Centrepoint’s communal headquarters. The plaintiff had written to the Attorney-General in 1995 asking him to restore the operation of the Centrepoint Community Growth Trust,\textsuperscript{118} which had been created by Potter,\textsuperscript{119} to its proper purposes. Instead, the Attorney-General ordered an independent inquiry into the Trust’s affairs. The inquiry was highly critical of the Trust’s operations and, based on this report,\textsuperscript{120} the High Court disestablished the Trust and ordered that a Public Trustee be appointed in substitution for the existing trustees.\textsuperscript{121} Mendelssohn contended that the Attorney-General’s failure to take positive steps to ensure the survival of the religious community in the face of these incursions on its autonomy constitute d a breach of, inter alia, ss 13 and 15 BORA.\textsuperscript{122} In his negative response to the submission, Keith J said:\textsuperscript{123}

\textit{The short answer to this submission is that in their essence those provisions do not impose positive duties on the state, at least in any sense relevant to this case. Rather they affirm...}


\textsuperscript{116} [1999] 2 NZLR 268 (CA) (“\textit{Mendelssohn}”).


\textsuperscript{118} Justice Tompkins had granted the group charitable trust status on the grounds that the group’s activities fell, inter alia, within the charitable head of advancement of religion in \textit{Centrepoint Community Growth Trust v Commissioner of Inland Revenue} [1985] 1 NZLR 673 (HC), 695.


\textsuperscript{120} See Ailsa Duffy \textit{Report of the Committee of Inquiry on its examination and inquiry into the Centrepoint Community Growth Trust, pursuant to Section 58(2) of the Charitable Trusts Act 1957} (Crown Law Office, Wellington, 1997).

\textsuperscript{121} The Court of Appeal rejected a challenge by Mendelssohn to this appointment; \textit{Mendelssohn v Centrepoint Community Growth Trust} [1999] 2 NZLR 88 (CA).

\textsuperscript{122} The submission also invoked ss 14 (freedom of expression), 17 (freedom of association), and 20 (the right of minority religionists not to be denied the right to practise their religion in community with others). \textit{Mendelssohn}, above n 116, 272-273.

\textsuperscript{123} Ibid 273 (emphasis in original).
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freedoms for the individual which the state is not to breach. The very nature of these rights and freedoms means that they are freedoms from state interference. These rights and freedoms are affirmed by s 2 against acts of the various branches of the state (referred to in s 3) including the Executive branch. The freedoms in issue are in general within the category often referred to as the negative freedoms, to use one part of Isaiah Berlin’s famous categorisation...

The appellant attempted to argue that the historical context reflected in the statute law pertaining to religion in New Zealand supported an “active or positive reading of the relevant provisions of [BORA]”. He pointed to legislation in which the state had apparently assisted religious bodies, for instance in matters relating to property concerns or to removing legal obstacles to their activities. These included the Spiritualist Church of New Zealand Act 1924, which established that Church as a body corporate, and a number of similar private Acts in 1924 allowing the Catholic Church to take actions in relation to its own lands and other interests. Also, the Church of England Empowering Act 1928 was invoked, as this legislation took the more active step of enabling the General Synod to alter its own doctrines and formularies.

For Keith J, however, this species of statute law, as well as others, was merely “facilitative in respect of a particular matter” and could not be characterised as implying a “general positive duty to protect freedom of religion”. Apart from extreme instances (which were not relevant to the case at bar) where the state would have an obligation to protect religionists from other private actors in society, there was, in Keith J’s view, nothing in the statutory landscape that could assist in reading BORA as compelling the state to act in the way the appellant wanted. Instead, the record pointed towards a “power” as opposed to a “duty” on the part of government to intervene in religious matters. For the court to require the state to act otherwise in the present case would be to impose a “positive duty” on an “exceptional basis” that was not justified by the essentially negative protection affirmed in ss 13 and 15 BORA.

Justice Keith contrasted freedom of religion with other “positive” BORA guarantees that did require active state enforcement, especially those connected with the criminal justice system. For example, the right to be informed of one’s right to legal services and to receive legal aid and to be tried without undue delay were all cited as entitlements that demanded state action for them effectively to be realised. The long title to BORA, which provided that the rights thereby enacted were “affirmed” and “promoted” was further indication to Keith J that some of the rights were negative in nature, while others were positive and involved “government

124 Ibid 275.
125 Keith J explains this statute as being necessary to reassert the New Zealand Anglican Church’s powers in this respect, because of changes in Imperial legislation affecting the Churches of England and Ireland. Ibid.
126 Keith J also refers to legislation in respect of marriage ceremonies and burials in cemeteries, which in his view merely facilitate religious activities. Ibid 276.
127 Ibid (emphasis added).
128 Keith J refers to legislation preventing “private oppression or coercion” (ibid 275), such as s 131 Human Rights Act 1993 (banning incitation of racial disharmony); s 37 Summary Offences Act 1981 (prohibiting the disturbance of religious congregations); and s 123 Crimes Act 1961 (criminalising blasphemous libel).
129 Ibid 275. Keith J in effect employs Hohfeldian analysis to carve up the state’s obligations in this area. See Wesley Hohfeld Fundamental Legal Conceptions As Applied to Judicial Reasoning (Yale University Press, New Haven, 1919); and see the discussion of Hohfeld’s ideas in relation to the state’s duty to protect religionists from offence by private actors in Ahdar “Religious Feelings”, above n 117, 655.
130 Ibid 276. For a contrary opinion supportive of Mendelssohn’s claim that religion is a special case, see Noel Cox “Legal Aspects of Church–State Relations in New Zealand” (2009) 8 Journal of Anglican Studies 9. Cox plausibly argues that these statutes in fact reveal that organised religion enjoys a “quasi-established” status in New Zealand.
131 Ibid.
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obligations”. For Keith J, ss 13 and 15 BORA merely affirmed the common law tradition of negative protection for freedom of religion, as expressed by Isaiah Berlin and British lawyers writing within that tradition.

The Centrepoint saga was concerned primarily with drawing boundaries for the very limited instances where the state is required actually to do things for religion. What, then, does Mendelssohn say about religious conduct exemptions, which by their nature involve the qualitatively different activity of the state removing burdens on religionists imposed by laws that require them to do or refrain from doing certain things?

In his seminal lecture on liberty given in 1959, Berlin opined, citing differences of opinion on the matter ranging from Hobbes, Locke, Kant and Mill, that the area of the individual’s life that must be free from state interference is a subject of “haggling” and “infinite debate”. The critical question, therefore, is where this frontier should be drawn in this country for s 15. As we have seen in the American scholarship and judicial commentary on the concept of neutrality as an organising principle for ordering church-state relations, there are two ways of seeing the appropriate boundary. One view (substantive neutrality) holds that laws impinging on religion ought to be drawn in a way that has as little effect as possible on the choices of individuals in pursuing their life projects. This vision requires that exemptions be given in some cases, as long as society is not unduly harmed in the bargain. The other (formal neutrality) holds that freedom of religion is observed if laws are simply religion blind. As long as laws are not enacted with anti-religious animus and do not contain exclusively religious categories, but are made in pursuance of secular objectives, religionists will be sufficiently free. Both conceptions of neutrality arguably respect a zone of “negative” freedom within which, as Keith J puts it, “autonomous institutions…are left to determine their own conception of the ‘good’. That is what ‘freedom of religion’ in bills of rights is all about”.

I now propose to assess how the New Zealand polity arrived at its own conception of the right to religious free exercise in the century and a half of religion-state activity that took place before this principle was enshrined in s 15 BORA, and to ask whether this record aligned itself on one side or the other of the “neutrality” divide. But, before doing that, it is helpful to turn to the final throes of the US historical debate on the subject, in order to illustrate how the courts in that country framed the matter in political, historical and philosophical terms and also to show how thorny such a question can be.

(a) The inconclusive American historical debate

The issue of the original meaning of the Free Exercise Clause was not raised in the two modern cases that determined, on the one hand in the Sherbert decision of 1963 that it sometimes

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132 Ibid.
133 Ibid; citing Berlin Two Concepts, above n 115; and Lord Hailsham of St Marlylebone Halsbury’s Laws of England (4th ed reissue, Butterworths, London, 1996) Vol 8(2), [105], n 2: “Rights can be sub-divided into positive and negative rights. Positive rights require some action by the state to ensure their fulfilment whilst negative rights merely require that the state refrain from certain forms of action. The common law has traditionally protected only negative rights.”
134 Berlin Two Concepts, above n 115, 9-11.
135 See text accompanying ns 27-36 in Chapter 1, and the scholarly writings cited therein. The contrast between formal and substantive neutrality is also helpfully described by Souter J in Lakumi v City of Hialeah 508 US 520, 576 (1993) (per Souter J, concurring); see also my discussion of Justice Brennan’s preferred (substantive) conception of neutrality in text accompanying ns 140-142 in Chapter 2.
required exemptions from general laws, and on the other in the *Smith* case of 1990 that it merely stood for the principle of formal neutrality. Although the historical background to the clause featured in *Reynolds* as long ago as the 19th century, the *Sherbert* and *Smith* Courts were able to evade the topic. In *Sherbert*, this was because historical meaning was not at the time considered a necessary feature of constitutional adjudication.\textsuperscript{137} In *Smith*, the question did not arise simply because the basic meaning of the clause was not raised in argument.\textsuperscript{138} As we saw in Chapter 2, Justice Scalia was able to resolve the interpretive issue without making any firm pronouncements on the text or history of the provision. Instead, he relied almost exclusively on arguments related to institutional competence.\textsuperscript{139} The historical provenance of the clause therefore remained undetermined in the modern era, and therefore had the potential to upset the doctrinal solution advanced in *Smith*.

This matter was finally given a judicial airing in 1997 in *Boerne*, when Justice Scalia and Justice O’Connor, in the words of one commentator, “battled to a draw on the question of original understanding”.\textsuperscript{140} Because a majority of the *Boerne* Court considered the doctrinal solution in *Smith* to be settled law by 1997 and did not lend their weight decisively to one historical view or the other, this relative sideshow to the main decision had no immediate effect on the meaning of the clause. Despite the continuing impasse, however, *Boerne* does cast considerable light on the types of arguments that can carry weight in enquiries into the meaning of constitutional provisions that have obscure and deeply contested meanings. As we have already seen in my discussion in Chapter 2, the First Amendment’s stipulation that “Congress shall make no law…prohibiting the free exercise [of religion]” is assuredly in this category.

The basic political premise justifying thorough judicial exegesis of the historical underpinnings of constitutional texts (an endeavour known in the US as “originalism”) is that, for essentially democratic reasons, judges (who are unelected) ought to confine themselves to uncovering what the provisions actually meant to the 18th century founding generation who enacted them.\textsuperscript{141} This avoids the charge – often levelled at some of the ultra-liberal judicial decisions of the latter part of the 20th century in areas such as birth control, gay rights and the death

\textsuperscript{137} See Michael McConnell “The Origins and Historical Understanding of Free Exercise of Religion” (1990) 103 Harv L Rev 1409, 1413. Moreover, Brennan J, the author of *Sherbert*, is on record as regarding the views of the founding generation as unlikely to be of assistance in solving religious controversies in the different social environment of the late 20th century. See Brennan J’s concurrence in *Abington v Schempp* 374 US 203, 238 (1963), which was decided in the same year as *Sherbert*, and where he states that “views of the eighteenth century” drafters of the Bill of Rights were unhelpful in determining the issue of whether Bible readings ought to be prevented in public schools under the Establishment Clause. See also William Brennan “Why have a Bill of Rights?” (1989) 9 Oxford J Legal Stud 425, 426, where he describes the ideal constitution as one that is a “living, evolving document that must be read anew for our time”.

\textsuperscript{138} As noted by O’Connor J in *City of Boerne v Flores* 521 US 507, 546 (1997) (“Boerne”).

\textsuperscript{139} Recall that the determinative factor in *Smith* was that secular courts were unable as a matter of logic to weigh the centrality of religious beliefs against the importance of conflicting secular regulation. Scalia J preferred to resolve such conflicts by requiring the state simply to enact non-discriminatory laws. This would allow courts to apply predictable rules as opposed to vague standards, thus furthering rule of law values. For Scalia’s definitive views on the merits of using non-subjective rules in constitutional adjudication generally, see Antonin Scalia “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175.

\textsuperscript{140} Bloom *Methods of Interpretation*, above n 85, 118. Stevens J joined Scalia J, and Breyer J allied with O’Connor J in their respective opinions in *Boerne* concerning original understanding.

penalty\textsuperscript{142} – that judges will insert their own moral and philosophical predilections into the vaguely worded terms of the text, and then use these interpretations to strike down or otherwise frustrate democratically made laws that conflict with these interpretations.\textsuperscript{143} Some, on the other hand, perceive the originalism method to be an invention of the political right to roll back recent hard-won liberalising moves in society\textsuperscript{144} to the prevailing social mores of the 18th and 19th century when, for example, gay rights could not plausibly be said to be on the political agenda of the American citizens who created the Due Process Clause of the 14th Amendment.\textsuperscript{145} An enormous literature has grown up around the validity and coherence of this methodology.\textsuperscript{146} I do not propose to summarise that literature here, but it would seem that the real issue in the debate is not so much whether historical materials are relevant, but how much weight should be accorded to them.\textsuperscript{147}

Returning for a moment to the New Zealand interpretive debate, it is beyond dispute that questions as to the meaning of the text of BORA rights can receive illumination (and, as we saw in \textit{Poumako, Lange,} and \textit{Mendelssohn,} have done in the courts) from what would be described in the US as originalist sources, including consideration of classical and contemporary legal or political writings, parliamentary debates, committee reports, and international law materials that were debated and crafted in the mid-20th century.\textsuperscript{148} For this


\textsuperscript{143} For a critique in this vein of the jurisprudence of Brennan J, who often wrote controversial opinions that departed from established constitutional history, see Bradley Watson “The Jurisprudence of William Joseph Brennan Jnr., and Thurgood Marshall” in B Frost & J Sikkenga (eds) \textit{History of American Political Thought} (Lexington, New York, 2003) 772.

\textsuperscript{144} Sunstein makes this claim, writing that certain “fundamentalist” judges espousing originalist methodologies would empower states to, inter alia, establish religions, restore slavery, criminalise homosexual sex and much else. See Cass Sunstein \textit{Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America} (Basic Books, New York, 2005) (“Sunstein \textit{Radicals in Robes}”) 63-65.

\textsuperscript{145} In \textit{Bowers v Hardwick} 478 US 186 (1986), the Court upheld statutes criminalising homosexual sodomy in part because it had been a criminal offence in all 13 states at the time the Bill of Rights was ratified, and in 32 of 34 states when the 14th Amendment was enacted in the 19th century.

\textsuperscript{146} For a treatment favourable to originalist methodology, see, eg, Keith Whittington \textit{Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review} (University Press of Kansas, Lawrence, 1999); for critical evaluation, see, eg, Sunstein \textit{Radicals in Robes}, above n 144.

\textsuperscript{147} Greenawalt describes “originalists” as those who believe a provision’s “initial” meaning should determine modern meaning, whereas “nonoriginalists” believe this meaning assists initial interpretation, but that these meanings should also be allowed to evolve as “social conditions and cultural values change”. Greenawalt \textit{Free Exercise and Fairness}, above n 141, 12. Like Greenawalt, Rishworth considers that some form of originalist enquiry into BORA terms is “inescapable”, considering that BORA was in large part crafted to “preserve important values”. Finding out what these values were is thus a “necessary starting point” in rights analysis. However, Rishworth goes on to argue that original meaning can be superseded, especially in relation to broadly worded provisions, such as s 15, that may require new specification as novel issues come to light in society. See Rishworth et al, above n 9, 49.

\textsuperscript{148} See Butler & Butler \textit{NZBORA Commentary}, above n 9, ch 4, for a summary of these potentially relevant materials. I discuss the meaning of the international law texts and debates in section 3 below. For an interesting “originalist” stand-off in New Zealand, see \textit{Quilter v Attorney-General} [1998] 1 NZLR 153, where Keith J argued that the prohibition of discrimination in s 19 BORA did not “reach” the issue of whether the non-recognition of same-sex marriage in Marriage Act 1955 discriminated against gay couples. For Keith J, the fact that Article 23 ICCPR, which New Zealand ratified in 1978, only acknowledged that “men and women” had the right to marry meant that the Marriage Act could not be viewed as discriminatory. In dissent (at 545), Thomas J objected that it was wrong to interpret s 19 as frozen in time and as reflecting only what legislators thought was its ambit in 1990.
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reason, an enquiry into the way this discourse has developed in the US – where the process has been in train for a very long time – may offer insights into how historical material could be marshalled to inform the meaning of s 15.

According to current thinking, the original understanding of the US Constitution is to be deduced, not from the subjective intentions of the men who drafted and ratified it, but by careful analysis of how the terms of the document would have been publicly understood by intelligent and informed American citizens at the time it was finally adopted. As I will show, this methodology potentially can bring in a wide variety of material. What will also become clear is that the meaning of this material can, like the constitutional text itself, become muddied by the passage of time and, relatedly, by the natural indeterminacy of the language used by the long-dead political actors who were involved in the founding era debates. Moreover, some of the religious arguments inhering in the material, referred to by Rishworth above, are arguably inapplicable to modern secular discourse, even though they were politically essential for achieving consensus in the intensely pious times when the US Bill of Rights was ratified. Relevant sources for construing historical meaning in US Bill of Rights jurisprudence include: legislative and executive practice at colonial, state and national level both before and after the Constitution was ratified, pre-existing English common law, practices and statements of the executive branch of government, the writings of leading public intellectuals who shaped the religious, legal and political climate in Europe and in the US, contemporaneous dictionaries, and much else besides.

149 The foremost modern expositor of originalism, Justice Scalia, argues that trying to ascertain the subjective intentions of legislators (whether of constitutional or statutory texts) is fraught with difficulty, as compared with the more objective activity of assessing the ordinary contemporaneous meaning of the finalised words of these texts. See Antonin Scalia A Matter of Interpretation: Federal Courts and the Law (Princeton University Press, Princeton, 1997) 38: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”

150 This is the type of analysis used in District of Columbia v Heller 554 US 570 (2008), in which the Court struck down a legislated ban on private hand gun ownership, as it contradicted the historically understood meaning of the Second Amendment right to “bear arms”. See, generally, discussion in Lawrence Solum “District of Columbia v. Heller and Originalism” (2009) 103 Nw UL Rev 923.

151 Scalia argues that originalism is not without its difficulties (he acknowledges the problem of immersing oneself in the political culture of previous eras), but that it is more reliable than judges trying to deduce the meaning of the text from evaluating evolving moral standards in American society. See Antonin Scalia “Originalism: The Lesser Evil” (1989) 57 U Cin L Rev 849, 855-857. Many disagree: see, eg, Paul Brest “The Misconceived Quest for the Original Understanding” (1980) 60 BU L Rev 204, and John Valauri “Everson v. Brown: Hermeneutics, Framers’ Intent, and the Establishment Clause” (1989) 4 Notre Dame JL Ethics & Pub Pol’y 661 (“Valauri ‘Framers’ Intent”), where the authors caution about the uncertainties arising from sifting through vast quantities of conflicting historical materials and translating these into modern times.

Religious freedom in America: the legacy from Europe

The text of the prototypical American solution to the religious conduct issue sprang out of and reflected a mixture of political and moral ideas – some of which were primarily religious and some not, although these perspectives were inevitably recruited together by their proponents, if only for rhetorical purposes. Whose views counted most – and what the speakers were in fact trying to say – remains a subject of perennial debate, and perhaps partly explains why the majority of the Boerne Court preferred not to address the historical question. This leads us to consider the historical materials that arguably informed the meaning of the Free Exercise Clause.

For much of Western history, received wisdom held that a fusion of religion and the state was essential in order to maintain political (and religious) stability. Early Christian thought based on the scriptures held that heresy could be punished by severe penalties including banishment, torture and execution. Citing the Bible in relation to an intractable dispute between orthodox Catholics and the dissident Donatist group in the region of North Africa where he was bishop, Augustine (354-430) contended that Christian dissenters could be made to recant by force and not merely by persuasion, as he had previously believed. He relied on the parable of Jesus concerning a rich man who ordered guests to attend a feast he had prepared. Those who refused to attend (apart from Jews and non-Christian infidels) were deemed heretics that could be “compelled to enter” (the doctrine of “compelle intrare”). This religious

153 Witte and Green explain that confusion over the original meaning of the Religion Clauses stems from the fact that it reflects the theological views of many political and religious leaders of the early Republic, as well as the sceptical or rationalist views of political leaders like Thomas Jefferson who had different ideas about what the clauses should mean. See John Witte Jr & M Christian Green “The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles” in JD van der Vyver & J Witte Jr (eds) Religious Human Rights in Global Perspective: Legal Perspectives (Martinus Nijhoff, The Hague, 1996) 501.

154 The records of the debate in the first Senate in which the final wording of the Free Exercise Clause was adopted are unavailable, as the discussion was conducted in secret. This has meant that secondary materials of the sort listed in this paragraph have become the main source of historical analysis. See Greenawalt Free Exercise and Fairness, above n 141, 23; and Valauri “Framers’ Intent”, above n 150, 668. This gap in the record resembles the lack of substantive discussion of s 15 in the legislative debates preceding BORA’s enactment in 1990.

155 I confine myself in this section to considering the Anglo-American, and in its original guise, Christian, philosophical tradition pertaining to religious freedom, to which New Zealand belongs. This is not to say, of course, that other cultures did not grapple with the issue and in some cases formulated successful answers to the problem of religious conflict, such as the regimes of religious tolerance and equality promoted by Indian rulers, viz King Asoka (272-232 BC) and Akbar the Great (1556-1605); and the “millet” system instituted by the Ottoman Empire (which existed from the 15th to the 20th centuries), under which non-Muslim communities were permitted a degree of self-rule within the Islamic Caliphate. For a very general sweep of the different traditions, see “History and Philosophy” in Parliament of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade Completed Enquiry: Freedom of Religion and Belief (Canberra, 2003), ch 3.

156 The prevailing consensus for the “fourteen hundred years” of various types of governments in Western Christendom preceding the US Constitution had been that the “stability of the social order and the safety of the state demanded the religious solidarity of all the people in one church”, with the corollary that a union of one church and the civil government in any given nation was essential for civil order. Winfred Garrison “Characteristics of American Organized Religion” (1948) Annals Am Acad Pol & Soc Sci, vol 256, 14, 17; cited in Sydney Mead The Lively Experiment: The Shaping of Christianity in America (Harper & Row, New York, 1963) 60; see also Nussbaum Liberty of Conscience, above n 153, 354; and Butler & Butler NZBORA Commentary, above n 9, [14.5.1].


158 See Luke 14: 23: “Then the Lord said to the servant ‘Go out into the highways and the hedges and compel them to come in’”; quoted in Tierney “Historical Perspective”, above n 157, 21.
position remained influential for a thousand years and was used to justify religious persecution on a massive scale. In the theocratic regime of John Calvin’s Geneva, this ideal was fully realised. In one infamous episode in 1553, the religious scholar Michael Servetus, an intellectual forerunner of the Unitarian Church, was burned at the stake by Genevan authorities at the instigation of Calvin for denying the divinity of Christ and rejecting infant baptism.

In the realm of secular political discourse, Thomas Hobbes (1588-1679) argued that civil peace could only be assured by a close allegiance of church and government, with the latter exercising total control and enforcing religious unity among the populace by force of law. This brand of church-state relationship, known as “Erastianism”, was partly dictated by prudential concerns resulting from the chronic instability of the English Civil War era in which Hobbes lived. Hobbes, as did many others, considered the religious disputation between opposing sides to be a primary, or at least exacerbating, cause of the conflict. In a parallel development, itself a response to the wars of religion on the European continent when the unity of the Catholic Church was fractured as a result of the Protestant Reformation, certain peace treaties permitted private non-conforming religious worship in homes or allowed dissenting religionists to emigrate to neighbouring polities where their religion was in fact supported by the temporal power. Otherwise, religious uniformity was to be enforced, depending on the


160 Calvin, despite being a mere private citizen, exercised enormous authority in Geneva during the period 1541-1564. He advocated death for heretics based on his version of Protestantism, and relied in part on Augustine’s treatment of the Donatists to justify his position. For discussion of Calvin’s doctrines, see ibid 77-82.


162 See Thomas Hobbes Leviathan (1651) (M Oakeshott (ed), 1957) pt III, ch 3, 355, cited in McConnell “Origins”; above n 152, n 550: “[T]he Right of Judging what Doctrines are fit for Peace, and to be taught the Subjects, is in all Commonwealths inseparably annexed … to the Soveraign Power Civill.”

163 Erastian states are to be contrasted with theocracies. In the former the secular arm of government controls religion, while in the latter religious authorities dominate. See Ahdar & Leigh Religious Freedom in the Liberal State, above n 157, 70-71.


165 See, eg, Conrad Russell The Causes of the English Civil War (Clarendon Press, Oxford, 1990) ch 3; and Douglas Laycock “Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century” (1996) 80 Minn L Rev 1047 (“Laycock ‘Reformation Era’”), 1062 (internal footnote omitted): “The English Civil War of the 1640s was partly political and economic, partly religious. It was for the rights of Parliament and the middle class against Stuart absolutism and the hereditary aristocracy, but it was also Puritans against Anglicans, Catholics, and Scots Presbyterians. The religious causes were inextricably linked with the others; arguably the religious causes dominated.”

166 The Catholic Church was virtually synonymous with Western Christendom until the 16th century. The “Protestant Reformation” began in the 1520s in Germany when Martin Luther began a revolt against Catholicism with the publication of his Ninety-Five Theses against the Sale of Indulgences. Indulgences were bought from the Church by individual Catholics to save their souls or those of others. Luther believed this device was a venal mercenary practice. Luther preached that the mediating and corrupt role of the Catholic Church, as exemplified by the Indulgences scheme, should be replaced by an individual relationship with God based on Scriptures alone. Luther’s ideas spread quickly and led to the springing up of a large number of new Christian sects. See Zagorin Religious Toleration, above n 159, 58-60; and Malcolm Evans Religious Liberty and International Law in Europe (Cambridge University Press, Cambridge, 1997) 45-54.
private religious confession of the state’s ruler (the principle of “cuius regio, eius religio” – whose realm, his religion”).

Versions of this type of government existed in some of the early American colonies long before the Constitution of 1787. The Puritan colonies in New England were peopled by those who had departed England in the early 17th century in the wake of persecution and dissatisfaction with what they saw as the newly formed Anglican Church’s incomplete break with Catholic doctrine. Although, for example, the Puritan colony of Massachusetts Bay practised what might be called in today’s terms a rudimentary separation of church and state, in that its civic and religious leaders were barred from holding office in each other’s realm of authority and were directly elected, only persons belonging to the established religion could stand for political office, and strict religious uniformity was applied to persons inside its borders. As in Calvin’s Geneva, this task was performed by the secular authorities in line with biblical principles, as laid down by Church leaders. For example: the Christmas holiday celebration, which was denounced as a Catholic invention since it was not reported in the Old Testament, was outlawed; Baptists were ordered to leave the colony by statute in 1644; four Quakers who returned after being banished were hanged; and other dissenters were horsewhipped or imprisoned.

In Virginia, where the Church of England was established by order of the English Crown in 1624 until the American Revolution, dissenters, including visiting Puritan ministers, were expelled, Presbyterians were prevented from preaching and Baptists were often jailed or subjected to public whippings. In both colonies, the inhabitants were required to worship according to their respective Calvinist and Anglican rituals and to pay tithes, or assessments, to support the established church.

In both polities, civic and religious authorities, despite nominal separation, worked closely together in matters concerning education and a host of other mundane activities such as maintaining census rolls and libraries. In questions concerning personal religious conscience,
John Cotton, an eminent teacher and minister in Boston, claimed, in the spirit of Augustine, that it was “Toleration that made the world anti-Christian”, and that a man who continued to violate the laws laid down in his colony and was punished for doing so was not being “punished for his Conscience, but for sinning against his own Conscience”. Individual religious dissent was not tolerated in either colony and propagation of religious doctrine was a joint pursuit by secular and religious authorities, which, in the words of Cotton (speaking of the Massachusetts polity), were to be “close and compact”. As one local writer put it: “Christ Reigns among us in the Commonwealth as in the Church, and hath his glorious Interest involved and wrapt up in the good of both Societies respectively.”

A different view that constituted a major departure from the early Christian writers and which was later to be advocated vigorously by evangelical religious dissenters and rationalist political theorists in America was that the state and religion belonged to completely separate temporal and spiritual realms and that each should stay out of the other’s sphere of operation. This idea was employed initially to define the respective and sometimes overlapping roles of ecclesiastical and secular rulers in Europe from the 11th century onwards. Based on the teaching embodied in Christ’s words, “Render to Caesar the things that are Caesar’s, and to God the things that are God’s”, this contested idea of the “Dual Kingdoms” saw much disputation in the Middle Ages between secular and religious authorities. In one archetypal conflict in 1077, King Henry IV of Germany sought to select bishops in his realm above the wishes of the Pope. Pope Gregory VII responded by excommunicating the king. Eventually the dispute was resolved when Henry travelled in person to Italy where he gained papal forgiveness. Later, after both Henry and Gregory had died, it was decided at the Concordat of Worms in 1122 that the right to appoint clergy was invested in the Pope, although as a practical matter secular rulers would continue to exercise decisive influence in these choices.

Regardless of the outcomes of disputes such as these, the significance of these dualistic struggles is that they planted an important seed in the history of religious freedom and indeed liberalism generally. Unlike societies where religion and state resided unquestionably in one person (eg, in the Pharaohs of Egypt and the Incas of Peru), these European duopolies provided unique experiments in limited secular government, and thence became breeding grounds, albeit unintentionally on the part of the actors involved, for the development of political arguments for religious toleration.
The concept of the Dual Kingdoms underwent a crucial overhaul during the Protestant Reformation when religious thinkers began to argue that genuine individual conscience and freedom to choose how one should relate to God was the primary religious good, and that persecution on account of religious belief was a mistake. Whereas the Catholic Church had insisted on itself as being the essential intermediary between individuals and God, the Protestant conception of faith was different, in that it stressed the primacy of the individual’s direct relationship with God. In the words of one commentator, Protestantism “sought to cut out (or at least downsize) the middleman, so to speak, and to encourage a more direct relation between the individual and God”. This change in attitude meant that the “spiritual centre of gravity had shifted to the individual conscience”, which, allied with advances in the spread of information heralded by the printing press and exhaustion from religious wars and irreversible increases in religious diversity, created a new reality. New theories were needed to encompass this thought, which made it possible to contend that the individual and not just corporate church bodies ought to enjoy a degree of freedom from temporal rulers. This change in theological argument coincided with (and no doubt helped drive) the Enlightenment concept that human affairs ought to be guided by reason alone, with the human person at its centre, and in line with the observable laws of nature.

In this environment of natural law centred on the individual person and new ideas springing from radical Protestant theologians, recognisably modern formulations of religious human rights began to emerge. Three discernible strands of argument in favour of individual freedom in religious matters sprang from this new milieu. One important thinker was the French scholar and religious cleric, Sebastian Castellio (1515-1563), who, in response to the execution of Servetus at Geneva produced a series of pamphlets that furnished what Brian Tierney calls the “first full-scale argument for religious tolerance”. Castellio contended that there was no doubt that God existed and should be worshipped, but that the things that Christians fought over, such as the doctrines of predestination, baptism, and the existence of the Trinity, were not in fact clearly revealed in the scriptures. Accordingly, it was pointless and cruel for Christians...

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183 The Catholic Church would hold this position until 1965, when the “Declaration of Religious Liberty” of Vatican Council II acknowledged that “all men are to be immune from coercion”, and that the right to “religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself”. The Documents of Vatican II (WH Abbot tr, New York, 1966); quoted in Tierney “Historical Perspective”, above n 157, 18.

184 Smith “Discourse in the Dusk’”, above n 179, 1877. Recall that Martin Luther was the main harbinger of this change when he challenged the Catholic Church hierarchy in the 1520s; see n 166 above.

185 Ibid; see also Tierney “Historical Perspective”; above n 157, 39: “The old claim that the church ought not to be controlled by secular rulers was now taken to mean that the civil magistrate had no right to interfere with any person’s choice of religion.”

186 See Lewis Spitz The Protestant Reformation, 1517-1559 (Harper & Row, New York, 1985) 88-93: “[T]he Reformation was the first historical movement in the post-Gutenberg era and the printing press made it possible.”

187 In Europe as a whole, it is estimated, for example, that some two-thirds of its inhabitants perished during the Thirty Years War. See Ronald Asch The Thirty Years War: the Holy Roman Empire and Europe, 1618-48 (Macmillan, London, 1997) 17.

188 In England, for example, during the Interregnum period (1649-1660), toleration was extended to many religious sects and laws making church attendance compulsory were repealed. When the monarchy was restored in 1660, these differences had become impossible, as a practical matter, to roll back. See Zagorin Religious Toleration, above n 159, ch 6, describing how Cromwell’s extension of toleration to Christian dissenters and Jews “produced a degree of religious pluralism impossible to eradicate after 1660”. Ibid 239.

189 Tierney traces the idea that all humans possessed inherent rights to Christian theories, beginning in the 12th century, that accorded primacy to the individual human conscience in matters such as assessing guilt, consent in marriage and so on. Tierney “Historical Perspective”, above n 157, 26-30.

190 Ibid 35. Zagorin describes Castellio, due to his originality and moral courage, as the “hero” of his book on the origins of toleration; Zagorin Religious Toleration, above n 159, 97.
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to persecute one another on such subjects. For Castellio, “heretics” were simply those “with whom we disagree”, and that if you are “orthodox in one city or region, you are held for a heretic in the next”. To persecute on the basis of reasonable disagreement on contestable matters in the scriptures was therefore illogical and, in the face of entrenched diversity, futile.

A second and related argument was one of expediency in the face of broadening religious pluralism that had not been erased by centuries of religious wars, and which deepened as the Reformation became entrenched. This argument was perhaps best typified in the Netherlands, where one ruler, upon viewing the success of that polity in trade, argued that: “[F]reedom of conscience is essential to commercial expediency”. In France, Henry IV reluctantly recognised the existence of Protestants in the predominantly Catholic country in 1598, granting them a limited degree of toleration and freedom to worship openly in certain towns in the agreement known as the Edict of Nantes. However, because this agreement was merely a matter of expedient recognition of a large minority, and did not rest on any profound commitment to toleration, it was revoked by a later king, the devout Catholic Louis XIV, in 1685, resulting in the flight of some 200,000 Protestants to neighbouring countries and to the New World.

The final, and in the opinion of modern commentators on the subject, the most important historical reason for toleration, was that persecution was against the teachings of Christ. In Castellio’s view, “Satan could not devise anything more repugnant to the will of Christ [than persecution].” Since Christ had not used “worldly weapons” to put across His message, it was wrong for secular powers to use force to suppress religious dissent. In Castellio’s version of Dual Kingdom analysis, he asserted that the proper task of the civil magistrate was merely to punish criminals and to prevent injury to others. “Heretics” were only punishable in the life to come, by God. Another important writer in the same tradition was the Frenchman, Pierre Bayle (1647-1706), who contended that the Augustinian position on Christ’s parable of compelle intrare incorrectly interpreted it as mandating persecution of Christian

194 Ibid 38; quoting Don Juan of Austria, Spanish Regent to the Netherlands, who was writing in 1577.
195 Zagorin Religious Toleration, above n 159, 243-245.
196 Tierney “Historical Perspective”, above n 157, 37-38.
197 A major thesis of Zagorin’s book is that permanent toleration in Europe only became possible when religious reasons were developed to justify it. Other reasons, such as expediency, exhaustion from war and scepticism about biblical truth were important but could not guarantee broad societal consensus on the need for religious freedom. Enduring change was enhanced by writers such as Castellio who formulated convincing philosophical and religious rationales for tolerating religious dissent that would eventually convince political elites to create legal structures where freedom of conscience was permanently recognised. See Zagorin Religious Toleration, above n 159, 12-13; see also Tierney “Historical Perspective”, above n 157, 38-39.
198 Castellio Concerning Heretics, above n 191, 123; quoted in Tierney “Historical Perspective”, above n 157, 38; see also Zagorin Religious Toleration, above n 159, 106.
199 See Zagorin Religious Toleration, above n 159, 111, summarising Castellio Concerning Heretics, above n 191, 226-228.
200 Ibid. Compare with the teachings of Calvin, who argued vehemently that the temporal powers were primarily in the business of enforcing God’s commands. See John Calvin Institutes of the Christian Religion (1559); discussed in Ahdar & Leigh Religious Freedom in the Liberal State, above n 157, 20; see also Zagorin’s description of Calvin’s riposte to the writings of Castellio, his former protégé, in Zagorin Religious Toleration, above n 159, 114-122.
201 See text above accompanying ns 157-160.
dissenters. In any case, argued Bayle, where the scriptures appeared to require persons to act immorally, then human reason (a faculty he described as the “natural light”) overrode such commands. Both Castellio and Bayle divined from Christ’s teachings that true faith could only be arrived at through free will, that Christ disapproved of forced conversion and that in any case the secular arm of government was incompetent to pass judgment on such matters.

These ideas were transmitted to the American colonies by certain religious dissenters who, far away from their native England, were in a position to engage in polity-building that was directly at odds with the theocratic experiments created by the Puritan and Anglican founders of Massachusetts and Virginia. Roger Williams (1604-1683), who was expelled from the Massachusetts colony in 1635 for questioning its close relationship of church and government, is an important figure in this regard. He argued, like Castellio and Bayle, that enforced religious observance was contrary to the “spirit and mind and practice of the Prince of Peace”. For Williams, the coercion of conscience amounted to “spirituall and soule Rape”, and of conscience itself he wrote that it was the “most precious and invaluable Jewel” known to man. In his view, therefore, it was necessary to grant the “permission of the most Paganish, Jewish, Turkish, or Antichristian consciences and worships… in all Nations and Countries”.

In Williams’s opinion, the commingling of the spiritual and temporal realms that he had witnessed in Massachusetts was damaging to religion and was the ultimate cause of all persecution. In a famous passage, he claimed that the Church was akin to a garden and that the worldly domain was a wilderness that must not be allowed to break through into the garden, and so corrupt the Church (a conceit known famously as the “Wall of Separation” metaphor). Cotton, by contrast, argued that temporal enforcement of the scriptures was necessary for civil peace. For Williams, the civil government’s duty was merely to protect

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201 See Tierney “Historical Perspective”, above n 157, 38. Pierre Bayle, a French Protestant who fled to the Netherlands after persecution in France, argued that the use of force to compel faith was against reason and could not be reconciled with Christ’s teachings. He also maintained that the parable of the feast could not be read to justify the use of force in religion. In any case, if the parable were interpreted in this way, it would cause endless war between faiths. See discussion of Bayle’s work in Zagorin Religious Toleration, above n 159, 273-276; and Pierre Bayle’s Philosophical Commentary (1686) (Amie Tannenbaum tr, Peter Lang, New York, 1987) 35-37, 39-43.

202 See Zagorin Religious Toleration, above n 159, 274.

203 Williams was offered the ministry of the church in Boston, but refused as he considered the colony to have made an insufficient break with the Anglican Church. He objected, moreover, to the Massachusetts authorities’ use of civil power to enforce religious uniformity. He also created friction by claiming the grant of Indian lands by Charles I to the colony was illegitimate. He was expelled by the General Court in 1635 for disseminating these opinions. See Zagorin Religious Toleration, above n 159, 196-199; Adams & Emmerich “Heritage”, above n 168, 1564-1566; and see, generally, Nussbaum Liberty of Conscience, above n 152, ch 2, where Nussbaum gives a full account of Williams’ life story and beliefs.


205 Ibid 219; quoted and discussed in Nussbaum Liberty of Conscience, above n 152, 53-54.


207 Williams “Bloudy Tenent”, above n 204, 3; quoted in Tierney “Historical Perspective”, above n 157, 36.


209 See discussion of Cotton’s views in Nussbaum Liberty of Conscience, above n 152, 39.
the “bodies and goods” of subjects. Religious belief, on the other hand, was to be governed in the temporal world by persuasion alone, and to be judged finally only by God.

Upon leaving Massachusetts, Williams founded his own colony in Rhode Island. He procured a charter of government from Charles II, which provided that “liberty of conscience” was to be respected. It held that residents of the colony were protected from being “in any wise molested, punished, disquieted, or call into question, for any differences of opinione, in matters of religion, and doe not actually disturb the civill peace of sayd colony”. Furthermore, it provided that all persons may:

> [F]reely, and fully have and enjoye his and their own judgments and consciences, in matters of religious concernments…; they behaving themselves peacable and quietlie, and not using this libertie to lycentiousnesse and profaneness, nor to the outward disturbance of others; any lawe, statute, or clause, therein contained, or to be contained, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding.

Read literally, this document appeared to grant a full measure of freedom for religiously motivated actions, even against generally applicable laws, except where such actions impinged upon the public peace, or interfered with the rights of others. The Rhode Island Charter, alongside similar constitutional experiments in religious liberty in Maryland, Carolina, Delaware, Pennsylvania, New York and New Jersey, was to be invoked three centuries later by advocates for the substantive neutrality reading of the Free Exercise Clause. This brings us to John Locke (1632-1704). Locke was an extremely important figure in the development of religious freedom as a legal concept. His views on the topic, which were the product of many years of reflection, synthesised religious ideas of the sort mentioned above with the latest political and philosophical thought into a potent argument for religious freedom. His ideas were later to take on a singular importance in America, where he is considered one of the intellectual forebears of the experiment in republican government.
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his early writing career, which was informed by personal experience in the English Civil War, Locke aligned himself with the opinion of Hobbes, in that he considered religious unity to be a sine qua non for stable government.\(^{218}\) For Locke, writing in 1660 in a series of essays he never published, it was disputation over insignificant religious matters that had caused the war, and accordingly he believed that it was necessary for government to exercise control over all religious matters.\(^{219}\) By 1689, however, when religious disputation continued to wrack his native England after the restoration of the English monarchy in 1660,\(^{220}\) Locke altered his views and came to the opposite conclusion. Writing in exile in the Netherlands, where he witnessed first hand the plight of the Protestant refugees from France in the wake of the revocation of the Edict of Nantes, and where he came into contact with many thinkers on religious freedom, including Bayle,\(^{221}\) Locke penned his definitive statement on the subject, *A Letter Concerning Toleration*.

Locke argued that attempts by the state to impose uniformity in religious matters (and not religious diversity itself) were in fact the root cause of the conflicts and persecutions that had torn apart Europe, thus necessitating a new political arrangement that took this insight into account.\(^{222}\) He therefore proposed a separation of religion and state, which he justified by a series of arguments, both theological and prudential. Like Castellio, he accepted the inevitability of differences of opinion in religious matters, observing that every “church is orthodox unto itself”,\(^{223}\) and that this was an inescapable reality. Following essentially the argument made by Castellio and Bayle, he argued that religion should not be imposed by the state against the human will. To do so was against Christian charity and countermanded God’s will. In Locke’s view, “true and saving religion consists in the inward persuasion of the mind”,\(^{224}\) and “liberty of conscience is every man’s natural right, equally belonging to

\(^{218}\) See text above, accompanying ns 162-165; and, for comparisons of Locke’s views with Hobbes, see Zagorin *Religious Toleration*, above n 159, 250; see also Gough “Introduction”, above n 164, 9-10.


\(^{220}\) The return of the monarchy in the person of Charles II (1649-1685) saw the Anglican and royalist dominated Parliament enact a raft of laws designed to punish Puritan and other Christian dissenters for their part in the Interregnum. See, eg, *Conventicle Act* 1664, 16 Car 2 (Eng), c 4 (making it unlawful to attend a non-Anglican gathering where more than 5 persons are present); *Second Test Act* 1678, 30 Car 2 (Eng), c 1 (preventing Catholics from sitting in the English Parliament). Nearly a thousand Presbyterian ministers were expelled from their parishes for refusing to take an oath to assent to the contents of the Anglican Book of Common Prayer; see *Act of Uniformity* 13 & 14 Car 2 (Eng), c 4; and discussion in Zagorin *Religious Toleration*, above n 159, 241-242. Suffering in England for non-conformists during this period was severe, with some 10 percent of the people living in the country subject to confiscation of property, banishment and incarceration. See James Tully “Introduction” in J Tully (ed) *John Locke: A Letter Concerning Toleration* (Hackett Publishing, Indianapolis, 1983) 2-3.

\(^{221}\) Locke met Bayle during his exile in Holland. Locke also had an extensive library, containing tolerationist works by, among others, Castellio, Bayle, and William Penn. Zagorin *Religious Toleration*, above n 159, 258. Locke fled England in 1683, along with his political sponsor the Earl of Shaftesbury, both men fearing for their safety due to their public opposition to the perceived drift of the English monarchy towards a brand of absolutism similar to that of Louis XIV’s Catholic regime in France. Ibid 258-259.

\(^{222}\) John Locke *A Letter Concerning Toleration* (1689), reprinted in J Horton & S Mendus (eds) *John Locke: A Letter Concerning Toleration in Focus* (Routledge, New York, 1991) (“John Locke *A Letter Concerning Toleration*” or “Letter”) 52: “It is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion.”

\(^{223}\) Ibid 14.

\(^{224}\) Ibid 18. Like Williams, he argued that the “Prince of Peace” used “conversation” to gather persons into his faith, not force. Ibid.
dissenters” as to those adhering to the majority church. In any case, he continued, the inner conscience could not meaningfully be persuaded by a temporal authority using force; and, besides, who was to say the “magistrate” (and by “magistrate” Locke meant civil government generally) would be infallible in deciding what was in fact the true religion? Locke argued that religious groups thenceforth ought to be regarded as voluntary societies, and that the only power these groups had over their members ought to be that of persuasion and, if necessary, expulsion. Like Castellio and Williams, Locke argued that civil government, on the other hand, ought not to legislate in religious matters. Religion was outside its proper sphere of worldly concerns, which was solely to preserve “life, liberty, health, and indolence of body” and other “outward things”, such as “money, land, house, furniture, and the like”.

The solution designed by Locke in the area of religious conduct exemptions was to remove the power of the state to legislate for religion. In an example regarding religiously motivated animal sacrifice, Locke argued that the magistrate could prohibit this activity, as long as it banned it for all persons, whether they did so for religious or secular reasons. Thus, if the government adjudged a ban necessary for human health, or to build up the stock of cattle following an outbreak of disease, then this would not be a law “prohibiting” religion, but rather a legitimate exercise of state power. Conversely, if something was permitted to the general population, then it could not be banned for any religious group (eg, if the speaking of Latin is allowed “in the market-place”, then it must also be allowed in the church). Where, however, the government legislated in a manner that did infringe on human conscience (something Locke hoped would not happen if the state adhered to its core tasks), the individual had to conform, or accept temporal (and ultimately spiritual) punishment: “Who shall be the judge between them? I answer, God alone; for there is no judge upon earth between the supreme magistrate and the people.”

Hence, Locke contended that as long as laws were not discriminatory and were enacted for secular reasons, they would be valid. He considered that a
regime of this sort would solve religious disputations, and would carry the ancillary benefit of creating loyal citizens, who would become the “common support and guard” of the state once they are guaranteed the “same benefit of the laws”.

Locke’s writings on toleration were widely read in revolutionary America. One of his chief disciples was Thomas Jefferson (1743-1826), a key political figure from Virginia who drafted the Declaration of Independence in 1776 and became President in 1801. Jefferson, who was an agnostic (at best) and apparently held great disdain for fanatical religious believers, was an enthusiastic reader of Locke, and thoroughly approved of the allocation of labour between church and civil authority into the private and public realms (the secular political incarnation of the originally religious concept of Dual Kingdoms theory) that featured in Locke’s Letter. Jefferson relied on Lockean arguments in his drafting of the famous Virginia Statute for Religious Freedom in 1779 (enacted in 1786), stating that government, although it must not legislate in a way that would “molest” persons “on account of” their “religious opinions or belief”, was otherwise free to legislate to secure the civil peace: “[I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.”

Like Locke, Jefferson believed that people’s private religious beliefs were an inviolable “natural right”, but when such persons attempted to manifest these beliefs in public, their desires were subordinated to their “social duties” as citizens; in other words, they were overridden by the duly enacted, non-discriminatory, laws of the land. These phrases were relied on by the US Supreme Court in the 19th century Reynolds decision to reject the claim by Mormon polygamists that their religious practice...
ought to be protected by the Free Exercise Clause against a generally applicable law banning multiple wives. 240

The Boerne decision

Moving forward two centuries to 1997, Justice O’Connor in her dissent in Boerne argued that the historical understanding of the Free Exercise Clause at the time of the founding of the US was much broader than the Lockean analysis of the Reynolds Court. Borrowing heavily from an article investigating the historical origins of the Free Exercise Clause written by the pro-substantive neutrality academic Michael McConnell, 241 O’Connor made three broad contentions in this regard. First of all, she claimed that the pre-constitutional charters in polities such as Rhode Island (discussed above 242) indicated that from very early on the American colonists, many of whom were fleeing religious persecution and war in Europe, sought greater freedom than mere formal neutrality on the part of their new governments. These charters, 243 read alongside the post-Revolution state constitutions enacted in the decades immediately prior to the ratification of the federal Constitution, indicated that something more than the Locke/Jefferson formula was provided in the positive law of the land. The Maryland Declaration of Rights 1776, for example, stated: 244

That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights…

For O’Connor J, the key element of provisions like the Maryland Declaration were the provisos contained within them, which seemed to imply that laws which do not ensure “good order, peace or safety”, but are designed to secure less essential goals, ought not to prevail over religious persons wishing to engage in “religious practice” contrary to such laws. To read the Maryland provision otherwise would, in her view, render the provisos “superfluous”. 245 Hence, O’Connor J argued that these state bills of rights, like the colonial charters preceding them, were forerunners to the Sherbert-Yoder-era rule that generally applicable laws impinging on religious practices were invalid unless they were narrowly tailored in order to further


241 See, generally, McConnell “Origins”, above n 152; and my discussion of its author’s intent to challenge the Supreme Court’s “formal neutrality” holding in Smith in Chapter 2, text accompanying ns 379-380.

242 See text above accompanying ns 213-214.

243 O’Connor J refers to other founding colonial charters in her judgment; eg, in 1649, the Maryland Assembly decreed that nobody should be “in any waies troubled…for or in respect of his or her religion or in the free exercise thereof”; and see Boerne, above n 138, 551-552 (per O’Connor J, dissenting), for similar provisions in Rhode Island, Carolina, New York, and New Jersey.

244 Maryland Constitution of 1776, Declaration of Rights, Art 33; reprinted in Founders’ Constitution, above n 237, 70; quoted in Boerne, above n 138, 553-554 (per O’Connor J). To the same effect, O’Connor J quotes other, similarly worded, “free exercise” provisions in the New York, New Hampshire, Georgia and Virginia state constitutions. See ibid 553-557.

245 Ibid 554-555; see also McConnell “Origins”, above n 1461-1462.
“compelling” governmental interests. Since these state constitutions were enacted by the same citizens who ratified the federal Free Exercise Clause in 1791 (which contained no express proviso), O’Connor J claimed, moreover, that it was reasonable to conclude that they expected the new federal provision to be read in a similar way.

As a second ground of support for this proposition, O’Connor J referred to instances where colonial and state legislative bodies had in fact granted exemptions to religionists from otherwise generally applicable laws. For example: Quakers and some other Protestant dissenting sects were exempted from taking religious oaths, including for testimony in court, in Carolina in 1665 and in New York in 1734; Quakers and Mennonites were excused from military service in the 1600s and 1700s; Baptists and other dissenters were excused from paying compulsory tithes to state and colonial churches; Quakers were excused from removing their hats in court in North Carolina and Maryland; and in Rhode Island, Jews were exempted from certain requirements of state marriage laws. These legislative exemptions were, in O’Connor J’s view, evidence that the founding generation considered themselves required to provide exemptions in some cases because they were bound to do so by the relevant colonial and state free exercise provisions. Anticipating the rejoinder that these exemptions were granted by legislatures and not by courts and that the federal Free Exercise Clause ought only to be read as sanctioning legislative, and not court-ordered, exemptions to general laws (as Smith now holds), O’Connor J argued that in the pre-constitutional era “judicial review did not yet exist”, and that it was therefore “reasonable to presume that the drafters and ratifiers of the First Amendment…assumed courts would apply the Free Exercise Clause similarly, so that religious liberty was safeguarded”.

Finally, O’Connor J enlisted the support of James Madison (1751-1836), amongst other political and religious leaders, to show that the founding generation likely assumed that the new federal Bill of Rights would guarantee religious freedom as a legally enforceable substantive liberty. Although Madison was a lifelong friend and colleague of Jefferson, and both men are generally regarded as standard-bearers for the new, rationalistic system of

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246 See ibid 552 & 555.
247 Ibid.
249 See McConnell “Origins”, above n 152, 1471-1472. Notoriously, the founder of Pennsylvania, William Penn was imprisoned in 1670 for refusing to remove his Quaker hat while on trial for addressing an illegal gathering in London. Ibid 1472.
250 Nussbaum notes that the Rhode Island legislature excused jews from the usual laws of consanguinity, allowing, for example, uncles to marry nieces, a practice that was otherwise banned. Nussbaum Liberty of Conscience, above n 152, 124.
251 Boerne, above n 138, 559-560; see also McConnell “Origins”, above n 152, 1443-1444.
252 O’Connor J also quotes for support, eg, Isaac Backus, a leading Baptist minister and delegate to the Massachusetts constitutional ratifying convention in 1788, who said: “[E]very person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby.” Ibid 563. Backus belonged to the evangelical tradition of Roger Williams, and was an important leader of the dissenting Protestant faction during the period immediately prior to the Constitution’s ratification; see Witte & Green “Search for Principles”, above n 170, 508; and McConnell “Origins”, above n 152, 1517, explaining how the “political muscle” provided by minority religious sects was possibly even more significant to the creation of the Religion Clauses than the argumentation of sceptical Enlightenment theorists (such as Jefferson and Madison), who constituted a relatively small minority of the populace at the time.
253 Madison served as Secretary of State in Jefferson’s two presidential terms and was, according to one biographer, “his dearest friend and most trusted adviser”; see Douglass Adair “James Madison” in W Thorp (ed) The Lives of Eighteen From Princeton (Princeton University Press, New Jersey, 1946) 137, 155.
national government being attempted in late 18th century America. Madison’s rationales for guaranteeing religious freedom may have pointed towards a more expansive protection than Jefferson’s. While Madison’s personal religious beliefs are obscure, he, unlike Jefferson, never disparaged religious believers. And whereas Jefferson expressed the wish that one day all citizens would become “Unitarians”, Madison instead argued that the promotion of a variety of religious groupings in the new republic would be a guarantor in its own right of political stability. At the Virginia ratifying convention of the Constitution in 1788, for example, Madison contended that “religious liberty” was secured by the “multiplicity of sects which pervades America”, a demographic fact of the time which meant that it was impossible for there to be a “majority of any one sect to oppress and persecute the rest”. According to McConnell, Madison’s desire to maintain religious diversity is powerful evidence that he supported the relief of religionists from general laws impeding their religious practices.

Furthermore, in an especially important debate in post-revolutionary Virginia, Madison fought steadfastly alongside Jefferson against the imposition of a general tithing system for residents that would replace the thitherto-exclusive system of taxpayer support for the erstwhile Anglican Church establishment. The so-called Assessments Bill, which was designed to set up a compulsory taxpayer-funded system for all Christian sects in the state, nevertheless met with immense opposition from dissenting Baptists and others who objected on theological grounds to being coerced in religious matters. The bill was eventually defeated, and in its stead the Virginia legislature enacted Jefferson’s Statute for Religious Freedom.

A pivotal document in O’Connor J’s dissent was a pamphlet written in 1785 by Madison as part of the political campaign against the Assessments Bill. In his famous “Memorial and Remonstrance Against Religious Assessments”, Madison argued that requiring citizens to furnish money to any religion (even one of their own choice) was an unacceptable establishment of a generic form of Christianity. Madison claimed, like Locke and Jefferson, that the religion of every man cannot be directed by “force or violence”, but rather must be “left to the conviction and conscience of every man; and it is the right of every man to exercise...

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255 An important trope of McConnell’s 1990 essay is that Jefferson and Madison, while of one mind on the question of Establishment Clause issues, are opposed on the issue of the formal and substantive neutrality reading of the Free Exercise Clause.

256 Letter from Thomas Jefferson to Dr Benjamin Waterhouse (June 26, 1822); quoted in McConnell “Origins”, above n 152, 1450.

257 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (J Elliot 2nd ed, 1836) 330 (June 12, 1788); quoted in McConnell “Origins”, above n 152, 1479.

258 The Virginia Assessments controversy is recounted in Curry First Freedoms, above n 171, 138-146; see also New Catholic Encyclopedia (McGraw-Hill, New York, 1967) vol 4, 989.

259 See the text of the Bill for Establishing a Provision for the Teachers of Religion (“Assessments Bill”) in McConnell et al Religion, above n 239, 60-61. The measure required residents to pay a tith to the religion of their choice, which was to be spent on the ministry or on houses of worship. The Bill had an exemption for Mennonites and Quakers, who could place their contributions in a general fund for any purpose.

260 According to McConnell, Madison ensured the passage of his friend’s Statute through the Virginia legislature; see McConnell “God is Dead”, above n 171.

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it as these may dictate”. Where Madison appeared to depart from Locke and Jefferson, however, was in his general argument regarding the relationship between civil society (and its laws) and religious citizens. Recall that Jefferson contended that men’s “social duties” were superior to their religious activities. By contrast, Madison appeared, crucially in the mind of O’Connor J, to reverse the relationship, saying:

This duty [owed the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society... Every man who becomes a member of any Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

Justice O’Connor regarded this formulation as implying, for free exercise purposes, that laws not serving essential governmental interests, should give way to personal religious conduct. From this wording, and other pronouncements by the man described as the “architect of the Bill of Rights” due to his work in the drafting committees and debates in the First Congress where he advocated for the adoption of the whole document, O’Connor J felt empowered to draw her final conclusion in her dissent: that the Free Exercise Clause is “properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer’s conduct is in tension with a law of general application”.

In response to what he called O’Connor J’s “extravagant” claims from the historical sources, Justice Scalia, in his concurring judgment, disputed that these sources led definitively to the conclusion made by the dissent in Boerne. Regarding O’Connor J’s arguments that the state and colonial constitutions appeared to envisage substantive protection for religionists, Scalia J pointed out that the language of these protections appeared in their terms only to target laws that actually had as their purpose the deliberate singling out of religion for special burdens.

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262 Boerne, above n 138, 561; quoting Madison “Memorial and Remonstrance”, above n 261, 82.
263 Ibid.
264 Ibid: “[Madison’s] idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.” See also McConnell “Origins”, above n 152, 1453.
265 For example, Madison argued that the Virginia Declaration of Rights 1776 (see final text of this document in Boerne, above n 138, 556) should include the phrase “all men are equally entitled to the full and free exercise of [religion], according to the dictates of conscience”, and that limitations on the right should only be imposed when the “existence of the State” was “manifestly endangered”. Ultimately, the Virginia legislature adopted Madison’s formulation as to the prima facie content of the right (although it excluded the word “full”), but chose not to include any proviso. The Virginia debate is helpful, however, as it gives a flavour of Madison’s arguably permissive views on the subject of religious accommodations; see McConnell “Origins”, above n 152, 1462-1463; and Boerne, above n 138, 555-556.
266 Greenawalt Free Exercise and Fairness, above n 141, 13; see also Flast v Cohen 392 US 83, 103 (1968), where he is described as the “leading architect” of the document. Jefferson’s role in the Bill of Right’s paternity is less direct, in that he was serving as Ambassador to France during the ratifying debates, which is noted by Rehnquist J in dissent in Wallace v Jaffree 472 US 38, 91-92 (1985) as a reason to discount, for Religion Clauses interpretation purposes, Jefferson’s Letter to the Danbury Baptists Association (quoted above in text accompanying n 239) when he was President in 1802.
267 Finkelman describes how, “despite opposition from all sides”, Madison introduced the text of the first 10 amendments to the Constitution in the House of Representatives in May 1879. See Paul Finkelman “James Madison and the Bill of Rights: A Reluctant Paternity” (1990) 9 Sup Ct Rev 301, 301-303. For an account of Madison’s role in the drafting process of the Free Exercise Clause, see, generally, Curry First Freedoms, above n 171, ch 8; and McConnell “Origins”, above n 152, 1480-1485.
268 Boerne, above n 138, 564.
269 Ibid 537 (per Scalia J, concurring).
Thus, in the Maryland Declaration, for example, he noted that the prohibition contained within this document’s free exercise provision was only against laws or actions taken “on account of” religion. For Scalia J, these provisions meant that laws which were generally applicable and did not target religion as such ought not to be construed as laws made “on account of” religion. As for the peace and safety provisos, which O’Connor J put forward as embryonic versions of the compelling interest test of the Sherbert-Yoder era, Scalia J made the point that in the 18th century all proper laws were by definition enacted to preserve the “peace [and] safety” of the state. In fact, early legal sources and dictionaries virtually defined the law and the peace as synonyms. For O’Connor J, therefore, to say that laws which were not crafted per se to preserve public peace (as that concept is understood in modern terms) ought to subject to exemptions for religious believers was anachronistic as an historical matter. Regarding the dissent’s claim that the advent of judicial review transferred the power of granting exemptions to the courts, Scalia J noted that not all legislatures in colonial and pre-constitutional states exempted Quakers from military conscription, for example, which suggested that they did not in fact feel bound by their religious free exercise provisions to do so. In Scalia J’s view, therefore, this argument said nothing about the issue of whether courts ought to be granted this power.

Concerning O’Connor J’s arguments from the statements of certain leading politicians (including Madison) of the founding era, he contended that their utterances could just as easily be read as merely suggestive of what would be “morally” desirable for legislatures to do, not what courts must do. In conclusion, Scalia conceded that the “historical evidence mustered by the dissent cannot be fairly said to demonstrate the correctness” of the Court’s decision in Smith to read the Free Exercise Clause as only imposing a duty on the state of making formally neutral laws. However, in fairly mild terms, he concluded that the sources recruited by O’Connor J were in fact “more supportive of [Smith] than destructive of it”. Because O’Connor J could only garner one other vote on the Boerne Court to support her “Madisonian” reading of the Free Exercise Clause, Scalia J’s defence of his Smith opinion was therefore successful in shoring up the formal neutrality reading of the clause for the foreseeable future.

Thus ended the final chapter in the modern saga of Free Exercise Clause litigation. Most commentators agree that the historical debate in Boerne was inconclusive from an academic point of view. But in the real world, the Boerne decision effectively locked in the formal neutrality reading of the Free Exercise Clause for the foreseeable future.

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270 Ibid 538.
271 Scalia J makes similar observations regarding the wording of the other charters and state constitutions marshalled by O’Connor J. See ibid 538-539. For example, he notes that the Rhode Island Charter only forbade laws made “for” religion; and that the New York Constitution 1777 only prohibited interference with religious free exercise by “discriminat[ory]” actions.
272 Ibid 539: “At the time these provisos were enacted, keeping ‘peace’ and ‘order’ seems to have meant, precisely, obeying the laws.” See also Marshall “Compelled Free Exercise”, above n 152, 378-379.
273 Scalia J cites the English case Queen v Lane (1704) 6 Mod 128, 87 Eng Rep 884, 885 (QB) for this proposition, as well as a contemporaneous dictionary, which defined “peace” as “that quiet, order and security which is guaranteed by the laws”. See ibid 539-540.
275 Ibid 541.
276 Ibid.
277 Ibid 544.
278 Ibid.
neutrality reading of the provision that had been ushered in seven years previously in Smith. What can overseas observers glean from the historical debate in Boerne? In my view, Boerne illustrates how a rich historical tradition, while diverting and interesting to behold, can, perhaps ironically, have the effect of providing too much information for judicial decision-makers unanimously to resolve the relevant interpretive question.280 Regarding O’Connor J’s use of Madison, for example, many would dispute (especially given the two men’s similar intellectual proclivities and their personal intimacy) that he differed on the matter of religious conduct exemptions from Jefferson at all.281 Others would argue, on the other hand, that even if Locke’s solution was the one foremost in the minds of the founding generation,282 modern considerations ought to be regarded as displacing, or augmenting, that assessment.283

(b) The historical argument in New Zealand

I now move on to consider the New Zealand historical conception of religious freedom, in light of the insights derived from the domestic case law above on how materials can be recruited for such an enquiry, and also by the example of the US Supreme Court in Boerne. This will take into account certain documents that surrounded the founding of this country, as well as actions and statements by those in power both before and after these documents were created. It will also consider the statutory and case law that grew up around this foundational material over time, a factor that proved highly influential in Poumako, Lange and Mendelssohn. I will conclude that the most plausible reading of s 15 BORA in light of these materials is that it was intended to grant, at least as a prima facie matter, a substantive liberty right to religionists seeking shelter from general laws. I will, however, begin my analysis with an assessment of these records that aligns itself with the Equal Regard, or formal neutrality, reading of s 15 BORA.

280 Kurland remarks that the sheer volume of different founding era sources means that “evidence of different meanings likely can be garnered for almost every disputable proposition”. Philip Kurland “The Origins of the Religion Clauses of the Constitution” (1985) 27 Win & Mary L Rev 839, 841; see also Bloom Methods of Interpretation, above n 85, 107, opining that Madison’s writings “can be as difficult to understand, if not more so, than the Constitution itself”. 281 See Bradley ‘Siren Song of Liberalism”, above n 152, 271; West “Case Against Exemptions”, above n 152, 628; and Vincent Munoz “James Madison’s Principle of Religious Liberty” (2003) 97 Am Pol Sci Rev 17, 23-24, where Munoz argues forcefully that Madison’s view in the Memorial and Remonstrance that the state must not take “cognizance” of religion simply means that it may not make exemptions for religious believers (which explains why Madison objected to an exemption for Quakers and Mennonites from operation of the Assessments Bill). But see McConnell “Origins”, above n 152, 1454-1455. 282 McConnell does not deny that Locke was a critical intellectual forebear of the American colonists. However, he argues that certain members of the founding generation (such as Madison and Backus) developed Locke’s arguments into a full-blown case for substantive religious liberty, even from general laws enacted by legislative bodies. McConnell “Origins”, above n 152, 1431 & 1445. 283 See Nussbaum, Liberty of Conscience, above n 152, 107, where she notes that many Bill of Rights provisions were couched in “vague and general” terms, and therefore it is necessary to adapt them to “changing circumstances”. See also Valauri “Framers’ Intent”, above n 150, 667, where he explains that even if one can deduce what the leading political thinkers of the founding generation thought on a given topic (what he describes as the “horizontal” problem), the next issue is whether the application of this meaning to situations not envisaged by the founders is appropriate (the “vertical” problem). For example, the founding generation lived in an era when state regulation of person’s private lives was minimal, and so the Lockean solution was probably amenable to their circumstances. In the modern state, by contrast, the state’s regulatory apparatus comes into contact with many aspects of people’s lives, such as in education, health and welfare, and so something like the Madisonian position might be more appropriate for modern conditions.
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The egalitarian tradition

It is tempting to say that the historical record in this country discloses a polity that was more disposed to granting religious believers a right to freedom from discriminatory laws than any substantive liberty right to have non-discriminatory laws that apply to everyone else set aside for their benefit. This argument could be made in the following way.

The New Zealand state that came into existence in 1852 with the passage in the British Parliament of the New Zealand Constitution Act of that year was an experiment in post-Enlightenment colonisation that sought to exclude religion, and its attendant vices of war and sectarian favouritism, from its governmental structures. Its people were not relevantly similar to the Puritan Pilgrims who occupied 17th century New England and sought to create a “City on a Hill” modelled along Old Testament lines, expelling religious dissenters and dominating the spiritual lives of those who remained. Rather, or so the story goes, they chose to leave behind the sectarian conflicts of the Old World to forge an egalitarian and secular utopia that would be governed by reason alone and be a lesson for other countries to follow. These settlers merely sought to get ahead in life, far away from the entrenched British religious and political establishment they had left behind. Low church attendance rates in the new colony reflected this attitude. As the historian Keith Sinclair wrote in the mid-20th century, the “prevailing religion” of the New Zealander was a “simple materialism”, and the “pursuit of health and possessions filled more minds than thoughts of salvation”.

As an indirect manifestation, perhaps, of this preoccupation with material advancement, the people elected politicians of all creeds, and none, to office. This permissive environment led the future Prime Minister and famed rationalist Robert Stout to declare in 1879: “As a nation we have nothing to do with religion. Every religion has equal rights before the law. None are supported by the State, and our highest offices of state can be held by men not professing the...

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284 See Little “Religious Exemptions and BORA”, above n 87, 126-127 for an assertion of this argument. Little refers to Ahdar for the proposition that in New Zealand a “recurrent theme has been to treat religion equally”. Ibid 127; citing Rex Ahdar “Reflections on the Path of Religion-State Relations in New Zealand” (2006) BYU L Rev 619 (“Ahdar “Reflections”), 623-627. In the cited article, however, Ahdar claims (at ibid 622 & 629) that a commitment to religious pluralism and “pragmatic secularism” also characterised the founding period, a summation with which I will ultimately agree in this section.

285 15 & 16 Vict, c 72 (UK) (“Constitution Act”).

286 See text above accompanying ns 168-178 for description of the New England religious establishments.

287 See Erik Olssen “Mr Wakefield and New Zealand as an Experiment in Post-Enlightenment Experimental Practice” (1997) 31 NZJH 197.

288 The classic work in this area is William Pember Reeves State Experiments in Australia and New Zealand (Grant Richards, London, 1902); see also Judith Bassett “The New Zealand Legal System: Early Historical Influences” in R Bigwood (ed) Legal Method in New Zealand: Essays and Commentaries (Butterworths, Wellington, 2001) 15, 23, where she claims that the New Zealand tradition of providing a model society for the world continues to this day.

289 See Rishworth “Coming Conflicts”, above n 104, 225 (comparing New Zealand in this respect to the American experience, where many settlers came to the new continent expressly in order to avoid religious persecution).

290 See Hugh Jackson “Churchgoing in Nineteenth-Century New Zealand” (1983) 17 NZJH 43. Jackson assesses church attendance data and concludes that the “churchgoing of New Zealanders was mediocre by the standards of the British at home”, and that in 1870 attendance was 10% below that of New South Wales (estimated at 58.6%). Ibid 51 & 56. Fairburn attributes lack of church attendance to the fact that New Zealand was (as it still is) a largely bondless, atomised society, with little in the way of organised social structures. See Miles Fairburn The Ideal Society and Its Enemies: The Foundations of Modern New Zealand Society, 1850-1900 (Auckland University Press, Auckland, 1989) 177-178, & 184.

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Christian religion. We have had a Jew Premier…. We are a Christian nation in the sense that a majority of citizens are Christian, but in no other sense.\(^{292}\)

Importantly, as is implied in Stout’s words, New Zealand, like the US at national level, has never had an established church in the legal sense.\(^{293}\) To be sure, the Crown Colony period (1840-1852)\(^{294}\) saw an inevitable connection between leaders of the numerically dominant Anglican Church and government officials, who were often adherents to that faith and were typically appointees from England, where the Church remained legally established.\(^{295}\) Sometimes the relationship exhibited itself at the level of high ceremony. This occurred in 1843, for example, when Governor FitzRoy (surrounded by members of the Executive Council) took a series of oaths, administered by the Chief Justice, on the day he assumed office. These testaments included the oath of support for the “Protestant succession in the Hanoverian line”, and the anti-Catholic oath deploring the “heterodox and damnable doctrine” that rulers who had been excommunicated by the “Bishop of Rome” could be killed by their subjects.\(^{296}\) Moreover, the Colonial Chaplain, an Anglican appointee, opened sessions of the Legislative Council with a prayer during this period.\(^{297}\)

However, in areas more directly affecting the local inhabitants, government pursued a pragmatic course of neutrality between the religious groups then present in the country.\(^{298}\) Often, this led to what today might be called “non-preferential”\(^{299}\) aid for religion generally. In education policy, the young cash-strapped colony, being unable to perform this function itself,

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\(^{292}\) Robert Stout “Presidential Address to the Otago Educational Institute” (1879); quoted by DV MacDonald The New Zealand Bible in Schools League (MA Thesis, Victoria University of Wellington, 1965) 9. Stout was referring to Julius Vogel, who was Premier from 1873-1875 and in 1876. By 1891, three Freethinkers had ascended to the premiership (Domett, Stout, and Ballance); and Joseph Ward, a Catholic, served as Prime Minister from 1906-1912, and 1928-1930.

\(^{293}\) This is confirmed in several court judgments; see, eg, Carrigan v Redwood (1910) 30 NZLR 244 (HC), 252, and Mabon v Conference of the Church of New Zealand [1998] 3 NZLR 513 (CA), 523; see also J Hight & HD Bamford The Constitutional History of New Zealand (Whitcombe and Tombes Ltd, London, 1914) 378-379; and Rishworth “ReligionClauses”, above n 113, 650.


\(^{295}\) The Anglican Church remains established in the UK to this day. For an historical account, see James Torke “The English Religious Establishment” (1995) 12 JL & Religion 399.

\(^{296}\) See AH McLintock Crown Colony Government in New Zealand (Government Printer, Wellington, 1958) (“McLintock Crown Colony”) 113, & n 4. For the origins of these oaths, which were created episodically after the break of the English Church from Rome, and thus had a distinctly anti-Catholic theme, see “Oaths, English Post-Reformation” in New Catholic Encyclopedia (McGraw-Hill, New York, 1967) vol 10, 596.

\(^{297}\) See GA Wood “Church and State in New Zealand in the 1850s” (1975) 8 J Religious Hist 255 (“Wood ‘Church and State’”), 258. Wood describes the relationship between the Anglican Church and the New Zealand state during the 1840s and early 1850s as a “shadowy affair” in comparison with the clearer position in the UK and some of the older colonies. Incidents of the quasi-establishment included the fact that the “Governor was an Anglican as a matter of course”, and that the Anglican bishop of the colony, the first of whom was appointed in 1841 by Letters Patent, “took precedence in the colony over all but the Governor and his deputy”. Ibid 257, 267.

\(^{298}\) Wood attributes this to a strong presence of nonconformists and dissenters in the country from the beginning of settlement. These people wished to experience no repetition of grievances suffered in England at the hands of the established Church of England. Ibid 256; see also Ivanica Vodanovich “Religion and Legitimation in New Zealand: Redefining the Relationship Between Church and State” (1990) 3 Brit Rev NZ Stud 52 (“Vodanovich ‘Religion and State’”), 54, noting how religious pluralism ensured that religious equality was maintained in public and private life in the new colony; and Andrew Porter “Religion, Missionary Enthusiasm, and Empire” in R Lewis (ed) The Oxford History of the British Empire (Oxford University Press, New York, 1998-1999) vol 3 (“Porter ‘Religion and Empire’”), ch 11, 226.

provided assistance, by means of the Education Ordinance 1847,\textsuperscript{300} to churches already engaged in the field on an even-handed basis, even to Catholics.\textsuperscript{301} In another instance, however, the government evinced an impartiality of a different kind. The Church and Chapels Ordinance 1842\textsuperscript{302} was initially passed by the Legislative Council in 1842 to provide money from the Colonial Treasury to assist in the building of churches and to provide stipends for ministers of any “Christian religion”.\textsuperscript{303} This Ordinance was later disallowed by the British government on the advice of the Colonial Office, which suggested an awareness, perhaps, that state assistance to all religious sects was in fact not neutral, in that it exhibited favouritism to religion over non-religion.\textsuperscript{304}

In these two qualitatively different examples can be found evidence, therefore, that the concept of religious equality – even before the Constitution Act 1852 was passed – was beginning to become the dominant norm in New Zealand church-state relationships. Indeed, even the Education Ordinance came under attack in the Wellington area by a group of secularists and religious dissenters.\textsuperscript{305} This group, who occupied key positions in the New Munster Legislative Council,\textsuperscript{306} was led by the future Prime Minister, Alfred Domett. Domett, who held at the time the position of Provincial Secretary, argued in an extensive minute on the subject that the Ordinance, given that it favoured only those sects already present in the country, was inherently unfair, and that, in any event, the implied union of the state with religion in the measure was likely to afford “opportunities for the gradual subjection of the human mind to priestcraft”.\textsuperscript{307} Hence, he regarded the arrangement as an infringement of the people’s “freedom of religious expression and liberty of conscience”.\textsuperscript{308} Accordingly, Domett contended (albeit to no avail\textsuperscript{309}) that all sectarian education should be prohibited in the province in favour of a purely secular system.

\textsuperscript{300} 11 Victoriae 1847, no 10.
\textsuperscript{301} See RP Davis “Sir George Grey as an Educational Secularist” (1966) 1 New Zealand Journal of Educational Studies 126 (“Davis ‘Grey as a Secularist’”), 127, where he notes that the Education Ordinance 1847 allowed moneys to be paid to the three major groups, the Anglicans, Catholics and Wesleyans. Clause 3 of the Ordinance allowed parents dissenting from religious instruction at these schools (which was required) to have their children excused from that part of the curriculum.
\textsuperscript{302} 5 Victoriae 1842, no 7.
\textsuperscript{303} The national ordinances discussed in this section are reproduced in \textit{The Ordinances of the Legislative Council of New Zealand, 1841-1853} (Wellington, 1871). The Education Ordinance 1847 is also reproduced in AG Butchers \textit{Young New Zealand} (Coulls Somerville Wilkie Ltd, Dunedin, 1929) (“Butchers \textit{Young New Zealand}”) 310.
\textsuperscript{304} See Wood “Church and State”, above n 296, 259, & n 19, Wood says the Ordinance was disallowed for “defects of form, not principle”. But see Vodanovich “Religion and State”, above n 298, 55, where Vodanovich explains that the New Zealand Anglican Bishop Selwyn objected to the Ordinance, because its recognition of other religions would have the effect of “making Dissent and Popery the established religion of the colony”. Ibid; quoting GA Selwyn, Letter to J Hope-Scott (4 January 1844), National Library of Scotland, MS 3671. The text of Selwyn’s letter and the Ordinance is in Allan Davidson & Peter Lineham \textit{Transplanted Christianity: Documents illustrating Aspects of New Zealand Church History} (Massey University, Palmerston North, 1995) (“Davidson & Lineham \textit{Transplanted Christianity}”) 81-82.
\textsuperscript{305} See Davis “Grey as a Secularist”, above n 301, 126-127; McLintock \textit{Crown Colony}, above n 296, 238; and Butchers \textit{Young New Zealand}, above n 303, 96-100, 315-320.
\textsuperscript{306} The New Munster Legislative Council was part of an aborted constitutional reform that was heralded by a constitutional Charter of 1846, and entailed the division of the country into two regions. These councils were superseded by the Constitution Act 1852. See Joseph \textit{Constitutional Law}, above n 294, 105-106; and McLintock \textit{Crown Colony}, above n 296, ch 11.
\textsuperscript{307} Butchers \textit{Young New Zealand}, above n 303, 99. The full minute is reproduced in ibid, 317-320.
\textsuperscript{308} Ibid 319.
\textsuperscript{309} The Lieutenant-Governor of New Munster, Edward John Eyre, insisted that the Education Ordinance was a valid law enacted by the national legislature and could not be overridden or amended by the subordinate New Munster Council. See ibid 316-317.
Similar to the semi-formal Anglican alliance at the national level, other quasi-establishments existed in the early European settlements. These had attempted, like the Massachusetts and Virginia colonies 200 years before, to erect communities along denominational lines and this was reflected in their institutions. However, in none of these polities did persecution take place on the scale of their American analogues. In the South Island, for example, the Otago settlement was dominated by Scottish Presbyterian Free Churchmen who strove to set up a “Geneva of the Antipodes” modelled after the “Pilgrim Fathers two centuries earlier”. In Canterbury, led by John Godley, the stated goal was to become a “world exemplar of an Anglican state”. Both communities, which were granted legislatures when they achieved provincial status under the 1852 Constitution, enacted provincial ordinances that created preferences for those belonging to the dominant religion. In Otago, for instance, daily Bible readings and religious instruction conforming to “evangelical Protestant doctrines” were required at schools (albeit with an opt-out for children of objecting parents), and prospective settlers were vetted for their religious rectitude while still in the mother country. The leader of the Catholic minority in Dunedin, Bishop Moran, protested vigorously at the situation in schools, which he regarded as sectarian favouritism and he pushed for the public funding of Catholic schools, which was refused. Other regional mini-establishments occurred as well, depending on the countries from which their occupants were sourced.

The spiritual mission of these religiously based communities, was, however, quickly diluted by immigrants adhering to different religions, and who objected to the preferred status of the majority religion in these regions. A further critical factor was the eventual enforced

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312 Section 2 of the Constitution Act divided the country into six provinces, each of which had a representative legislature. See Joseph Constitutional Law, above n 294, 106; and McLintock Crown Colony, above n 296, 344.
313 See AH McLintock The History of Otago (Otago Centennial Historical Publications, 1949) (“McLintock Otago”) 376-377; see also Butchers Young New Zealand, above n 303, app B. Moreover, under an 1856 Ordinance, nobody could be appointed to a teaching post unless he furnished a certificate from a minister “guaranteeing his fitness to give religious instruction”. Ibid 154.
314 Ibid 268. James Watson, who was secretary of a London-based committee that screened would-be immigrants to Otago, was instructed by organisers of the colony to “preserve the character of the settlement as a Scottish Presbyterian one”, and that grants of free passage to labourers should only be made to those “Presbyterian in character and religion”. Ibid.
315 See McLintock Otago, above n 313, 518-519; and see Rory Sweetman ‘A Fair and Just Solution’?: A History of the Integration of Private Schools in New Zealand (Dunmore, Palmerston North, 2002) (“Sweetman Private Schools”) 23-24.
316 Ahdar notes a Catholic “stronghold” on the West Coast of the South Island, a “fledgling Nonconformist settlement in Albertland in Northland; and the small Scandinavian Lutheran settlements in places such as Dannevirke”. Ahdar Worlds Colliding, above n 310, 11-12.
317 The census taken the year after Stout’s 1879 speech records the following religious affiliations, which reflect that New Zealand’s 19th century immigrant intake came predominantly from, respectively, England, Scotland and Ireland: Anglican 42.75%; Presbyterian 22.95%; Catholic 14.21%; Methodist 9.14%. Small numbers of Lutherans, Congregationalists, Jews, Freethinkers, and objectors, among others, are also recorded. See a full breakdown for the period 1871-1911 in Davidson & Lineham Transplanted Christianity, above n 304, 176-180.
318 In Otago, the goldrushes of the 1860s saw a huge influx of outsiders, including Roman Catholics. See McLintock Otago, above n 313, 518; and see John Collie The Story of the Otago Free Church Settlement, 1848 to 1948 (Presbyterian Bookroom, Dunedin, 1947) 88, where the writer notes that by 1870 nearly 50% of the local population was “outside the pale of our denomination”.
319 In response to religious pluralism, many provincial legislatures provided funding to denominational schools. For example, Nelson supported Catholic schools with public money from 1856 until 1877, and allowed religious instruction if desired by school committees, with an opt-out for objectors. In Canterbury, non-Anglican schools
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centralisation caused by the creation of a General Assembly under the Constitution Act 1852. This democratic body exercised plenary power over the provincial authorities and was prepared to use it.\textsuperscript{320} In 1876, the General Assembly abolished the provincial legislatures removing one potential source of sectarian control.\textsuperscript{321} Then, in 1877, a new national compulsory educational regime was put in place, which prohibited funding for all denominational schools,\textsuperscript{322} and teaching under the new regime was required thenceforth to be entirely “secular”.\textsuperscript{323} Attempts to institute nation-wide Bible readings in schools were at the same time defeated in the legislature by a coalition of secularist-minded MPs, Catholics, and liberal Protestants, who outnumbered traditionalist legislators.\textsuperscript{324} This radical break from the provincial period made New Zealand more secularised than most states of the US in this regard, where, despite the Establishment Clause, readings from Protestant versions of the Bible were commonplace at state schools and provided a constant flashpoint for sectarian tension, especially with Catholics.\textsuperscript{325}

I now turn to the New Zealand Constitution Act 1852, against which backdrop the Education Act 1877 was forged. The only explicit reference in this essentially modernist document to religion was itself a neutralising one. Section 48 permitted the legislature to excuse non-religious parliamentarians (as well as religious objectors) from giving the prescribed oath acknowledging God before taking their seats.\textsuperscript{326} This was done in 1884 while the freethinker Stout was Premier,\textsuperscript{327} and was thought to be an essential liberalising move, especially given that Quakers were already excused from taking the oath.\textsuperscript{328}

The general move towards religious equality for all citizens, which, as we have seen, was already visible in some parts of the colony before 1852, was perhaps best embodied by the

\textsuperscript{320}New Zealand has never had a truly federal system. The provincial governments did not hold exclusive jurisdiction over any sphere of activity, and the ordinances of the provincial legislatures were subject to conflicting superior legislation made by the General Assembly. See Joseph \textit{Constitutional Law}, above n 294, 106; and see WP Morrell \textit{The Provincial System in New Zealand} (Longmans, London, 1932) 55.

\textsuperscript{321}See \textit{Constitutional Law}, above n 294, 107.

\textsuperscript{322}See \textit{Private Schools}, above n 315, 24; and Davis “Grey as a Secularist”, above n 301, 128-129.

\textsuperscript{323}See s 84(2) Education Act 1877. For a full account of the debates surrounding this measure, see Ian Breward \textit{Godless Schools? A study in Protestant reactions to the Education Act of 1877} (Presbyterian Bookroom, Christchurch, 1967) (“Breward \textit{Godless Schools}”) ch 1; see also Adhar \textit{Worlds Colliding}, above n 310, 14-15; and Colin McGeorge & Ian Snook \textit{Church, State, and New Zealand Education} (Price Milburn, Wellington, 1981) (“McGeorge & Snook \textit{Church, State}”) 7-10.

\textsuperscript{324}See McGeorge & Snook \textit{Church, State}, above n 324, 8; but see Breward \textit{Godless Schools}, above n 323, 18, where he claims there was “very little doctrinaire secularism” among MPs voting in the new system. Catholics opposed Bible readings and other forms of religious instruction in schools because they did not regard state teachers as qualified to instruct their children, and in any case they did not trust the state, which was dominated by Protestants, to teach religious instruction in an impartial manner. See Sweetman \textit{Private Schools}, above n 315, 24-25.

\textsuperscript{325}See Nussbaum \textit{Liberty of Conscience}, above n 152, 217-218.

\textsuperscript{326}Section 47 prescribed the oath, which included a vow of loyalty to the monarch, and ended with “So help me GOD”.

\textsuperscript{327}See Affirmations in Lieu of Oaths Act 1884; and see discussion of the legislative history in Peter Lineham “Freethinkers in Nineteenth Century New Zealand” (1985) 19 NZJH 61 (“Lineham ‘Freethinkers’”), 61-62.

\textsuperscript{328}This is to be compared with the Bradlaugh saga in the UK, in which the famous atheist Charles Bradlaugh was prevented on numerous occasions between 1880 and 1886 from taking his seat in the House of Commons, due to his professed atheism. See ibid 61; and Walter Arnest \textit{The Bradlaugh Case: A Study in Late Victorian Opinion and Politics} (Clarendon Press, Oxford, 1965). During this period, Bradlaugh was imprisoned on one occasion in the Clock Tower, and was involved in a series of high-profile cases concerning his inability to swear the requisite oath; see, eg, \textit{Bradlaugh v Gossett} (1884) 12 QBD 271.
following illuminating event that occurred at the beginning of the era of representative government.

In the very first session of the new General Assembly on 26 May in 1854, a debate took place on the question of whether the new body ought to commence its business with a prayer.\(^{329}\) James Macandrew, a Presbyterian member from Dunedin, moved that the House should enlist the nearby Anglican minister to make sure that proceedings would start with an “acknowledgment of dependence on the Divine Being”.\(^{330}\) Objections to this possibility were immediately raised. Dr Walter Lee asked how it could be expected that a Jew could join with a Christian in a prayer, and he urged that the “House of Representatives be not converted into a Conventicle”.\(^{331}\) He reasoned that: “[A]s the Constitution had very properly rid them of State religion, the House should take care how they voluntarily submitted to it.”\(^{332}\) Edward Gibbon Wakefield countered by saying that in the US, “where state religion is absolutely repudiated”, the practice of opening legislatures by prayer was allowed.\(^{333}\) He believed that it would be regrettable if “New Zealand should be singular...among the Christian countries of the earth” by not opening legislative sessions with prayer.\(^{334}\) The future Premier, Frederick Weld, who came from an English Catholic background, responded to the debate by putting forward an amendment that the House should not open with prayer, because this “may tend to subvert that perfect religious equality that is recognized by our Constitution”.\(^{335}\) Weld’s amendment, however, was rejected by twenty votes to ten. The House then returned to Macandrew’s original motion and passed it (without a recorded vote), but also made the following declaration:\(^{336}\)

That, in proceeding to carry out the resolution of the House to open its proceedings with prayer, the House distinctly asserts the privilege of a perfect political equality in all religious denominations, and that, whoever may be called upon to perform this duty for the House, it is not thereby intended to confer or admit any pre-eminence to that Church or religious body to which he may belong.

The Reverend JF Lloyd, an Anglican clergyman, then read the prayer. Thenceforth, however, the prayer was read by the Speaker and that tradition continues to this day.\(^{337}\)

\(^{329}\) For description of this event, see Ahdar Worlds Colliding, above n 310, 10-11; Wood “Church and State”, above n 297, 255 & 258; and Allan Davidson “Chaplain to the Nation or Prophet at the Gate? The Role of the Church in New Zealand Society” in J Stenhouse (ed) Christianity, Modernity and Culture (ATF Press, Adelaide, 2005) 311 (“Davidson ‘Role of the Church’”), 312-314.

\(^{330}\) (1854) 1 NZPD 4 (HR).

\(^{331}\) Ibid 6. James Fitzgerald, a Canterbury-based Anglican, also expressed concerns about having Christian prayers should Jews or Unitarians be present, and said that there was “no wish to establish a State Church, but one that should be maintained by voluntary support”. Ibid 5.

\(^{332}\) Ibid 6.

\(^{333}\) Ibid 5. Wakefield was “quite sure” that both Houses of Congress opened with prayer, led by ministers of various denominations. Ibid. Wakefield was correct; Congressional chaplains were established in 1789. See Greenawalt Establishment and Fairness, above n 167, 30; see also Marsh v Chambers 463 US 783 (1983), where the US Supreme Court endorsed this practice as not violative of the Establishment Clause, due primarily to the longstanding history of the custom.

\(^{334}\) Ibid 6.

\(^{335}\) Ibid 5.

\(^{336}\) Ibid 6 (emphasis added).

\(^{337}\) See Davidson “Role of the Church”, above n 329, 313-314; and see Ruth Berry & Amanda Spratt “My will be done, says Speaker” New Zealand Herald (17 October 2003), reporting a decision to retain the parliamentary prayer. The prayer contains an explicit reference to “Jesus Christ”, hence the concern with the sensibilities of non-Christian denominations. See text of the latest version of the prayer (which was altered in 1962), in Report of the Standing Orders Committee Petition of Dr Anthony Hochberg and 9 others (relating to the parliamentary prayer)
Given this conclusion, which mirrored or arguably helped drive all the state actions mentioned above concerning religion, it seems reasonable to infer that the early colonists regarded the silence on the topic in the Constitution as meaning that a state church was an impossibility as a legal matter, and that the general governing principle in such affairs was to be that of a “perfect political equality in all religious denominations”. No doubt this situation was inevitable at the time of New Zealand’s formal colonisation, which occurred in a period when religious scepticism was openly expressed in the mother country, and current scientific thought, exemplified by the publication of Darwin’s Origin of the Species in 1859, contributed to a new mood in which state-enforced religious uniformity was no longer tenable. This sociological fact was, moreover, reflected by the repeal of most of the raft of English statutes that excluded non-Anglicans from public life. Although relief from such laws began as early as 1689, it was not until the middle of the 19th century that the UK Parliament legislated to remove most of the civil disabilities that affected Catholics and Jews. In New Zealand, by dint of the English Laws Act 1858, English common law and statute (as they stood on 14 January 1840) were enforceable in the local courts to the extent that they were “applicable to the circumstances” of the colony. This measure meant that New Zealand automatically...
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inherited the hard-fought fruits of centuries of English evolution in matters concerning religious toleration. In an interesting application of this legal rule, the New Zealand Supreme Court (as the High Court was then known) chose not to apply an English statute, enacted in 1547, which prohibited the giving of moneys in wills and trusts that requested the “continual services of priests”. Carrigan v Redwood concerned a testatrix who had stipulated in her will that “masses” be “offered up” for her soul by the Palmerston North Catholic parish – an activity that the English statute appeared to interdict. However, although this law remained on the books in England, the Court refused to apply it in New Zealand. This was simply because, unlike in the mother country, there was no official state religion. Even though “Protestants” did not “believe in the efficacy of such masses”, and this religious group constituted a majority of the New Zealand population, this was immaterial in Cooper J’s view, because the “Anglican Church” was “in no sense a State Church”. Instead, the judge continued, it stood “legally on no higher ground than any of the other religious denominations in New Zealand”. The judge therefore determined that the 1547 statute, which was essentially a measure designed to buttress the legally established Anglican Church in England, was inapplicable to the “circumstances” of the colony. Thus, as a consequence of the egalitarian nature of the church-state relationship in New Zealand, which flowed on from the non-establishment of religion in the country, Cooper J held that the will was valid in the eyes of the “secular court”. Religious equality, therefore, had become a legal fact of life in New Zealand.

Robert Stout’s formally neutral state

A State is a growth, it is an organism of a Society which has taken a long time to evolve, and in most states there has not yet been committed to writing or put in print the exact limitations of its authority over individuals.

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Footnotes:
345 Wood claims that if New Zealand had been settled 50 years, “or even a decade” earlier than 1840 (ie, before reform in the mother country had taken place), then the religious history of this country would have been considerably more fractious. See his section on the “Context of Settlement” in GA Wood “Church and State in the Furthest Reach of Western Christianity” in J Stenhouse (ed) Christianity, Modernity and Culture (ATF Press, Adelaide, 2005) 207 (“Wood ‘Furthest Reach’”), 213. The timing of settlement was indeed propitious in this respect. The English historian JCD Clark argues that the Anglican religious establishment finally crumbled in England in the early 1830s. See JCD Clark English Society 1660-1832: Religion, ideology and politics during the ancien regime (2nd ed, Cambridge University Press, Cambridge, 2000) pt 6.
347 See Carrigan v Redwood [1910] 30 NZLR 244, 244 (per Cooper J).
348 Ibid 253.
349 Ibid 252.
350 Ibid; citing Long v Bishop of Cape Town (1863) 1 Moore PC (NS) 411 (PC), 461.
351 Ibid 254. See also Doyle v Whitehead [1917] NZLR 308, where Stout CJ invalidated a town by-law, because it forbade the playing of golf on town reserves on Sundays. Upon investigating the matter and finding that the proprietors of a Presbyterian orphanage, which was located near one such reserve, had requested that the by-law be made in order to preserve the Sabbath, the Chief Justice declared the measure invalid, as its only purpose was to enforce a religious rule. A rule of this sort was forbidden by s 347(e) Municipal Corporations Act 1908. Stout also observed that “recreation on Sunday is not even an offence in countries where the Christian religion is established”. Ibid 314.
352 See Porter “Religion and Empire”, above n 298, 222, where he explains that “politicians and officials” throughout much of the British Empire eventually came to realise that “only a policy of religious neutrality” would suffice to bring justice to the inhabitants of the new religiously plural societies.
353 Robert Stout “Religion and the State” (Speech delivered at the Unitarian Free Church, Wellington, 4 January 1914) 3.
This leads us to consider Robert Stout (1844-1930), a man who devoted his considerable intellectual talents over a period of many decades to creating a full rationalisation of the status of religion vis-à-vis government in this country. Stout was one of the “outstanding figures” of 19th and 20th century New Zealand public life. During a career of more than 50 years he held many positions of authority (including the offices of Prime Minister from 1884-1887 and Chief Justice from 1899-1926) from which he was able to exert, with varying success, his conception of religious freedom on the country. As I shall now explain, he was to state a position that was broadly similar – at least in terms of its practical implications – to Thomas Jefferson’s conception of the Free Exercise Clause.

Born in 1844 in the Shetland Islands in Scotland to Free Church Presbyterian parents, the young Stout received a theologically liberal education in the Scottish Enlightenment tradition. According to his biographers, this education imbued in him a lifelong distaste for blind belief in religious dogma. By the time he set sail from Scotland for New Zealand in 1864, it is said that he had become, through the influence of close relatives, a confirmed believer in Darwin’s theory of evolution. In New Zealand, where he lived at first in the Presbyterian Free Church colony of Otago, Stout’s early influences received a boost when he studied political economy at the University of Otago under the tutelage of Professor Duncan MacGregor. MacGregor was a prominent and controversial Darwinist, and was also a keen advocate and teacher of the ideas of Herbert Spencer, the 19th century English philosopher who was famed for bringing Darwin’s essentially scientific conclusions into the realm of political philosophy and sociology. Stout quickly adopted these teachings and they were later to provide intellectual ammunition in many areas of contestation in his political life.

Stout quickly earned a reputation as the most famous agnostic in the colony. With John Ballance, a future minister of defence in the Stout premiership, he formed the nation’s first Freethought society in 1884. Before this event, he had been embroiled in a series of religious controversies that caused him to become, in the words of one historian, the “bête noire of the local clergy”. In one famous episode, he attempted to break the control of Presbyterian elders over appointments to professorships at Otago University. This came about because his former mentor Duncan Macgregor, holder of the inaugural chair in mental and moral philosophy, had enraged the religious community in 1876 by publishing an article that advanced his evolutionary views and was also vehement in its criticism of the influence of

355 For a synopsis of Stout’s career, see DH Bray *The place of Sir Robert Stout in New Zealand social history* (MA Thesis, Victoria University of Wellington, 1953) (“Bray Place of Stout”) vi.
356 It is said that in Bible class, the young Stout was “instructed in the positions of the various churches and asked to take sides and debate them”. David Hamer “Robert Stout” in *Dictionary of New Zealand Biography* (“Hamer Stout”) 1; available at: <www.teara.govt.nz/en/biographies/2s48/1>.
357 See ibid; and see Waldo Dunn & Ivor Richardson *Sir Robert Stout: A Biography* (Reed, Wellington, 1961) (“Dunn & Richardson Robert Stout”) 18-19.
358 Dunn & Richardson *Robert Stout*, above n 357, 28. Stout also became the first law lecturer at Otago University, in 1873. Ibid.
360 Ibid 62; Stout also founded a freethought newspaper, called The Echo, in 1870; see Dunn & Richardson *Robert Stout*, above n 357, 10.
361 Lineham “Freethinkers”, above n 327, 63.
churches in the settlement. The Presbyterian minister James Copland, a firm opponent of Darwinism, attempted to mobilise support to have MacGregor removed. Stout, who was by then Attorney-General in the New Zealand government, attempted to have a Bill passed in 1878 that would disinvest the Presbyterian Synod of this power. Writing in support of the Otago University Amendment Bill (which eventually was abandoned), Stout argued that it was necessary in order to rid the university of the “intolerable incubus of ecclesiastical scholarship”.

This opinion gave an insight into Stout’s personal views on religion, which resembled those of Thomas Jefferson. Similarly to Jefferson, with whom he shared a connection to the Unitarian Church, he hoped that the day would come when educated persons would equate miracles and religious systems in the same way that scientists now regard fossils. For Stout, who held the modern Victorian man’s belief in inevitable human progress, religious belief had to give way in the modern world to “truth – obtained after careful research”. Regarding the Bible itself, and its theory that God created the Earth, Stout would later say: “No Biologist of standing accepts the poem or myth of Genesis as true.”

What were Stout’s views on religion and the state? As we saw from his speech in 1879, he claimed that the “nation” had “nothing to do with religion”, but that “[e]very religion has equal rights before the law”. As I have explained elsewhere in this thesis, equality (and state neutrality) can be of the formal or substantive sort, so it is necessary to look more closely at Stout’s writings and actions as a politician to see what he really meant by this.

Stout formed his views in part by considering the record I described above. First of all, writing in 1911, he said that the relationship between church and state could be divined from consideration of the statute law and general practice that was in turn driven by the country’s constitutional history. To this end, he relied, as did Keith J in Mendelssohn, on the relevant statute record over time to deduce what the constitution demanded. For example, he pointed to the decision of the British government to disallow the Church and Chapels Ordinance, and the local legislature’s enactment of the Education Act 1877 – both of which, it will be recalled, removed the power of the state to aid religion – as clear evidence that the relationship was to be one of strict neutrality between religions, and also between religion and non-religion.

As further evidence of his brand of religious equality, he referred to the debate at the first

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364 Otago Daily Times (3 October 1878); quoted in Stenhouse “Darwinism in New Zealand”, above n 363, 70.
365 See text above n 237. Hamer claims that Stout “moderated” his views on religion later in life, when he became “closely associated with Unitarianism”. Hamer Stout, above n 356, 2.
367 Robert Stout “Evolution and Theism” (Christchurch, 1881); cited in ibid 61. Stout believed, following the philosophy of Spencer, that God was unknowable, and that all man could discern were the “manifestations of this transcendent power in ourselves and the external world”; Robert Stout “Evolution and Theism” (Christchurch, 1881); cited in ibid 61
368 Robert Stout “Religion and the State” (Speech delivered at the Unitarian Free Church, Wellington, 4 January 1914) 8.
369 Robert Stout “Presidential Address to the Otago Educational Institute” (1879); quoted by DV MacDonald The New Zealand Bible in Schools League (MA Thesis, Victoria University of Wellington, 1965) 9.
370 See text above n 113.
372 See text above accompanying ns 124-130.
373 Stout & Stout New Zealand, above n 371, 113-115. Stout argues that the decision to disallow the Ordinance was endorsed by the “subsequent history of legislation in New Zealand”. Ibid 113.
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Parliament concerning prayer.\textsuperscript{374} Evidently, Stout considered that the silence on religion in the 1852 Constitution meant that all laws ought thenceforth to be religion-blind.

It is also reasonably clear, although there is no record of him commenting on this, that Stout would have approved of the result in \textit{Carrigan v Redwood}. This was because the statute involved in that case created a religious classification to the disadvantage of one segment of the population, or was, in short, discriminatory. Speaking at the Unitarian Church in Wellington in 1914, Stout elaborated further on his views, and on this occasion he looked further afield for his sources. In arguing that there should not be a state religion, he said, quoting Abraham Lincoln, that if government made laws “propagat[ing] the religious experiences of only one section of the people” – as the Act for the Dissolution of Chantries 1547 assuredly did – this would mean that it was not a “‘Government of the people for the people’, but a Government for part of the people”.\textsuperscript{375}

That there should never be a state church, and that government ought never to legislate for religious matters was necessary, in Stout’s view, because of the suffering that unions between religions and civil governments had caused in centuries past, in regard of which he spoke of the execution of Catholics in the reign of Elizabeth I, the fleeing Protestants after the revocation of the Edict of Nantes, and also the death of Michael Servetus.\textsuperscript{376} Closest in time and place to Stout’s own experience in this regard was the great Scottish Disruption of 1843, an event that took place only a year before Stout’s birth, in which the Scottish Church split in two, creating the Free Church of Scotland.\textsuperscript{377} For Stout, the root cause of the trouble in his homeland, which had resulted in considerable bloodshed and ill-feeling, was that the state had tried to impose its wishes on who should lead the Church.\textsuperscript{378} As he would later write in a newspaper article in 1927: “Whenever and whatever religion is mixed up with politics, there are strife and a want of good feeling amongst the people.”\textsuperscript{379}

Stout also argued from a practical point of view, and in very similar terms to James Little in his argument above for the formal neutrality reading of s 15 BORA. In an article written in 1927, Stout responded to a renewed, and eventually unsuccessful, call to introduce religious instruction in schools\textsuperscript{380} by questioning the practicality of the matter. For Stout, there were two

\textsuperscript{374} Ibid 113.
\textsuperscript{375} Robert Stout “Religion and the State” (Speech delivered at the Unitarian Free Church, Wellington, 4 January 1914) (“Stout ‘Religion and State’”) 4; quoting Abraham Lincoln “The Gettysburg Address” (19 November 1863); reprinted in Henry Commager Documents of American History (6th ed, Appleton-Century-Crofts, New York, 1958) 428, 429. It was typical of Stout to refer to US sources in his work; see KJ Keith “The Case of Law” in D Philips, G Lealand & G McDonald (eds) The Impact of American Ideas on New Zealand’s Educational Policy, Practice and Thinking (NZ-US Educational Foundation, 1989) 234, 235 & 238, noting Stout’s use of US materials in his work as a counsel and judge, and that he had very “extensive American holdings in his very large library”.
\textsuperscript{376} Ibid 1-2.
\textsuperscript{377} Ibid 2. The Disruption involved a dispute over whether the nobles could select parish priests and pass on this right down through the generations. A popular movement, beginning after the Reformation, sought to secure the right for parishioners to choose their own priests. Many civil disturbances ensued from the 18th century onwards during this dispute. See Stewart Brown “Disruption, the” in M Lynch (ed) The Oxford Companion to Scottish History (Oxford University Press, Oxford, 2007).
\textsuperscript{379} Sweetman reports that some “42 bills were presented and rejected” on the matter between 1877 and 1935. Sweetman Private Schools, above n 315, 25.
choices if the state was to pursue this course. One was that the state could direct schools to teach the creed of one religion, and so fall into the impermissible trap of establishing a state church. The only fair choice was to fund all sects to provide religious instruction, including Freethought associations and “even the Chinese”.\footnote{Stout “Educational System”, above n 379, 2-3.} This comment echoed the speech he had made 50 years previously as a member of the House of Representatives in the 1877 debate, when he declared that religious education – if it were to favour only a select few religions – would “violate” the consciences of those who had no religion at all if they were forced to pay taxes in support of such an arrangement.\footnote{See (1877) NZPD 227 (HR).} Stout therefore believed that the only fair solution was impractical. Because of these considerations, Stout contended that maintaining the extant, and fully secular, system was the only answer to the problem.

Finally, in his 1914 speech Stout resorted to philosophical arguments. He did not turn to Locke or Jefferson in this respect,\footnote{It is uncertain whether Stout read these men’s writings. It is possible, however, that even if he did he would have found their arguments, which were based on Protestant theology, untenable, given that he was advocating for a state that was religion-blind. Instead, he made his arguments from later writers within the secular tradition.} but rather drew from the latest in contemporary thinking. While Herbert Spencer (1820-1903), when compared with John Stuart Mill, is now perhaps regarded as a relic of the 19th century, he was arguably the more significant figure in the Victorian era.\footnote{One recent commentary on his work claims that Spencer may have been the “single most influential philosopher of the nineteenth century Anglo-American world”. Duncan Bell & Casper Sylvest “International Society in Victorian Political Thought: T.H. Green, Herbert Spencer, and Henry Sidgwick” (2006) 3 Modern Intellectual History 207 (“Bell & Green ‘Spencer’”), 215. Regarding the recent desuetude of Spencer’s ideas, see JW Burrow Evolution and Society: A Study in Victorian Social Theory (Cambridge University Press, Cambridge, 1966) 190.} Certainly, having been introduced to great effect in his student days by Duncan MacGregor to Spencer’s works, Stout referred to him in many of his writings and speeches, including on matters relating to religious freedom.\footnote{Hamer claims that many of Stout’s public utterances were “restatements of Spencer’s leading ideas”. Hamer Law and the Prophet, above n 354, 45-46.} As David Hamer explains, Spencer famously converted many of Darwin’s “biological arguments into an elaborate social, moral and political philosophy.”\footnote{Ibid 46; see also Leslie Stephenson & David Haberman Ten Theories of Human Nature (5th ed, Oxford University Press, Oxford, 2009) 206-208.} As we shall see, Stout fully subscribed to Spencer’s view of the correct ends of human existence. In his 1914 speech, Stout, openly acknowledging his debt to Spencer, argued that civilisations were essentially organisms that evolved in the same way as animals and plants. The more primitive species – and societies – explained Stout, had less specialisation in their organs: “Biologists tell us that the most primitive living things...are not specialised in structure. Some of them have only one sac that has to serve them for their life’s equipment.”\footnote{Stout “Religion and State”, above n 375, 2.} Mammals were infinitely more complicated than single-cell “protozoa”, as they had a “specialised heart” and lungs and liver, and therefore had ascended further up the “ladder of life”.

By way of analogy, Stout adapted these biological assertions to religion-state matters. Stout declared that countries that maintained an established church were less further up the evolutionary “ladder of life” than those that maintained a separation.\footnote{Ibid.} In this regard, he compared the Arunta tribe in Australia – an archetypal primitive culture in his view – with
Russia and Britain. All three societies had a fusion of religion and government. In the Arunta tribe, the “chief men are leaders in their government and their religion”; in Russia, the Czar was head of the Orthodox Church; and the “King of England” was the “chief ruler of both the English and Scotch national churches”.\(^{390}\) Given that civilisation was essentially an uphill race for survival between individuals, and indeed between countries, he reckoned that New Zealand ought to emulate the more advanced societies, such as America,\(^{391}\) which were free of civil strife in religious matters, and where religion was considered a “specialised function” that was kept strictly apart from government. Stout then concluded that the “law of progress shows a change from the homogeneous to the heterogeneous”.\(^{392}\) If New Zealand was to be properly “heterogeneous”, then it was necessary to maintain the separation of church and state that had already been secured by its Constitution.

As a final comment, it is important to stress that Stout was not an enemy of freedom of religion. In fact he believed strongly in individual freedom and the concomitant need to have a state that exercised its powers within a limited range of affairs.\(^{393}\) Spencer’s sociological arguments based on biology and his version of “Social Darwinism”, regardless of their merits, can be viewed as essentially a secularised gloss on the Lockean concept of a limited state.\(^{394}\) Indeed, Stout argued in terms very similar to Locke that the care of religion should be left to parents and voluntary religious societies, while the state took care of its strictly temporal duties.\(^{395}\) In education, the state’s role was to be restricted to teaching mathematics and other practical subjects on which it was not possible for sectarianism to intrude.\(^{396}\)

For Stout, quoting Immanuel Kant, the basic rule was: “[S]o act that your action may form a law for humanity.”\(^{397}\) Within this secular formula there was no room for special favours for religious denominations to the exclusion of the non-religious. In Stout’s view, laws derived from particular religious traditions could never be recruited for making laws that formed a “law for humanity”; and, given the silence on religion in the Constitution and his take on the latest Spencerian ideas of political economy, this was, for him, the correct arrangement. Thus, when Stout spoke in 1914 on the need for the state to be “neutral to all phases of religious experience”,\(^{398}\) it seems clear that he was prescribing that the state should be neutral in the formal, not substantive, sense.

\(^{390}\) Ibid 1.
\(^{391}\) Ibid 4.
\(^{392}\) Ibid 2, paraphrasing Spencer, in which the philosopher described evolution as an “integration of matter and concomitant dissipation of motion; during which the matter passes from an indefinite, incoherent homogeneity to a definite, coherent heterogeneity”. Herbert Spencer \textit{First Principles} (London, 1867) 396; quoted in Bell & Green \textit{Spencer}, above n 384, 224.
\(^{393}\) Stout was, at least in his early years, an extreme laissez-faire liberal, who, following the ideas of Mill and Spencer, consistently propounded a minimalist state. He initially argued, for example, that the state ought not to fund education. See Bray \textit{Place of Stout}, above n 384, 224.
\(^{394}\) See Robert Stout “Politics and Poverty” \textit{Otago Daily Times} (date unknown) 3: “I say that the function of Government, if we are to have true liberty in any State, must be limited, and that it must not depend on a chance majority.”
\(^{395}\) Stout “Religion and State”, above n 375, 8.
\(^{396}\) Stout argued (successfully) in 1877 for the exclusion of history as a compulsory subject in the school curriculum. This was because he considered that it lent itself to being taught with sectarian bias. See Hamer \textit{Law and the Prophet}, above n 354, 177-178; and Butchers \textit{Young New Zealand}, above n 303, 301.
\(^{397}\) Robert Stout “Can Morals be Taught in Secular Schools?” (Paper delivered at the Otago Educational Institute, 24 April 1878) 8. The phrase, known as the “Categorical Imperative”, is taken from Immanuel Kant \textit{Foundation of the Metaphysics of Morals} (1785).
\(^{398}\) Stout “Religion and State”, above n 375, 5.
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A useful example that is directly on point concerning how Stout’s thoughts ran in cases of special legislated exemptions for religionists occurred in a late 19th century debate in the General Assembly. It was proposed to the House that existing legislation granting priests a right to be exempt from giving testimony in criminal cases required amendment. In 1895, the General Assembly considered a Bill to modernise the pre-existing legislation, which only allowed ministers to refuse to testify if they belonged to a denomination where the formal confession of penitents was a matter of duty or custom. The new Bill would expand the category of persons eligible for the exemption by opening it up to the members of any denomination – not just those, like the Catholic Church, where confession was a core sacrament. Stout, however, objected to the proposal, and moved his own amendment, which nicely encapsulates his attitude to legislation recognising religion. His solution, which was to remove any mention of religion from the clause, read as follows:

No person to whom any confession of any crime has been made in confidence shall be bound to disclose the same unless with the consent of the person who has made such confession.

Stout’s position on religious exemptions, therefore, is the ideal historical antecedent for Little’s argument that the substantive neutrality reading of s 15 BORA is untenable because excusing religiously motivated persons from generally applicable laws “differentiates between the rights of individuals on the basis of the particular foundation of their personal beliefs and commitments”. Recall that Little contended it would be unfair if a woman running a soup kitchen for the needy in a residential area was allowed to do so by authorities, despite zoning laws, if she had a religious motivation (a result that may be required by the substantive neutrality reading of s 15), while a woman who wanted to do the same thing for secular reasons of compassion for her fellow human beings was not. For Stout, as can be seen in the priest-penitent exemption debate, the solution to this dilemma would be either to allow both of them to open a soup kitchen, or neither: “[S]o act that your action may form a law for humanity.”

Stout’s formula is perhaps best summarised by the words of the American scholar Philip Kurland, who favoured what is known as the “strict neutrality” reading of the Religion Clauses of the First Amendment. Kurland stipulated the following restriction on government:

[T]he [religion] clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.

Thus concludes the secularist “story” from history for the formal neutrality reading of s 15 BORA. Relating it back to the purposive technique in defining BORA rights discussed above, one might argue that: given the silence on religion in the Constitution Act 1852, and given decisions made to create a secular education system (among other statutory moves, both before and after 1852, recognising religious equality), and given the debate on prayer at the first ever session of Parliament, a decision by the courts of today to read s 15 as providing a substantive

399 See Evidence Further Amendment Act 1885, s 7.
400 See R v Howse [1983] NZLR 246 (CA), 250 (per Cooke J), for a useful summary of the evolution of this provision.
401 See (1895) NZPD 599 (HR).
402 Little “Religious Exemptions and BORA”, above n 87, 117; and see discussion in the text above accompanying ns 87-98.
liberty right to religionists to avoid the incidence of general laws would fly in the face of the relevant “historical, social and legal context” of the right, as it is understood in this country.

The inconvenient facts of history

Obviously, the problems we face are historically structured: only by knowing the story so far can we have any idea of what to do next. On the other hand, we address the past in order to escape from it. 405

While it is impossible to deny the importance of the secular inheritance embodied in Stout’s arguments, 406 the difficulty with according primacy to that legacy in interpreting s 15 BORA is that it misses out much of what really happened in the relevant legal history. As I shall now explain, I believe it would be a mistake to say that the formal or strict neutrality regime advocated by Stout, and advanced recently by Little, is determinative of the meaning of s 15. 407

Although the New Zealand state made a real commitment to religious equality and secular governance in the mid-19th century, it was, I believe, of the contestable sort and open to the same differing interpretations that we saw in the American debate in Chapter 2 and in the Boerne decision, described above. For a start, regarding Stout’s position on the priest-penitent bill in 1895, perhaps the truly salient thing to learn from that episode is that Stout lost. His amendment was voted down 34 votes to 19, and the new legislation was in fact passed containing the original proposal to widen the type of religious denominations who could benefit from it, 408 but excluding from its ambit confidences made to persons for non-religious reasons. This result clearly went against Stout’s prescription that laws must not “propagate the religious experiences of only one section of the people”. It is apparent from this episode, then, that a different view of the place of religion in society was also jostling for space in the New Zealand polity at that time, and that not all politicians believed that the writings of Spencer provided an accurate gloss on what the New Zealand Constitution meant. 409

Indeed, it seems clear that a more positive conception of religious freedom was in the ascendant on many occasions. For example, despite Stout’s protestations that there should be no provision criminalising blasphemous libel in the Criminal Code Act 1893 (because it would imply New Zealand had a “State Church” 410), such a prohibition was duly enacted. 411

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404 Jefferies, above n 9, 299 (per Richardson J).
406 For a book-length advocacy that Stout’s vision for a secular New Zealand was the dominant strand in our history (and one that must not be allowed to be rolled back by entangling the state with religion), see Jim Dakin The Secular trend in New Zealand (First Edition Ltd, Wellington, 2007).
407 The account just given here of New Zealand’s secularist past conforms to the type of “story-telling” that can often (invisibly) underpin judicial approaches to legal problems that demand historical analysis. As Smith explains, legal doctrine is often “driven and shaped to a significant extent by background stories that inform our selection and use of the [legal] propositions and principles we explicitly emphasize”. If, however, only one version of such stories dominates the field to the exclusion of all else, the resulting “law” can become “oppressive”. See Steven D Smith “Religious Freedom in America: Three Stories” in S Feldman (ed) Law & Religion: A Critical Anthology (New York University Press, New York, 2000) 15.
408 See Evidence Further Amendment Act 1895, s 9.
409 An observation of this sort was once famously made by the US Supreme Court: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Lochner v New York 198 US 45, 74-75 (1905) (per Holmes J, dissenting).
411 See Criminal Code Act 1893, s 133. Due to pressure from Stout and others who did not approve of the codification of the common law offence of blasphemous libel, the Legislative Council added a provision requiring
codification of this common law offence indicates that legislators regarded religion as a social force for the good that was worthy of protection. In the field of education, despite the formal victory of Stout and others in 1877, the “secular clause” in the Education Act was in fact subverted to an extent by what came to be known as the “Nelson” system. The Act, which required that schools be open for exclusively secular instruction for four hours a day – two in the morning and two in the afternoon – did not, however, prevent school premises being used for other purposes outside those hours. Hence, a practice emerged of not commencing classes until 9.30am, and (under the direction of school committees) setting aside a period of 30 minutes from 9am for religious instruction during which time schools were officially “closed” (with exemptions for objecting students). This arrangement, which became commonplace throughout the nation, was actually formalised by the Religious Instruction and Observances in Public Schools Act 1962. Clearly, religion was regarded as a preferred activity in these two instances. What can explain this?

First, it is important to acknowledge that the declaration (mentioned above) by the historian Keith Sinclair in 1959 that New Zealanders were more concerned with material advancement than with “thoughts of salvation” is perhaps best dismissed as an overstatement typical of his generation of historians. As John Stenhouse and others have explained, religious fervour was not absent from the mindset of the 19th century settlers from Britain. This is reflected in the fact that religious belief helped underscore some of the popular mass movements of the period. For example, the groundswell of support for women’s suffrage in the late-19th century was orchestrated primarily by Protestant Christians, as were the Bible in Schools and Temperance movements, which only just failed to achieve national prohibition of alcoholic beverages in 1919. Accordingly, Jeanine Graham declared in her assessment of the religiosity of settler society that: “Christian faith and practice played a fundamental role in the shaping of Colonial society. Consciously or unconsciously the greater proportion of the population acted according to what was essentially a Christian code.” This was also the opinion of the French visitor André Siegfried, who wrote in 1914 that: “No tradition has remained so strong in New Zealand as the religious one…. It has split up into a number of sects, in which the slightest shades of thought are represented.” The salient point, then, was that New Zealanders were in the main

the consent of the Attorney-General for prosecutions to proceed. See Criminal Code Act 1893, s 133(4). This provision remains in the Crimes Act 1961 (see s 123) to this day.

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412 The scheme was named after a Nelson clergyman who discovered the loophole in the legislation. See Ahdar Worlds Colliding, above n 303, 13-14; see also Butchers Young New Zealand, above n 303, 301.

413 See Education Act 1877, s 84(2).

414 See ibid, s 84(3).

415 See ss 77 & 78 Education Act 1964. Public school teachers are permitted (see s 80) to give this instruction. See discussion of this legislation in Sweetman Private Schools, above n 315, 33-34. A further amendment in 1975 allows additional religious instruction to be given if a majority of parents at a school so wish. See s 78A Education Act 1964; and discussion in ibid 102-103.

416 For an excellent historiographical account of the secularist strand of historical scholarship in the mid-20th century, see John Stenhouse “God’s Own Silence: Secular Nationalism, Christianity and the Writing of New Zealand History” (2004) 38 NZH 52 (“Stenhouse ‘God’s Silence’”). Stenhouse argues that Sinclair and others “assumed the inevitability of secularization…and depicted it as a Good Thing”. Accordingly, they chose to play down the significance of religion in New Zealand’s social history, and claimed that religion, despite its importance in the very early days of settlement, “soon disappeared, or retreated into the private sphere, where it allegedly ceased to have much wider social, cultural, intellectual or political significance”. Ibid 53.

417 Ibid 57; see also AR Grigg “Prohibition: The Church and Labour” (1981) 15 NZH 135, where the writer explains that the prohibition movement was the “most articulate expression” of the non-conformist churches’ desire to make New Zealand a more “civilized and sophisticated community”. Ibid.


419 André Siegfried Democracy in New Zealand (EV Burns tr, Bell, London, 1914) 310-311.
a religiously plural people, and it follows from this that when settlers came to New Zealand they would have expected the nation’s laws to respect their different religious affiliations, where possible. The priest-penitent exemption, which was initially created to accommodate the Catholic minority, was surely a manifestation of this demand.

Second, at the founding of the country in 1840, numerous documents expressed the wish that the religious beliefs of all denominations should be respected, save where they broke out into acts that threatened the peace. For example, the Imperial Instructions to the first New Zealand Governor William Hobson, dated 9 December 1840, enjoined him to afford the “most absolute toleration to every form of Christian Worship”, while “resolutely opposing any practice by which the peace of society and the freedom of Religious Worship might be invaded”. Regarding Maori customs, the document advised that these should be tolerated, except – as in the cases of “cannibalism, human sacrifice, and infanticide” – where the “violations of the external and universal laws of morality no compromise can be made, under whatever pretext of religious or superstitious opinion they may have grown up”. Apart from serious breaches such as these, the Governor was to accept practices that, “being rather absurd and impolitic than directly injurious, may be borne with until they shall be voluntarily laid aside by a more enlightened generation”.

This direction also reflected an incident that had occurred earlier at the central founding event of the country, the signing of the Treaty of Waitangi, which was negotiated by the naval captain Hobson in his capacity as British Consul. This document comprises three written articles from which the British government obtained sovereignty in exchange for guarantees relating to Maori rights, and a promise that Maori would enjoy equal rights as British subjects. At the ceremony, the French Catholic missionary, Bishop Pompallier, requested that a guarantee of toleration in religious matters also be granted. The following oral declaration was made:

The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.

Taken together, the Imperial Instructions and the oral promise made in the Fourth Article of the Treaty could be regarded as implying a positive duty on the part of government to accommodate religious practices, save where they manifest themselves in ways that are

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420 Robert Stout, by contrast, belonged to a tiny minority of Freethinkers, who perhaps occupied positions of power out of proportion to their presence in the religious demography. Freethinkers and those describing themselves as belonging to no religion constituted 0.85% of the population in 1886. See Davidson & Lineham Transplanted Christianity, above n 304, 178.

421 Lord John Russell, Secretary of State for Colonies to Hobson, 9 December 1840, GBPP 1841/311, 28.

422 Ibid.

423 Ibid.


425 The meaning the Treaty is heavily disputed, particularly in regard to the extent that sovereignty was ceded to the British. See James Belich Making Peoples: A History of the New Zealanders (Penguin, Auckland, 1996) 193-197; see also Joseph Constitutional Law, above n 294, ch 3. The text of the three written articles of the treaty is laid out in Treaty of Waitangi Act 1975, sch 1. Article 4 has received recognition in some modern documents; see, eg, New Zealand Human Rights Commission “Chapter 9: The right to freedom of religion and belief” in New Zealand Action Plan for Human Rights (2004); available at: <www.hrc.co.nz/report/chapters/chapter09/religion01.html>.

injurious to public safety. In short, they arguably constitute an embryonic commitment to observing a measure of substantive religious freedom to all occupants of New Zealand at the time of British acquisition. These guarantees are, perhaps, the functional equivalent of the preconstitutional colonial and state constitutional guarantees of religious free exercise that O'Connor J employed in *Boerne* to argue that the founding generation of the US considered that the federal Free Exercise Clause should be read as guaranteeing a genuine liberty right to immunity from ordinary laws.\(^{427}\)

The final evidence that a substantive conception of religious free exercise is inherent in the long legislative record of legislation effecting what would be considered in today’s terms as exemptions from general laws. This record discloses that the state has been generally permissive over a long period to a degree that would not have pleased Stout, given his principled position on the priest-penitent exemption in 1895. In 1910, for example, an exemption was inserted in the Licensing Amendment Act 1910 for persons wishing to partake of sacramental wine in the face of the proposed (but never enacted) prohibition of alcoholic beverages in the early 20th century, an exemption that was primarily deemed necessary to accommodate Catholics.\(^{428}\) This was undertaken, moreover, despite heightened Protestant-Catholic conflict in the country during this period.\(^{429}\) Many other similar exemptions have been accorded to many other religionists over the years.\(^{430}\) For example: exemptions were given to religious conscientious objectors in both world wars;\(^{431}\) religious employers are exempt from non-discrimination laws in the hiring of staff and are able in some cases to refuse access to unions on religious grounds;\(^{432}\) medical personnel are permitted to absent themselves from abortion procedures;\(^{433}\) and prisoners are permitted to take wine in religious ceremonies, despite the general ban on consumption of alcohol in correction institutions.\(^{434}\) What these examples disclose is a pattern – spanning more than a century – of governmental solicitude for religious believers in the public conduct of their religion. It resembles, of course, the substantive neutrality conception of religious free exercise. In Douglas Laycock’s terms, they are all examples of a species of governmental neutrality that accords people, where possible, equal concern and respect for their personal choices about their private religious belief.

It may be objected that, on closer inspection, many of these exemptions have been “flattened out” over time to include non-traditional belief systems, and in so doing pass muster in terms of Stout’s formal neutrality test. Regarding the priest-penitent exemption, the latest version of that legislation – which was enacted in 2006 – provides that communications made in order to receive “religious or spiritual advice, benefit or comfort” are privileged from being divulged in court, when they are made to a person who has a “status within a church or other religious or

\(^{427}\) See text above accompanying n 247.

\(^{428}\) Licensing Amendment Act 1910, s 62(2).


\(^{430}\) For a good summary, which shows how widespread such exemptions were by the 1960s, see ILM Richardson *Religion and the Law* (Sweet & Maxwell, Wellington, 1962) (“Richardson Religion & Law”) 57-60.

\(^{431}\) See, eg, Defence Amendment Act 1912, s 65(2), Military Service Act 1914, s 18(1)(e), National Service Emergency Regulations 1940/117, reg 21(1)(e); and see discussion in Alan Beavan *Conscientious Objection to Military Service* (LLB Hons Dissertation, University of Auckland, 1974).

\(^{432}\) See Human Rights Act 1993, ss 28 & 39; Industrial Relations Act 1973, ss 105-112B, and Employment Relations Act 2000, ss 23-24. Richardson said that such provisions were of benefit to “such sects as the Seventh Day Adventists who are opposed to compulsory unionism on religious grounds”. Richardson *Religion & Law*, above n 430, 58.

\(^{433}\) See Contraception, Sterilisation, and Abortion Act 1977, s 46.

\(^{434}\) See Corrections Act 2004, s 79.
spiritual community that requires or calls for that person to receive confidential communications”. And in the case of the abortion exemption for medical staff, a provision that dates from the early 1970s, this protection is extended to any person “on grounds of conscience”. While I concede that these exemptions are phrased very widely, it is important to note that they are still only available to persons who wish to be exempted from some general burden on grounds that are religious, or on grounds of individual positions on important subjects that are felt with an intensity that is equivalent to that of a traditional religious believer. All other persons, who wish to act similarly out of a simple preference, do not qualify. In other words, these exemptions would still be discriminatory when viewed through Stout’s (or Little’s) lens of neutrality, because they have the defect of distinguishing between religion – and religion-like beliefs – and non-religion. Moreover, many exemptions remain on the statute books that still single out religion, and religion only, for special protection. The prison exemption for communion wine, for example, expressly restricts the protection to rituals involving a “religion”. What all these modern examples indicate is that religion, or its near analogues, are being singled out for privileges that nobody else can receive. One could argue, as presumably Stout would, that these exemptions are unfair. However, one cannot deny that they exist. They are further evidence that the legislature – both before and after BORA’s enactment – has considered itself bound to consider moral claims from religiously motivated citizens to be excused from the incidence of general laws.

For myself, I regard the alleged inequality in these cases as minor and, in any event, I consider the distinctions to be justified. Let us return to Little’s example of a woman who resigns from a Saturday job because it falls on her Sabbath and then receives unemployment insurance because her motivation for leaving work, being religious, was deemed acceptable by government officials administering the system. Recall that Little claimed it was unfair that a non-custodial parent who resigned from work so that he could see his children on a Saturday would not be eligible for insurance under the substantive neutrality reading of s 15. In my view, however, these two cases are not relevantly similar. This is because, as Laycock has explained, non-religious believers like the non-custodial parent do not hold “intense moral commitments that are at odds with the dominant morality reflected in government policy”. They instead are acting out of mainstream beliefs that perhaps ought to be accommodated by government. However, because they do not act out of a religious (or near-religious) intensity that distinguishes them from the mainstream, then they cannot be regarded as falling within the protective scope of s 15 BORA, which surely, if it means anything, ought only to be read as protecting non-mainstream interests, not the interests of everyone acting for any reason.

To adapt slightly the words of a former Australian Chief Justice: the secular belief systems of the majority can look after themselves. Section 15 BORA is surely designed to protect the religious (or near-religious) belief systems of often-unpopular minorities who live outside the established norms of wider society. The very text of s 15, which stipulates protection for people manifesting “religion or belief”, seems to demand this conclusion. To read it otherwise would strip it of any meaning. Adams and Emmerich express very well the core semantic

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435 See Evidence Act 2006, s 58.
436 See text above accompanying n 93.
438 See Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth (1943) 67 CLR 116, 123 (per Latham CJ): “The religion of the majority can look after itself. Section 116 is required to protect the religion (or the absence of religion) of minorities, in particular, of unpopular minorities…”.
problem with criticisms expressed by scholars like Little that favouring religion to the exclusion of other categories is unacceptable:

A neutrality between religion and ‘everything that is not religion’ defies definition and leads to nonsensical results, because it rests on a comparative world that knows no bounds. Countless human activities, such as gold, carpentry, driving, eating, sleeping, and hiking, to name a few, fall into the category of ‘nonreligion.’ But it does not follow that government must be neutral between such activities and those motivated by religion.

This conclusion is backed up, moreover, by the existence of the very long, and unbroken, legislative record in this country evincing the substantive neutrality interpretation of religious free exercise protection. That record of legisprudence, which was at first a response, perhaps, to a Madisonian or Dual Kingdom conception of religious freedom that was supported by a majority of the inherently religious people who founded New Zealand, still holds true in this country, if only because the text of s 15 demands it. Indeed, further evidence that this should be so can be found in a 1983 Court of Appeal judgment, in which Justice Cooke was required to determine the scope of the priest-penitent privilege. In \( R v \) Howse, Cooke J used terms that could be described as a 20th century gloss on the oral guarantee given by Hobson in 1840 regarding the importance of religious free exercise:

The rationale of any such privilege must be that a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief.

As a final point, I would argue that Little’s egalitarian complaint is adequately addressed by the modern, expansive definition of “religion or belief” that includes much more than traditional religious systems of the theistic variety, but stops short of including every motivation to act known to humanity. This addresses Keith’s concern, expressed in the lecture quoted above, that sometimes an enquiry into the history of a law may reveal that the “law is no longer justified or may explain its particular features or may justify it.” In my view, the inclusion of non-theistic, and essentially agnostic beliefs into the modern scope of s 15 means that reading the provision as providing a substantive liberty right remains justified; whereas, if s 15 only included within its ambit the traditional “Churches”, such as Anglicanism or Catholicism, I would agree with Little that it could no longer be justified in today’s religiously plural society.

For all these reasons, I believe the central normative argument of Little (and by extension Eisgruber and Sager on whose scholarship he relies) that s 15 BORA should be read as

440 \( R v \) Howse [1983] NZLR 246 (CA), 251 (per Cooke J). Cooke J was in fact applying Evidence Amendment Act (No 2) 1980, s 31, which essentially restated the equivalent provision in the 1895 statute.
441 For a nuanced attempt at delineating the (post-)modern scope of the right to religious free exercise, see, eg, Greenawalt Free Exercise and Fairness, above n 141, 149-156.
442 KJ Keith “1883 to 2008: Law and Legal Education Then and Now” (2009) NZ Law Review 69, 72. See my discussion of Keith’s injunction in the text above accompanying n 78.
443 I retain the label “Equal Regard” for this thesis, even though the term was coined by Eisgruber and Sager. This is because the two American scholars generously accept that it is possible for others to concur on their doctrinal solution for interpreting the Free Exercise Clause (which I do, albeit in the context of s 15 BORA), while disagreeing with their central normative argument. See Eisgruber & Sager Religious Freedom, above n 92, 118. For criticisms resembling my own regarding the coherence of Eisgruber and Sager’s normative claims, see, eg: Michael McConnell “The Problem of Singling Out Religion” (2000) 50 DePaul L Rev 1, 32-38; Thomas Berg “Book Review: Can Religious Liberty Be Protected as Equality?” (2007) 85 Tex L Rev 1185, 1201-1203; and Andrew Koppelman “Corruption of Religion and the Establishment Clause” (2009) 50 Wm & Mary L Rev 1831, 1845-1846 & n 59.
providing only a protection from discriminatory state actions – and not a substantive liberty right – falls down.

(c) Conclusion: section 15 codifies a substantive conception of religious free exercise for New Zealand

Recall that at the start of this section, I explained Justice Keith’s basic prescription for religious freedom protection in New Zealand. He claimed, relying in part on Isaiah Berlin, that religious freedom is simply a negative liberty right to be free from governmental interference. Keith J concluded by opining that freedom of religion in bills of rights was “all about” allowing “autonomous institutions” determining their “own conception of the ‘good’”.444

In this section, I have traversed how the domestic historical record vis-à-vis free exercise exemptions from general laws has been managed in this country over time, and how certain events, personalities, and, most importantly, legislation, have contributed to this conception in their different, and not entirely convergent, ways. What the record discloses is that the issue is a very close question. Thus, while I consider that reading s 15 as providing only a right to non-discrimination has a venerable heritage in this country, the language and purpose of the provision is, I believe, on the whole, more in line with the substantive neutrality construal of the text. This is primarily because the New Zealand state has on many occasions decided that in order truly to be neutral in its dealings with religionists – in order genuinely to allow institutions and individuals to seek out their “own conception of the good” – it is sometimes necessary to exempt religiously motivated persons from general laws.

It is therefore reasonable to suppose (as Justice O’Connor did in Boerne), on the basis of my findings regarding the historical provenance of s 15 BORA, that the provision contemplates that the courts will – as the legislature has done to the exclusion of the judicial branch for much of our history – be involved in administering a substantive liberty regime for persons litigating under s 15. This would entail the courts scrutinising all legislation – even laws that are religiously neutral and generally applicable to all citizens – to see whether any indirect burdens on religious persons wishing to act in ways contrary to such laws can be “demonstrably justified” as a “reasonable limit” in a “free and democratic society” (the s 5 BORA enquiry).

In the next section, however, I will explain why the New Zealand courts should resist embarking on a project of this sort.

2.2.3 ...But why the New Zealand courts should “underenforce” the formal neutrality reading of section 15

My core argument for why the New Zealand courts should refrain from inspecting legislation to see whether it complies with the substantive neutrality reading of s 15 BORA is based in the main on the reasons given by Scalia J in the 1990 case of Smith for abandoning such an enquiry in litigation involving the Free Exercise Clause. I believe, in short, that the arguments advanced by Scalia J in Smith are intrinsically compelling, and they are also transferable to the New Zealand constitutional environment. This is so despite my conclusion in the previous section that s 15 BORA incorporates a substantive liberty right that religionists can invoke against state action when that takes the form of general laws applied to all citizens. I will now explain why.

444 See text above accompanying n 136.
First, it is important to recall that in *Smith* and *Boerne*, the US Supreme Court did not ground its restatement of the meaning of the Free Exercise Clause on any particular reading of the text or history of the provision. In *Smith*, Scalia J merely said that the wording of the clause was amenable to two “permissible” readings – either the formal or substantive neutrality conceptions of the right; and, in *Boerne*, he was similarly ambivalent on the historical provenance of the clause, stating that the “historical evidence mustered by the dissent cannot be fairly said to demonstrate the correctness” of the decision in *Smith*, but that it was, on the whole, “more supportive of [Smith] than destructive of it”. 446 This ambivalence is further underscored by the fact that only one other judge on the panel of nine would even join Scalia J in his, uncharacteristically for him, tentative originalist conclusion. 447 Because of these two holdings, I submit that there can be no barrier to importing the US Supreme Court’s doctrinal formula for applying the Free Exercise Clause into the New Zealand environment on either textual or historical grounds. 448

Second, it will be recalled from my discussion in Chapter 2 that attempts in the US to administer the substantive neutrality regime during the *Sherbert-Yoder* era (1963-1990) were sharply criticised both on the Court and in the academy on a number of grounds that led eventually to the system’s collapse in 1990. Scalia J’s chief reason for rejecting the substantive liberty approach was his perception that the courts were institutionally unsuited, especially in a time of increasing religious diversity, to making extremely fine-grained balancing enquiries into whether a law was an unreasonable infringement on the right to religious free exercise. Given that such delicate questions are open to dispute on all sides, 449 and given that – as an essential feature of the rule of law – courts need to be able to apply the law in an impartial and predictable manner that is fair to all members of society, he considered that such questions should be directed at first instance to democratically elected legislatures. The judiciary’s role, he concluded, was simply to hold legislatures to a standard of formal neutrality – or, in other words, to ask whether laws burdening religionists were discriminatory. That type of relatively straightforward enquiry, which was to be crisply demonstrated three years after *Smith* in the...

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445 See *Smith*, above n 3, 878: “It is a permissible reading of the text...to say that if prohibiting the exercise of religion...is not the object...but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” See also my discussion of this point in the text accompanying ns 415 & 416 in Chapter 2.

446 See *Boerne*, above n 138, 544; and see my discussion in the text above accompanying ns 277 & 278.

447 Compare with Scalia J’s majority opinion for the court in *District of Columbia v Heller* 554 US 570 (2008), in which he relied almost entirely on originalist arguments to strike down a legislated ban on private hand gun ownership, as it contradicted the historically understood meaning of the Second Amendment right to “bear arms”.

448 A former Canadian Supreme Court Justice has cautioned against using US decisions that depend on factors that are unique to US constitutional history to help elucidate the meaning of non-US bills of rights: “By definition, decisions with a greater emphasis on originalism are less useful outside the country where they are written, since the basis for the decision does not apply elsewhere.” Claire L’Heureux-Dubé “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34 Tulsa LJ 15, 33. Since the combined holdings of *Smith* and *Boerne* do not hinge on originalist interpretation, they therefore become more amenable for transplant into non-US jurisdictions such as New Zealand.

449 See, eg, *Bowen v Roy* 476 US 693 (1986), where the Court was split down the middle on the issue of whether a legal requirement that an American Indian girl be furnished with a social security number (which his father claimed would “rob the spirit” of his daughter) was an unreasonable infringement of the right to religious free exercise. In *Smith*, Scalia J decried courts being involved in intensely metaphysical enquiries of this sort: “What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith?” *Smith*, above n 3, 887; see also, for Scalia J’s extra-judicial expression of this concern, Antonin Scalia “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175.
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The case of *Lukumi*, was one that the courts could perform with the degree of certainty appropriate to the judicial branch of government.

I believe that Scalia J’s claim that the US courts should be debarred, as a matter of institutional capacity, from conducting the balancing exercise mandated by a substantive neutrality regime in assessing the right to religious free exercise is equally, if not more, valid in the New Zealand constitutional scene. I base this conclusion on a number of grounds. First of all, I consider that the arguments put forward by Scalia J as to the difficulty of balancing the centrality of religious beliefs against the secular needs of government are inherently compelling in any legal jurisdiction that contains a religiously plural populace. The 27-year period in which the US courts struggled mightily to weigh these two factors, but in many cases arrived at manifestly arbitrary results that were open to attack as being based on culturally biased assumptions, in my view cautions strongly, and perhaps even decisively, against conducting a similar project in this country.

The fact, moreover, that the New Zealand courts are not empowered to strike down laws, due to the statutory nature of BORA, makes this point even more telling in the New Zealand legal setting. Section 4 BORA, which provides that the courts are not to disapply or hold invalid any enactments of the legislature sends a strong message that Parliament ought to be the primary institution for making decisions on human rights matters when these involve issues that are finely balanced and open to reasonable disagreement by persons acting in good faith. Given that the US jurisprudence showed, rather dramatically in my opinion, that courts cannot conduct the balancing analysis in a fair or predictable way over time, it would in my view be preferable to entrust the primary responsibility of creating religious exemptions from general laws to the legislature with its larger resources of fact-finding, its greater time and capacity for reflection, and, above all, its democratic mandate.

An objection to this conclusion could be that the courts in this country already employ the balancing analysis to many other BORA rights, so it would be incongruous for judges to withdraw from conducting a balancing analysis in religious manifestation cases. A helpful comparison at this point is with the right to freedom of expression. Jurisprudence in this area has already seen the courts balancing the right against public policy goals, and sometimes finding in favour of rights claimants. I consider, however, that a distinction can be made in this regard between the two rights. In most cases of balancing, such as in instances implicating the right to freedom of speech, free association, the right to privacy, and so on, the courts will

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450 I discuss *Lukumi* (which saw the Court strike down discriminatory city by-laws targeted at a small religious sect in Florida) in detail in the text below (see section 4.1).

451 In a country where, say, the entire population belonged to one religion, it might be acceptable for courts to engage in balancing analyses, because, presumably, members of the courts would belong to the same religion and would be able confidently to assess whether a given law imposes an unacceptable burden on a core rite of the religion. That said, the legislature of such a country would be unlikely to enact such a law in the first place.

452 See my critical discussion of the “balancing” jurisprudence in section 2.2 of Chapter 2.

453 One of the main, if not the most important, reasons why New Zealand did not enact a supreme law bill of rights was a perception that it would entrust too much power to judges in making value-laden decisions involving rights that were traditionally the preserve of the legislature. See Paul Rishworth “The Birth and Rebirth of the Bill of Rights” in G Huscroft & P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker’s, Wellington, 1993) 1, 19.

454 See, eg, *Hopkinson v Police* [2004] 3 NZLR 704 (HC), where the High Court decided that a statutory prohibition on destroying the New Zealand flag with the intention of dishonouring it did not apply to a person who burnt a flag as part of a political protest. The Court assessed that the law should not be applied to this activity because it would be an unreasonable interference with the right to freedom of expression, which is affirmed by s 14 BORA. See, generally, “Limiting Rights” in Butler & Butler *NZBORA Commentary*, above n 9, ch 6.
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be weighing competing social goals against long-standing legal rights that have themselves become “norms internal to society’s value system”. In free speech cases, for example, the courts can create a workable descending scale categorising which instances of speech are deserving of the most protection. For example, political speech is adjudged to be at the high end in terms of importance, whereas other activities, like commercial speech or pornography are much lower in importance. By making initial ranking enquiries like these, it is relatively simple for the courts then to assess whether governmental inroads on these activities is justified. Religion, by contrast, is not at all amenable to a sorting process like this, because the significance of religious activities is not reducible in terms of its value to secular society. Moreover, the same activity may have different significance for different religious groups, and for individuals within these groups, which makes such an enquiry almost impossible to conduct in a reasoned way. For this reason, I suggest that religion is a special case in the spectrum of human rights, and therefore it is defensible to say, as I do in this thesis with my theory of Equal Regard, that the courts ought to adopt a sui generis approach to adjudicating on religious matters.

A further criticism of my conclusion might be that, since BORA is a statutory instrument, and Parliament can therefore override any decisions with which it disagrees by virtue of the doctrine of parliamentary sovereignty, then it is of relatively little import when a court finds that a general law conflicts with s 15 BORA. By contrast, when a US court decides that a governmental action infringes the federal Constitution, the democratic branch is thereby forbidden from re-legislating to “overturn” the court decision. Some have argued that this is why the US Supreme Court decided to abandon the substantive neutrality regime in 1990: since the balancing process was so unpredictable and its decisions interpreting the Constitution were final, the Court felt it was better as a matter of judicial policy to allocate this role to the legislature. For this reason, Eugene Volokh has suggested that statutory religious freedom guarantees are a better option in the US, because judges will feel more disposed to make generous findings towards religious conduct claims if they know that legislatures are able to override any wayward decisions. Accordingly, Volokh favours the use of the many statutory protections (known collectively as “RFRAs”) of this sort currently existing at federal and state
level. Since BORA is also a statutory instrument, then the concern that may have animated the Supreme Court when interpreting the federal Constitution in *Smith* is absent. Therefore, or so the argument might go, the New Zealand courts should feel free to interpret s 15 BORA to its full substantive extent.

I certainly agree that the relative institutional powers and status of courts within different national systems are a relevant factor in determining whether it is wise to import doctrinal solutions from foreign jurisdictions. However, I would respond by saying that, whereas the statutory religious free exercise protections in the US occupy a relatively low position in the hierarchy of laws (they reside beneath state and federal constitutions), the situation is different in New Zealand. Much is made of the fact that BORA is a “mere” statutory, or parliamentary, bill of rights, and that contrary statutes can easily override it. However, the fact remains that statutes are in fact the supreme form of law in this country, with the result that s 15 BORA lies psychologically on a far higher plane than the functionally equivalent RFRA schemes in the US, which, as I have said, are of a lesser status than the federal Constitution, and are for that reason relatively easy to amend as a matter of politics.

It is generally regarded by legal commentators discussing bills of rights, such as BORA, which are at the apex of common law legal systems, that once courts declare that a governmental limit on a right contained in a statutory bill of rights conflicts with the right, it will be very difficult for governments to go against the will of the courts, as a political matter, even though legally they are competent to do so. For this reason, I do not consider the comparison with the RFRA schemes in the US to be particularly apt. Accordingly, I maintain my position that the formal neutrality reading of s 15 BORA remains the better choice.

A final criticism might be that in other countries from which New Zealand traditionally seeks guidance in construing rights guarantees, the substantive neutrality interpretation is the current norm, and that the US formal neutrality formula is therefore an outlier on the global scene. In the UK, Europe, Canada and South Africa, the courts regularly construe their equivalent religious free exercise protections as providing protection of this sort, and so it would be more consistent with the prevailing attitude to follow their examples. My first response to this criticism is that the US courts have been wrestling with the issue of constitutionalised rights for a much longer period than any of these countries, and that the lessons the US courts took from

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461 The federal Religious Freedom Restoration Act (107 Stat 1488, 42 USC), and the 15 state RFRA schemes now in operation perform a constitutional function that is broadly analogous to s 15 BORA, in that judicial decisions applying them in favour of religious claimants can subsequently be overturned by the democratic process. For comparison, see Paul Rishworth “Interpreting and Invalidating Enactments Under a Bill of Rights: Three Inquiries in Comparative Perspective” in R Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 251, 260-263. Laycock describes several instances where US legislatures have done just this; for example, Illinois amended its state RFRA so that it was not applicable to a potential religious free exercise claim when an expansion of O’Hare Airport impinged upon a cemetery. See Laycock “Religious Exemption Debate”, above n 437, 156-157.

462 Tushnet urges extreme caution when borrowing doctrinal solutions from foreign jurisdictions where broadly analogous rights guarantees are administered within unique cultural and constitutional frameworks that are sometimes obscure to foreign observers. See Tushnet “Comparative Law”, above n 12, 1239: “Identifying common functions across constitutional systems is always problematic because doing so inevitabaly omits institutional details unique to the systems being compared.”

463 See Gedicks “Scope of Legal Limitations”, above n 458, 1195-1200.

this experience are therefore arguably of greater value than the relatively untried religious freedom guarantees in any of these jurisdictions.

There are also factors in the constitutional environments in these other jurisdictions that may render their approach to free exercise litigation less relevant to the New Zealand scene. For example, the European Court of Human Rights has developed an interpretive stance towards religious freedom issues in which it accords a large degree of deference towards the member countries who are subject to its jurisdiction. Because so many of the European states have institutional arrangements between the state and religion that are unique to any given state, the European Court has declined in many cases to engage in meaningful scrutiny of religious free exercise claims brought before it. Accordingly, it is my view that the decisions of this body should be approached with caution when assessing their relevance to the New Zealand scene.

Regarding Canada and South Africa, it is significant in my view that these courts have a much stronger mandate to scrutinise state actions, including legislation, than the New Zealand courts, in that they are interpreting supreme law bills of rights. Other factors operating within these different constitutional settings also explain the aggressive posture of these courts in construing human rights violations. The South African Constitution was, of course, enacted as a means of repudiating the Apartheid era, with the result that its Constitutional Court has intuited a firm mandate to scrutinise all governmental actions that have human rights implications. This, in my view, underpinned its explicit decision not to follow the US Supreme Court’s doctrinal formula in Smith. In the New Zealand setting, by contrast, BORA was enacted during a time of political tranquillity, and was arguably not intended to re-orient the social order. Because of

465 See Carolyn Evans “Church-State Relations in the European Court of Human Rights” (2006) BYUL Rev 699, 723: “[I]t is important to recall that the Court is an international court that needs to allow states to maintain some flexibility and accept that there are plural ways to address this complex issue. The Court does not have the same authority or connection with the constitution of a particular state as does the United States Supreme Court. The European Court has recognized this in the development of the ‘margin of appreciation,’ which requires the Court to defer to some extent to the judgment of states in relation to whether a restriction on rights is necessary.” In Chapter 4, I will address in more detail the applicability in New Zealand of the Court’s decision in the case of Sahin v Turkey (2007) 44 EHRR 5 (10 November 2005). In Sahin, the European Court attached great significance to the Turkish Constitution’s guarantee of state secularism, and therefore allowed to stand the decision of a state university to prevent a Muslim woman from wearing an Islamic veil. In New Zealand, no comparable “secular” provision exists, so it is a moot point whether decisions like Sahin ought to have any bearing on how s 15 BORA is to be interpreted.

466 The British case law on Art 9 (which is incorporated into British law by the Human Rights Act 1998 (UK)) is also distinguishable in that the UK courts are bound to apply the proportionality test, as this is mandated by the European judicial organs in assessing limits on Art 9 of the European Convention. See, eg, Thomas Poole “Proportionality in Perspective” (2010) NZ Law Review 369, 392, where he notes that the British courts are “in effect servants of two masters”.

467 Note that technically the Canadian Charter of Rights and Freedoms (Part I Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK) (“Canadian Charter”)) preserves parliamentary sovereignty by virtue of s 33 of that document, which permits federal and proroguing governments to legislate in a manner contrary to many of its provisions. However, because of political considerations, legislatures have very rarely done this. Effectively, therefore, the Canadian Charter, which permits courts to disapply statutes, is a supreme law document. See Huscroft “Role of Courts”, above n 464, 12.

468 See, eg, Iain Currie & Johan de Waal The Bill of Rights Handbook (5th ed, JUTA & Co, Lansdowne, 2005) 153 (internal quotation marks omitted), where the authors note that the Constitution was designed to make a “ringing and decisive break with the past”, and that a purposive interpretation of the document’s provisions will take this history into account.

469 See Prince v President, Cape Law Society 2002(2) SA 794 (CCSA), [122], where the Court, without further comment, said that the approach of the minority judgments in Smith “is more consistent with the requirements of our Constitution”.

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the different circumstances of its birth, therefore, it is reasonable to suppose that the courts will be more circumspect when considering the guarantee contained in s 15 BORA.\(^{470}\)

In Canada, which has a relatively benign historical record more in line with New Zealand’s, this consideration is less applicable. However, there are features of the Canadian Charter that could be read as distinguishing it significantly from the New Zealand document in a way that may explain the Canadian Supreme Court’s decision to apply a substantive neutrality reading of its religious freedom provision. For example, in s 27 of the Charter there is an interpretive direction that requires the entire document to be construed in a manner that is “consistent with the preservation and enhancement of the multicultural inheritance of Canadians”.\(^{471}\) While there is some dispute about the significance of this provision,\(^{472}\) it would appear to support the Canadian Supreme Court’s decision to read s 2(a) as providing a substantive liberty right for religionists. In the New Zealand document, by contrast, there is no equivalent positive guarantee that the rights contained within it are to be construed in such a spirit.\(^{473}\)

In the paragraphs above, I have offered suggestions as to why New Zealand should take a different route from jurisdictions on which it usually relies for assistance in construing human rights provisions in BORA. In truth, these suggestions have been largely speculative in nature. There is one more significant consideration that, I believe, argues strongly in favour of reading s 15 as providing in the courts simply a right to freedom from non-discrimination in religious matters. One potential criticism of the Equal Regard formula is that it does not fit with the general interpretive direction to construe rights “generously”.\(^{474}\) Intuitively, the approaches in jurisdictions that apply the substantive neutrality regime appear to grant religionists a greater measure of protection than the US formal neutrality formula,\(^{475}\) which merely requires that government enacts non-discriminatory laws. The difficulty with this complaint, however, is

\(^{470}\) It is said that BORA is best described as falling within the tradition of “affirmatory” bills of rights that seek primarily to lock in past practices that have served the relevant countries well. By contrast, the South African Bill of Rights assuredly is best categorised as an “amendatory” human rights document. See discussion of the affirmatory-amendatory distinction in Justice Antonin Scalia “The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?” in G Huscroft & P Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 19; and Rishworth et al, above n 9, 31-32.

\(^{471}\) Section 29 also preserves rights guaranteed to some religious schools that pre-existed the founding of modern Canada in 1867. By s 93 of the Constitution Act, 1867, 30 & 31 Vict, c 3 (UK) certain denominational schools are provided with state funding to the exclusion of new religious groups. This arrangement was declared not violative of the Charter in *Adler v Ontario* [1996] 3 SCR 609. Arguably, the finding that s 93 is not discriminatory against other religious groups in Canada supports the expansive definition of religious freedom in s 2(a). But see the ambivalent treatment of this factor in *Grant v Canada (Attorney-General)* [1995] 1 FC 158, 169.

\(^{472}\) See Gerald Gall “Jurisprudence under Section 27 of the Charter: The Second Decade” (2002) 21 Windsor YB Access Just 307. Note that s 27 was mentioned as supportive of the result (to strike down a statute that criminalised Sunday trading in order to honour the Christian God) in the foundational Canadian religious freedom case of *R v Big M Drug Mart* [1985] 1 SCR 295 (SCC), 337-338.

\(^{473}\) The New Zealand state has never consciously espoused a formal policy of multiculturalism. See Richard Mulgan *Māori, Pākehā, and Democracy* (Oxford University Press, Auckland, 1989) 7-10. Mulgan explains this was in part due to reluctance by indigenous Māori to accept parity with new immigrant cultures, a state of affairs that an official multiculturalist policy might imply.

\(^{474}\) See *R v Goodwin* [1993] 2 NZLR 153, 168 (CA) (per Cooke P). The instruction to give rights as broad a meaning as possible in the first stage of BORA analysis is derived from a famous passage by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319 (PC), 328, where he states that constitutional rights call for: “A generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.” See discussion in Butler & Butler NZBORA Commentary, above n 9, 76.

\(^{475}\) Peter Hogg, the Canadian constitutional law scholar, makes this claim with respect to Canada’s treatment of free exercise claims as against the US. See Peter Hogg *Constitutional Law of Canada* (5th ed, Thomson, Ontario, 2007) vol 2, 64: “[F]reedom of religion…[has]…been extended beyond the American precedents.”
that in jurisdictions that apply substantive neutrality regimes, the great bulk of cases brought before the courts are rejected for reasons that resemble the now-discredited techniques used by the US courts during the Sherbert regime to scuttle religious free exercise cases.

To take one example, consider Cha’are Shalom Ve Tsedek v France. In this case, a Jewish group petitioned the European Court of Human Rights with the complaint that the refusal of French authorities to grant it a license to produce meat in accordance with its religious beliefs infringed its right to manifest its religious beliefs under Art 9 of the European Convention on Human Rights. The Jewish group was dissatisfied with the kosher food available in France, because it believed the extant slaughterhouses (which were operated by only one licensed organisation) did not meet the strict standards it understood to be laid out in the Old Testament. The European Court, however, disposed of its claim in the following way. First of all it found that there was no relevant burden on the applicant’s Art 9 right, because it could simply import meat ritually slaughtered to its stricter standards from neighbouring Belgium. And second, the Court found that, in any event, it could not be said that the group’s Art 9 right included the “right to take part in person in the performance of ritual slaughter and the subsequent certification process”. The group therefore had no Art 9 case.

The methods used here by the European Court are eerily similar to the ones adopted by the US during the Sherbert era to avoid applying the balancing test mandated by the substantive neutrality analysis. For example, the claim that the Jewish group in Tsedek did not need to be involved directly in the slaughter process to satisfy their religious beliefs resembles a multitude of US court decisions in which judges argued that a governmental activity that clearly impaired a religious practice by any normal definition of the word “impair”, did not in fact do so. Recall that in Lyng, the US Supreme Court made the remarkable claim that requesting the government to refrain from building a logging road through a Native American sacred site was the equivalent of asking government to change the colour of its “filing cabinets” (because, like filing cabinets, the land was owned by the government), and that because the Native American tribes involved were not actually being coerced into doing anything, then it could not be said that the logging road would “prohibit” them from exercising their religion at all. Tsedek is also reminiscent of the US case of Hernandez, which involved a claim by the Church of Scientology that the refusal of the government to grant it a tax deduction for moneys received in return for special “auditing” sessions for its adherents breached its free exercise rights. The Court replied to this claim by expressing doubt as to whether “auditing” was a genuine religious practice, and then proceeded to ignore the fact that government regularly gave such deductions for broadly analogous services provided by mainstream faiths. Likewise, in Tsedek, as the dissenting judges pointed out, the fact that licenses were routinely granted to one Jewish body in France was clearly discriminatory against the applicant religious group.

477 Ibid [60].
478 Ibid [81].
479 Ibid [82].
480 Ahdar and Leigh locate a plethora of European and British decisions that employ what they call “this pernicious practice”. See Ahdar & Leigh Religious Freedom in the Liberal State, above n 157, 165-168. The Canadian Supreme Court has also begun to use the technique of arbitrarily declaring “no burden” in its jurisprudence. See Alberta v Hutterian Brethren of Wilson Colony [2009] 2 SCR 567 (SCC), where the Court declared that requiring the members of a self-sufficient religious colony to provide photographs on their drivers licences was not an infringement of their religious freedom (the group considered the taking of images of living things to breach biblical injunctions), because they could avoid the interference on their religious practice by employing drivers from outside the community.
481 Lyng is discussed in the text accompanying ns 198-213 in Chapter 2.
482 Hernandez is discussed in the text accompanying ns 239-240 in Chapter 2.
The Tsedek decision contrasts sharply with the US case of Lukumi (which I discuss in more depth in section 4 below when I introduce the Equal Regard methodology). In Lukumi, the US Supreme Court easily identified that a regulation targeting one religious sect in its particular method of animal slaughter but leaving other religious and secular groups unaffected was a breach of the formal neutrality rule that had recently been announced in Smith. What Tsedek and Lukumi demonstrate, when viewed side by side, is that sometimes when a court interprets a right narrowly (as the US Supreme Court does with respect to the Free Exercise Clause), it will be considerably bolder when it detects that the right is truly at stake than courts engaging with rights that have a nominally broader scope. Hence, it is apparent that, in countries where substantive neutrality analysis of religious freedom cases is applied, the discriminatory elements of some government practices can get “lost” within the intricacies of the balancing analysis. For this reason, I consider that complaints to the effect that to interpret s 15 BORA as providing only the right to a formally neutral state in religious matters would thereby constitute a failure to read the right “generously” is not a telling criticism of my preferred construal of the legal scope of s 15.

Finally, it is important to explain conceptually how it is possible to find (as I did in section 2.2.2 above) that the historical conception of religious freedom in this country comes out broadly in favour of the substantive neutrality reading of s 15, while nevertheless arguing in this thesis that the courts should only engage in meaningful scrutiny of laws that actually discriminate against religiousism.

Essentially, the Equal Regard methodology institutes a two-tiered system of human rights protection. It asks the legislature to apply the substantive neutrality conception of religious freedom in this country, while the courts are entrusted with the role of ensuring that all laws emanating from the primary supervision of the legislature – and which may impede religious practice to some extent – are non-discriminatory. It is instructive at this point to return again to the Smith decision. As Michael McConnell has explained, the US Supreme Court in that case did not pronounce on the core meaning of the Free Exercise Clause in any definitive manner relating to the text or history of the provision. In his opinion, the case (and those that later applied its holding) is best read as affirming that the Free Exercise Clause does indeed provide a substantive liberty right to religionists, but that the courts will “underenforce” because of the institutional concerns relied on by Scalia J in Smith. Meanwhile, the legislature will enforce the full measure of the right in its substantive form. This is possible to do, says McConnell,

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483 Scalia J argues with some justification (in light of the comparison between Tsedek and Lukumi) that judges applying predictable and easily applied standards in human rights cases will feel more confident in making decisions that go against mainstream preferences. See Antonin Scalia “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175, 1180: “While announcing a firm rule of decision can…inhibit courts, strangely enough it can embolden them as well.”

484 Michael McConnell “Institutions and Interpretation: A Critique of City of Boerne v. Flores” (1997) 111 Harv L Rev 153, 156 (internal citations omitted): “[T]he Smith decision was based not on what ‘free exercise’ means (either historically or normatively), but on the institutional point that ‘democratic government,’ despite its admitted inability to accord full and equal accommodation to all religious denominations, is to be ‘preferred’ to a system in which courts make highly subjective and intrusive judgments that ‘weigh the social importance of all laws against the centrality of all religious beliefs.’”

485 For this proposition, McConnell refers to the analysis of Lawrence Sager “Fair Measure: The Legal Status of Underenforced Constitutional Norms” (1978) 91 Harv L Rev 1212. Sager argues that some constitutional provisions are only partially amenable to judicial enforcement, possibly due to questions relating to judicial competence, which was in effect the finding in Smith. This does not mean that the aspect of the right that is unenforceable in the courts does not exist as a legal concept, but rather that it is to be enforced by a different branch of government.
because the Court – as a result of its ambivalent findings on the text and history of the provision in the two cases – did not foreclose a more expansive reading of the right in Smith and Boerne. Rather, the Smith Court left it to the democratic branches of government to see that the right is fully enforced.

I believe that s 15 can be conceived in precisely the same way that McConnell, in the context of the Free Exercise Clause, explains (disapprovingly, I might add) the holding of the Smith decision. Indeed, I suggest that this is the best way of explaining the two-tiered approach to enforcing s 15 BORA in this country. In this way, the New Zealand egalitarian tradition that was espoused passionately by Stout a century ago will actually live on, in that the courts will be enforcing an interpretation of the right to religious free exercise that comes close to his preferred solution to the problem of religious exemptions. It also respects the traditional reliance in this country on Parliament, which has throughout the country’s history been the main locus for resolving human rights issues, and whose primacy in human rights matters has effectively been re-affirmed by the statutory nature of BORA.

To conclude on this matter, it is worth noting that the doctrinal solution I advance here would perhaps be applauded by Matthew Palmer, who has argued that solutions to legal reform in this country need to reconcile themselves with the underlying traits of the New Zealand constitutional culture in order to ensure lasting success: 486

Parliamentary sovereignty seems to me still to be an ultimate principle of New Zealand’s constitution. Suspicion of judges’ ability to frustrate the will of a democratically elected government taps into a deep root in the New Zealand national constitutional culture. The egalitarian and apparently democratic ethic remains strong in New Zealand.

I now move on to consider a final objection to the Equal Regard reading of section, one that is based on the international origins of its terms.

3. Why the Equal Regard reading of s 15 adequately affirms New Zealand’s commitment to the ICCPR

Even if one concedes that the New Zealand historical tradition points plausibly towards the courts enforcing the formal neutrality reading of s 15, there remains an important, international law-based, objection to this conclusion. This counter argument holds that the substantive neutrality reading may be a more faithful rendering of the commitment made by New Zealand when it ratified the UN International Covenant on Civil and Political Rights in 1978. 487 Article 18 of the Covenant was the most direct semantic source for s 15, as was acknowledged in the White Paper and is immediately apparent from reading the two provisions. 488 Recourse to international materials, which is not automatic under orthodox constitutional principle in this

488 Article 18(1) ICCPR reads: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”. Compare with s 15 BORA: “Every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.” The White Paper refers to Art 18 specifically as the main textual source of s 15 BORA; see White Paper, above n 10, 81.
country, has, however, become commonplace in human rights litigation. As with all other articles in the ICCPR that have direct equivalents in BORA, an enquiry into the meaning of Art 18 is therefore a highly relevant consideration for elucidating the purpose of s 15. This interpretive source is authorised, moreover, in the second recital of the long title to BORA, which declares that one of the purposes of the statute was to “affirm New Zealand’s commitment to the [ICCPR]”, an interpretive instruction which, alongside consideration of substantive articles in the ICCPR, has often been noted and proven to be persuasive in many domestic court decisions.

A necessary first step for assessing the impact of treaty articles on domestic law is to determine what the international provisions themselves actually mean. According to the Vienna Convention on the Law of Treaties 1969, on which the New Zealand courts rely as an authoritative guide for statutory interpretation where international conventions have inspired equivalent domestic legislation, treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Because the terms of Art 18 are the primary source for s 15, there is consequently a powerful argument that, whatever the domestic historical record might say about the right to manifest religious belief in this country, the most natural reading of Art 18

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489 The general rule in New Zealand’s dualist system is that treaties are not part of the law of the land, unless they have been incorporated into statute. See Kenneth Keith “Roles of the Courts in New Zealand in Giving Effect to International Human Rights – With Some History” (1999) 29 VUWL 27 (“Keith ‘Roles of the Courts in International Human Rights’”), 34, citing, eg, New Zealand Air Pilots Association v Attorney-General [1997] 3 NZLR 269. The dualist position is typical in British Commonwealth countries where the doctrine of parliamentary sovereignty holds sway; see KJ Keith “New Zealand Treaty Practice: the Executive and the Legislature” (1964) 1 NZULR 272; and Oscar Schachter “The Obligation to Implement the Covenant in Domestic Law” in L Henkin (ed) The International Bill of Rights (Columbia University Press, New York, 1981) 311 (“Schachter ‘Obligation to Implement’”), 312. For case law confirming this basic principle, see, eg: Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326 (PC), 347-348; Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC), 210; and Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA), 224.


491 See, generally, Rishworth et al, above n 9, 61-65; Butler & Butler NZBORA Commentary, above n 9, 78-81; and Keith “Roles of the Courts in International Human Rights”, above n 489.

492 See, eg, R v Goodwin (No 2) [1993] 2 NZLR 390 (CA), 393, where the Court of Appeal cites the second recital of the long title, and discusses jurisprudence of the UN Human Rights Committee, the treaty body that is charged with monitoring implementation of the Covenant; see ICCPR, Arts 28-45. See also Baigent, above n 8, 676; Bailey v Whangarei District Court (1995) 2 HRNZ 275 (HC), 287; and R v Hanson [2007] 3 NZLR 1 (SC) (“Hansen”), [11].

493 One 1999 study counted 35 references to the ICCPR out of 200 reported cases in two specialist human rights law report series. See Butler & Butler “Judicial Use of International Human Rights Law”, above n 490, 184. Examples of references to ICCPR articles in case law include: Baigent, above n 8, 676 (referring to the right to an effective remedy for Covenant breaches, in Art 2(3)); R v Pora [2001] 2 NZLR 37 (CA), [20] (the right to be sentenced according to the law existing at the time of committing a crime, in Art 15(1)); and Hanson, above n 492, [28] (the right to the presumption of innocence, in Art 14(2)).


495 See, eg, Zaoui v Attorney-General (No 2) [2006] 1 NZLR 289 (SC) (“Zaoui”), [24], where the Vienna Convention was applied in a statutory interpretation question, after the Supreme Court described it as “stating the rules of customary international law for the interpretation of treaties”. See also Tresa Dunworth “Review: Public International Law” (2006) NZ Law Review 367, 377-378; and, generally, Burrows Statute Law, above n 27, 486-499.

496 Vienna Convention, Art 31(1). This direction closely resembles 5(1) Interpretation Act 1999: “The meaning of an enactment must be ascertained from its text and in the light of its purpose.” The resemblance is not coincidental; see Keith “Sources of Law”, above n 76, 91.
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(and thereby s 15 BORA) is that it embraces the “liberty” interpretation of the text as opposed to the non-discrimination reading advocated in this thesis. Indeed, purely as a textual matter, this is how Rishworth and the prominent international law scholar Malcolm Evans construe the Covenant guarantee. As Evans puts it:

Article 18(1) sets out an absolute right to freedom of thought, conscience and religion before articulating two particular aspects of this freedom: the freedom to have or adopt a religion or belief and the freedom to manifest a religion or belief in a number of ways. Article 18(3) then sets out the grounds on which the freedom to manifest a religion or belief may be restricted.

It is significant that this “ordinary meaning” reading of the ICCPR has been used by some to advocate constitutional reform in Australia and the US, where these countries’ respective courts have interpreted domestic religious free exercise guarantees as merely providing religious citizens the right to a formally neutral state. Australia’s Constitution is an interesting case in this regard, because it is a rare example among Western liberal democracies of the wording of a constitutional text proving determinative in litigation involving religious freedom. Section 116 of the federal Constitution, which was modelled on the US Free Exercise Clause, provides in relevant part that: “The Commonwealth shall not make any law…for prohibiting the free exercise of any religion.” In a series of 20th century decisions, the High Court of Australia has come to interpret this command only to forbid federal legislation that expressly singles out religious activities for special burdens, with all other laws enacted by the federal Parliament being regarded as legitimate, as long as they come within other heads of law-making authorised by the Constitution.

The basis for this determination was heavily influenced by textualist constitutional interpretation techniques that have long been favoured by the Court over other interpretive

497 See text in Chapter 1 accompanying ns 62-82, where I concede that the substantive protection reading of s 15 has a “head start” over Equal Regard as a textual matter, in part because of its genesis in Art 18.


499 Some US scholars have argued that congressional legislation to enforce the ICCPR against the states could be a means of circumventing the narrow formal neutrality reading of the federal Free Exercise Clause introduced by the Supreme Court in Smith. See discussion below, accompanying n 590.


501 See, eg, Adelaide Company of Jehovah’s Witnesses v Commonwealth (1943) 67 CLR 116 (HC) (“Jehovah’s Witnesses”), where regulations pursuant to the National Security Act 1939 (Cth) dissolved the Jehovah’s Witness organisation of Adelaide and seized its premises on the basis that the group’s activities were prejudicial to the war effort. In this case, the High Court declared that s 116 was ineffective in attacking most of the regulations, holding that the infringement on religious activities was “reasonably necessary”; see, eg, Jehovah’s Witnesses, 155 (per Starke J). The regulations were, however, held invalid as they were ultra vires the Constitution’s defence power (at’s 51(vi)) and restricted religious activities more than was necessary to promote the war effort. For discussion of Jehovah’s Witnesses, see Tony Blackshield “Religion and Australian Constitutional Law” in P Radan, D Meyerson & RF Croucher (eds) Law and Religion: God, the State and the Common Law (Routledge, London, 2005) 81 (“Blackshield ‘Religion’”), 87-96; and William Kaplan State and Salvation: The Jehovah’s Witnesses and Their Fight for Civil Rights (University of Toronto Press, Toronto, 1989) 111-113.
methodologies.\(^{502}\) Hence, the inclusion of the preposition “for” in the provision, which crucially is not present in the US Free Exercise Clause,\(^{503}\) has been construed by the Court to mean that general laws which have not been enacted with the purpose of (ie: “for”) prohibiting religious activities are immune from constitutional scrutiny under s 116. Thus, using words that echo the phraseology of Justice Scalia in Smith, the Court stated the law on s 116 in the following unequivocal terms in Church of the New Faith v The Commissioner for Payroll Tax (Vic):\(^{504}\)

> The freedom to act in accordance with one’s religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them…. Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity…it if offends against the ordinary laws, i.e. if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.

Statements of the law such as these created a seemingly insurmountable, and largely text-based, barrier to an equivalent of the Sherbert-era substantive neutrality regime from occurring in Australia.\(^{505}\) Indeed, the durability of this narrow construal of s 116 prompted a failed attempt by referendum to remove the word “for” from the provision in 1988.\(^{506}\) Also relevant for our purposes was the recent recommendation, in the 2009 “Brennan Report”, that an Australian federal Bill of Rights should be enacted.\(^{507}\)

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503 Blackshield speculates that the framers added “for” before each clause of the section simply for “reasons of euphony”, but also perhaps because opposition to including the provision in the Constitution at all “might well have led them to prefer a narrower version of it”. Blackshield “Religion”, above n 501, 85-86; see also Puls “Wall of Separation”, above n 500, 163.

504 (1983) 154 CLR 120, 135-136 (rejecting claim of a Scientologist group to be exempt from general state payroll tax legislation). For this proposition, the Court (just as Scalia J claimed he was bound to do in Smith) cited the 19th century US polygamy case of Reynolds as persuasive authority; see ibid. Note, however, that this was an obiter statement by the Court; this is because state legislation is not susceptible to challenge under s 116, which applies only against the federal government; see Grace Church Bible Inc v Reedman (1984) 54 ALR 571 (Supreme Court of South Australia), which held that state laws are immune from s 116 challenges.


506 See Constitutional Alteration (Rights and Freedoms) Act 1988 (Cth). The referendum question also sought to make s 116 applicable to the states and territories. (Recall that s 116 applies only to federal legislation; see n 504 above). See Puls “Wall of Separation”, above n 39, 160; and Mortensen “Unfinished Experiment”, above n 44, 177.

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constitutional guarantees based on the ICCPR in order to bring about more generous legal protection of (among other rights) religious free exercise,\(^{508}\) as in fact has already eventuated in some Australian state bills of rights.\(^{509}\) The federal government has since balked at proceeding with the constitutional amendment process,\(^{510}\) but it is clear that promoters of the reform were eager to import the international law norm contained in provisions such as Art 18 ICCPR, because of an assumption that this would thereby extend the protection of religious conduct beyond that which is currently possible under s 116.\(^{511}\)

In the New Zealand legal system, which is considerably more receptive to international norms than that of Australia, the argument based on the text of Art 18 is, as we have seen, already in play by dint of the long title to BORA.\(^{512}\) The fact that Art 18 is couched in terms that arguably invite judges to accord the substantive neutrality reading to s 15 therefore provides a strong textualist case against Equal Regard, one that has in fact been made by Rishworth.\(^{513}\) I shall nevertheless argue here that the formal neutrality formula advocated in this thesis amply implements the guarantee contained in Article 18, because the division of labour envisaged by Equal Regard between Parliament and the courts with respect to s 15 is in my view sufficient to discharge this country’s international obligations. This will become more evident in sections 4 and 5 below, where I explain how the non-discrimination reading could provide excellent protection for minority religionists in this country to a level that ought comfortably to survive international scrutiny. For the moment, however, it is worthwhile to consider more closely the issues arising from the Covenant.

One argument that runs against the substantive neutrality construal of Art 18 could be that the framers of the Covenant,\(^{514}\) who compiled the document over a two-decade period from the

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508 The Brennan Report noted that no claim has ever succeeded under s 116; Brennan Report, above n 507, 111.

509 See Human Rights Act 2004 (ACT), s 14, and Charter of Human Rights and Responsibilities Act 2006 (Vic), s 14; and see discussion in Mortensen “Unfinished Experiment”, above n 505, 179-185, where the author tracks the origins of these provisions primarily to Art 18 ICCPR. Note that there has been no case law on these state-based religious freedom protections.

510 See Sarah Joseph “Stance on human rights has everything – except a charter” The Age (Melbourne Australia, 22 April 2010).

511 See Evans “Religion as Politics”, above n 505, 298-299; and Mortensen “Unfinished Experiment”, above n 505, 201, where he argues that the “adoption of international law” could expand what he regards as the unduly limited ambit of s 116.

512 New Zealand resembles the UK and South Africa in this respect, where courts have been directed by legislative bodies to refer to international law; see Human Rights Act 1998 (UK), s 2, which requires courts to take the European Convention on Human Rights into account; and see Constitution of the Republic of South Africa Act 1996, s 39, which requires the courts to consider international law, and also permits consideration of foreign domestic law. By comparison, the US and Australian courts generally eschew international and other foreign domestic law, in part because of these nations’ federal structures and because of the existence of longstanding domestic constitutional documents that have never been regarded as authorising judicial recourse to international law. See text above, n 12, concerning the non-receptivity of foreign and international law in US courts; and see Goldsworthy “Devotion to Legalism”, above n 502, 135, where the writer explains that current majority thinking on the Australian High Court is that international legal sources should not be used as a guide to informing the meaning of the Constitution. See, eg, Al-Kateb v Godwin (2004) 219 CLR 562 (HC), [73], cited in ibid, n 198: “It is…difficult to accept that the Constitution’s meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a ‘loose-leaf’ copy of the Constitution.”

513 Rishworth et al, above n 9, 297: “The ICCPR…explicitly contemplates a proportionality review of the nature of any governmental interest advanced to justify restrictions.”

514 Article 32 Vienna Convention permits examination of the preparatory works of the Covenant, in order to ascertain the intentions of those who drafted it in cases of ambiguity or obscurity in the text. See, eg, Zaoui, above n 495, [24]; and Quilter v Attorney-General [1998] 1 NZLR 523 (CA) (“Quilter”), 561.
end of World War II until the UN General Assembly finally adopted the treaty in 1966,\(^{515}\) intended simply to erect protection against overt religious persecution. In this vein, James Little has asserted that the “great evil” which was meant to be expunged by Art 18 was that of deliberate oppression of religious minorities by the state,\(^{516}\) such as had occurred in early modern England,\(^{517}\) and, within the immediate memory of the founders of the UN system, in persecutory policies that were pursued in Europe and Asia during the war. It was, so the argument goes, history of this sort that was the sole preoccupation of the drafters of the ICCPR, and so the final codified guarantee ought to be read in this way.

The exclusively anti-persecution reading of the international provision is arguably reflected in the precursor documents and events that drove the creation of the Covenant. Thus, it is plausible, for example, to assume that when the prototypical Declaration by the United Nations of 1 January 1942 declared in its preamble that “complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice,”\(^{518}\) the authors of this document were referring to the state-sanctioned destruction of houses of worship and mass incarceration and extermination of religious communities, such as was then occurring in Nazi Germany\(^{519}\) and elsewhere.\(^{520}\) Similarly,

\(^{515}\) See Charter of the United Nations 1945, 59 Stat 1031, TS 993 (entered into force 24 October 1945) (“UN Charter”), Art 55, which required the UN to “promote…universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. This injunction authorised the creation of the so-called “International Bill of Rights” in the aftermath of the war, a task that was undertaken by drafting committees reporting to the UN’s Economic and Social Council, in conjunction with the General Assembly, under the auspices of its Third Committee (see UN Charter, Art 60). These deliberations resulted in the broadly similar religious freedom protections contained in Art 18 in both the Universal Declaration of Human Rights 1948, GA Res 217A (III), UN Doc A/810 (“UDHR”) and the ICCPR 1966. For good histories of the evolution of UN activities in the field of religious freedom, see, eg: Malcolm Evans Religious Liberty and International Law in Europe (Cambridge University Press, Cambridge, 1997) (“Evans Religious Liberty”) chs 7-9; Roger Clark “The United Nations and Religious Freedom” (1978) 11 NYU J Int’l L & Pol 197 (“Clark ‘UN and Religious Freedom’”); and Brice Dickson “The United Nations and Freedom of Religion” (1995) 44 ICLQ 327 (“Dickson ‘UN and Freedom of Religion’”).

\(^{516}\) See Little “Religious Exemptions and BORA”, above n 87, 126-127. For a similar argument in the context of the Free Exercise Clause, see William Marshall “Correspondence on Free Exercise Revisionism; In Defense of Smith and Free Exercise Revisionism” (1991) 58 U Chi L Rev 308, 325

\(^{517}\) See, eg, Conventicle Act 1664, 16 Car 2 (Eng), c 4 (making it unlawful to attend a non-Anglican gathering where more than 5 persons are present); and for historical accounts of religious pogroms in English history, see, eg, Geoffrey Elton Reform and Reformation: England, 1509-1558 (Harvard University Press, Massachusetts, 1977) 382-389, describing the execution of some 300 Protestants in the reign of the Catholic Queen Mary (1553-1554) for crimes of heresy and treason; and for persecution of Catholics under Elizabeth I (1558-1603), see John Black The Reign of Elizabeth 1558-1603 (2nd ed, Clarendon Press, Oxford, 1959) 374-387.

\(^{518}\) US Exec Agreement Ser 236, 1 January 1942. This document was initially concluded by 26 nations, including New Zealand. The Declaration re-affirmed the commitment to the 1941 Atlantic Charter, issued jointly by US President Franklin Roosevelt and UK Prime Minister Winston Churchill, in which, inter alia, they declared the right of all peoples to “choose the form of government under which they will live” and to “live out their lives in freedom from want and fear”. The Declaration and Atlantic Charter are reproduced in Ruth Russell A History of the United Nations Charter: the Role of the United States 1940-1945 (Brookings Institutions Press, Washington DC, 1958) Appendices B & C. See discussion in Evans Religious Liberty, above n 515, 173-174; and Paul Lauren The Evolution of International Human Rights (University of Pennsylvania Press, Philadelphia, 1998) (“Lauren Evolution of Human Rights”) 140-145.

\(^{519}\) For example, on 10 November 1938 in the notorious “Kristallnacht” pogrom in Germany, thousands of Jewish synagogues were destroyed by mobs and paramilitary groups, while some 30,000 Jews were rounded up and sent to state-run concentration camps. Martin Gilbert Kristallnacht: Prelude to Destruction (HarperCollins, New York, 2006). The mass extermination of around 12 million people in Europe in the Nazi era included an estimated 6 million Jews and was also directed at other religious minorities, such as the Jehovah’s Witnesses. See Lauren Evolution of Human Rights, above n 518, 146; and Detlef Garbe Between Resistance and Martyrdom: Jehovah’s Witnesses in the Third Reich (University of Wisconsin Press, Madison, 1993).
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while one of the purposes of the United Nations Charter outlined in its preamble was to “reaffirm faith in fundamental rights”, this declaration ought arguably to be read in conjunction with another preambular aim, one that clearly tied the new-found respect for individual human rights to the need to secure a lasting world peace, that is: “[T]o save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”

In summary, there can be little doubt that the excesses of the wartime Axis powers against ethnic and religious minorities who fell under their control were foremost in the minds of the drafting committees that worked on the text of the ICCPR from the late 1940s, and that religiously neutral laws of general applicability that incidentally burdened religious conduct (e.g., zoning regulations that restrict construction of large communal buildings, including churches, in urban residential areas) were at best peripheral to their concerns. As a result, there is a colourable argument that, when viewed in an originalist purposive spirit, Art 18 – and, a fortiori, s 15 BORA – should only be read to guarantee a right to freedom from deliberate discrimination of minority religious groups.

The main, and in my view ultimately fatal, difficulty with this contention is that it has never received any endorsement in any of the international legal materials traditionally regarded as relevant for shedding light on the meaning of the Covenant. In Marc Bossuyt’s account of the travaux préparatoires of Art 18, for example, there are no indications that the protection was intended by the various UN drafting bodies to be directed solely against direct discrimination by the state against religionists.

The resulting implication from the silence on this issue to the effect that Art 18 ought therefore to be regarded as codifying an internationally binding right to substantive protection of religious conduct is in fact countenanced in numerous other sources. In 1956, for example, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur, Arcot Krishnaswami, to compile a series of drafting principles to assist the ongoing UN codification of Art 18 ICCPR and to suggest a programme for action “with a view to eradicating…discrimination in the matter of religious conduct”.

520 See, eg, Sheldon Garon “State and Religion in Imperial Japan, 1912-1945” (1986) 12 Journal of Japanese Studies 273, in which the author recounts the banning of the Jehovah’s Witness religion in Japan in 1940, as well as official persecution of new home-grown religious movements, such as befell the Omotokyo Shinto sect on 8 December, 1935, when authorities arrested 987 members of this group and demolished several of its shrines and other buildings. See ibid 274 & 290.

521 UN Charter, preamble; see also, to similar effect, preamble to UDHR. Note that Art 31(2) Vienna Convention permits recourse to treaty preambles as an aid for interpreting substantive articles.

522 The “original meaning” of the ICCPR has played a part in informing interpretation of other BORA rights. For example, in a claim by lesbian couples that the failure of the Marriage Act 1955 to recognise same-sex marriage breached their right to equality under s 19 BORA and Art 26 ICCPR, the Court of Appeal found that no such breach occurred. See Quilter, above n 514 (aff’d in Joslin et al v New Zealand Comm No 902/1999, UN Doc A/57/40 (17 July 2002) (HRC)). This was because, in part, Art 23 ICCPR recognised only the right of “men and women” to marry, rather than the right of every human being to do so. Therefore, it was unarguable, reading the ICCPR as a whole, to claim that failure to recognise marriage between couples of the same sex was discriminatory under Art 26. Implicit in this judgment was a view that the framers of the ICCPR from the 1940s-1960s (and by extension, the New Zealand Parliament in 1990 when it enacted BORA) did not conceive of the restriction of marriage to opposite-sex couples as discriminatory towards homosexual couples. See discussion in Rishworth et al, above n 9, 47; and Sarah Joseph, Jenny Schultz, and Melissa Castan The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (2nd ed, Oxford University Press, Oxford, 2004) (“Joseph et al The ICCPR”) [20.29].

religious rights and practices”. The resulting *Study of Discrimination in the Matter of Religious Rights and Practices* ("Krishnaswami Report"), which was presented to the UN Commission on Human Rights in 1960, is now widely recognised as being uniquely influential in the drafting and interpretation of subsequent UN instruments pertaining to religious freedom.

The report is instructive for my purposes because it more or less explicitly endorses the substantive neutrality reading of Art 18. Using the then-existing draft text of the religious freedom guarantee in the Covenant and the already adopted protection in Art 18 of the 1948 Universal Declaration of Human Rights as a structural guide for his report, Krishnaswami’s analysis included consideration of the status of religious freedom protection in domestic law throughout the world, based on information gleaned from 86 country monographs that had been submitted to him in aid of his work. The report therefore can be viewed as a considered elaboration of the spare text of the then extant 1948 Declaration, and provides an excellent synthesis of global attitudes to the scope of the right existing in the decades immediately prior to the conclusion of the Covenant.

Despite the reference to “discrimination” in the report’s title and in his terms of reference, Krishnaswami clearly regarded the right to manifestation of religious belief as extending beyond mere protection from direct persecution on the grounds of religion. In his chapter on the right to practise religious beliefs, the Special Rapporteur noted that the “demands of various religions are different”, and went on to explain that, even in countries espousing a policy of “strict neutrality” vis-à-vis religion, a “law prohibiting certain acts, or enjoining the

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525 For example, Krishnaswami’s opinion that the expression “religion or belief” in Art 18 included “in addition to theistic creeds, such other beliefs as agnosticism, free thought, atheism and rationalism” (see ibid 1, n 1) was quoted in the heated drafting debates on the issue (see discussion in Evans *Religious Liberty*, above n 515, 203-204). This view is now regarded as the orthodox interpretation of the provision’s prima facie scope; see Human Rights Committee *General Comment 22, Article 18 UN Doc HRI/GEN/1/Rev 1 at 35* (1994) [2].

526 The basic text of Art 18 ICCPR remained fairly stable in the two decades after the first draft was submitted by the UK in 1947, and the final form approved by the UN General Assembly in 1966 differed little (and certainly in no way touching upon the central question in this thesis) in the intervening years. The British draft Art 13 (as it then was) read in relevant part: “Every person shall be free to practice, either alone or in community with other persons of like mind, any form of religious worship and observance, subject only to such restrictions, penalties or liabilities as are strictly necessary to prevent the commission of acts which offend laws passed in the interests of humanity and morals, to preserve public order and to ensure the rights and freedoms of other persons.” See Commission on Human Rights, Drafting Committee on the International Bill of Rights *Report of the Drafting Committee to the Commission on Human Rights* UN Doc E/CN4/21 (1 July 1947), Annex G. The main area of debate during drafting surrounded the issue of whether Art 18 included the right to change religions, a possibility that attracted the ire of representatives of Islamic countries, some of which to this day continue to impose the death penalty on Muslims attempting to abandon their faith. Article 18 UDHR expressly guarantees the right to change religions, but Art 18 ICCPR conspicuously fails to do so, due to the pressure exerted on this matter during drafting. For discussion of apostasy laws in Islamic countries, see Abdullahi An-Na’im “Islamic Foundations of Religious Human Rights” in JD Witte Jnr & J van der Vyver (eds) *Religious Human Rights in Global Perspective: Religious Perspectives* (Martinus Nijhoff, The Hague, 1996) 337, 352-353; and Donna Arzt “The Application of International Human Rights Law in Islamic States” (1990) 12 Hum Rts Q 202, 209. For accounts of the debates on this issue during the drafting of Art 18, see Bossuyt *ICCPR Travaux*, above n 523, 357-363; Evans *Religious Liberty*, above n 515, 201; and Clark “UN and Religious Freedom”, above n 515, 200-204.

527 For a similar observation, see Evans “Work of the HRC”, above n 498, 36.

528 See ibid 62, where he describes the rules he lays out in his conclusion as “intended to show how the goals proclaimed in the [UDHR] may be accomplished”. See also Evans “Work of the HRC”, above n 498, 36.
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performance of others, may prevent one religious group from performing an essential rite or from following a basic observance”, even though it might “be of no importance at all to another group”. As an example of the need to observe this basic articulation of the principle of substantive neutrality on the part of the state towards religious conduct, the report cited the potentially “discriminatory” effect of general laws governing the humane slaughter of animals in the context of the Jewish practice of sechita (which involves the cutting of animals without prior stunning) as raising concerns with regard to the right to manifest religious belief:

Such laws may not expressly prohibit Shehitah, being phrased in general terms, but their intent as well as their effect may be to prevent the observance of this rite; and this is felt to be discriminatory by the group affected…. The general rule should be that no one should be prevented from observing the dietary practices prescribed by his religion or belief.

Although Krishnaswami deliberately did not refer to any countries by name in his report, this example surely was in reference to the ostensibly religion-neutral and generally applicable law passed by the Nazi regime that effectively banned Jewish kosher slaughter in pre-war Germany. The citation of this example undermines somewhat the argument that the framers of the Covenant were simply concerned to prevent legislative and executive acts that in their very terms discriminated against religionists, and that a more subtle type of protection was contemplated from the very outset of the UN system – one that, moreover, accords closely with the substantive neutrality reading of Art 18.

Two recent events in the international law recognition of the right to manifest religious belief provide further support for this more expansive interpretation of Art 18. In a parallel development to the drafting of the Covenant, the UN General Assembly requested the Economic and Social Council in 1962 to commence work on a draft declaration and draft convention on the elimination of “religious intolerance”. Although a legally binding convention continues to elude international agreement, in 1981 the UN General Assembly was finally able to adopt (without a vote) the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. While the 1981 Declaration

530 Krishnaswami Report, above n 524, 48.
531 Ibid 36.
532 See ibid vi, where he explains that he decided, essentially for reasons of diplomacy, to generalise from the country reports, rather than to single out any countries for adverse comment.
533 This measure was passed in 1933 within three months of Hitler coming to power and is regarded by some as the very first legal measure devised by the Nazi regime to persecute Jews. It did not mention sechita specifically, but merely required that “all warm-blooded animals have to be stunned before being bled and slaughtered”. The ban was lifted soon after the war by the Allied Control Council in 1946. See Dorothee Brantz “Stunning Bodies: Animal Slaughter, Judaism, and the Meaning of Humanity in Imperial Germany” (2002) 35 Central European History 167, 192; and David Smith “‘Cruelty of the Worst Kind’: Religious Slaughter, Xenophobia, and the German Greens” (2007) 40 Central European History 89, 92-93.
is technically a non-binding instrument, general opinion holds that it is the most authoritative and detailed cataloguing to date of the right to religious freedom, as the concept is understood at international law.\footnote{Dickson considers the 1981 Declaration, in part because of the reliance on it by the Human Rights Committee in its recent work, as “largely, if not entirely, declarative of existing law”. Dickson “UN and Freedom of Religion”, above n 515, 345; for similar statements on the high import of this instrument, see Lerner “Religious Human Rights”, above n 534, 114; and Rishworth et al, above n 9, 282. Significantly, the 1981 Declaration has been cited in New Zealand jurisprudence as an aid to statutory interpretation; see \textit{Huakina Development Trust v Waikato Valley Authority} [1987] 2 NZLR 188 (HC), 197 & 218.}

The final form of the 1981 Declaration, when contrasted with earlier draft versions, provides compelling evidence that the authors explicitly rejected affirming a mere right to a formally neutral state in matters of religious freedom. In a 1974 draft, which as late as 1978 was a candidate for the final text of the declaration, the proposed Art 6 provided the following protection for external religious conduct:\footnote{The initial impetus for creating the Declaration was to respond to global outbreaks of religious intolerance and anti-Semitism, especially in Europe, in the 1950s and 1960s, which explains the heavy use of the language of non-discrimination in the early drafts of the document. See Lerner “Religious Human Rights”, above n 534, 103, 114. The focus on discrimination is further explained by the fact that work on the Declaration began at the same time as the Convention on the Elimination of All Forms of Racial Discrimination, which was concluded in 1965. See Evans \textit{Religious Liberty}, above n 515, 230; and Lerner “Religious Human Rights”, above n 534, 104.}

Every person and every group or community has the right to manifest their religion or belief in public or in private, \textit{without being subjected to any discrimination on the ground of religion or belief}; this right includes in particular:

1. Freedom to worship, to assemble and to establish and maintain places of worship or assembly;
2. Freedom to teach, to disseminate, and to learn their religion or belief and also its sacred languages or traditions;
3. Freedom to practise their religion or belief by establishing and maintaining charitable and educational institutions and by expressing the implications of religion or belief in public life;
4. Freedom to observe the rites or customs of their religion or belief.

The highlighted reference to discrimination in this preparatory text indicates that the drafters might not have been concerned so much with substantive protection for religious activities in the face of general laws, but rather with equal treatment for religious minorities subjected to outright majoritarian suppression.\footnote{The main (and controversial) alteration from the text in Art 18 ICCPR was a potential diminution in the right to change one’s religion in the final version of Art 1 1981 Declaration. At the insistence of certain Muslim nations} This impression is enhanced by the complete omission from the draft text of a limitation clause requiring a proportionality analysis of all burdens on religious conduct along the lines of Art 18(3) ICCPR, which is a standard ancillary provision for modern substantive protection regimes. The implication of this was that, at this juncture during the gestation of the declaration, its authors were chiefly concerned with prohibiting direct discrimination.

The final version of the 1981 Declaration, however, removed this potentially limiting wording and now contains a simple affirmation of the liberty right to manifest belief in Art 1, which substantially\footnote{The protection is supplemented,} replicates the guarantee in Art 18 ICCPR. This protection is supplemented,
moreover, with a non-exhaustive list of religious activities, which were drawn in part from the Krishnaswami Report,\textsuperscript{541} and which were by 1981 regarded by common consensus as falling uncontroversially within the penumbra of the right.\textsuperscript{542} Removing any doubt that the 1981 Declaration may only be directed at direct discrimination, the main operative articles provided a dual protection, which, taken as a whole, indicated an unambiguous desire to encompass substantive protection for religious conduct. Thus, Art 1 protects the basic right to manifest religious belief in absolute terms, and, presumably in order to make it clear that the protected area of conduct includes, but is not limited to, freedom from discrimination, Art 2 provides that:

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other beliefs.
2. For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

The combined effect of the finalised Arts 1 and 2, when compared with more ambiguous provisions in earlier drafts,\textsuperscript{543} in my view leaves very little doubt that the 1981 Declaration departed from the UN’s initial motivation in the 1960s, which had been to craft protection against direct instances of intolerance by state and private actors.\textsuperscript{544} This is made especially clear in Art 2(2), which refers to laws having the “purpose or effect” of impairing the right to freedom of religion, a choice of language that reflects an unmistakable intent on the part of the UN General Assembly to ban not only laws and activities intentionally burdening religious believers, but also those laws, like the general laws passed by the Nazi regime in 1933 concerning sechitta, which indirectly have this consequence.\textsuperscript{545}

where Islamic law bans apostasy, the phrase “freedom to have or to adopt a religion” in Art 18 was changed to “freedom to have a religion”, in order to ensure the Declaration was not opposed in the General Assembly. See discussion in, eg, Evans \textit{Religious Liberty}, above n 515, 236-238. This controversy, however, is highly unlikely to have any direct significance to the point under examination in this thesis, which concerns the right to external manifestations of religious belief under New Zealand law, where the principle of freedom of internal belief is sacrosanct. See, eg, \textit{Watch Tower Bible and Tract Society v Mount Roskill Borough} [1959] NZLR 1236, 1241: “Every person is free to choose the content of his own religion.”

\textsuperscript{540} The limitations clause in Art 18(3) ICCPR is also reproduced in Art 1(3) 1981 Declaration.
\textsuperscript{541} See Lerner “Religious Human Rights”, above n 534, 100-103 & 119, where he describes the direct influence of the Krishnaswami Report during the drafting of the 1981 Declaration.
\textsuperscript{542} Art 6 1981 Declaration states that the right to freedom of religion includes, “inter alia”, nine specific “freedoms”, such as the ability to maintain places of worship, to acquire and use articles necessary for conducting religious rites, and to celebrate religious holidays. For a thorough account of the provisions of the 1981 Declaration, see Lerner “Religious Human Rights”, above n 534, 116-123; and, generally, Sullivan “1981 Declaration”, above n 534.
\textsuperscript{543} The change in title from the single reference to “religious intolerance” in the 1960s period of drafting to the more capacious category of “intolerance and discrimination” in the final form is also indicative of a change of emphasis from a narrow focus on intentional discrimination to the more substantive or indirect variety described in Art 2(2) 1981 Declaration. See Evans \textit{Religious Liberty}, above n 515, 229-230, & n 17.
\textsuperscript{544} As explained in above, the initial intent of the Declaration and proposed convention was to combat outbreaks of anti-Semitism in the 1950s and 1960s. The Bulgarian delegate in the Third Committee debates in fact complained about this change of emphasis late in the gestation of the Declaration: “[I]nstead of dealing with the question of eliminating intolerance and discrimination based on religion or belief, it concentrated in fact on freedom of religion”; see UN Doc A/C3/36/SR35 (1981); quoted in Evans \textit{Religious Liberty}, above n 515, n 18.
The impetus towards providing a standard of substantive protection to religious manifestation is further reflected in General Comment 22, which was issued by the Human Rights Committee in 1994, and lays out the treaty body’s definitive views on the ambit of Art 18.546 In the paragraph dealing with the prima facie right to religious manifestation, the Committee describes the protection for religious conduct as a liberty right that “encompasses a broad range of acts”, and then lists a non-exhaustive catalogue of conduct that would typically fall within the prima facie ambit of the right.547 Crucially, in para 8, the Committee goes on to state that limitations on the right may not be imposed for “discriminatory purposes”,548 which is a simple statement of the need for formal neutrality. It is clear, however, that formally neutral laws will not in themselves meet the standard provided in Art 18 if they do not satisfy the requirement of proportionality, which is also stipulated in para 8, where the Committee explains that: “[L]imitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.” To summarise, the language of General Comment 22 appears unambiguously to require, as a base standard, that laws be religiously neutral and generally applicable, but also contemplates a proportionality enquiry even in cases where laws impairing religious conduct are non-discriminatory on their face.549

Consideration of the jurisprudence of the HRC issued under the Optional Protocol to the ICCPR550 provides further support for the argument that Art 18 creates more than a mere protection for religionists against intentional discrimination, although, as I shall now explain, this case law is not entirely unequivocal on the subject. One decision directly on point is K Singh Bhinder v Canada.551 In Bhinder, an electrician complained that a federal legal requirement that all workers wear hard hats in certain high-risk environments infringed his right to manifest his religious beliefs, because as a practising Sikh he was required to wear a turban at all relevant times. If the HRC had adjudged itself bound to hold states parties to a mere standard of formal neutrality, the case would have been easily disposable on the grounds

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546 Human Rights Committee General Comment 22, Article 18 UN Doc HRI/GEN/1/Rev 1 at 35 (1994) (“General Comment 22”). Malcolm Evans describes the general comments issued by the HRC as “without doubt” providing “the most important source of interpretation of Covenant articles”. Evans “Work of the HRC”, above n 498, 38-39. General Comment 22 is especially important, in Evan’s view, because of the “comparative dearth of other forms of interpretive material from the Committee relating to Article 18 arising from the reporting process and from individual communications”. Ibid 39.  
547 General Comment 22, above n 546, [4]: “The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.”  
548 Ibid [8].  
549 See also Report of the Special Rapporteur on freedom of religion and belief, Asma Jahangir Civil and Political Rights, Including the Question of Religious Intolerance (Economic and Social Council, 9 January 2006), UN Doc E/CN4/2006/5, [55]. In this report, and in line with General Comment 22, the Special Rapporteur notes that when laws or administrative practices are “worded in a neutral and all-embracing way” this may indicate the law or practice is in fact sufficiently neutral, but will not necessarily be disposable in the matter, and in some cases the law will nevertheless be ruled discriminatory or disproportionate under international law. By contrast, under the rule in Smith, laws that are generally applicable will, ipso facto, be deemed valid in the US under the federal Constitution.  
550 The HRC is empowered to receive individual complaints from the citizens of States parties that have subscribed to the Optional Protocol to the ICCPR (“OP”). Article 2 of the OP provides that: “[T]hose who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.” New Zealand acceded to the OP complaints process on 26 May 1989.  
that the regulation was a neutral law of general applicability and therefore could not amount even to a prima facie infringement of Art 18. Indeed, the Canadian government stated its case against the complainant in these very terms, with its principal argument being that a “neutral legal requirement, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, cannot violate the right defined in article 18”. 552

The response of the HRC to this argument was Delphic. Although the Committee found against the complainant, it did not, as such, endorse the Canadian government’s contention. It did, however, note somewhat ambiguously that the regulation was “on the face of it…neutral in that it applies to all persons without distinction”; but then the Committee proceeded to be extremely coy about whether any prima facie interference with the right had nevertheless occurred. In a very short passage dealing with the merits of the case, the HRC stated:553

If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3,… [A]pplying criteria now well established in the jurisprudence of the Committee, the legislation requiring workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

The resolution of Bhinder in favour of the Canadian government was unsatisfactory on a number of levels. As can be seen in the paragraph quoted above, the Committee effectively ducked the question as to whether a prima facie interference with the right in question had occurred at all; instead, the HRC appeared to regard this matter as irrelevant in any event to the final result. As Malcolm Evans has pointed out in a perceptive article on Art 18, a general characteristic of the HRC’s jurisprudence in the area is that important issues as to prima facie breach and justified limitations with regard to religious manifestation claims tend to be “rolled up” by the Committee “into a general, unreasoned, assessment”, 554 leaving observers – who may seek to distil a ratio from the case for guidance in future controversies – uncertain about

552 Ibid [4.1], citing LTK v Finland Comm No 185/1984, UN Doc CCPR/C/OP/2 (9 July 1985), in which the HRC had refused a claim for conscientious objection to military service, stating that the author of the complaint was not “prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service”; ibid [5.2]. Although the HRC in Bhinder subsequently did not address the import of this case, it was probably distinguishable on the grounds that the Covenant has been read to require simply that governments administer any laws on the matter in a non-discriminatory manner. See Evans Religious Liberty, above n 515, 217; and General Comment 22, above n 546, [11].

553 Bhinder, above n 551, [6.2].

554 Evans “Work of the HRC”, above n 498, 51. Many authors have criticised the quality of the HRC’s jurisprudence. See, eg, Paul Rishworth “The Rule of International Law?” in G Huscroft & P Rishworth (eds) Litigating Rights: Perspectives from Domestic and International Law (Hart Publishing, Oxford, 2002) 267 (“Rishworth ‘International Law’”), 276; and Butler & Butler NZBORA Commentary, above n 9, [4.5.3], which certainly applies in regard to the Bhinder case: “[T]he HRC’s…reasoning tends to be curt, giving individual decisions little explanatory power beyond the individual circumstances dealt with in the particular communication.” It is also worth noting that the HRC’s jurisprudence does not appear to be considered binding on the New Zealand courts; see, eg, R v Goodwin (No 2) [1993] 2 NZLR 390 (CA), 393: “Whether a decision of the Human Rights Committee is absolutely binding in interpreting [BORA] may be debatable, but at least it must be of considerable persuasive authority”; see also discussion in JS Davidson “Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee” (2001) NZ Law Review 125 (“Davidson ‘Intention and Effect’”). The HRC itself has come to the view in recent years that states parties are obliged to “give legal effect” to its decisions; see Bradshaw v Barbados Comm No 489/1992, UN Doc CCPR/C/51/D/489/1992 (1994), [6.3]; cited in Davidson “Intention and Effect”, above n 554, 132.
what standards have in fact been applied.\(^{555}\) While cases such as Bhinder are (perhaps intentionally) opaque on the matter,\(^{556}\) it is clear enough that the fact that the regulation was generally applicable and evinced no anti-religious animus carried great weight with the HRC. However, it would in my view probably be reading too much into Bhinder to say that this factor was determinative. Indeed, the reference to the limitations provision in Art 18(3) is perhaps best read as an implicit recognition that a prima facie breach of the right to manifest religious belief had in fact occurred, despite the general applicability of the regulation, as one would expect under a judicial application of the substantive neutrality reading of Art 18.

Therefore, because of this mentioning of the justificatory limb in Art 18(3), and because of the fact that the HRC did not at the outset dismiss the claim solely on the grounds that general laws inhibiting religious practices ipso facto cannot constitute a violation, I submit that the better view of Bhinder is that it supports the position that Art 18 ought to be interpreted as guaranteeing a broad liberty right to religious free exercise, and not merely a right to equal treatment.\(^ {557}\) Certainly, to read Bhinder in this way would bring the case more squarely in line with the ordinary meaning of the text of Art 18, as well as with the position held by the HRC in its general comment on the matter, and would also fit the system of substantive protection that is plainly envisaged in the 1981 Declaration.

It may be an irresistible conclusion, then, that, whatever the framers of the UN Charter thought were the core concerns of the international community regarding religious freedom, the conception of the right has long since expanded beyond protection for individuals from the type of egregious human rights violations that had occurred during World War II (although, of course, it still does perform this function). To interpret Art 18 as providing substantive protection for religious conduct would be consonant with a more general trend, observable as the war receded in memory, in which international law has moved away from regarding the

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\(^{555}\) See also Coeriel et al v Netherlands Comm No 453/1991, UN Doc CCPR/C/52/D/453/1991 (9 December 1994) ("Coeriel"). In Coeriel, the Committee declared inadmissible an Art 18 complaint by trainee Hindu priests who were refused permission by state authorities to change their surnames, as required for their religious training. The HRC did not address whether their religious beliefs had been interfered with and simply regarded the changing of surnames as a "matter of public order", and that "restrictions were therefore permissible under [Art 18(3)]". Ibid [6.1]; and see discussion in Evans "Work of the HRC", above n 498, 51; and Joseph et al The ICCPR, above n 522, [17.18]. There has in fact been one communication under Art 18 against New Zealand, although, like Bhinder and Coeriel, it offers no definitive enlightenment of the issue examined in this thesis. In this case, the complainant argued that the removal of her six children from her custody by the state under statutory authority (due to her alleged inability to look after them adequately) breached her Art 18 rights. She contended that the removal occurred because she was a "new-born Christian". At the urging of the State party, the HRC held this claim to be inadmissible on the grounds that the author had failed to substantiate her claim sufficiently. See Buckle v New Zealand Comm No 858/1999 UN Doc CCPR/C/70/D/858/1999 (16 November 2000) [3.2], [5.1] & [7.3].

556 As far as I can tell, only two complaints under Art 18 have ever been successful. The cases of Boodoo v Trinidad and Tobago Comm No 721/1996, UN Doc CCPR/C/74/D/721/1996 (2002) and Hudoybergenova v Uzbekistan Comm No 931/2000, UN Doc CCPR/C/82/D/931/2000 (2004), however, were inconclusive on the matter under examination in this thesis, in part because of the success of both complaints was attributable to the failure of the state parties in question to offer any justification for the alleged infringements of the religious activities under consideration. See Boodoo [6.6] and Hudoybergenova [6.2]. In both cases, moreover, the complaints involved allegations of direct coercion on the part of the governments under investigation.

557 I should add that the Committee also addressed issues arising under Art 26 ICCPR, which guarantees protection from discrimination on the grounds of religion. The HRC has interpreted Art 26 as including indirect discrimination. See Human Rights Committee General Comment 18, Non-discrimination UN Doc HRI/GEN/1/Rev 1 at 26 (1994) [7], where the Committee claims that, for the purposes of the Covenant, "discrimination" includes "any distinction...based on any ground such as...religion...and which has the purpose or effect of nullifying or impairing the...exercise of all rights and freedoms". Note that, despite strong abstract statements like these, the HRC rejected the Art 26 complaint in Bhinder for exactly the same reasons as it did the Art 18 complaint, and was similarly unforthcoming on the issue of whether any discrimination had in fact taken place. See Bhinder, above n 551, [6.1]-[6.2].
protection of human rights as being a matter exclusively within the purview of states as an incidence of their sovereignty. The Equal Regard reading of s 15, with its institutional choice of leaving substantive protection of religious free exercise to domestic democratic organs, thus arguably falls on the wrong side of history with regard to the movement in the second half of the 20th century to create a more substantive international supervision of individual human rights. Consequently, a compelling case exists, based on a holistic assessment of the available international legal sources underpinning Art 18 ICCPR, that the meaning of s 15 BORA ought to encompass the substantive neutrality reading of the provision.

The next question to address, therefore, is whether this conclusion means that for the courts to interpret s 15 BORA as only providing a legally enforceable right to protection from intentional, or direct, religious discrimination would be inconsistent with New Zealand’s international obligations. As already indicated, I do not think this inference necessarily follows.

The key to understanding the Equal Regard scheme’s compatibility with Art 18 is to be found in the nature of the obligation to implement the Covenant. According to the division of labour I have allocated in this thesis, it is the courts that will apply the standard of formal neutrality to legislation (or administrative action) that impairs the right to manifest religious belief, and it will be the courts that then provide remedies if they detect a breach of that base standard. Where the courts do not detect a failure of Equal Regard, because the legislation under attack is religiously neutral and generally applicable to all relevant persons, then Parliament will step in, if it chooses to do so, and create an exemption to the challenged law in a manner that reads the right as providing for a measure of substantive neutrality. If, however, Parliament chooses not to create an exemption, it will then be open to the losing petitioner to author a communication to the HRC, where this person will have a final opportunity to have his rights vindicated in an international forum where, presumably, the question of whether the Art 18 right has been violated will be assessed according to the standard of substantive neutrality.

What does the ICCPR have to say about this essentially two-tiered approach to implementing Art 18? There is a highly respectable view, which I share, that the Covenant merely creates – as described in an extra-judicial speech by the Chief Justice of the Supreme Court – an “obligation of result and not an obligation of method or content”, and that effective protection of human rights under the treaty can be achieved if compliance is in fact worked out in a “co-

558 Lauren described well this new change of emphasis in the wake of the passage of the UDHR in 1948: “Its vision proclaimed that all persons everywhere possessed certain basic and identifiable rights, that universal standards existed for the world as a whole, and that human rights were matters of legitimate international concern and were no longer within the exclusive domestic jurisdiction of nation states as in the past.” Lauren Evolution of Human Rights, above n 518, 239-240; see also, eg, AW Brian Simpson Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford University Press, Oxford, 2001) 92-93, and Patrick Thornberry International Law and the Rights of Minorities (Clarendon Press, Oxford, 1992) ch 2.

559 Indeed, the first recital to BORA’s long title, which describes one of the purposes of BORA as being to “affirm, protect, and promote” human rights in New Zealand could be read as mandating an evolving approach to interpreting s 15 that is influenced by international norms and not one that is merely declaratory of the existing religious freedom law in New Zealand prior to BORA’s enactment. Hence, judicial statements to the effect that there was no right to freedom of religion at common law (see, eg, Grace Church Bible Inc v Reedman (1984) 54 ALR 571) need now to be read in light of international developments. As Lord Bingham of Cornhill put it in the context of the British judicial system: “Where the common law was uncertain, unclear or incomplete, the courts ruled, wherever possible, in a manner which conformed with the [European Convention on Human Rights].” Rt Hon Lord Bingham of Cornhill ‘The Way We Live Now: Human Rights in the New Millennium’ (Speech delivered at Earl Grey Memorial Lecture, University of Newcastle upon Tyne, 29 January 1998) 6-7.
operative enterprise between parliament and the courts”. 560 Thus, if a complainant under s 15 fails to convince a court that a law burdening her religious conduct breaches the rule of formal neutrality, but then succeeds in a subsequent petition to Parliament to secure an exemption, perhaps doing so after gaining a favourable result under the ICCPR’s Optional Protocol complaints process, then the “co-operative enterprise” envisaged by the Equal Regard formula, in which the “content” of the right is spread, in terms of its enforcement, across the judicial, legislative and executive branches of government ought not to concern the international treaty bodies assessing New Zealand’s compliance with international law – as long as the final result in any given case provides an acceptable remedy.561

Returning to the text of the Covenant, I believe this approach is expressly provided for in Art 2(2), which sets out the basic requirement for implementation of the treaty in the following terms:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.

This article clearly contemplates that the protection of human rights by states parties to the Covenant is the responsibility of government as a whole, as provided for under the extant constitutional apparatus of each state, and is thus not necessarily to be administered exclusively by one branch, such as the judiciary.562 Sir Kenneth Keith, one of the principal authors of BORA, and a sitting judge on the International Court of Justice since 2006, has lent further weighty support to this general results-oriented view of the Covenant obligation. Writing extra-judicially in 2003, he repeated the words of the Chief Justice above that the Covenant obligation was one of “result”.563 In support of this he then referred to the 2001 Draft Articles on State Responsibility that were adopted by the International Law Commission in 2001.564 According to the articles, states that are adjudged to have breached international obligations are

560 Rt Hon Dame Sian Elias “Another Spin on the Merry-Go-Round” (Speech delivered at University of Melbourne, Australia, at seminar on “Sovereignty in the 21st Century”, 19 March 2003) 19 & n 81. This approach has good support in the academy; see, eg, Schachter “Obligation to Implement”, above n 489, 312: “[Art 2]…leaves open questions as to the status of the Covenant in national law, the mode of application, the latitude for adaptation of national law, the self-executing effect of the Covenant in domestic law, the requirement of effective remedies….”.

561 The arrangement argued for here appears to comply with the HRC’s own opinion on the obligation to implement the treaty under Art 2: “All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the State Party.” See Human Rights Committee General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant UN Doc CCPR/C/21/Rev 1/Add 13 (2004) (“General Comment 31”) [4].

562 In my view, the implementation requirement that a State party’s internal constitutional framework may not be cited by the state as a bar to effective implementation of Covenant rights will not be breached if, in fact, this framework delivers good results in individual cases. See General Comment 31[4], where the Committee says that states parties should not invoke “provisions of constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty”; see also Vienna Convention, Art 27. I would add that this admonition appears to be directed mainly at states with federal structures, such as Australia and the US, where international commitments entered into by the executive do not necessarily extend to state government level. New Zealand, being a unitary state, does not suffer from this infirmity, with the result that BORA automatically applies to all levels of government.

563 Keith “BORA Experience”, above n 1, 124. See also Matadeen v Pointu [1999] 1 AC 98 (PC) [24]: “Article 2.2 [of the]…Covenant contemplates a diversity of constitutional arrangements, including both legislative and ‘other measures’ by which effect may be given to the rights recognised in the Covenant.”

564 Keith “BORA Experience”, above n 1, n 7; citing International Law Commission Draft articles on Responsibility of States for internationally wrongful acts UN Doc A/56/10 (November 2001).
required to take steps to cease acts constituting a violation, or to provide other satisfaction for breach, such as compensation for injured parties and guaranteeing non-repetition of the act. The articles do not, however, stipulate which organ of state should remedy a wrong, only that it is in fact remedied by some state actor.\footnote{565}

The phenomenon of states parties to the Covenant being left to their own devices to determine the appropriate institutional arrangements for enforcing rights is hardly a novel concept. For example, Art 14 ICCPR does not specify whether the Anglo-American system of jury trials is a sine qua non for ensuring a “fair and public hearing” for persons faced with criminal charges, but appears to leave room for other institutional methods of securing the right, as indeed is the case in democracies where jury trial does not exist.\footnote{566} Alston, Steiner and Goodman explain this essentially relativist argument concerning implementation of international treaty obligations in this way: “[R]ights and rules about morality are encoded in and thus depend on cultural context”, with the “term ‘culture’ often being used in a broad and diffuse way that reaches beyond indigenous traditions and customary practices to include political and religious ideologies and institutional structures”.\footnote{567} Equal Regard, in my view, with its specialised apportioning of the institutional responsibility for enforcing Art 18, is an internationally acceptable emanation of such a cultural “encoding” process in the New Zealand context. I therefore submit that the right to manifest religious belief is adequately implemented by New Zealand law under the schema described in this thesis, in which the courts “underenforce” the formal neutrality aspect of the right, while the broader, substantive neutrality reading of the right, which as we have seen accords with international law pronouncements on the content of Art 18, will always be amenable to consideration by Parliament, perhaps at the instigation of the executive after an adverse finding by the HRC in a communication under the Optional Protocol.\footnote{568}

Evidence that my position on the two-tiered implementation of Art 18 envisaged by Equal Regard is viable can be seen in generally favourable (or, more accurately, perhaps, inconclusive) concluding comments issued by the HRC in response to country reports issued by New Zealand, Australia, and the US, all of which countries maintain an equality focus in their legal systems’ implementation of Art 18 at the highest constitutional level. Turning first to New Zealand, there are clear indications that, throughout the drafting process of the Covenant guarantee and up to the time of this country’s ratification of the treaty in 1978, New Zealand officials charged with assessing this country’s compliance with Art 18 have

\footnote{565} For a contrary view, that reliance on OP decisions is not an adequate safeguard for implementing ICCPR rights, because these decisions are not legally enforceable in New Zealand, see Andrew Butler “Judicial Review, Human Rights and Democracy” in G Huscroft & P Rishworth (eds) Litigating Rights: Perspectives from Domestic and International Law (Hart Publishing, Oxford, 2002) 47 (“Butler ‘Judicial Review’”), 55-57.\footnote{566} See Butler & Butler NZBORA Commentary, above n 9, [22.6.6]; and Henry Steiner, Philip Alston, & Ryan Goodman International Human Rights in Context: Law, Politics, Morals (3rd ed, Oxford University Press, Oxford, 2008) (“Steiner et al Rights in Context”) 517.\footnote{567} Steiner et al Rights in Context, above n 566, 517-518. For endorsement of this concept by a New Zealand court, see Lange v Atkinson [1998] 3 NZLR 424 (CA), 467 (emphasis added): “[T]he complex process of balancing the values underlying free expression and fair trial rights may vary from country to country, even though there is a common and genuine commitment to international human rights norms. The balancing will be influenced by the culture and values of the particular community.”\footnote{568} Further reinforcing my position, the OP requires the following response by states after an adverse finding in an individual communication: “Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.” Article 4(2) OP. For an example of where a violation of an ICCPR right was rectified expeditiously by the New Zealand government after a rare negative result in an OP communication, see Claudia Geiringer “Case Note: Rameka v New Zealand” (2005) 2 NZ YB Int’l L 185.
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consistently regarded the domestic record to be in full accord with the emerging codification of the international norm.

Most importantly, New Zealand’s first periodic report to the Human Rights Committee, which was issued four years after ratification in 1982, adopted a position on the country’s implementation of the ICCPR that corresponds well with the model advocated in this thesis. In assessing the country’s compliance with Art 18 as a whole, the report stated that the fundamental principle of freedom of thought, conscience and religion was guaranteed absolutely by the common law, and by the fact that New Zealand has never had an established state religion. External manifestations of religious belief, on the other hand, were protected by what the report described as the “general principle of New Zealand law” that was announced in Watch Tower Bible and Tract Society v Mount Roskill Borough. In this case, the Court declared that “all creeds” in the country possessed an equal right to justice, which, when not contradicted by legislation, was enforced in the courts as an incidence of the common law, as indeed it was in this case, where the Court held that it was unreasonable for a city borough council to refuse the use of a public war memorial hall by a Jehovah’s Witnesses organisation for a public lecture.

The report then went on to supply a series of instances of this basic right to religious equality where it had been “carried into effect” by statute. For example, it mentioned the fact that under the Marriages Act 1955, marriages could be solemnised by persons nominated by any organisation “which has as a principal object the upholding or promoting of religious beliefs or philosophical or humanitarian convictions”. School children enrolled at state primary schools could receive religious instruction at their schools for limited periods if this was authorised by their school committee, with an opt-out stipulated by the Education Act 1964 for those parents who informed school principals in writing that they wished their children to be excused. The report also referred generally to the Human Rights Commission Act 1977, which made it unlawful for private actors to discriminate against persons in certain areas of public activity, such as the provision of goods and services and in employment, on the basis of religious belief. These provisions are all examples par excellence of the Equal Regard principle being observed in legislation.

569 States parties to the Covenant are required to submit reports “on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights”; see ICCPR, Art 40.
571 Ibid [233]; citing R v Glover [1922] Gazette LR 185. This was the last (and unsuccessful) prosecution for blasphemy to be brought in New Zealand. In this case, Hosking J instructed the jury that the “truth or otherwise of any religious doctrine” was not at issue but that the matter to be considered was whether the accused had used language that crossed “over into the region of what is insulting or contemptuous”. Ibid 187. In short, the freedom to believe was regarded as inviolable and only the accused’s actions were being examined.
572 NZ Report ICCPR, 1982, above n 570, [233].
574 NZ Report ICCPR, 1982, above n 570, [235].
575 Ibid.
576 Ibid [237].
With regard to the substantive liberty aspect of religious freedom, the report candidly acknowledged that the protections of the common law mentioned above could be abrogated by statute. However, the New Zealand representative in Geneva who submitted the report and responded in person to questioning by the HRC also spoke of the “long-standing recognition by both the executive and legislative branches of government that the absence of formal restraints on the authority of Parliament to legislate does not sanction legislation which invades individual liberties”. Although the report did not provide any instances where the government had exercised restraint of this sort, it could have mentioned the fact that exemptions abounded in the law for religious activities. For example, and recalling the German law of 1933 in this respect, an accommodation existed on the statute books for kosher slaughter from at least 1951, when an exception to the general law requiring livestock to be stunned before slaughter in order to render them insensible to pain was granted to accommodate “certain Jewish methods”. It is reasonably clear, then, that the position of the New Zealand government was that religious freedom was protected by long-standing common law principles that protected equal rights in the public sphere and that the executive, or Parliament, would step in when religious exemptions from general laws were deemed necessary. On the basis of its spare summary of the New Zealand record, with its prime emphasis on efforts to secure equality for religionists, the report felt in a position to declare that: “[T]here are no legal rules, whether of common law or statute law, which restrict freedom of thought, conscience or religion in New Zealand.”

The response of the Human Rights Committee to New Zealand’s submission on Art 18 was broadly favourable. There was no criticism of the general stance taken on Art 18 with its focus on equality, and not on substantive liberty per se. The main question was whether steps had been taken to “protect the Maori religion”. The New Zealand representative replied that “no specific measures have been taken with respect to Maori religion”, noting blandly that “[m]ost Maoris who profess a religion in New Zealand have adopted the Christian faith”.

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578 Ibid [3]. The HRC has consistently criticised the New Zealand government for not having a supreme law bill of rights enabling courts to strike down legislation inconsistent with Covenant rights. See, eg, Concluding Observations of the Human Rights Committee: New Zealand UN Doc CCPR/C/NZL/CO/5 (2010) [7]: “The Committee...remains concerned that the Bill of Rights does not take precedence over ordinary law, despite the 2002 recommendation of the Committee in this regard.” The New Zealand government has steadfastly declined to upgrade BORA in this way, and the matter has been debated widely in the literature; see, eg, Janet McLean, “Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act (2001) 4 NZ Law Review 421 (arguing the current statutory protection is sufficient); and, generally, Butler “Judicial Review”, above n 565 (arguing that the statutory status of BORA inadequately implements New Zealand’s international law commitments).

579 Opening Statement by Mr CD Beeby, Assistant Secretary, Ministry of Foreign Affairs, New Zealand, to the Human Rights Committee at Geneva on 7 November 1983; reproduced in NZ Report ICCPR, 1982, above n 570, 1-2.

580 See Slaughter of Stock Regulations 1951, regs 3 & 7; and discussion in ILM Richardson Religion and the Law (Sweet & Maxwell, Wellington, 1962) 59. Richardson provides numerous other legislated exemptions of this sort existing in the 1960s, such as the exemption from union membership (under s 175 Industrial Conciliation and Arbitration Act 1954, as amended in 1961) for religious groups opposed to compulsory membership of other groups; see Richardson Religion and the Law, 57-58.

581 Ibid [233]. That the New Zealand government thought it complied with Art 18 is confirmed, moreover, by communications between Wellington and New York immediately prior to the adoption of the 1981 Declaration advising the country’s officials to “vote in favour of the Declaration as presently cast”. Cable from Wellington to New York (27 October 1981) 108/11/23, Ministry of Foreign Affairs and Trade Archives.


583 Ibid [174].

584 Final Reply by MR CD Beeby, Assistant Secretary of Foreign Affairs to the Human Rights Committee, 10 November 1983; reproduced in NZ Report ICCPR, 1982, above n 570, 7 & 19. The Committee also criticised
The spokesman might have added, if he been had fully briefed on the matter, that the Tohunga Suppression Act 1908 had been repealed in 1962, thus securing an even playing field for traditional Maori religion in this respect.\(^{585}\) In summary, it is clear from documents surrounding New Zealand’s ratification that this country considered its conception of the right to manifest religious belief was sufficiently guaranteed by its tradition of parliamentary oversight of human rights and relatively weak form of judicial review, and that its efforts to secure compliance with Art 18 were considered sufficient by the treaty body charged with assessing the matter.

This general position of the New Zealand government regarding Art 18 has not been scrutinised in recent years by the Human Rights Committee. This was perhaps due to the government regarding this area of the law as settled and largely uncontroversial, which led in turn to the provision of very little information on which the HRC could comment.\(^{586}\) The US government, on the other hand, has explicitly laid out the state of its law in its country reports under the Covenant and has received a clean bill of health from the Committee regarding its domestic application of the international law norm.\(^{587}\) Importantly for the purposes of this thesis, the US has escaped any direct criticism for the Supreme Court’s interpretation of the federal Free Exercise Clause in the cases of *Smith* and *Lukumi*, in which the formal neutrality standard was announced and applied to religious manifestation issues.\(^{588}\) While some US scholars have argued forcefully that the current judicial treatment of the Free Exercise Clause does not adequately reflect that nation’s commitment to the ICCPR,\(^{589}\) it appears that the HRC

New Zealand for the practice of compelling prisoners to attend religious services of their stipulated denomination. Ibid. Beeby conceded this practice was questionable, and undertook to refer the matter to his government. Note that current law now forbids such compulsion; see Corrections Act 2004, s 79(2).

\(^{585}\) The repeal of the Tohunga Suppression Act was, however, noted in a 1963 letter from the Department of External Affairs, which claimed that the repeal of this statute (among others) put “Maori and non-Maori citizens on an equal footing” in matters of religious intolerance. This claim was in response to GA Res 1779 (XVII) (7 December 1962), which urged states to “take all the necessary action to put an end” to “all forms of religious intolerance”. The letter concluded that it was not necessary for the government to take any “specific action” in this regard. Letter from Department of External Affairs to New Zealand Ambassadors in Bangkok, Canberra, Geneva, Kuala Lumpur, London, New Delhi, Ottawa, Paris, San Francisco, Singapore, Tokyo, Washington (21 August 1968); see “Freedom of Worship” 108/11/23 ABHS 950 (28 June 1948-31 March 1967) (National Archives of New Zealand).

\(^{586}\) In the subsequent report, the New Zealand government merely stated that religious freedom was protected by the guarantees contained in ss 13 & 15 BORA, and by the requirement that employers make accommodations of religious employees unless to do so would be unreasonably disruptive (see s 28(3) Human Rights act 1993). See *Third periodic reports of States parties due in 1990: New Zealand* UN Doc CCPR/C/64/Add 10 (30 May 1994) [101]. In the report issued by the government in 2002, there was no entry under Art 18. In its 2007 report, the government referred solely to the result in *Police v Razanjoo* [2005] DCR 408, in which a Muslim witness, who wished to wear a burqa while testifying, was required to remove the garment but was permitted to give evidence behind a screen. See *Fifth periodic reports of States parties: New Zealan* UN Doc CCPR/C/NZL/5 (18 February 2008), [288]. As I shall explain in Chapter 4, this result conforms well to the Equal Regard reading of s 15 BORA. None of these reports have elicited any specific comments from the HRC regarding Art 18.

\(^{587}\) The US ratified the Covenant in 1992, but has not as yet acceded to the OP. On US attitudes to the ICCPR, see, generally, Gerald Neuman “The Global Dimension of RFRA” (1997) 14 Const Commentary 33.

\(^{588}\) See *Initial reports of States parties due in 1993: United States of America* UN Doc CCPR/C/81/Add 4 (24 August 1994) [548], [552] & [833]. The response by the UN did not mention the US statements on compliance with Art 18, and simply issued a generally positive imprimatur: “The Committee recognizes the existence of effective protection of human rights available to individuals under the Bill of Rights and federal laws. The Committee notes with satisfaction the rich tradition and the constitutional framework for the protection of human rights and freedoms in the United States.” Human Rights Committee *Concluding Observations of the Human Rights Committee, United States of America* UN Doc A/50/40 (1995), [272].

\(^{589}\) See Neuman “Global Dimension”, above n 587, arguing that the decision in *Boerne* to strike down the federal RFRA with respect to the states (see discussion of *Boerne* in section 2.2 above) could be rectified by use of the Constitution’s treaty power (see US Constitution, Art 6); and Douglas Laycock “Religious Freedom and
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is sanguine about the judicially underenforced nature of Art 18 in the US environment. This is perhaps a result of the fact that the claimants in *Lukumi* actually won under the formal neutrality reading, and because, in cases where claims failed both before and after the demise of the substantive neutrality regime, claimants subsequently gained legislative accommodations that vindicated their rights,\(^{590}\) as is contemplated under the Equal Regard schema, which allocates to legislatures the power to enforce the substantive neutrality aspect of religious free exercise when courts are restrained from doing so. Indeed, the Committee, in what is perhaps an understandable prioritisation of its supervisory role, has appeared in recent years to be more preoccupied with the US’s treatment of foreign Muslim prisoners detained in the aftermath of the US-led invasions of Afghanistan and Iraq, where direct instances of discrimination, not to say outright compulsion of prisoners to violate their beliefs, have in fact drawn international criticism.\(^{591}\) In Australia, where, as we have seen, a very similar standard to the US is applied, the UN has been less positive, noting (without referring as such to s 116 of the federal Constitution) that the coverage of human rights in that country with respect to the ICCPR has significant “lacunae”.\(^{592}\) Whether this refers to the narrow interpretation judges have given to s 116 is, however, not at all clear. It is just as likely, in my view, that the Committee is concerned with the lack of coverage of ICCPR rights generally, particularly in light of the fact that the few rights that are enumerated in the federal Constitution (including s 116) are not necessarily applicable to the states under the federal system.\(^{593}\)

While it is wise to be cautious about inferring lessons for New Zealand from UN statements concerning the compliance of other nations with Art 18,\(^{594}\) it is undeniable that states enforcing a regime of formal neutrality have not received express criticism of this arrangement from the HRC. This is in part no doubt due to the relatively excellent records of these countries in the field,\(^{595}\) compared with other UN member states that openly persecute religious minorities\(^{596}\)

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International Human Rights in the United States Today” (1998) 12 Emory Int’l L Rev, 951, 970-971. Note that, while the US has lodged a declaration accompanying its accession to the treaty in 1992 to the effect that the ICCPR is not directly enforceable in the courts (see Declaration 1, 138 Cong Rec S4781-01), Neuman points out that this is no bar to Congress nevertheless enacting laws that implement the Covenant. Neuman “Global Dimension”, above n 587, 57.

\(^{590}\) For example, soon after the decision in *Smith*, the Oregon legislature, as well as Congress and numerous other states, enacted exemptions from the criminal law for sacramental use of peyote at Native American rituals; see, eg, 42 USC, s 1996a (b)(1). And subsequent to the decision in *Lyng v Northwest Indian Cemetery Association* 485 US 439 (1988) (see discussion in Chapter 2, in the text accompanying ns 197-221), Congress acted to prevent the building of a logging road through federal land in California that was sacred to Native Americans, thus overriding the Supreme Court’s decision; see House Committee on Appropriations, Department of the Interior and Related Agencies Appropriations Bill, 1989, HR Rep No 713, 100th Cong, 2d Sess 72 (1988).

\(^{591}\) See Special Rapporteur on freedom of religion or belief, Asma Jahangir et al *Situation of detainees at Guantánamo Bay* Un Doc E/CN4/2006/120 (27 February 2006) [60]-[65]; and *Concluding observations of the Human Rights Committee: USA* UN Doc CCPR/C/USA/CO/3/Rev 1 (18 December 2006)[13]. In these reports, there is strong criticism of the conditions in which detainees held by the US have been allegedly subjected to forced grooming, removal of religious objects and mishandling of the “Holy Koran” by prison guards.

\(^{592}\) See the HRC’s comments under the heading “Principal subjects of concern and recommendations” in Human Rights Committee *Concluding Observations of the Human Rights Committee: Australia* UN Doc A/55/40 (2000).

\(^{593}\) As Carolyn Evans explains, it is well established that s 116 does not extend beyond federal law, and there are no provisions under state law that would prevent states from establishing a state religion or from legislating to ban religious activities. See Evans “Religion as Politics”, above n 44, 287.

\(^{594}\) See Rishworth “International Law”, above n 505, n 23.

\(^{595}\) In 1998, a UN report criticised the *Smith* doctrine, especially because of its impact on Native American religious practices (note that the report was especially scathing of the *Lyng* decision, which, it will be recalled, was issued during the substantive neutrality era). However, the report also praised the unmistakable existence of a “vast mosaic of religions and beliefs” in the country and the fact that the US was “free and open to all religions and beliefs”. See Report submitted by Abdelfattah Amor, Special Rapporteur, in accordance with Commission on
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and engage, for example, in judicially sanctioned executions and imprisonments based on religious precepts.\textsuperscript{597} The overall impression from commentary at the international law level, therefore, is of a tacit acquiescence in the Equal Regard reading of s 15 BORA. I believe this ought to go some way towards deflecting any criticism of the methodology from the point of view of the Covenant.

To conclude on the matter of international oversight of New Zealand’s human rights compliance, it is instructive to refer to a speech of the then Secretary-General of the UN, Kofi Annan, on the occasion of the 50th anniversary of the UDHR in 1998. In it, he expresses an inclusive view of the various forms of democracy around the world that can, through their differing institutional arrangements, give expression to human rights. His vision, I believe, encompasses the form of protection for religious practices that I lay out in this thesis – one that, in a manner consonant with New Zealand history and political culture, distributes the duty of implementing Art 18 over all three branches of government.\textsuperscript{598}

There is no single model of democracy, or of human rights, or of cultural expression for all the world. But for all the world, there must be democracy, human rights, and free cultural expression. Human ingenuity will ensure that each society, within its own traditions and history, will enshrine and promote these values. I am convinced of that. The Universal Declaration of Human Rights, far from insisting on uniformity, is the basic condition for global diversity. That is its great power. That is its lasting value.

I shall now turn to an examination of the American free exercise jurisprudence, where the courts have in the last 20 years fleshed out an institutional solution to the implementation of Art 18 in a manner that is workable and has the potential to provide strong protection for religious conduct in this country.

4. The Equal Regard methodology

The final issue to be addressed in this chapter is exactly how New Zealand’s egalitarian tradition vis-à-vis religion should be translated into the judicial setting when s 15 BORA is invoked. State-directed religious persecution of the manifestly intentional variety will be easily detectable by the courts. A statute that on its face bans, say, the “casting of statues that are to be used for religious purposes”,\textsuperscript{599} will quickly be identified as discriminatory, because it singles out religion on its face and clearly privileges secular over religious sculptural projects. Under the “fundamental nonpersecution principle”\textsuperscript{600} affirmed in \textit{Lukumi}, which, as I argue in

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\textsuperscript{596} The Constitution of Iran, for example, establishes Shia Islam as the state religion, permits limited tolerance for some religious groups (eg, Christians and Jews), but Baha’is and Kurds are regarded as apostates from Islam and have severely reduced civil rights. See Abdullahi An-Na’im “Religious Minorities under Islamic Law and the Limits of Cultural Relativism” (1987) 9 Hum Rts Q 1, 11-13; and John Leith “A More Constructive Encounter: A Baha’i View of Religion and Human Rights” in N Ghana et al (eds) \textit{Does God Believe in Human Rights?: Essays on Religion and Human Rights} (Martinus Nijhoff Publishers, Leiden, 2007) (“Leith ‘Baha’i’”) 121.


\textsuperscript{598} UN Secretary-General Kofi Annan “Secretary-General on the 50th Anniversary of the Declaration” (Speech delivered in Teheran, Iran, 10 December 1997); available at: <www.un.org/News/ossg/sg/stories/statements_search_full.asp?statID=47>.

\textsuperscript{599} Scalia J in \textit{Smith} provided this hypothetical example of a law that is not “facially neutral”, describing it as “obviously” breaching the formal neutrality standard announced in that case. See \textit{Smith}, above n 3, 877-878.

\textsuperscript{600} \textit{Lukumi}, above n 19, 523 (per Kennedy J).
this chapter, is eminently amenable to adoption in New Zealand, such a law could never be considered religiously neutral in any sense of the word, and would almost certainly fail to be justified by any government imposing it.\footnote{Such a law would be unlikely to survive scrutiny under s 5 BORA analysis, which stipulates that the necessity of laws impinging on BORA rights is to be “demonstrably justified” by government (an analysis which broadly equates to the “compelling interest” test applied to laws offending the \textit{Smith} standards of neutrality and general applicability). As will be explained further below, any governmental justification for such a law (eg, that it is necessary to preserve natural stone reserves) would fail because the “secular ends” being asserted to defend the rule are fatally undermined by the fact that they are being “pursued only with respect to conduct motivated by religious beliefs”. Ibid 524.} In modern liberal democracies, however, such overt repression of religionists through express legislation is vanishingly rare. More common is legislation or administrative decision-making that prohibits religious activities in an indirect way, and which is done inadvertantly or perhaps through indifference to its effect on non-mainstream religionists. This type of law will fit into two crucially distinct categories. The first of these are laws that apply across the board to \textit{all} relevant persons but which happen to burden religious conduct, as was the case with the impugned law in \textit{Smith}. Even-handed laws like these will never be susceptible to attack in the courts in a regime of Equal Regard; rather, any religious objections to such laws will need to be addressed to the legislature in its role as guarantor of the substantive neutrality aspect of s 15.

The second type of law that indirectly burdens religious conduct lies somewhere on a continuum between laws overtly targeting religion and those laws applying to all persons wishing to engage in the relevant conduct, whether or not they are motivated by religious reasons. In some instances, laws falling between these two poles will subtly depart from the standard of formal neutrality in a manner that does not equate to the deliberate oppression of religion, but which also does not satisfy the “general applicability” rule announced in \textit{Smith}.\footnote{American legal commentator, Richard Duncan, describes laws of this type as making up an “infinity of hard cases that lies between an ‘across-the-board criminal prohibition’ and a law that ‘specifically directs’ a restriction only at religiously motivated behaviour”. Richard Duncan “Free Exercise is Dead, Long Live Free Exercise: \textit{Smith}, \textit{Lukumi} and the General Applicability Requirement” (2001) 3 U Pa J Const L 850 (“Duncan ‘General Applicability’”), 859, quoting \textit{Smith}, above n 3, 884 & 878.} It is laws of this type that will predominantly arouse the interest of Equal Regard.

Given that laws targeting religion on their face will be extremely rare, an essential function of a meaningful non-discrimination standard, therefore, will be to smoke out instances of governmental discrimination that exist in the grey zone depicted above.\footnote{See Little “Religious Exemptions and BORA”, above n 87, 130.} In this section, we will take a close look at how the formal neutrality regime that was ushered in by the US Supreme Court in \textit{Smith} has since evolved into a system of religious free exercise protection that creates a workable standard incorporating this function.\footnote{Ibid 38-45. Recall that earlier in this chapter I sharply disagreed with Little’s normative argument for attributing a non-discrimination reading to s 15 BORA. See text above accompanying n 443. However, I am in substantial agreement with Little’s summary of doctrine in the US case law and his advocacy for the adoption of this jurisprudence in the New Zealand setting.} I will contend that this methodology strikes a fair balance between the interests of states that need to exert a principled measure of authority in governing, and the many claims that may potentially be advanced against governmental regulation by a religiously diverse society. This system, it will be argued, provides an excellent model for the New Zealand courts to follow in light of the conclusion reached above that s 15 BORA is best read as creating a legally enforceable right that affirms the New Zealand tradition of religious equality, and one that accordingly invites the more or less wholesale transplant of current US Supreme Court reasoning and doctrine. The remainder of this chapter will show how this methodology works, where its outer limits lie, and will also
assess whether it is an appropriate mechanism for enforcing s 15 BORA within the human rights framework already operating in this country.

### 4.1 The Smith-Lukumi-Newark line of cases: the Equal Regard doctrine explained

It will be recalled that, in dismissing the Free Exercise Clause claim in *Smith* of two drug counsellors who had been refused state unemployment insurance on the ground that they had ingested the illegal hallucinogenic substance peyote at a rite of the Native American Church, Justice Scalia stated that their case in fact presented no judicially cognisable constitutional issue. This was because the Oregon state law banning the possession of the substance was a “valid and neutral law of general applicability”. Hence, once the Court had determined that the law applied to all relevant possessors of peyote, it found that the fact it had the indirect effect of outlawing a core religious activity was of no legal consequence. The state of Oregon, therefore, was free to enforce the law against the sacramental use of peyote, and it followed from this that it was also entitled to refuse to extend unemployment insurance to the drug counsellors.

As mentioned in Chapter 1, this decision provoked a chorus of academic criticism, with Douglas Laycock, among other prominent defenders of the substantive neutrality regime enforced during the *Sherbert* era, describing *Smith* as creating a “legal framework for persecution”. Indeed, it is accurate to say that the new doctrine in *Smith* gave legislatures legal carte blanche to “proscribe[] (or prescribe[]) conduct that…religion prescribes (or proscribes)”. Under *Smith*, all laws burdening religious activities would escape any significant constitutional scrutiny, as long as they applied to the relevant conduct across the board, or, put another way, as long as they met a flat requirement of formal neutrality. A standard such as this undeniably opened a clear route for majoritarian legislatures to enact prohibitory laws indirectly burdening religious minorities.

In the wake of *Smith*, therefore, the future of free exercise protection in the US looked bleak to many observers. As we shall now see, however, on closer inspection the *Smith* standard turned out not to be the blunt instrument its detractors first depicted it as being.

#### 4.1.1 The Lukumi precedent: neutrality and general applicability explained

The *Smith* decision contained the germ of an exception that had great potential to provide meaningful protection for religious conduct in the face of laws containing subtle elements of discrimination. In subsequent judicial elaborations of the *Smith* requirement that all laws
burdening religious conduct must be neutral and generally applicable, a new, robust, test emerged from the apparently religion-hostile holding in *Smith*. 609

Since the impugned statute in *Smith* was an across the board measure, 610 however, the decision itself provided little guidance for future legal controversies that might turn on the issue of whether challenged laws were sufficiently neutral, or generally applicable, in order to pass constitutional muster. 611 What was needed to inject clarity into the *Smith* doctrine was a *negative* instance of a law failing to survive scrutiny because of its discriminatory impact. The *Lukumi* case, which was decided three years after *Smith*, provided a useful instance of such a law and went some way to indicating how the new Free Exercise Clause regime would be enforced.

On 9 June 1987, the city council of Hialeah, Florida, convened an emergency meeting, attended by many alarmed citizens, to discuss the presence of a new and unfamiliar religious group within the municipality. The Santeria Church, a syncretic faith combining elements of traditional African religion and Roman Catholicism, had established itself in large numbers in Florida from the 1950s as a result of mass migration from Cuba, where the modern form of the Church originated. The Church counted among its chief forms of devotion the ritualistic sacrifice of animals. The sacrifices were conducted to honour and sustain the “*orishas*”, or spirits, who oversaw the wellbeing of devotees, and entailed the ritual slaughter by means of the cutting of the carotid arteries of fully conscious animals, including chickens, goats, guinea pigs, turtles, sheep and ducks. The sacrament was performed during birth, marriage, medical procedures and death rites, as well as at an annual celebration of the religion. The animals were typically cooked and eaten after slaughter, except in the case of death rites or cures for the sick. 612

Although the Santeria Church succeeded in gaining the necessary licensing for opening a house of worship, school, cultural centre and museum, it soon ran into trouble with the civic authorities regarding its intention to conduct animal sacrifices more or less openly. 613 At the council meeting on 9 June, several councillors and other city officials expressed consternation

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610 The *Smith* Court did not closely analyse the law. In fact, the Oregon statute did provide one exception to the general ban on peyote – for potential medical uses of the substance (of which none existed, according to the Court). See *Smith*, above n 3, 874 (per Scalia J) & 904 (per O’Connor J, concurring). For the reasons discussed below, however, this was not a relevant exemption for the purposes of Free Exercise Clause analysis under the *Smith*-*Lukumi*-*Newark* standard. See discussion below in section 4.1.

611 See Duncan “General Applicability”, above n 602, 860, noting the indeterminacy of *Smith* in this respect.


613 *Lukumi*, above n 19, 526. In Cuba, the Church had conducted these rites secretly, due to widespread persecution, both before and after the revolution. See ibid 525 & 541; and O’Brien *Animal Sacrifice: Lukumi*, above n 612, 13-19.
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at this possibility. For example, the chaplain of the city police department denounced the faith as a “foolishness” and an “abomination to the Lord”, and depicted the Santeria veneration of orishas as amounting to the worship of “demons”. Typical of many statements at the gathering were those of councillor Mejides, who claimed that he was “totally against the sacrificing of animals”, and that the Jewish practice of kosher slaughter was different, because it had a “real purpose”. Jewish sechita, which also mandated the killing of fully conscious animals with a sharp blade (and which was expressly exempted from humane animal slaughter codes by state and federal statutes), was acceptable in his view because the “Bible says we are allowed to sacrifice an animal for consumption”, whereas it did not condone animal sacrifice for “any other purposes”. Since the prime purpose of Santeria-style sacrifice was to honour the orishas, and consumption of the resulting meat was apparently a subordinate matter, the council deemed it appropriate to prohibit this core ritual of the Church on the basis that they were preventing, inter alia, the unnecessary infliction of cruelty on animals.

At this and subsequent meetings, the council enacted a series of by-laws that systematically sought to ban the practice by targeting the theological underpinnings of Santeria sacrifice, as distinguished from Jewish sechita and the many analogous (in terms of animal suffering) secular killings of animals that were also to remain lawful, such as hunting and pest eradication. Noting its “concern”, in Resolution 87-66, “that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety”, the council then incorporated, in Ordinance 87-40, Florida’s animal cruelty legislation, which subjected to criminal punishment “whoever…unnecessarily or cruelly…kills any animal”. Having subsequently gained a legal opinion from the state Attorney-General, who declared that the “ritual sacrifice of animals for purposes other than food consumption” was not a “necessary” killing of animals under state law, the council then moved specifically to ban the Santeria practice. In Ordinance 87-52, which was the centrepiece of three substantive ordinances directed at the rite, the council outlawed the “sacrifice” of animals, which it defined narrowly as meaning “to unnecessarily kill, torment, torture, or mutilate an animal in public or private ritual or ceremony not for the primary purpose of food consumption”.

Following the enactment of these ordinances, the Church commenced litigation on the grounds that they violated the Free Exercise Clause. The US Supreme Court held that the enactments failed both limbs of the Smith requirement that laws impinging on religious conduct must be

614 Lukumi, above n 19, 540-542. For a full account of this acrimonious meeting, at which the Church’s leader was also present, see O’Brien Animal Sacrifice: Lukumi, above n 612, 42-44.
615 Ibid 541. The chaplain concluded by exhorting the council “not to permit this Church to exist”. Ibid 542.
616 Ibid 541.
617 Ibid 539, citing 7 USC, s 1902(b), and Fla Stat, s 828.23(7)(b) (1991), which both certified kosher slaughter as “humane”.
618 Ibid 541. See also, eg: “What can we do to prevent the Church from opening?” (councillor Echevarria); and councillor Cardoso’s claim that Santeria devotees were “in violation of everything this country stands for”. Ibid.
619 Ibid 526.
620 Ibid.
621 Ibid 526-527. This opinion was sought because Florida law prevented municipal authorities from passing ordinances that conflicted with state law.
622 Ibid 527. See also Ordinance 87-51, which provided that “it shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida”; and Ordinance 87-72, which defined “slaughter” as “the killing of animals for food” and banned slaughter outside city areas that were specifically zoned for slaughterhouse use. See ibid 528 for excerpts from these ordinances, as well as the appendix to Kennedy J’s majority opinion for the full text of all ordinances. Ibid 548-557.
neutral and of general applicability. Having made these findings, the Court went on to conclude that the discriminatory burden placed on the Church could not be justified under the compelling interest test, thus invalidating the ordinances. For the purposes of this thesis, the Court’s framing of the neutrality and general applicability standards (which, as we shall see, establish conceptually distinct, though inter-related, approaches to determining whether laws breach the formal neutrality requirement for constitutionality under the Free Exercise Clause) provides a well articulated framework for identifying inappropriate governmental discrimination towards religious conduct. We consider the two heads of analysis in Lukumi in turn.

(a) Neutrality

Recall from our discussion in Chapter 1 that Laycock’s general formulation of the formal neutrality requirement reads as follows: “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.” In Lukumi, the lead opinion of Justice Kennedy laid out detailed indicia for determining whether a law was impermissibly using religion as a “category” and therefore was non-neutral. As explained by Kennedy J, a law would not be neutral if its “object or purpose” was to “restrict religious practices because of their religious motivation.” In order to identify the object or purpose of an impugned law, the Court then prescribed an enquiry both into the text of the law, and also into the law’s practical operation, or effect.

Regarding first the Lukumi Court’s textual analysis, Kennedy J noted:

[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.

Accordingly, the Court considered the actual terms of the ordinances. In particular, the words “sacrifice” and “ritual” tended to suggest the laws were targeted at religion, but because

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623 In the lower courts, the Church lost under the pre-Smith enquiry mandated by the Sherbert test (see 723 F Supp 1467 (SD Fla) (1989); affirmed in 936 F 2d 586 (11th Cir) (1991)). The District Court held that the ordinances’ effect on the Church was merely incidental and that the laws were not targeted at religious conduct “on their face”. In any event (and applying the pre-Smith substantive neutrality standard), the District Court held that the ordinances were justified by the government’s asserted interest in, inter alia, preventing cruelty to animals. See ibid 528-531 for the Supreme Court’s summary of the case’s passage through the lower courts.

624 For a thorough summary of the oral argument before the Court and the opinions of the Court, see O’Brien Animal Sacrifice: Lukumi, above n 39, chs 6 & 7. See also Kent Greenawalt Religion and the Constitution: Free Exercise and Fairness (Princeton University Press, New Jersey, 2006) 30-42.

625 As explained in Souter J’s concurrence, the brand of neutrality enforced by the Lukumi Court was of the formal (not substantive) variety, as stipulated by Smith. See Lukumi, above n 19, 561-563 (per Souter J, concurring). “Though Smith used the term ‘neutrality’ without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose ‘object’ is to prohibit religious exercise and those that prohibit religious exercise as an ‘incidental effect,’ Smith placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, Smith would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application.” Ibid 562 (emphasis in original).


627 Lukumi, above n 19, 533.

628 Ibid.

629 Ibid.

630 Ordinance 87-52, for example, banned the “sacrifice” of animals, which it defined as meaning “to unnecessarily kill, torment, torture, or mutilate an animal in public or private ritual or ceremony not for the primary purpose of food consumption”.

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these words also admitted of secular meanings. The ordinances narrowly survived the initial test of “facial” neutrality. An ineluctably religious classification was apparently needed to breach this textual requirement.

Justice Kennedy did not, however, cease his enquiry into facial neutrality by considering only the bare words of the text. Conclusive evidence of the enactments’ discriminatory object was to be found elsewhere. After close analysis of all the ordinances, Kennedy J determined that the careful manner in which they had been crafted was decisive evidence of a discriminatory purpose that acted as a proxy for facial non-neutrality. Most egregiously, perhaps, Ordinance 87-71 prohibited “sacrifice” in a “ritual or ceremony” where this was “not for the primary purpose of food consumption”. This formulation had the effect of excluding kosher slaughter from the ban, and also clearly did not apply to any other activities, such as hunting or fishing. Ordinance 87-40, moreover, which incorporated the Florida state animal cruelty statute and banned the “unnecessary” killing of animals, had been interpreted by city officials as prohibiting only religiously motivated animal killings, and as not applying to any other form of killing, such as hunting, fishing, all other modes of slaughter of animals for food, eradication of pests, and also the use of live rabbits for greyhound training. As a result, Kennedy J found that the laws contained a “pattern of exemptions” for virtually all killings of animals except the Santeria sacrifices, which by contrast were targeted by a “narrow pattern of prohibitions”. Because, as a practical matter, the only conduct subject to the ordinances was the “religious exercise of Santeria church members”, the Court concluded that the ordinances, as a whole, disclosed a “subtle departure[] from neutrality” and amounted to a “religious gerrymander” on the part of the city. The ordinances therefore failed the first limb of the Smith test.

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631 Kennedy J referred to dictionary meanings, discovering, for example, that the “word sacrifice ultimately became very much a secular term in common usage”. , above n 19, 534, quoting M Eliade (ed) The Encyclopedia of Religion (Macmillan, New York, 1987) vol 12, 556 (emphasis in original).
632 The hypothetical examples given by Scalia J in Smith are presumably laws of this type, as the language used in them only admits of religious applications. “It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that are to be used for worship purposes,’ or to prohibit bowing down before a golden calf.” Smith, above n 3, 877-878.
633 Kennedy J noted that the use of the words “ritual” and “sacrifice” supported the final determination that the laws “improperly or target[ed]” the Santeria religion, but did not on their own “compel” this finding. Ibid 534.
634 Ibid 537. In a recent litigation concerning animal cruelty laws in Florida, a court had held that the use of live rabbits in this way was “not unnecessary”; ibid, citing Kiper v State 310 So 2d 42 (1975) (Fla App).
635 Ibid 538. For example, Ordinance 87-72, which banned the slaughter or process for sale of animals outside areas zoned for licensed slaughterhouses, provided an exemption for the slaughter in non-zoned areas of “small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law”. Ibid 528.
636 Ibid 535. The city argued that the ordinances were neutral in part because they also banned secular “ritual” activities, such as “hazing” rites involving animals at college fraternities. See Robert Drinan & Jennifer Huffman “Religious Freedom and the Oregon v. Smith and Hialeah Cases” (1993) 35 J Church & St 19, 29. The District Court accepted this argument; see 723 F Supp 1467, 1488 (1989) (SD, Fla): “The ordinances are not targeted at the Church of the Lukumi Babalu Aye and practitioners of Santeria, but are meant to prohibit all animal sacrifice, whether it be practiced by an individual, a religion, or a cult.”
639 Kennedy J deemed two other factors as significant to the finding of non-neutrality. First, the fact that the ordinances proscribed “more religious conduct” than was “necessary to achieve their stated ends” made it reasonable to infer the laws had as their purpose the suppression of religious activities. Ibid 538. For example, the city’s stated interests in protecting public health and preventing cruelty to animals could have been served by regulating the religious activity, not by enacting a “flat prohibition of all Santeria sacrificial practice”. Ibid 539.
640 Secondly, he found that the legislative record (including statements by councillors) surrounding the enactment of the ordinances disclosed that the “object” of the ordinances was to “target animal sacrifice by Santeria
The neutrality component of the Court’s analysis in *Lukumi* helpfully defined an important role for courts in identifying *intentional* targeting of religious conduct, whether of the overtly “facial” variety or of the virtual sort necessarily implied in a law’s operation. However, the Court’s framing of this test indicated that it would only be of use in extreme instances of direct persecution, of which the Hialeah ordinances provided a rare example in the modern era. As we shall now see, the Court framed the second limb of the *Smith* test – the “general applicability” requirement – in a way that was potentially more significant than the neutrality enquiry. This significance was due to its possible application in future legal controversies to a far more common type of law: those that are not necessarily crafted as a result of anti-religious animus.

(b) General Applicability

It is significant that the *Lukumi* Court stated that laws directly targeting religious conduct for special burdens fell “well below” the second standard announced in *Smith*, that of general applicability. This implied that laws impeding religious practices that are not facially non-neutral, or are not in their operation targeted exclusively at religious conduct, might still be deemed discriminatory if they are not generally applicable. The Court did in fact acknowledge that neutrality and general applicability were “interrelated” concepts, and that “failure to satisfy one requirement is a likely indication that the other has not been satisfied”. However, the two standards clearly diverged in their theoretical application in that, whereas the neutrality requirement was designed to identify intentional religious gerrymanders, the general applicability standard was, as became more evident in cases subsequent to *Lukumi*, also capable of identifying more subtle instances of discrimination where religious persecution was not necessarily present.

The general applicability rule described in *Lukumi* requires courts to engage in two steps. First, courts must identify the governmental interests being asserted in defence of laws subjected to analysis. In *Lukumi*, the city of Hialeah made two claims in this respect: that the laws were intended to prevent animal cruelty and also to protect public health. The next step is for courts to ask whether the laws themselves are *underinclusive* in their pursuance of these goals. The key question will be to ask whether laws fail to prohibit other religious or nonreligious conduct that “endangers” the asserted interests to a “similar or greater degree” than the prohibited religious conduct does.

Regarding Hialeah city’s asserted interest in preventing cruelty to animals, the *Lukumi* Court made the following observations on the underinclusiveness of the impugned enactments:

> Despite the city’s proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing...is legal. Extermination of mice and rats within a home is also

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640 Duncan “General Applicability”, above n 602, 866.
641 *Lukumi*, above n 19, 543.
642 Duncan “General Applicability”, above n 602, 866-867.
643 *Lukumi*, above n 19, 531.
644 Ibid 543.
645 Ibid.
646 Ibid 543-544.
permitted… Ordinance 87-40 sanctions euthanasia of “stray, neglected, abandoned, or unwanted animals,”…; destruction of animals judicially removed from their owners “for humanitarian reasons” or when the animal “is of no commercial value,”…; the infliction of pain or suffering “in the interest of medical science,”…; the placing of poison in one’s yard or enclosure, …; and the use of a live animal “to pursue or take wildlife or to participate in any hunting,”…, and “to hunt wild hogs”.

In response to the alleged failure of the ordinances’ general applicability implied in these remarks, the city argued that the various permitted animal killings listed above were “different”, “important” or “obviously justified”.\(^{647}\) The Court, however, was unimpressed by these statements, commenting dryly that they were “ipse dixit” justifications that failed to explain why the city had failed to prohibit, along with the Santerian practice, other religious and non-religious conduct that clearly had threatened to a “greater or similar degree” the asserted secular interest in preventing animal cruelty.\(^{648}\)

This inequality had been emphasised in oral argument, where, for example, it was pointed out to the Court that under the city’s laws any person could leave poison in his backyard, and it would not matter whether an animal that came to eat it would then “wander off and suffer for a week”. The city did not regulate this use of poisons, for example, to require that they be quick acting.\(^{649}\) By contrast, the city had reacted by enacting a flat ban when it came to animals being killed in the comparatively rapid manner employed in Santeria-style sacrifice.

The Court evidently found arguments such as these compelling, and accordingly concluded that the ordinances pursued the “city’s governmental interests only against conduct motivated by religious belief”,\(^{650}\) were thereby underinclusive to a “substantial, not inconsequential”\(^ {651}\) degree, and so failed the second limb of the Smith test for general applicability.\(^{652}\)

Having found that the ordinances were not neutral and not generally applicable, the Court then quickly concluded that the city had failed to advance a compelling interest to justify the prima facie constitutional infirmity identified in the laws. Kennedy J stated that a “law cannot be regarded as protecting an interest ‘of the highest order’…when it leaves appreciable damage” to asserted governmental interests “unprohibited”.\(^{653}\) Given the Court’s earlier findings as to neutrality and underinclusiveness, it was unsurprising that the city was unable to furnish an interest of this sort. And so, having found the “categories of selection”\(^ {654}\) written into law by

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\(^{647}\) Ibid 544.

\(^{648}\) Ibid (emphasis in original).

\(^{649}\) For an account of the oral argument, see O’Brien Animal Sacrifice: Lakumi, above n 612, ch 6, and ibid 135-136 (with respect to the poison exemption).

\(^{650}\) Lakumi, above n 19, 545.

\(^{651}\) Ibid 543.

\(^{652}\) The Court dismissed, a fortiori, the city’s claim that the ban was necessary to protect public health. Two problems asserted by the city were that the ordinances were necessary to prevent the improper public disposal of animal carcasses and the consumption of uninspected meat. As with the animal cruelty argument, however, the Court noted that hunters, fishermen and private owners of animals were not subject to any regulation regarding disposal of carcasses, or indeed to any inspection of their kill before eating it. In both contexts, the Court concluded the laws were underinclusive, in that the city only pursued its asserted concerns when they resulted from religious activities. Moreover, in instances where the city did regulate for public health concerns, it had stopped short of the flat ban that it reserved only for the Santeria ritual. See Lakumi, above n 19, 544-545.

\(^{653}\) Ibid 547; quoting Florida Star v BJF 491 US 524, 541-542 (1989).

\(^{654}\) The Court acknowledged that all laws had to make distinctions between certain classes of persons in order to operate. One can imagine, for example, a law banning marijuana use that naturally distinguishes between users and non-users of the substance. The Court went on to explain, however, that when laws involve “categories of selection” based on religion, this creates a strong suspicion of discriminatory intent. Ibid 542.
the Hialeah council to be constitutionally impermissible under the formal neutrality schema introduced in *Smith*, the Court declared the laws invalid.

It might be asked whether the Court’s final step of applying the compelling interest test was redundant. However, it is significant that in his judgment Kennedy J made a distinction between “substantial” and “inconsequential” underinclusion, which indicated that an impugned law that is not completely general might be able to satisfy the compelling interest test if its failure to cover all instances of an activity is deemed trivial. The *Lukumi* case – which involved a series of discriminatory categories of selection that could not be described as trivial – did not provide a suitable factual matrix to test this distinction. That task has fallen to lower courts in the US judicial hierarchy.

4.1.2 The Newark precedent: further elucidating the general applicability standard

As indicated above, one question that remained after *Lukumi* related in part to the uniqueness of its facts. Justice Kennedy based part of his reasoning on the legislative history in the case, which revealed a clear sectarian bias on the part of the city officials who “gerrymandered” the laws. Moreover, the ordinances themselves prohibited only one form of animal killing – that of the Santeria Church – while leaving virtually all other forms of killing unaffected. In the wake of *Lukumi*, uncertainty existed as to whether the case should therefore be read as turning on the bias in both the legislative history of the ordinances and in the highly particularised effect of the laws themselves.

Some legal commentators, typically those who enthused over the demise of the *Sherbert* doctrine in *Smith*, believed that *Lukumi* stood for the rule that only laws passed with the specific intention of oppressing religiously motivated conduct were thenceforth to be subjected to close scrutiny. Indeed, Kennedy J prefaced his opinion with a general remark that the Court had granted certiorari because it feared that the "fundamental nonpersecution principle of..."
the First Amendment was implicated on the facts. Furthermore, it seems reasonable to say that the anti-Santerian animus of the city council certainly influenced the result in *Lukumi*. Importantly, however, only two members of the *Lukumi* Court (Kennedy and Stevens JJ) agreed that this legislative record was relevant to the finding that the laws were not neutral under the *Smith* standard. Nevertheless, it plausibly remained moot, as a matter of calibrating the precise holding of the Court, whether laws that were enacted without anti-religious hostility and passed the Court’s test for neutrality would in fact fail the test of general applicability.

An important case focusing on this matter was *Fraternal Order of Police Newark Lodge No 12 v City of Newark*, in which the meaning of the general applicability requirement was given greater clarification than was possible in *Lukumi*. In this case, the Newark city police department enforced an internal policy banning the wearing of beards by male police officers. The department provided exemptions from the no-beard rule for undercover officers whose “assignments or permits permit a departure from requirements”, and for officers with the skin condition, *pseudo folliculitis barbae*. This medical condition typically affects males of African extraction and makes shaving painful. The policy was challenged by two Sunni Muslim policemen who claimed that their religious beliefs forbade shaving and that the refusal of the police department to allow them to grow beards therefore infringed their free exercise rights.

Judge Samuel Alito of the US Court of Appeals for the Third Circuit did not discuss the issue of neutrality in his opinion in *Newark*. Presumably, this was because it was difficult to argue on the facts that the policy infringed the neutrality limb of the *Smith-Lukumi* principle. Unlike *Lukumi*, the police department policy did not appear to have been crafted with any overt anti-religious animus, and the words of the written policy did not employ language that had religious connotations. Also unlike *Lukumi*, the policy applied to almost all police officers, including those who might have wished to wear beards for “secular” reasons – for example, to emulate an honoured relative or for personal reasons of style or comfort.

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661 *Lukumi*, above n 19, 523.
662 See *Lukumi*, above n 19, 522. See discussion of this point in O’Brien *Animal Sacrifice: Lukumi*, above n 612, 138-139; and see Laycock “The Court and Religious Liberty”, above n 609, 28, noting that of the nine justices who voted to disallow the ordinances, seven did not consider anti-religious animus to be relevant. See Scalia J’s concurring opinion on this matter, where he argues that it is impossible to “determine the singular ‘motive’ of a legislative body”; *Lukumi*, above n 19, 558-559.
663 See, eg, *Thomas v Anchorage Equal Rights Comm’n* 165 F 3d 692 (9th Cir) (1999) (vacated on ripeness grounds, in 220 F 3d 1134 (9th Cir) (2000)), in which the US Court of Appeals for the 9th Circuit rejected an argument that a state anti-discrimination code’s prohibition of landlords discriminating on the basis of marital status was underinclusive. The Court read the tests for neutrality and general applicability in *Lukumi* as being designed solely to discover intentional oppression of religious believers. “In *Lukumi*, the Court considered the ordinances’ lack of neutrality and general applicability as a proxy for of the Hialeah lawmakers’ illicit intention to single out the Santeria religion for unfavourable treatment.” Ibid 701-702. See discussion in McConnell et al *Religion*, above n 239, 212-213.
665 Ibid 360.
666 Ibid 360-361.
667 The *Newark* decision is particularly important for observers of US free exercise doctrine in part because its author has since become a member of the US Supreme Court.
668 See Gedicks “Formal Neutrality”, above n 609, 488; and Little “Religious Exemptions and BORA”, above n 87, 134.
669 The department’s internal order read: “Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited.” *Newark*, above n 664, 360.
670 Gedicks explains that the policy would not have been religiously neutral under *Lukumi* if secular categories like these had been exempted, and the Muslim police officers had not been accommodated as well. Gedicks “Formal Neutrality”, above n 609, 486.
would have been difficult to say that the police department had committed an act of religious
gerrymandering in its formulation of the policy, which in any case had existed for more than
two decades. Because such animus was not present, Newark therefore presented an ideal
opportunity to explore whether the general applicability standard described in Lukumi had
content that was independent of the neutrality requirement.671

Applying the test set out in Lukumi, Alito J found in favour of the Muslim police officers
firmly on the grounds of the policy’s lack of general applicability. At the outset of his opinion
he stated:672

Because the Department makes exemptions from its policy for secular reasons and has not
offered any substantial justification for refusing to provide similar treatment for officers who are
required to wear beards for religious reasons, we conclude that the Department’s policy violates
the First Amendment.

The Newark police department attempted to justify its policy on the basis that it wished to
project the image of a “monolithic, highly disciplined force”, that it would enhance a sense of
esprit de corps among police officers, and because it would offer the “public a sense of
security in having readily identifiable and trusted public servants”.673 The department
contended that allowing an exemption for the Muslim officers would compromise these
interests. As in Lukumi with respect to the underinclusive ordinances, however, Alito J
attached crucial significance to the fact that the department had allowed secular exceptions to
its policy. The fact that it permitted officers with the skin condition mentioned above to grow
beards, but did not allow Muslim officers to do the same fatally undermined the interests
asserted to justify its policy. Recall that the chief defect of the Hialeah ordinances was that they
had granted exemptions which threatened to a “greater or similar degree” the asserted state
interests in that case. In similar vein, Alito J stated that the Court was “at a loss to understand
why religious exemptions threaten important city interests but medical exemptions do not”674.
For example, the Court could not adduce from the department’s evidence a “legitimate
explanation” as to why allowing officers to grow beards for medical reasons would not
undermine esprit de corps, whereas allowing officers to grow them for religious reasons
would.675 Similarly, it could not see why allowing Muslim officers to wear beards would pose
a risk to public safety (on the grounds that the public might not be able to identify bearded
officers as “genuine” police officers), whereas officers wearing beards for medical reasons
would not present this risk.676 As a result, the Court found that the granting of the medical
exemption suggested that the department had made a “value judgment that secular (i.e.,
medical) motivations for wearing a beard [were] important enough to overcome” its interests,
but that “religious motivations” were not.\footnote{Ibid.} Inferring from the department’s position a form of discriminatory intent,\footnote{Alito J described the department’s decision to “provide medical exemptions while refusing religious exemptions” as “sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under Smith and Lukumi.” Newark, above n 664, 365.} or “hostile indifference”,\footnote{Perry describes the type of discrimination present in Newark in this way, as compared to the outright persecution present on the facts in Lukumi. See 300-302. Michael Perry “Freedom of Religion in the United States: Fin de Siècle Sketches” (2000) 75 Ind LJ 295, 300-302.} towards the religious beliefs of the Muslim officers, Alito J affirmed the lower court’s decision to disallow the policy.

Some commentators have opined that Lukumi ought not to be regarded as standing for the principle that if a law has one secular exemption then courts must grant a religious exemption. Eugene Volokh has pointed out that many laws banning serious harmful activities in fact contain secular exemptions, and that it is often legitimate for law-making bodies not to exempt religious activities.\footnote{Eugene Volokh “A Common-Law Model for Religious Exemptions” (1999) 46 UCLA L Rev 1465 (“Volokh ‘Common-Law Model’”), 1539-1542.} For example, Volokh notes that laws banning intentional homicide contain exemptions – for executions, police killings of dangerous fleeing criminals, self-defence, the disconnecting of medical equipment at the request of the terminally ill, and so on.\footnote{Ibid 1540.} Would these exemptions show that the legislature is improperly respecting secular values more highly than religious non-exempted activities, such as Hindu widow-burning (sati) and other non-exempted non-religious activities?\footnote{This critique can of course be made of all equality-based claims, not just those concerning religious discrimination. For the classic essay on the topic, see Peter Westen “The Empty Idea of Equality” (1982) 95 Harv L Rev 537.} Volokh believes that such legislative exemptions do value secular values over religion, but he is of the view that this will be “perfectly proper”,\footnote{Volokh “Common-Law Model”, above n 680, 1541. Volokh believes that such majoritarian legislative decisions are the “essence of democratic decision making”. Ibid 1534. Volokh does, however, make a case for allowing courts to engage in balancing enquiries as long as legislatures have the “last word”, as they do in statutory religious exemption schemes (such as BORA and RFRA).} and that courts should only be in the business of striking down direct religious persecution of the type exemplified in Lukumi.\footnote{See Eugene Volokh “Intermediate Questions of Religious Exemptions – A Research Agenda with Test Suites” (1999) 21 Cardozo L Rev 595, 631. See also Tushnet “Redundant”, above n 71, n 29 (emphasis added), where he argues that, if a statute banned, for secular reasons, an activity which a religious group wished to engage in, but provided exemptions for some non-religious groups, it would not be targeting religion in a discriminatory way if the “exemptions were provided only to non-religious activities, but were denied to some [other] non-religious activities as well as to religious ones.”} To do otherwise would result in courts “substituting their moral and practical judgments about what constitutes ‘true’ harm to others for those of the legislature, as they determine which secular exemptions are indeed based on good enough reasons.”\footnote{Volokh “Common-Law Model”, above n 680, 1542.} Once the courts embark on this type of second-guessing enquiry, they will inevitably be caught up in the difficult balancing of incommensurable values of the sort that – as the Supreme Court explained at length in Smith – they are not competent to undertake reliably or fairly.\footnote{See, generally, Chapter 2 of this thesis.} Hence, if Hialeah city had, alongside the ban on Santeria slaughter, in fact prohibited sechita, as well as, say, the use of live rabbits for greyhound training, but not, say, hunting or the use of slow-acting poisons to eradicate pests, then under Volokh’s understanding of the holding in Lukumi the ordinances’ prohibition of Santeria-style slaughter may well have survived scrutiny under a pure anti-persecution reading of the Free Exercise Clause.
The result in *Newark* could be viewed as flying in the face of this well-reasoned critique, because at first glance it seemed to open up the possibility that almost all laws could be challenged as discriminatory towards religious believers if – as many do – they contain a solitary secular exemption. Such a reading of the *Smith-Lukumi* holdings had the potential to swallow up the *Smith* rule, which after all had clearly sought to leave accommodation of religious conduct primarily to legislatures, and not to courts. The police department in *Newark* in fact made an argument resembling that of Volokh, pointing out that the impugned anti-peyote law in *Smith* actually had one secular exemption – for instances where the “substance has been prescribed by a medical practitioner”. The department therefore contended that, since the *Smith* Court had considered this exemption too trivial to render the anti-peyote law non-generally applicable, then Alito J ought also to validate the department’s no-beard policy, with its medical exception, as generally applicable and therefore immune from serious constitutional scrutiny. Alito J rejected this argument, however, and in doing so demonstrated how the *Newark* decision provides a sophisticated, and sensibly bounded, test for determining whether a law is discriminatory or not.

The key to understanding the *Smith-Lukumi-Newark* troika’s combined holding on general applicability is to focus on the relationship of exempted conduct to the asserted purposes of impugned laws. In *Newark*, Alito J, having conducted a succinct summary of free exercise doctrinal history, went on to explain why the medical exemption in *Smith* was not constitutionally relevant in that case. This was because the medical prescription exception to the state of Oregon’s anti-peyote law did not “necessarily undermine the Oregon’s interest in curbing the unregulated use of dangerous drugs”. By contrast, the Newark police department’s exemption from its no-beard rule for sufferers of *pseudo folliculitis barbae* certainly did have the effect of undermining its interest in maintaining the uniform appearance of its officers when in public view.

Judge Alito further emphasised this point by analogising the medical exemption in *Smith* with the Newark police department’s other exemption from the no-beard rule for undercover officers. As with the medical peyote exception, the exemption for undercover officers did not undermine the asserted state interest, which in *Newark* was, inter alia, the department’s interest in uniform public appearance. This was because undercover officers “obviously are not held

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687 For an interesting exchange of views on this point, see Volokh “Common-Law Model”, above n 107, 1539-1542, and Duncan “General Applicability”, above n 602, 874-880.

688 Several commentators have cautioned against a too-generous reading of *Smith* and *Lukumi*: see, eg, Gedicks “Formal Neutrality”, above n 609, 488-489: “[R]equiring that the government provide religious exemptions whenever a law allows any exemption for secular conduct would be to create an exception to the *Smith* doctrine that swallows up the general rule.” See also Kaplan “Exceptions from *Smith*”, above n 609, 1067; and Sansom “Exploring the Space”, above n 609, 768.

689 *Smith*, above n 3, 874; cited in *Newark*, above n 664, 366.

690 Ibid 365-366.

691 For good explanations of how categories of exemption are important, see Gedicks “Formal Neutrality”, above n 609, 488-490; Duncan “General Applicability”, above n 602, 873-874; and Laycock “The Court and Religious Liberty”, above n 609, 32-33.

692 For a potted official history of the Free Exercise Clause, one can do little better than consult current Supreme Court Justice Alito J’s account in *Newark* of the doctrinal evolution from *Cantwell v Connecticut* 310 US 296 (1940) to *Lukumi*. See *Newark*, above n 664, 361-365.

693 Ibid 366.

694 *Newark*, above n 664, 366.
out to the public as law enforcement personnel”.

Therefore, it was not possible to infer from the undercover exemption on its own that the department had made a value judgment that the uniformed Muslim officers’ religious beliefs were less important than other secular needs.

More properly, therefore, the undercover exemption (and also the exceptions to the intentional homicide law mentioned above) ought to be regarded as a separate rule, and thus irrelevant to the adjudication at hand. If the police department policy only had the undercover officer exemption, and no medical exemption, then the underinclusiveness of its policy would have been regarded as “inconsequential” and not “substantial”, and so would have survived scrutiny under Lukumi. This distinction between different levels of underinclusion in Newark also illustrated why the Lukumi Court had found it necessary to retain the compelling interest test, which would surely have been a redundant step if the Free Exercise Clause were only to be read as protecting religious believers against direct oppression.

The Newark decision thus had the beneficial effect of fleshing out the general applicability requirement first given skeletal form in Lukumi but which had been left in some doubt as to its scope due to the peculiar facts of that case. Newark provides the final component of the two-tiered test for formal neutrality first conceived in Smith. On the one hand, Lukumi affords the best mode of analysis for laws that on their face (or by necessary implication) have been expressly crafted to oppress religious minorities; while on the other, Newark shows how laws that have an indirect burden on religious believers, and which have not necessarily been created with the purpose of suppressing religious conduct, can still be subjected to a meaningful level of scrutiny on the basis that they may imply the possibility of discriminatory intent against religious activity. It is largely because of the capability of this methodology to

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695 Ibid. Gedicks explains that the interest in maintaining morale on the force would also not be undermined by the undercover exemption, as “undercover officers do not interact with regular officers as part of the regular uniformed chain of command”. Gedicks “Formal Neutrality”, above n 609, 489.

696 Alito J explained that: “[T]he Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing.” Newark, above n 664, 366.

697 On this point, see Laycock “The Court and Religious Liberty”, above n 609, 33; and Gedicks “Formal Neutrality”, above n 609, 489.

698 It also allowed courts to factor into their review of underinclusive legal rules considerations of deference towards institutional decision makers who operate in special circumstances. See, eg, Jackson v District of Columbia 89 F Supp 2d 48 (2000) (DC, Cir) (“Jackson”). In Jackson, the Court declined to apply Newark to a challenge by religiously motivated prison inmates (who, like the plaintiffs in Newark, were Sunni Muslims) to a policy banning beards except when grown for medical reasons and for persons taking courses in cosmetology. The Court said Newark was inapplicable for the simple reason that the “plaintiffs here are in prison”; see Jackson, 68. See also, for a very similar conclusion involving prisoners, Hines v South Carolina Department of Corrections 148 F 3d 353 (4th Cir) (1998); discussed in Kaplan “Exceptions from Smith”, above n 609, 1080.

699 The US Supreme Court denied certiorari; see 328 US 817 (1999). The Supreme Court did, however, refuse to apply the broad reading of general applicability endorsed in Newark in Locke v Davey 540 US 712 (2004). This case was, however, distinguishable on the applicable law, and so Newark remains good law. See Douglas Laycock “Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty” (2004) 118 Harv L Rev 155, 213-218. For an opposing view, see Hamilton God vs Gavel, above n 659, 215-216; and for a (very) strong retort in his review of Hamilton’s book, see Douglas Laycock “A Syllabus of Errors” (2007) 105 Mich L Rev 1169, 1183-1184.

700 Note, however, that the methodology employed in Newark had been used in domains of constitutional law outside the Free Exercise Clause. See cases listed in Lukumi, above n 19, 543; and, for discussion of what Gedicks calls “Fundamental rights/equal protection” analysis”, see Frederick Mark Gedicks “An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions” (1998) 20 U Ark Little Rock LJ 555, 573-574.

701 For other judicial applications of the Newark methodology, see, eg: Tenafly Eruv Assn, Inc v Borough of Tenafly 309 F 3d 144 (3rd Cir) (2002) (upholding complaint of Jewish organisation who wished to place religious symbols on town utility poles contrary to by-laws prohibiting this, when the city had allowed others to use the poles to erect, inter alia, “lost pet”, house number, and religious holiday displays); Keeler v City Council 940 F Supp 879 (DC, Md) (1996) (holding that an historic preservation ordinance enforced against a church wishing to conduct renovations offended the Newark principle, because it contained exemptions for reconstruction or
identify subtle forms of discrimination in ostensibly neutral legislation that I argue in this thesis that the combined holdings in Smith-Lukumi-Newark provide an excellent (and ready-made) jurisprudence for adoption in the New Zealand setting.

I now conclude my discussion of the Equal Regard, or formal neutrality, regime that is enforced in the US federal courts.

4.2 Equal Regard: advantages, criticisms and final comments

I will not dwell long on what I consider the primary benefits of New Zealand enforcing an Equal Regard regime modeled on the US jurisprudence that I have laid out in the section above. A few conclusory comments are, however, appropriate at this point.

The key advantage of the formal neutrality methodology, I believe, is that it avoids getting the courts involved in impossible metaphysical questions into whether government, in enacting a secular regulation, has in fact impermissibly burdened an activity that constitutes a “central” part of a person’s religious beliefs. Instead, it mandates a highly particularised (and secular) enquiry into whether religionists are being treated unfairly when compared with other persons conducting themselves in a relevantly similar way, either for religious or non-religious reasons. This is something that courts are eminently well equipped to do. Also, as we have seen with the Newark and Lukumi examples, the methodology is very capable of recognising inequalities in ostensibly neutral and general laws in a manner that actually gets very close to enforcing the type of disparate impact regime that is envisaged by Art 18 ICCPR. This is because it forces majority groupings in society to provide the same concessions they receive from the legislature to minority groups who do not have the same ability to place pressure on politicians through the usual democratic channels.

A further advantage of the method is that it leaves intact the basic policy choices of the legislature. It simply requires law-makers to be evenhanded in their placing of burdens on demolition of historical buildings where this would carry substantial benefits to the city, would otherwise cause “undue financial hardship”, or where keeping the structure intact would “not be to the best interest of a majority of persons in the community”); Rader v Johnson 924 F Supp 1540 (DC, Neb) (1996) (holding that the refusal of a university to allow an evangelical Christian freshman to live outside university housing violated the Newark standard, when it already exempted one third of other freshmen, for a variety of secular reasons, to reside off-campus); Axson-Flynn v Johnson 356 F 3d 1277 (10th Cir) (2004) (excusing a Mormon university student in Utah from taking part in theatre activities which required her to utter profanities contained in a script, when she had previously been excused from doing so and when another student had been excused from the same course for a Jewish religious holiday). But see Riback v Las Vegas Metropolitan Police Department 104 Fair Empl Prac Cas (BNA) 34 (2008), in which it was held that a Jewish police officer’s wish to wear a yarmulke while inside the department’s offices did not violate the Newark principle, because an internal rule against wearing hats indoors was enforced with no exceptions. The complainant failed in his argument that his wish to wear a yarmulke ought to be accommodated on the grounds that the department already allowed officers to display religious symbols in their offices and on their desks and previously may have permitted the wearing of Christian crosses on lapels. Note, however, that officer Riback was subsequently accommodated by his employers, despite his setback in litigation, and was permitted to wear a plain baseball cap under certain conditions; see “Orthodox Jewish cop settles with Las Vegas department” (31 January, 2009); available at: <www.firstamendmentcenter.org/news.aspx?id=21178>.

See the text accompanying ns 43-48 in Chapter 1, where I made the case for why the methodology could be very effective in rooting out cases of religious discrimination in a manner that is considerably more nuanced and potentially effective than a bald enquiry into whether a law is intentionally discriminatory.

3. The case for Equal Regard

society. This is an important benefit in the New Zealand constitutional environment, where parliamentary sovereignty, for better or worse, is a foundational norm of our government. In any event, it is important never to lose sight of the fact that, even if one considers that the non-discrimination formula provides a relatively meager protection for religionists when compared with a well-enforced substantive liberty regime, religious believers are equally entitled to the same rights that all other citizens have; that is, the right to life, the right to vote, the right to free speech, the right to freedom from medical experiments, and so on. None of these rights are enforceable in the courts only when a governmental regulation is discriminating against certain classes of people – they are available to everyone. Hence, concern that the legislature will abuse its legal ability to create generally applicable laws in order to impede religious practices is automatically qualified by many other restrictions on the legislature’s ability to make laws in other areas touching on human rights.

One criticism that has been made in the US academy is that the Equal Regard method relies on a form of luck, or a type of parlour game. If one cannot point to a suitable comparator (for example, the presence of a skin affliction among African American policemen, as occurred in the Newark case), then the religious claimants will lose if the impugned law cannot otherwise be identified as intentionally discriminatory. However, as Eisgruber and Sager point out in their rejoinder to this criticism, the same comment could be made “about every antidiscrimination principle”. They conclude that it is therefore difficult to understand why this would be a valid argument to “reject antidiscrimination principles in general” or Equal Regard in particular.

A related concern might be that the Equal Regard reading of s 15 does no more than guarantee a right to discrimination, and thus is redundant when one considers that freedom from discrimination on the grounds of religious belief is already protected by the Human Rights Act 1993. My answer to this complaint, as I explained above, is that s 15 is best conceived as providing for a substantive liberty right, but that for institutional reasons, the courts should “underenforce” the formal neutrality aspect of the right. Thus, the complaint that s 15 is a mere repetition of a right provided elsewhere is not accurate. Religionists who wish to approach Parliament for relief from generally applicable laws (either proposed laws, or ones already on the books) will be able to invoke the substantive liberty right guaranteed by s 15 in their approach to the legislature as an important moral resource. This is in fact how persons have engaged with the right for many decades in this country, and the legislature on many occasions has been able to find a way to accommodate minority interests, where this does not create an unacceptable burden on society. The Equal Regard reading of s 15 regularises this history in a clever and imaginative way. In my opinion, it is a methodology that could provide very real protection for minority religionists in this country, and one that should also attract the support of the legal community once its robust and fair attributes have been properly recognised.

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704 Ahdar and Leigh cite the South African Constitutional Court’s handling of the issues in Prince v President, Cape Law Society 2002(2) SA 794 (CCSA) as a best-case application of the substantive neutrality balancing methodology. See Ahdar & Leigh Religious Freedom in the Liberal State, above n 157, 170-173.
706 Eisgruber & Sager Religious Freedom, above n 92, 106.
707 Ibid.
708 See s 21(c) & (d) Human Rights Act 1993.
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5. Conclusion

In *Mendelssohn*, Justice Keith was asked by the appellant to apply the principle contained within the paradigm Equal Regard case of *Lukumi* to the case at bar.\(^709\) The judge, however, queried the propriety of referring to *Lukumi* in dealing within *Mendelssohn*’s s 15 BORA claim. This was because the famous Florida case, in which an exiled Cuban religious group succeeded against the odds in striking down municipal by-laws intentionally designed to suppress the group’s activities, depended on a body of judicial doctrine that had accreted around “quite a different legal text arising from a different history and context”.\(^710\) Ultimately, the judge did not need to address this fundamental interpretive issue regarding *Lukumi*’s import to the case before him. Instead, Keith J was able to say that, even if the Free Exercise Clause – as it has come to be understood since the *Smith* and *Lukumi* decisions in the 1990s – were applicable to the New Zealand legal environment, the formal neutrality standard contained within it, being an essentially negative right, would in any event be unavailing to the appellant, who was asking the New Zealand Attorney-General to intervene in the operation of the ordinary laws of the land “on an exceptional basis”\(^711\) to protect his troubled New Age religion.

This chapter has in a sense been an attempt to answer Keith J’s question regarding the appropriateness of transplanting US religious free exercise doctrine into New Zealand law.\(^712\) While the histories of the two countries cannot fairly be described as a perfect match, and the wordings of their respective constitutional religious freedom guarantees – given that they were enacted two centuries apart and in somewhat different social and intellectual climates – differ as much as one would expect, I believe the doctrinal solution reached at the federal constitutional level after much argumentation in the US is eminently applicable to the New Zealand human rights environment. Indeed, as I have endeavoured to show in the last three chapters, the main and perhaps sole reason for the US Supreme Court’s decision to abandon the substantive neutrality reading of the clause in the combined holdings of *Smith*, *Lukumi* and *Boerne* did not so much depend on the unique text or history of the provision (although the Court’s solution aligned itself with a plausible reading of both), but on considerations of institutional competence and judicial restraint that are equally applicable, if not more so, to the New Zealand legal setting.

To accord s 15 BORA the same meaning as its American counterpart would therefore, I believe, provide a good fit with New Zealand’s own constitutional history, where the courts have never seen themselves as adversaries of the executive or legislative branches of government,\(^713\) and where a strong, interwoven, commitment to egalitarianism and parliamentary democracy has created a defining strand in our constitutional culture. Speaking at an interfaith gathering at Parliament in 2006, the then Prime Minister Helen Clark argued

\(^{709}\) *Mendelssohn* is discussed in the text above accompanying ns 116-133.

\(^{710}\) *Mendelssohn*, above n 116, 22.

\(^{711}\) Ibid 23. Keith J went on to say that *Lukumi* did not provide any support for the appellant’s proposition that s 15 created “positive governmental obligations”, and that the US case was, rather, “all about restraining government power”. Ibid.

\(^{712}\) It also responds to similar requirements, stipulated by Robin Cooke, among other judges and academics, that domestic human rights jurisprudence must respect the “national ethos” and not be “compelled from outside”. See text above accompanying ns 4-13.

\(^{713}\) In a recent speech, the Chief Justice affirmed this position when she described the “Queen’s Judges” as performing an “auxiliary role compared to the more dynamic” executive and parliamentary branches of the state. See Rt Hon Dame Sian Elias “Speech of the Chief Justice of New Zealand, Dame Sian Elias at the opening of the Supreme Court of New Zealand” (Speech delivered at the New Zealand Supreme Court, Wellington, 18 January 2010); available at: <www.courtsofnz.govt.nz/speechpapers/Opening%20of%20Supreme%20Court.pdf>.
that an “ability to reconcile our past and adjust to the diversity of our present times is critical to building New Zealand’s nationhood”. Meanwhile, the president of the Federation of Islamic Associations, Javed Khan, has said that: “Muslims are happy to abide by New Zealand laws as long as they are equitable.” In my opinion, the Equal Regard reading of s 15, which splits the responsibility of enforcing a two-tiered regime of substantive neutrality and formal neutrality between, respectively, the legislature and the courts, is the legal embodiment of these complementary utterances by two important actors on the national scene.

Some might regard the interpretive solution I offer here to be a reward for an unattractive feature of New Zealand’s 19th century settler culture that is inappropriate to extend into the 21st century – a culture of uniformity and assimilation presided over by an overweening executive with considerable power over law-making by virtue of its dominance of the legislature and the doctrine of parliamentary sovereignty. My first answer to that complaint is that, even before BORA was enacted, throughout our history minority religious groups have done fairly well when approaching those in power for relief from general laws which indirectly burden their activities, and there is no reason to suppose that this will not continue.

My second answer is to be found in the case studies that follow these introductory chapters. They will illustrate how the Equal Regard method could provide a workable, non-arbitrary, and fair formula for resolving many of the vexing questions concerning the issue of religious conduct exemptions that have yet directly to be addressed in this country in litigation under s 15 BORA. They will also show how positive results might accrue for minority religionists should the New Zealand courts rigorously apply the methodology advanced in this thesis.

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715 See Mary Boland “Unholy Row” New Zealand Listener (20 December 2008).
717 See text accompanying ns 146-162 in Chapter 1 for a collection of administrative and legislative accommodations spanning New Zealand’s history.
Chapter 4
The Auckland “burqa trial”: Equal Regard in action?

1. Introduction

In this chapter, I shall consider – in light of my conclusions in the previous chapters – one of the rare instances in which s 15 BORA has been given a full judicial treatment in this country. In 2004, at a criminal trial in the Auckland District Court, two Muslim women of Afghan origin but resident in New Zealand, wished to wear a burqa (a veil which covers the whole body and face, save for an opening for the eyes) while giving evidence for the prosecution in an insurance fraud case. In an interlocutory decision after a special hearing devoted exclusively to this issue, Judge Lindsay Moore determined that they would be required to remove the garment, but that their faces would be screened from the public and the defendant. The judge and counsel alone would be able to observe the witnesses’ faces at trial.

Most pertinently to the eventual resolution of the case, the defence had argued that if the women remained veiled, it would breach the defendant’s fair trial rights under s 25 BORA. In particular, it was contended that to allow them to remain covered in this way would prevent the defence, and the trier of fact, from assessing facial demeanour during cross-examination. This was arguably provided for by s 25(f) BORA, which stipulates that those charged with an offence have the right to “examine the witnesses for the prosecution and to obtain the attendance and examination of the witnesses for the defence under the same conditions as the prosecution”. The two witnesses, for their part, relied primarily on the right to manifest religious belief contained in s 15 BORA.

The apparent conflict of these two rights threw up a panoply of issues, most of which were the subject of defence submissions and also attracted a great deal of comment outside the courtroom. Is New Zealand a secular society with a correspondingly religion-free corpus of laws that ought naturally to be embodied in its essentially rationalistic court system? Does Islam truly require women to wear veils? Is it possible to preserve the right of a defendant to a fair trial while also giving effect to the rights of others to practise their religion? In order to “examine” a witness, is it necessary to see the whole face of a witness? And should a cultural practice that has its origins in a country where, as some might claim, women play a subordinate role to men, be given what would amount to an official imprimatur in this country?

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1 William Shakespeare Richard II Act 1, sc 1.
3 Police v Razamjoo [2005] DCR 408 (District Court, Auckland) (“Razamjoo”). The women were also permitted to wear a scarf covering their hair, but not dark glasses.
4 The defendant was subsequently convicted in a non-jury trial conducted in these conditions; see “Man at centre of burqa court case convicted” New Zealand Herald (24 March 2005).
5 The women also asserted their rights under ss 13 (the right to freedom of thought, conscience and religion), 14 (the right to freedom of expression), 19 (the right to freedom from discrimination), and 20 (the right of minority groups to practise their religion and culture); see Razamjoo, above n 3, [42].
The reactions of media commentators and various politicians to the dilemmas posed by this case were of the generally consonant view that the defendant’s rights should prevail over Mrs Salim’s and Ms Razamjoo’s request to wear the burqa. Some spoke of the necessity for the facial demeanour of trial witnesses to be accessible,⁶ while others stressed the need to insulate the New Zealand state’s secular institutions and well-established assumptions as to gender equality – which had been hard won over the centuries in Western societies – from the irrational religious practices of misogynistic immigrant cultures.⁷ Some even suggested that if the two women did not like New Zealand’s inherently secular and gender-neutral laws regarding witness testimony in court, they would “need to move to more accommodating countries”.⁸

As already mentioned above, despite these concerns Moore DCJ decided that New Zealand’s “secular” laws required, in “the interests of justice”,⁹ that an accommodation be made to allow the women to testify in a manner that respected their beliefs. My discussion of Razamjoo in this chapter is divided into two parts. First, I shall give a broadly descriptive account of the judge’s reasoning, which, as we shall see, appears to deploy the balancing test mandated by the substantive neutrality reading of s 15. And then I shall measure the decision against the standard of Equal Regard, asking whether the result in Razamjoo in fact comports more closely with the theory of the right to religious free exercise that is advanced in this thesis. Importantly, I shall conclude that Razamjoo, as well as the other rare domestic jurisprudence that has touched on the right both before and after the enactment of BORA, fits comfortably within the scope of the formal neutrality reading of s 15.

2. Consideration of Razamjoo

One important threshold question in the case was whether any law existed that expressly banned the veiling of witnesses in the courtroom.¹⁰ There have been a number of instances in which assertions of BORA rights have failed because of the operation of s 4 BORA, the

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⁶ See, eg, Editorial “Care needed on issue of veils in court” New Zealand Herald (30 July 2004): “How something is said, as much as what is said, can hold the key to credibility.” ACT party MP Stephen Franks opposed the prosecution submission so strongly that he wrote to the Attorney-General, urging that legal and financial help be given to the defendant from the Crown, because of the fundamental importance of the fair trial right at stake. See Helen Tunnah “Burqa not norm: Muslim MP” New Zealand Herald (29 October 2004).

⁷ See, eg, Brian Rudman “A cover-up the courts should ban” New Zealand Herald (29 October 2004): “[W]hen a fundamentalist minority within a minority tries to impose its beliefs on our free and secular justice system, it’s time to remind its members why they sought refuge in Auckland. Wasn’t it to get away from the medieval mullahs of Kabul and their warped ideas about the lowly place of women before God and society?” See also Michael Laws “Row over burqa reveals more than was intended” Sunday Star-Times (31 October 2004); and Finlay Macdonald “Enough is enough of this fruitcake fundamentalism” Sunday Star-Times (24 October 2004).

⁸ Gordon McLauchlan “Better maybe to burqa off” New Zealand Herald (30 October 2004); Winston Peters, then merely an opposition MP, but later to become Minister of Foreign Affairs as part of a coalition agreement between his New Zealand First party and the Labour-led government that would take office in 2005, said: “If you do not like our laws, there are thousands of Kiwis who will willingly take you to the airport, pay your departure tax, and fly you to the Islamic paradise of your choice.” Ruth Berry “Buy back the silver and live better, says Peters” New Zealand Herald (1 November 2004).

⁹ Razamjoo, above n 3, [108].

¹⁰ In order for a limit on a BORA right to be valid it must be “prescribed by law”, and not merely the product of an arbitrary decision by persons in authority. This is required by s 5 BORA, which reads (emphasis added): “Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” See discussion of this issue in Andrew Butler and Petra Butler The New Zealand Bill of Rights Act: A Commentary (LexisNexis NZ Ltd, Wellington, 2005) (“Butler & Butler NZBORA Commentary”) 151-153.
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provision maintaining parliamentary supremacy. Consider, for example, *R v Yong Bum Lee*, a case where the defendant was convicted at first instance of manslaughter under s 160(2)(a) Crimes Act 1961. Lee had attempted to claim that the religious exorcism that he performed (and which resulted in the accidental death by strangulation of a member of his evangelical Christian church) was a protected religious practice under s 15 BORA. This claim was not successful, because of the presence of s 4 BORA, which meant, according to the judge in his sentencing notes, his “religious beliefs [did] not allow [him] to break the laws of the land”. Justice Paterson’s remarks are typical of numerous other BORA cases where asserted rights have conflicted directly with legislation, and where s 4 has been invoked to give primacy to unambiguous statutes directing the courts to override rights. A strong indication in the positive law of the land, therefore, could have created difficulties for the burqa-wearing women’s request.

Looking overseas, it seems plain that legislation enacted in France in 2010, which prohibits the wearing of face-covering apparel in all public places, would altogether foreclose the possibility of the facial veiling of witnesses in French courtrooms. Moving to the Anglo-American world, where the adversarial trial process is central to the criminal justice system, the Sixth Amendment to the US Constitution provides that every defendant has the right to be “confronted with the witnesses against him”. In *Coy v Iowa*, the US Supreme Court struck down a state law providing for the screening of child witnesses in a child sex abuse case. The lead opinion of the Court found the presence of the word “confront” in the constitutional provision flatly precluded this arrangement, and that the accused had an absolute right to a facial confrontation with the child witness at trial. For Justice Scalia, in a judgment exhibiting his preference for an originalist and text-based construal of the US Bill of Rights, the Latin origins of the word, long-standing practice in the Western world, as well as the underlying

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11 Section 4 BORA provides: “No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), – (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of this enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.”


13 Ibid [13]; the Court also cited s 5 BORA, before commenting that: “[Section 15 BORA] does not override the provisions of the Crimes Act 1961.” See also, to similar effect, *R v Anderson* [23 June 2004] CA, CA27/04, [9]: “There is nothing in the Bill of Rights Act…that enables the defendant to set up his beliefs as a defence to particular crimes.”

14 *R v Yong Bum Lee aka Luke Lee* [20 December 2001] HC, Auckland, T10974 (sentencing notes of Paterson J), [7]. In fact, Lee subsequently had his conviction overturned on appeal, in part because of s 15 BORA considerations impacting on the issue of consent. I will consider *R v Lee* [2006] 3 NZLR 42 (CA) in the text below, accompanying ss 243-251.

15 For a list of cases where s 4 BORA has frustrated rights claimants, see Andrew Butler “Judicial Review, Human Rights and Democracy” in G Huscroft & P Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart, Oxford, 2002) 47, 57-59, in which the author cites 15 instances where s 4 has been invoked to validate rights-infringing enactments; eg, *R v Phillips* [1991] 3 NZLR 175 (CA) (upholding, in part because of s 4 BORA, s 6(6) Misuse of Drugs Act 1975, which provided that possession of more than 28 grams of cannabis was deemed not to be for personal use of possessor but for supplying others, “unless proved to the contrary”, thus negating the presumption of innocence in s 25(c) BORA).

16 See Lizzy Davies “France: Senate votes for Muslim face veil ban” *The Guardian* (UK, 14 September 2010). The law, which comes into effect in 2011, bans the covering of the face in any public space, with certain exceptions, such as for those wearing sports equipment, or engaged in “professional” activities, such as fire fighting, where this is deemed necessary.


18 Ibid 1016: “[T]he word ‘confront’ ultimately derives from the prefix ‘con-‘ (from ‘contra’ meaning ‘against’ or ‘opposed’) and the noun ‘frons’ (forehead).”

19 Ibid 1015-1016; citing Shakespeare’s *Richard II* (in the quotation that begins this chapter), the Bible (Acts 25:16, describing ancient Roman practice), and scholarly work claiming that the right to confrontation predated
rationale of the Confrontation Clause, compelled this result. While the US Supreme Court has subsequently softened its stance on the right to face-to-face confrontation, the wording of the provision created a stern textual barrier against doing so.

In the present case, where, of course, Moore DCJ did not have to reckon with the then non-existent French anti-burqa legislation, the Sixth Amendment, or anything like the express statutory prohibition of manslaughter that was at issue in Lee, there was no law of similar specificity that positively required the women to remove their veils. There were, however, two candidates that might qualify as such a law, and which taken together could be read as militating against the women’s claim under s 15. One relevant law is to be found in the District Court Rules, which provide that:

Except where otherwise directed by the Court or required or authorised by these rules or by any Act, disputed questions of fact arising at the trial of any proceeding shall be determined on evidence given by means of witnesses examined orally in open Court.

The presumption contained in r 495 that evidence should be given in “open Court” is an enunciation of the common law convention that the normal manner in which testimony is given requires that “judge, jury, witnesses, and accused are all present in the sight of one another” in the courtroom. This presumption clearly operated against the two women who wished to wear the burqa, as facial coverings were not, at first glance, consistent with the classical jury trial in England.

Much to the chagrin of Scalia J, the US Supreme Court would later qualify Coy in Craig v Maryland 497 US 836 (1990) (“Craig”); see discussion in Antonin Scalia “The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?” in G Huscroft & P Rishworth (eds) Litigating Rights: Perspectives from Domestic and International Law (Hart, Oxford, 2002) 19, 25-26. In Craig, a child witness was able to testify against her alleged sexual abuser in the presence of counsel in a separate room by closed circuit television. The Court distinguished Coy on the grounds that the statute at issue in Craig did not provide as strong a presumption in favour of the screening arrangement, but rather required judges to make fact-specific assessments of the need to protect individual children from trauma.

No doubt because of the textual difference between the US provision and s 25(f) BORA, which only refers to a right to “examine” witnesses, no attempt was made per se by the defence to assert a right of “confrontation” between the accused and the witnesses. The New Zealand Law Commission has explained that no such right exists in New Zealand: “It seems that prior to the New Zealand Bill of Rights Act 1990, no common law right to face-to-face confrontation existed in New Zealand.” New Zealand Law Commission The evidence of children and other vulnerable witnesses: a discussion paper (NZLC PP26, 1996) [196]; see also R v Accused [1989] 1 NZLR 660 (CA) (“R v Accused”), 670, where McMullin J makes the distinction explicit: “Unlike the Sixth Amendment, s 376 [Crimes Act 1961] gives, as the common law before it gave, a defendant only a right to be present at his trial, which is not necessarily a right to confrontation.”

District Courts Act 1947, r 495. See also the identical rules for the High Court; Judicature Act 1908, Sch II, Pt 5, r 496. I should note that Moore DCJ did not refer to the Rules, but preferred solely to regard the case as one to be determined under the common law and by reference to BORA.

R v Accused, above n 22, 664 (per Cooke P). See also Scott v Scott [1913] AC 417 (HL), 432-439, where Viscount Haldane LC states: “[T]he administration of justice must so far as the trial of the case is concerned, with certainly narrowly defined exceptions…be conducted in open Court”; and see discussion in Paul Rishworth, Grant Huscroft, Scott Optican & Richard Mahoney The New Zealand Bill of Rights (Oxford University Press, Melbourne, 2003) 695 (“Rishworth et al”), where Optican notes: “The common law has generally accepted the notion that it is always more difficult to lie to someone’s face.”
understanding of what constitutes an open court. Moreover, when read in conjunction with s 25(f) BORA, which legal commentators Butler and Butler claim affirms a common law presumption in favour of a right to a “face-to-face confrontation of prosecution witnesses”, the relevant law on this matter begins to look firmly weighted against the two Afghan witnesses. That said, r 495 equally clearly contemplates discretion for judges to order different courtroom arrangements. This happened, for example, in Aeromotive Limited v Page, where, in a civil case, the judge invoked a judicial discretion to allow video testimony from overseas. Justice Harrison stated that r 496 of the High Court Rules (the equivalent to r 495 of the District Court Rules) “vests the court with jurisdiction” to diverge from the basic presumption of physical presence at common law and in r 496. The judge made this ruling despite his observation that “physical presence is a significant factor in the adversarial process. For a witness under pressure, a metre or two fron an exponent of the art of penetrative cross-examination, there is no safe haven. The immediacy of the courtroom creates its own dynamic”. The absence of an express legislative direction that Mrs Salim had to unveil appeared, on balance, to create an opportunity for the judge to order an arrangement that accommodated her religious beliefs. This could be done, to use the framework of r 495, by acting under the authorisation of “any Act”, which, as we shall see in this case, would turn out to be s 15 BORA. In a sense, absent any direct legislative guidance, the Court in Razamjoo would be operating in lieu of the legislature, and would, presumably, analyse its own actions in a way that is similar to the Attorney-General’s duty to “vet” all bills for consistency with BORA. Unlike instances where judges are scrutinising more or less specific legislative directions, this case was of a type where the usual deference to the legislature’s choices was absent and therefore the judge had more licence to consider whether it was necessary for the women to unveil. This is reinforced by the fact that s 3 BORA provides that BORA applies to “acts done” by the judicial branch of government, which suggests that all orders made in court should be crafted so that they are

26 Regardless of whether the common law is well settled in an area, it is now well established that this source of law qualifies under the “prescribed by law” requirement of s 5 BORA, even in cases where the common law imposes limits that are not ascertainable in advance of litigation; see Duff v Communicado Ltd [1996] 2 NZLR 89 (HC), 100. See discussion in Butler & Butler NZBORA Commentary, above n 25, 152.
27 Butler and Butler also note the presumption of face-to-face confrontation is rebutable if good reasons can be adduced to make alternative arrangements for witness testimony. Ibid [23.8.16].
29 Ibid [15].
30 For the sake of brevity, henceforth I shall refer to the two prosecution witnesses collectively as “Mrs Salim”, who in fact spoke on behalf of her similarly-situated co-witness.
31 See BORA, s 7. The need to vet prospective legislation is a necessary consequence of the Attorney-General’s duty to report on inconsistency to Parliament. This task is undertaken by Ministry of Justice or Crown Law officials.
32 See Paul Rishworth “Human Rights” (2005) NZ Law Review 87 (“Rishworth ‘Human Rights’”), 103, where Rishworth notes Hosking v Runiting [2005] 1 NZLR 1 (CA), the first case relying on s 5 in a dispute over the content of the common law. The absence of legislative direction in the case meant that Keith J had to conduct a thorough discussion of whether there was a compelling need for growth in the relevant common law area. Where legislation is involved, such an enquiry into the need for the legislation tends to be more cursory, given the traditional deference to legislative choices in this country. See, eg, R v Hansen [2007] 3 NZLR 1 (SC) (“Hansen”) [106]: “If Parliament enacts a limit, it must generally be taken to have regarded that limit as reasonable and justified in the free and democratic society in which it is designed to operate.”
33 Rishworth distinguishes actual decisions in cases from acts “perpetrated” by judges during proceedings, such as, in the present case, the act of a judge in pronouncing whether or not a witness can give veiled testimony. In the latter type of judicial acts, actions for breach of BORA provisions can be made in appeals, as occurred in Upton v
consistent with BORA. This is not to say, of course, that Mrs Salim’s religious right had to prevail, as s 5 BORA provides that the rights contained in BORA can be subject to reasonable limits. Thus, the order by Moore DCJ had to be consistent not only with s 15, but also was potentially moderated by s 5 (and the fair trial right in s 25).

2.1 The core reasoning of Judge Moore

2.1.1 Sincerity of belief: is wearing the burqa a religious practice?

Judge Moore considered that the first necessary step in the case was to determine whether Salim’s desire to wear the veil was in fact a religious practice that triggered analysis under s 15 BORA. If it was not, then Mrs Salim could not avail herself of the BORA protections. To this end, Mrs Salim testified that if she were to remove the burqa in court she would be “in trouble” with God on the Day of Judgment. She was particularly concerned about unveiling in front of the accused, who was a friend of her family but not within the category (typically close relatives) who were permitted to see her face.

The defence countered by saying that there were many conflicting views among Muslim authorities as to the need for women to be veiled, none of which could be “conclusive”. Also, it was argued that the Qur’an did not require women to wear the veil or to be kept apart from men. The corollary of this point was that wearing the burqa was merely a cultural choice, or individual preference, that was not required by Islam and therefore not a religious practice for the purposes of s 15 BORA. Interestingly, comments in the media by certain Muslim leaders supported the defence argument, with one cleric saying that it was not a religious issue and that the burqa should “definitely” be removed in court.

Judge Moore dealt with these submissions by referring to the American case of McMillan v State of Maryland, which advised against courts getting involved in deciding between different doctrinal views on religious practices, warning that to do so would be to enter a “theological thicket” and would amount to the courts conducting, in effect, heresy trials – a


34 Section 15 BORA reads: “Every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.”

35 Author’s notes from hearing in Police v Razamjoo (26 October 2004, Auckland District Court); on file with author. See also Elizabeth Binning “I’d rather kill myself than remove veil, woman tells court” New Zealand Herald (27 October 2004).

36 Another prosecution witness, Professor Paul Morris, a religious studies professor from Victoria University, located for the Court the principal scriptural basis for Salim’s claim: “O Prophet, tell your wives and daughters, and the women of the believers to bring down over themselves part of their outer garments. That is the more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful.” The Qur’an Sura 33:59; cited in Razamjoo, above n 3, [16]. See also Sura 24:3, quoted in ibid. According to Professor Morris, this passage is interpreted in many parts of Afghanistan (the birthplace of the two witnesses) as requiring women to wear the burqa.

37 Razamjoo, above n 3, [54].

38 Ibid [57] & [59].

39 This is the opinion of Dr Zuhair Araji, a Shiite minister at the Imam Ali Institute in Epsom. See Monique Devereux “Experts: wearing veil a personal choice” New Zealand Herald (30 October 2004). Malaysian lawyer Kamar Ainiah Kamaruzaman claimed that “in Islam it is not compulsory to veil your face in public”, and that the reasons for doing so are merely historical or cultural. See Chris Barton “Behind the Burqa” Weekend Herald (7 August 2004).

40 258 Md 147, 153 (1970).
task that the judicial institutions of secular countries are ill-equipped to perform. The only proper course, according to this US precedent, was to enquire into whether the religious claimant’s belief was sincere and bona fide. Judge Moore accordingly did not inspect closely the doctrinal underpinnings of Mrs Salim’s belief and merely decided that her testimony was sincere, thus bringing the women’s claims within the prima facie ambit of s 15 BORA. If the defence had produced a Muslim religious figure to testify that the wearing of the burqa was not a religious practice (although in this case no such attempt was made), or that Islam did not compel the wearing of veils, it apparently would have been deemed irrelevant.

This stage of the enquiry could conceivably have taken a different route. International jurisprudence falls into two schools regarding the question of whether a religious practice warrants prima facie protection. As we saw in Chapter 3, the European Court of Human Rights generally takes the view that the European Convention on Human Rights’ protection of manifestation of religious belief covers only those practices that have a very direct link to the religion in question, and not those that are merely “motivated or influenced by a religion or a belief”. In practice, this has meant that it has been necessary for the European Court to detect a degree of compulsion in the religious activity, or – and this of course would often amount to the same thing – to find that it objectively constitutes a core tenet of the religion in question. For example, in Khan v UK, a Muslim man, who had been arrested for abduction when he married a 14-and-a-half-year-old girl in an Islamic ceremony, had failed in his claim that the marriage was a Muslim religious practice for the purposes of the European Convention. Apparently, Islamic law permitted the marriage of girls at 12 (under British law at the time, 18 was the lower age limit for marriage without parental consent), but the European Commission on Human Rights held that, because Islam did not require marriage at this age, the applicant could not successfully claim that his marriage was a “practice” of his religion for the purposes of Art 9(1) ECHR. The individual’s sincere belief that his religion permitted such a marriage

41 For a good example where a court made a choice between differing versions of Islam, see Kamaruddin v Public Services Commission, Malaysia [1994] 3 MLJ 61, Civ App No 01-05-92, (5 August 1994) (SC). In this case, the Malaysian Supreme Court ruled that Islam did not require women to wear face-covering veils, and so considered the wish of a public service employee to wear such a garment at work to be religiously invalid. The Court stated: “[W]e find that there is a misconception on her part with regard to her interpretation of Surah 24 that she must not expose her body including her face.” The Court based this finding on a senior Islamic cleric’s testimony. Significantly, Art 3(3)(1) Constitution of Malaysia states that Islam is the established religion of the Malaysian Federation.

42 See Razamjoo, above n 3, [66].

43 Ibid [67].

44 For a full discussion of the contested nature of veiling within Islam, and detailed discussion of Razamjoo from the interdisciplinary perspective of a social anthropologist, see Erich Kolig “New Zealand Muslims: The Perimeters of Multiculturalism and its Legal Instruments” (2005) 20 NZ Sociology 73; see also the commentary on the case by religious studies academic Paul Morris (who testified on behalf of the women in Razamjoo), Paul Morris “Covering Islam – Burqa and Hijab: Limits to the Human Right to Religion” (2004) 2 HRRJ 119 (“Morris ‘Covering Islam’”).

45 See text accompanying ns 476-479 in Chapter 3.

46 Article 9(1) European Convention on Human Rights and Fundamental Freedoms ((4 November 1950) 213 UNTS 221 (“European Convention” or “ECHR”) reads: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

47 Arrowsmith v the United Kingdom (1978) 3 EHR 218 (“Arrowsmith”), [71]. This was in fact a decision of the European Commission on Human Rights; nonetheless, as we shall see, the “Arrowsmith test” has subsequently become a settled feature of ECHR law on Art 9.


49 Ibid 255. See also Arrowsmith, above n 44, [72]-[75], where the Commission found that, while the complainant’s belief in pacifism came within the protection of Art 9(1), the complainant’s actions in distributing
was thus deemed inadequate to satisfy the threshold requirements for gaining protection under the Convention.

This “necessity” test has been utilised in numerous decisions of the European human rights organs. However, as Carolyn Evans has pointed out, its application has been somewhat haphazard and its results manifestly unfair for minority religious claimants. Sometimes the Court considers expert testimony in order to determine if a practice is “necessary”, while in others it appears to employ its own subjective views as to what is a necessary “practice”. It is apparent that in the case of Mrs Salim, a European approach to determining whether her belief was a “practice” under s 15 could have placed her wish to wear the veil outside the scope of BORA. Chief among Evans’s arguments against the European method, and relevant to Mrs Salim’s case, is the complaint that dissenting members of a faith could have their sincerely held religious practices called into doubt if a court decided to give weight to the testimony of orthodox members of the hierarchy of the same religion. Thus, a religious authority espousing a scriptural interpretation deeming the burqa to be surplus to the requirements of Islamic law could, under the European approach to adjudicating on such matters, be called to testify that Islam does not require the burqa and so disentitle Mrs Salim from protection under s 15.

The North American courts have dealt with submissions that resemble these lines of European authority and have consistently declined to delve into doctrinal disputes within religions. For example, in *Thomas v Review Board of the Indiana Employment Security Division*, a factory worker who was a Jehovah’s Witness, resigned from his job when he was transferred to a part of the factory that was directly involved in armaments manufacture. He declared that his religion forbade employment in weapons production. The Indiana Supreme Court decided that pacifist pamphlets in relation to the conflict in Northern Ireland was more related to political activity and did not as such express her beliefs. The Commission would apparently have regarded more general leafletting that counseled against war in toto to be a protected activity. See, eg, *Hasan and Chaush v Bulgaria* (2002) 3 EHRR 55, [60]; and *Pretty v UK* (2002) 35 EHRR 1, [82].


51 In *D v France* (1983) 35 E Comm HR 199 10180/82 (“*D v France*”), the Commission accepted expert evidence from Jewish religious leaders saying that the applicant’s refusal to hand a repudiation letter (or “guet”) to his ex-wife, as was the custom under Jewish law in order to allow her to re-marry, was not in fact required by Jewish law.

52 In *Valsamis v Greece* (1997) 24 ECHR 294 (18 December 1996) (“*Valsamis*”), the European Court, having received no expert testimony, rejected the claims of Jehovah’s Witness parents that compulsory participation by their children in a parade on Greek National day (which fell on the same day as the outbreak of fighting between Greece and Italy in World War II) offended the pacifist tenets of their religion. Evans compares this case unfavourably with *West Virginia State Board of Education v Barnette* 319 US 624 (1943), in which the US Supreme Court allowed an exemption for Jehovah’s Witness children from saluting the flag, noting that “[N]o official…can prescribe what shall be orthodox in…religion”; *Evans Freedom of Religion*, above n 51, 120; see also discussion in Ahdar & Leigh *Religious Freedom in the Liberal State*, above n 51, 164. In another case, the Court “assumed” for the purpose of argument that the wearing of a veil by a university student in Turkey was a “practice”, but went on to dismiss the application by recourse to the limitations provisions contained in Art 9(2) ECHR, *Sahin v Turkey* (2005) 41 ECHR 8 (29 June 2004) (“*Sahin*”), [71]; aff’d by European Court of Rights Grand Chamber in *Sahin v Turkey* (2007) 44 ECHR 5 (10 November 2005), [78].


54 Indeed, Morris reports that the president of the of the Federation of Islamic Associations of New Zealand requested a finding on the Islamic legal requirements for veiling from the association’s committee of imams. A narrow majority found that the “law could be satisfied with a head covering less than the full head and face veil”. Morris “Covering Islam”, above n 44, 121-122.

55 450 US 707 (1981) (“*Thomas*”).

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his belief was not a religious one, partly on the basis of the testimony of a co-worker (also a Jehovah’s Witness) who did not believe their religion required such conduct.\(^57\) This led the Court to decide that the man resigned because of a philosophical scruple and not a religious one, and that, because mere philosophical beliefs did not fall within the scope of the Free Exercise Clause of the US Constitution, his claim failed. The US Supreme Court rejected this approach, stating that: “[I]ntrafaith differences” of this kind were “not uncommon among followers of a particular creed”, and that courts were “ill equipped to resolve such differences.”\(^58\) The only proper function of the courts in the initial enquiry into a religious claim was to determine that the claimant had resigned because of an “honest conviction”\(^59\) that his religion forbade such work.

The experience in Canada regarding this preliminary enquiry mirrors that of the US. In \textit{Syndicat Northcrest v Amselem},\(^60\) the Canadian Supreme Court rejected the lower courts’ reliance on testimony by a Jewish rabbi who declared that the religious practice in dispute in the case was not required by the Jewish faith. The lower courts had used this evidence to find that the practice was not a religious one for the purposes of the Canadian Charter.\(^61\) The Canadian Supreme Court, referring approvingly to the finding in \textit{Thomas},\(^62\) held this methodology to be defective, declaring that the fact that the religious conduct was merely motivated by the claimant’s religion and was sincerely held was enough to trigger the religious protections in the Charter. Moreover, the Court held that a religious claim which is based on a perception that the practice is merely a \textit{voluntary} aspect of a claimant’s religion would also come under the protection of the Charter.\(^63\) The religious claimant went on to win the case when the Court decided that the interference on his right was a non-trivial one and was not justified under the limitations test in the Charter.\(^64\)

Judge Moore clearly favoured the approach in North America, as indicated by his reliance on US authority. Indeed, this would appear to conform to New Zealand precedent. In \textit{Feau v Department of Social Welfare}, Justice Elias in the High Court held that the appellant’s sincere belief that his religion forbade him from attending periodic detention training on a Saturday (which was his Sabbath) was determinant in the initial stage of a s 15 BORA claim.\(^65\) There was

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\(^{57}\) Ibid 715.
\(^{58}\) Ibid. The Court went on to say that: “Courts are not arbiters of scriptural interpretation”; ibid 716.
\(^{59}\) Ibid.
\(^{60}\) [2004] 2 SCR 551 (SCC) (“\textit{Amselem}”). Section 2, Canadian Charter of Rights and Freedoms, Part I Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK) (“Canadian Charter”) provides in relevant part: “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.”
\(^{61}\) Ibid [65]. Two rabbis had given conflicting testimony on this point and the trial judge had favoured one of them.
\(^{62}\) Ibid [45]. The resemblance between the US and Canadian courts ends at this point, however. Since 1990, the US has held the state to a standard of formal neutrality, whereas in Canada the courts apply the principle of substantive neutrality.
\(^{63}\) Reproduced in full, the \textit{Amselem} test provides: “[A]t the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered”; ibid [56].
\(^{64}\) The only limitation on this sincerity test was a caution that courts should be satisfied that claims are “neither fictitious nor capricious, and that it is not an artifice”; ibid [52]. The US Supreme Court offers a similar warning to discount claims that are “so bizarre, so clearly non-religious in motivation, as not to be entitled to protection”; \textit{Thomas}, above n 56, 715.
\(^{65}\) (1995) 2 HRNZ 528 (HC).
The main lesson to be learned from the discussion by Moore DCJ at this initial stage in a s 15 BORA case is that law practitioners arguing that a practice is not a religious one cannot rely on testimony from religious authorities that contradicts a claimant’s belief that his or her faith requires certain behaviour. All that practitioners can do is cross-examine claimants as to the sincerity of their subjectively held beliefs. For this reason, this initial “filter” on religious claims might be regarded as a very modest one, capable of accommodating not only practices that are uncontroversially central to a religion, but also (to repeat the language of the House of Lords in a case that dealt with manifestation of religious belief under the European Convention) those that are “relatively peripheral matters observed by only the most devout”. Moreover, the fact that, under an Amselem-type enquiry, the claimant need not even subjectively view his religious beliefs as being compelled by his religion makes the task of practitioners who seek to defeat a religious claim even more difficult.

The defence in the present case did in fact attempt to undermine Mrs Salim’s claim as to her sincerity of belief by gaining an admission that her driver’s licence contained an unveiled photograph, which contradicted her declaration that she never removed the veil in public. However, as would be expected under the North American approach (at Supreme Court level in both the US and Canada) to determining sincerity, this was not regarded as a relevant factor by Moore DCJ at this initial stage of the enquiry.

We shall now proceed to the next stage of the Moore DCJ’s discussion, which was the conduct of s 5 BORA analysis.

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66 Similarly, in a Human Rights Commission mediation in New Zealand, evidence that not all Muslims “conformed to the practice of boys wearing long trousers” was not relevant to a complaint made by a Muslim against school uniform policy under the Human Rights Act 1993; C149/94 Human Rights Commission (1994). For other New Zealand use of the sincerity requirement, see Friends and Community of Ngawha Inc v Minister of Corrections [2002] NZRMA 401 (HC), [42]-[43].

67 One could perhaps imagine a situation where a religious authority’s testimony regarding religious texts might be relevant; say, where someone claimed that Islam required her to eat ice cream on the witness stand. However, such testimony would not be part of a doctrinal enquiry into the tenets of the religion per se, but rather would be one factor in determining sincerity; see R v Secretary of State for Education and Employment ex parte Williamson and Others [2005] 2 AC 246 (HL), [22] (“Williamson”) where Lord Nicholls states: “The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.”

68 Ibid [62]. The UK House of Lords acknowledged the Arrowsmith doctrine that not all religious practices amount to a manifestation of religion for the purposes of the European Convention, with Lord Nicholls affirming Arrowsmith: “Clearly this is right”; ibid [31]. However, the actual determination by their Lordships of whether the relevant practice (in this case certain parents claimed that they manifested their religious beliefs on corporal punishment when they placed their children in schools where that type of punishment is administered) was within the scope of the Convention was not a particularly rigorous one. Moreover, Lord Nicholls accepted that a “perceived obligation” on the part of the claimants was sufficient on its own, without expert testimony; ibid [32]. Also, Lord Walker gives “the appellants the benefit of the doubt” in overcoming this initial hurdle; ibid [69]. If however, the practice merely “scrapes over” this initial enquiry, this might have a bearing on the proportionality debate when considering justified limitations on the right in the second stage of the enquiry; ibid [66].

69 Note that Moore DCJ relied exclusively on US precedent and did not in fact cite Amselem, leaving the issue of whether subjective, voluntary religious practices are sufficient in a s 15 BORA enquiry for another case. See also Williamson, where Lord Nicholls comments in obiter dicta that “perceived obligation” is not a prerequisite to this enquiry and acknowledges the liberal attitude taken by the Canadian Supreme Court in Amselem; Williamson, above n 67, [33].
4. The burqa trial

2.1.2 The fair trial right: a reasonable limit?

There’s no art to find the mind’s construction in the face.\textsuperscript{70}

Having determined that the conduct of Mrs Salim was a religious practice for the purposes of s 15, the enquiry moved on to consider whether the right could be subject to reasonable limits under s 5 BORA.\textsuperscript{71} The dispute centred on the fair trial rights contained in s 25 BORA, which could be counted among the “fundamental rights and freedoms of others” that are regarded by the International Covenant on Civil and Political Rights as an acceptable grounds for limiting a right.\textsuperscript{72}

The Crown made multiple references to judgments that indicated that a fair trial was not necessarily a perfect one from the point of view of the accused.\textsuperscript{73} This “imperfection” was necessitated by the need to ensure fairness to other people who had been drawn into the criminal process, which, in this case, meant the witnesses themselves. Also the right of the broader community to see offenders efficiently brought to justice was invoked.\textsuperscript{74} The prosecution did, however, concede that there must be some aspects of trial procedure that were so fundamental to a fair trial that they could not be abandoned without destroying the fairness of proceedings. Clearly, the defence considered the ability to assess facial demeanour was one of these aspects. The Crown did not, and backed this up by reliance on social science research from the US that had consistently shown that human beings are poor judges of the veracity of others when that determination is made from observing facial demeanour alone.\textsuperscript{75} In any case, the Crown’s argument continued, most of the other aspects of testimony would remain accessible, such as verbal demeanour, and the actual content of what the women would say.\textsuperscript{76}

Crucially, numerous other exceptions to open court testimony (such as in sexual abuse cases, admission of written pre-trial testimony, and gang violence trials) were also cited to indicate that, since there were so many other instances of witnesses testifying in alternative modes, it

\textsuperscript{70}William Shakespeare \textit{Macbeth} Act I, sc 4.

\textsuperscript{71}Section 5 BORA reads: “Subject to Section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society.”

\textsuperscript{72}Article 18(3), 21 UN GAOR Supp (No 16) at 52, UN DOC A/6316 (1966), 999 UNTS 171, (entered into force 23 March, 1976) (ratified by New Zealand 28 December, 1978) provides: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Note that the limitations clause in Art 18(3) has been quoted verbatim in New Zealand case law, and is therefore relevant for construing s 5 BORA; see \textit{Re J (An infant): B and B v Director-General of Social Welfare[1996] 2 NZLR 134, 145 (CA)}; see also \textit{Hansen}, above n 32, [7] (per Elias CJ concurring).

\textsuperscript{73}For example, the Crown cited \textit{R v Lyons [1987] 2 SCR 309, 362} as authority for its position that “a fair trial does not of itself entitle an accused to the most favourable procedures”. See \textit{Razamjoo}, above n 3, [43].

\textsuperscript{74}For example, regarding the interest of the public, see \textit{R v L [1994] 2 NZLR 54 (CA)}, 60, where Richardson J says that a fair trial is secured by striking a “balance between the interests of all the parties involved including the interests of the general public, the hidden parties to the proceedings.” Concerning the interest of the public in the effective prosecution of criminal charges, see \textit{R v Hines [1997] 3 NZLR 529, 549}. Moore DCJ summarises these submissions in \textit{Razamjoo}, above n 3, [43].


\textsuperscript{76}Crown submissions in \textit{R v Razamjoo [35]}; on file with author.
could not be argued that there was a compelling need to require the witnesses to unveil. One particularly striking precedent was that of *R v Atkins*, a Court of Appeal case in which witnesses to a gang-related killing testified from a remote location by closed circuit television. The accused and defence counsel were unable to assess visual or verbal demeanour, as the faces and voices of the witnesses were distorted. In response to protests from the defence, the Court of Appeal had stated: “We doubt there is much weight in this complaint, and in the circumstances consider any disadvantage must be comparatively slight.” In *Atkins*, the Crown had not used the social science data deployed in *Razamjoo* in written submissions, but the clear inference was that the Court of Appeal was satisfied – without needing any corroborating scientific proof – that a fair trial was possible, even though counsel would not have the benefit of assessing facial (or verbal) demeanour. The Court was apparently content with the Crown’s assertion that “what the witness says” could still be scrutinised and “matched against other testimony”. This seemed to be an adequate arrangement to the Court, which was surprisingly phlegmatic about the erosion of open court testimony that had gone on in the past.

What is at issue in this respect is an inroad into generally accepted trial processes, something which has occurred from time to time over the years but without infringing the basic concept of a fair trial.

The defence in *Razamjoo* made no rebuttal to the social science claim. Its most significant submission on the point of demeanour evidence was that of the right of the community for justice to be *seen* to be done. One element of this was arguably the community’s perception that open justice required faces to be visible for all in court.

In summary, the Crown was asking the judge to refrain from infringing the witnesses’ religious freedom protection for two reasons. First, that there could be no important objective achieved by an order to unveil, as the exceptions in other types of trials indicated that this was not essential for creating a fair trial. And second, that, as shown by the scientific research, an order for the two women to unveil and so render their facial demeanour accessible to cross-examination, had no rational connection to the right of the accused under s 25(f) to “examine” the witnesses against him. These two points, based on the proportionality test propounded by the Supreme Court of Canada in *R v Oakes* (and subsequently endorsed by the Court of Appeal in *Moonen v Film and Literature Board of Review*) worked together, in the view of the prosecution, to render any order to unveil an unreasonable interference with the religious right.

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[77] The Crown also noted that the legislature has itself indicated that facial demeanour is not essential for a fair trial, as blind people were eligible to serve on juries; Juries Act 1981, s 16AA; ibid [46].
[78] [2000] 2 NZLR 46 (CA) (“*Atkins*”); cited in ibid [21].
[79] *Atkins*, above n 78, [27].
[80] *Atkins*, above n 78, [27].
[81] Crown submissions in *R v Atkins* CA 521/99 [62]. In fact, this assertion was made regarding the Crown’s (disallowed) wish that the jury too should be unable to view the faces of witnesses.
[82] *Atkins*, above n 78, [21].
[83] The defence cited *R v Sussex Justices exp McCarthy* [1924] 2 All ER 635 (CA); see *Razamjoo*, above n 3, [60].
[84] [1986] 1 SCR 183.
[85] [2000] 2 NZLR 9 (CA). The *Oakes* test was first considered in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA), and was subsequently endorsed by the Supreme Court as the template for assessing limitations on BORA rights in *Hansen*, above n 32, [185]. I use the *Oakes* methodology more fully in Chapter 5 of this thesis, where I analyse the legislative prohibition of female genital mutilation vis-à-vis s 15 BORA.
Judge Moore appeared to accept the Crown argument based on the research data, although it was clear that he was uneasy with the inference from it that the prosecution sought. In support of the Crown submission, the judge conceded that conclusions from the facial demeanour of witnesses from different cultures needed to be carefully drawn, because of different reactions across cultures to cross-examination. Yet the judge still considered facial demeanour useful in many situations that were not contemplated by the research data (which had not been compiled from real trials but from artificial clinical experiments). For example, he noted the unique dynamics of real trial cross-examinations when witnesses abruptly change their facial expression if subjected to a surprising line of questioning, a phenomenon that the research did not explore. Regarding the actual testimony at the hearing as to sincerity of belief from Mrs Salim while wearing the burqa, the judge commented that there had been a “strong sense of disembodiment”, which he compared to the difficulty in gaining a sense of character from a phone call from a stranger, or, more colourfully, the “voice of the rogue computer in ‘2001 A Space Odyssey’”. Because of this, it took more time to get a sense of a witness’s character, although, interestingly, the judge did not go so far as to say that it was impossible to arrive at this “sense”. Despite these reservations, however, and, perhaps, driven to do so more by precedents such as Atkins than by the scientific data, the judge was “reluctantly forced to conclude that there could be a fair trial even if Mrs Salim and other witnesses of like belief gave evidence wearing their burqas”.

And that may have been the end of the matter, had it not been for one extra factor that the Crown had not directly considered in its submission. This was the right of the community literally to see justice being done, which had been mentioned in the defence submission. According to this a view, a criminal trial was properly seen as a “public event” in which the public were entitled to see and hear the proceedings. Any departure from normal courtroom procedures, in the opinion of the judge, could see the courts lose the confidence of the public and bring the judiciary into “disrepute”. The judge considered public expectations of what a trial entails to be a decisive consideration, and the ability of counsel and trier of fact to be able to assess facial demeanour was one aspect of a trial that the public had a right to expect to see being observed in practice. The judge then noted that the right to practise religion was not an absolute one, and that it could be limited by the countervailing right of public expectations as to proper trial processes. Finally, remarking on a concession by Mrs Salim in her testimony that she was prepared to alter some of her customary practices in order to adjust to life in a new society, the judge held that she would have to remove her burqa while testifying in the substantive part of the trial, though she would be protected by a screen from the gaze of the defendant and of the general public. This minimum curtailment of the religious right perhaps accords well with the Oakes test requirement that rights should be impaired no more than is necessary to secure the objective sought by the limitation.

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86 Razamjoo, above n 3, [77].
87 Ibid [78].
88 Ibid [69].
89 Ibid [106].
90 See text above accompanying n 83.
91 Razamjoo, above n 3, [93].
92 Ibid [109].
93 Ibid [97]. The judge cited R v B [1995] 2 NZLR 172 (CA), 182, where Richardson J states: “[T]here are limits on the absoluteness of the rights in the Bill of Rights. They reflect the fundamental consideration that individual freedoms are necessarily limited by membership of society and by the rights of others in the interests of the community.”
94 Razamjoo, above n 3, [111]
95 For application of this limb of the Oakes test requirement that rights should be impaired no more than is necessary to secure the objective sought by the limitation.
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There was no detailed discussion in the decision regarding the quality of the research data, nor of whether it was appropriate to use it in this country. One example of where social science has been invoked in New Zealand was in *Gisborne Herald v Solicitor-General*, where research had been deployed in an unsuccessful attempt to show that pre-trial media disclosure of information likely to prejudice a jury had no such effect. In that case, Justice Richardson noted that assertions in Canada and the US in both empirical research and case law had been inconclusive on this issue, and that in any case it possibly did not apply to New Zealand society. There was apparently no empirical data that supported the public policy assumption that juries could be contaminated by media reporting of a crime pre-trial, but this was not enough to dislodge the preference in New Zealand to curtail freedom of media expression in order to secure a fair trial. This long-standing rule therefore has similarity with the rule of facial demeanour that was asserted in the present case. That is, that an absence of social science data that supports a long-standing rule is not sufficient to abandon the rule. These rules, it appears, have a resilience that is not easily broken down by scientific data that is used in tandem with the *Oakes* requirement that limitations on rights must be rational.

As mentioned above, the quality of the research data was not evaluated by Moore DCJ, save where he mentioned that it did not include any actual research done on real juries. Despite this lack, however, the conclusions reached by numerous experts conducting experiments assessing the ability of people to assess veracity from facial demeanour alone stated universally that it was unreliable, leading one commentator to conclude:

> Taken as a whole, the experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe non-verbal behaviour in judging whether someone is lying. There is no evidence that facial behavior is of any benefit; some evidence suggests that observation of facial behavior diminishes the accuracy of lie detection.

To take one experiment that was critically evaluated by Olin Guy Wellborn III, it was recorded that laboratory subjects, when asked to assess the veracity of a series of videotaped interviews, had a success rate of .467 where only facial demeanour was available (ie, no audio or transcript). When subjects based their judgments on transcripts alone, this improved considerably to .625. However, it is interesting to note that when *all* evidence (including facial, audio and transcript) was available in this experiment, the success rate rose to .637, which was the highest score in all the tests. Wellborn brushed this last result aside, saying it was “not significantly higher” than the transcript-only result, but I would suggest that in the context of criminal trials, where the consequences of conviction for defendants can be very serious, it is significant. Taking this last result into account, Moore DCJ’s decision to order the unveiling of the face is supported by the experimental evidence.

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97 Ibid 575.
98 Ibid.
99 For discussion of this “resilience”, see Rishworth “Human Rights”, above n 32, 107.
100 Wellborn “Demeanor”, above n 75, 1088.
101 Wellborn describes the conditions of the experiment (reported in J Hocking et al “Detecting Deceptive Communication from Verbal, Visual, and Paralinguistic Clues” (1979) 6 Hum Comm Res 33) thus: “Respondents were senior criminal justice students who were told that ability to lie successfully is important in police work, that the experiment would measure their aptitude in this regard, and that the results would be reported to their school and might affect such things as letters of recommendation.” Ibid 1084.
102 Ibid 1085.
103 Ibid.
104 In Canada, for example, the issue of full-face veiling has received recent attention in a sexual assault charge by a burqa-wearing complainant regarding events alleged to have occurred in the mid-1980s. The complainant wishes
The burqa trial now appears more rational than the research (as it was presented by the Crown, who sought to gain permission for Mrs Salim to testify fully veiled) suggests.

The Crown cited some overseas cases where the Wellborn data had been discussed. Justice Kirby in the High Court of Australia (in the context of appellate review of trial court evaluation of demeanour evidence) considered the social research very persuasive. On the other hand, American precedent is less supportive, and unfortunately was not cited by either the Crown or the defence. In Morales v Artuz, a witness in a criminal case wished to wear dark glasses (out of fear of the accused) and the court allowed his request, relying in part on Wellborn’s findings, and doing so despite the Sixth Amendment’s affirmation of the right of an accused to confront the witnesses against him. This decision, however, was sharply criticised (and not followed) by a later case, which opined that the social science data regarding demeanour was unlikely to be accepted by the US Supreme Court, should it ever have occasion to decide on the matter.

Clearly, therefore, the social science data could have benefited from closer scrutiny by the judge in this case. This lack, however, can largely be explained by the fact that the judge chose to decide the issue on the grounds of what the judge considered the community thinks a criminal trial should involve, and not per se on the grounds of the scientific utility of demeanour evidence. The resilience of this expectation, which has its analogues in other areas of the criminal law where lawyers have attempted to invoke science in order to dislodge long-established legal and cultural assumptions, is evidently not susceptible to arguments based on the currently available, albeit limited, scientific data. That said, despite pronouncements by the judge on the necessity of preserving basic cross-examination procedures in order to maintain public confidence in the trial process, it seems clear that the social science data (alongside prior statutory and judge-made exceptions to the presumption in favour of full-face testimony) played an important, albeit perhaps subsidiary, role in Moore DCJ’s decision to order the arrangements described at the start of this chapter.

to wear the garment while testifying against her alleged assailant. See Natasha Bakht “What’s in a Face? Demeanour Evidence in the Sexual Assault Context” in E Sheehy (ed) Sexual Assault Law, Practice and Activism in a post-Jane Doe Era (University of Ottawa Press, Ottawa, forthcoming); available at: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1550233>. Whereas the Razamjoo controversy was decided in the context of a relatively minor insurance fraud matter involving a car that the defendant fraudulently claimed was stolen, the Canadian case involves significantly higher stakes, and will, I suggest, more severely test the witness’s request to remain veiled form the defendant.

105 State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) (1999) 160 ALR 588 (High Court of Australia), [68]-[94]. Kirby J has, however, been somewhat of a lone voice, and one academic commentator has suggested that the jury is still out on the implications of this social science data; see H Luntz “Editorial Comment: Round-up of cases in the High Court of Australia in 2003” (2004) 12 TLJ 1, 19.

106 (2001) 281 F 3d 55. The case cites, inter alia, the Wellborn paper in fn 3.

107 Romero v Texas (2004) 136 SW 3d 680. In Edmunds v Deppisch (2002) 313 F 3d 997, 1000, Posner J described the lack of judicial authority based on the Wellborn data as being a result of the research being “too outré to have been litigated” in the context of excluding a witness’s recollection of demeanour.

108 Romero v Texas (2004) 136 SW 3d 680, 688. In this case, the witness appeared at a criminal trial wearing dark glasses, a baseball cap and a jacket with an upturned collar.


110 Some proponents of the use of scientific data in criminal trials lament the persistence of what they pejoratively call “folk psychology” to maintain scientifically unsupported assumptions in legal settings in the face of advances in science. Moore DCJ’s reliance on public perceptions as to what is necessary for a trial to be “fair” could be attacked on this basis. See ibid 628-652.
2.2 Peripheral factors in Razamjoo

In the tradition of judicial minimalism, Moore DCJ did not thoroughly engage with all the issues put to him by counsel. Two further matters, which were the subject of submissions and did elicit some comment by way of asides by the judge, are worth considering here.

2.2.1 The “New Zealand is a secular country” complaint

There was a public perception surrounding the hearing that, as New Zealand is a secular state, there ought not to be any concessions made to religious belief in the necessarily rational endeavour of the ascertainment of facts in a criminal trial. Acting in this respect as a conduit for the public mood, the defence argued that to allow veiled testimony would be to “create a separate justice system for Muslims in what is essentially a secular society”.

There are some precedents where courts have prevented religious rites from taking place in the courtroom, but these instances may be distinguished from the present case in that they involved occasions where there would have been an element of the court taking part in the ritual. For example, in Mair v Wanganui District Court the High Court upheld a conviction for contempt of court where the appellant had, against the express order of the judge in the lower court, attempted to say a Maori prayer, or karakia. Justice Heron remarked that courts are secular institutions and that “involving any person in a karakia against their personal wishes is insensitive and unacceptable”. The judge appeared particularly concerned that the institution of the court might be considered to have joined in the religious ceremony, amounting to an endorsement by the state of the religion in question. Such an endorsement (or, to use the American phraseology, establishment) of Maori spiritual beliefs would infringe on the rights of others who did not share the religious creed that was being invoked. This type of violation of private religious belief is arguably prohibited by s 13 BORA, which provides an absolute

111 For example, one newspaper article characterised the women’s request as being tantamount to insisting that “secular New Zealand adapt to their sacred madness”; Michael Laws “Row over burqa reveals more than was intended” Sunday Star-Times (1 November 2004).

112 Razamjoo, above n 3, [54]. See also the defence counsel’s reported comments in Nick Smith “Lifting the Veil” New Zealand Listener (27 November-3 December 2004) 14: “It is important to draw a line in the sand against religious encroachment into the state; important in protecting the integrity of the court. What galls [defence counsel Colin Amery] is that it is the Crown, which is seeking to bring religion into the secular state, that is spending ‘all this money to bring the burqa into our court…they’re out of step with the whole of the rest of New Zealand.’”


A karakia consists of “pleas, prayers, and incantations addressed to the gods who reside in the spirit world”; Cleve Barlow Tikanga whakaaro: key concepts in Maori culture (Oxford University Press, Auckland, 1991) 37; cited in ibid 557. According to Barlow, modern-day karakia “follow a Christian format and are offered to the Christian god”; ibid 557.

115 Ibid 564.

116 The classic statement of the non-endorsement principle is by O’Connor J in Lynch v Donnelly 465 US 668, 688 (1984): “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” The US Supreme Court decided that a nativity display alongside Santa Claus and his reindeer that had been erected by a city government, did not necessarily endorse Christianity (and thereby infringe the Establishment Clause), because of the mixed message created by the “secular” reindeer and Santa displays. A later decision by the Court declared unconstitutional a similar display of a nativity scene, using O’Connor J’s endorsement test; see County of Allegheny v ACLU 492 US 573 (1989). See discussion of the endorsement test in Kent Greenawalt Religion and the Constitution: Establishment and Fairness (Princeton University Press, Princeton, 2008) 74-90; and Ahdar & Leigh Religious Freedom in the Liberal State, above n 51, 138-145.

117 Section 13 BORA reads: “Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference.” Note that Heron J did not explicitly cite s 13;
4. The burqa trial

The present case was somewhat different to the situation in Mair. The pattern of the US jurisprudence on Establishment Clause issues suggests that, in situations where a government actor (e.g., a court) merely removes a burden on religious exercise, it is more likely to be regarded as a permissible “accommodation of the exercise of religion rather than as a Government endorsement of religion”. An accommodation would be allowed to stand as long as the government had not “advanced religion through its own activities and influence”. Applying this thinking to the present case, it seems plain that the court could not realistically be regarded as taking part in or positively facilitating Mrs Salim’s religious activity. Rather, the court’s acquiescence in the wearing of the burqa (or, more accurately, allowing her to testify behind a screen) should be categorised as an acceptable accommodation of her religion for the purposes of s 13, when it is viewed as an anti-religious establishment provision. This concession to religious belief contrasts with the public ceremonial nature of oral religious incantations in cases such as Mair, where it is considerably more difficult for judges to distance themselves from the religious practice in question when they are themselves present in the courtroom.

Indeed, he seemed more concerned about promoting a general standard of impartiality on the part of the Court towards the parties to the proceedings. Thus, he considered that in cases where Maori interests were at stake (such as in Court of Appeal litigation involving the Treaty of Waitangi, where karakia have been allowed) it might be acceptable to commence proceedings with a karakia; ibid 564. The fact that a karakia can plausibly be regarded as impartial in Treaty cases, does not, however, address the s 13 issue of whether members of the public (who do not ascribe to the Maori religious practice on display) witnessing such proceedings would feel excluded by a religious incantation. As the government had not “advanced religion through its own activities and influence”, the Court did not have to act at all, illustrating the fact that religious freedom is properly considered a negative right (i.e., to be free from government interference). In Mendelssohn v Attorney-General [1999] 2 NZLR 268 (CA), where a religious claimant asked the government to act positively to promote the survival of his religion, the Court of Appeal said government was under no duty to act, but merely had a power to do so; ibid [20].

In Mair, the District Court judge had given permission for the karakia to be performed before he entered the courtroom. The fact that the appellants insisted on making the incantation while the judge was present was unacceptable, as it would have effectively made the judge a party to the religious practice.
This leads us to the “New Zealand is a secular state” issue. The preference I declare here for the US practice of leaving space in the public sphere for individual religious expression can be contrasted with, to give an extreme example, Turkey. Article 2 of that country’s Constitution describes the nation as a “democratic, secular and social state”, and the document also expressly prohibits the “exploit[ation] or abuse of religion or religious feelings…for the purpose of personal or political influence, or for even partly basing the fundamental social, economic, political or legal order of the State on religious tenets”.123 The Turkish preference for a religion-free public square that is suggested by these formulations is without doubt a product of the country’s history.124 In Turkey, the state’s governing institutions, backed up by its military, consider one of their roles to be the prevention of a takeover of government by fundamentalist Islamic elements within a society that is numerically dominated by Muslims. 125 This aggressive stance has manifested itself in many controversies in recent years, including the banning of a major political party that had Islamic policy goals126 and, remarkably, the threat of a criminal prosecution when the wives of the nation’s president and prime minister were seen wearing Muslim veils at public events.127

In Sahin v Turkey,128 a European decision that is discussed in Razamjoo,129 Turkey’s Constitutional Court invoked the Constitution’s secular clauses to endorse an edict of a state university which banned religious attire from its campuses, and received the following support from the European Court of Human Rights in doing so:130

> In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9(2) of the Convention.

Given the fact that there is no Muslim majority in New Zealand with a fundamentalist minority inside it agitating for political supremacy, and the fact that there is no explicit general “secularist” principle in this country’s positive law, for Moore DCJ to rely on the sentiments expressed in Sahin to order Mrs Salim to unveil before all those present in the courtroom would have been problematic. A further consideration that would obviate reliance on a Turkish solution to the issues in Razamjoo is the generally “pragmatic” approach to secularism in this country. The New Zealand court system itself is not averse to making concessions to religious sensitivities that cut against claims that to allow Salim an exemption from the normal rules of testimony would undermine the essentially rationalistic pursuit of truth in New Zealand’s “secular” courts. For example, persons summoned to jury service are permitted to request that

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124 For the origins of Turkish secularism, see Adrien Wing & Ozan Varol “Is Secularism Possible in a Majority-Muslim Country? The Turkish Example” (2006) 42 Tex Int’l LJ 1. I discuss this issue further in Chapter 6 in the context of religious attire at educational institutions in New Zealand.
125 See, generally, ibid.
126 See Refah Partisi (Welfare Party) and others v Turkey (2003) 37 EHRR 1, in which the European Court endorsed the banning of a political party that sought to introduce laws enshrining certain principles from the Shari’a code.
127 See “Beyond the Burqa” The Economist (UK, 13 May 2010).
129 Razamjoo, above n 3, [92].
130 Sahin, above n 128, [99]. This decision was affirmed by the Grand Chamber of the Court in Leyla Sahin v Turkey (2007) 44 EHRR 5 (10 November 2005) (“Sahin Grand Chamber”).
they be excused on the basis of religious belief, and clergy are not in fact permitted to testify at all if they have received information in the confessional. Looking outside the courtroom, other concessions to public religiosity abound, such as the decision by a government agency to redirect a major highway that threatened to interfere with a Maori taniwha (or spiritual creature) in 2002, a court decision quashing resource consent for a television antenna on a sacred Maori hill in 1998, and the decision of the government in 2003 to construct a Muslim prayer room at a state school in Christchurch.

The Hagley Community College “Mosque” saga is especially illuminating of the secularism issue in this country. In 2003 a government-funded purpose-built prayer room especially tailored for Muslim students opened at the school. When questioned in Parliament as to the appropriateness of the $121,000 expense, the Education Minister Trevor Mallard condemned the spending, which he was later to discover had in fact been approved by ministry officials without his knowledge. Mallard’s personal view was that it contravened what he understood to be the “secular provisions of the Education Act 1989”. The opposition ACT Party MP Rodney Hide complained to the Auditor-General regarding the spending. The Auditor-General rejected the complaint, however, simply stating that “there are no secular provisions in the Education Act 1989 pertinent to the concerns you have raised”. While the conclusory reply of the Auditor-General was regrettably unforthcoming on this matter, it was likely informed by the following factors. First of all, the “secular” provision in the Education Act to which both Hide and Mallard referred does not in its terms enact an overarching “secular principle” designed to inform all decisions regarding education in New Zealand. Rather, it simply states, in s 77(b), that: “[E]very State primary school shall be kept open 5 days in each week for at least 4 hours each day, of which hours 2 in the morning and 2 in the afternoon…and the teaching [shall be] entirely of a secular character”. Unfortunately for Mallard and Hide, this provision does not speak at all to pupils at state secondary schools who wish to avail themselves of a prayer room between classes, and where they do not receive any accompanying religious

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131 See Juries Act 1981, s 15(2)(a), which requires exemptions for persons who claim they are “a practising member of a religious sect or order that holds service as a juror to be incompatible with its tenets”.

132 See Evidence Act 2006, s 58.


134 See TV3 Network Services Ltd v Waikato District Council [1998] 1 NZLR 360 (HC), in which the High Court affirmed an Environment Court decision that found the proposed construction would interfere with the values protected by s 6(e) Resource Management Act 1991. This provision requires decision-makers to take account of the “relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”.


136 The room contained special ablution facilities and divisions for the sexes.

137 See Order Paper 366 (10 February 2004), Rodney Hide to Minister of Education; and (23 March 2004) 616 NZPD 11842.

138 Letter from Trevor Mallard to Rodney Hide MP; reported in “Mallard backdown on Muslim prayer room” New Zealand Herald (5 March 2004). Mallard also wrote in the letter that he expected that “both the school and I will receive an apology for the embarrassment we have suffered”. This was presumably in reference to Mallard’s condemnation of the school’s request to have the mosque built, which was approved by ministry officials without his input.

139 Letter from Pania Grey, Sector Manager, Office of Auditor-General, to Rodney Hide MP (20 April 2004); on file with author. I was kindly forwarded this letter by the office of Rodney Hide MP.

140 This provision in fact appears in Education Act 1964, and was initially enacted in Education Act 1877.

141 The room was built in order to allow the students to conduct their obligatory prayers on school grounds without having to travel to a Mosque outside the school, which would interfere with their studies. Interestingly, the large number of Muslims at the school (some 130 out of a roll of 1890, making it the largest such student body outside
instruction, or ‘teaching’ by state actors. Other factors which may have influenced the Auditor-General’s decision were that religious instruction is in fact permitted on state primary school premises, and also the fact that state-run universities typically have prayer facilities for many religious denominations.

What the Hagley incident illustrates is that persons wishing to invoke a general New Zealand “secular principle” to prevent any accommodation of religious believers in their interactions with the state in this country may struggle to make any case at all, as indeed occurred in Razamjoo. The relative weakness of secularism as a legal concept in New Zealand is acknowledged in a 2005 select committee report into the country’s constitutional arrangements. The report expressly excluded the secular clause from the Education Act 1877 in a list of the nation’s “constitutional milestones”, because the committee regarded the issue as remaining “contested constitutional ground”. It is possible to view the New Zealand version of secularism, therefore, as being pragmatic to the point of non-existence in comparison with the aggressive form of this concept that is pursued consciously as a founding ideology in countries like France and Turkey, which have far more violent and contested histories in religious matters. Rather, it resembles more the relaxed standard imposed in most countries within the Anglo-American tradition, where a certain degree of public religious expression is regarded as acceptable, so long as it does not coerce non-members of the religion in question to join in any form of ritual, and does not otherwise interfere with the rights of others. As one commentator has put it, this latter type of “liberal” secularism is sharply at odds with the “fundamentalist” type seen in France and Turkey.

Auckland) was the result of the school agreeing, at the government’s request, to enroll refugees from Muslim countries.

See Education Act 1964, s 78, which permits religious instruction by outside instructors (or teachers employed at the school if they wish; see s 80) when this is permitted by school committees, and also allows “religious observances” to take place at school assemblies.

According to a ministerial briefing paper, Massey, Otago, Lincoln and Canterbury universities all provide similar facilities for Muslim students. Ministerial Briefing paper “Hagley Community College”, 03/060 (obtained by Official Information Act 1982 request), [9].

See Report of the Constitutional Arrangements Committee Inquiry to review New Zealand’s existing constitutional arrangements (August 2005), 1.24A, App B. The committee also posed (but did not answer) the question of whether the “convention that New Zealand is a secular state” is being “eroded by various statutory directives to consider cultural and spiritual values”. Ibid App G. See also Erich Kolig “Coming through the backdoor? Secularization in New Zealand and Maori Religiosity” in J Stenhouse & B Knowles (eds) The future of Christianity: historical, sociological, political and theological perspectives from New Zealand (ATF Press, Adelaide, 2004) 183.

For a good comparison of the historical foundations of French secularism and the more religiously permissive US history, see T Jeremy Gunn “Religious Freedom and Laïcité: A Comparison of the United States and France” (2004) BYUL Rev 419. Gunn describes how the French principle of secularism (or “laïcité”) was born out of the violence following the French revolution, in which the Catholic Church was seen as an inseparable aspect of the reviled ancien régime. The American founders, by contrast, were more concerned with securing the freedom of new citizens of the republic from state coercion from religious or secular authorities. These different legacies explain the rather different approaches of these two countries today to public displays of religiosity. I discuss this issue further in Chapter 6.

Although Moore DCJ did not articulate any reasons of the sort I have just put forward here for discounting the relevance of the “secular state complaint” to the facts in *Razamjoo*, his aside that legal precedents from countries “whose traditions and legal systems are far removed from those in this country will not assist” was probably an indication that he considered the Turkish example exemplified in *Sahin* to be an inappropriate template for New Zealand law, history and culture. To conclude on this matter, I would reiterate that the distinction made above between *Mair* and the present case, when viewed through the helpful lens of US precedents that are generally permissive to private religious expression in public places (and which hail from a country that, as I have argued in Chapter 3, has created a religion-state jurisprudence that could suit the New Zealand scene very well), would be the correct approach to the facts in *Razamjoo*. When one analogises further, moreover, from the Hagley incident and other concessions from the “secular” state towards religionists in this country, the *Razamjoo* decision appears unassailable from this line of attack.

### 2.2.2 The “gender equality” complaint

A final avenue of analysis for *Razamjoo* was broached by the defence claim that the “burqa was seen by the rest of the world as symbolic of the crushing of women”, and that the “witnesses concerned might, through their particular culture, be exposed to support the dominant male family member”. This submission tapped into feelings that were expressed by many media commentators on the issue before the court. As explained by legal commentator Matthew Palmer, female equality is one of the cherished norms that inform the deep constitutional culture in this country, a fact that is famously symbolised by New Zealand being the first country in the world to grant women the right to vote in 1893.

The journalist Gordon McLauchlan made this connection between the underlying gender-equality culture of the polity and the *Razamjoo* controversy in this way:
Whether [the witnesses in Razammjoo] should be able to wear burqas in situations where the rest of us are required by law and convention to bare our faces raises other issues that involve the gender wars that have been hard fought in this country.... Women have thrived in this country with successes over a century in winning the right to vote, to own property, to escape from unsatisfactory marriages, to retreat from abusive relationships, to be free from sexual intimidation in the workplace and, in almost every case, to wear clothing they choose without being oppressed for it or fearful of the consequences.

And, in similar vein, the then leader of the opposition National Party claimed in a speech on immigration that.\(^\text{152}\)

\[\text{[T]he bedrock values I see as fundamental to New Zealanders are an acceptance of democracy and the rule of law, religious and personal freedom, and legal equality of the sexes. If you don’t accept these fundamentals, then New Zealand isn’t the place for you.}\]

These assertions that to allow the women to remain veiled would be a deeply incongruous victory in this country for an allegedly enforced patriarchal practice has some resonance with the international literature on gender, culture and law,\(^\text{153}\) although, regrettably, the defence submission on this point was not sufficiently sophisticated to enlist any of this material.\(^\text{154}\) Gila Stopler, for example, takes the view that, whereas it is no longer regarded as acceptable to use religious precepts to justify racial or ethnic discrimination,\(^\text{155}\) “religious and cultural norms continue to be the most prevalent and widely-accepted justifications for discrimination on the basis of sex”.\(^\text{156}\) The fact that women who are themselves allegedly the target of sex discrimination by non-state actors (which is, so the theory goes, aided by the acquiescence of the state) may in fact give their verbal support to these practices is typically dismissed by writers like Stopler as being an instance of “false consciousness”.\(^\text{157}\) Sarah Waldeck explains the concept of false consciousness well, albeit in the somewhat different context of cultures that continue to practise male circumcision in the face of a preponderance of modern medical opinion advising against the procedure: “[B]ecause we are often inclined to assume that a particular behavior is preferable simply because so many of our peers do it, norms provide a reference point which predisposes us to exaggerate variables that support the norm and to


\(^{154}\) It is difficult to overstate the poor quality of the defence submissions. Moore DCJ described them as “political rather than legal in nature” and dependent upon “factual assertions for which there was no evidential foundation”. The submissions, drawn largely from inadmissible Internet articles of uncertain provenance, were, in the view of the judge, based mainly on “appeals to ignorance and prejudice”. See Razammjoo, above n 3, [55] & [73]. One of the ironies of this case was that, despite the substandard nature of the defence submissions, their appeal to the notion of open justice, while characterised by the judge as being made in an “inaccurate watered-down form” (ibid [60]), actually carried the day and led to the women being required to unveil (albeit behind a screen).

\(^{155}\) Stopler gives the examples of religious justifications that were used to support the Apartheid regime, and slavery in the US and in some Islamic countries; see Stopler “Countenancing Oppression of Women”, above n 153, 154-155.

\(^{156}\) Ibid 155.

\(^{157}\) See ibid 186-189; and also Olkin “Is Multiculturalism Bad”, above n 153, 21-22, where she explains that patriarchal norms are often enforced by older women in minority religious communities, who have been brainwashed to collude in patriarchal customs.
downplay those that contradict the norm.”

While the false consciousness charge is equally applicable to practices like male circumcision and forced marriage, which are practised by but are by no means exclusive to Muslim societies, the term is, one suspects, employed most frequently in the modern era to denigrate exclusively Islamic cultural norms. Mrs Salim’s claim, which was reported in the media, that she saved her beauty for her husband alone, and comments by others that being able to avoid the gaze of men when wearing Muslim attire in public was in fact a liberating experience, would no doubt be classic cases in point for those espousing the false consciousness argument. Indeed, media commentator Colin James explains this view in relation to the burqa in this way: “[I]n this society a woman who cannot or does not, for whatever reason (including voluntarily), go among us openly is instinctively counted among the oppressed.”

Whether ancient religious norms should therefore give way to modern non-discrimination values is a question that has animated many scholars writing in the field. Charlesworth and Chinkin, for example, have pointed out that, while gender equality norms can be used to limit religious rights in some contexts, it is important for those attempting to make this argument to be aware that, “in political practice cultural and religious freedom are accorded much higher priority [than gender equality] nationally and internationally”. Judge Moore, no doubt due to the lack of briefing on the matter, did not delve deeply into this philosophical debate, or engage at all with relevant international treaties. In this regard, it is interesting that the judge did not seriously engage with the portion of Sahin that he quoted in Razamjoo, in which the European Court of Human Rights endorsed the decision of Turkish authorities to ban headscarves at universities partly on the grounds of gender equality. The European Court found that the protection of female students from coercion by others to wear veils qualified as a legitimate restriction on their right to wear religious garb under Art 9(2) ECHR.

In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to

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158 Waldeck “Norms as Multipliers”, above n 153, 467-468.
159 See Morris “Covering Islam”, above n 44, 121; quoting Mrs Salim in media interview.
160 See supporting comments for those wearing burqas by a member of the Islamic Women’s Council of New Zealand, and a Labour party candidate in the 2005 election, in Anjum Rahman “Burqa-wearing women deserve right of reply” New Zealand Herald (1 September 2006); quoting Na’ima Robert From My Sisters’ Lips: “‘I wanted and needed to free myself from my reliance on my looks. I wanted to test myself, to see whether I had the courage to get by on the strength of my personality, character and deeds…I thought, good, don’t look, don’t compare me with your latest squeeze, don’t try and guess my measurements…my body is my own business…’”
161 Colin James “Even liberals find burqas don’t fit with bedrock values” New Zealand Herald (29 August 2006).
162 See text in Chapter 1 accompanying ns 130-146, where I introduce this discourse.
163 Hilary Charlesworth & Christine Chinkin The Boundaries of International Law: A Feminist Analysis (Manchester University Press, Manchester, 2000) 239; cited in Stolper “Countenancing Oppression of Women”, above n 153, 155, n 7. Raday argues strongly that gender equality norms should take priority over the right to manifest religious belief, which, unlike the freedom to believe, is not an absolute right at international law; see Frances Raday “Culture, religion, and gender” (2003) 1 Intl J Constitutional Law 663, 678: “Article 18(3) [ICCPR]…provides an exception to the right to the freedom to manifest one’s religion, should a confrontation materialize with the fundamental rights and freedoms of others, including…the right to gender equality also protected in the ICCPR.” Raday’s views are especially significant, as she was a member of the CEDAW Committee from 2000-2002.
164 See Razamjoo, above n 3, [92], where Moore DCJ quotes in full (though without subsequent comment) paragraphs [97] to [99] of the Sahin decision.
165 Sahin, above n 128, [99]; quoted in Razamjoo, above n 3, [92] (emphasis added). Article 9(2) ECHR reads: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”
another religion may be justified under Article 9(2) of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others. …

Judge Moore preferred to avoid the country-specific reasoning of the European Court regarding gender equality for the same reason (and in the same sentence of his judgement, which I have already quoted above) that he chose to turn away from the secularism issue, commenting simply that: “[d]ecisions from jurisdictions whose traditions and legal systems are far removed from those in this country will not assist.” Evidently, the judge considered that the dangers of fundamentalist Muslims seizing on a concession to veiling in his courtroom to advance the Islamicisation of gender relations in New Zealand society was not a real risk. Instead, the judge chose to seek guidance from an academic article by Isha Khan, who argues that the tension between Islamic law and modern human rights norms such as gender equality ought to be approached by public authorities in a spirit of “gradualism”. Just as Western civilisation struggled with innovation and change in the 16th and 17th centuries in the wake of the Renaissance and the Protestant Reformation – two seismic events that challenged the West’s own long-established “social and economic theories” – it might be expected that a similar breathing space would be accorded to Islamic cultures to adapt to life in liberal Western societies. Having noted Khan’s writings with approval, Moore DCJ declared it was not the function of the Court, in the absence of explicit direction in the positive law directing otherwise, to “put the world to rights”. As a result, the judge felt fortified from the perspective of gender equality concerns not to require the women to unveil to all those present in the courtroom.

In any event, if Moore DCJ had been directed by counsel to the relevant international law, he might have found legal support for his position in Art 2(f) of the Convention on the Elimination of All Forms of Discrimination Against Women, which requires States parties:

To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Article 2(f) does not by its terms necessarily contemplate drastic paternalistic measures, such as legislation (or, in the case of Razamjoo, a strict interpretation of s 25(f) BORA and the underlying common law), to force burqa-wearing women to unveil in front of all those present in courtrooms as a way of dealing with the allegedly discriminatory custom at issue in Razamjoo. It merely suggests “appropriate measures”. In my view, practices that can be

166 Razamjoo, above n 3, [86].
169 Razamjoo, above n 3, [75]. Such a policy of gradualism is not without precedent in New Zealand history. Brookfield explains that the Crown did not move decisively through the imposition of criminal law to eradicate the Maori practice of slavery in the 19th century, but instead turned a blind eye while Christian missionaries gradually persuaded Maori to abandon the custom. See FM Brookfield Waitangi and Indigenous Rights: Revolution, Law and Legitimation (2nd ed, Auckland University Press, Auckland, 2006) 141-143, & n 42: “A gradual (rather than sudden) ending of slavery, to avoid or lessen the competing evil of social disruption, might have been morally justified in the circumstances.”
170 UN Doc A/34/46, entered into force 3 September 1981 (acceded to by New Zealand in 1985) (“CEDAW”).
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adjusted over time after exposure to different cultures ought as a general rule to be left alone to survive on their own merits, or not, as the case may be. And, in any event, I believe it is generally inappropriate to use equality norms against the persons they are designed to protect without very good reason.\textsuperscript{171} In a truly liberal culture, the assertions of adult women like Mrs Salim should be treated at face value: that is with respect.\textsuperscript{172} This also was manifestly the opinion of Moore DCJ.

To conclude on this issue, it is my opinion that Moore DCJ’s decision – with its emphasis on allowing gradual change to occur within cultures rather than imposing change from outside – would appear to fit comfortably within international law norms governing gender equality, at least within the context of the factual matrix in \textit{Razamjoo}. Thus, whether or not one regards the burqa as a “re-invented artefact”,\textsuperscript{173} or a misogynistic, geographically contingent, interpretation of the Qur’an, there was apparently sufficient room for the judge to make the order that he did within international law.\textsuperscript{174} Given that religious and ethnic communities long present in this country continue to maintain gender-biased relationships within their own cultural structures,\textsuperscript{175} Moore DCJ’s decision not to “put the world to rights” in \textit{Razamjoo} appears doubly wise.

3. \textit{Razamjoo}: implications for this thesis

3.1 \textit{Is Razamjoo} an Equal Regard case?

The remaining issue to address in this chapter is whether the result in \textit{Razamjoo} ought to be categorised as a victory for the substantive or formal neutrality reading of s 15 BORA. While the judge did not find it necessary to consider the fundamental issue surrounding the legal scope of s 15 that is the subject of this thesis, some commentary on the case has depicted it as a good example of the former methodology. Legal commentator Paul Rishworth, for example, appears to classify the decision as a court-granted exemption to a general law,\textsuperscript{176} one that is inappropriate to do so. Whether gender equality is a valid justification for prohibiting Islamic dress in schools, where young children may be subjected to severe peer pressure to wear Muslim apparel, is another hotly debated matter, which I address in Chapter 6 of this thesis.

\textsuperscript{171} Extreme versions of female genital mutilation practised on young children are probably an example where it is appropriate to do so. Whether gender equality is a valid justification for prohibiting Islamic dress in schools, where young children may be subjected to severe peer pressure to wear Muslim apparel, is another hotly debated matter, which I address in Chapter 6 of this thesis.

\textsuperscript{172} I therefore generally agree with Judge Tulkens, who wrote the following in dissent in \textit{Sahin Grand Chamber}, above n 130, [12] (per Tulkens J, dissenting): “I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them.”

\textsuperscript{173} \textit{Razamjoo}, above n 3, [59].

\textsuperscript{174} The Islamic cultural practice of female circumcision presents a rather different picture in this regard. International law in fact expressly requires states to enact legislation banning the custom. See my discussion of the international instruments urging states to prohibit this practice in the text accompanying ns 34-38 in Chapter 5 of this thesis.

\textsuperscript{175} For example, women in the Exclusive Brethren Church wear head-coverings in public, and Maori protocol has recently been enforced by a decision to exclude menstruating women from certain areas at the National Museum in Wellington. See, respectively, Nicola Shephard “Exclusive brethren – sects, secrets and lies” \textit{New Zealand Herald} (1 October 2006); and Amelia Wade “Anger at Te Papa ban on pregnant women” \textit{New Zealand Herald} (12 October 2010). As Tulkens J explains: “[I]f wearing the headscarf really was contrary to the principle of the equality of men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private. \textit{Sahin}, above n 128, [12] (per Judge Tulkens dissenting); see also the following wrly observation in An-Na’im “Promises”, above n 168, 61: “ Whereas the minority culture faces an ultimatum in meeting the standard set by the majority culture, the latter can take its own time in achieving gender equality at the level set by international human rights norms, if ever.”

\textsuperscript{176} See Paul Rishworth “The Religion Clauses of the New Zealand Bill of Rights” (2007) NZ Law Review 631 (“Rishworth `Religion Clauses’”), 657. Note, however, that Rishworth comments that “general practice” on the
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alogous to the many exemptions from across-the-board laws on the statute books, as typified by the accommodation made to medical professionals not wishing to take part in abortion procedures for reasons of conscience.\(^\text{177}\) Under this view, the judge in Razamjoo could be described as conducting a classic substantive neutrality analysis, in which the Court balanced the conflicting rights and interests before ultimately carving out an exemption for Mrs Salim in a manner that would not look out of place in the Sherbert-era jurisprudence of the US Supreme Court.\(^\text{178}\) If this is the correct way of characterising Razamjoo, the implication for this thesis would be that the reading of s 15 BORA advocated here is in fact one that is at variance with the domestic case law directly on point in the BORA era.

I think that Rishworth’s view is arguably correct, although only insofar as it describes the operation of BORA within the category of judge-made, as opposed to legislated, law. One way of looking at Razamjoo is to say that it was essentially an accretion of the common law rules on witness testimony, an area of the law of evidence that judges are eminently well qualified to develop on their own, without waiting for Parliament’s lead.\(^\text{179}\) Where judges engage in declaring the law in matters pertaining to potential burdens on religious free exercise, and the statute book is silent or obscure on the matter, it is arguable that they will be effectively taking the legislature’s place as they develop the common law.\(^\text{180}\) Accordingly, in cases such as these, it will be legitimate, within the parameters of my overall political theory of Equal Regard, for the courts to address s 15 BORA questions by employing the substantive neutrality reading of the provision.

Some might say that this goes against the core reason I adduce in this thesis to support my reading of s 15: that is, that courts are unreliable fora for balancing the right to practise religion against the state’s secular policy goals, due to the impossibly polycentric nature of the competing issues at stake, with the result that the courts ought only to be entrusted with “underenforcing” the formal neutrality aspect of the right.\(^\text{181}\) My answer to this critique is threefold. First, in litigation where there is no definitive legislative direction, the courts nevertheless have no choice but to make a decision that deals with the issues put before them as best they can. Second, common law decisions in this area will always be able to be overturned or adjusted by subsequent legislation. And third, in instances where the legislature has not spoken, but where a litigant comes before the courts invoking s 15, other considerations will intervene, such as the UN Human Rights Committee’s interpretation of Art 18 ICCPR,

\(^{177}\) Contraception, Sterilisation, and Abortion Act 1977, s 46; cited in ibid n 83.

\(^{178}\) Selene Mize describes it thus: “The Court analysed this case as involving conflicting rights, and balanced the defendant’s right to a fair trial against the witnesses’ right to practice their religion and culture by wearing burqas”. Selene Mize “Resolving Cases of Conflicting Rights Under the New Zealand Bill of Rights Act” (2006) 22 NZULR 50 (“Mize ”Conflicting Rights”), 58; see also Butler & Butler NZBORA Commentary, above n 25, [14.11.4].

\(^{179}\) Prior to BORA’s enactment, the key question for judges to make regarding witness testimony was whether to forgo an expansion of common law exceptions to ordinary trial processes, or whether the courts should leave such expansion to Parliament. For a dramatic example of where this occurred in the context of undercover policemen seeking to testify anonymously in criminal trials, see \textit{R v Hughes} [1986] 2 NZLR 129 CA (in which a majority on the Court of Appeal declined to augment the law in this way without Parliament’s direct approval). The Razamjoo decision can be viewed as a decision on the other side of this line of cases, where the courts decide that authorising legislation is not needed for an accretion to the common law.

\(^{180}\) I have already commented on the lack of legislative direction in the Razamjoo case, and the relatively free hand that this gave Moore DCJ in coming to his decision. See text above accompanying 30-32.

\(^{181}\) See discussion in text accompanying ns 484-485 in Chapter 3.
which, as we have seen, accords the substantive protection reading to that article.\textsuperscript{182} To conclude on this point, it may be that common law development of religious free exercise controversies could be best classified as analogous to the legislature’s substantive neutrality role in enforcing s 15, and that it is plausible to consider Razamjoo as an example of this occurring.\textsuperscript{183}

The second, and in my opinion, better, view of Razamjoo is that it was in fact an Equal Regard decision. This classification of the case is compelled by two factors. First, in the initial phase of BORA analysis, when Moore DCJ was considering whether the witnesses’ claim merited prima facie protection under s 15, the judge was not tempted by any of the limiting strategies that are typically deployed by courts enforcing substantive religious liberty regimes around the world to avoid making the crucial concession that a practice is religious or that it has been burdened by state action. Specifically, the judge did not succumb to any defence arguments resembling judicial analysis in jurisdictions enforcing substantive neutrality regimes abroad to the effect that:

(a) The practice of wearing a burqa was a mere individual preference: ie, it was not religious;\textsuperscript{184} or
(b) The practice was not actually compelled by Islam, but was merely a permitted practice;\textsuperscript{185} or
(c) The burden on the women’s religious belief was minor, or constituted no burden at all.\textsuperscript{186}

\textsuperscript{182} See discussion in section 3 in Chapter 3.
\textsuperscript{183} Indeed, this is how Scalia J disposed of People v Philips (New York Court of General Sessions, June 14, 1813, reprinted in Michael McConnell, John Garvey & Thomas Berg Religion and the Constitution (Aspen Law & Business, New York, 2002) 123-130), which was put forward by McConnell as one of the very rare examples of a free exercise provision (in this case not the federal Constitution, but the New York State Constitution) successfully providing substantive protection to a religious claimant against a general law. In this case, one Anthony Kohlmann was asked to testify against a man accused of burglary. Kohlmann, who was a Catholic priest, had knowledge of the crime because the defendant had told him about it in the confessional. The priest invoked the religious free exercise provision in the state constitution to avoid testifying and therefore offending against a core sacrament of his Church. The judge excused him from testifying based on his reading of the state free exercise provision. Justice Scalia found that this decision was not relevant to the question of whether the federal Free Exercise Clause, as it was historically understood, provided substantive protection for religious conduct from general laws, because: “[I]t did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court’s simply modifying the common-law rules of evidence to recognize such a privilege”. City of Boerne v Flores 521 US 507, 543 (1997), discussing Michael W McConnell “The Origins and Historical Understanding of Free Exercise of Religion” (1990) 103 Harv L Rev 1409, 1504, 1506-1511. See also Martha Nussbaum Liberty of Conscience: In Defense of America’s Tradition of Religious Equality (Basic Books, New York, 2008) 126-130 (arguing, like McConnell, that the case is good historical evidence that the Free Exercise Clause provided substantive protection).

\textsuperscript{184} As occurred in Valsamis, above n 53, [31], where the European Court of Rights denied that the wish of Jehovah’s Witness children not to take part in a martial parade was a religious practice for the purpose of Art 9 ECHR: “[The Court] can discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants’ pacifist convictions”; see also Williamson v Secretary of State for Education and Employment [2003] QB 1300 (CA), [19], in which the judge refused to extend prima facie protection under Art 9(1) ECHR to parents wishing their children to be physically chastised at school in contravention of a general law banning the practice, in part because of disagreements amongst parents and teachers as to the theological or other rationale behind the practice: “[E]vidence of the beliefs and practices of the parents and the teachers reveals a significant degree of unclarity as to the basis upon which corporal punishment is inflicted, and disagreement as to the implementation in practice of the beliefs asserted.”

\textsuperscript{185} See Khan v UK (1986) 48 E Comm HR 11579/85 253, where prima facie protection under Art 9(1) ECHR was refused because the practice in question was not mandated by the religion in question (see text above accompanying ns 47-48); see also D v France (1983) 35 E Comm HR 199 10180/82 (discussed in text above, n 51).
(d) The women could practise their beliefs in all other places outside the courtroom;\textsuperscript{187} or
(e) The women “contracted out” of their rights by coming to New Zealand.\textsuperscript{188}

Instead, as is now the practice in the US courts, where the formal neutrality standard is applied under the federal Free Exercise Clause, all that Moore DCJ would say on this matter was that: “All [beliefs] are protected”,\textsuperscript{189} and that the claimants were sincere in their wish to wear the burqa.\textsuperscript{190} He also accepted, without cavilling, that to ask the women to unveil briefly in the courtroom would burden this belief.\textsuperscript{191} It is, I submit, telling that the judge referred to US precedents concerning sincerity from the 1970s and 1940s, which are still good law in the US under the formal neutrality regime that was introduced in 1990.\textsuperscript{192} This mode of analysis, it should be added, merely affirms what the New Zealand courts have been doing for over a century. In the 1910 case of \textit{Carrigan v Redwood},\textsuperscript{193} for example, it was suggested to the then Supreme Court (now the High Court) that the Catholic practice of praying for the dead was a mere superstition, which ought not to be tolerated in this predominantly Anglican country. \textit{Carrigan} concerned a contested will in which a testatrix had bequeathed half of her property to be held in trust and ordered that it be expended on “masses announced publicly from the altar and that the prayers of the people of the Palmerston North Roman Catholic Parish be asked for the claimant’s religious belief, even though the Court conceded this could have “devastating effects on traditional Indian religious practices”. See also \textit{Mozert v Hawkins Bd of Education} 827 F2d 1058 (6th Cir) (1987), where the US Court of Appeals for the Sixth Circuit found that the exposure of born-again Christian children to “secular humanist” school readers was not a burden on their beliefs; and see \textit{Freeman v Florida} (Case No 2002-CA-2828, judgment 6 June 2003) (cited, though not discussed in this respect, in \textit{Razamjoo}, above n 3, [89]), where a Florida court found that asking a Muslim woman who wore a burqa to provide an unveiled photograph for her driver’s license did not constitute a “substantial burden” on her religion, because of the relatively brief inconvenience of having her photo taken in this way.

See \textit{Lyng v Northwest Indian Cemetery Association} 485 US 439 (1988), where the US Supreme Court found that plans to build a logging road through sacred Native American land would not constitute any burden on the claimant tribes’ religious belief, even though the Court conceded this could have “devastating effects on traditional Indian religious practices”. See also \textit{Mozert v Hawkins Bd of Education} 827 F2d 1058 (6th Cir) (1987), where the US Court of Appeals for the Sixth Circuit found that the exposure of born-again Christian children to “secular humanist” school readers was not a burden on their beliefs; and see \textit{Freeman v Florida} (Case No 2002-CA-2828, judgment 6 June 2003) (cited, though not discussed in this respect, in \textit{Razamjoo}, above n 3, [89]), where a Florida court found that asking a Muslim woman who wore a burqa to provide an unveiled photograph for her driver’s license did not constitute a “substantial burden” on her religion, because of the relatively brief inconvenience of having her photo taken in this way.

See \textit{Cha'are Shalom Ve Tsedek v France} [2000] ECHR 351, where the European Court found that the claimants, who lived in France and were denied a license to set up a kosher slaughterhouse, could practise their belief in a strict version of Jewish slaughter (which was not available at any French slaughterhouses) by importing meat killed in Belgium according to their requirements.

See \textit{Begum v Denbigh High School} [2004] EWHC 1389 (Admin) (cited and discussed in \textit{Razamjoo}, above n 3, [90]-[92]), where the English High Court found that the complainant, who wished to wear an Islamic dress that was not permitted by her school’s dress code, could have satisfied her beliefs by moving to a different school; aff’d in [2007] 1 AC 100 (HL). See also \textit{Stedman v UK} [1997] ECHR 178, where the European Commission found no breach of the complainant’s Art 9 ECHR rights. Here, the claimant wished to avoid the terms of a new employment contract that required her to work on Sundays (her Sabbath). The Commission found that no violation of her rights had occurred because she was “free to resign” from her job. Echoing these holdings, the defence in \textit{Razamjoo} argued that: “[T]he witnesses in question had, by coming to this country tacitly agreed to accept and obey New Zealand laws.” \textit{Razamjoo}, above n 3, [56]. This submission was ignored by Moore DCJ. \textit{Razamjoo}, above n 3, [65].

\textsuperscript{186} See, eg, \textit{Lyng v Northwest Indian Cemetery Association} 485 US 439 (1988), where the US Supreme Court found that plans to build a logging road through sacred Native American land would not constitute any burden on the claimant tribes’ religious belief, even though the Court conceded this could have “devastating effects on traditional Indian religious practices”. See also \textit{Mozert v Hawkins Bd of Education} 827 F2d 1058 (6th Cir) (1987), where the US Court of Appeals for the Sixth Circuit found that the exposure of born-again Christian children to “secular humanist” school readers was not a burden on their beliefs; and see \textit{Freeman v Florida} (Case No 2002-CA-2828, judgment 6 June 2003) (cited, though not discussed in this respect, in \textit{Razamjoo}, above n 3, [89]), where a Florida court found that asking a Muslim woman who wore a burqa to provide an unveiled photograph for her driver’s license did not constitute a “substantial burden” on her religion, because of the relatively brief inconvenience of having her photo taken in this way.

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\textsuperscript{189} See ibid [67]: “This Court accepts the evidence of Mrs Salim’s faith and beliefs.”

\textsuperscript{190} Ibid: “[The Court] accepts that to require her to remove her burqa in public (dire emergencies or other very compelling reasons excepted) would be to shame and disgrace her both in her own eyes and in those of the community of like believers whose customs and beliefs she is proud to uphold.”

\textsuperscript{191} See ibid [66]; citing \textit{McMillan v State of Maryland} 258 Md 147, 153 (1970), and \textit{United States v Ballard} 322 US 78 (1944). The minimal query into a religious complainant’s sincerity is still pursued in the US courts enforcing Equal Regard; see, eg, \textit{Fraternal Order of Police Newark Lodge No 12 v City of Newark} 170 F 3d 359, 361, n 1 (1999) (3rd Cir).

\textsuperscript{192} [1910] 30 NZLR 244 (“\textit{Carrigan}”). See my earlier discussion of \textit{Carrigan} in section 2.2.2 of Chapter 3

\textsuperscript{193} Ibid 254; quoting \textit{O’Hanlon v Logue} [1906] 1 Ir Rep 257, an Irish case with very similar facts.
The secular Court must act upon evidence of the belief of the members of the community concerned. The exclusiveness, the vagueness, or the self-sufficiency of principles religiously held by particular creeds, whether they rest on dogma, or doctrine, or on conscience, cannot exclude those who profess any lawful creed from the benefits of charitable gifts.

Given the lack of any prohibition of such a bequest by statute in New Zealand, the Court went on to validate it, even though the “soundness” of the Catholic rite was “disputed by other sections of the Christian Church”. The judge in Razamjoo, echoing the steadfast reasoning of Justice Cooper a century earlier, when Catholics and the numerically dominant Protestants openly clashed in numerous contexts, would not allow himself to be drawn into discussion of the theological basis of the s 15 claim. If Moore DCJ had been asked to apply the principle in Carrigan to the prima facie analysis under s 15 BORA, it would have suited his reasoning well, because enquiring simply into the sincerity of Mrs Salim would have been all that a “secular” court could do. To do otherwise would have seen Moore DCJ taking sides in a sectarian controversy between Muslim religionists. There is thus a certain irony in the defence’s argument that a “secular” New Zealand court should reject the religious basis of the Mrs Salim’s claim. The secular principle in New Zealand, which, as we have seen, is a different species to the more aggressive model enforced in Turkey and France, was not able to be employed to weaken the claim: in fact, it supported it at this threshold stage of analysis.

To conclude on this aspect of the case, it is possible to discern in Moore DCJ’s perfunctory finding of a burden on the religious beliefs of the witnesses a typical characteristic of the Equal Regard method in action. American Courts applying the standard of formal neutrality are usually solicitous of religious beliefs at this initial stage, because there is no need for them to be alarmed at granting prima facie protection for a vast range of religious beliefs. Under the Equal Regard methodology, the crucial pressure point in judicial analysis is whether religious conduct is burdened in a discriminatory manner – an enquiry that, in many cases, will see religionists fail in s 15 claims because a significant number of laws will, presumably, be found to be formally neutral. Judges enforcing substantive neutrality regimes, on the other hand, tend to exercise great caution at the threshold stage of analysis as a way of avoiding the hard questions posed in the balancing enquiry mandated by the substantive protection regime, which forces them to engage in the essentially metaphysical act of weighing incommensurable religious and secular values.

Judge Moore’s decision on the prima facie issue is therefore a good indicator that he was applying an Equal Regard mode of analysis.

I turn now to the judge’s use of the balancing analysis mandated by s 5 BORA once a prima facie incursion on a protected right has occurred. In her commentary on Razamjoo, Selene Mize depicts the methodology used by the judge as employing the balancing test typical of substantive neutrality regimes: “The Court analysed this case as involving conflicting rights,

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196 It will be recalled from my discussion in Chapter 3 (see text accompanying ns 348-350) that this aspect of the submission was rejected because the Anglican Church was not established by law in New Zealand. Thus, an English statute (which was predicated on the formal establishment of the Anglican Church in that country) that banned certain Catholic rites was deemed inapplicable to New Zealand conditions.

197 Ibid 255; and see ibid 253: “Protestants do not believe in the efficacy of such masses, or subscribe to the doctrine of purgatory, but members of the Roman Catholic Church do, and there are many thousands in New Zealand.”

198 See, eg, PS O’Connor “Sectarian Conflict in New Zealand, 1911-1920” (1967) 19 Political Science 3, in which the author chronicles certain intense rivalries between Catholics and Protestants in this era.

199 See Rishworth et al, above n 24, 295: “The motivation behind a restrictive approach to the term ‘practice’ is clear enough:…a broad conception of practice could put governments to the burden of justifying an enormous range of generally applicable laws and practices if persons choose to claim that their practice of religion is impaired.”
and balanced the defendant’s right to a fair trial against the witnesses’ right to practice their
religion and culture by wearing burqas.” While it is true that the judge considered both of
these “conflicting” rights and other relevant matters, it is nevertheless arguable that the sole
dispositive factor in his decision was an Equal Regard consideration. Thus, while Moore DCJ
ultimately agreed with the defence’s contention that the need for justice to be seen to be done
in the eyes of the community implied that witnesses should testify in open court in full view of
all those present, the numerous exceptions to this rule undermined this purpose to a significant
extent, and so enabled the judge to craft the exemption for Mrs Salim. This reasoning closely
remains a similar finding to that of Alito J’s *Newark* decision in which, as will be recalled from my discussion of this
paradigm Equal Regard case in Chapter 3, the US Court of Appeals for the Third Circuit
assessed the Newark City Police department’s claim that its “no beard” policy was necessary to
create a uniform appearance amongst its officers (in order to promote an *esprit de corps* and to
reassure the public of the force’s impartiality), and that the policy ought therefore not to be
construed as discriminatory against Muslim police officers wishing to wear beards for religious
reasons. Judge Alito found, however, that the department’s policy was fatally flawed in that it
was substantially underinclusive: “The Department’s decision to allow officers to wear beards
for medical reasons undoubtedly undermines the Department’s interest in fostering a uniform
appearance through its ‘no-beard’ policy.” An American court applying the formal neutrality
methodology employed in *Newark* to the facts in *Razamjoo* would, in my view, find that a
decision not to give the women the opportunity to testify behind a screen, when this
arrangement was already made available to witnesses in child sex abuse cases and gang trials,
would disclose a “discriminatory intent” towards Mrs Salim’s religious beliefs that would
not be tolerated under the current reading of the Free Exercise Clause.

To adapt Alito J’s finding to the pleadings in *Razamjoo*: the defence provided no legitimate
explanation as to why exemptions for child witnesses in sex abuse trials and gang murder trial
witnesses from normal procedures would not have the effect of destroying a defendant’s right
to a fair trial, but that an exemption for Mrs Salim, who wished to wear a burqa, would. As a
result, it was not possible for the defence to argue that to ask Mrs Salim to unveil in front of all
those present in the courtroom was a reasonable limitation on her right to manifest her religious
belief in public. The Court then felt able to craft an exemption for Mrs Salim in a manner that
could not seriously be described as threatening the state’s interest in facilitating a fair trial to a
“greater” degree than had already occurred in cases like *Atkins* and *R v Moke*

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200 See Mize “Conflicting Rights”, above n 178, 58; see also Butler & Butler NZBORA Commentary, above n 25,
[14.11.4].
202 See my discussion of the Lukumi-Newark methodology in Chapter 3, section 3.1.
203 *Newark*, above n 201, 366.
204 Ibid 365.
205 Ibid [366]: “[T]he Department has provided no legitimate explanation as to why the presence of officers who
wear beards for medical reasons does not have this effect but the presence of officers who wear beards for
religious reasons would.” For this reason, Alito J found that it was virtually impossible for the Police department
to furnish a compelling interest for applying the no-beard policy to Muslim officers, as required by Free Exercise
Clause doctrine.
206 See *Church of the Lukumi Babalu Aye, Inc v City of Hialeah* 508 US 520, 544 (1993), where the US Supreme
Court found that a by-law banning ritual animal sacrifices was inconsistent with unregulated secular practices
(such as hunting and pest control) which threatened to a “greater or similar degree” Hialeah city’s asserted interest
in preventing animal cruelty.
207 In *Atkins*, above n 78, cited and discussed in *Razamjoo*, above n 3, [45], which was a murder trial involving
witnesses who feared for their safety if identified, the Court of Appeal endorsed an arrangement whereby
witnesses’ faces and voices were distorted for cross-examining counsel, and the judge and jury could see faces,
but not hear voices undistorted. See discussion of *Atkins* in the text above accompanying ns 78-82. See also
*Accused v Attorney-General* (1997) 15 CRNZ 148 (CA), in which the Court of Appeal permitted the giving of
Lawrence, where exceptions to the “open Court” rule had already created substantial inroads into the relatively weak presumption in favour of face-to-face confrontation.

The impression that Razamjoo is best understood as an Equal Regard case is further reinforced by Moore DCJ’s reliance on a now-discarded historical practice in New Zealand courts whereby “it was considered obligatory for a woman giving evidence in the then Supreme Court to wear a hat, indeed gloves also”. This custom, which may have had Christian religious origins, created an opportunity for the judge to make a second order augmenting the main decision: that the witnesses could wear a scarf covering their hair while testifying behind the screen. This further concession to the women’s religious beliefs, which is also tied perhaps to the gradualism argument regarding gender equality concerns made earlier by the judge, is paralleled by Eisgruber and Sager’s use of hypothetical comparisons with concessions to mainstream religious groups to resolve religious free exercise cases in the US where no obvious benchmarks are available (such as the medical exemption in Newark) in order to assess whether a breach of Equal Regard has occurred.

Razamjoo is thus an easy case when viewed through the lens of Equal Regard, and was, in my opinion, effectively decided as such. Indeed, the Equal Regard consideration was, I suggest, the only factor that drove Moore DCJ’s ultimate order. To illustrate this, consider the following counterfactual situation: Would the court have allowed the witnesses to testify behind a screen for religious reasons if, in fact, no exceptions (eg, for child witnesses, for witnesses in gang trials, or indeed for blind jurors) existed? I very much doubt that Mrs Salim’s testimony would have moved the court at all if this had been the case. It is therefore not at all accurate, in my view, to say that the judge “balanced” the right to a fair trial against the religious right: in fact, he did not need to do so, because previous court decisions touching on witness testimony controversies outside the field of religious freedom had already made this judgment and provided helpful benchmarks that resemble the medical exemption in Newark. Moreover, other factors, such as the gender equality argument and the “secular New Zealand” complaint were, as I have explained above, deemed irrelevant in the case at hand and therefore ought not to be thought of as being part of any balancing analysis either. All the judge had to do was to secure closed circuit television testimony at a preliminary hearing of a murder trial at an undisclosed location; cited and discussed in Razamjoo, above n 3, [83].

[1996] 1 NZLR 263 (CA); cited and discussed in Razamjoo, above n 3, [82], in which the Court of Appeal permitted the testimony via closed circuit television of child witnesses involved in sex abuse trials. Adult complainants in sex trials have also been accorded this exemption; see, eg, R v Daniels (1993) 10 CRNZ 165 (CA).

See Anonymous “Woman Witnesses: Hats in the Witness Box” [1930] 6 NZLJ 271, describing an incident where a hatless female witness was instructed by Justice Roche to wear a hat the next time she appeared in court. The writer claimed that it seemed “natural” that men should be uncovered but that “women should be covered when taking an oath”, as it “may seem appropriate on religious grounds”. For a possible Biblical basis for this practice, see Holy Bible, 1st Epistle of Paul to Corinthians.

See Razamjoo, above n 3, [112]. Moore DCJ did, however, declare that the witnesses would not be permitted to wear dark glasses.

See Christopher Eisgruber & Lawrence Sager Religious Freedom and the Constitution (Cambridge, Harvard University Press, 2007) (“Eisgruber & Sager Religious Freedom”) 92, where the authors argue that the Lyng case (in which the federal government planned to build a road through sacred Indian land; see text above at n 186) could have been determined in the religious claimants’ favour by asking: “‘If the…site was sacred to a small but well-acknowledged group of Catholics or Orthodox Jews, would the Forest Service have pushed ahead with its plans?’ The answer to that question is almost certainly no.”

Mize notes this factor as well, but does not appear to attribute it to the exclusivity that I do here. Mize “Conflicting Rights”, above n 178, n 34.

Juries Act 1981, s 16AA; submission of Crown, noted in Razamjoo, above n 3, [42]; see also ibid [48], where Moore DCJ notes the allowance in the UK for blind lay Justices to sit on criminal matters.
for the s 15 claimants the same privilege that had been accorded child witnesses in sex trials and witnesses in gang trials.\textsuperscript{215}

In an opinion piece by the \textit{Otago Daily Times},\textsuperscript{216} the core non-discrimination rationale of Moore DCJ was attacked as essentially caving in to a mere “personal choice”;\textsuperscript{217} and that it was therefore misguided to equate Mrs Salim’s claims with the “genuine threat” to witnesses’ lives in gang murder trials, or with the “extreme vulnerability” of child witnesses in sex cases. This critique chimed with the defence’s argument that to allow the witnesses to remain unveiled (or, presumably, to testify behind a screen) would amount to providing “special laws”\textsuperscript{218} for them. This contention, which has its analogues in academic debate overseas,\textsuperscript{219} ignores the fact that s 15 BORA was enacted to protect the manifestation of religious beliefs (or of secular beliefs that resemble religious beliefs in their intensity)\textsuperscript{220}, and not to accord relief to activities that do not rise to the same level of cogency or comprehensiveness in the lives of those holding them. The newspaper’s views are typical of those operating within a fully secularised and aggressive liberal worldview,\textsuperscript{221} and who cannot distinguish between autonomous acts based on religious beliefs, which are perhaps regarded by believers as divinely ordained, and acts motivated by more mundane and ephemeral concerns.\textsuperscript{222} However, if, as the opinion piece implies, religious beliefs are not deserving of this status (and I concede that this argument can be made out in modern times), then the proper response would be for Parliament to repeal s 15, and for the

\textsuperscript{215} The defence claim that the witnesses were demanding “special laws for themselves” (\textit{Razamjoo}, above n 3, [56]) is especially spurious when viewed alongside accommodations for other persons for reasons also recognised in legislation, such as the right not to be deprived of life (see BORA, s 8) for those excused from the normal rules of testimony in gang murder trials, and children in sexual abuse cases (as is now provided for in Evidence Act 2006, s 107).

\textsuperscript{216} See “Blinded by burqa” \textit{Otago Daily Times} (20 January 2005).

\textsuperscript{217} Ibid. The article also decried the fact that the decision was “prompted wholly by the self-interest of the witnesses involved”.

\textsuperscript{218} \textit{Razamjoo}, above n 3, [56].

\textsuperscript{219} See, eg, Christopher Eisgruber & Lawrence Sager “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct” (1994) 61 U Chi L Rev 1245, 1263: “It expects us to treat the religious believer’s very long-term (possibly abstract, metaphorical) self-interested reasons for obedience as more powerful than other persons’ immediate self-interest and driving passions – the deeply devoted artist, the parent with a hungry child, or the lover overwhelmed with love, who are driven to disobey the law.” Eisgruber and Sager were, of course, referring to the substantive protection reading of the Free Exercise Clause, and would no doubt approve of the decision in \textit{Razamjoo}, because it treated the deep spiritual concerns of Mrs Salim in the same way it treated secular reasons for screened testimony.

\textsuperscript{220} Section 15 protects the manifestation of “religion or belief”, not mere thought or opinion or conscience, which are protected by s 13 BORA and are regarded as mere instances of the forum internum. Overseas jurisprudence suggests that “belief” ought to be construed as embracing beliefs that are closely analogous to religious beliefs. See, eg, \textit{United States v Seeger} 380 US 163, 176 (1965), where the US Supreme Court extended the definition of “religion” under the First Amendment to a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by…God”; see also \textit{Campbell and Cossans v UK} (1982) 4 EHRR 293, [36]: “‘Beliefs’…denotes views that attain a certain level of cogency, seriousness, cohesion and importance”; and see Rishworth et al, above n 24, 292: “‘Belief’ takes its colour from, and extends ‘religion.’”

\textsuperscript{221} According to one strand of liberal thought, religion is best confined to the private sphere, because, for example, it draws on inaccessible and irrational beliefs that ought not to be given public support by the neutral state. See Rex Ahdar Worlds Colliding: Conservative Christians and the Law (Ashgate, Aldershot, 2001) (“Ahdar Worlds Colliding”) 82-85.

\textsuperscript{222} This is the prime difficulty with according an autonomy rationale to s 15 in order to provide a modern justification for religious freedom that is free of the religious underpinnings of the concept in past centuries. For commentators like the \textit{Otago Daily Times}, there is no principled way to distinguish between those wishing to wear a burqa in court for religious reasons, and those wishing to wear, say, a face mask because they are shy in public. For discussion of this issue, see Rishworth “Coming Conflicts”, above n 118, 232; Ahdar & Leigh \textit{Religious Freedom in the Liberal State}, above n 51, 60-64; and my discussion of this issue in Chapter 2, text accompanying ns 112-118.
government to lodge a (probably illegal) retrospective reservation to the underlying treaty guarantee contained in Art 18 ICCPR. While s 15 remains on the books, however, arguments like that put forward by the Otago Daily Times must surely fall on stony ground.

The result in Razamjoo, therefore, can plausibly be classified as an instance of a secular court, not wishing to take sides in religious controversies, but rather enforcing a formal neutrality application of s 15 BORA and finding in favour of a religious claimant.

3.2 What about the other case law turning on s 15 BORA?

A response to my claim that Razamjoo was essentially an Equal Regard case could be that, while it was arguably decided on non-discrimination grounds, there is nevertheless other s 15 jurisprudence where judges have not ruled on the basis of formal neutrality. My answer to this critique is that, apart from Razamjoo, and another decision issued during the BORA era, discussed below (which also comports well with the Equal Regard reading of s 15), the results for religious claimants in s 15 BORA litigation have been predominantly negative. As I shall now explain, this general record of failure tells its own story.

In the scant case law in the area, the courts have balked at conducting full-blooded proportionality enquires into any s 15 BORA cases. For what is perhaps the high-water mark of this phenomenon, consider Re J (An infant): B and B v Director-General of Social Welfare. In this case, Jehovah’s Witness parents challenged the state’s decision to act in contravention of their wishes that their son not be given a life-saving blood transfusion, because such treatment conflicted with a fundamental tenet of their religion. Instead of balancing the right of the parents to direct the upbringing of their child against the state’s interest in securing the child’s right to life, which was itself guaranteed by s 8 BORA, the Court of Appeal chose to limit the scope of the s 15 right at the definitional, or prima facie, stage of analysis. Thus, while the Court affirmed the parents’ right to hold their belief, the Court excluded from the scope of s 15 the right of the parents to act on the belief in a way that might put the child’s life at risk. Justice Gault explained the Court’s reasoning thus: “We prefer to approach potential conflicts of rights assured under the Bill of Rights Act on the basis that the rights are to be defined so as to be given effect compatibly. The scope of one right is not to be taken as so broad as to impinge upon and limit others.” This technique of limiting rights at the initial, or definitional, stage, instead of giving them a broad and generous meaning at the outset and then to ask whether any burden has been imposed in a reasonable manner (the s 5 BORA enquiry, as mandated by the substantive neutrality reading of s 15) has been subjected to much criticism in the literature.

For our purposes, however, the Re J decision resembles one of the

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224 According to this view, it could be conceded that Razamjoo is best described as a non-discrimination decision under s 15, but that religious non-discrimination claims of this sort only constitute a subset, albeit an important one, of the scope of the broader liberty right to manifest religious belief.


226 Ibid 145; citing Art 18(4) ICCPR, which provides that states are to “have respect for the liberty of parents…to ensure the religious and moral education of their children in conformity with their own convictions” – which the Court interpreted as including the right to make decisions about health care.

227 Ibid 146.

228 This is how the Canadian Supreme Court analysed a similar case; see B(R) v Children’s Aid Society of Metropolitan Toronto [1995] 1 SCR 315.

229 See, eg, Ahdar Worlds Colliding, above n 221, 191. The main difficulty with the definitional balancing technique is that it means that substantial intrusions by the state into individual liberties will not need to be
foundational 19th century US decisions relied on by the US Supreme Court to resurrect the formal neutrality reading of the Free Exercise Clause in 1990. In *Reynolds v United States*, the US Supreme Court made the following statement regarding the scope of the federal Free Exercise Clause while rejecting the claim of Mormon religionists that federal anti-polygamy laws placed an unconstitutional burden on their right to practise their religion: “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.” The decision in *Reynolds*, truncating from the scope of the s 15 right, as it were, the right of Jehovah’s Witness parents to direct the medical care received by their children, but allowing them to cling on to their outlawed beliefs in private, fits well with the belief/action distinction that was famously first drawn in *Reynolds*.

In other cases, the courts have given very short shrift to religious free exercise claims under s 15, sometimes not even acknowledging that an asserted claim had any implications at all for the right to religious freedom. For example, in *Director of Human Rights Proceedings v Catholic Church of NZ*, a woman complained that the Catholic Church had refused to furnish her with information relating to the annulment of her marriage, which she contended was required by the disclosure regime set up by the Privacy Act 1993. The Church countered by saying that, if it were required to do so, this would impede an aspect of its religious mission: that is, the future adjudication of annulments and other proceedings relating to marriage, which could be compromised if the sensitive information accrued in this process were circulated to others. The Court dismissed this submission bluntly, stating that it could not see how the Church’s rights under s 15 BORA could be “threatened in any way” by disclosing this information.

In *Feau v Dept of Social Welfare*, Elias J accepted that a requirement that a member of the Seventh Day Adventist Church attend periodic detention training on a Saturday would conflict with his right to observe his Sabbath, but considered that, given the training would occur on only one Saturday, this would amount to a minimal impairment of the right. And in *R v Anderson*, a Rastafarian attempted to enlist s 15 in order to escape a criminal charge for cannabis possession. The Court of Appeal simply replied: “There is nothing in the

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231 *Reynolds*, above n 230, 164.

232 See also *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC), where Greig J found that the placing of swastikas on the outside of the appellant’s house was “offensive or objectionable” for the purposes of s 322 Resource Management Act 1991, and confirmed an order that they be removed. Regarding the appellant’s claim that the decision did not take account of his religious beliefs, the Court said: “The appellant’s religious views were, of course, entirely irrelevant.” Ibid 710. The Court went on to remark that he was “at liberty to use swastikas” as long as they did not impact on others’ enjoyment of the surrounding environment. Ibid 711. See discussion in Rishworth et al, above n 24, 297, n 126.

233 [2008] 3 NZLR 216 (HC) (“Catholic Church”).


236 Ibid 529. The judge acknowledged that this requirement would be a burden on his “sincere beliefs”.

237 Ibid 530. The judge invoked s 5 BORA at this point, stating that the requirement would be “reasonable within the meaning of [s 5 BORA]”.

Bill of Rights Act...that enables the defendant to set up his beliefs as a defence to particular crimes. He is entitled to hold these beliefs but he is obliged to abide by the law.\(^{239}\)

I would suggest that the best way of viewing this catalogue of failed s 15 claims is in fact to regard them as instances of courts refusing to engage in balancing analysis with respect to what they regard as religiously neutral and generally applicable laws burdening religious conduct. While the courts in each controversy (sometimes) paid lip service to the religious right in question, and arguably engaged in some of the threshold-balancing manoeuvres typical of substantive neutrality regimes, I believe the better view is that the courts merely “purported\(^{240}\) to engage in substantive protection analysis. The results in each case essentially saw religious claims falter against general laws, with the courts refusing to “balance” the religious claim against the state’s secular policy goals. It would have been preferable, in my view, for the judges in question simply to acknowledge this, instead of sometimes denying that the religious freedom of the claimants had been impaired at all. A possible exception in this regard was Elias J’s decision in Feau, where the judge did express some sympathy for the religious claimant and acknowledged the burden that was to be placed upon his religious beliefs. However, it must be said that Elias J’s s 5 BORA analysis was extremely brief, and her claim that the intrusion on the right was a “relatively modest encroachment” perhaps could be more accurately characterised as a finding that the burden was so trivial that the s 15 right was not truly engaged. In my view, this finding was unfortunate, because the case was perhaps amenable to an Equal Regard solution, because it seemed that the staff operating the periodic detention induction sessions in fact had offered alternatives in the past to persons in the same position as the claimant,\(^{241}\) a factor that disclosed a possible discriminatory intent on the part of those administering the periodic detention regime.\(^{242}\)

My reading of these (admittedly rare and ambiguous) cases to the effect that they ought to be interpreted as instances of judges enforcing a de facto formal neutrality reading of s 15 is further borne out by the final determination on appeal in the case of Lee. At first instance, it will be recalled,\(^{243}\) Lee had been convicted of manslaughter after he had conducted an exorcism of a woman in his Church that resulted in her death by strangulation. On appeal, Lee argued that the trial judge had erred in failing to put to the jury a defence of consent to the religious rite. The Court of Appeal accepted his contention, overturned his conviction and ordered a new trial.\(^{244}\) In reaching its decision, the Court rejected the Crown’s initial argument, which may have been successful if it had been put before the European Court of Human Rights.

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239 Ibid [9].
240 Indeed, this is how Justice Scalia described the half-hearted analyses of the US Supreme Court in the Court’s substantive neutrality era; see Smith, above n 230, 883: “Although we have sometimes purported to apply the Sherbert test...we have always found the test satisfied, see United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971).”
241 See Feau, above n 235, 530, where Elias J chides the “inflexible approach” of the periodic detention centre towards the claimant’s objection and notes that, in the past, attendees had in fact been excused from the induction programme “on receiving written material which expresses the content of the programme”. Ibid.
242 For an example from the US jurisprudence where the existence of previous administrative concessions to religious believers has mandated a similar concession to a later claimant under the Free Exercise Clause, see Axson-Flynn v Johnson 356 F 3d 1277 (2004) (10th Cir).
Rights, that only “mainstream”, or relatively mild, forms of exorcism ought to be eligible for prima facie protection under s 15. Having accepted Lee’s initial contention, the Court then referred to the fact that ritual circumcision and religious flagellation (as well as secular activities like organised boxing matches, piercing, tattooing and surgery) were regarded as exceptions to the general common law rule that consent did not operate in cases where infliction of actual bodily harm occurred. The Court then observed that it was “difficult to see why” exorcisms should be treated any differently by the law. Because of this basic finding of inequality between the trial judge’s treatment of what were legally analogous practices, the Court ultimately held that a defence of consent should have been put to the jury. The debt to an Equal Regard style of analysis in this case is, I believe, evident. Indeed, it is apparent that the defence counsel in Lee had skilfully employed Equal Regard arguments, in particular saying that:

The aim of liposuction is a flatter stomach; the aim of exorcism is a clean soul…[W]e can consent to the former which causes serious injury and carries serious risks, so why should exorcisees be denied the same right?

In a recent survey of the case law discussing the religious freedom protections in BORA, prominent legal commentator Rex Ahdar argues that Lee was “[p]erhaps the only case where the right to religious freedom had any ‘traction’.” In his summary of the other s 15 jurisprudence, Ahdar submits that in “every one” of the other cases that have arisen (which included in his article Re J, Catholic Church, Zdrahal, Feau, R v Anderson, and Razamjoo) the “outcomes were just as likely to have resulted without a Bill of Rights”. For Ahdar, the bulk of the cases, with their “cursory analysis” and minimal discussion of the “meaning and scope” of BORA’s religious freedom provisions, revealed a reluctance on the part of the courts to attribute anything more than “makeweight” status to BORA. While I am in agreement with Ahdar that the analysis in these cases was disappointingly meagre, I also think it is clear from my assessment of the case law that the courts are in fact, perhaps unwittingly, enforcing an Equal Regard interpretation of s 15. This is because an unmistakable pattern has emerged whereby generally applicable laws have escaped any meaningful scrutiny, and in the two cases where s 15 has gained “traction”, this has been because the courts have detected a potentially discriminatory burden being placed by the state on s 15 claimants.

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245 Recall that the European Commission rejected an Art 9 ECHR claim on the basis that the religious practice in question was not regarded as orthodox by senior members of the claimant’s Church. See D v France, above n 52.
246 See Lee CA, above n 244, [329]. The Court referred to testimony from a pastor at the same Church as Lee, who claimed that only light touching of the neck and shoulders was normal in an exorcism. Ibid [46]. The exorcism conducted by Lee involved considerably greater force. The Crown argued that only the gentler forms of exorcism should receive s 15 protection. The Court rejected this argument, at ibid [329]: “In our view… it would not be appropriate to differentiate between exorcisms in such a manner as it would not give adequate recognition to the right to manifest other than mainstream religious beliefs.” This reasoning resembled that of the US Supreme Court in Thomas, above n 56, 717: “Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”
247 Lee CA, above n 244, [323].
248 Ibid [299]; this category of defence is not boundless, as judges have discretion to withdraw the defence of consent on public policy grounds, as in the case of street fighting; ibid [317].
249 Ibid [323].
250 Submissions of counsel for appellant in R v Lee, CA 437/04; quoted in Kavan “Korean Exorcist”, above n 244.
251 Ahdar “New Zealand Experience”, above n 234, 14.
252 Ibid 12 (emphasis in original).
Elsewhere, Ahdar and Leigh have argued that the best way for courts to deal with s 15 claims is to conduct full-fledged proportionality analysis. They take as the “best practice” of this occurring the methodology of the South African Constitutional Court and urge that it be adopted in other jurisdictions. To recapitulate my argument in Chapter 3, however, it is my belief that the New Zealand courts do not see their role as being to cast a sceptical eye over every action by the state impeding religious conduct, especially where impugned laws are not suspiciously underinclusive. The South African Court, by contrast, which is applying a supreme law bill of rights in a country where not so long ago the state was engaged in widespread persecutory acts against large segments of the population, sees itself as having a more activist mandate. The same observation, moreover, might be made of the British courts, where it is virtually mandatory for them to engage in the proportionality methodology envisaged by substantive neutrality analysis, since that is how their decisions will in fact be reviewed in appeals to the European Court of Human Rights.

Evidence of how the New Zealand courts see their rather different role is in fact to be seen in Re J, where, when asked to engage in a searching s 5 analysis similar to that used by the Canadian Supreme Court in a case involving very similar facts, the Court of Appeal refused to do so. Part of the Court’s rationale for its reticence was that the Canadian Supreme Court was enforcing a supreme law bill of rights, whereas the New Zealand courts were enforcing a statutory bill of rights, which creates no “power for the Courts to declare statutes unconstitutional in New Zealand”. This observation in my view provides a strong clue as to why the courts in this country assume a relatively auxiliary stance towards the other branches of government vis-à-vis their responsibilities under BORA generally, as compared to their more expressly empowered brethren overseas. This goes some way, moreover, to explaining why s 15 BORA has been interpreted in such a cautious manner, with the courts allowing generally applicable laws enacted by Parliament, or by its delegates in other branches of government, to stand. It should be no surprise, then, that the New Zealand courts, however unconsciously, have already constructed a body of s 15 jurisprudence that arguably accords closely with the methodology of Equal Regard.

To conclude on this point, I submit that it has been a de facto practice of the New Zealand courts, as is exemplified in the cases of Lee and Razamjoo, to interpret s 15 BORA in a way that resonates with the interpretive solution that I advocate in this thesis. For the courts openly now to adopt the methodology of the US jurisprudence in religious free exercise cases would

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255 See ibid 170-173, where Ahdar and Leigh contrast the “careful probing of the state’s justifications for restrictions [on cannabis use by Rastafarians]” in Prince v President, Cape Law Society 2002(2) SA 794 (CCSA) with the peremptory dismissal of a similar claim by the English Court of Appeal in R v Taylor (Paul) [2001] EWCA Crim 2236. The English case is cited and followed by the New Zealand Court of Appeal in Anderson, above n 238, [9].
256 As I explained in Chapter 3 (see text accompanying ns 454-457), it may be the case that the New Zealand courts will be more adventurous when asked to analyse infringements on rights that relate to internal norms of society, such as freedom of speech and association.
257 See Rishworth et al, above n 24, 31-32, comparing the basic design of BORA as confirming the need to preserve fundamental values already existing in the legal system, with that of the South Africa Constitution, which was crafted to seek a “decisive break with its past, in recognition that transformation is needed”. See also Grant Huscroft and Paul Rishworth “‘You Say You Want a Revolution’: Bills of Rights in the Age of Human Rights” in D Dyzenhaus, M Hunt & G Huscroft (eds) A Simple Common Lawyer: Essays in Honour of Michael Taggart (Hart Publishers, Portland, 2009) 123, 141.
258 However, as I have explained in Chapter 3 (see text accompanying ns 476-483), this ostensibly more generous mode of analysis has failed to yield any major victories for religious manifestation claims in Europe or the UK.
259 See Re J, above n 225, 145.
therefore be a relatively simple step to take, and one, moreover, that is attractive on other grounds that were discussed in Chapter 3 of this thesis.

4. Conclusion

Whether or not Razamjoo can be classed as an example of the Equal Regard methodology “in action” is, of course, a matter that is open to dispute. The New Zealand Supreme Court has never dealt with a religious manifestation case. Also, the existing Court of Appeal precedents are now beginning to look old and none of these in any case directly confronted the central issue in this thesis. I would therefore suggest that, whether or not the jurisprudential edifice touching on s 15 is best characterised in the way I would like it to be, the Supreme Court surely has some leeway to strike new ground when the issue eventually comes before it.

Parliament responded to Razamjoo in a manner that befits the collaborative enterprise between the courts and Parliament that I envisage for the Equal Regard method. Despite critical comment from some MPs during its passage, s 103 Evidence Act 2006 now provides judges with discretion to order that evidence be given in alternative ways on the grounds of the “linguistic or cultural background or religious beliefs” of witnesses. This broader formulation ensures that the privilege is extended not only to a narrow class of female Muslims, but also, as Eisgruber and Sager put it, to all persons who are drawn into the court system and put to difficult choices touching on the “spiritual foundations of their deep commitments”.

Although Razamjoo attracted a lot of attention during the hearing, media commentary after the decision was muted. This can perhaps be put down to the even-handed nature of the decision, which allowed protagonists on either side of the debate to claim a victory of sorts. The general satisfaction with the result is also a product, I suggest, of the fact that some of the truly important issues raised in the case regarding the secularity (or otherwise) of the New Zealand polity and the gender equality issue were not, in the final analysis, genuinely at stake. Giving the two women an exemption from the witness testimony rules was, as we have seen, hardly a novel event in terms of the already-eroded principle of face-to-face confrontation in the courtroom. In my view, not to have given the exemption in fact would have been more likely to breach the secular principle, such as it is, than to have accommodated the women, as it would have disclosed an anti-religious (or “fundamentalist” secular) position on the part of the state that would have been out of keeping with New Zealand’s “live and let live” tradition in this regard. As for the gender equality issue, asking the women to unveil to the whole world was shown to be unnecessary to preserve the defendant’s fair trial rights, and the judge was ultimately not persuaded to make an example of the women in order to “showcase” the country’s vaunted tradition of female equality. Finally, Razamjoo can be counted as a relatively easy case because Moore DCJ was essentially making a decision regarding courtroom procedure, a matter that is assuredly the province of judges. Thus, due to conventions of inter-

260 The then opposition National Party Associate Spokesman for Constitutional and Treaty Issues, Wayne Mapp MP, said during the first reading of the Evidence Bill that: “I personally think that the witness should not have been behind a screen”; (10 May 2005) 625 NZPD 20425. ACT Party Justice spokesman, Stephen Franks MP, argued that the decision offends the legal principle that every accused has the right to “face their accuser” and that, if the matter is not appealed, the government “should change the law”; Stephen Franks “Burqa decision good as far as it goes” (18 January 2005) New Zealand ACT Party; available at: <act.org.nz/item.jsp?id=26516>.

261 Note that judges are only to make alternative arrangements of the sort that occurred in Razamjoo if they are satisfied the defendant’s right to a fair trial is not unduly compromised. See Evidence Act 2006, s 103(4).

262 Eisgruber & Sager Religious Freedom, above n 212, 87.

263 Rishworth described the decision as “Solomonic”. Rishworth “Human Rights”, above n 32, 107.
branch comity it was always unlikely that Parliament would reverse the final result when it came to legislate in the area of the law of evidence in 2006.

I turn now to consideration of religious controversies that have not yet been litigated in this country, and which I anticipate shall provide much sterner tests for the Equal Regard reading of s 15 BORA than was eventually the case in Razamjoo.
Chapter 5

The trouble with circumcision

Girls are not supposed to be cowards according to the nomadic custom and should tolerate the pain, but unfortunately I could not stand the severe pain of the circumcision. I screamed when the woman performed the operation and cut my clitoris and ran away bleeding before she could sew me with the thorns. My mother and the midwife caught me and all the women held me tight and pressed me down until the woman operator sewed me up. (Faduma’s story)

I don’t know how to explain it, but let’s say that if I had never been cut maybe I would not even have called myself a Somali. I would have died of shame. (Anonymous 21-35-year-old Somali-born resident in New Zealand)

1. Introduction

In this chapter, I consider an Islamic practice which strains to the limit the notion of compromise seen in Judge Moore’s solicitude in Razamjoo for the gradual evolution of questionable cultural activities that have implications for gender equality. The custom of female genital mutilation (“FGM”), defined by an activist in the field as the “collective name given to several different traditional practices that involve the cutting of the female genitals”, differs from the wearing of veils in many important respects. Whereas the wearing of veils under Qur’anic prescription is a concept that many can accept, however grudgingly, as a legitimate religious practice, the acceptability to Western eyes of the cutting of the female genitals is an altogether different question. This should be no surprise, as the wearing of the Muslim veil has familiar parallels in Western cultures, from bridal veils to the routine wearing of scarves by some Western women when going outdoors. The difference in acceptability between the veil and FGM is reflected in the rhetoric surrounding the two practices. One does not commonly hear reference by public figures to the wearing of veils as “barbaric” or

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2 Response in survey of 21-35-year-old Somali resident in New Zealand. Pauline Guerin & Fatuma Elmi “Case Studies of Living in a Diverse Community: Somali women’s views of circumcision” Seminar, End-Users Conference, March/April 2005, Wellington (“Guerin & Elmi ‘Survey’”) 7; available at: <www.waikato.ac.nz/wfass/migration/docs/guerinp-somali-circumcision.pdf>; cited in Ruth Laugesen “In the Cut” Sunday Star-Times (29 October 2006) (“Laugesen ‘Cut’”). Both “Faduma” and the anonymous New Zealand resident quoted above were subjected in Somalia to “pharaonic” circumcision, or infibulation. This procedure involves the removal of part or all of the external genitalia, followed by stitching and narrowing of the vaginal opening.
3 See text accompanying ns 167-169 in Chapter 4.
5 Professor Paul Morris, the Crown’s expert witness on the religious issue in Razamjoo, made this point in order to bolster the argument that the burqa is a religious practice: “Veiling also has a widespread Western cultural history, the remnants of which are still evident in the nun’s wimple and the bridal veil, and in some European cultures the veil is worn by widows.” Police v Razamjoo [2005] DCR 408 (“Razamjoo”), [16]. FGM has no Western religious analogue, unlike male circumcision, which is practised in all Muslim cultures, is a well-known requirement of Judaism, and is practised by significant numbers of secular Western parents. See comparative discussion of religious bases in Islam and Judaism for male circumcision in Sami Abu-Sahlieh “Male and Female Circumcision: The Myth of the Difference” in Rogaia Abusharaf (ed) Female Circumcision: Multicultural Perspectives (University of Pennsylvania Press, Philadelphia, 2006) 47 (“Abu-Sahlieh ‘Myth of the Difference’”).
“abhorrent”, terms used by some\(^6\) to condemn FGM. Compare these condemnations to the more temperate comments made regarding the burqa by, for example, British MP Jack Straw, who stated in 2006 that he preferred his constituents to remove it when visiting him in his office, but that he “respected those who wished to wear the veil”\(^7\). In New Zealand, we have seen Winston Peters MP encouraging those who wear the burqa to return to their country of origin,\(^8\) but at no point during the public debate surrounding the Razamjoo trial did he, or others who share his perspective, suggest that the burqa should be banned outright or that the wearing of the garment excited any particular revulsion.

Another common refrain against FGM is that it has no genuine religious basis, with the implication being that it is less worthy of respect than other practices to which a religious motivation can be attributed. Indeed, the Qur’an does not mention female circumcision at all, whereas promoters of the Islamic veil can point to injunctions to cover the female figure in the fundamental religious text.\(^9\) There is some support for female circumcision in the secondary Islamic texts – the Hadith – though there is much debate about the strength of these references, even in the countries where FGM originated. Those wishing to ban FGM in Western jurisdictions have exploited this perceived weakness in the religious argument. Essentially, opponents of the practice have argued that it is a mere cultural accretion that has grown up around Islam, but is not a Muslim tenet per se.\(^10\) In Australia, for example, the Family Law Council asserted in its 1994 report on FGM that there is “no Islamic religious basis for the practice”,\(^11\) and cited the findings of one religious authority in Egypt that FGM was not a Muslim practice.\(^12\) In New Zealand, opposition MP Chris Fletcher echoed this point in Parliament during the debate on the prohibition of FGM in 1994, saying “there is nothing in either the Koran or the Bible that calls for this particular practice”.\(^13\) I shall explain below that these statements are an over-simplification of the religious argument, and in any case are of relatively little import from a legal point of view. However, they encapsulate a viewpoint that

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\(^7\) James Sturcke “Straw: I’d rather no-one wore veils” The Guardian (UK, 6 October 2006).

\(^8\) See Ruth Berry “Buy back the silver and live better, says Peters” New Zealand Herald (1 November 2004).

\(^9\) In Razamjoo, the following passage in the Qur’an was cited as the prime religious basis for wearing the burqa: Sura 33:59: “O Prophet, tell your wives and daughters, and the women of the believers to bring down over themselves part of their outer garments. That is the more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful.” Razamjoo, above n 5, [16].

\(^10\) In this respect, arguments against FGM do resemble the burqa debate in 2004, when some Muslims from countries where the burqa is not worn disputed the need for full-face veiling under the Qur’an and asserted that the burqa is a cultural development separate from Islam. See comments to this effect by a Malaysian lawyer resident in New Zealand, in Chris Barton “Behind the Burqa” Weekend Herald (7 August 2004).


\(^12\) This was apparently the opinion in 1986 of the Al-Azhar University of Cairo (one of the leading exponents of Islamic law for Sunni Muslims). Ibid. This is in fact a gross over-simplification of the Al-Azhar stance on FGM, which has in fact fluctuated significantly over time. For example, a year after the Family Law Council Report, the then head of the Al-Azhar Institute, Sheik Gad al Haq Ali Gad al-Haq, issued a fatwa in which he stated that FGM “is a duty for men and women and if the citizens of a country refrain from practicing it, the imam should challenge them as if they were ignoring the call to prayer”. For the Egyptian debate, see Carol Messito “Regulating Rites: Legal Responses to Female Genital Mutilation in the West” (1997) 16 In Pub Int 33 (“Messito ‘Regulating Rites’”), 57; see also “Islam’s authority deficit” The Economist (UK, 28 June 2007).

\(^13\) (November 29 1994) 545 NZPD 5238. But see Hon Alec Neill MP (and Chairman of the Justice and Law Reform Committee, which considered the Bill): “There is the religious aspect of it.” Alec Neill MP (1 June 1995) 547 NZPD 7031.
has found currency in most of the Western countries where FGM has been banned, and are significant for that reason alone.

At the international level, *General Comment 22* of the Human Rights Committee explicitly mentions religious headgear as an example of a religious practice, thereby giving the veil a virtual enumerated status under the ICCPR.\(^{14}\) *General Comment 22*, on the other hand, does acknowledge the right to participate in “rituals associated with certain stages of life”, which conceivably could include female circumcision (and, for that matter, the circumcision of males). However, in his assessment of an early draft of the ICCPR religious freedom protections, UN Special Rapporteur Arcot Krishnaswami considered that public authorities were entitled to limit certain religious manifestations and he included “mutilation of the self or others” as an instance of practices that are “obviously contrary to morality, public order, or the general welfare”.\(^{15}\) Manfred Nowak makes it clear in his detailed study of the final version of the ICCPR religious protections that public health is the main concern regarding bodily mutilation, and he lists female circumcision as a practice that can be countered by “certain restrictions” under the limitations clause in Art 18(3) of the Covenant.\(^{16}\) Furthermore, as I shall demonstrate below, both Nowak’s and the Special Rapporteur’s opinions have subsequently been backed up by a myriad of international documents that condemn the practice, either directly or indirectly. The relative international status of veiling and female circumcision is therefore observable in these different treatments.

Moving on to a more philosophical level, the Muslim veil is, I suggest, regarded more by its Western critics as a regrettable barrier that, in the best of liberal traditions concerning personal autonomy, can be removed after the passage of time, when the individual has had a chance to revise her version of the “good life”.\(^{17}\) However, FGM, at least where it involves the removal of healthy human tissue, does not allow this type of revision, for the simple reason that the procedure is irreversible and in most cases is performed on children,\(^{18}\) who lack the capacity for consent. It is perhaps at this point of irreversibility and denial of personal agency for those

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\(^{14}\) *General Comment 22* states: “The observance and practice of religion or belief may include not only ceremonial acts but also such customs as… the wearing of distinctive clothing or headcoverings”. Human Rights Committee *General Comment 22, Article 18 UN Doc HRI/GEN/1 Rev 1* at 35 (1994) [4]. Note, however, that the list of examples is not an exhaustive one and that *General Comment 22* goes on to say that Art 18 is not limited to “practices analogous to those of traditional religions”; ibid.


\(^{16}\) Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel Publisher, Arlington, 2005) (“Nowak *CCPR Commentary*”) 430. It is significant to note, however, that Nowak lists “circumcision” as an example of a religious “observance” under Art 18(1) ICCPR: “[Observance] covers processions, wearing of religious clothing or beards, circumcision, prayer and all other customs and rites of the various religions.” Ibid 420. It is not clear whether Nowak regards both male and female circumcision to be prima facie observances for the purposes of Art 18(1), or whether he is referring only to male circumcision.

\(^{17}\) Will Kymlicka describes the core liberal value in this way: “The defining feature of liberalism is that it ascribes certain fundamental freedoms to each individual. In particular, it grants people a very wide freedom of choice in terms of how they lead their lives. It allows people to choose a conception of the good life, and then allows them to reconsider that decision, and adopt a new and hopefully better plan of life.” Will Kymlicka *Multicultural Citizenship* (Clarendon Press, Oxford, 1995) 80. Kymlicka cites “clitoridectomy” as a practice that should not be permitted under his multicultural theory. Ibid 41.

\(^{18}\) And where it is performed on older children or adults, the consent is also arguably defective, due to pressures from the social group in which they belong. The Cabinet Paper that recommended going ahead with the New Zealand anti-FGM legislation in 1994 made this very point in deciding not to allow adult FGM: “There are many kinds of pressure that can be brought to bear on [adult] women to ‘consent’ to cultural practices of the type under consideration.” Cabinet Social and Family Policy Committee, “Female Genital Mutilation: Proposed Legislation” (1 November 1994) SOC (94) 61 (“Cabinet Paper”), [16].
who have undergone FGM that liberal solicitude for individual and group autonomy breaks down. Supporting this philosophical objection are the documented health dangers attached to the more severe forms of the practice. Among these are: severe pain and bleeding at the time of the cutting, sometimes resulting in death, as well as the possibility of fatal septicaemia, tetanus and HIV/AIDS infection from the use of unclean instruments.\(^\text{19}\) Long-term adverse effects include cysts, keloid scars, loss of sexual enjoyment, and difficulties with childbirth resulting from the most extreme form of FGM, infibulation, which entails removal of almost all the external female genitalia and the sewing together of much of the vaginal opening (described in the quotation at the start of this chapter).\(^\text{20}\)

The philosophical argument, backed up by the physical harm caused by the practice, sits well with the basic principle behind much legislation in liberal democracies that could otherwise be attacked as being paternalistic.\(^\text{21}\) This fundamental liberal principle is that government should only use the criminal law to prevent acts which cause harm to third parties.\(^\text{22}\) The classic statement on this exception to personal autonomy is that of John Stuart Mill in his essay “On Liberty”, where he says: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”\(^\text{23}\) A decision to outlaw the actions of those performing FGM on others (and not those who might perform the procedure on themselves\(^\text{24}\)) would clearly be in line with Mill’s prescription. As I shall show below, this is precisely what the New Zealand legislation sets out to achieve. By comparison, the veil is not easily susceptible to arguments focusing on harm, at least in the physical sense of the word.\(^\text{25}\) According to classical liberal theory, therefore, this reason might be in itself (quite apart from

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\(^\text{20}\) Also, long-term psychological health can be compromised, including “feelings of incompleteness, anxiety and depression”. See WHO Fact Sheet No 241 Female Genital Mutilation (WHO, Geneva, June 2000) 1.

\(^\text{21}\) The UK Law Commission expresses it thus: “Liberalism, when applied to the question of criminalisation, is the view that only the ‘harm principle’...can ever provide a good reason to support criminal legislation.” The Law Commission (UK) Consent in the Criminal Law (Consultation Paper 139, 1995) 252.


\(^\text{24}\) Recall that Krishnaswami, in an illiberal aspect to his conception of religious freedom, sanctioned the abolition of self-mutilation as well as mutilation carried out by others. See text above accompanying n 15.

\(^\text{25}\) It is argued by some that the veil can cause psychological or social harm in that it isolates the wearer from society and subjects women to male dominance. In France for example, the Stasi Commission (which recommended the banning of religious insignia in public schools in that country) based part of its argument on psychological pressures: “Young people force girls to wear oppressive and asexual clothes and lower their gaze when they see a man – and, if they do not obey, are stigmatised as whores.” Bernard Stasi et al Rapport de la Commission de Réflexion sur l’Application du Principe de Laïcité dans le République (Documentation Française, Paris, 2004) 101. It is worth noting that Mill never clarified what actually constitutes “harm”. See Raes “Paternalism”, above n 22, 32.
the international calls for abolition) sufficient justification for the decision in 1995 to prohibit FGM in New Zealand.\footnote{Another example of the harm principle being expressed by statute is the Smoke-Free Environments Act 1990, which lists one of its purposes as being “to prevent the detrimental effect of other people’s smoking on the health of people in workplaces, or in certain public enclosed areas, who do not smoke or do not wish to smoke there”.\footnote{See Chapter 4.}}

For the purposes of the analysis in this thesis, perhaps the most significant difference between veils and FGM is the legal source of the prohibition against the practice. In \textit{Razanjoo}, we saw that a relatively weak common law preference for testimony in open court could be re-fashioned in a way that protects religious belief.\footnote{The Cabinet Paper that initially recommended legislation in 1994 argued for outlawing all forms of FGM, even those not causing permanent harm: “The drafting of a suitable offence requires care. In order to ensure that various forms of female genital mutilation are covered (ranging from a nicking of the clitoris to the removal of most of the external female genitalia and the stitching of the labia majora) it would be necessary to have a fairly broad definition of what is meant by ‘mutilation’.” See Cabinet Paper, above n 18, [14]. But see text below accompanying n 262, where the Department of Justice, in a subsequent report, suggests mere nickings of the female genitalia would not be caught by the Act.} By contrast, the possibility of an accommodation of FGM runs into at least two major obstacles. The first of these is the philosophical barrier, or the “harm principle” exception to personal autonomy that I have just considered. The second obstacle, and the one to which I shall devote the bulk of my attention in this chapter, is the vehicle for this harm principle. That is, the legislative statement contained in the Crimes Amendment Act (No 2) 1995, which was drafted with the intention of banning the practice in virtually all its forms.\footnote{Note that s 204A does not provide for the prosecution of sufferers of FGM, even if they perform the procedure on themselves. Also, note that the UK legislation in 2003 made it illegal to assist or persuade others to self-mutilate. See Female Genital Mutilation Act 2003 (UK), s 2.} Under s 204A(2) of the amended Crimes Act 1961, anyone who “performs, or causes to be performed, on any other person, any act involving female genital mutilation”\footnote{“Sexual reassignment procedure” is defined in s 204A(1) as “any surgical procedure that is performed for the purposes of altering (whether wholly or partly) the genital appearance of the person to the genital appearance of the opposite sex”.

\footnote{26} is liable to a prison term of up to 7 years. “Female genital mutilation” is defined in s 204A(1) as “the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person”. The prohibition is followed in subs 3 by an exemption for medical or surgical procedures carried out by medically qualified persons for therapeutic reasons. These reasons are defined broadly as being for the benefit of that person’s “physical or mental health”. To remove doubt, specific exemptions are provided for sexual reassignment procedures,\footnote{28} and for any surgical or medical procedures during labour for the benefit of the child or for maternal health. Subsection 6 then removes the possibility of a defence on the grounds that the person on whom FGM was performed might have given consent to the act. And finally, subs 4 precludes recourse to a cultural defence on the basis that psychological harm would ensue from \textit{not} having the procedure performed:

\begin{quote}
In determining, for the purposes of subsection 3 of this section, whether or not any medical or surgical procedure is performed on any person for the benefit of that person’s physical or mental health, no account shall be taken of the effect on that person of any belief on the part of that person or any other person that the procedure is necessary or desirable as, or as part of, \textit{a cultural, religious, or other custom or practice}. (Emphasis added)
\end{quote}

The legislative intention, then, appears clear. Subsections 4 and 6 provide the direct legislative pronouncement against recourse to a defence based on religious practice that was lacking in \textit{Razanjoo} with regard to the burqa. In doing this, the New Zealand legislature is of course exercising its undoubted authority to legislate, a legal fact affirmed in s 15(1) of the
Constitution Act 1986, which declares that Parliament “continues to have full power to make laws”.\textsuperscript{31} Parliament can also rely on express international law authorisation to use legislation to ban the practice. International interest in FGM began in 1958 when the UN Economic and Social Council requested the World Health Organization (“WHO”) to “undertake a study of the persistence of customs which subject girls to ritual operations, and of the measures adopted or planned for putting a stop to such measures”.\textsuperscript{32} In the introductory speech to the Crimes Amendment Bill, the Honourable Doug Graham MP cited two UN instruments that are direct descendants of the original UN initiative.\textsuperscript{33} First, the Convention on the Rights of the Child, which does not mention FGM by name but which, in Art 24(3), requires States Parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”\textsuperscript{,34} and, second, the Declaration on the Elimination of Violence Against Women 1993, which requests States to develop penal sanctions specifically against FGM.\textsuperscript{35} Doug Graham also could have mentioned\textsuperscript{36} the Convention on the Elimination of All Forms of Discrimination Against Women, which requires States Parties in Art 2(f) to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.\textsuperscript{37} One can therefore

\begin{itemize}
\item \textsuperscript{31} And, relevant to any BORA analysis, s 4 BORA, which states: “Other enactments not affected – No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), – (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.”
\item \textsuperscript{32} ECOSOC, 1029th Plenary Meeting, 10 July 1958; cited in Efua Dorkenoo & Scilla Elworthy \textit{Female Genital Mutilation: Proposals for change} (3rd rev ed, Minority Rights Group International, London, 1992) 17. Despite this direction, however, at the 12th WHO Assembly in 1959, WHO declined to undertake the study, as the “ritual operations in question are based on social and cultural backgrounds, the study of which is outside the competence of the World Health Organization”. Ibid.
\item \textsuperscript{33} (29 November 1994) 545 NZPD 5231.
\item \textsuperscript{34} Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990 (“UNCROC”); ratified by New Zealand 6 April 1993. A move by the US and UK to include FGM by name in Art 24(3) during the drafting of UNCROC was successfully opposed by Senegal, a State that traditionally practices FGM. See Lawrence LeBlanc \textit{The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights} (University of Nebraska Press, USA, 1995) 88-89. Subsequent general comments and concluding observations by the UNCROC Committee have declared that Art 24(3) encompasses an obligation on States Parties to commence education programmes and to outlaw FGM. See, eg, Committee on the Rights of the Child \textit{General Comment 4} UN Doc CRC/GC/2003/4 (1 July 2003), [10] & [24]. See also Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res 36/55 (25 November 1981) Art 5: “Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development.”
\item \textsuperscript{35} Declaration on the Elimination of Violence Against Women 1993, Gen Ass, UN Doc A/RES/48/104 (23 February 1994) (“DEVAW”) Art 2(a), which includes FGM in a non-exhaustive list of activities that amount to violence against women, and Art 4(d), which says that States should “[d]evelop penal…sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence”.
\item \textsuperscript{36} Indeed, the two jurisdictions that New Zealand used as a model for its legislation, New South Wales and the UK, both cited CEDAW when introducing anti-FGM bills.
\item \textsuperscript{37} Convention on the Elimination of all Forms of Discrimination Against Women, UN Doc A/34/46, entered into force 3 September 1981 (“CEDAW”), to which New Zealand acceded in 1985. See also Art 5: “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” The CEDAW Committee recommended in 1990 that States Parties take “effective measures with a view to eradicating” FGM, suggesting measures such as education, but not legislation. Committee on the Elimination of Discrimination against Women \textit{General Recommendation 14: Female Circumcision} A/45/38 (1990). The Committee later recommended that States Parties should ensure “[t]he enactment and enforcement of laws that prohibit female genital mutilation”. CEDAW Committee \textit{General Recommendation 24: Women and Health} (1999), [15(d)].
\end{itemize}
regard the legislation as the domestic implementation of New Zealand’s international commitments in the area.

The existence of these, and other UN documents to which New Zealand subscribes contributes moral and legal weight to the prohibition. It also adds, in a sense, extra breathing room for legislation that seeks to honour the relevant international obligations. To illustrate this point, it is worth noting that at no stage in the legislative process in New Zealand was there any discussion of the BORA provisions regarding religious practice, or of any of the international protections for culture or religion. In fact, the main criticisms in Parliament concerned whether legislation was necessary at all, given existing provisions in the Crimes Act, and the common opinion during the submission process that education of the communities affected by FGM was a better route to take, either on its own or alongside the legislation. At one level this is explicable if one supposes that the prevailing view at the time was that extreme forms of religious practice were clearly not contemplated as falling within the s 15 BORA protection of religious manifestation, even on a prima facie assessment. And in any case it might have been thought that the burden of justifying any limits on such a right under s 5 BORA analysis would

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39 As I shall explain below, however, the precise scope of the prohibition of FGM at international law is contestable, a fact that I will argue is potentially significant if persons are prosecuted under s 204 Crimes Act 1961.

40 With the honourable exception of the Ministry of Health, which responded to the proposed bill by saying it raised gender discrimination issues under the Human Rights Act 1993. The Ministry pointed to similarities between male circumcision and milder forms of FGM, such as nicking or scraping of the clitoris. See Cabinet Paper, above n 18, [21]. Also, three MPs attempted to make comparisons between FGM and male circumcision in Parliament, arguing that both practices should be banned. See, eg, Lianne Dalziel (29 November 1994) 545 NZPD 5247: “I have to say that male circumcision fits into that category [of mutilation] as well and I think that during the course of the debate on this issue we need to look at whether some of the other practices that have been accepted in our culture are appropriate as well.” However, for reasons that will be discussed later in this chapter, all of these objections were summarily dismissed.

41 Such as ICCPR, Art 27, which provides that ethnic and religious minorities should not be “denied the right, in community with other members of their group, to enjoy their own culture” and “to profess and practise their own religion”; and see the equivalent provision in BORA, s 20.

42 For example, opposition MP Phil Goff considered that existing law already bans the practice (eg, Crimes Act 1961, ss 188 (“Wounding with intent”), 189 (“Injury with intent”) & 195 (“Cruelty to a child”); Hon Phil Goff MP (29 November 1994) 545 NZPD 5237. Note that the Cabinet Paper recommending the legislation claimed that consent might be a defence to any charges brought under these existing provisions. Cabinet Paper, above n 18, 3. Doug Graham MP cited this uncertainty in the existing law as a prime motivator for legislating for an explicit ban: “Under existing law, it would almost certainly amount to an offence…”. Doug Graham MP (29 November 1994) 545 NZPD 5231.

43 Seven of the 22 submissions to the Justice and Law Reform Select Committee on the Bill were of this view, including those of the Human Rights Commission and the School of Refugee Education. See Elisabeth MacDonald “Circumcision and the Criminal Law: The Challenge for a Multicultural State” (2004) 21 NZULR 233, 234 & 243. In response to these submissions, the Select Committee recommended that the commencement date for s 204A be moved to 1 January 1996, so that Government departments would have “sufficient time to put in place and to develop an educational programme”. Hon Alec Neill MP (Chairman of the Justice and Law Reform Select Committee) (30 March 1995) 547 NZPD 6563. At present the government has allocated $88,000 a year to these educational measures through Ministry of Health community support programmes. Ruth Lauersen “Female circumcision supported by Somalis” Sunday Star-Times (29 October 2006).
have been a light one, as suggested above by Krishnaswami.\textsuperscript{44} It should also be remembered that when the Crimes Amendment Act was passed in 1995, BORA was still in its infancy, and had been characterised by the White Paper promoting it in 1985 as not being likely to have a significant effect on Parliament’s decision making powers, and that the courts would in most cases leave it to “Parliament to define the public interest, and to enact legislation encapsulating its decision”.\textsuperscript{45} This was the climate in which the Crimes Amendment Bill was introduced and goes part of the way to showing why the Bill was not scrutinised as rigorously as perhaps it might be if it were being introduced today.\textsuperscript{46}

On another level, one could perhaps explain the absence of BORA consideration by conceiving of the international instruments calling for a ban on FGM as later, more specific, “laws” aimed at a particular religious practice that prevail over the earlier, more general, protections for religious observance in the ICCPR and in s 15 BORA.\textsuperscript{47} According to this view, one might therefore conceive of the developments of international treaty law post-ICCPR as effectively qualifying the rights to religious freedom protection in New Zealand’s domestic human rights legislation. Baroness Hale of Richmond appears to express this interpretive posture regarding the effect of a specific international instrument on other human rights norms of a more general nature in a UK House of Lords decision in 2005 concerning the banning of corporal punishment in British schools. In \textit{Williamson}, Baroness Hale states that, despite the successful arguments\textsuperscript{48} by parents that their right to have their children physically disciplined at school was a prima facie manifestation of their religious beliefs under Art 9(2) of the European Convention on Human Rights, the UK government was nevertheless free to ban the activity: “[T]he state is entitled to give children the protection they are given by an international instrument to which the United Kingdom is a party, the United Nations Convention on the Rights of the Child.”\textsuperscript{49} It seems plausible, then, to attribute the lack of rights-based scrutiny of the Crimes Amendment Bill at least in part to a sense that the UN had given something of a free hand to domestic legislators to prohibit the practice. Finally, it is also probable that the very similar prior British and New South Wales legislation banning FGM, as well as that of

\textsuperscript{44} Similarly, the White Paper asserted that the law against polygamy “would be upheld without difficulty against arguments based on religious freedom”. \textit{A Bill of Rights for New Zealand: A White Paper} (Government Printer, Wellington, 1985), (1985) AJHR A6, [10.61].

\textsuperscript{45} Ibid [6.17]. The White Paper also made the following claim, which is perhaps an overstatement in retrospect: “[W]ith a few basic exceptions the Bill of Rights would not control matters of substance.” Ibid [4.11].

\textsuperscript{46} Most bills today that have human rights implications are certified in advance by Ministry of Justice officials, as occurred with the Evidence Bill in 2005, which affirmed the \textit{Razamjoo} decision. See David Griffiths “Pluralism and the Law: New Zealand Accommodates the Burqa” (2006) 11 Otago LR 281, 302. Note also that systematic scrutiny of bills for BORA compliance only became a reality in 1996 with the Cabinet Office Manual’s guidelines of that year. See Geoffrey Palmer & Matthew Palmer \textit{Bridged Power: New Zealand Government under MMP} (Oxford University Press, Auckland, 1999) 153.

\textsuperscript{47} Indeed, Art 30(3) of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS, would indicate that a more recent treaty covering the same subject matter as an earlier one is to prevail: “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.” Another view might be that the prohibition on harmful traditional practices contained in Art 24(3) of UNCROC is in fact compatible with the religious freedom protection in Art 18 ICCPR, in that it amounts to an appropriate limitation under Art 18(3) ICCPR.

\textsuperscript{48} Lord Walker of Gestingthorpe says the desire of parents to have their children exposed to corporal punishment at school just “scraped over” the prima facie test of whether the conduct amounted to a religious manifestation. \textit{Secretary of State for Education and Employment, ex parte Williamson} [2005] 2 AC 246 [66] (HL) (“Williamson”); and see Baroness Hale, ibid [78].

\textsuperscript{49} Ibid [80], per Baroness Hale of Richmond (emphasis added). The prohibition was also held to be a proportionate limitation of the right under the ECHR. See Lord Nicholls of Birkenhead; ibid [49];[50].
many other similarly situated Western democracies, had an even greater effect in creating the 
impetus to legislate and provided a model for the New Zealand drafters to follow.50

To summarise at this point, the case for legislating against FGM is undeniably a strong one.
Even if New Zealand were not obliged to implement the many international instruments calling 
for its abolition, the undoubted harm caused by the procedure in its extreme forms and the 
generally vulnerable status of the class of people on whom it is performed means that the 
legislation, when viewed from the liberal perspective (and in particular Mill’s harm principle) 
is, at first glance, a legitimate incursion into the private realm by Parliament. Leaving aside 
even these factors, the doctrine of parliamentary sovereignty means that from a legal point of 
view the law is not easily assailable by a legal challenge. And yet, despite all these factors, it is 
possible to discern a major area of concern with the anti-FGM law that could have benefited 
from a more rigorous legislative process in 1994. This area of concern, it will be argued, does 
allow for the possibility of a legal challenge. The concern lies in the discriminatory aspects of 
the legislation, or, to be precise, the fact that the banning of FGM for immigrant communities 
in New Zealand appears to leave arguably analogous “Western” practices of genital alteration 
surgeries for both adults and children unaffected.51 These practices, it will be demonstrated, are 
no less a product of culture, and, in light of advances in obstetric opinion that have coalesced in 
the years both before and after the coming into effect of the anti-FGM law in 1996, are no 
more defensible on medical grounds.

This issue shall be explored in the remainder of this chapter. I shall outline in section 2 the 
discriminatory defect that lies at the heart of the anti-FGM Act, before canvassing in section 3 
a possible legal response to that infirmity. I will conclude that the “free hand” with which 
legislators prohibited FGM in 1995 ought to have been accompanied by a harder look at 
whether the law achieved its task in a proportionate manner that takes into account the 
commitment to equality and religious freedom that lies at the heart of the Equal Regard reading 
of s 15 BORA. However, before I attempt this, it is worthwhile by way of background and as a 
resource for the discussion that follows to describe the global practice of FGM and to speculate 
on its incidence in New Zealand.

1.1 FGM: Global incidence and possible New Zealand manifestation

1.1.1 The global picture

Female genital mutilation is said to have originated in Egypt in pre-ancient times and so 
antedates the advent of the major world religions.52 Denholm cites the earliest written record of 
the custom as being that of Strabo, the Greek geographer and historian, who reported

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50 Doug Graham mentioned the British legislation enacted in 1985, as well as progress in the Australian states 
system towards similar bans (now complete); (29 November 1994) 545 NZPD 5232. Section 1 of the Prohibition 
of Female Circumcision Act 1985 (UK) says it is an offence for any person to “excise, infibulate or otherwise 
mutilate the whole or any part of the labia majora or labia minora or clitoris of another person”. A revised version 
retaining this definition was passed in 2003; see Female Genital Mutilation Act 2003 (UK), s 1. See also Crimes 
Act 1900 (NSW), s 45, which provides for a maximum of 7 years imprisonment to anyone who “excises, 
ininfibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person”.

51 In particular, male circumcision, corrective operations for intersex children, cosmetic vaginal surgeries for 
women, as well as genital piercings, tattooings and so on. All of these are arguably non-therapeutic, culturally-
driven activities, which New Zealand law leaves largely unregulated.

52 Slack claims it has been practised for “nearly 2,500 years”. Alison Slack “Female Circumcision: A Critical 
incidences of excision on Egyptian girls in 25 BC.\(^5^3\) The practice, however, existed many centuries before that date, with one estimate being that it was brought to Egypt as long ago as 3,100 BC.\(^5^4\) From there, it spread throughout much of sub-Saharan and East Africa, carried by dominant tribes in a fluid process of conquest and shifting tribal, ethnic and cultural loyalties.\(^5^5\)

The practice currently affects approximately 130 million women and girls around the world, and numerous reports estimate that up to 2 million females are at risk from the procedure every year.\(^5^6\) FGM is carried out in around 42 countries, Africa being the most common location, with WHO reporting that most of those who have undergone the procedure live in 28 African nations.\(^5^7\) There are also instances of FGM occurring in the Arabian Peninsula amongst minority ethnic groups and in Asia (principally in Malaysia and Indonesia).\(^5^8\) It is now generally agreed that the practice has spread outside these areas as a consequence of the mass emigration from the developing world to industrialised nations since World War II. In recent years, this has been observed most notably in the context of civil wars in the horn of Africa, a phenomenon that has produced large numbers of refugees, some of whom may continue to adhere to the custom in their adoptive countries.\(^5^9\)

I will now consider precisely what practices are considered by the international human rights community to fall under the definition of FGM. There are in fact a number of different classifications espoused by different sources, some encompassing a broader range of procedures than others. Perhaps the most exhaustive typology is that provided by WHO:\(^6^0\)

**Type I** Excision of the prepuce, with or without excision of part or all of the clitoris.

**Type II** Excision of the clitoris with partial or total excision of the labia minora.

**Type III** Excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation).

**Type IV** Unclassified: includes pricking piercing or incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding


\(^{54}\) White reports the possibility it was imported at this time by “invading militant people” who “brought the practice of FGM to the Nile River Valley”. Allen White “Female Genital Mutilation in America: The Federal Dilemma” (2001) 10 Tex J Women & L 129, 133, citing Efua Dorkenoo *Cutting the Rose: Female Genital Mutilation: The Practice and its Prevention* (Minority Rights, London, 1994) 33.

\(^{55}\) Denholm *FGM in NZ*, above n 19, 17.

\(^{56}\) Ibid 18; Toubia *Global Action*, above n 4, 5; *Joint WHO/UNICEF/UNFPA statement*, above n 19, 5. Davis reports that the practice may affect 4-5 million girls annually, with 80-110 million currently affected. Dena Davis “Male and Female Genital Alteration: A Collision Course with the Law?” (2001) 11 Health Matrix 487 (“Davis ‘Collision Course’”), 491.

\(^{57}\) *Joint WHO/UNICEF/UNFPA statement*, above n 19, 5; Denholm *FGM in NZ*, above n 19, 18.

\(^{58}\) Denholm *FGM in NZ*, above n 19, 18; Toubia *Global Action*, above n 4, 26.

\(^{59}\) *Joint WHO/UNICEF/UNFPA statement*, above n 19, 5.

\(^{60}\) Ibid 3; available at: <www.who.int/reproductive-health/publications/fgm/fgm_joint_st.pdf>. Compare with Toubia’s narrower classification in 1995, which excludes the WHO Type I and IV procedures. Regarding Type IV, she prefers to omit “minor forms of genital rituals”, such as pricking and washing of the clitoris, from her definition of FGM. With respect to Type I, Toubia considers that “male style female circumcisions are only done on women in surgical settings, usually on adult women”. Toubia *Global Action*, above n 4, 9-11.
tissue; scraping of the tissue surrounding the vaginal orifice (angurya cuts) or cutting of the vagina (gishiri cuts); introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purposes of tightening or narrowing it; and any other procedure that falls under the definition of female genital mutilation given above.

The prevalence of FGM ranges from 5% (in Uganda) to 99% (in Somalia and Djibouti) of women in practising countries. The most common forms carried out are Type I and Type II, which are said to account for 80% of all cases. WHO reports that the most severe version, infibulation (Type III), is performed in 15% of global instances, although in Djibouti, Somalia and northern Sudan it is said to affect 90% of women. Regarding the age at which FGM is performed, this differs from community to community. Toubia claims it is carried out most commonly on girls between 4-10 years of age and sometimes on girls of marriageable age, as a form of initiation ritual into adulthood, often for girls aged between 14-16 years. WHO reports that it is performed on infants a few days old, on girls between the ages of 6 and 10, and also on adolescents and occasionally during adulthood. In Somalia, which shall feature prominently in my discussion, it is believed that circumcision is typically conducted on girls between 6-10 years of age. Finally, it is worth noting that there has been a reported change in recent years to performing the procedure on much younger children, and in some cases this is done before families emigrate to Western countries where the criminal law prohibits the practice.

In cultures where FGM is common, it is usually performed by traditional practitioners, almost always older women, who apparently use “special knives, scissors, razor blades, scalpels or pieces of glass”. Anaesthetics are generally not used in the customary setting and the girl is held down by other women during the operation to prevent struggling, which is regarded as a major cause of unintended damage. There are reports of FGM being performed by medical personnel under much safer conditions in urban areas in Africa, though this “medicalisation” of the practice is strongly opposed by WHO, which takes the view that this may lead to entrenchment of the practice.

This leads us finally to the question of why FGM is performed. The reasons for the practice are comprised of a complex web of cultural, religious, sociological and psychosexual motivations. I shall explore these reasons further in the next section, but for the moment it

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61 Denholm FGM in NZ, above n 19, 19.
63 Ibid.
64 Toubia Global Action, above n 4, 9. In Nigeria, FGM is performed in some tribal groups at the same time a woman gives birth to her first child. See Emily Collins v Sweden (2007) ECHR, Application no 23944/05 (admissibility decision).
65 Joint WHO/UNICEF/UNFPA statement, above n 19, 4; Denholm FGM in NZ, above n 19, 21.
67 Guerin reports that some of the Somali women in her study on FGM evaded the prohibition by “having young girls circumcised as early as two years of age before they come to New Zealand”. Ruth Laugesen “Female circumcision supported by Somalis” Sunday Star-Times (29 October 2006); and see Denholm FGM in NZ, above n 19, 21.
68 Denholm FGM in NZ, above n 19, 21; Joint WHO/UNICEF/UNFPA statement, above n 19, 3-4.
69 Denholm FGM in NZ, above n 19, 21.
70 Joint WHO/UNICEF/UNFPA statement, above n 19, 8. This appears to have occurred in Egypt, where it was thought that banning FGM outright would drive the practice underground. See “A little less purity goes a long way” The Economist (UK, 5 July 2007).
71 For the WHO summary of these reasons, see Joint WHO/UNICEF/UNFPA statement, above n 19, 4. For a diagramme that depicts the overlapping reasons for FGM, see WHO Female Genital Mutilation: Programmes to
suffices to identify the basic motivations behind the custom. These lie in the perceived need to preserve, by reducing female sexual desire, pre-marital female chastity in tribal cultures as a necessary precursor to marriage. Also significant is the wish, on the part of practitioners and of at least some of those on whom FGM is performed, to identify with one’s cultural heritage by means of a significant rite of passage, as is the case with male circumcision in some cultures. Thus, FGM is seen by many as a way of preserving tribal traditions and family bonds, thereby enhancing social cohesion. It is a matter of debate as to whether these reasons emanate from a religious underpinning, or whether they exist separately from religion and that religion merely interceded later to endorse them. However, it is not disputed that FGM is at least associated with certain religious groups, in particular Muslims and Christian Copts, as well as animists in some parts of Africa. Importantly for our purposes, many of the individuals who perform or are subjected to FGM believe that it is a required tenet of Islam. Intertwined with this religious nexus are other motivations, described as “myths” by the WHO, such as perceptions that the procedure will enhance fertility and that the clitoris, if left intact, can be “dangerous”, or even grow to an unmanageable size. Other reasons for carrying out FGM include a perceived need for cleanliness and a general aesthetic attitude that uncircumcised genitalia look unattractive. There are no documented health reasons for performing FGM, save for those cited above concerning myths and hygiene, which have received no support in Western medicine. It is interesting to note at this point that clitoridectomy (removal of the clitoris) was carried out by medical doctors in 19th century England and also in the United States up to the 1950s. The medical justifications given then were that the surgery could control, inter alia, masturbation, epilepsy, lesbianism, melancholy, hysteria and nymphomania, reasons that overlap perhaps with some of those given for modern incidences of FGM in Africa, particularly as they relate to


\[\text{72 Infibulation is regarded in Somalia as “proof of virginity when the young women marry”. Sara Johnsdotter “Somali Women in Western Exile: Reassessing Female Circumcision in the Light of Islamic Teachings” (2003) 23 J of Muslim Minority Affairs 261 (“Johnsdotter ‘Somali Women’”), 262.} \]

\[\text{73 The converse of this social cohesion argument of course is the view that FGM is a tool of patriarchal and patrilinear societies that are designed to keep women subjugated to men. Southard argues: “Female genital mutilation continues, …supported by three powerful forces: a gender hierarchy so ingrained it is difficult to recognize, a male (often unconscious) desire to maintain gender hierarchy, and the support of the victims who are granted at least occasional feelings of power by the performance of the mutilation.” Jo Southard “Protection of Women’s Rights under the Convention on the Elimination of All Forms of Discrimination Against Women” (1996) 8 Pace Int’l L Rev 1, 65. The fact that it is actually women who typically perform FGM is of no odds to this line of feminist discourse, which promotes the view that FGM is at base a discriminatory act, and not merely a human health issue. Southard considers that women persist with carrying out the procedure because it “provides a rare opportunity for a woman to be powerful”; ibid.} \]

\[\text{74 Joint WHO/UNICEF/UNFPA statement, above n 19, 4. WHO notes that FGM has often been carried out by Muslim communities, but that it “pre-dates Islam” and “there is no substantive evidence that it is a religious requirement of Islam”. Ibid. See text below accompanying ns 348-350 for discussion of the religious bases for female circumcision.} \]

\[\text{75 Slack “Critical Appraisal”, above n 52, 459.} \]

\[\text{76 Ibid 460. And see Sussman “Contending with Culture: an Analysis of the Female Genital Mutilation Act of 1996” (1998) 31 Cornell Int’l LJ 193, 210.} \]

\[\text{77 For example, the Queensland Law Reform Commission Report on FGM in 1994 found: “There are no known medical advantages in performing female genital mutilation on normal healthy female genitalia.” Queensland Law Reform Commission Female Genital Mutilation (Report No 47, September 1994) 56. See also, Letter from Department of Justice to the Chairperson of the Justice and Law Reform Select Committee Crimes Amendment Bill (no 2): Briefing Paper (8 February 1994), JL/95/94, DJ1, 4: “There appears to be no accepted therapeutic benefits associated with the practice.”} \]

\[\text{78 Melissa Morgan “Female Genital Mutilation: An Issue on the Doorstep of the American Medical Community” (1997) 18 J Legal Med 93, 105.} \]
marriageability and the desire to curb the female sex drive.\textsuperscript{79} No doubt the removal of the clitoris would “cure” some of these conditions, but support for the procedure has emphatically long ceased to exist in Western countries.

1.1.2 Possible New Zealand incidence of FGM

I now move on to speculate on the extent to which FGM may currently be practised in New Zealand. The 1994 Cabinet Paper recommending passage of the Crimes Amendment Bill made reference to the then recent influx of Somali refugees following civil war in that country, which apparently had aroused “policy and public interest” in FGM.\textsuperscript{80} However, at the time of the paper the police could produce no evidence that the custom had taken place in New Zealand. The paper then offered the tentative opinion that FGM “might be performed in New Zealand” because of the “immigration of people from African and Middle Eastern countries where female genital mutilation is prevalent”.\textsuperscript{81} The Ministry of Health estimated in 1995 that 2,199 females were resident in New Zealand whose birthplace was an African nation (excluding South Africa, which is not regarded as a practising country) and speculated that “there is likely to be a small number of women and girls living in New Zealand who have been subjected to FGM, or who are at risk of being subjected to it”.\textsuperscript{82} It is apparent, therefore that, despite the possible logic of these inferences from immigration figures, at the time of the initiation of legislation against FGM there were no data – not even of an anecdotal nature\textsuperscript{83} – indicating that the procedure had occurred in New Zealand.

The number of New Zealand residents who can trace their origins to African countries has increased considerably in the decade since the inception of the anti-FGM legislation. Regarding the Somali community, Ministry of Health figures from 1992-1995 indicate that approximately 420 Somalis settled in New Zealand during that period.\textsuperscript{84} The latest census in

\textsuperscript{79} Ibid. For the saga surrounding the British practice, which was carried out for the same reasons as in the US, see Robert Darby \textit{A Surgical Temptation: The Demonization of the Foreskin & the Rise of Circumcision in Britain} (University of Chicago Press, London, 2005) (“Darby \textit{Surgical Temptation}”) ch 7.

\textsuperscript{80} Cabinet Paper, above n 18, [3].

\textsuperscript{81} Ibid [6].

\textsuperscript{82} Ministry of Health \textit{To Health Professionals: Female Genital Mutilation} (Ministry of Health, December 1995) 2. One study records an FGM prevalence of 71.5% for Somali refugees, who were most likely to have had the operation out of a sample of 606 women from Congo, Sudan, Ethiopia and Somalia. A McLeod & M Reeve “The health status of quota refugees screened by New Zealand’s Auckland Public Health Service between 1995 and 2000” (2005) 118 NZMJ.

\textsuperscript{83} Compare with Australia, where the Family Law Council Report in 1994 was able to document, so far as this is possible, some anecdotal occurrences of the practice. For example, these included reports that some Malaysians practise the cutting of the clitoral prepuce in Western Australia, and that “old grannies” are known to have performed FGM on Somali children in Melbourne. See Family Law Council Report, above n 11, [2.41]. Macklin speaks of anecdotal reports suggesting the practice is being carried out in Canada and that “most operations are performed by healthcare professionals, since in Canada, unlike Britain or France, few young women show up at hospitals suffering from botched procedures”. Audrey Macklin “The Double-Edged Sword: Using the Criminal Law Against Female Genital Mutilation in Canada” in Rogaia Abusharaf (ed) \textit{Female Circumcision: Multicultural Perspectives} (University of Pennsylvania Press, Philadelphia, 2006) 207 (“Macklin \textit{Double-Edged Sword}”), 210.

In the UK, the famed atheist scientist Richard Dawkins claims: “[FGM] is a regular practice in Britain today. A senior Schools Inspector told me of London girls in 2006 being sent to an ‘uncle’ in Bradford to be circumcised. Authorities turn a blind eye, for fear of being thought racist in the ‘community’.” Richard Dawkins \textit{The God Delusion} (Bantam Press, Auckland, 2006) 329. It seems likely that Dawkins’ claim is correct; see Helen Pidd “Met’s unique £20,000 reward to stop mutilation of women” \textit{The Guardian} (UK, 11 July 2007).

\textsuperscript{84} See table in Ministry of Health \textit{To Health Professionals: Female Genital Mutilation} (Ministry of Health, December 1995) 2. In the period 1992-1995, the Ministry of Health identified residence approvals in New Zealand of persons from 19 FGM-practising countries, all of which were African. Somalia was placed second highest in terms of numbers accepted, behind Egypt.
2006 discloses a population of 2,316 Somalis, though apparently the number of new Somali immigrants has dropped sharply, from 207 in 1999-2000 to just 13 in 2005-06, as a result of the New Zealand refugee intake shifting its focus to other countries. The implication in the Cabinet Paper that increased immigration from countries such as Somalia would lead to the occurrence of FGM in New Zealand has not been borne out in the form of prosecutions under the anti-FGM Act. However, some anecdotal evidence has since arisen that, when taken in conjunction with recent research conducted on attitudes to FGM within the New Zealand-based Somali community, suggests the custom may be taking place in secret. In August 2006, an anonymous social worker claimed that two teenage Somali girls had been “circumcised” by their mother and grandmother in the previous two years. This instance has never been verified, but is significant if viewed alongside the interesting findings of the Guerin and Elmi study on attitudes among Somali New Zealand women to FGM. Guerin and Elmi found that 78% of the women taking part in their research thought the anti-FGM law was “unfair” or “too harsh”; and 90% said that Type I FGM (defined in the study as “excision of the prepuce with or without excision of part of all the clitoris. (Sunna)”) should be legal in New Zealand. Many of the interviewees also gave reasons for wishing to continue the practice that fit with the type of motivations that Kymlicka identifies as typical for members of minority religious groups who wish to retain access to the customs of their own “societal cultures”. According to Kymlicka, where access to these choices is made unavailable through the law, the liberal ideal of being able to construct one’s life from within one’s culture is denied. Putting to one side for the moment Kymlicka’s proviso that these choices must be made voluntarily, it is possible that for many Somali women FGM provides a valued link to the culture they left behind in Africa and one that gives their lives meaning in New Zealand. For example, one of Guerin’s interviewees says: “Cutting is good. It is like embracing your culture and you can’t be a Somali in one thing and Westener in another thing…. It’s like a ticket for marriage, acceptance and being a true Somali.” The salient point here is that where a community considers a practice to be beneficial in theory, as appears to be the case with respect to Somali New Zealanders’ attitudes to FGM, then it seems reasonable to infer that FGM is also being carried out in practice.

These findings give the strong impression that many Somalis still support the custom, although amongst the Somali immigrant population there appears to have been a move away from the traditional preference for infibulation that is the norm in Somalia. This impression is given particularly strong voice in the words of one woman in the Guerin study, herself having been subjected to infibulation in her home country, who said: “I’m a firm believer of cutting. Sunna

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86 See Jenny Macintyre “Fresh Start” New Zealand Listener (3-9 February 2007).
87 As far as I am aware, there have been no successful prosecutions brought against practitioners of FGM in New Zealand, nor indeed in any other Western country with specific anti-FGM legislation. In Canada one attempted prosecution was abandoned, as it appears prosecutors were not confident that the complainant’s testimony would carry the day in court (the complainant, a Sudanese immigrant, said that she had had the operation in Canada, whereas her parents insisted it had been done in Sudan, before emigrating to Canada). See Macklin “Double-Edged Sword”, above n 83, 222. However, numerous prosecutions have taken place in France under ordinary criminal law. See text below, n 324.
88 Kim Thomas “Families Mutilate Refugees” The Press (29 July 2006); and Laugesen “Cut”, above n 2. Note that the truth of this report was denied by Somali leaders.
89 Guerin & Elmi “Survey”, above n 2, 1.
90 Ibid 4.
92 Anonymous respondent, aged 16-20, with Type III FGM. Guerin & Elmi “Survey”, above n 2, 6.
now, but 15 years ago it was Pharaonic [infibulation].”93 The Laugesen article also points to the possibility that a modified version of Sunna FGM is now being practised in New Zealand, namely a “nicking” of the clitoris so that it bleeds. Indeed, submissions to the Human Rights Commission during the debate on the anti-FGM Bill indicate that this may now even be the form of FGM most favoured by immigrants.94 Moreover, the likelihood that Sunna FGM, whether the version involving actual tissue removal or a mere nicking, is now the preferred form in New Zealand is corroborated by similar findings in studies conducted with Somali immigrants in the UK and Sweden.95

Why has the Somali community altered its attitude to the practice of FGM since arriving in New Zealand? One could speculate that government education, which includes information on the content of the anti-FGM law, has seen Somalis adjust the custom so that it comports with their reading of the law (or at least as close to the law as they feel their culture allows).96 Mahad Warsame, a leader of the Auckland Somali community,97 puts this change down to the fact that many Somali men now would happily marry uncircumcised women, presumably due to the different social environment in New Zealand and weaker social pressures regarding chastity and female purity. Another factor, a result of the dislocation suffered by many refugees, is that an overwhelming priority of immigrants to New Zealand has been the search for employment98 and for acceptability by the host culture, which has meant, perhaps, that traditional practices have reduced in relative importance out of necessity. Looking at this another way, a sociologist might argue that patriarchal tribal structures that were strong in Somalia and which demanded strict adherence to moral and religious precepts may not have survived completely intact after the immigration of their main promoters to New Zealand.

From our discussion, therefore, it appears at least possible that some in the Somali community are practising FGM in New Zealand. To summarise, and using the WHO classification, the two forms that apparently receive some community support are:

(1) Type I (excision of the prepuce, with or without excision of part or all of the clitoris);

93 Ibid 6.
94 The unattributed submissions described this version of Sunna as “a needle pricking (piercing) of the clitoris to draw some drops of blood to satisfy the ceremonial requirements of the practice without causing significant physical trauma”. New Zealand Human Rights Commission Submission of the Human Rights Commission on the Crimes Amendment Bill (No 2) 1994, JL/95/71, 8. Johnsdotter describes this version of Sunna as occurring in Somalia itself, so it may not be an entirely new iteration of the practice for immigrant Somalis. Johnsdotter “Somali Women”, above n 72, 362. See also Amede Obiora “Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision” (1997) 47 Case W Res L Rev 275 (“Obiora ‘Rethinking Polemics’”), 370.
95 One British study saw a drop to only 3.6% supporting infibulation, 23.4% favouring Sunna circumcision and 53.6% opposing the practice altogether. Marwa Ahmed “Attitudes towards FGM among Somali women living in the UK” in Comfort Momoh (ed) Female Genital Mutilation (Radcliffe Publishing, Abingdon, 2005) 95, 103. Regarding Sweden, one study found that: “Most Swedish Somalis seem to have reached the conclusion that sunnah circumcision is acceptable if no harm is inflicted on the girl…..” Johnsdotter “Somali Women”, above n 72, 361.
96 The Ministry of Health notes: “The New Zealand Government is…conducting an education strategy led by the Ministry of Health. It aims to educate affected communities, health professionals, and other professionals such as teachers and social workers, about the health and legal consequences of FGM.” Ministry of Health To Health Professionals: Female Genital Mutilation (Ministry of Health, December 1995) 3. In the Guerin study, 49 of the 54 Somali interviewees claimed they knew about the New Zealand anti-FGM law; Guerin & Elmi “Survey”, above n 2, 4.
97 Warsame estimates that “half the Somali community opposed FGM, and half supported the milder Sunna form”, and that “none supported Pharaonic circumcision”. Laugesen “Cut”, above n 2.
98 Ibid.
2. The infirmity of the Crimes Amendment Act 1995: the cultural bias problem

On the night before the ceremony, women from the nearby villages came to sing and clap while the initiates danced. The next morning the boys washed in the river’s cold waters, wrapped themselves in blankets and paraded before the elders and the regent. At midday the old incibi appeared with his assegai to perform the circumcision. Mandela waited in line, tense and anxious. The old man approached and knelt, looking into Mandela’s eyes. Then, with a single pass of the spear’s blade, the incibi severed the foreskin. Pain burnt through Mandela’s veins like fire. For a moment he closed his eyes, his head bowed, then he cried out, “Ndiyiyindoda” – “I am a man.” (Nelson Mandela’s story)

2.1 MacDonald’s critique of section 204A

Writing in 2004, legal academic Elisabeth Macdonald articulates the discrimination argument against the New Zealand anti-FGM Act – essentially one of cultural bias – in the following way. She argues that the criminalisation of FGM for immigrant communities is fundamentally discriminatory. This is because the Crimes Act at the same time preserves either explicitly or by implication Western practices of genital alteration: namely, circumcision of male children and operations to normalise infants with ambiguous genitalia.

99 “Sunna” means “following the traditions of the prophet Mohammed”. See Asma El Dareer “Attitudes of Sudanese People to the Practice of Female Circumcision” (1983) 12:2 Int’l J of Epidemiology 138.

100 M Maharaj & A Kathrada (eds) Mandela: The Authorised Portrait (Hodder Moa, London, 2006) 14-15. See Alec Russell “Ancient practice of tribal circumcision divides South Africa” Daily Telegraph (UK, 23 January 1997), where a male circumcision event amongst the Xhosa people (the former President Mandela’s tribe) of South Africa is described, in which “three initiates died, 16 lost their manhood and 26 had to have intimate plastic surgery”. See also “Boys who die to be men – the painful initiation” New Zealand Herald (30 December 2009).


102 Regarding the modern trend for adult females to opt for labial “trimmings”, and so on, for cosmetic, sexual, or cultural reasons, MacDonald does not actually discuss this issue in her article, but does mention this class of practices in a subsequent newspaper interview on FGM. In the interview, MacDonald claims that the Act does in fact catch cosmetic operations on women and that not to read it that way is to apply the law “selectively”, so that
on to show that the exemption afforded to intersex surgery in s 204A(3) and the Act’s silence regarding male circumcision, which amounts to an exemption, is the result of the view that culturally inspired genital surgeries are acceptable in New Zealand if they stem from traditions long practised in the West, as male circumcision, for example, assuredly does. In order to demonstrate this, she provides a careful comparison of the cultural and religious reasons for male circumcision (which I describe in section 2.2 below) with those advanced in favour of FGM. Having pointed to striking similarities between the two customs, she then turns to a consideration of the current medical opinion surrounding male circumcision and concludes that none of the standard medical justifications for male circumcision retain any credible basis in modern science.

For MacDonald, the corollary of these conclusions is this: if one takes away the medical reasons for male circumcision, then one is left with only cultural or religious ones. When only cultural/religious reasons for maintaining a Western surgical practice remain, then a prohibition on other substantially analogous forms of surgery, which have a foreign origin and are also justifiable only on cultural/religious grounds, is open to the charge of being “culturally imperialistic” and therefore discriminatory. This, claims MacDonald, is unacceptable in a modern multicultural state. Accordingly, she offers the following solutions to the discrimination inherent in s 204A:

Two options are either to amend the section so that it includes all forms of genital mutilation (including, by definition, male circumcision), or to repeal the section and allow the regulation of the practice of all forms of genital alteration to occur through the education of the relevant communities, and, if necessary, use of the pre-existing criminal law.

We leave to one side for the moment MacDonald’s suggested legislative remedies, which I shall argue later in this chapter as being logical but unrealistic, and will consider now the arguments for and against male circumcision, with particular emphasis on the modern medical consensus that has come down against the practice being recommended as a routine obstetric procedure for infants. As we discuss each issue, the equivalent discourse related to FGM will be invoked in order to show how clear the similarities are between the two practices, and thereby to illustrate the compelling nature of MacDonald’s thesis.

only foreign cultural practices are caught by the ban. Ruth Laugesen “Female circumcision supported by Somalis” Sunday Star-Times (29 October 2006). MacDonald’s view is countered in the article by Dr Andrew Mackintosh, an Auckland “appearance gynaecologist”, whose services include labia re-shaping. Mackintosh says, unsurprisingly perhaps, that MacDonald’s claim is “a nonsense”, although he apparently offers no further argument to support his refutation. In my view, a literal reading of the anti-FGM Act plainly supports MacDonald’s interpretation.

MacDonald performs an identical process regarding intersex surgery, and reaches similar conclusions. MacDonald “Circumcision and the Law”, above n 101, 254-263; see also Nancy Ehrenreich & Mark Barr “Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of ‘Cultural Practices’” (2005) 40 Harv CR-CLL Rev 71. MacDonald also argues that s 204A appears to criminalise inadvertently the alteration of female sex organs in surgery to correct ambiguous genitalia. See MacDonald “Circumcision and the Law”, above n 101, 236.

Ibid 265.

Ibid 264.
5. Circumcision

2.2 Arguments for and against male genital mutilation ("MGM")

As with FGM, the origins of male genital mutilation are obscure, but evidence of the practice has been found in Egyptian mummies dating back to 2,300 BC, and wall paintings in that country suggest it took place “several thousand years earlier still”. An immediate comparison can therefore be made with FGM, in that MGM clearly predates any of the major world religions, certainly Judaism and Islam, both of which regard circumcision of males as a compulsory ritual.

Estimates of the number of living males on whom the MGM procedure has been performed run to 650 million, as compared to some 130 million females. Approximately 13.3 million boys are circumcised each year, whereas the figure for girls is put at around 2 million. When the operation is performed in a tribal setting, as with the example of Nelson Mandela given above, it is often done “under unsanitary conditions”, is performed “without anesthetic”, and is “extremely painful”, circumstances that also obtain in the equivalent female ritual. Moreover, it is claimed that the use of the same instrument in multiple MGM rituals in the tribal setting creates a serious risk of HIV infection, which is also the case according to the WHO report cited earlier in this chapter with respect to FGM.

I will now alter my focus to Western countries, as this assists in drawing our attention to the Western prohibition of FGM in contrast to the non-prohibition of MGM; or, as MacDonald puts it, it makes “more apparent the culturally based judgments underlying the Western criminalisation of female circumcision”. In the West the favoured procedure is that of the

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106 From this juncture, I will refer to male circumcision as “male genital mutilation”, or MGM, in part out of fairness to my earlier lexical choice to prefer “FGM” (which is more or less a result of its use in the New Zealand statute) to more culturally sensitive terminology, such as “female genital cutting”. I will, however, use the word circumcision interchangeably, purely as a matter of prose style, or where context demands. For discussion of the heated debate over terminology in this area, see Dorian Coleman “The Seattle Compromise: Multicultural Sensitivity and Americanization” (1998) 47 Duke LJ 717 (“Coleman ‘Seattle Compromise’”), n 17.

107 Douglas Gairdner “The Fate of the Foreskin: A Study of Circumcision” (1949) 2 BMJ 1433; Davis “Collision Course”, above n 101, 547. See also Ken McGrath Submission to the Justice and Law Reform Committee on the Crimes Amendment Bill (No2) 1994 (9 February 1995), JL/95/85, 2.

108 The Hebrew Bible’s injunction (Genesis 17: 11-12) reads: “Every male among you shall be circumcised. And ye shall be circumcised in the flesh of your foreskin, and it shall be a token of a covenant betwixt Me and you. And he that is eight days old shall be circumcised among you, every male throughout the generations.” For discussion of the Jewish ritual and its attendant controversies, see Davis “Collision Course”, above n 101, 546-551. There is no mention of male circumcision in the Qur’an, but it is recorded in the Hadith, or sayings of Muhammed: “Circumcision is sunnah [accommodating to Muhammed] for men and makrumah [meritorious] for women.” (Al-Sukkari 1988: 59). See Abu-Sahlieh “Myth of the Difference”, above n 5, 55-56; and Myra Williamson “Islamic Headscarves and Female Circumcision: Unveiling the Threat Posed by Islam to Human Rights” (2005) 2 NZ Postgraduate L eJournal 16; and see John Esposito The Oxford Encyclopedia of the Modern Islamic World (Oxford University Press, Oxford, 1995) Vol I (“Esposito Islamic World”), 290, where it is observed: “There are differences of opinion among the legal authorities whether circumcision is fard (legally obligatory) or sunnah (the practice of the Prophet), nor is the motive for the operation always clear.”


110 MacDonald “Circumcision and the Law”, above n 101, 244.

111 Povenmire “Authority to Consent”, above n 101, 115. Povenmire catalogues several other tribal rites, including the Ysidi tribe in Yemen, who apparently “strip the skin from the navel to the anus”. Ibid 116.

112 Ibid.

113 See text above accompanying ns 19, 20, & 68-70 for description of health risks associated with FGM in non-clinical settings.

114 MacDonald “Circumcision and the Law”, above n 101, 244.
surgical removal of the foreskin from the glans of the penis. In its secular guise, the operation is typically performed on newborn males within the first few days after birth. The Jewish custom is to carry out the religious ritual, or bris, in the home when the child is 8 days old, as is mandated by the prescription in Genesis. The bris ritual, the baby is held down, often by the grandfather, while the mother is absent in another room. According to Davis, neither the secular nor the Jewish procedure is accompanied in all cases by anaesthetic, with the Jewish custom being to sedate the baby with a cloth drenched in wine. Numerous reports in the American context show very low rates of anaesthesia when the practice takes place in a clinical setting. For example, Waldeck cites one 1993 survey in which, out of 74 physicians, only 24% used any form of pain relief. This is due, it seems, to the prevailing view historically (even after anaesthesia became more sophisticated and usable on very young babies) that newborn boys are insensitive to pain, although, as I shall explain below, medical opinion in recent years has concluded that this is certainly not true.

Turning now to the New Zealand prevalence of MGM, the first thing to note is that this country once had one of the highest rates of MGM in the Western world, but now has one of the lowest. Starting from a very low incidence in the 19th century, the local rate came to mirror that of Britain during the interwar period, ranging from 20% in 1915 to 39% in 1939. But then, in the years from the beginning of World War II to 1950, New Zealand experienced a dramatic rise in the occurrence of circumcision, with McGrath and Young estimating that “the rate of early childhood circumcision went from about 40% just prior to WWII to over 90% by 1942”. McGrath and Young speculate that this extraordinary increase may have been a result of what they term the “Sand Myth”, or the belief propagated by returning soldiers from the war.

115 “Circumcision is the amputation of the prepuce from the rest of the penis, resulting in permanent alteration of the anatomy, histology and function of the penis”. R Van Howe et al “Involuntary Circumcision: The Legal issues” (1999) 83 BJU Int’l 63; cited in Davis “Collision Course”, above n 101, 510.

116 Many circumcisions are also conducted by General Practitioners in New Zealand, and these incidences in doctors’ rooms are not required to be reported, unless they stem from “notifiable diseases” Ken McGrath & Hugh Young “A Review of Circumcision in New Zealand” in GC Denniston et al (eds) Understanding Circumcision: A Multi-Disciplinary Approach to a Multi-Dimensional Problem (Kluwer Academic, New York, 2001) 129, 141. According to one newspaper report, those seeking religious or cultural circumcisions pay about $1000 for these to be performed in private hospitals, or $300 to a GP. See Martin Johnston “Leave the circumcising to us, surgeon tells GPs” New Zealand Herald (6 August 2002).

117 MacDonald “Circumcision and the Law”, above n 101, 244. Muslims living in Western countries have apparently adopted this timing, but in the Middle East, for example, the procedure is carried out between the ages of 2 and 12. Esposito Islamic World, above n 108, 290.

118 The bris ritual is traditionally carried out by a mohel, or specialised religious operator, who does not necessarily have medical training. Davis “Collision Course”, above n 101, 549. In New Zealand, one report in 2001 observed there are no resident mohelim and that traditional bris ceremonies are performed for the small Jewish community once or twice a year when a mohel is flown out from Australia. McGrath & Young “Circumcision in NZ”, above n 116, 143.


120 Ibid 525; cited in MacDonald “Circumcision and the Law”, above n 101, 245. One study in the US in 1998 revealed rather low rates of anaesthesia and that the type used (necessarily mild on newborns) was unlikely to eliminate circumcision pain entirely. In the Northeast of the US, 28% of doctors reported using analgesics; 37% in the South; 45% in the Midwest; and in the West, 67%. Sarah Waldeck “Using Male Circumcision to Understand Norms as Multipliers” (2003) 72 U Cin L Rev 455 (“Waldeck ‘Norms as Multipliers’”), 511.

121 Davis “Collision Course”, above n 101, 550.


123 MacDonald “Circumcision and the Law”, above n 101, 245.

124 McGrath & Young “Circumcision in NZ”, above n 116; and see Darby Surgical Temptation, above n 79, 315-316.

125 McGrath & Young “Circumcision in NZ”, above n 116, 135. It should be noted that these figures were extrapolated from incomplete data and from anecdotal evidence.
in the desert that uncircumcised penises were prone to various forms of infection and in particular to sand balanitis (inflammation of the glans due to insinuation of sand). This belief, the theory goes, was rapidly disseminated amongst the relatively homogenous population at home and thus the need for circumcision became a “received truth amongst medical professionals”, even though sand balanitis was not an obvious risk in New Zealand. This led in turn to parents having the impression that neonatal circumcision was an essential part of good parenting. It was also thought that waiting for a child to grow older before performing the operation would be more “troublesome” than doing it at birth.

Following the publication of an article in the British Medical Journal by Douglas Gairdner in 1949 that argued strongly against the need for circumcision, medical opinion in New Zealand underwent a (slow) sea change, and by 1961 Otago Medical School was teaching medical trainees that circumcision was unwarranted. Nevertheless, many parents still continued to ask for the procedure, which, according to McGrath and Young, was due in part to pressure exerted by members of the preceding generation who continued to believe in its necessity. Despite the clear transformation in medical opinion that began in 1949, it therefore appears that New Zealand doctors did not at first feel able to refuse the operation when it was insisted upon by parents. From the 1960s, however, the medical profession gradually began to turn public opinion around, employing, it seems, a practice of not mentioning the subject to parents and thereby causing at first a gradual and then a sharp decline in the rate. By 1989, perhaps in the face of a change in parental attitudes, this subtle, “don’t mention male circumcision”, approach appears to have been abandoned, with 61% of doctors in one survey stating that they actively tried to dissuade parents who still wished to have the procedure performed. This initially gradualist and then more active strategy yielded results over time and the latest figures disclose a rate in New Zealand of below 2%. This statistic is comparable to the British level of 3.7%, rather lower than the rate in British Columbia of 6% and the Australian incidence of 10%, and significantly lower than in the US, where the rate

126 McGrath and Young dispute the existence of sand balanitis in desert war theatres but believe that the perception that it was a real medical problem was significant in promoting near universal male circumcision at home. The debate on the Sand Myth continues to this day. See Robert Darby “The riddle of the sands: circumcision, history, and myth” (2005) 118 NZMJ, for a debunking of claims as to the existence of sand balanitis in wartime; and, for the opposite view, see Spencer Beasley “Circumcision: certain controversy over uncertain origins” (2005) 118 NZMJ.

127 McGrath & Young “Circumcision in NZ”, above n 116, 138.

128 “The many and varied reasons commonly advanced for circumcising male infants are critically examined. None are convincing.” Douglas Gairdner “The Fate of the Foreskin: A Study of Circumcision” (1949) 2 BMJ 1433. The British National Health Service, upon its establishment in 1947, made an immediate decision not to fund circumcision, for reasons anticipating Gairdner’s findings. McGrath & Young “Circumcision in NZ”, above n 116, 139. The New Zealand Health Ministry has consistently refused to establish any sort of policy regarding MGM. Ibid ibid.

129 McGrath & Young “Circumcision in NZ”, above n 116, 139.

130 One study identified fathers and grandmothers as most likely to push for circumcision. FT Shannon et al “Infant Circumcision” (1979) 90 NZMJ 283-284; cited in ibid ibid.

131 Ibid 140.

132 Darby Surgical Temptation, above n 79, 316. Darby comments that “New Zealand’s small and (until recent times) homogenous population, and extreme conformism of its society, may help explain both the sudden rise of circumcision and its even more rapid disappearance”. Ibid.

133 Waldeck “Norms as Multipliers”, above n 120, 505.

dropped from a level of 85% of newborn males in 1971 to 65% in 1999, a figure that has remained steady ever since.\textsuperscript{135}

I now move on to consideration of the cultural reasons advanced in favour of MGM. I have already explained that the Jewish practice is based firmly on biblical requirements,\textsuperscript{136} which appear to be unquestioned. This is interesting in itself. Many of those who argue against FGM begin with a conclusory refutation of the religious basis for the practice, mentioning its absence from the Qur'an (while ignoring, or being ignorant of, its arguable textual basis in the Hadith\textsuperscript{137}) and the fact that the custom clearly was in existence before the advent of Islam.\textsuperscript{138} A similar attack might be made on Jewish male circumcision. Although the biblical source is convincing insofar as it certainly exists, there is undisputed evidence that males were circumcised in the Middle East and Africa long before the Hebrew Bible was written. At the beginning of this section, I cited the existence of circumcised mummified remains in Egypt, a location that some scholars have claimed as being the true, non-biblical, starting place of Jewish male circumcision. Waldeck expands on this possibility, citing the writings of Rabbi Norman Mirsky, who argued that Moses introduced the custom of MGM to the Israelites for the purpose of elevating them to the same social level as their Egyptian slave-masters.\textsuperscript{139} It appears, then, that whatever source is regarded within Jewish culture as controlling, it is fairly certain that the practice was not invented by the Israelites. The main point to make here is that many cultural activities predate their inclusion in foundational religious texts, a fact that a moment’s thought would not regard as surprising. One might, for example, think of the custom against murder as one that predates the Ten Commandments. However, to argue now that the biblical injunction against murder is therefore not a religious tenet would surely seem strange. To conclude on this point, the common spectacle of opponents of FGM regarding the mere fact of its existence before the advent of Islam as a knockdown argument for denying the religious basis for the custom seems unsustainable.

The great majority of male circumcisions in the West are now done within secular-cultural and/or newly invented medical contexts. These two motivations superseded, or in some cases grew up around, the original and now discredited 19th century purpose of MGM, which was the perceived medical need to curb masturbation\textsuperscript{140} and the illnesses (such as blindness, madness and epilepsy\textsuperscript{141}) that were supposed at the time to flow from that activity. I shall consider each in turn.

\textsuperscript{135} Waldeck “Norms as Multipliers”, above n 120, 474-475. Waldeck ascribes the fall in circumcision in the UK and Canada in large part to the withdrawal of public funding. In the US, Medicaid and most private insurance plans continue to fund circumcision. This has contributed to the continuation of strong support for the practice amongst parents in the US, where male circumcision is still regarded as a sign of “good parenting”. Ibid 505. In New Zealand, public funds are no longer allocated to male circumcision, unless it is justified by verifiable disease. See Martin Johnston “Leave the circumcising to us, surgeon tells GPs” New Zealand Herald (6 August 2002).

\textsuperscript{136} See above n 108. Note that there appears to be no Western Christian impetus in favour of MGM per se. Saint Paul was adamant that it should not be performed on Christians, which echoes the disputes among Muslim scholars regarding FGM; see, eg, Romans 2:25:29 & Corinthians 7:18-24 in New English Bible Edition; cited in Ken McGrath Submission to the Justice and Law Reform Committee on the Crimes Amendment Bill (No2) 1994 (9 February 1995). JLR/95/85, 2; see also Queensland Law Reform Commission Circumcision of Male Infants: Miscellaneous Paper 6 (December 1993) n 5.

\textsuperscript{137} I sketch the possible religious basis for FGM in the text below accompanying ns 348-350.

\textsuperscript{138} See text above accompanying ns 52-55.

\textsuperscript{139} Davis “Collision Course”, above n 101, 547.

\textsuperscript{140} An American study concludes that, in any case, circumcised men are in fact more likely to masturbate than uncircumcised men. Waldeck “Norms as Multipliers”, above n 120, 493.

\textsuperscript{141} Ibid 471; Davis “Collision Course”, above n 101, 551; and see MacDonald “Circumcision and the Law”, above n 101, 251, where she lists blindness, memory loss, depression, diabetes, loss of muscle tone and impotence as conditions once thought to be caused by masturbation. Nineteenth century medicine also apparently regarded the
5. Circumcision

2.2.1 Cultural justifications for MGM

In the tribal setting, MGM plays a key role in adult initiation ceremonies in some cultures, as seen in the Mandela example above. In this context, it mirrors the reasons cited for FGM, where it is performed on young women as a means of facilitating a conscious transition to the adult sphere and the concomitant new roles that initiates are expected to play.\(^{142}\)

In the West, where males are generally circumcised at birth, it is interesting to note that the cultural factors supporting FGM have arguable parallels to those associated with MGM. Numerous studies (mainly conducted in the US, where MGM remains the norm) report that male circumcision creates a feeling of belonging and manliness.\(^{143}\) The main promoters of this view, it seems, are parents, who ask for the procedure to be carried out for “social concerns”. These include the desire for the son to resemble his father and his peers, and also to avoid ridicule, or what is known as the “locker room” syndrome.\(^{145}\) Another motivation is to avoid harm to the male child’s chances in his later sex life.\(^{146}\) Some research indicates that women (particularly in the Caucasian community, where MGM is statistically most common in the US) regard the uncircumcised penis as unattractive, and this preference is confirmed by some research into heterosexual activity. For example, circumcised men are more likely to receive oral sex than uncircumcised ones, presumably because of female aversion to the intact male foreskin.\(^{147}\) Another reason for male circumcision identified by researchers is generated by the powerful norm of masculinity that runs through Western society. Many cultures, it is argued, provide tests of masculinity, which often involve creating “stress or distress as a means of proving manhood”.\(^{148}\) Some consider that dangerous contact sports are examples of this type of activity, and MGM may be another.

Similar social justifications are also cited in the context of FGM. Regarding the last of the reasons given above for MGM, “Faduma’s story”, which begins this chapter, demonstrates a parallel factor in FGM regarding the need in some societies for a testing of the physical and mental resolve of initiates into adulthood through a stressful rite of passage. Also, as with MGM, the desire to resemble one’s peers is important and is mentioned in the Guerin and Elmi survey by one interviewee: “Sometimes a girl longs to be cut so that she can be similar to her peers.”\(^{149}\) Related to this is the fact that it is difficult if not impossible for uncircumcised females, at least in the tribal setting, to marry, a factor that is mirrored perhaps in the abovementioned aversion of some females in the West to the uncircumcised penis. Also, many

\(^{142}\) MacDonald “Circumcision and the Law”, above n 101, 249.
\(^{143}\) Ibid.
\(^{144}\) A reason given by both Jews and non-Jews. Davis “Collision Course”, above n 101, 555. Indeed, even non-practising Jews are said to still prefer circumcision, for the non-religious reasons cited here.
\(^{145}\) Waldeck “Norms as Multipliers”, above n 120, 492.
\(^{146}\) Ibid.
\(^{147}\) Ibid 493.
\(^{149}\) Guerin & Elmi “Survey”, above n 2, 5.
who still advocate FGM in the tribal setting, and indeed in New Zealand according to the interviews conducted by Guerin and Elmi, appear to regard vague but deeply felt notions of simple “tradition” as the most important factor, with one respondent stating: “It is every aspect of being a complete Somali woman. If I was not feeling this I wouldn’t have it done on my daughter.” This factor is surely also significant with respect to the continued maintenance of the rate of MGM in the US, which remains high despite a recent statement by the American Academy of Pediatricians (to which I shall refer in more depth below) recommending against routine neonatal circumcision of males. Overarching all these reasons is the need for minority groups to promote social cohesion in the midst of the assimilationist demands, both conscious and unconscious, of the larger society. This is particularly strongly felt in the American, and presumably New Zealand, Jewish minority group. This reason is also apparent in the Guerin and Elmi study into Somali New Zealand attitudes to FGM, indicating that non-religious factors, including the fear of assimilation, have at least as strong an influence on the decision to circumcise as religious ones: “Our culture should be introduced to them and its significance to us, but should not promote western culture and kill our culture. There are good things in both communities.”

In the New Zealand context of male circumcision, it might be thought that such considerations are irrelevant, due to the very low incidence of MGM. However, in communities where circumcision is practised it seems that many of the motivating factors mentioned above are present. McGrath and Young speak of the near 100% prevalence of MGM in the Samoan and Tongan community in New Zealand. In their study, all interviewees drawn from these ethnic groups claimed that “none of their females will have any contact with a genitally intact male, and older boys have this potential sexual failure pointed out to them”. Apparently, the wider family in these communities, typically uncles and cousins, have been known forcibly to escort older intact males to doctors, some “being manhandled to their circumcision against their vehement protest”. McGrath and Young also suggest that some New Zealand-based Pacific Island families will have their sons circumcised in advance of their visiting relatives in the islands, in case they are kidnapped and mutilated in non-clinical village settings upon arrival. Such scenes, if true, bear a striking resemblance to the type of genital alteration rites in Africa that cause such consternation in the West.

In concluding her consideration of the cultural justifications put forward for FGM and MGM, Dena Davis (whose 2001 article informs in part MacDonald’s position on this issue) makes the following summary, which the discussion above of the cultural similarities between the two practices is intended to illustrate. Regarding FGM, Davis states: “The reasons why parents subject their daughters to [FGM] include a mix of religion, custom, group cohesion, concern

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150 Guerin & Elmi “Survey”, above n 2, 7. Slack points to tradition being the "most widely held justification for the continued practice of female circumcision" and is very often the only reason given. Slack “Critical Appraisal”, above n 52, 448.
151 Slack makes this observation regarding MGM’s persistence in the US regarding parental insistence on having MGM performed, despite mounting evidence against its necessity. Ibid 449.
153 Waldeck “Norms as Multipliers”, above n 120, 554.
154 Guerin & Elmi “Survey”, above n 2, 6.
155 McGrath & Young “Circumcision in NZ”, above n 116, 143. Apparently, the traditional Pacific Island cultural preference for circumcision involves “supercision”, whereby “dorsal” slits are made lengthways in the foreskin, although McGrath & Young claim that in many cases Western-style total circumcision is in fact performed. One doctor refers to the appearance of dorsal circumcision as “like Mickey Mouse with two big ears. I get a number of these and have to repair them when they are older”. Martin Johnston “Leave the circumcising to us, surgeon tells GPs” New Zealand Herald (6 August 2002).
156 Ibid.
for cultural survival, family pressure, a misunderstanding of medical benefits, and economic concerns.”

Concerning MGM: “The reasons why parents subject their sons to [MGM] include religion, custom, group cohesion, family pressure, a misunderstanding of medical benefits, and economic motivations from those who perform circumcision.”

The only difference of course is that male circumcision is legal in New Zealand, whereas the female equivalent, even where it entails the roughly analogous procedure of removal of the clitoral prepuce, or the even less intrusive nicking of the clitoris or clitoral prepuce, is illegal. The point at which the male and female procedures resemble each other closely thus reveals at the cultural level an inconsistency in the reach of the anti-FGM legislation that is difficult to justify.

I now turn to a consideration of the medical justifications for MGM, which have traditionally been regarded as a point of distinction between MGM and FGM. Davis regards the distinction charitably, as being the result of a “misunderstanding” on the part of parents who believe they are acting in their sons’ best interests when they allow male circumcision to be performed. This viewpoint has in the past formed an arguable scientific basis for a defence of the continued legality of MGM in response to those who would ban the male procedure along with FGM. For example, British academic RD Mackay argued in 1983 (in light of the proposed UK legislation to ban FGM, which was passed in 1985) that, “whereas for males circumcision is harmless, for females it is quite the reverse.” The following discussion will attempt to show that while it may have been possible to argue in 1983 that MGM is a harmless or even beneficial procedure, it is certainly more difficult to make that argument now in light of modern medical discourse on the subject.

2.2.2 Medical justifications for MGM

In the debates surrounding passage of the New Zealand anti-FGM Act, there was an attempt to include male circumcision among the banned activities. This was put forward, somewhat half-heartedly it must be said, in Parliament by some opposition MPs. It also formed the content

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157 Davis “Collision Course”, above n 101, 562. The economic benefit for parents, who have genitally altered daughters in traditional societies, stems from their enhanced marriageability, a crucial factor in arranging socially advantageous marriages and obtaining higher dowries. Ibid 543.
158 Ibid. The economic motivations are allegedly those of the medical profession, who make a profit from the continued funding of MGM by Medicaid. Ibid 537.
159 Regarding the analogousness of the two procedures, one study recorded that discussions with “pediatric urologists and gynecologists” yielded a consensus that: “Excision of the clitoral prepuce is anatomically neither more nor less radical a procedure than removal of the penile foreskin”. M Benatar & D Benatar “Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision” (2003) 3:2 Am J of Bioethics 35, 44 (“Benatar ‘Ethics of Circumcision’”).
160 The main thrust of Waldeck’s article on the strong normative power of MGM in the US, where, uniquely in the West, MGM remains a majority choice, is that parents are duped into arranging MGM for their sons due to a sort of “false consciousness” as to the benefits of the procedure: “[B]ecause we are often inclined to assume that a particular behavior is preferable simply because so many of our peers do it, norms provide a reference point which predisposes us to exaggerate variables that support the norm and to downplay those that contradict the norm.” Ibid 467-468. The existence of the norm to circumcise male infants is no longer evident within the majority Caucasian culture of New Zealand, although it probably maintains a very strong functional power within traditional Pacific Island communities that universally circumcise their male children.
of an impassioned, long submission\textsuperscript{163} to the Justice and Law Reform Select Committee by Ken McGrath of the Department of Anatomy of the Auckland University School of Medicine (and also the author of the book chapter on MGM in New Zealand that is relied on above). McGrath lobbied for the inclusion of male circumcision in the Crimes Amendment Act based on the growing medical consensus that the procedure was not warranted by any convincing medical indications. His submission drew attention also to the ever-increasing medical literature that proves, among other things, that the removal of the foreskin from male infants is in fact extremely painful and, furthermore, results in significant loss of feeling for circumcised adult males during sexual activity later in life.

The response of the Select Committee to McGrath’s submission was a negative one, with no recommendation being made to extend the prohibition of FGM to include MGM. The Committee’s decision appears to have relied on a Department of Justice report that disputed whether the broader medical community accepted the opinion advanced by McGrath. The report, which did not engage at all with the medical arguments put forward by McGrath, claimed that: “While the medical debate on the merits of the practice of male circumcision is still unsettled, the practice of female genital mutilation is almost universally deplored.”\textsuperscript{164}

I shall now turn to the medical debate surrounding MGM.

The first point to note is that the decision in 1995 not to regulate the practice because the debate on the medical justifications of MGM was “unsettled” has been overtaken by events. In 1999, the American Academy of Pediatrics (“AAP”) determined that the health benefits associated with MGM were not sufficiently compelling to justify its use as a routine medical procedure.\textsuperscript{165} These findings repeat in substance those made by the Canadian Pediatric Society, the British Medical Association, and the Australasian Association of Paediatric Surgeons (“AAPS”).\textsuperscript{166} The AAPS summarised its conclusions thus:\textsuperscript{167}

The AAPS does not support the routine circumcision of male neonates, infants or children in Australia. It is considered to be inappropriate and unnecessary as a routine to remove the prepuce, based on the current evidence available.…. We do not support the removal of a normal part of the body, unless there are definite indications to justify the complications and risks which may arise. In particular, we are opposed to male children being subject to a procedure, which had

\textsuperscript{163} Ken McGrath Submission to the Justice and Law Reform Committee on the Crimes Amendment Bill (No2) 1994 (9 February 1995), JL/95/85.

\textsuperscript{164} Letter from Department of Justice to the Chairperson of the Justice and Law Reform Select Committee Crimes Amendment Bill (No 2) Report of the Department of Justice (9 March 1995), JL/95/95, DJ2, 7; cited in MacDonald “Circumcision and the Law”, above n 101, 247. McGrath and Young later claimed to have heard that “officials of the Ministry of Justice had advised the Minister to avoid considering the points we had raised on the grounds that they were ‘too difficult’”. McGrath & Young “Circumcision in NZ”, above n 116, 144.


\textsuperscript{166} See MacDonald “Circumcision and the Law”, above n 101, 252. Note that none of the medical societies listed here recommended a ban on male circumcision for cultural or religious purposes. Indeed, the Royal Australasian College of Physicians (“RACP”) records simply that circumcision of males “remains an important ritual in some religious and cultural groups”, and that it has been under the legal spotlight in recent years. Royal Australasian College of Physicians Policy Statement on Circumcision (September 2004) (“RACP Policy Statement”), at introduction & [7]; available at: <www.racp.edu.au/index.cfm?objectid=A4254F55-2A57-5487-DFE129631BCB4C59>. Note that the RACP speaks for the agreed position held by a number of organisations, including the New Zealand Paediatric Surgeons and the Paediatric Society of New Zealand. The American Academy of Pediatrics states that “it is legitimate for parents to take into account cultural, religious, and ethnic traditions” when making the decision to circumcise male infants. American Academy of Pediatrics: Task Force on Circumcision Circumcision Policy Statement (1999) 103:3 Pediatrics 686.

\textsuperscript{167} Ibid.
they been old enough to consider the advantages and disadvantages, may well have opted to reject the operation and retain their prepuce.

Current medical opinion, therefore, appears to have “settled” since the conclusory remark made by the Department of Justice in 1995. The AAPS statement above that “current evidence” does not justify the routine removal of the prepuce is based on a growing body of medical opinion that debunks, one study after another, the reasons that formerly justified the operation. I shall now consider some of these.

Pain

It will be recalled that some proponents of MGM have suggested that the discomfort caused by the operation is minimal, as newborns have little sensitivity to pain. For example, it seems that Jewish mohelim have made this claim on several occasions in the US, with one sample of this viewpoint being that of Rabbi Eugene Cohen, president of the Brit Milah Board of New York, who said in a 1996 letter to the *New York Times* that newborns “cannot feel pain”. A quick consideration of the procedure itself makes such assertions appear doubtful. Waldeck describes a generic MGM operation in the following way: “Although the procedure varies depending on which surgical instruments are used, typically the doctor grasps the foreskin with clamps, tears it away from the glans, slits the foreskin and pulls it through the clamp, tightens the clamp to hold the foreskin in place, and then cuts off the foreskin.” This procedure results in a virtual flaying of the glans, which, after forcible breaking of the synechia (the membrane which binds the glans and foreskin), remains “raw, bleeding and frequently pitted”. Ordinarily the glans and foreskin are fused together until the age of three in most cases, so it seems counterintuitive, to say the least, to argue that the necessarily bloody removal of the foreskin during an infant’s first days of life would not cause pain.

Indeed, medical opinion has concluded that newborns do in fact feel pain; and also that infants will not forget pain. And even if it were conceded that pain is forgotten over time,
some studies suggest that the irrefutable instance of pain at the time of the procedure can result in psychological damage later in life, such as “bonding impairment” and “long-term heightened pain response”. In any case, some commentators have suggested imaginatively that if newborns were in fact likely to forget pain then surely it would also be justifiable to operate without anaesthetics on elderly patients with senile dementia.

To conclude on this point, the fact that pain is felt is confirmed indirectly by the medical bodies cited above, all of which state that anaesthetic must be administered during the procedure. Indeed, most medical discussion now revolves around agreeing on the appropriate anaesthetic to use, and not on whether pain is present.

Loss of sexual feeling in later life

Some studies claim that the loss due to circumcision of “highly erogenous preputial tissue”, as well as the absence of the lubricating properties of the foreskin and consequent dryness of the exposed glans, leads to a substantial diminishment of male sexual pleasure. Given that MGM was originally conceived in its modern form in the West as a cure for masturbation, and in some cultures it is seen as a way of curbing the male sex drive, this seems a reasonable, if not obvious, conclusion to draw. The following is an account from a man who underwent male circumcision surgery as an adult, which would seem to confirm this:

The greatest disadvantage of circumcision is the awful loss of sensitivity when the foreskin is removed. I was deprived of my foreskin when I was 26. I had had ample experience and was happy with the pleasure I could experience as an intact male. After my circumcision, that pleasure was utterly gone. Let me put it this way: on a scale of 10, the intact penis experiences pleasure that is at least 11 or 12; the circumcised penis is lucky to get to 3.

These comments are corroborated in the findings of one Canadian study, which declared that the intact male prepuce has a high concentration of sensory nerves and “should be considered a structural and functional unit made up of more [or] less specialized parts”. The study went on to conclude that the “glans and penile shaft gain excellent if surrogate sensitivity from the prepuce (foreskin)”. This finding appears to gain further support from a later study which reported that male circumcision “removes between a (third and a half) of the penile skin, as

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175 MacDonald “Circumcision and the Law”, above 101, 246.
176 Povenmire “Authority to Consent”, above n 101, 97; and see Waldeck “Norms as Multipliers”, above n 120, 479.
178 See, eg, RACP Policy Statement, above n 166, [8].
179 Benatar “Ethics of Circumcision”, above n 159, 42.
180 It is also argued that pleasure is diminished for female partners due to the loss of the lubricating function of an intact penis; see Gillian Bensley & Gregory Boyle “Effects of male circumcision on female arousal and orgasm” (2003) 116 NZMJ 595.
181 The twelfth century physician and rabbi, Moses Maimonides, recommended circumcision as a way of reducing male sexual appetite. See Waldeck “Norms as Multipliers”, above n 120, n 165. Other, more modern, authors have recommended MGM as a way of preventing adultery and premature ejaculation. Ibid.
182 MacDonald “Circumcision and the Law”, above n 101, n 73.
184 Ibid.
well as nearly all of the penile fine-touch neuroreceptors”. Medical opinion seems to be pointing to a clear loss of sexual function in circumcised males, although this does not yet appear to have become a factor in the Royal Australasian College of Physicians (“RACP”) consideration of MGM (in fact, RACP do not touch on the matter at all). Also, the AAP report appears to dismiss the issue when it characterises as “anecdotal” the numerous personal accounts concerning loss of sexual feeling, and points to the (relatively old) Masters and Johnson finding in 1966 that there is no difference between circumcised and uncircumcised males concerning sexual sensation in the glans. In line with the AAP ambivalence, Benatar relates studies that conflict with the Canadian research mentioned above. These studies (including that of Masters and Johnson) report insignificant or non-existent loss of sexual pleasure, and Benatar notes that sensory loss will in any case depend on the amount of preputial material that is removed. Also, other studies conclude that “sexual dysfunction” is in fact less common in circumcised men and that female partners in fact prefer circumcised males. This will, however, depend on cultural variables, such as the prevalence of MGM in a community. In New Zealand, for example, it seems likely that the low current rate of male circumcision operations would have (according to the Waldeck analysis of this issue) the downstream effect of women regarding the intact prepuce as more normal and therefore more attractive, thus leading to less “sexual dysfunction”. In the Pacific Island community, where circumcision is apparently universal, an opposite conclusion might be reached.

In summary, despite what seems an obvious consequence of the removal of penile tissue, it is not possible to conclude from the current conflicting data that prepuce removal causes loss of sexual pleasure for men. Interestingly, a similar argument is put forward by some regarding FGM. One study reports that despite the loss of the clitoris in infibulation procedures, up to 90% of women interviewed in a survey conducted in Sudan insisted they were able to achieve orgasm through intercourse. It seems that much more research is required into this sensitive area.

Medical conditions

As with FGM, the short-term effects of MGM, even when conducted in a clinical setting, can be severe. In up to 35% of cases, excessive bleeding is reported, sometimes resulting in death, with infection, including blood poisoning, being the second most common
complication. On some very rare occasions, amputation of the penis has been known to occur. More common problems include “adhesions, curving of the penis, skin tags along the scar, and formation of keloids”. These conditions closely resemble the health consequences of FGM that were described earlier in this chapter. One newspaper report into the problems associated with MGM procedures conducted by New Zealand GPs reveals that surgeons in hospitals are sometimes required to correct faulty surgery in doctors’ rooms, with Starship children’s hospital in Auckland advising that “surgeons repair at least 12 foreskins a year after doctors in the community have made mistakes”. Complications from the procedure, therefore, seem rather common, as is borne out by US research into the statistics, with Waldeck reporting a rate of complications from MGM of 0.19% to 0.60%. One recent study records 0.20%, or one complication for every 476 circumcisions.

It seems reasonable to expect that a procedure that has significant rates of complication would carry major benefits that offset this risk, and that these benefits could be demonstrated by statistics. In his 2003 cost-benefit analysis of medical studies into the preventive medicine claims made in favour of male circumcision, Benatar describes how in some cases the procedure does bring advantages, although in some areas the jury is out due to lack of data or consensus among the medical commentators. However, he goes on to argue that the extremely low incidences of foreskin-related disease that form the grounds for the medical procedure do not on balance justify recommending male circumcision as a routine prophylactic measure. The conclusions he makes are substantially reproduced in the RACP analysis of the supposed benefits of male circumcision. The RACP report, which also comes down against MGM as a routine procedure, conducts a methodical review of each of the supposed benefits of circumcision. These include protection against: penile cancer, urinary tract infection (“UTIs”), sexually transmitted diseases (“STDs”), phimosis and balanitis. I shall now consider the RACP assessment of these conditions.

Regarding penile cancer, RACP notes that the condition has an incidence rate of about 1:100,000 in developed countries, and that the consequences of the disease are severe, with a mortality rate of 20-25%. The report acknowledges that circumcision can protect against carcinoma of the glans penis and that the risk of this occurring can be reduced tenfold by the operation. However, RACP concludes that universal circumcision in view of such a low rate of incidence is not justified on these grounds, especially where good hygiene and other lifestyle choices, such as not smoking, could have equally beneficial results in terms of avoiding the condition.

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192 MacDonald “Circumcision and the Law”, above n 101,246; Waldeck above n 121, 480.
193 Ibid. MacDonald reports further that: “Circumcision can also result in meatal stenosis and an increased incidence of non-specific urethritis.” Ibid.
194 Martin Johnston “Leave the circumcising to us, surgeon tells GPs” New Zealand Herald (6 August 2002).
196 Benatar “Ethics of Circumcision”, above n 159, 45. Benatar is, however, somewhat equivocal in the final analysis: “[Neonatal circumcision] is not something that can be said to be routinely indicated, nor something that is routinely contra-indicated. It is a discretionary matter.” Ibid 43.
197 See, generally, RACP Policy Statement, above n 166.
198 In the US one study suggests that if no males were circumcised the rate for this disease would increase from 1,000 to 3,000 a year. Another study argues that the most serious form of penile carcinoma (invasive penile cancer) is relatively common in uncircumcised males. See Waldeck “Norms as Multipliers”, above n 120, 482-483.
199 RACP Policy Statement, above n 166, [5.4]. See also Benatar, who records wildly varying incidences of penile cancer in Western countries. For example, in the US, where MGM is common, the incidence of this form of
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The RACP statement makes a similar finding regarding MGM being used to protect against HIV infection.²⁰⁰ The relative novelty of this prophylactic purpose and the confounding effect of conflicting medical commentary has led RACP to discount it as a convincing reason to recommend universal circumcision. Moreover, the fact that HIV still has a low incidence in New Zealand and Australia contributes to RACP’s opinion that circumcision is not appropriate, in contrast to the extremely high rates in sub-Saharan Africa, where some are calling strongly for universal circumcision to be introduced.²⁰¹ To conclude, the RACP recommendation with respect to penile cancer and HIV appears to be in line with other decisions not to engage in major surgery to remove organs that carry a relatively small statistical risk of causing illness, even where the consequences are serious.²⁰²

Concerning UTIs, which can be caused by the build-up of bacteria in the foreskin, it appears that this condition occurs about 5 times less frequently in circumcised boys, and therefore circumcision is undoubtedly beneficial for that reason.²⁰³ However, as with penile cancer, the incidence of this condition is extremely low, affecting only 1-2% of boys, whereas the complication rate from circumcision is about the same, with the RACP putting it at about 2%.²⁰⁴ Assuming, as RACP does, that the degree of “harm” from complications is about the same as for UTIs, the fact that the circumcision of 1,000 boys would probably result in 8 fewer UTIs but also would produce 20 complications from surgery, argues against the procedure. From this statistical analysis, therefore, RACP finds that MGM cannot be justified on the grounds of preventing UTIs.²⁰⁵ The fact that UTIs are treatable after the event and occur in the first years of life²⁰⁶ is also significant in discounting the invasive prophylactic remedy of circumcision for such a rare condition.

cancer is higher than in Denmark, where male circumcision is very uncommon. Benatar “Ethics of Circumcision”, above n 159, 38.

²⁰⁰ Some studies have suggested that HIV is less common in circumcised males, with some theories being: (1) the intact foreskin may provide a safe harbour for the HIV virus; (2) the hardened glans of circumcised men may provide a barrier to infection. See Waldeck “Norms as Multipliers”, above n 120, 483-484. Regarding other STDs, the RACP notes that the evidence is conflicting and mentions some of these studies without drawing any conclusions. The AAP Task Force on Male Circumcision concludes on this issue that the “[e]vidence regarding the relationship of circumcision to STD in general is complex and conflicting”. American Academy of Pediatrics: Task Force on Circumcision Circumcision Policy Statement (1999) 103:3 Pediatrics 686, 691. See also Waldeck “Norms as Multipliers”, above n 120, 485-486, where it is noted that the US has both the highest rate of STDs (including HIV) and MGM in the Western world, suggesting that behavioural factors are most significant in the incidence of STDs.

²⁰¹ Ibid. The medical debate seems to have been resolved in recent years, with a 2005 study in South Africa showing that circumcision caused a 63% drop in HIV infection for heterosexual men. BBC News “Male circumcision ‘cuts’ HIV risk” (13 December 2006) <news.bbc.co.uk/go/pr/fr/-/2/hi/health/6176209.stm>. This, and similar findings elsewhere, has not yet influenced advice from medical bodies in Western countries regarding MGM, however.

²⁰² For example, the surgical removal of female breasts to avoid future instance of cancer appears to be conducted only when a genetic disposition to the disease has been found to exist, and then only on women who are old enough to consent. See News-Medical.Net “Women satisfied with contralateral prophylactic mastectomy” (24 October 2005) <www.news-medical.net>. On the comparison with prophylactic surgery for breast cancer, see further Svoboda et al “Informed Consent”, above n 168, 100-101.

²⁰³ Benatar can locate no studies that find the contrary. Benatar “Ethics of Circumcision”, above n 159, 39.

²⁰⁴ Obtaining reliable figures as to complication rates is a confounding factor for studies into MGM. There is great disagreement as to what counts as a “complication”. RACP notes varying figures of 0.2%, 0.6%, and 2-10%. The 2% figure that RACP uses is therefore merely a mid-range estimate. See RACP Policy Statement, above n 166, [6].

²⁰⁵ Ibid [5.1].

²⁰⁶ See Benatar “Ethics of Circumcision”, above n 159, 40; and Waldeck “Norms as Multipliers”, above n 120, 482.
Regarding the incidence of phimosis (narrowing of the foreskin preventing retraction), RACP does in fact conclude that this condition is a plausible indication for circumcision. However, as with all of the supposed risks that arise from leaving the male prepuce intact, the incidence rate is very low, with RACP putting it at 1%. Moreover, treatment with topical steroid creams is regarded as effective for the majority of boys with phimosis, although in some rare cases surgery will be necessary later in life. This possibility of treatment after the event, as well as the low incidence rate, probably explains why RACP’s finding that phimosis is the “best recognized medical indication” for circumcision does not have any bearing on the across-the-board finding of RACP regarding all the medical arguments in favour of male circumcision. This conclusion, to repeat, is that there is “no medical indication for routine neonatal circumcision”. The use of the word “routine” seems important here. In line with the RACP findings, the New Zealand government evidently will fund surgery on conditions that have not responded to less invasive treatment (such as the use of topical creams) but will emphatically not fund “routine” operations that are unnecessary.

To conclude our brief survey of some of the traditional medical justifications for MGM,207 it is surely possible to state that while there is certainly no medical justification for FGM,208 the argument in favour of MGM as a medical prophylactic measure appears to attract no decisive mainstream support in the medical literature. Where it is undeniable that some conditions do arise that could merit prophylactic surgical intervention, these are either not statistically worthwhile (eg, with respect to phimosis and UTIs) or can easily be treated without surgery (or with surgery at an older age when all else fails). And finally, the other more serious conditions such as penile cancer and HIV infection appear to be regarded by the medical community as better dealt with by education as to lifestyle choice.

### 2.3 Conclusions and a way forward

There is, in my view, an irresistible conclusion to draw from the medical discussion above. This is: if one takes seriously the conclusions of the medical literature and of the medical bodies, such as RACP, which consider it their task to rely on this literature and make recommendations to healthcare workers, then one can only infer that the lack of medical justification for the performance of neonatal male circumcision signifies that it is a purely cultural or religious activity. In this respect there is a direct analogy with FGM, which is also a cultural or religious practice with no medical benefits.

Some commentators are unconcerned about the spectacle of allowing a surgical practice that has no strong health benefits to continue, while others are extremely animated. Benatar considers that medicine is concerned just as much with making allowances for culture as other

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207 Other perceived reasons for MGM are discounted, a fortiori, elsewhere in the literature. Regarding hygiene, Benatar and the RACP both indicate that the washing of the intact foreskin is admittedly more difficult than with the circumcised penis, but, given their strong opposition to unnecessary invasive surgeries, it is not surprising that neither considers this to be a significant factor in deciding whether circumcision is warranted. Balanitis (inflammation of the glans) appears to be more common in uncircumcised men, although as with other relatively minor conditions, the incidence is low, and in any case, other conditions that are of similar severity, such as meatitis and meatal ulceration, occur more often in circumcised males. Benatar “Ethics of Circumcision”, above n 159, 42. See also Waldeck “Norms as Multipliers”, above n 120, 486-488, for her conclusion that MGM is unlikely to be justified as a prophylactic against cervical cancer for females in a heterosexual relationship, despite lukewarm medical opinion suggesting that it may offer protection.

208 Benatar can locate no literature suggesting medical benefits for removal of the female prepuce, which he puts down to the probability there are no such benefits, or to the fact that the matter has “received no attention (yet)”. Benatar “Ethics of Circumcision”, above n 159, 44.
professions, such as engineering and education, and therefore believes that male circumcision is justifiable purely as a parental choice, with the proviso that sufficient pain medication is applied.\(^{209}\) McGrath on the other hand sees no justification for MGM whatsoever, and refers to the protection of the genitals of female children in the New Zealand anti-FGM Act as discriminatory against boys who have no such protection.\(^{210}\)

The scant case law on male circumcision reflects the position of Benatar.\(^{211}\) In the British case of Re J (child’s religious upbringing and circumcision),\(^{212}\) Justice Wall prevented the circumcision of a child where separated parents (a Muslim father who wanted the procedure performed for religious reasons and a non-practising Christian mother who opposed it) disagreed on whether to have the operation performed on their 5-year-old son. The judge surveyed the medical literature and concluded that, apart from three conditions which were not relevant to the case, the medical benefits from circumcision were “highly contentious”.\(^{213}\) However, Wall J declared that male circumcision for ritual religious reasons was lawful where the two parents agreed.\(^{214}\) In this case, where parental agreement was not reached, the judge decided to forbid the circumcision, in part because it was in the child’s best interests not to undergo a drastic and traumatic surgery that was opposed by his mother (who had custody),\(^{215}\) especially when there were no medical reasons for it to take place.\(^{216}\) Nevertheless, throughout the judgment there was a strong theme of judicial restraint regarding practices that are considered acceptable by broader society, a view that resembles that of Benatar in his mild advocacy for the continuation of MGM for cultural reasons. The case, however, cannot be viewed as a victory for anti-MGM activists, as Wall J was at pains to point out that his decision was driven by the particular facts in the case at hand and that a different decision might accordingly be reached where the circumstances were different.\(^{217}\) Nevertheless, it is

\(^{209}\) Benatar “Ethics of Circumcision”, above n 159, 45.

\(^{210}\) McGrath & Young argued after the second reading of the anti-FGM Bill that “female” should be struck out of the Bill’s wording, so that the protection applied to all, regardless of sex. They contended that the forbidding of discrimination according to gender under the Human Rights Act 1993 mandated this alteration. McGrath & Young “Circumcision in NZ”, above n 116, 143-144.


\(^{213}\) Wall J appears to accept that phimosis, balanopphimosis and paraphimosis are genuine medical reasons for the surgery but that the conditions are rare, or “treatable by less invasive techniques”, an observation that tallies with the consideration of these conditions in the medical literature in section 2.2 of this chapter. Other justifications for MGM, such as the prevention of UTIs, penile cancer, STDs, and cervical cancer in women partners, are regarded by the judge as unresolved medical issues. Concerning the argument that MGM can cause loss of sensory pleasure in the penis, the judge simply notes the relevant evidence that is accruing in the medical literature.

\(^{214}\) For judicial support of his position, Wall J refers to the obiter statement of Lord Templeman in R v Brown [1993] 1 AC 212, 213, which lists “Ritual [male] circumcision, tattooing, ear-piercing and violent sports including boxing” as “lawful activities”. Wall J also cited the UK Law Commission to similar effect. The Law Commission (UK) Consent in the Criminal Law (Consultation Paper 139, 1995), [9.2].

\(^{215}\) One social benefit that was weighed by the judge was that by having the operation performed the child would feel “firmly identified with his father”. However, the judge held that the fact that his mother would find it difficult to present the operation to him in a positive light might ultimately cause damage to his relations with both parents.

\(^{216}\) American cases on male circumcision conclude that parents have the right to consent to the procedure. See discussion in Waldeck “Norms as Multipliers”, above n 120, 503-504.

\(^{217}\) Wall J gives the example of a Jewish mother who wishes to have a male child circumcised after separating with the father who now opposes the operation (and where both parents consented, while married, to the circumcisions of a number of older brothers). In this hypothetical case, Wall J speculates that “the court would be likely to grant the mother a specific issue order”. 
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significant that none of the prophylactic justifications for male circumcision was considered convincing enough to advance the case of the child’s father for the procedure to go ahead.

The conclusions of legal academics are as polarised as the medical writers on the subject. Dena Davis suggests that, given the large numbers of complications arising from the surgery, male circumcisions should be systematically supervised by official medical bodies and that “nonphysician practitioners”, such as Jewish mohelim, should be licensed. With respect to female circumcision, Davis recommends that a limited form of the practice should also be allowed, in the form of a small “nicking” or bloodletting in the genital area by healthcare workers using anaesthesia in a sterile setting. As with McGrath’s opinion, she justifies this on the basis of equality: if male circumcision of newborn boys is allowed for Jewish and secular parents, then an analogous procedure for girls should be allowed for Muslim parents who have a sincere belief that the practice is required by their religion. Conversely, Jo Lynn Southard equates, as many other academics do without much further enquiry, the circumcision of females with the amputation of the penis, and can see no circumstances where any procedures that involve incisions in the female genitalia are warranted. This is premised on a strong feminist stance which views all forms of FGM, even ritualised nickings, as springing from gender inequality. Arguments along the lines that minor symbolic surgeries might actually have the effect of an incremental elimination of the practice over the long term, and of avoiding dangerous “back street” operations, have no purchase against this absolutist feminist position.

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218 Davis “Collision Course”, above n 101, 569. Davis also recommends accurate monitoring and recording of all MGM procedures.
219 Ibid 565 & 568.
220 For a similar conclusion, see Obiora “Rethinking Polemics”, above n 94, 377.
222 There is no acknowledgment in this line of academic commentary that “nickings” are medically analogous with male circumcision. Cohen simply states: “Until just over a decade ago, the practices referenced as ‘female genital mutilation’ were known as ‘female circumcision’, a term that functioned, euphemistically, to smuggle them into analogical alignment with the procedure commonly practised on males.” Ibid 148. However, Cohen does mention one plan suggested (and quickly withdrawn due to a public outcry) by a hospital in Seattle in 1996 to administer ritualised nickings on the labia minora of young girls in safe clinical conditions, but does not consider whether such a procedure might be less harmful than male circumcision; instead she merely notes: “The procedure…does not involve the excision of any tissue. But it does involve permanently incising some.” Ibid 158.
223 For example, Christiana Scoppa, director of Aidos, a non-governmental organisation based in Rome, stated: “Safeguarding the symbolic value of a ritual whose scope is the control of female sexuality by males would mean legitimising the cultural belief system behind it, making it more difficult to eradicate [FGM].” Fabio Turone “Controversy surrounds proposed Italian alternative to female genital mutilation” BMJ (2004) 328 (“Turone ‘Italian Alternative’”), 247.
224 Waldeck explains her position of allowing symbolic nickings on the basis that the best way to attack a harmful and engrained cultural activity is to “chip away” at it over time, not to ban it outright. This strategy has been successful in the worldwide anti-smoking campaign and also with respect to MGM in New Zealand. “[A]lthough a law that applied to both routine and ritual circumcisions would be constitutional, such a comprehensive measure is not necessarily the best approach for dampening the social norm favoring circumcision. Remember that the strategy is to use incremental reforms because more dramatic efforts may generate resistance and are harder to sell politically.” Walbeck “Norms as Multipliers”, above n 120, 521. See also Coleman “Seattle Compromise”, above n 106, 778.
225 One Italian proponent of ritualised circumcision explains his advocacy of the procedure in terms of the need to offer an alternative to women who take their daughters out of Italy and back to Africa to have a more extreme and dangerous version of the practice carried out. Turone “Italian Alternative” above n 223.
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Turning to New Zealand, it will be recalled that MacDonald believes that either MGM should be added to the prohibition on female genital surgeries for cultural reasons in the Crimes Act (which is McGrath’s position), or that s 204 Crimes Act 1961 should be repealed altogether, leaving all practices related to genital alteration to be dealt with by education, discussion within the affected communities, and, where necessary, by the use of the existing criminal law. MacDonald, like everyone else who has contributed to this debate, bases her position on equality. Why should, she argues, the gradualist approach adopted by the medical and legal community to the elimination of MGM over many decades not be extended to FGM as well? The medical justifications for MGM are in her view not sufficient to elevate that practice above FGM, and this deficiency forms the main pillar in her conclusion that “the exclusion of one practice from the scope of the criminal law privileges it over the other”.226

I find the arguments of MacDonald as to cultural bias compelling. However, as has been the norm in New Zealand regarding significant social issues, she advocates a legislative solution to the discriminatory problem in the Crimes Amendment Act 1995. For the following reasons, I take the view that such a change is unlikely in the current climate. First, criminalisation of MGM would probably elicit a public outcry. This would emanate from two main sources: those in the mainstream community who have been brought up to believe in its medical utility, and from the Jewish community, who are well resourced politically and have a long collective memory that is apt to recall quickly attempts to ban circumcision in past centuries, as indeed happened during, for example, the eras of the Spanish Inquisition, Nazi Germany and the Soviet Union.227 Regarding the mainstream response, my own informal discussions with a number of people suggest that such a move would be unpopular. A female doctoral student in political science responded to my tentative suggestion that some forms of FGM (such as ritualised nickings) were basically analogous to or less harmful than male circumcision with the answer: “No”. A law professor responded to the same gambit with the statement that male circumcision, unlike FGM, “has no medical sequelae”. A retired appellate judge said: “Speaking as a judge, there are some things that you know are just plain wrong. Female circumcision is one of these.” Another interlocutor, a Master’s graduate in sociology who read the MacDonald article at my request, described the thesis advanced therein as “seductive”, but would not be further drawn on why this was so. These perfunctory, conversation-stopping, responses from educated persons indicate that an amendment to the Crimes Act to make MGM illegal (or a limited form of FGM legal) in order to offset the discriminatory effects of the anti-FGM law is most unlikely.228

227 Waldeck “Norms as Multipliers”, above n 120, 521. Indeed, when the Swedish Parliament announced in 2000 that only doctors or other registered healthcare workers would be permitted to operate on male prepubes under a proposed law, the resultant opposition from Jewish pressure groups led to the eventual law being modified. The final law allowed mohelim (albeit after being certified by a “competency examination” devised by the Swedish Ministry of Health) to perform the bris ritual in the first two months of life, with an attendant nurse being required to give adequate anaesthetics. See Yngve Hofvander “Circumcision of Boys in Sweden: Proposal for Government Regulation” in GC Denniston et al (eds) Understanding Circumcision: A Multi-Disciplinary Approach to a Multi-Dimensional Problem (Kluwer Academic, New York, 2001) 147; and see BBC News Online “Sweden restricts circumcisions” (1 October 2001): <news.bbc.co.uk/1/hi/world/europe/1572483.stm>.
228 Moreover, Macklin points out in the Canadian context that “once a criminal offence is added to the Criminal Code, it is rarely removed”, and even laws that are declared unconstitutional remain on the books for a long time afterwards (although they thereby become unenforceable). Macklin “Double-Edged Sword”, above n 83, 218. It is likely that this is the case in New Zealand too. Consider for example the persistence of the blasphemous libel provision in s 123 of the Crimes Act. This law has not been invoked since 1922 and is generally considered to be in desuetude, but still remains on the statute books. See Rex Ahdar Worlds Colliding: Conservative Christians and the Law (Ashgate, Dartmouth, 2001) ("Ahdar Worlds Colliding") 256-257.
Second, there is no international movement to eradicate MGM, in contrast to the extraordinarily well-documented and legally expressed global anti-FGM crusade. This is no doubt in part due to the fact that the international human rights movement, which was formed partly as a result of the Holocaust, is unlikely to countenance any measures that might undermine the core rituals of Judaism; nor indeed of Islam (at least with respect to the Muslim support for MGM in the West, which has no doubt benefited from being in the slipstream of the Jewish version of the practice) in the more combustive post-September 11 world.\(^{229}\)

And finally, regarding MacDonald’s option of repealing s 204 outright, it is unlikely that the New Zealand legislature would take such a step, especially in view of the international pressure that is currently being exerted on countries to enact specific anti-FGM statutes.\(^{230}\) Indeed, it seems that the New Zealand government has consistently regarded s 204 as a badge of honour in this field and has in fact earned praise from the United Nations for having adopted it.\(^{231}\)

To summarise at this point, neither amendment nor repeal seems possible in light of this array of factors. The solution I shall propose is a more nuanced legal one, more typical of that found in countries with constitutionalised bills of rights. The deeply invasive procedures of infibulation and the more extreme versions of excision (for example, those that remove the clitoris) are, I believe, worthy of direct legislative prohibition. No other equivalent procedures on the male genitals are legal,\(^ {232}\) and so it is legitimate that this part of the prohibition remains on the statute books. However, as is suggested above, Somalis in New Zealand appear to have adopted two relatively mild versions of FGM that do not involve major tissue removal: first, the removal of the female prepuce; and second, the nicking of either the vulva, clitoral prepuce, or the clitoris, so as to cause a small bloodletting. It is my position, as it is of three other legal (and, incidentally, female) commentators whose work I have cited in this chapter,\(^ {233}\) that at least the latter of these two procedures ought to be legal in New Zealand and that the courts, operating as the natural vehicle for promotion of minority rights in the face of majoritarian preferences, might be able to assist in bringing this about.

I return now to my departure point at the end of section 1, where I identified the possibility that FGM is being carried out in New Zealand. Given that it appears unlikely that a legislative solution can be found to the discriminatory problems inhering in the Crimes Amendment Act 1995, I shall consider in the next section the possibility of a legal challenge to the banning of the two practices of Mild (ritualised genital nicking) and Traditional (removal of clitoral prepuce) Sunna FGM. This will involve exploring how far the Equal Regard reading of s 15, in conjunction with the interpretive sections of BORA, could go in crafting a limited exemption to the potentially broad ambit of s 204 of the Crimes Act 1961.

\(^{229}\) In fact, one commentator suggests that the international human rights movement may in fact be poised to begin a campaign against the “illiberal” practices of the minority cultures it was formed to protect. See David Smolin “Will International Human Rights be used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender” (1995-1996) 12 JL & Religion 143.

\(^{230}\) The Committee on the Rights of the Child was not satisfied by the statement of Ireland in its periodic report under UNCROC that its ordinary criminal law prohibited FGM, and accordingly enjoined Ireland to enact specific FGM legislation. See Committee on the Rights of the Child Concluding observations: Ireland CRC/C/IRL/CO/2 (29 September 2006), [55].

\(^{231}\) See the laudatory comments on New Zealand’s activism in the field in Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Traditional Practices Affecting the Health of Women and the Girl Child E/CN.4/Sub.2/2001/27 (4 July 2001), [8]-[13].

\(^{232}\) We leave to one side the question of Western practices of cosmetic genital surgery for adult women.

\(^{233}\) Refer to the articles of Obiora, Davis and Coleman cited in this chapter. MacDonald does not go so far as to address this possibility. She does, however, suggest that FGM should (as one of her alternative solutions) be subject to the ordinary criminal law.
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3. The New Zealand Bill of Rights Act and the rise of the legitimate aim test

We will cut the whole foreskin off a penis, but we won’t even consider a cut, a sunna, cutting the prepuse, a little bloodletting [on a girl]. (Dr Leslie Miller, Harborview Hospital, Seattle, 1996)\textsuperscript{234}

While it is clear that bona fide medical and surgical procedures should be exempted, some of the less severe forms of female genital mutilation such as scraping or nicking the clitoris are analogous in terms of their effect to male circumcision. (New Zealand Ministry of Health, 1994)\textsuperscript{235}

3.1 Two hypothetical cases

I begin this section by sketching a hypothetical fact situation that involves both the practices mentioned above and which appears to implicate s 204A Crimes Act 1961. I will then consider how the Equal Regard reading of s 15 BORA might be invoked in a court setting to mediate the apparent conflict between the statutory rule and the activities of those who might come within its prohibitive ambit. The legal argument will be a two-pronged one. First, an interpretive solution will be canvassed with respect to the Mild Sunna procedure, involving ordinary principles of statutory construction for ambiguous or obscure terms in a statute that has its genesis in international texts. And then a more ambitious “constitutional” analysis will be attempted, making use of BORA’s interpretive provisions – which could assist in analysing the legal status of both the Mild and Traditional Sunna versions of FGM in this country.

The situation I envisage is a prosecution of a Somali-born New Zealand doctor, who, at the instigation of two sets of Somali parents, performs operations on two unrelated children at a private clinic in Christchurch. The clinic has been set up to provide services for immigrant women who suffer the ill effects of extreme versions of FGM that have been conducted in countries of origin.\textsuperscript{236} Dr Waris Aziz claims that the parents of both children cited their Muslim religious beliefs as mandating some form of circumcision for their daughters. Both sets of parents initially requested infibulation, but the doctor persuaded them to consider less invasive surgery more in line with male circumcision. One set of parents consented to the surgical removal of a few drops of blood by syringe from the clitoris of their 10-year-old daughter, Ayanna. The other parents insisted on excision of the tip of the clitoral prepuce (leaving untouched the clitoris proper) of their 10-year-old daughter, Nadifa. Both sets of parents considered these revised versions of FGM to satisfy their religious beliefs. Both procedures were conducted using adequate anaesthesia and in clinical conditions. Neither child suffered any complications from the surgeries, with Ayanna in particular showing no signs of having undergone surgery at all after a few days.\textsuperscript{237}

\textsuperscript{234} Carol Ostrom “Harborview Debates Issue of Circumcision of Muslim Girls” Seattle Times (Seattle, 13 September 1996).
\textsuperscript{235} Facsimile from Ministry of Health to Law Reform Section, Department of Justice Proposed Amendments to Crimes Act 1961 Prohibiting Female Genital Mutilation (28 October 1994); on file with author.
\textsuperscript{236} One of these clinics exists at National Women’s Hospital in Auckland.
\textsuperscript{237} The solution of taking a few drops of blood from the clitoral area was suggested by a Somali-born Italian doctor in Florence in 2004. Dr Abdulcadir ran a clinic in Florence that treated FGM victims and proposed the symbolic procedure for the same reasons as my fictional, New Zealand-based Dr Aziz. Dr Abdulcadir’s proposal met with immediate outrage amongst feminist groups, and the Regional Council passed a resolution blocking the area medical board from allowing the procedure to occur. See E Turillazzi & V Fineschi “Female genital mutilation: the ethical impact of the new Italian law” (2007) 33 J Med Ethics 98. Another similar proposal by a hospital board in Seattle was withdrawn in response to a public outcry and comments from a US Congresswoman that the procedure would contravene the US federal prohibition on FGM. See also Coleman “Seattle
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Doctor Aziz claims that she would prefer that none of her patients underwent any form of non-therapeutic genital surgery, but feels that by agreeing to do these relatively mild operations she may prevent more dangerous circumcisions being performed secretly and in unsafe conditions, something she believes to have already occurred in New Zealand. She is of the opinion that, within a generation, the practice will completely die out and that the best way to achieve this is by education, debate within religious communities, and by offering minimal procedures that for the time being satisfy the Islamic religious requirements of first generation Somali parents. Refusing to carry out these milder forms of the practice will, she believes, drive FGM underground (or see parents taking their children back to countries of origin to have the operation performed in a dangerous environment), and lend an air of martyrdom to traditional practitioners, which will ensure the custom’s longevity. Many more victims will be subjected to extreme forms of the practice, leading to many girls suffering from horrendous complications that will afflict them for their whole lives. Furthermore, Dr Aziz claims that Ayanna’s operation does not contravene New Zealand law for the reason that the clinically conducted removal of a small amount of blood from the clitoris, which leaves no permanent mark and carries minimal risk of other complications, should not be considered a “mutilation” under s 204A. Regarding Nadifa’s surgery, Dr Aziz believes that it is no more dangerous than the “analogous” practice of removing the male prepuce and therefore should be protected by human rights law as it pertains to religious freedom, particularly in view of the fact that Jewish (as well as secular, and Pacific Island) parents are allowed to have the surgery performed on their male children.

The police are not satisfied with Dr Aziz’s responses and subsequently charge her (and both sets of parents) under s 204A(2) Crimes Act 1961 for performing or causing to be performed one of the prohibited practices listed in s 204A(1). Regarding Ayanna’s procedure, the police believe that the definition of FGM includes the puncturing of the clitoris and that the WHO classification for FGM makes this clear. As for Nadifa’s operation, the police maintain that the partial removal of a girl’s clitoral prepuce for cultural purposes is clearly caught by the definition contained in s 204A(1), which prohibits the removal of any tissue from the genital area for non-therapeutic reasons. Also, the police contend that s 204(3) precludes a cultural or religious defence, and that even if a religious defence were possible, the right of parents to make medical decisions for their children consistent with their religious beliefs is not within the scope of the right to religious manifestation in s 15 BORA in situations where this may result in physical harm to their children.238

Compromise”, above n 106, 737, where the procedure suggested was a nick on the clitoral prepuce sufficient to draw blood. Neither the Seattle nor the Florence procedures took place and were never tested in court. 238 The police will rely on the decision in Re J (An Infant): B and B v Director-General of Social Welfare [1996] 2 NZLR 134 (CA) (“Re J”), which held that the s 8 BORA protection of the right to life trumped the right of Jehovah’s Witness parents to manifest their religious beliefs under s 15 by refusing to allow life-saving blood transfusion for their child. Under this analysis, the s 15 right was not even engaged, as the conduct did not fall within the scope of the right. Thus, scrutiny of the decision to override the parental objection, using the justifiability criteria in s 5 BORA, was not reached. See in particular, ibid 146: “The parents’ right to practise their religion cannot extend to imperil the life or health of the child. Before it would become necessary to embark upon a s 5 examination it would be necessary to define the scope of the right to practise religion as extending (notwithstanding the right of a child to life) to the right to refuse medical treatment for the child on religious grounds even in circumstances where it is evident death will ensue without that treatment. We are not able to do that.”
3.1.1 Does s 204A catch Mild Sunna FGM? The statutory construction argument

A straight reading of the s 204A(1) definition of FGM would certainly catch Nadifa’s Traditional Sunna operation. The “excision” of any part of the clitoris entails a cutting away of tissue, and removal of the tip of the clitoral prepuce would fall under that definition. Less certain is whether Ayanna’s Mild Sunna procedure would come within the Act’s ambit at all. A light puncturing of the flesh that leaves no scarring would not constitute an “excision” or “infibulation”. The remaining issue would be whether the catchall term of “mutilation” covers Ayanna’s case. Standard dictionary definitions of “mutilation” indicate that the procedure would not be caught by the Act. The word “mutilation” is defined in the Oxford Dictionary of English by its verb form, “mutilate”, which means to “inflict a violent and disfiguring injury on”. The Collins English Dictionary, for its part, defines “mutilate” as: “1. To deprive of a limb, essential part, etc; maim; dismember”, and notes the Latin root, “mutilare”, which means, “to cut off”. However, a different perspective is contained in Black’s Law Dictionary, which provides that “female genital mutilation” denotes the “act of cutting, or cutting off, one or more female sexual organs”. This last definition appears to envisage customs falling short of the ordinary meaning definition of “mutilation”. Moreover, it has the advantage of being from a legal text that is often relied upon in New Zealand courts. It also considers the full three-word collocation (ie, not just “mutilation” in isolation). If applied, this definition could well catch Ayanna’s surgery. Despite this final entry, however, it is surely possible to argue that “mutilation” may in fact require some form of disfigurement, dismemberment or interference with organ function, which, I suggest, is probably what “mutilation” (or indeed “female genital mutilation”), as it is used in general parlance, would be taken to mean. On this initial basis, Dr Aziz might contend that the New Zealand anti-FGM law does not prohibit the Mild Sunna operation.

This would, however, not be the end of the enquiry. A court confronted with this issue would conduct an analysis into whether a broader definition of “mutilation” was intended by the

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239 Section 204A(1) reads in relevant part: “For the purposes of this section, – ‘Female genital mutilation’ means the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person.”

240 The definition of “excise” in the Oxford Dictionary of English is to “cut out surgically”. “Excision” is defined as “the action of excising something”, with “the excision of the carcinoma” given as an example. See Oxford Dictionary of English (2nd ed, Oxford University Press, 2003).

241 Dr Abdulcadir’s proposal, which envisages a procedure identical to Ayanna’s, would leave no marking at all on the clitoris. See Turone “Italian Alternative”, above n 223, where it is asserted that a “puncture would leave no visible sign”. I assume for the purposes of analysis that no scarring has occurred in Ayanna’s case, and that a minimal degree of bruising and discomfort occurs for a few hours after the operation.

242 Collins English Dictionary (7th ed, Harper Collins, Glasgow, 2005). The Shorter Oxford Dictionary defines “mutilate” as “1. To deprive (a person or an animal) of a limb or organ of the body; to cut off or otherwise destroy the use of (a limb or organ) 2. To render a thing imperfect by cutting off or destroying a part.”


244 See, eg, Lat v Chamberlains [2007] 2 NZLR 7 (SC), [111]; R v Hansen [2007] 3 NZLR 1 (SC), [255]-[256], and Hopkinson v Police [2004] 3 NZLR 704 (HC), [79].

245 Tellingly, perhaps, the definition of “mutilation” in Black’s Law Dictionary accords with the standard dictionary definitions: “The act of cutting off or permanently damaging a body part.” This suggests that “female genital mutilation” is a term of art that is to be afforded a wider meaning than “mutilation”, as it is understood in common parlance.

246 A similar argument has been advanced with respect to the British anti-FGM legislation: “What exactly does ‘otherwise mutilate’ mean? Does the provision encompass ritualistic circumcision…?” Bibbings “Tradition”, above n 101, 151; see also, regarding the American federal legislation, Coleman “Seattle Compromise”, above n 106, 751-752. The New Zealand Human Rights Commission made the same point in its submission on the Crimes Amendment Bill; see Submission of the Human Rights Commission on the Crimes Amendment Bill (No 2) 1994, JL/95/71, 8.
legislature, and whether the word has acquired a broad, term of art, meaning that is in line with the Black’s Law Dictionary definition. Indeed, a court would feel bound to arrive at some meaning of mutilation\textsuperscript{247} that does not rise to the level of excision or infibulation, otherwise the word would carry no meaning, a result that courts seek to avoid.\textsuperscript{248} This would imply that “mutilation” must encompass at least some, if not all, of the meanings attributed to it by the WHO definition of Type IV FGM, which includes a “pricking” of the clitoris – the procedure that occurred in Ayanna’s operation.\textsuperscript{249} For convenience, I reproduce here the relevant limb of the WHO definition:

**Type IV Unclassified:** includes pricking piercing or incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of the tissue surrounding the vaginal orifice (angurya cuts) or cutting of the vagina (gishiri cuts); introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purposes of tightening or narrowing it; and any other procedure that falls under the definition of female genital mutilation given above. (emphasis added)

Dr Aziz might respond to the introduction of this material by claiming that not all these practices involve a “mutilation” and that the legislation therefore does not succeed in incorporating all of them into New Zealand domestic law. The courts will discount international material if it conflicts with domestic legislation, which is a necessary corollary of parliamentary sovereignty as it pertains to statutory interpretation.\textsuperscript{250} She will argue, in any case, that the use of the word “unclassified” at the beginning of the Type IV definition is an indication that WHO did not intend to catch surgeries of Ayanna’s type at all, but rather signifies an intention to include only the “classified” versions of the practice.\textsuperscript{251} Dr Aziz could

\textsuperscript{247} The British legislation, which was referred to by Doug Graham in the New Zealand Parliament makes this clearer, where it says “otherwise mutilate” in s 1(a) Prohibition of Circumcision Act 1985 (UK).

\textsuperscript{248} For conflicting views on the significance of this principle of statutory construction, see R v Pora [2001] 2 NZLR 37, [29] & [44] per Elias CJ, and [101] & [109] per Keith J. In R v Pora, Keith J, speaking for the majority, held that the need to ascribe at least some meaning to a statutory term was one factor in deeming the provision at issue valid (albeit to a limited degree), even though to do so meant that it conflicted with a fundamental right.

\textsuperscript{249} Indeed, in the Seattle dispute over whether ritualised forms of FGM would contravene the federal Act, legal advisers to Congresswoman Schroeder cited the WHO classification in their objection to the Harborview Hospital proposal to offer ritualised nickings to Somali patients; see Obiora “Rethinking Polemics”, above n 94, 366. Schroeder herself went on to say “[T]he clear intent of the legislation…was to criminalize any medically unnecessary procedure involving female genitalia.” Letter from Representative Schroeder to Dr James LoGerfo, Medical Director of the Harborview Medical Center (15 October 1996); quoted in Coleman “Seattle Compromise”, above n 106, 746. A subsequent statement by the American Academy of Pediatrics indicates that this dispute has not been resolved: “It is…unclear whether performing such lesser procedures would be exempt from federal criminal laws.” American Academy of Pediatrics: Committee on Bioethics Female Genital Mutilation Pediatrics (1998) 102:1 153, 155.

\textsuperscript{250} See, eg, Andrew Butler & Petra Butler “The Judicial Use of International Human Rights Law in New Zealand” [1999] 29 VUWLR 173 (“Butler & Butler Judicial Use of International Human Rights Law”), 177: “The fundamental proposition of which sight must not be lost is that as a matter of New Zealand law, Parliament may exercise its sovereignty in a manner inimical to New Zealand’s international obligations (including human rights obligations) by enacting legislation which is inconsistent with those obligations. Should Parliament choose to do so, it is the duty of the courts to give effect to that decision;” citing Richardson J in Ashby v Minister of Immigration [1981] 1 NZLR 222, 229 (CA) for this proposition: “[I]f the terms of the domestic legislation are clear and unambiguous they must be given effect in our courts whether or not they carry out New Zealand’s international obligations.”

\textsuperscript{251} See Bibbings “Tradition”, above n 101, 145: “The position in the [WHO] statement is far from clear on this, although it might be taken to target the ‘classified’ types of modification.” An opposing view of the meaning of “unclassified” might be that the Type IV category is simply impossible to express definitively, and that the types of FGM listed there are a non-exhaustive, or miscellaneous, list. ADDENDUM: at the time this thesis went to press, WHO had issued a new definition of FGM, removing the word “unclassified”. Type IV is now described simply thus: “Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking,
then seek to corroborate this view by illustrating that the definition is a contested one in the international human rights community, perhaps by pointing out that Amnesty International, in a statement on FGM in 1997 (the same year that WHO published its classifications), favours a narrower formulation.\(^{252}\)

In some traditions a ceremony is held, but no mutilation of the genitals occurs. The ritual may include holding a knife next to the genitals, pricking the clitoris, cutting some pubic hair, or light scarification in the genital or upper thigh area.

How would a court respond to these preliminary points? In my opinion, the initial enquiry into the actual words of s 204A and the Crimes Act as a whole would yield no conclusive answer to the basic dispute over the meaning of “mutilation”.\(^ {253}\) Where, as here, there is ambiguity or obscurity in a statutory term the courts will try to ascertain the Act’s underlying purpose as a means of resolving the ambiguity, as mandated by s 5(1) of the Interpretation Act 1999. This will involve a consideration of extrinsic materials; in this case the parliamentary works that created the anti-FGM Act, and the international materials that provided the impetus for these works.\(^ {254}\) I shall now consider these sources.

(a) Parliamentary history\(^ {255}\)

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\(^{252}\) Amnesty International What is Female Genital Mutilation? (1 October 1997) ACT 77/006/1997(emphasis added); available at: <www.web.amnesty.org/library/index/ENGACT770061997>.

\(^ {253}\) An application of s 5(1) of the Interpretation Act 1999 (“The meaning of an enactment must be ascertained from its text and in the light of its purpose”) could furnish, for example, a textual argument that the lack of exemptions in s 204A for Western cultural practices, such as genital piercing, cosmetic labial “trimmings”, and so on, indicates that the drafters considered that the prohibition was not meant to catch minor forms of genital alteration like the pricking of Ayanna’s clitoris. The exemptions that were provided allowed for major therapeutic surgeries, such as episiotomy and intersex operations, both of which entail significant alteration of the genital area, which is arguably all that the provision is aiming to prevent.

\(^ {254}\) For detailed discussion of the admissibility of the various parliamentary materials used here, see JF Burrows & RI Carter Statute Law in New Zealand (4th ed, LexisNexis, Wellington, 2009) (“Burrows Statute Law”) ch 9. The main threshold for considering parliamentary materials in New Zealand is whether the legislation is clear on its face. If it is not, as I submit is the case with the meaning of “mutilation”, the courts have assumed great latitude in admitting a great deal of this material. Other criteria for admissibility are whether the materials are publicly available and known to those engaged in the lawmaking process. Ibid 283. All the materials I consider here arguably meet these criteria. There is indeed a large amount of judicial precedent allowing parliamentary works, including: comments in Parliament by the minister moving a bill and the chairperson of the relevant select committee (Brewer v R [1994] 2 NZLR 229, 235, Brooker v Police [2007] 3 NZLR 91 (SC) [28]); explanatory notes (Real Estate House (Broadtop) Ltd v Real Estate Agents Licensing Board [1987] 2 NZLR 593, 596); parliamentary debates (Marac Life Assurance Ltd v CIR [1986] 1 NZLR 694, R v Pora [2001] 2 NZLR 37, [45]); select committee reports (Worsdale v Polglase [1981] 1 NZLR 722, 726); Cabinet papers (Skycity Auckland Ltd v Gambling Commission [2008] 2 NZLR 182 (CA)); Law Commission reports (R v Pora [2001] 2 NZLR 37, [105]); changes made to a bill during the legislative process (R v Lee [2001] 3 NZLR 858, 862); departmental reports made on the content of a bill (R v Goodwin [1993] 2 NZLR 153); and overseas law reform commission reports (Williams v Aucutt [2000] 2 NZLR 479, [42]). Note that in extra-judicial comments on this issue in 2001, Keith J of the Court of Appeal (as he then was) appears to regard the New Zealand courts to be relatively
An unfortunate aspect of the debates in Parliament was that in the introduction and the second and third readings of the Bill the Minister of Justice did not offer any definition of the activities that were meant to be caught by the Act. There was no mention by him, or indeed by any other speaker in Hansard, of minor procedures, such as that experienced by Ayanna. The most detailed attempt at a definition was by opposition MP Chris Fletcher who offered the following formula, one that appears to exclude Ayanna’s case (and arguably even Nadifa’s): “The procedures range from simple circumcision, which is the removal of the clitoris, to infibulation, which is the removal of virtually all the external female genitalia.” This would accord with Dr Aziz’s reading of the law and could lead one to deduce that the purpose of the Act is merely to catch extreme forms of FGM, which would (probably) catch Nadifa’s surgery, but not Ayanna’s. However, it must be noted that comments outside those made by the main promoters of a bill are accorded relatively less weight in the courts, in which case Fletcher’s statement is unlikely to be determinative.

If one extends the search for a clear definition beyond Hansard and into the preparatory documents that underpinned the debate in Parliament, some intriguing inconsistencies soon appear. The Cabinet Paper recommending legislation in November 1994 gave the firm impression that symbolic bloodlettings would be caught by the Act, when it stated that a “broad definition” would be necessary to cover the “various forms” of FGM, which it defined as “ranging from a nicking of the clitoris to [infibulation]”. This expressly encompasses Ayanna’s procedure, and the fact that no amendments were made to the Bill concerning the definition of FGM subsequent to the Cabinet Paper would contribute to an argument that nickings or puncturings ought to be considered as part of the definition in s 204A(1).

However, the very opposite conclusion can be reached from a later Department of Justice report to the Select Committee in March 1995, which stated that symbolic surgeries such as Ayanna’s would not be caught: “Relatively minor or symbolic forms of the practice, if they do not cause serious harm and are done with the requisite consent, would probably fall outside the permissive: “[T]he New Zealand position appears to be different from that in Australia and the United Kingdom. The Courts and Parliament have not formulated strict prerequisites for the use of this material, in terms for instance of ambiguity or obscurity.” Sir Kenneth Keith “Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness” in R Bigwood (ed) Legal Method in New Zealand: Essays and Commentaries (Butterworths, Wellington, 2001) 77 (“Keith ‘Sources of Law’”), 93.

Note there was also no detailed Select Committee report on the Bill, which was not a common practice until 1996, just after the anti-FGM act was passed. See Burrows Statute Law, above n 251, 265.

257 See, eg, Hon Doug Graham (29 November 1994) 545 NZPD 5231, where the minister refers only to the health risks of the practice, all of which are associated typically with more severe versions of FGM, often as a result of being carried out in non-surgical environments: “The medical literature indicates that the effects on a person’s health can be severe. They include such short-term complications as pain, haemorrhaging, blood poisoning, and infection. In the longer term a person may suffer painful urination, sterility, loss of sexual enjoyment, chronic infection, and the build-up of scar tissue.”

258 Hon Chris Fletcher (29 November 1994) 545 NZPD 5238.

259 The only other attempt at a definition was made by Alec Neill MP, the Chairman of the Select Committee that considered the Bill. Neill was non-committal in this respect: “The procedures range from simple circumcision to infibulation.” Hon Alec Neill MP (1 June 1995) 547 NZPD 7030.

260 Cabinet Social and Family Policy Committee “Female Genital Mutilation: Proposed Legislation” (1 November 1994) SOC (94) 61 [14].

261 Burrows points out that early statements of policy, even by those responsible for drafting a bill, can become less helpful if the wording of the bill changes during its passage through Parliament. JF Burrows “The Changing Approach to the Interpretation of Statutes” [2002] 33 VUWLR 981, 987.
definition and outside the criminal law.” 262 This advice demonstrates a narrowing of the definition offered in the Cabinet Paper and contradicts earlier advice given in another Department of Justice briefing paper issued in February 1994, which did include the “nicking or scraping of the clitoris” as a type of “mutilation”. 263 Why did this refinement of the definition occur? It appears that submissions by the Human Rights Commission and the School of Refugee Education, both of which are noted by the Department in its report, drew attention to the possibility that surgeries such as Ayanna’s were now favoured in FGM-practising communities. In response, the Department conceded that the analogous and “more familiar Western practices of tattoos and genital piercing” were not intended to be criminalised by the Bill, and so, in a pragmatic moment, the Department evidently thought it even-handed, or logical, to state that symbolic forms of FGM would not be caught either. Furthermore, by this time the writers of the report had also become aware of submissions calling for the outlawing of male circumcision (which, as we have seen, they ultimately recommended against). In a revealing paragraph on this issue, the Department stated that the “least severe” form of FGM involved the “removal of part or all of the clitoris”, which it equated with amputation of the penis. Surgeries such as Ayanna’s (or arguably even Nadifa’s) are not caught by this definitional stance and the Department’s words amount in my view to an implicit acknowledgement that nickings or piercings of the female genitals are somewhat less severe than standard male circumcision. 264

This departmental response tallies with Fletcher’s definition of FGM referred to above (and possibly informed her statement). This congruence of factors appears, therefore, to open up the possibility of an assessment that s 204A does not catch symbolic procedures. Moreover, it is my guess that no specific exemption for Mild Sunna FGM was deemed necessary, or even considered, presumably because “mutilation” was no longer regarded as encompassing minor cuttings or piercings of the genital area, whether these procedures were performed for religious or non-religious reasons. 265

Faced with these contradictory facts a court might consider other jurisdictions with anti-FGM statutes on the books to see how they have dealt with symbolic forms of female circumcision. This is a potentially significant line of enquiry, since the courts will often seek to achieve harmonisation with other countries when construing legislation that is based on the same international treaties. 266 There have been no cases directly on point (save for some asylum decisions, which are considered below), but some of the law reform reports in Australia on FGM offer interesting guides as to how the legislation might be interpreted there. The

262 Letter from Department of Justice to the Chairperson of the Justice and Law Reform Select Committee Crimes Amendment Bill (No 2) Report of the Department of Justice (9 March 1995), JL/95/95, DJ2, 8. The report also declared that “removal of all or part of the clitoris” was the “least severe” form of FGM, which also indicates that symbolic surgeries were not intended to be caught by the Bill. Ibid 7.

263 Letter from Department of Justice to the Chairperson of the Justice and Law Reform Select Committee Crimes Amendment Bill (No. 2): Briefing Paper (8 February 1994), JL/95/94, DJ1, 4.

264 Letter from Department of Justice to the Chairperson of the Justice and Law Reform Select Committee Crimes Amendment Bill (No. 2) Report of the Department of Justice (9 March 1995), JL/95/95, DJ2, 7. The Department of Justice was careful, however, not to make any direct comparison between mild forms of FGM and MGM. The political delicacy of comparing male circumcision with FGM is evident in the debates in the US surrounding the federal anti-FGM Act. In fact, orthodox Jews in the US were opposed to the FGM law, as they feared it might be a precursor to a ban on male circumcision. See P ovenmire “Authority to Consent”, above n 101, 117.

265 Note that these deliberations were conducted before the WHO issued its guidelines in 1997, in which “unclassified” (some “mutilating” in the ordinary sense of the word, some not) forms of FGM were listed as part of its definition of the practice.

266 For this principle, see Keith “Sources of Law”, above n 255, 91; and see Taylor Bros Ltd v Taylors Group Ltd [1988] 2 NZLR 1, 39.
Queensland Law Reform Commission report on FGM²⁶⁷ expressly considered recommending an exemption for symbolic forms of FGM (described as “‘little cuts’” by a Sudanese father cited by the Commission²⁶⁸) in the state legislation. This was rejected for the reason that girls who undergo a minor form of FGM may nevertheless be subjected to “more invasive ritual mutilation” should they return to their home countries on holiday. However, this possibility was disputed by women from affected communities that were consulted by the Commission, who said relatives would not do so “against the mother’s wishes”. The Commission finally decided against recommending that an allowance be made for “non-mutilating” procedures, in part because it accepted the logic behind the rejection of a similar proposal in the Netherlands. The Dutch government had decided against this course because it felt that allowing minor surgeries would “perpetuate female circumcision as it implies toleration of the practice” and that “an unambiguous policy aimed at the total elimination of all forms of female circumcision [is] necessary” in order to avoid any confusion.²⁶⁹ From the Commission’s discussion of this issue it seems reasonable, therefore, to suppose that the catchall phrase of “any other mutilation of the female genitalia” in the final Queensland FGM statute²⁷⁰ was intended to include symbolic nickings of the type experienced by Ayanna.²⁷¹

These decisions by other Western governments not to permit a ritualised form of FGM would probably weigh heavily on a New Zealand court which was considering an argument that the New Zealand anti-FGM Act was not intended to cover such procedures. This is particularly so in light of the fact that Doug Graham MP, in moving the first reading of the Bill, laid great emphasis on the need for international co-operation in eradicating the practice.²⁷² This desire for uniformity in international criminal matters, especially with respect to a neighbouring country, might seriously undermine Dr Aziz’s otherwise strong case that the New Zealand Parliament did not intend to criminalise Mild Sunna FGM.

As mentioned above, there is not yet any case law dealing with specific anti-FGM legislation in any of the countries that New Zealand traditionally relies on for guidance. However, in a landmark decision under the 1951 Refugees Convention, the UK House of Lords unanimously granted asylum in 2006 to a woman who feared being subjected to Type I FGM if she was forced to return to Sierra Leone.²⁷³ Baroness Hale relied on the 1997 WHO definition, and

²⁶⁷ Queensland Law Reform Commission Female Genital Mutilation (QLRC R47, September 1994).
²⁶⁸ M Liverani “Painful Scars of Tradition” Australian (Australia, 17 May 1994); cited in ibid 61.
²⁶⁹ Netherlands Government’s Standpoint on Female Circumcision (undated); cited in ibid. Note also that in the definition section of the report, nicking of the clitoris was regarded as part of the definition of FGM, thus making it necessary to craft an explicit exemption if one was thought desirable; see ibid 7.
²⁷⁰ Criminal Code (Queensland), s 323A(3).
²⁷¹ Nevertheless, the original draft of the Bill drawn up under the Commission’s guidance did specifically outlaw the cutting of the female genitalia (“A person must not cut, excise, infibulate or otherwise mutilate…”), whereas the final version did not, and instead used the vaguer phrase, “any other mutilation”. See draft Bill in Queensland Law Reform Commission Female Genital Mutilation (QLRC R47, September 1994) 96. This change in drafting could create an opportunity for an interpretive argument allowing for symbolic nickings under the Queensland legislation; however, it must be noted that the Commission explicitly stated that nickings were a form of FGM. See also Family Law Council Female Genital Mutilation: A Discussion Paper (Commonwealth of Australia, 1994) [2.01]-[2.07], for its definition of FGM, which also includes ritualised nickings, even though they “may result in little mutilation or long term damage”.
²⁷² Hon Doug Graham MP (29 November 1994) 545 NZPD 523 1: “In the last 10 or so years there have been steady developments in the growth of international criminal law and in arrangements between countries to help enforcement of each other’s domestic law.” The need for uniformity is illustrated by considering whether, by allowing a chink in the international ban on FGM to exist in New Zealand, a court might thereby invite a flood of Mild Sunna “tourists” from abroad.
²⁷³ Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) Fornah (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2007] 1 AC 412 (HL).
reproduced it in full in her judgment, including, without any comment, the Type IV procedures that encompass “unclassified” piercings of the genital area. This statement is to be contrasted, however, with a European Court of Human Rights admissibility decision on a similar issue in 2007, which also cited the WHO definition, but did not include the “unclassified” Type IV part of the WHO typology. It would seem that the European Court does not consider symbolic procedures of the type experienced by Ayanna to amount to torture or to inhuman or degrading treatment under Art 3 of the European Convention, which was invoked in this case. One can suppose that the European Court could not see itself, in a future case, granting asylum where claimants feared being subjected to Mild Sunna FGM. These conflicting judicial views on the status of Mild Sunna (both obiter dicta and concerning refugee law, which operates in an entirely different context to domestic FGM legislation) highlight the need for a case directly on point for this matter to be resolved as an interpretive issue.

(b) International materials

A final and perhaps decisive point of reference in the interpretive enquiry would be to consider the international materials themselves. This is necessary in cases where, as here, the interpretation of the provision at issue cannot be resolved using standard statutory interpretation techniques with respect to domestic materials. In fact, the order of enquiry I have pursued here might actually be reversed with regard to provisions that incorporate international human rights treaties, which are necessarily expressed in vague terms (and which often lead to similar vagueness in the wording of implementing statutes). In the case law, judges have often gone directly to the relevant international materials, which can include treaty texts (or subsequent, more detailed treaties or declarations based on core treaties), and the travaux préparatoires of all these documents when the texts themselves are not clear.

Typically, this occurs when determining the scope of a right as part of, for example, an enquiry into whether a proposed application of a statutory limit on the right can actually be said to have

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274 Ibid [91]. The woman in question belonged to the Temne tribe, which practises Type I FGM: “Excision of the prepuce, with or without excision of part or all of the clitoris.” The House of Lords does not elaborate further on the procedure at issue. Ibid [95].

275 Collins & Akaziebie v Sweden (2007) ECHR Application no 23944/05 (admissibility decision) 7.

276 The Court noted that it was “not in dispute” that subjecting a woman to Types I-III FGM amounted to “ill-treatment contrary to Article 3 of the Convention”. Ibid 12. The two women applicants failed in their bid to have an expulsion order revoked, as they could not substantiate their claims that there was a real risk of their being subjected to FGM if they were required to return to Nigeria.

277 See also the equivalent landmark US decision, in which the US Board of Immigration Controls attached some significance to the fact that the successful asylum applicant would not be returning to Togo to “some minor form of genital ritual” but one that would cause “permanent damage”. In re Fauzia Kasinga (1996) 21 I & N Dec 357, 361. Moreover, the Chairman of the Board referred to the Toubia FGM classification – which does not include symbolic nickings or mere removal of the prepuce; see text above, n 60.

278 Keith does not consider the use of the travaux préparatoires to be a separate enquiry to be undertaken after the use of Hansard and other parliamentary works. Rather they should inform construction of these materials: the role of the travaux préparatoires is a “matter related to the use of Hansard and other cognate material in the interpretation of domestic legislation”. Keith “Sources of Law”, above n 255, 91.

279 See Vienna Convention on the Law of Treaties, 1155 UNTS (“VCLT”), Art 32, which permits consideration of the “preparatory work of the treaty” when interpretation of the treaty text “leaves the meaning ambiguous or obscure”. For judicial approval of the use of international materials, see, eg, Fothergill v Monarch Airlines Ltd [1981] AC 251 (HL), 283. For academic endorsement of seeking the scope of a treaty-based right through consideration of original treaty texts and travaux préparatoires, see Claudia Geiringer “Tavita and all that: Confronting the Confusion surrounding Unincorporated Treaties and Administrative Law” (2004) 21 NZUL Rev 66, 104: “This inquiry into scope involves the interpretation of international rather than domestic law. It should be conducted by reference to international law materials, including the principles of treaty interpretation found in the Vienna Convention on the Law of Treaties.” And see discussion in Keith “Sources of Law”, above n 255, 91.
breached the right. To take an example, in *Police v Smith and Herewini* the issue was whether two men who had been hospitalised following separate car accidents and subsequently failed breath alcohol testing in their hospital beds (under the procedure outlined in s 58D of the Transport Act 1962) had been subjected to a “detention” for the purposes of s 23(1)(b) BORA. The significance of this was that if they were considered to have been “detained” by a person acting in a public function during the testing, then the fact that they were not advised of their right to consult a lawyer could have led to a finding of a breach of s 23(1)(b) BORA, and potentially to success in their appeal. Justice Richardson held that the meaning of “detained” did not include minor interactions between government officials and citizens, which is all that had occurred on the judge’s reading of the facts of the case. Thus, Richardson J concluded that s 58D did not conflict with the right at all.

Justice Richardson arrived at this conclusion from a consideration of Art 9(1) of the ICCPR (on which s 23(1)(b) is based) and subsequent, more detailed, interpretations of the ICCPR text in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and also in the Report of the Working Group on Arbitrary Detention. The first of these documents described a “detained person” as being “any person deprived of liberty except as a result of conviction for an offence”, which indicated, in Richardson J’s view, that “detention” involved a restraint of liberty that approached the condition of being arrested or convicted of a crime. The second document gave a list of examples of detention that included “all deprivations of liberty, whether in criminal cases or in other cases, such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control etc”.

Richardson J considered the combined effect of these two elaborations on the meaning of Art 9(1) ICCPR as indicating that smaller deprivations of liberty (eg, an immigration official questioning a passenger at an airport) are not contemplated as falling within the correct definition of “detained”. His view was that only substantial deprivations of liberty of a similar nature to (but not identical with) an actual arrest could amount to a “detention” for the purposes of s 23(1)(b) BORA. The two men’s predicaments (ie, being asked to give a blood sample under s 58D when already in hospital, thus making any loss of liberty very temporary in nature) did not rise to this level of restraint. Therefore, the activity mandated in s 58D did not in fact impinge on the right at all, and their appeals were consequently dismissed.

The decision in *Herewini* and others like it involving legislation that implicates international texts indicates that judges will have a broad mandate to scour the international materials that

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280 *Police v Smith and Herewini* [1994] 2 NZLR 306 (CA) (“*Herewini*”).
281 In fact one of the men had fled the hospital after refusing to submit to the test.
282 Section 23(1)(b) BORA reads: “(1) Everyone who is arrested or detained under any enactment - ...(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right”.
283 GA Res 43/173, annex, 43 UN GAOR Supp (No 49) at 298, UN Doc A/43/49 (1988); cited in *Herewini*, above n 280, 316.
286 Richardson J was prepared to dismiss the appeals in *Herewini* on this ground alone, but did give alternative reasons that did not rely on his interpretation of the scope of the right contained in s 23(1)(b) BORA. Cooke P for his part appears to hint that Richardson J’s reasoning was an artificial (“juristic”) gloss over the reality of the psychological pressure exerted by public officials on the two men; see ibid 310. Note also that other members of the *Herewini* Court did not adopt Richardson J’s use of the international materials as an interpretive aid, though they concurred in the final result.
287 See, eg, *King Ansell v Police* [1979] 2 NZLR 531(CA), 537 & 540-541; Wellington District Legal Services Committee v Tangiora [1998] 1 NZLR 129 (CA); and *Right to Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 (HC), which considers, at [26]-[27], the travaux préparatoires of UNCROC regarding the status of the foetus.
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gave rise to s 204A of the Crimes Act and that this will often prove decisive.\textsuperscript{288} As with Art 9(1) ICCPR concerning the meaning of “detention”, the primary international instruments enjoining governments to prohibit through legislation the practice of FGM are not forthcoming on the meaning of FGM. For example, the UN Convention on the Rights of the Child (UNCROC) speaks generally about eliminating harmful “traditional practices” against children, and CEDAW merely refers to modifying or abolishing “customs and practices” that “constitute discrimination against women”. The Declaration on the Elimination of Violence Against Women specifically requests states to outlaw FGM; however, like its parent treaty (CEDAW), the Declaration does not on its face spell out the precise details of the practices to be eliminated. A deeper enquiry into international preparatory works is therefore necessary.

Following the \textit{Herewini} approach, the \textit{travaux préparatoires} of some of these instruments do give some indications as to what state parties to the respective international obligations considered their responsibilities towards FGM to entail. For example, when the US and UK representatives in the 1987 Working Group on the drafting of what was to become Art 24(3) of UNCROC suggested that the phrase “including, for example, female circumcision” be appended to the requirement for states to abolish “traditional practices prejudicial to the health of children”, this specific inclusion was successfully resisted by Senegal.\textsuperscript{289} As a result, Canada (joined by Japan, Sweden and Venezuela) stated\textsuperscript{290} that its understanding of the harmful customs referred to in Art 24(3) was that they “included all those practices outlined in the 1986 report of the UN Working Group on Traditional Practices Affecting the Health of Women and Children”.\textsuperscript{291}

The 1986 Working Group’s definition of FGM contains Types I-III of the WHO typology but not the “unclassified” limb of Type IV,\textsuperscript{292} suggesting that Nadifa’s surgery was the type of procedure that the international community sought to eradicate, but not Ayanna’s. This definition is also reflected in the documents referred by the UN Commission on Human Rights to participants in the Fourth World Conference on Women in Beijing in 1995, which is significant in that this gathering immediately preceded the enactment of the anti-FGM Act in New Zealand.\textsuperscript{293} One of these (dated 22 November 1994 – seven days before Doug Graham introduced the Crimes Amendment Bill) outlined the narrow definition of FGM favoured by the scholar Nahid Toubia,\textsuperscript{294} and also that endorsed by Canada in the UNCROC Working

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\item\textsuperscript{288} Moreover, Keith J, writing extra-judicially, specifically recommends this with regard to Crimes Act offences, where appropriate; see Sir Kenneth Keith “Roles of the Courts in New Zealand in Giving Effect to International Human Rights – with some History” (1999) 29 VUWLr 27, 37.
\item\textsuperscript{289} See Sharon Detrick \textit{A Commentary on the United Nations Convention on the Rights of the Child} (Martinus Nijhoff Publishers, Boston, 1999) (“Detrick UNCROC Commentary”) 416-417. The lack of an express inclusion of FGM in the treaty text is not in itself significant. Senegal did not claim that FGM was not a harmful traditional practice – its concern was more with FGM being singled out unfairly. In any event, the UNCROC Committee has since declared Art 24(3) to encompass FGM, thus removing any doubt on this issue; see Committee on the Rights of the Child General Comment 4 UN Doc CRC/GC/2003/4 (1 July 2003), [10] & [24].
\item\textsuperscript{290} Detrick \textit{UNCROC Commentary}, above n 289, 417; citing UN Doc E/CN4/1987/25, [37].
\item\textsuperscript{292} Ibid [34]-[36]. The Working Group refers to Nadifa’s surgery as “similar to male circumcision”; ibid [34].
\item\textsuperscript{293} The conference produced the Beijing Declaration and Platform for Action UN A/CONF 177/20 (September 1995), which required states, in Strategic Objective D1/125, to: “Enact and enforce legislation against the perpetrators of practices and acts of violence against women, such as female genital mutilation, prenatal sex selection, infanticide and dowry-related violence…..”
\item\textsuperscript{294} See text above accompanying n 60; and see Toubia \textit{Global Action}, above n 4, 9-11. Recall that Toubia excludes symbolic nickings of the genital area and also removal of the clitoral prepuce from her classification.
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Group discussions on Art 24(3). It stated that FGM fell along the following spectrum of practices: “[R]anging from clitoridectomy (partial or total removal of the clitoris) and excision (the removal of the clitoris and the labia minora)...to infibulation.”\(^{296}\) Once again, Mild Sunna does not appear to be a practice contemplated in the initial international push towards prohibition.

To summarise, therefore, it appears from the international preparatory materials leading to the documents cited by the Minister of Justice in his introduction of the Crimes Amendment Bill 1995 that Ayanna’s procedure ought not to be considered as being caught by the Act. This might be criticised as an overly “originalist”\(^{296}\) interpretation of the obligation, but this is a method of statutory interpretation of treaty-based legislation that has been used many times in New Zealand in the field of human rights. Most notably, perhaps, this occurred in Quilter v Attorney-General,\(^{297}\) where Keith J resisted classifying the prohibition on gay marriage in New Zealand as being even a prima facie breach of the right of homosexuals to freedom from discrimination. He did this in part by pointing to the traditional common law understanding of marriage (ie, as being between a man and a woman) that existed at the time of the drafting and adoption of the ICCPR in the 1950s and 1960s.\(^{298}\) Keith J found support for this stance in the actual text of the ICCPR, which, in Art 23 specifically states that it recognises the “right of men and women” to marry, one of the very few instances in the treaty where gender-specific language is used. In light of this, a contention that the ICCPR’s equality provision in Art 26 was capable of supporting an equality-based challenge against the prohibition of gay marriage is necessarily defeated when one considers this earlier article. In Keith J’s view, Art 26 was not a freestanding provision that could be applied mechanically in all situations, but rather must be read subject to the other, more specific, rights contained elsewhere in the Covenant, including Art 23. In Keith J’s opinion, therefore, an argument that the prohibition on gay marriage was in contravention of discrimination provisions in the Covenant (and thence in BORA) was a non-starter and could not have been contemplated by the ICCPR drafters (and thence the New Zealand legislature which ratified it).\(^{299}\) As can be seen in this example (and in Herewini), the originalist approach to interpretation has a respectable pedigree within New Zealand jurisprudence that might be marshalled in favour of Dr Aziz.\(^{300}\) To borrow Keith J’s language in Quilter, one could argue, on the basis of the international materials, that the definition in s 204A(1) does not “reach”\(^{301}\) symbolic surgeries that occasion no significant harm and do not involve removal of human tissue. That said, one wonders whether this originalist approach would be so readily invoked in an unpopular cause, as no doubt FGM, even in its mildest form, would be.

\(^{295}\) Economic and Social Council, Commission on Human Rights Preliminary report submitted by the Special Rapporteur on violence against women UN Doc E/CN4/1995/42 (22 November 1994) [147].

\(^{296}\) See my discussion of the “originalism” interpretive method (which is most famously associated with US jurisprudence) in section 2.2.2 of Chapter 3.

\(^{297}\) [1998] 1 NZLR 523 (CA) (“Quilter”).

\(^{298}\) See ibid 560-563 for Keith J’s consideration of the treaty texts and travaux préparatoires of the Covenant.

\(^{299}\) The defeated litigants in Quilter took their complaint to the Human Rights Committee, which endorsed Keith J’s approach to ascertaining whether discrimination had occurred; Joslin v New Zealand Comm 902/1999 (30 July 2002), [8.2]. For similar reasoning relating to the continued legality of the death penalty at international law, see Soering v UK (1989) ECHR Application no 14038/88 [101]-[103].

\(^{300}\) But see Thomas J’s criticism of Keith J’s originalist approach to the international materials in his dissent in Quilter. Thomas J has also endorsed a more evolutive view of human rights more recently in Brooker v Police [2007] 3 NZLR 91 (SC) [229]: “[T]he Bill of Rights is not a static document. As with written constitutions, it can be approached as a ‘living’ instrument. Just as the interpretation of the affirmed rights may vary and develop over time, existing rights can be identified and given the sanction of a fundamental right to be protected and promoted in this country.”

\(^{301}\) Quilter, above n 297, 571.
One might nonetheless point to the narrower definitions of Toubia and Amnesty International, alongside an originalist reading of the international texts, as indicating that Ayanna’s surgery ought not to be considered a “mutilation” for the purposes of s 204A. However, as I have explained, the 1997 WHO typology may have added a new category to the definition of FGM, and a non-originalist interpreter of the international instruments might regard that as a legitimate outgrowth of the original commitment. Furthermore, the WHO formulation, emanating as it does from a UN specialised agency speaking in an area of its competence, would no doubt be a powerful interpretive guide that a New Zealand court would prefer not to ignore. It is also worth pointing out that the UN Committee on the Rights of the Child eschews an originalist approach to interpreting UNCROC, as can be seen in its campaign against corporal punishment of children. Those who argued that the original commitment contained in UNCROC to protect children from violence did not include a demand for states to prohibit corporal punishment in the home were rebuffed by the UNCROC Committee in 2006, when it stated that the “Convention, like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time”. Accordingly, the Committee regarded as insignificant the fact that the travaux préparatoires of the Convention did not record any discussion of corporal punishment during drafting sessions. One would expect, therefore, that the UNCROC Committee, with WHO at its side, would be reluctant to interpret the articles of its treaty relating to FGM as static in meaning.

In view of the disposition of the UNCROC Committee towards according a “living instrument” approach to interpretation of its treaty, it seems likely that a New Zealand court would give considerable weight to the 1997 extension of the definition of FGM by WHO, and might regard it as determinative of the issue being considered here. Indeed, the Chief Justice of the Supreme Court, in a speech directly on point in Vanuatu in 2005, specifically stated that statements by international agencies would be used in interpreting CEDAW:

Modern Bills of Rights invariably draw on the language of the international Covenants. They therefore import as persuasive in the domestic legal systems the texts themselves, any international agency consideration of them, and the jurisprudence of domestic jurisdictions with similarly derived Bills of Rights.

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302 See text above accompanying n 252, where Amnesty International argues that prickings ought not to constitute “mutilation”.

303 The WHO’s status is evident in the fact that it is entitled, along with other UN specialised agencies, to be present at meetings of the UN Committee on the Rights of the Child to “provide expert advice on the implementation of the Convention in areas falling within the scope” of its mandate. UNCROC, Art 45(a).

304 Committee on the Rights of the Child General Comment No 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts 19; 28, para 2; and 37, inter alia) UN Doc CRC/C/GC/8 (2 March 2007), [20].

305 It was also important that the right to be free from torture or other degrading punishment in Art 37 was complemented or extended by the much broader protection in Art 19, which requires states to prevent “all forms of physical or mental violence”. The Committee regarded any form of physical force inflicted on a child (“however light”) as falling within these articles’ collective compass. See ibid [11] & [18]. No doubt even Mild Sunna FGM would be considered a prohibited act under this analysis. Note, however, the Canadian Supreme Court’s recent decision to allow a restricted form of corporal punishment of children to continue in Canada in Canadian Foundation for Children v Attorney-General [2004] SCC 4. The leading judgment of McLachlin CJ failed to acknowledge previous findings of the UNCROC Committee demanding the abolition of all forms of corporal punishment; ibid [33]; cf Arbour J (dissenting) at [187]-[188].

In light of the lack of domestic jurisprudence dealing with the issue at hand and the vagueness of the original UN treaty texts, the WHO typology would likely be an overwhelming candidate as the primary interpretive guide for FGM definitions. However, a closer look at the current WHO website (to which the Chief Justice refers in her speech) may provide a surprising result. On it, the WHO typology is set out as it was in 1997, except for the word, “unclassified”, which has, it seems, been “airbrushed” from the original Type IV definition, perhaps in response to commentators like Lois Bibbings who seized on this word in order to suggest that Type IV FGM might not be included among the prohibited (or “classified”) activities. This potentially brings all forms of FGM, arguably even ritualised nickings, into the purview of international law. The fact that the Chief Justice has taken (extra-judicial) notice of these classifications could therefore be fatal to Ayanna’s case.

This would not be the final word on this matter, however. On a subsequent page of the same website, entitled “Ending the practice”, WHO endorses the promotion of “alternative ‘rites of passage’ that preserve the ritual or symbolic component of FGM marking the admission of young girls into the community or adulthood but without unduly harming their bodies”. What would these alternative rites involve? Would Ayanna’s (or even Nadifa’s) surgery be regarded as not “unduly harming” her body? To date I am not aware of any programmes in FGM-practising countries that involve medicalised ritual nickings or piercings of the genital area receiving the WHO imprimatur, although it now seems possible that the WHO is inching, possibly reluctantly, towards that position.

Indeed, a new draft of the WHO’s FGM typology presages an approaching change in attitude by UN agencies to symbolic bloodletting rites that cause minimal harm. The draft contains
three interesting new features. First, Type I FGM requires at least a partial removal of the actual clitoris (ie, mere removal of the prepuce, without more, does not seem to fall within the definition at all), which hints that even the status of Nadifa’s surgery is being reconsidered. Next, the scope of Type IV FGM has been reduced and now includes only those customs expressed in the 1997 edition that involve some permanent reconfiguration or significant scarring (eg, by cauterising, using corrosive herbs, stretching, or severe cutting, etc) of the genital area. Tellingly, pricking or minor cutting to release small drops of blood is no longer included in this part of the putative definition. Finally, a new fifth category is added, which refers to “symbolic practices that involve the nicking or pricking of the clitoris to release a few drops of blood”. If WHO is serious about encouraging the use of symbolic rituals, and Type V is officially added to include small bloodlettings, then it may soon be the case that procedures like Ayanna’s will no longer be considered worthy of prohibition at the international level. This would be a significant retrenchment of the 1997 classification that would accord with the narrow Touibia definition, as well as the New Zealand Department of Justice’s pragmatic reading of s 204A in 1995. Moreover, it would place those versions of FGM that are arguably analogous to MGM into the range of acceptable cultural activities, while continuing to push for the prohibition of practices that cause true harm. This in my view would be a welcome return to the actual commitment made by the New Zealand government when it originally chose to adhere to CEDAW, UNCROC and DEVAW, before the WHO released its broader definition in 1997.\footnote{Note that it is not clear whether the Type V category will be considered an activity within the range of prohibited practices, or whether it is a category that is exempted. The use of the word “symbolic” suggests that the latter may be more likely, given WHO’s promotion of symbolic rituals.\footnote{The redrafting of the WHO typology was underway in 2005 but has not been published as official WHO policy. One can imagine a fierce debate is being conducted in Geneva surrounding this re-classification. On one side of the argument, one would assume, are the absolutist views of feminists and others who regard any ritual surgeries on the female genitals, however harmless, as assisting the perpetualisation of patriarchal cultures (in this vein, the Innocenti report states: “‘symbolic’ interventions do not address the gender-based inequality that drives the demand for this service and may actually inhibit progress toward abandonment of the practice”; UNICEF report, above n 314, 17). On the other side may be those who take the view of Waldeck that the best way to eradicate the practice in the long term is to allow a safe version to be performed until economic, educational and social progress see the practice completely die out, as is being allowed to occur with male circumcision in New Zealand.\footnote{ADDENDUM: at the time this thesis went to press, a new definition of FGM had been produced by WHO, which did not categorise ritual nickings as a “symbolic” (and perhaps tolerable) practice. Instead nickings, and other minor customs are placed in Type IV, and presumably are regarded as undesirable activities. See WHO Fact Sheet No 241 Female Genital Mutilation (WHO, Geneva, February 2010); available at: <www.who.int/mediacentre/factsheets/fs241/en/>}.

(c) Conclusions: statutory interpretation

The foregoing discussion was intended to illustrate the contestable nature of the definition of FGM at its less harmful margins. This contestability exists both within the contradictory parliamentary history that drove the Act’s passage in 1994-1995, and is also present at the international level. In particular, the new draft of the WHO classifications shows that the margins of the definition (even for Nadifa’s procedure) are currently unstable, and probably are subject to much philosophical debate at the UN between those who advocate an absolutist stance to eliminating the practice and those who favour a more passive and nuanced supervision of incremental change in the societies where FGM is practised. Given this instability, and also considering the originalist arguments surrounding New Zealand’s actual treaty commitments at the time of the enactment of s 204A in 1995, there must surely be some
doubt as to whether Ayanna’s surgery falls under the prohibition in s 204A. Placed conceptually alongside the s 5 BORA framework for assessing limits on rights, it is eminently arguable, therefore, to say that the limit sought by the police to be imposed on the right to manifest religious belief in the case of Ayanna’s surgery is not in fact “prescribed by law”.\textsuperscript{317}

Returning to my consideration of the meaning of “mutilation” in s 204A(1), a court might be disposed, as a matter of ordinary statutory construction without any recourse to BORA,\textsuperscript{318} to determine that the purpose of the provision was to criminalise only those cultural procedures that cause permanent injury or disfigurement to the female genitals, as is envisaged by the international legal stance that immediately pre-dated the legislation. This would require the court to distinguish between non-mutilating and mutilating procedures within the Type IV definition. It also would leave the term “mutilation” in s 204A(1) with substantial content, thereby addressing the principle of construction mentioned above that the term must be accorded a substantive meaning in order to give at least some effect to Parliament’s will as expressed in the statute.

In regard to the co-accused (Dr Aziz and Ayanna’s parents), their position on symbolic surgeries would be further aided by the common law presumption that penal statutes “should be interpreted narrowly in favour of the subject”.\textsuperscript{319} This presumption would point towards a narrow reading of s 204A(1) so that it does not apply to Ayanna’s surgery at all. If this presumption is not invoked here it would in effect give the word “mutilation” an “ambulatory” or “mobile” meaning that can expand according to which philosophical view is in the ascendancy at WHO. This would not be an attractive state of affairs for a provision in a criminal statute, where a lack of precision ought to be resolved in favour of accused persons. Legal commentator Jim Evans explains the reason behind the “nullum crimen sine lege” principle as being that, were criminal statutes to be accorded expansive corrections over time, this would create a danger of abuse by public authorities, thereby harming the “condition of our polity”.\textsuperscript{320} Thus, he concludes: “Although I think that a rational system of interpretation would allow corrective extensions in most cases I do not think they should be allowed when the effect is to extend a criminal offence.”\textsuperscript{321} Hence, it is arguable that extending the definition of mutilation to cover Ayanna’s surgery would be an unprincipled departure from traditional statutory interpretation methodology in the area of the criminal law.

\textsuperscript{317} Section 5 BORA stipulates that the “rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (emphasis added).

\textsuperscript{318} As occurred in Drew v Attorney-General [2002] 1 NZLR 58 (CA), [67], where Blanchard J was able to dispose of the issue regarding an impingement on the right to natural justice by subordinate legislation by using “common law principles of construction” without recourse to BORA. Blanchard J did, however, go on to state that an application of ss 6 and 27 BORA to the facts would have arrived at the same result. In the case at hand, however, ordinary principles of statutory construction provide a more equivocal result, thus necessitating a BORA analysis.

\textsuperscript{319} Burrows Statute Law, above n 255, 215. See also FAR Bennion Statutory Interpretation: A Code (4th ed, Butterworths, London, 2002) 719: “One aspect of the principle against doubtful penalisation is that by the exercise of state power the religious freedom of a person should not be interfered with, except under clear authority of the law.” Moreover, the Siracusa Principles on the limitations provisions in the ICCPR require that limits on rights be “interpreted strictly and in favour of the rights at issue”. See “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights”, reproduced at (1996-98) 4 HRNZ 753, 754. Note, however, Butler and Butler’s strong position against applying this rule across the board, especially where the limits on certain rights are also an embodiment of other rights. Thus, one might regard Nadifa’s right to be free from torture or cruel treatment to be deserving of equal respect to the rights of her parents to direct her upbringing. See Andrew Butler & Petra Butler The New Zealand Bill of Rights Act: A Commentary (LexisNexis NZ Ltd, Wellington, 2005) (“Butler & Butler NZBORA Commentary”) [6.9.8]-[6.9.10].


\textsuperscript{321} Ibid.
A narrow interpretation of s 204A would also accord with the harm principle discussed earlier in this chapter, which is that private actors should only suffer criminal sanctions if their activities cause harm to third parties.\footnote{322} It is arguable that surgeries like Ayanna’s do not breach that rule. Indeed it is perhaps significant that Kymlicka comes down specifically against clitoridectomy (removal of the clitoris) as a practice worthy of prohibition under his theory of multiculturalism and he does not appear to give any thought to non-mutilating procedures.\footnote{323} Having said all this, however, there remains the possibility that a court may equally be persuaded by the fact that other jurisdictions with similar FGM legislation to New Zealand have consciously resisted granting exemptions to symbolic surgeries, and that it would be unwise as a matter of general judicial policy to craft such an isolated exemption on the global stage.\footnote{324} Moreover, recent legislation in New Zealand removing the right of parents to use reasonable force for the purpose of correcting their children shows that legislative tolerance of parental discretion in the upbringing of children is on the wane.\footnote{325} This might have an effect on a court’s interpretation of s 204A that militates against tolerating even Ayanna’s procedure.\footnote{326} On the other hand, the continued legislative silence on male circumcision argues the opposite conclusion.

Taking all the above matters into account, it appears that ordinary statutory construction principles can do no more than illustrate the evenly balanced nature of the debate regarding symbolic surgeries. What remains to be considered is whether the direction to the courts in s 6 BORA\footnote{327} to seek, where possible, alternative meanings to statutory provisions that appear to conflict with the rights in part 2 of BORA (as s 204A Crimes Act 1961 may do, according to the police’s broad interpretation of “mutilation”) can add anything to this discussion. The Supreme Court has certainly indicated, in \textit{R v Hansen}\footnote{328}, that the s 6 enquiry can bring an extra dimension to the interpretive methodology set out in s 5 of the Interpretation Act 1999 (which is essentially the analysis I have used up to this point). Elias CJ, for example, notes that s 6 BORA “adds a further principle of interpretation [to the general approach in s 5 Interpretation

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\item \footnote{322} See text above accompanying ns 23 & 24.
\item \footnote{323} See text above, n 17. Kymlicka might reply that “clitoridectomy” is simply a synecdoche for FGM generally. Martha Nussbaum, the American feminist scholar writes emphatically against the practice of FGM, but is careful to limit her comments to procedures involving tissue loss, and specifically excludes symbolic bloodlettings from her analysis. Martha Nussbaum \textit{Sex and Social Justice} (Oxford University Press, New York, 1999) 119.
\item \footnote{324} Note, however, the position in France, which has no specific FGM statute but, ironically, is the one Western country to have successfully prosecuted numerous cases of FGM using its ordinary criminal law. Interestingly, it seems that the French prosecutions have only been taken in serious cases involving girls under 15 where significant tissue removal has occurred, typically excision of the clitoris or infibulation. There do not appear to have been any prosecutions for symbolic surgeries. The French Penal Code prohibits (under Art 312(3)) violence against children that results in “mutilation, amputation, or deprivation of the use of a limb, blindness, loss of an eye, or other permanent disability or unintentional death”. Thus, if New Zealand were only to prosecute cases of severe mutilation, it would be in line with the French approach. See Bronwyn Winter “Women, the Law, and Cultural Relativism in France: The Case of Excision” (1994) 19 Signs 939.
\item \footnote{325} Crimes Act 1961, s 59(2).
\item \footnote{326} Keith recommends considering the statute book “as a whole” as an interpretive method, on the basis that Parliament presumably is “using principles and language in a broadly consistent way” throughout the entire corpus of statute law. See Keith “Sources of Law”, above n 255, 87-89.
\item \footnote{327} Section 6 BORA reads: “Interpretation consistent with Bill of Rights to be preferred – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”
\item \footnote{328} [2007] 3 NZLR 1 (SC) (“\textit{Hansen}”).
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Act] wherever the rights and freedoms of the Bill of Rights Act are affected by an enactment”. 329 The remainder of this chapter shall pursue this interpretive avenue.

With this in mind, the discussion above suggests that were a court to take into account s 6 BORA, it would certainly be possible as a matter of linguistics to construe the word “mutilation” in s 204A(1) in a way that allows some tolerance for symbolic surgeries. This would not require a strained interpretation that is divorced from the language and purpose of s 204A, a factor that has prevented New Zealand courts in the past from reading down other rights-infringing statutes. 330 My examination above of the extrinsic and intrinsic aids to the construction of s 204A discloses that the underlying purpose of the legislation is a moot point, and thus there is legitimate scope for “mutilation” to be accorded a narrow meaning so as to exclude symbolic surgeries on the female genitals. No doubt the Crown would argue that a broader definition is appropriate, 331 but in cases such as this where the debate as to the purpose of a statutory provision can go either way, s 6 could operate as a “tie-breaker” in favour of Dr Aziz and Ayanna’s parents – as a parallel statutory iteration of the common law principle of nullum crimen sine lege, which, as I have explained, operates to avoid convicting people when the criminal law uses vague terms.

A decision that might provide a useful model for this technique of reading down potentially rights-infringing statutory terms is that of Hopkinson v Police. 333 In that case, a political protest involving the burning of the New Zealand flag in Parliament grounds was initially judged in the District Court to have infringed s 11(1)(b) of the Flags Emblems and Names Protection Act 1981. Under this section an offence is deemed to have occurred if a person “in or within view of any public place, uses, displays, destroys, or damages the New Zealand flag in any manner with the intention of dishonouring it”. The issue became whether the circumstances of the protest truly amounted to a “dishonouring” of the flag. Ellen France J in the High Court held that the meaning of “dishonour” in the Act could be read narrowly so that it would not prohibit public burnings of the New Zealand flag for reasons of political protest. France J did not consider political protest of this sort to be worthy of prohibition in modern day New Zealand, a country that in her view had “reached a level of maturity in which staunch criticism is regarded as acceptable” . 334 In order to count as a “dishonouring”, she reasoned, something more was

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329 Ibid [10]-[11]. See also Anderson J, ibid [289]: “[T]he Bill of Rights Act now adumbrates the application of previously conventional principles of construction and may result in a meaning different from that which would have been found prior to the Bill of Rights Act. Now, a meaning dictated by s 6, rather than a meaning ascertained without reference to s 6, is what the courts must find if it is reasonably possible to do so.”

330 See Hansen, above n 328, in which the Supreme Court unanimously ruled that s 6 did not permit the reading down of s 6(6) Misuse of Drugs Act 1975 to conform with the Bill of Rights. Their Honours considered such a reading not (in the words of Blanchard J, at [61]) to be “genuinely open” in light of the provision’s “text and its purpose”. See discussion in Hanna Wilberg “The Bill of Rights and other enactments” [2007] NZLJ 112 (“Wilberg ‘Other Enactments’”), 115.

331 For example, the Crown might argue that one purpose of s 204A was to implement the CEDAW requirement in Art 5 for states to abolish “practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. Arguably even symbolic nickings trace their origins to patriarchal societal cultures that oppress women.

332 Jim Evans uses this expression in an essay on reading down enactments using human rights statutes; Jim Evans “Reading Down Statutes” in R Bigwood (ed) The Statute: Making and Meaning (LexisNexis, Wellington, 2004) 123, 143: “[T]he role of interpretive provisions in determining the meaning of a statutory provision can only be the modest role of operating as a tie-breaker when two or more candidate meanings are equally plausible.” I suggest that my search for the meaning intended for s 204A(1) by its authors is so evenly balanced that it is a case where the tie-breaker function of s 6 ought to be invoked.


334 Ibid [75].
required by way of vilification, or defiling, of the flag.\textsuperscript{335} The Crown had sought to give “dishonour” a much broader meaning that would have included Hopkinson’s protest actions, but France J rejected the Crown submission, as she considered it to involve a disproportionate impingement on the right to freedom of expression in s 14 BORA. France J, in part relying on US jurisprudence to this effect,\textsuperscript{336} determined that flag burning qualified in these circumstances as being an expressive act within the scope of freedom of expression in s 14. Having done this, she was then able to call on s 6 to interpret “dishonour” in a manner that disapproved the meaning argued by the Crown and thereby preserved the right.\textsuperscript{337}

Using similar reasoning to that in \textit{Hopkinson}, it may be possible to adopt the attenuated definition of “mutilation” already canvassed with respect to Ayanna’s surgery. As illustrated in France J’s decision, however, it is necessary to do two things in order to reach the s 6 remedy. First, it must be argued successfully that the practice of Mild Sunna FGM falls within the scope of s 15 BORA, thus crossing the threshold of eligibility for rights protection under BORA. And then to show that the Crown’s expansive interpretation of “mutilation” (which includes all the customs listed in Type IV of the WHO classification) would amount to an unreasonable limit on the exercise of that right.\textsuperscript{338}

Regarding Nadifa’s Traditional Sunna surgery, however, s 204A(1) clearly prohibits removal of the clitoral prepuce and, therefore, by dint of s 4 BORA, a court would be bound to rule that her case falls within the anti-FGM statute’s prohibition. This would be so even if the WHO typology were altered in the future so as to exclude mere excisions of the clitoral prepuce. The domestic statute is clear on its face and must be applied by the courts regardless of any change in the international stance.

I now turn to consider whether the protection in s 15 BORA for religious manifestation could provide space for the interpretive argument under s 6 already made in favour of the circumstances surrounding Ayanna’s procedure. In the event that Ayanna’s case (like Nadifa’s) turns out not to be amenable to an interpretive solution, I shall also consider a more “constitutional” analysis as to the appropriateness of the courts making a declaration that the legislative ban on Mild and Traditional Sunna FGM is inconsistent with the rights and freedoms in BORA.\textsuperscript{339} This will require a deeper enquiry into whether s 204A is a justifiable limitation in a free and democratic society on Ayanna’s and Nadifa’s parents’ right to manifest their religious beliefs.

\textsuperscript{335} That is, burning a New Zealand flag using kerosene in the context of a political protest about New Zealand hosting the leader of a country that had participated in the 2003 invasion of Iraq was not considered to “dishonour” the flag in the narrower sense of “vilifying” the flag. In order to qualify as dishonouring, “some additional action on the appellant’s part beyond a symbolic burning of the flag” was, in France J’s view, required; ibid [81]. One might imagine urinating on the flag, or similar activity, to meet this new test.


\textsuperscript{337} France J relied in part on the \textit{Black’s Law Dictionary} (5th ed, 1979) definition of “dishonour”, which relates the following meaning: “[A]s respects the flag, to deface or defile, imputing a lively sense of shaming or an equivalent acquiescent callousness.” This supported her narrow reading of “dishonour”, and, incidentally, imports the definition of that word in an American case cited in \textit{Black’s Law Dictionary: State v Schlueter} 23 A 2d 249, 251 (1941).

\textsuperscript{338} The Crown argued in \textit{Hopkinson} that “vilification” was merely an instance of a form of dishonouring and was not a true alternative meaning to “dishonouring”. See ibid [80]; and Paul Rishworth “Human Rights” [2005] NZ Law Review 87, 100. With regard to “mutilation”, Dr Aziz’s argument, from a linguistic point of view, would be stronger than the appellant’s in \textit{Hopkinson}, as the differentiation between mutilating and non-mutilating procedures provides truly discrete alternative meanings.

\textsuperscript{339} Using the remedy suggested by Tipping J in \textit{Moonen v Film and Literature Board of Review} [2000] 2 NZLR 9, 17 (CA).
3.2 A BORA approach to ritual genital surgeries

The most authoritative methodology for assessing whether an enactment is compliant with BORA is articulated by the Supreme Court in *Hansen*. The majority judgments on this point essentially lay out the same approach taken by France J in *Hopkinson*. In my enquiry, therefore, I make use of France J’s initial step with respect to the putative legislative limit on Ayanna’s surgery, as it appears to fit well with the linguistic issue in the case at hand. This step entails the setting out of the disputed interpretation of a term in an enactment that is advanced by the Crown, and which appears to conflict with a BORA right (ie, that the clinically conducted removal of a small amount of blood from the clitoris by syringe, which leaves no scarring, is a prohibited “mutilation” under s 204A(1)). Regarding Nadifa’s procedure, I use the first limb of Tipping J’s methodology in *Hansen*, which takes Parliament’s “intended meaning” of a term (ie, that the surgical removal of the tip of the clitoral prepuce amounts to a prohibited “excision…of whole or part of…the labia minora, or clitoris” under s 204A(1)) to be the appropriate starting point.

Having made these initial semantic choices, we now move on to the steps envisaged by Tipping J regarding the appropriate use of ss 4, 5 and 6 BORA in cases dealing with statutory limitations on BORA rights. I reproduce here Tipping J’s summary of his methodology (with additions incorporating France J’s approach to “applied meanings” in square brackets):

Step 1. Ascertain Parliament’s intended meaning [or ascertain an “applied meaning” forwarded by the proponent of a potentially rights-infringing reading of the term, which also, arguably, is that intended by Parliament].

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament’s intended meaning [and the “applied meaning”, which also becomes an “intended meaning” if it survives scrutiny under step 3] prevails.

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340 In fact, McGrath J explicitly endorses and replicates France J’s approach to the appropriate sequence for applying the operative provisions of ss 4, 5 & 6 BORA (*Hansen*, above n 328, n 226, citing *Hopkinson*, above n 333, [28]), and claims that it is “broadly consistent with that outlined by Tipping J” and “broadly similar” to that of Blanchard J in *Hansen* (at [92] and [60] respectively); *Hansen*, above n 328, [192] (per McGrath J).

341 Note that the clitoral prepuce is more properly considered to be a part of the labia minora that envelopes the clitoris, rather than as part of the clitoris per se. In any case, s 204A prohibits removal of any tissue from either the labia minora or clitoris.

342 France J’s approach (outlined in para [28] of her judgment) could be adapted to Ayanna’s case in the following way: “The approach I take is to consider, first, whether the conduct of the appellant falls within the…applied meaning of [s 204A(1)], and in particular that of [“mutilation”]. Then, to ask whether the prohibition of that conduct is prima facie inconsistent with the Bill of Rights. If it is, is it a justified limit? If not, the next step is to ask whether the section can be read consistently. If it can, it should be read in that way. If it cannot, then the natural or applied meaning has to be given effect to but on the basis that s 4 of the New Zealand Bill of Rights applies.”

343 *Hansen*, above n 328, [92] (per Tipping J). See, to similar effect, McGrath J at [192] and Blanchard J at [60], who claims his methodology is suitable where the natural meaning of a term coincides with Parliament’s intended meaning (see [57]), as is the case with the prohibition on Nadifa’s surgery.
5. Circumcision

Step 5. If Parliament’s intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament’s intended meaning be adopted.

I shall now consider how the Tipping methodology might apply to the case at hand.

3.2.1 Are the meanings “apparently” inconsistent with the right? The scope question

Having identified the “applied meaning” and “Parliament’s intended meaning” of the relevant terms in s 204A under Step 1 of the Tipping methodology, it is then necessary (under Step 2) to determine whether these meanings are prima facie inconsistent with s 15 BORA.\(^{344}\) It is clear that these interpretations of s 204A(1) prohibit the practices that we are concerned with. However, it is also essential to establish whether the practices in question lie within the scope of the right to religious manifestation in s 15. If they do not, then BORA is not engaged at all, and by definition there is no inconsistency. This is despite the obvious conflict between the asserted definitions of the prohibiting provisions in s 204A and the surgical procedures at issue.

In my consideration of Razamjoo in Chapter 4, I showed how that case demonstrated that the threshold for determining whether the right to religious manifesting religious belief in BORA is engaged is a low one. The claimants in that case were required merely to prove that they had a sincere religious belief that their faith required them to wear the burqa in public. The fact that they were able to point to verses in the Qur’an that supported their claim merely assisted in arguing that their beliefs were genuine. Apart from the obvious convenience in being able to point to a religious text, it was not necessary to make this scriptural argument. Thus, if Ayanna’s and Nadifa’s parents could testify convincingly that they subjectively believed their religious beliefs were at stake, and that these beliefs were not of a trivial nature, then this initial threshold enquiry will be satisfied.\(^{345}\) As with the statements of some legislators during the promulgation of anti-FGM laws in Western countries, it is probable that an opposing view that the Qur’an, and Islamic law generally, does not mention FGM would be proffered as a challenge to their sincerity.\(^{346}\) But, as Baroness Hale states in Williamson, the courts are not concerned as to whether a “particular belief is soundly based in religious texts”.\(^{347}\)

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\(^{344}\) Section 15 BORA reads: “Everyone has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.”

\(^{345}\) Note that this type of testimony is not required to be of a rigorous standard, but must be “coherent in the sense of being intelligible and capable of being understood”. Williamson, above n 49 [23] (per Lord Nicholls of Birkenhead). Lord Nicholls goes on to say that, “too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification”. Ibid.

\(^{346}\) A written submission to the Queensland Law Reform Commission by the Islamic Council of Queensland claimed that FGM was not a “part of Islamic law, and not a recommended practice”. Queensland Law Reform Commission Female Genital Mutilation (Report No 47, September 1994) 16.

\(^{347}\) Ibid [75]. Recall from my discussion in Chapter 4 that courts eschew deep enquiries into the provenance of religious beliefs, as this would require them to embark on virtual heresy trials that would see them having to decide between conflicting scriptural interpretations of sacred texts, testimony between religious leaders, and so on. Apart from being an impractical task, it would also compromise the courts’ religious neutrality, as to determine such issues would be effectively to take sides in theological debates. For judicial discussion and resolution of this difficulty in favour of limiting the enquiry into religious beliefs to a factual determination of
This is not to say however that there is no scriptural basis whatsoever for FGM. In fact, textual sources for FGM do exist in the Hadith, or secondary Islamic religious texts. As an example, the Prophet Mohammed is recorded in one Hadith as instructing a circumciser to practise a mild form of FGM that arguably vindicates (from a theological viewpoint) the surgeries carried out by Dr Aziz: “If you do cut, do not overdo it...because it brings more radiance to the face...and is...better for the husband.” Ayanna and Nadifa’s parents could usefully invoke texts such as these to support their claim as to sincerity. Arguments that the authenticity of the Hadith in question are contested by Muslim religious scholars (which in fact they are) would be nugatory, as long as the religious claimants believed they represented what they considered to be religious truth.

A second, ostensibly more demanding, threshold enquiry into whether the scope of s 15 BORA includes the Sunna FGM practices carried out by Dr Aziz is whether they are customs that infringe human dignity and therefore ought not to be considered to fall within the ambit of the right. Lord Nicholls of Birkenhead expresses this consideration thus: “The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection.” We have seen that the European Court of Human Rights, in Collins & Akaziebie v Sweden, considers Types I-III FGM to infringe Art 3 ECHR, and it is therefore arguable that Nadifa’s surgery (also Type I) should not be included in the right at all.

The mode of analysis employed in the New Zealand case of Re J suggests that courts have a methodological tool to exclude at least Nadifa’s surgery at this point in the Tipping analysis. In Re J, the Court of Appeal held that the religious practice in question (the right of parents to refuse lifesaving medical treatment to their child on religious grounds) was not within the compass of acceptable religious manifestations under s 15 BORA. This was because the right to life of the child in question took precedence over the asserted parental religious right. It is therefore possible that, in line with Re J, a court may regard the s 9 BORA right not to be subjected to “torture or to cruel, degrading, or disproportionately severe treatment” to have the effect of truncating the religious right of parents to direct religiously inspired surgeries. On this ground, a court might withdraw protection for at least Type I FGM, thus making it unnecessary to consider whether s 204A would survive a proportionality review under s 5 BORA (Step 3 of the Tipping analysis).

Nevertheless, it would, I suggest, be unlikely that a court would dispose of the case in this way at such an early stage. First, the decision in Collins & Akaziebie v Sweden concerned an asylum decision, in which the claimant feared being returned to Nigeria, where she said her daughter would be forcibly subjected to the custom in an unsafe setting. Given the fact that the case concerned a hypothetical future event, the circumstances of the girl’s subjection to Type I FGM were never actually considered. Also, the question whether Art 3 ECHR was to be
invoked was not in fact contested by either side in the case, thus making it a rather weak precedent in this regard. By contrast, Nadifa’s procedure, it must be remembered, was carried out in safe clinical conditions, with no resulting ill effects. Moreover, her operation was sanctioned by her parents, an element that was distinctly missing in the Nigerian asylum case. Thus, it seems particularly inapt to consider this ECHR admissibility decision as an appropriate precedent, quite apart from the fact that it is only of persuasive value. Furthermore, the methodology used in Re J is now regarded as an anomalous one and not suited to the scheme of BORA, which is geared, through s 5, towards engaging in detailed examination of the justifiability of limitations on all rights listed in part 2 of BORA. The modern trend, therefore, is to engage in s 5 analysis after conducting a fairly generous initial enquiry into whether the right is implicated. The general attitude taken by the courts at this threshold stage in recent years is to avoid a “niggardly approach to the content and meaning of BORA rights.”

It therefore seems likely that the parental right to subject children to a limited degree of harm based on religious belief would be accepted by a New Zealand court for the sake of argument as a religious manifestation for the purposes of s 15. This accords with the approach in Williamson, where Lord Walker of Gestingthorpe decided to bypass the debates over the contested religious basis for the parental religious belief in the need for corporal punishment in British schools. His cautious comments on this issue demonstrate the ease with which religious claimants can expect to succeed in this initial scope enquiry: “[T]he claimant’s conduct in accordance with that belief could just about be described as a manifestation of it”, and therefore could be said to have “scrapped over” the rather low hurdle contained in this initial enquiry. Reading between the lines of some of their Lordships’ speeches, one suspects that they could have disposed of the issue at this stage, but, in view of the deeply held religious beliefs of the claimants, they felt that it was necessary to consider whether the statutory ban under consideration could survive a more rigorous proportionality analysis at the next stage in the UK Human Rights Act framework. The position is, I suggest, similar in New Zealand.

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5. Circumcision

354 These comments on the persuasiveness of Collins & Akaziebie v Sweden apply also a fortiori to the analogous decision of the House of Lords in Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) Fornah (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2007] 1 AC 412 (HL); see text above, accompanying ns 273-274.

355 See discussion in Paul Rishworth, Grant Huscroft, Scott Optican, & Richard Mahoney The New Zealand Bill of Rights (Oxford University Press, Auckland, 2003) (“Rishworth et al”) 52-56; and Butler & Butler NZBORA Commentary, above n 319, [6.6.4]-[6.6.8]. Rishworth and Butler and Butler favour “ad hoc” balancing, which is shorthand for a full consideration of the merits of a limitation on a right under s 5 proportionality analysis. If a BORA enquiry ceases in the form of a negative answer at the stage where the scope of the relevant right is ascertained, then the opportunity to analyse important social policy concerns by means of the relatively transparent and detailed s 5 formula might be lost. Tipping J in Quilter, above n 297, 576, regards the “definitional balancing” approach used in Re J to be unwise: “[I]f restrictions which may be legitimate or justified in some circumstances are built into the right itself the risk is that they will apply in other circumstances where they are not legitimised or justified.”

356 This initial filter would no doubt exclude some egregious forms of religious manifestation, such as human sacrifice, or infibulation.

357 Butler & Butler NZBORA Commentary, above n 319, [4.2.3]; citing Minister of Home Affairs v Fisher [1980] AC 319, 328 (PC); see also Flickinger v Crown Colony of Hong Kong [1991] 1 NZLR 439, 440 (CA); and Mist v R [2005] NZSC 77, [45].

358 For a recent judgment in which the right to inflict a violent religious exorcism is given a charitable reception vis-à-vis the scope enquiry into s 15 BORA, see R v Lee [2006] 3 NZLR 42 (CA), [323]: “Exorcisms are clearly a manifestation of religious belief.”

359 Williamson, above n 49, [66].

360 See also R v Governors of Denbigh High School [2007] 1 AC 100, where a majority of the House of Lords determined that there was no interference with the right of a girl to manifest her religious belief by wearing a certain type of Islamic dress when a school uniform code prevented her from doing so. This was essentially because their Lordships believed the girl could simply have attended another school “down the road” that would
and accords with the spirit of the original ICCPR text, which contemplates in Art 18(3) judicial scrutiny of governmental justifications for any inroads on religious manifestation. Moreover, Nowak considers that female circumcision can be subject to “certain restrictions” for the health and fundamental rights and freedoms of others, which implies that, at the very least, the core right to believe that Mild and Traditional Sunna FGM are religious manifestations under s 15 ought to be respected for the purposes of this prima facie scope enquiry.

Regarding the case at hand, to say that the right of parents to direct surgeries on the genitals of their children for religious reasons qualifies as a protected right under Step 2 of the Tipping methodology does not mean that the issue of harm to Ayanna and Nadifa is left behind at this stage. Rather, the better view is that the matter is fed into the next step of the analysis – the enquiry as to whether s 204A is a justified limit under s 5 BORA, which contains ample scope for considering such factors.

At this second stage moreover it will be possible to engage systematically with more disparate considerations, such as whether the continued tolerance of MGM renders irrational the choice to prohibit analogous forms of FGM.

Having concluded that the surgeries conducted by Dr Aziz ought to qualify as prima facie protected manifestations of religious belief under s 15, it is therefore possible to say that Step 2 of Tipping J’s methodology is satisfied. That is, it is sufficiently evident that the prohibition on Mild and Traditional Sunna in s 204A(1) is apparently inconsistent with Nadifa’s and Ayanna’s parents’ right to manifest their religious beliefs under s 15 BORA.

3.2.2 Is the apparent inconsistency a justified limit under s 5 BORA?

In the crucial justificatory stage of my analysis, I propose to examine how my evaluation in previous sections of this chapter of the disputed medical justifications for MGM could potentially have a great bearing on the outcome of an FGM prosecution. However, before applying the approach in Hansen regarding s 5 BORA analysis to my hypothetical fact situation, it will assist to consider how the relevant US case law has dealt with instances where government regulation unfairly targets religious practices. I will suggest that the framing of the issues in the paradigm Equal Regard case of Lukumi v City of Hialeah, which concerned an allow the religious garb. Having done this, all three of the majority judges nevertheless subjected the school uniform code to proportionality analysis.

As is borne out by the decision of 4 of the 5 Supreme Court justices in Hansen to subject the governmental decision to limit the right to the presumption of innocence in s 25(c) BORA to proportionality review. They engaged in this analysis despite the fact that this right is expressed in Art 14(2) ICCPR in absolute terms.

Rishworth recommends that proportionality review (Step 3 of Tipping J’s methodology) should be undertaken, in part because the ICCPR appears to contemplate this in its formulation of the specific reasons required for government to justify limiting religious manifestation in Art 18(3). Rishworth et al, above n 355, 297.

Nowak ICCPR Commentary, above n 16, 430. Recall that Nowak considered circumcision to come within the scope of a “religious observance”; see ibid 420.

This appears to be the approach of Lord Gestingthorpe in Williamson, above n 48, [66]: “But the fact that the claimant may have only just scraped over those two thresholds should not be disregarded in determining the issue of interference or in the exercise of balancing interests and testing proportionality which is required under article 9 (2) if (perhaps by giving the claimant the benefit of the doubt) the court gets that far.”

It should be evident by now that male circumcision looms large throughout every stage of the discussion in this chapter. It could have been invoked for example in Step 2 as a means of arguing that Mild and Traditional Sunna FGM ought not to be conceived as infringements of “human dignity”. If one accepts that the level of harm caused by medicalised symbolic FGM and standard MGM is equivalent, it is difficult to see how any other conclusion could be reached. To an extent there is a degree of artificiality in putting off this debate. Lord Gestingthorpe intuit this when he says, “issues of engagement, interference and justification are in truth closely linked together”. Ibid.

impermissible governmental targeting of a minority religious practice, could be useful in my
assessment of the New Zealand anti-FGM law, which is also arguably an instance of a
legislative body disproportionately criminalising a religious practice conducted by a minority
group.

(a) The contours of a probable challenge to US anti-FGM legislation

The Lukumi precedent

It will be recalled from the discussion of US Free Exercise Clause jurisprudence in Chapters 2
and 3 that, since the decision in 1990 of the US Supreme Court in Smith, religious claimants
will have little success in challenging a law that incidentally burdens a religious practice, as
long as the law is neutral and generally applicable to all members of the society in which it
operates. In Smith, the impugned Oregon criminal statute prohibited the ingestion of peyote
across the board, regardless of whether it was being taken for religious, recreational, or any
other relevant purposes. The US Supreme Court declared that, in situations where legislation is
applicable to all, the Free Exercise Clause only requires the law to be subjected to rational
basis analysis, even if it substantially burdens a religious practice. This level of scrutiny carries
a minimal persuasive burden of justification on the part of governments seeking to defend
legislation burdening religious conduct. The claimants in Smith were unsuccessful under this
new framework, which overturned 27 years of Supreme Court jurisprudence in which a more
rigorous standard of scrutiny had been applied.

The decision in Smith, however, contained an observation from Scalia J (who authored the
opinion of the Court) that was to have a significant effect on a line of cases that began with
Lukumi in 1993. In Smith, Justice Scalia made it clear that some laws would still be held to the
higher standard of “strict scrutiny” if certain conditions were met:

It would be true, we think (though no case of ours has involved the point), that 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. It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that
are to be used for worship purposes,’ or to prohibit bowing down before a golden calf.

368 See, generally, Chapter 2, which describes how the Court abandoned the substantive neutrality regime in 1990
in Smith; and, for the evolution of the formal neutrality (or Equal Regard) rule by the combined holdings in Smith,
Lukumi, and Fraternal Order of Police v Newark 170 F 3d 359 (3rd Cir) (1999) (“Newark”), see section 4 in
Chapter 3.
369 Recall that the two claimants in Smith had ingested the hallucinogenic drug as part of a Native American
religious ceremony. They were dismissed from their employment at a drug rehabilitation organisation because of
their participation in these rites and were refused government unemployment compensation, “because they had
been discharged for work-related ‘misconduct’”. Ibid 874.
370 For discussion of the rational basis test, see text accompanying n 7 in Chapter 2.
371 See section 1.1 in Chapter 2.
372 This higher level of scrutiny saw the striking down of several laws in some pre-Smith cases dealing with
incidental burdens on religious practice occasioned by otherwise neutral and generally applicable governmental
regulation. The “strict scrutiny” test required government to show that an inroad on religious activity was “the
least restrictive means of achieving some compelling state interest”. Thomas, above n 347, 718. See also
Wisconsin v Yoder (1972) 406 US 205, 215: “Only those interests of the highest order and those not otherwise
served can overbalance legitimate claims to the free exercise of religion.”
373 Smith, above n 367, 877. Other exceptions to the rule in Smith are discussed in Chapter 2.
It will be recalled from my discussion in Chapter 3 that the Lukumi case involved governmental regulation of this sort. Certain ordinances enacted by the Florida town of Hialeah sought to ban the practice of ritual animal sacrifice by the Santeria faith. The by-laws were (in the Court’s view) deliberately engineered so that other, analogous practices (e.g., hunting, pest control, Jewish kosher slaughter, and the use of live rabbits for greyhound racing) were not caught by the ban. Kennedy J, writing for the Court, held that these laws were fatally underinclusive, because they failed to regulate activities that clearly undermined the ostensible purpose of the ordinances, which was, inter alia, to prevent cruelty to animals. Since the laws were enacted for a discriminatory purpose, and therefore could not logically be defended as narrowly tailored\(^{374}\) regulations furthering a compelling state interest,\(^{375}\) they failed the test introduced in Smith: that all laws impeding religious practice must be formally neutral in order to pass constitutional muster.

**The Lukumi test and a potential challenge to US FGM legislation**

One of the reasons there has been no prosecution under the federal anti-FGM Act\(^ {376}\) since its inception in 1996 (or under one of the many state anti-FGM statutes\(^ {377}\)) is the rather long list of potential constitutional challenges to the legislation, suggesting perhaps that prosecutors are reluctant to test it in court and prefer to rely on its supposed symbolic or educational force.\(^ {378}\) These include: a statutory interpretation argument that the Act does not reach minor symbolic surgeries which do not constitute a “mutilation”\(^ {379}\); an equal protection objection under the Fourteenth Amendment to the current acceptance of MGM, in that the anti-FGM law protects young girls from ritual mutilation but not young boys;\(^ {380}\) a claim that the treaty power\(^ {381}\) in the

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\(^{374}\) Because Hialeah city could have prevented animal cruelty in the Santeria animal sacrifices by carefully regulating them (instead of creating a flat ban of the ritual), it could not be said that the ordinances were crafted in a way that minimally impaired the right. See Lukumi, above n 366, 546.

\(^{375}\) Regarding the compelling interest test, Kennedy J said: “Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.” Ibid 546-547.

\(^{376}\) 18 USC S 116 (Supp III, 1997), which provides (using very similar terms to the New Zealand statute) in relevant part: “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.” As with the New Zealand law, the federal ban exempts surgeries conducted by health professionals that are “necessary to the health of the person on whom it is performed” (s 116(b)(1)) or are necessary during labour (s 116(b)(2)). Section 116(c), like the New Zealand Act, precludes a cultural defence: “In applying subsection (b)(1), 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 person, or any other person, that the operation is required as a matter of custom or ritual.”

\(^{377}\) FGM is specifically outlawed in 16 states. Three of these (Minnesota, Rhode Island, and Tennessee) criminalise the practice for adult women as well as minors under 18. The remaining states, like the federal statute, only prohibit FGM on minors. For a useful summary of all FGM laws in the US, see Center For Reproductive Rights: Briefing Paper Legislation on Female Genital Mutilation in the United States; available at: <www.reproductiverights.org/pdf/pub_bp_fgmlawsusa.pdf>.

\(^{378}\) Indeed, Povenmire remarks: “A challenge to the constitutionality of the Anti-FGM Act is practically certain the first time an attempt is made to enforce it.” Povenmire “Authority to Consent”, above n 101, 120. Another possible reason for the lack of prosecutions is the fact that FGM is performed in secret and hard to detect.

\(^{379}\) Coleman “Seattle Compromise”, above n 106, 751-752.


\(^{381}\) US Constitution, Art II, s 2, cl 2. Other enumerated powers were also cited by the federal anti-FGM Act as empowering the Congressional legislation; see 18 USC S 116 (Supp III, 1997) Congressional Findings (6); and
Constitution does not permit the federal government to legislate in this area; and, finally, that the anti-FGM Act contravenes the Free Exercise Clause, an argument that is based on the *Lukumi* precedent. I shall now consider how American commentators have dealt with the last of these grounds, as this perspective is obviously most apt for comparison with a potential s 15 BORA analysis of the New Zealand anti-FGM legislation.

The parallels between the circumstances at issue in the *Lukumi* case and those surrounding the US anti-FGM legislation are obvious, at least on a superficial level. Both involve criminalisation of a minority religious custom, while appearing to allow other analogous practices, both religious and secular, to continue unaffected. Commentator Charles Fried makes the link in his generalist book on Supreme Court constitutional jurisprudence, *Saying What the Law Is*. After relating the rule in *Lukumi*, Fried suggests that a law against FGM might be vulnerable to a similar Free Exercise Clause challenge if, as was established by Kennedy J with the Hialeah ordinances, it can be shown that government has prohibited the activity “just because it disapproves of the religion that enjoins it or only as a religious practice”. It would not be problematic as a matter of constitutional validity, Fried continues, if such a law were “enacted because a religious practice had brought it to legislative attention”, but it would be essential for the law to be “applied as well outside that religious context”. Fried is clearly hinting that US FGM laws do not meet these standards, but he does not, however, descend into detail and examine the validity of any of the US anti-FGM statutes. For an attempt at this analysis, I now turn to Dena Davis’s extensive 2001 article on the comparisons between MGM and FGM.

Davis, it will be recalled, comes down strongly on the side (also argued by MacDonald in the New Zealand context) that MGM has no medical value. To recapitulate, she concludes her comparison of MGM and FGM (which involved a systematic debunking of all the medical justifications for MGM on infant males) as follows: “Our revulsion toward cutting the genitals of girls should give us pause…for the themes the Western world abhors – removing part of the genitals to reduce sexual pleasure, carving children’s bodies to conform to certain social ideals, visiting pain on helpless children – are all present in the history of male circumcision.” She then points to the inequality inherent in Jewish parents being able to have their male infants genitally altered outside hospital settings by *mohelim* with no medical training and without

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382 Ibid. Note that Congress legislated FGM in part to “carry out certain obligations of the United States under the International Covenant on Civil and Political Rights by prohibiting the practice of female circumcision”. 141 Cong Rec H1751 (February 14 1995) (introducing Bill HR 941). Congress was not able to derive support from any obligations to UNCROC or CEDAW, as the US has not ratified either of these conventions.

383 See Davis “Collision Course”, above n 101, 562-567 (with respect to minors); Messito “Regulating Rites”, above n 12, 65-66 (with respect to adult women); and Charles Fried *Saying What the Law Is* (Harvard University Press, Massachusetts, 2005) (“Fried *What the Law Is*”) 152.

384 See section 3.1.1 in the text above.


386 Ibid.

387 Davis “Collision Course”, above n 101. Recall that Davis’s research informed much of the discussion in section 2 of this chapter regarding the justifications for MGM.

389 Ibid 562 (internal citations omitted).
modern anaesthetics, whereas Somali immigrant parents are not even permitted to have their daughters subjected to a “ritual nick” in a clinical environment, as was proposed in Seattle in 1996. In Davis’s view, this state of affairs is “unacceptable on First Amendment grounds”. Davis argues that criminalising FGM “clearly limits the ability of some parents to put their religious beliefs into practice”, thus satisfying the US equivalent of Steps 1 and 2 of the Tipping methodology. She then notes the difficulty presented by Smith, in that this watershed case had the effect of relieving government of the onus of justifying incidental regulatory burdens on religious practices, as long as such regulations are “neutral” and “generally applicable”. However, Davis then employs the Lukumi principle. She compares the exemption in the Hialeah ordinances for kosher slaughter and non-religious killing of animals in other contexts with the exemption for MGM that is implicit in all anti-FGM legislation. For her, this exemption for MGM means that the laws violate the requirement stipulated in Smith and Lukumi: that, in order for a statute which burdens religious exercise to avoid strict scrutiny analysis, it must be generally applicable.

Having determined that the anti-FGM laws fail the general applicability standard, Davis then considers whether a compelling governmental interest could be asserted to justify the laws. She judges that the best argument for the existence of such an interest is that, “allowing even the benign Seattle compromise [ie, ritualised nickings in a safe hospital environment] will handicap health and government workers in stamping out the more horrible forms [ie, infibulation and clitoral excision] of the practice”. Such a “zero tolerance” policy, or bright line rule, could have the benefit, she suggests, of sending out an unambiguous signal to affected communities and educators, and would avoid the problems that a more relaxed policy (eg, allowing ritual nickings) might cause, such as providing a “loophole through which the worst elements of [FGM] would slide”. Thus, she concludes that FGM could in fact survive a compelling interest test. A more sophisticated argument might be that the “bright line rule”

390 Note that Davis does not share Coleman’s view that the federal legislation may not in fact reach symbolic nickings; see Davis “Collision Course”, above n 101, 486.
391 Ibid 563.
392 Ibid.
393 Ibid. Earlier in her article, Davis notes that the subjective beliefs of a religious claimant are all that is necessary to engage First Amendment protection and that the common arguments that FGM is not prescribed by Islam are of no import, citing Thomas, above n 347, 539-540.
394 See text above accompanying ns 344-365.
395 Davis “Collision Course”, above n 101, 563-564.
396 Davis refers to the exemption for private bris ceremonies, as well as Jewish parents having the operation performed in hospitals. Ibid 565. She might also usefully have referred to the prevalence of the operation for the male infants of secular parents in the US. The more exemptions to a rule that can be pointed to, the stronger is the argument that the Lukumi principle should be applied. However, note that in Newark, above n 368, it was only necessary for one exemption to exist for the religious claimants to win in that case (see discussion of Newark in section 4.1.2 in Chapter 3, in which a solitary secular exemption engaged the Equal Regard methodology to the advantage of a religious claimant under the Free Exercise Clause).
397 Davis “Collision Course”, above n 101, 564. A difficulty with this argument might be that the Hialeah ordinances specifically exempted the Jewish ritual (by permitting ritualistic animal killing where the “primary purpose” is for food consumption), whereas the anti-FGM law is silent on MGM. This objection is related to the argument that MGM and FGM are not truly analogous practices. Eisgruber and Sager, as part of their theory of Equal Regard, consider it is appropriate in these circumstances to measure the “degree of accommodation implicit in the statutory scheme”. Christopher Eisgruber & Lawrence Sager “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct” (1994) 61 U Chi L Rev 1245, 1290 (emphasis added).
398 Davis does not consider whether the laws are neutral, though she notes that the drafters of the laws had “religion very much in mind”. Ibid.
interest is flawed, in that, if the state does not consider MGM to present a risk of extreme practices occurring under the protective shield of a relaxed policy, then it is not possible to argue that there is any such compelling interest.\textsuperscript{399} Davis disputes this type of argument, however, by noting that MGM does not exist in any of the extreme forms equivalent to the FGM practices, such as infibulation, thus preserving the compelling interest argument.\textsuperscript{400}

Davis prefers to make a strong case for allowing ritual nickings in the second limb of the strict scrutiny test – the requirement that laws failing the general applicability standard must be “narrowly tailored”, or be the “least restrictive means” needed to meet an asserted state interest.\textsuperscript{401} She argues that if the laws were changed to require that FGM could only be performed by physicians administering the ritualised form of the practice that was once suggested in Seattle, this would avoid the concern that traditional practitioners might “use the loophole of a ‘nick’” to perform more invasive surgeries.\textsuperscript{402} Davis acknowledges this might constitute a larger imposition on religious practice than is currently exerted on Jewish \textit{bris} ceremonies, but, given the greater dangers associated with FGM, she believes that such a requirement might satisfy the “least restrictive means” test.\textsuperscript{403}

The solution proposed by Davis to the cultural bias problem in US anti-FGM laws is a legislative one,\textsuperscript{404} although her arguments would certainly have equal force if argued in a court case involving the First Amendment and implicating the principles enunciated in \textit{Smith} and \textit{Lukumi}. There has been no litigation to date on FGM in the US, but if a lawsuit does eventuate it is likely that Davis’s \textit{Lukumi}-based reasoning would feature strongly.

I now turn to consider how a New Zealand court would deal with similar arguments to those of Davis within the BORA framework.

(a) Section 5 BORA analysis and a possible New Zealand approach to laws targeting religious practice

The underlying value inherent in \textit{Lukumi} is one of equality between religions (and non-religion), and for this reason Davis’ extrapolation of the rule in that case to FGM would – as I have already argued in Chapter 3 – be likely to garner a sympathetic hearing in New Zealand, where equality between religions (and non-religion) is also a prime value in our commitment to a free and democratic society. It was noted in Chapter 3 of this thesis, moreover, that this original commitment to equality has been reflected in most legislation affecting religious free exercise throughout New Zealand’s history. To give one of the more resonant examples, the Contraception, Sterilisation and Abortion Act 1977 provides in s 46 for medical professionals to refuse, as a matter of conscience, to take part in the procedures (including abortion) that are allowed under the Act. One would expect, therefore, that an analysis under s 5 BORA of possible governmental justifications for the New Zealand anti-FGM Act would reflect the

\textsuperscript{399} There have in fact been some instances of Jewish \textit{bris} ceremonies causing great harm; see Jamie Kerlee “Too Much Religious Freedom? Infants Infected with Herpes after Jewish Mohel Applies Oral Suction to Circumcised Penises” (2004-2005) 19 JL & Health 297.
\textsuperscript{400} Davis “Collision Course”, above n 101, 566.
\textsuperscript{401} Ibid 566-567.
\textsuperscript{402} Ibid 567.
\textsuperscript{403} Ibid.
\textsuperscript{404} Davis proposes that federal and state laws should be altered so that a genital “nick” may be performed in a clinical environment with proper pain control. She also argues that MGM, when carried out for non-medical reasons, should be subjected to strict controls, including proper medical supervision of \textit{bris} rituals (possibly requiring medical certification of \textit{mohelim}, and insistence on adequate analgesia). Ibid 568-569.
country’s legal and social history expressed in the pattern of solicitude for the deeply held beliefs of religious and non-religious individuals that is exemplified in the Contraception, Sterilisation and Abortion Act 1977. Consequently, a New Zealand court might be well disposed to the result in *Lukumi* and its implications for the domestic anti-FGM Act, since it reflects a similar solicitude towards belief of all kinds, whether secular or religious. In New Zealand, the legislature has been the traditional forum to pursue these claims of equality, but BORA now provides an alternative venue for these issues to be aired.

Bearing these thoughts in mind, I shall now consider how an analysis of the anti-FGM Act vis-à-vis Mild and Traditional Sunna FGM might proceed within the BORA. Section 5 BORA, which mandates consideration of whether government is justified in limiting the rights and freedoms contained in part 2 of BORA, reads:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The “reasonable limits” requirement in s 5 has been interpreted by New Zealand courts to entail a proportionality review of all legislation that amounts to a prima facie infringement of BORA rights. At a certain level of abstraction this provision resembles the US approach to assessing governmental limitations on rights, if one recalls, for example, the *Lukumi* Court’s imposition of a “compelling government interest” test on the laws in that case. The New Zealand practice, however, largely due to textual similarities, has been to resort to Canadian case law as a guide to determining the contours of this enquiry. Canadian jurisprudence on s 1 of the Canadian Charter of Rights and Freedoms (on which s 5 BORA is based) has provided many treatments on how such a section should be read and employed to assess impugned legislation. The New Zealand courts have readily adopted these glosses. In *Hansen*, four of the five judges of the New Zealand Supreme Court borrow from and use in their analyses the many iterations on s 1 by the Canadian Supreme Court, especially those to be found in the cases of *R v Oakes* and *R v Chaulk*. For example, Tipping J reproduces in his judgment the headnote from *Oakes* as it pertains to s 1 analysis:

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the

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405 See *A Bill of Rights for New Zealand: a white paper* (Government Printer, Wellington, 1985), (1985) AJHR A6, [10.26]; and see *Hansen*, above n 328, [19] (per Elias CJ). Moreover, Tipping J states that the “language of s 1 of the Canadian Charter of Rights and Freedoms is materially the same as the language of s 5 [BORA].” Ibid [103].

406 [1986] 1 SCR 103 (SCC) (“*Oakes*”). See *Hansen*, above n 328, [64] (per Blanchard J), [103] (per Tipping J), and [185] (per McGrath J). Elias CJ also refers to the *Oakes* test, although she considers it inappropriate to employ the test to the right engaged by the facts of *Hansen*; see ibid [42].

407 [1990] 3 SCR 1303 (SCC) (“*Chaulk*”). See *Hansen*, above n 328, [64] (per Blanchard J), and [269] (per Anderson J).

408 *Hansen*, above n 328, [103] (per Tipping J). See also, eg, Blanchard J’s s 5 methodology, which is gleaned from a summary of the *Oakes* test in *Chaulk*, above n 407, 1335-1336; cited in *Hansen*, above n 328, [64] (per Blanchard J).
measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.

After some discussion of the merits of the approach in Oakes, Tipping J then sets out his own summary of the two-stage approach in the Canadian case, which he then uses as his methodological basis for deciding the issue in Hansen:

(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

(b) (i) is the limiting measure rationally connected with its purpose?; (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?; (iii) is the limit in due proportion to the importance of the objective?

How would Dr Aziz and Ayanna’s and Nadifa’s parents utilise this mode of analysis to attack the interpretations of s 204A(1) Crimes Act 1961, which, as I established above, appear to conflict with their right to manifest their religious beliefs? I will now consider the two stages in turn, drawing on the approach of the New Zealand courts to the Oakes methodology.

Stage (a): Does s 204A Crimes Act 1961 serve a purpose that is sufficiently important to justify curtailment of Ayanna’s and Nadifa’s parents’ right to manifest their religious beliefs?

The government, in line with the language used in Oakes, will argue that s 204A addresses a social concern that is sufficiently important to override the right in question. They will say it is necessary to curb cultural or religious practices that cause harm to New Zealand society – and young girls and women in particular, who form a vulnerable class within that society. The possibility that this is taking place in New Zealand is a major social concern.

Banning FGM is obviously designed to further this goal. It is also necessary for the provision to cover all

409 Hansen, above n 328, [104] (per Tipping J). I offer here Tipping J’s approach rather than other formulations of the Oakes test by members of the Supreme Court, because, firstly, there is substantial overlap in these approaches, and also because we are already employing in this section Tipping J’s global methodology regarding ss 4, 5 & 6 BORA.

410 The government will cite Williamson, above n 49, [80] (per Baroness Hale) for the proposition that an absolute ban is necessary when a vulnerable class is at issue: “Even if it could be shown that a particular act of corporal punishment was in the interests of the individual child, it is clear that a universal or blanket ban may be justified to protect a vulnerable class: see Pretty v United Kingdom, para 74 where a universal ban on assisting suicide could be justified for the protection of vulnerable people generally, even though Mrs Pretty herself was not vulnerable: ‘it is the vulnerability of the class which provides the rationale for the law in question’.”

411 This framing of the purpose of s 204A mirrors Tipping J’s approach to formulating the objective of the impugned provision in Hansen (at [125] (per Tipping J)). The provision in question (s 6(6) Misuse of Drugs Act 1975) reversed the presumption of innocence where a person is apprehended in possession of a certain quantity of drugs and is charged with possession of the drugs for the purpose of supply or sale. This appeared to breach the right in s 25(c) BORA to be presumed innocent until proven guilty. Tipping J assessed the objective of s 6(6) to be as follows: “I am satisfied that Parliament’s objective was sufficiently important to justify some limitation of the presumption of innocence. Dealing in drugs is a major social concern and has the capacity to do immeasurable harm to society and its individual citizens. The presumption in s 6(6) of the Misuse of Drugs Act 1975 is obviously designed to make the task of establishing guilt easier for the prosecution. That will indirectly have some deterrent effect. These interrelated objects relate to a matter which I am satisfied is one of serious and pressing social concern.”
forms of FGM, because to allow any exemptions from the law would create problems of enforcement and demarcation and would frustrate attempts to eradicate the practice.\textsuperscript{412} Thus, the expansive definition of the procedures in s 204A(1) ought to be adopted, as recommended by the WHO. Citing Hopkinson, it will also be argued that s 204A must be a legitimate aim of government, as similar legislation is in force in other comparable liberal democracies.\textsuperscript{413} In support of this it will also be noted that legislating in this field is in line with important international obligations, such as CEDAW and UNCROC, to which New Zealand is bound.\textsuperscript{414} The government will then claim that all these “interrelated objects relate to a matter” which is “one of serious and pressing social concern”.\textsuperscript{415} These objectives, the government will contend, combine in such a way that makes it necessary to conclude that a sufficiently important government objective is being pursued by s 204A and that the right at stake can be legitimately overridden for the purposes (in particular, public safety, health and the rights and freedoms of others) envisaged in Art 18(3) ICCPR.\textsuperscript{416} In sum, therefore, Parliament was “entitled” to legislate as it did.

The defence will respond that these objectives do not pursue a legitimate aim with respect to the criminalisation of Ayanna’s and Nadifa’s surgeries. As was argued in Lukumi, the law is underinclusive in that it only targets the Muslim practice of FGM and leaves other analogous practices unaffected. In particular, male circumcision conducted at the behest of Jewish and secular parents for cultural reasons is unregulated.\textsuperscript{417} The practices of Mild and Traditional Sunna FGM cause less harm to female children than standard male circumcision. Moreover, none of the traditional prophylactic justifications for MGM are considered valid by modern science, as is shown in recent statements by medical bodies around the world, such as the Royal Australasian College of Physicians, which universally recommend against routine circumcision of male infants. Since there is no medical justification for MGM, then the only explanation for its continued legal acceptance is that it is an accepted cultural or religious practice. The mild forms of FGM, which the government argues are a legitimate target of the prohibition in s 204A, are also cultural or religious practices. In this crucial sense the practices of mild FGM and MGM are analogous. To treat MGM and FGM differently purely on the basis of their religious or cultural origin is irrational, and this is an unacceptable state of affairs

\textsuperscript{412} Baroness Hale makes a similar point in Williamson, above n 49, [86]: “But prohibiting only such punishment as would violate their rights under article 3 (or possibly article 8) would bring difficult problems of definition, demarcation and enforcement.”

\textsuperscript{413} See Hopkinson, above n 333, [51], where France J notes that there is support for her conclusion that s 11(1)(b) Flags, Emblems, and Names Protection Act 1981 is a legitimate legislative objective in that “other democratic countries have found it necessary to legislate” in the area of flag protection.

\textsuperscript{414} Similarly, in Hansen Blanchard J notes that the commentary on the 1961 United Nations Single Convention on Narcotic Drugs (520 UNTS 204) recommends that nations “could very usefully provide for a legal presumption that any quantity exceeding a specified small amount is intended for distribution”. Hansen, above n 328, n 113. This UN instrument contributed to Blanchard J’s argument that s 6(6) Misuse of Drugs Act 1975 addressed a social concern that warranted overriding a BORA right.

\textsuperscript{415} Ibid [125] (per Tipping J).

\textsuperscript{416} Article 18(3) ICCPR reads: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

\textsuperscript{417} It could also be argued that the exemption in s 204A for corrective surgery on infant female genitals (eg, feminising genitoplasties, which involve reducing oversized clitorises so they look more “feminine”) is a discriminatory concession to mainstream cultural attitudes to sexual appearance. In this chapter, I will restrict my discussion to MGM, as it more directly implicates issues of religious freedom and the distinction between the two religious practices is a “more fundamental one”; for discussion of which classes of people provide the most relevant distinction for analysis in cases involving discrimination, see Vriend v Alberta [1998] 1 SCR 493 [82] (SCC) (per Cory J). MacDonald in fact argues that these surgeries are performed only for “cultural” reasons, so should be considered illegal under s 204A; see MacDonald “Circumcision and the Law”, above n 101, 263.
in a multicultural society such as New Zealand. The criminalisation of Mild and Traditional Sunna should therefore fail the *Oakes* test at the very first hurdle.

The defence will seek support for this position from two sources. First, it will refer to the medical literature to demonstrate that MGM is not a justifiable routine procedure for infant males and that medical bodies only consider it to be a valid operation for religious or cultural reasons, as is reflected in the law.

Second, it will rely on English, American and Canadian case law in which discriminatory laws have failed to meet the standard required by the first limb of the *Oakes* test and its equivalents in other jurisdictions. These cases hold that discriminatory laws are irrational and cannot be regarded as necessary if they distinguish between different groups in society on irrelevant grounds, such as religious belief. I will now consider how these decisions might assist in the case at hand.

We have already seen in *Lukumi* how a discriminatory law can fall foul of the First Amendment and have examined Dena Davis’s assessment of how a *Lukumi*-based argument could be brought to bear on an FGM prosecution in the US. I shall now turn to consideration of decisions from jurisdictions that employ a mode of constitutional review that is more familiar to New Zealand and which essentially reproduce the reasoning in *Lukumi*, albeit in the context of human rights issues not directly concerned with religious freedom.

In *Ghaidan v Godin-Mendoza*, the issue was whether the word “surviving spouse” in the Rent Act 1977 (UK) could apply to a surviving member of a cohabiting homosexual relationship. The Act provided for succession to a statutory tenancy to the surviving member of a heterosexual marriage, and also to the surviving partner of a de facto heterosexual marriage, but an earlier decision of the House of Lords that pre-dated the Human Rights Act 1998 (UK) (“UKHRA”) had held that this inherited tenancy status was not to be extended to the surviving member of a cohabiting homosexual couple. The determination in the earlier case was challenged under the discrimination provision in Art14 ECHR, which required, according to Lord Nicholls of Birkenhead, that legislation must not “draw a distinction on grounds such as sex or sexual orientation without good reason”. Lord Nicholls conceded that in order for laws to be effective they must sometimes distinguish between groups in society, but that these distinctions are only acceptable if they “have a rational and fair basis”. Moreover, laws that

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418 This literature is summarised in section 2.2.2 above.
419 The Queensland Law Reform Commission considers that MGM can be regarded as an operation in the child’s best interests based on cultural (not medical) considerations: “For example, adherence to the religious and cultural beliefs and practices of the child’s community could be seen as being within the child’s best interests.” Queensland Law Reform Commission *Circumcision of Male Infants: Miscellaneous Paper 6* (December 1993) 39. See also Wall J’s analysis in *Re J (child’s religious upbringing and circumcision)* [1999] 2 FCR 345, in which the judge held that ritual male circumcision is lawful where the two parents agree (see text above accompanying n 214).
420 *Ghaidan v Godin-Mendoza* [2004] 2 AC 57 (HL); *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL).
423 [2004] 2 AC 57 (HL) (“Ghaidan”).
424 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL).
425 *Ghaidan*, above n 423, [6] (per Lord Nicholls of Birkenhead). The right to a home and family life in Art 8 ECHR was also invoked.
426 Ibid [9].
distinguish on the basis of race, sex, religion and sexual orientation are to be scrutinised especially closely. The law in Ghaidan failed this requirement, as his Lordship could locate no good reason for denying the relevant benefit to homosexual couples. Traditional justifications for privileging heterosexual couples, such as their ability to procreate, no longer held any relevance in contemporary society, a conclusion he made in part because the benefit also extended to heterosexual couples who were too old to have children. Once justifications of this type were deemed unsatisfactory, all that remained was the argument that the goal of the legislation was to give security to the survivor of long-term relationships. And once this reason for the policy underlying the Rent Act was established, Lord Nicholls could find “no rational or fair ground for distinguishing the one couple from the other”. His Lordship therefore declared that the distinction between heterosexual and homosexual couples in this context was discriminatory. Significantly for the purposes of my analysis, Lord Nicholls concluded that courts may not only just examine the means employed in bringing a policy into effect through legislation, but they may also scrutinise the ends:

[One] looks in vain to find justification for the difference in treatment of homosexual and heterosexual couples. Such a difference in treatment can be justified only if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Here, the difference in treatment falls at the first hurdle: the absence of a legitimate aim. None has been suggested by the First Secretary of State and none is apparent.

For commentator Sandra Fredman, cases like Ghaidan signal the increasing willingness of the English courts to look into the purposes of legislation and not just to consider whether the legislation has been well crafted, or to conduct what some writers call an “efficiency-based oversight”. This is a significant trend in a country in which the courts, as in New Zealand, have traditionally set great store in leaving the protection of rights primarily to the legislature. Fredman argues that equality is a key ingredient of any judicial examination of legislative ends, and emphasises that equality is a “central democratic principle, relevant both in its own right and as part of the proportionality enquiry”. Thus, equality is an important value even in cases that do not involve equality per se in terms of the substantive right being invoked (as occurred in Ghaidan, and in the similar Canadian case of Vriend), but also in cases where other rights are engaged.

An example of a case not directly involving equality as a substantive right is A v Secretary of State for the Home Department, a controversial case in which the House of Lords considered the British government’s decision to derogate from its commitments under the ECHR (specifically, Art 5(1) ECHR, which guarantees the right to liberty) and to introduce legislation providing for powers of indefinite detention for non-UK citizens who were suspected of

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427 Ibid.
428 Ibid [16].
430 Julian Rivers expresses the deferential position thus: “Carrying out important public objectives is the responsibility of legislatures and executives. All the court does is maintain an efficiency-based oversight to ensure that there are no unnecessary costs to rights.” Julian Rivers “Proportionality and Variable Intensity of Review” [2006] CLJ 174, 180.
431 Fredman “Role of Equality”, above n 429, 53-54.
432 The Supreme Court of Canada, in Vriend v Alberta [1998] 1 SCR 493, employed very similar reasoning and methodology to Ghaidan. In Vriend, the omission of sexual orientation from the prohibited grounds of discrimination in a provincial anti-discrimination statute was held not to further the pressing and substantial objectives identified in the Act, and thus failed the first hurdle of s 1 analysis under the Canadian Charter.
433 [2005] 2 AC 68 (HL) (“A v Home Secretary”).
terrorist activities. The decision of the House of Lords turned on the assessment of whether the government had complied with Art 15(1), which sets out the conditions for derogating from ECHR rights. Art 15(1) stipulates that the right to derogate can only arise “[i]n time of war or other public emergency threatening the life of the nation” and where the measures taken are “strictly required by the exigencies of the situation”. The government survived the first part of the test, as a majority of the Court considered the assessment of whether there was a public emergency threatening the life of the nation was “a pre-eminently political judgment”. The law lords concluded, however, that the legislative measure was not “strictly required”. This was because it applied only to non-UK nationals, and not to British citizens who might also be suspected of engaging in terrorist activities. Baroness Hale put it thus: “If the situation really is so serious, and the threat so severe, that people may be detained indefinitely without trial, what possible legitimate aim could be served by only having power to lock up some of the people who present that threat?” The measure accordingly failed to survive scrutiny in the House of Lords, due in large part to a failure to satisfy a legitimate aim test.

The two British cases discussed above could assist Dr Aziz and Ayanna’s and Nadifa’s parents in their contention that the anti-FGM Act does not pursue an aim that is sufficiently important to override the right implicated in the surgeries performed by Dr Aziz, and therefore that the law should fail the reasonable limits test in s 5. In short, they will claim that if it is not considered necessary to prohibit male circumcision, then the aim cannot be considered important enough. Moreover, they will draw attention especially to the British precedents of Ghaidan and A v Home Secretary and the preoccupation of the House of Lords with issues of equality. Taking these two cases as authorities for judicial scrutiny of legislative ends, and inserting into them the rationale employed to great effect in Lukumi, they will have a serviceable case for arguing that the New Zealand anti-FGM law is an unreasonable limit at the very first stage of the Oakes test.

In response the government will attack this contention on three grounds. First, that Ayanna’s and Nadifa’s surgeries are not truly analogous to MGM. This will involve a challenge to the medical arguments advanced in support of this proposition that were canvassed in section 2 of this chapter. The government could claim that comparing MGM to FGM is similar to comparing, say, the taking of communal wine in the Catholic sacrament to the ingesting of peyote in Native American rituals. The only point of similarity between the two is a superficial one, in that they are both part of a religious ceremony. The difference is that the

434 Anti-Terrorism, Crime and Security Act 2001 (UK), s 23.
435 A v Home Secretary, above n 433, [29] (per Lord Bingham).
436 Ibid [236].
437 Note that although “strictly required” may appear to attract a higher degree of judicial scrutiny than phrases used in other limitations clauses (eg, Art 9 ECHR: “…necessary in a democratic society in the interests of public safety…”), the Court appeared to believe it attracted an ordinary level of proportionality review, such as that set out in de Freitas v Permanent Secretary of Ministry of Agriculture [1999] 1 AC 69, 80; ibid [30] (per Lord Bingham). Lord Bingham even cited the test in Oakes as being “close” to the approach in de Freitas; ibid.
438 Fredman “Role of Equality”, above n 429, 61.
439 The US Supreme Court offers this comparison in obiter in Smith, above n 367, n 6. Note that in Lukumi the City of Hialeah failed to offer any convincing argument that Jewish kosher slaughter was more humane than the Santeria sacrifices (other than that kosher slaughter had been made legal by federal and state statutes). The city merely referred to other killings of animals (eg, pest eradication and hunting) as “obviously justified” in comparison to the Santeria rituals, and no evidence or argument was produced as to why this was so. See Lukumi, above n 366, 539 & 544. Regarding the comparison with kosher slaughter, the Supreme Court suggested that the laws regulating kosher slaughter could similarly be applied to Santeria sacrifice, avoiding the need to ban the ritual outright.
former is a harmless activity, whereas the latter potentially involves considerable danger, thus not making them sufficiently analogous practices. This is essentially an argument that MGM is not an apt comparator with FGM. I will say no more on this point, as it will be surely a matter for the court to decide, probably after receiving expert medical testimony. It is, however, certainly arguable that Ayanna’s and Nadifa’s surgeries are less invasive than male circumcision and therefore that Jewish and secular parents who wish to have their male infants circumcised and Muslim parents who wish to have their female infants circumcised are suitable comparator groups. Once a court accepts the validity of these comparisons, it is possible for a discrimination argument to get off the ground. For this reason, it is likely that this aspect of the case will be keenly contested.

The government’s second rebuttal will be that the legitimate aim limb of the Oakes test has never been rigorously applied by a New Zealand court, and that cases such as Ghaidan and A v Home Secretary reflect the British courts’ special concern for the UK’s obligations under the ECHR and European law generally. In Hansen, the close relationship between the UK and Europe was significant in terms of the patently greater power the British courts attach to s 3(1) HRA, as compared to the relatively weaker status New Zealand courts ascribe to s 6 BORA, the equivalent provision. Section 5 of BORA, they will argue, must be interpreted, as was s 6 in Hansen, in light of the fact that BORA is an ordinary statute. The government will contend, therefore, that the purpose of the first stage of the Oakes test is not (in the New Zealand context) to authorise a wide-ranging enquiry into whether Parliament should have legislated in a certain area in the first place, but merely a way of getting the ball rolling in the proportionality analysis (stipulated in Stage (b) of Tipping J’s gloss of the Oakes test) by setting up a plausible governmental purpose against which the means employed to carry out that purpose can be assessed. This is a necessary inference to make from the fact that a supreme law Bill of Rights was rejected in the 1980s. To subject governmental ends to an intense level of scrutiny may be appropriate in countries with constitutional bills of rights, but would not be suitable in the New Zealand context. Furthermore, the fact that the first limb of the Oakes test has never been used to declare a law to be an unjustifiable limit in New Zealand will also support the government’s argument as a matter of empirical fact. That said, academic commentators have claimed that there may be situations in New Zealand where it

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440 For discussion of the need to establish an appropriate comparator group in order to determine if unjustifiable difference in treatment has occurred, see Paul Rishworth “Human Rights” [2005] NZ Law Review 87, 112.
441 And Vriend must be viewed in the context of the Canadian Charter, which empowers courts to strike down legislation.
442 See McGrath J’s explanation of the prominence accorded by the House of Lords to s 3(1) UKHRA in Hansen, above n 328, [244]-[246].
443 This appears also to be the view of Joseph, who states that: “The need to establish a compelling legislative objective, [which is the first part of the Oakes test], does not impose a weighty onus. The courts are disinclined to judge the merits of legislative policy or hold that the legislature has acted with no good reason.” Philip Joseph Constitutional and Administrative Law in New Zealand (3rd ed, Brookers, Wellington, 2007) 1164.
444 Butler and Butler appear to endorse this limited application of the first limb of the Oakes test; see Butler & Butler NZBORA Commentary, above n 319, [6.11.5]: “[The purpose and importance of the objective underlying the limit should be reduced to a factor to be considered in undertaking a proportionality assessment.”
445 Janet McLean takes the view, however, that the concurring judgment of Elias CJ in Hansen could be conceived of as an instance of a law failing at the first hurdle of the Oakes test. Chief Justice Elias regards s 6(6) Misuse of Drugs Act 1975 as a law that can never be justified under s 5 BORA, because the right to the presumption of innocence can never be limited in any circumstances without breaching the right unjustifiably. This is in large part because the right in question is unqualified in Art 14(2) ICCPR. See Hansen, above n 328, [7]. McLean believes that judgments of this type engage the “very first part of the s 5 formula, namely whether the government’s decision to limit the particular right is judged to be in the service of a pressing and substantial social need”. Janet McLean “The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administrative Law” (2008) NZ Law Review 377, 390.
“would be appropriate to conclude that a legislative objective is insufficiently important to justify the establishment of a limitation on rights”. It is certainly arguable that the anti-FGM Act may be one of these situations.

Even if the government concedes that the ends (and not just the means) of government legislation can be questioned in court, they may argue that in this context, a high standard of review is inappropriate. Importantly, they will argue that the right to religious freedom is a qualified right. Art 18(3) permits government to impose restrictions on the exercise of the right for certain purposes. This is in contrast to other rights in the ICCPR that are expressed in absolute terms, such as the right not to be tortured or tried unfairly. Indeed, in Hansen, four out of five members of the Supreme Court were prepared to allow that the government was within its area of discretion to place some restriction on the right to the presumption of innocence, which, like the right to freedom from torture, is expressed in absolute terms in the ICCPR. All four held that reversing this presumption was a legitimate aim of government in the context of addressing the problem of drugs in society (although three of the four went on to declare the limit to be an unreasonable one).

McGrath J, for example, sets the hurdle of the first limb of the Oakes test very low, noting that whether illicit drug dealing is a pressing social concern that merits criminalisation is a “question of social policy on which democratic principle calls for respect for the legislature’s assessment”. He then says, “it would be rare” for a New Zealand court to decide that criminalising certain behaviour was not a legitimate aim. The standard of review he appears to regard as appropriate in this context is that favoured by Ian Dennis, a commentator writing on the same issue before the English courts. Dennis opines that “a criminalisation decision of Parliament might properly be said to be illegitimate if it had no rational foundation at all, but if it does have such a foundation it is not for the Courts to substitute their own views as to whether the public interest requires prohibition”. On this thinking, the decision to criminalise FGM in New Zealand ought to survive the first limb of the Oakes test, as there was clearly material available on which Parliament could base its decision (eg, WHO medical statements and UN treaties calling for prohibition of FGM).

In response to this assertion of deference for parliamentary choice, the defence will argue that the decision to criminalise Mild and traditional Sunna FGM was not rational, because it amounted to a discriminatory targeting of Muslim religious practices while leaving Jewish and secular male circumcision unaffected. To single out one religious group like this infringes on the “core” of the right to freedom of religion and can never be justified. In Hansen there was no issue of inequality in the operation of s 6(6) Misuse of Drugs Act 1975 and so comments like those of McGrath in Hansen may not carry the day with respect to s 204. In the case at

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446 Rishworth et al, above n 356, 184-185; and see Wilberg “Other Enactments”, above n 330, 114.
447 See Fredman “Role of Equality”, above n 429, 55.
448 See Hansen, above n 328, [65] (per Blanchard J) & [264] (per Anderson J).
449 Anderson J, however, expresses some uneasiness about this aim. He considers the fact that the onus of proof is not reversed for equally serious crimes, such as sexual abuse and other forms of serious violence, detracts from the legitimacy of the aim asserted by the government regarding s 6(6). He concludes that reversal of the onus in s 6(6) is an “unprincipled expedient”. Ibid [273]-[274]. Anderson J does not in fact expressly state whether s 6(6) pursues a legitimate aim, but prefers to devote his attention to the proportionality limb of the Oakes test.
450 Ibid [207]. See also Tipping J’s comments on the need to accord considerable deference to Parliament’s legislative choices; ibid [105]-[112].
451 Ibid.
452 Ian Dennis “Reverse Onuses and the Presumption of Innocence: In Search of Principle” [2005] Crim LR 901 (“Dennis ‘Reverse Onuses’”), 909; cited in Hansen, above n 328, n 245 (per McGrath J).
hand, it will be argued that s 204A is designed to operate only against one group in society for no good reason. As Lord Hoffman has said: “Treating like cases alike and unalike cases differently is a general axiom of rational behaviour.” Section 204A fails to meet this fundamental standard in similar fashion to the impugned provisions in Ghaidan, A v Home Secretary, Vriend, and Lukumi, and therefore should fail at the first stage of the Oakes test.

The government’s final argument will be that the criminalisation of Mild and Traditional Sunna FGM must be regarded as a legitimate aim because international treaties require (or at least urge) this action to be taken. For this aspect of their argument they may rely on the speech of Baroness Hale in Williamson. In her reasons, Baroness Hale adjudged Arts 3(1), 19(1), 37, and 28(2) of UNCROC, in conjunction with concluding comments by the UN Committee on the Rights of the Child on the first British report on its compliance with the Convention, to be crucial in her assessment both of whether the blanket prohibition of corporal punishment in British schools was a legitimate aim and whether it was proportionate. The Committee had recommended, based on its assessment of the treaty articles cited above, an absolute ban on corporal punishment in schools. Thus Baroness Hale concluded:

How can it not be a legitimate and proportionate limitation on the practice of parents’ religious beliefs to heed such a recommendation from the bodies charged with monitoring our compliance with the obligations which we have undertaken to respect the dignity of the individual and the rights of children?

The government in the case at hand, therefore, will similarly maintain that the vast array of UN treaties, declarations and treaty body statements urging a ban on FGM provides ample cover for Parliament’s choice to legislate as it did in s 204A.

In reply the defence will argue that, with respect to Mild Sunna FGM, these international materials do not in fact reach that practice, and therefore it is not possible to rely on international law support to claim that criminalisation of that form of circumcision is a legitimate aim. The discussion earlier in this chapter establishes that, as of 1995 (the year in which the anti-FGM Act was enacted), symbolic procedures involving small bloodlettings and no tissue removal were not considered to fall within the definition of FGM at the international level. The broader WHO definition, which does cover ritualised nickings, was issued in 1997, two years after the legislation was enacted, and, in any case, WHO statements are not binding international law documents. Concerning Traditional Sunna FGM, however, the government will be on firmer ground. The travaux préparatoires of UNCROC, for example, clearly indicate that any removal of tissue from the female genitalia is an activity that is caught within the ambit of the prohibition at international law.

454 Committee on the Rights of the Child Concluding observations: United Kingdom CRC/C/15/Add 34 (15 February 1995), [24].
455 Williamson, above n 49, [84].
456 For a summary of these international materials, see text above accompanying ns 33-37.
457 For a similar (rejected) argument in the US context regarding federal criminalisation of psychotropic substances (taken by a religious group as part of a sacramental ceremony) at the behest of an international treaty, see Gonzales v O Centro Espirita Beneficente Uniao do Vegetal et al 546 US 418, 437-438 (2006).
458 See text above accompanying n 293.
5. Circumcision

In this final aspect of the government’s defence of the law under the first limb of Oakes, it appears therefore that the legitimacy of banning Ayanna’s surgery is very questionable, whereas the prohibition on Nadifa’s operation could comfortably be regarded as legitimate. There remains, of course, the issue of whether banning Traditional Sunna FGM is rational on the grounds that it is roughly analogous to male circumcision in that it involves removal of preputial tissue and occasions no harm to the clitoris. These two competing values (equality and international obligations) are, however, extremely difficult to reconcile, and the determination of which of the two should prevail is a balancing exercise that is perhaps best left to Parliament. Therefore, it is probably necessary to conclude that the government will succeed in its claim that the criminalisation of Nadifa’s surgery is a legitimate aim.

To conclude on Stage (a) of Tipping J’s formulation of the Oakes test, I suggest there is a very strong case for arguing that to read s 204A as prohibiting Mild Sunna FGM would be to ascribe to Parliament an irrational legislative choice, because it leaves the analogous practice of MGM unaffected. Therefore, this applied meaning of s 204A cannot be regarded as serving a purpose sufficiently important to justify curtailment of the religious right. For this reason, this applied meaning ought to be declared an unreasonable limit on the religious right.

The case for Traditional Sunna FGM is arguably as strong as Mild Sunna FGM in terms of the medical equivalence argument, but it falls short in that international materials clearly envisage its prohibition. This also renders the decision to ban it arguably a rational one, as international obligations must surely be a grounds upon which a rational legislature would legislate.

I now move on to consider Stage (b) of Tipping J’s analysis of s 5 BORA.

Stage (b): If s 204A does in fact pursue a legitimate aim, is it a proportionate limitation on the right?

The government will begin by asserting, like Baroness Hale in Williamson, that the international law ban on FGM renders the New Zealand statutory ban ipso facto proportionate, despite the fact that limits on religious freedom are ordinarily to be subjected to tests of justification, as stipulated by Art 18(3) ICCPR and s 5 BORA. Therefore, the argument will run, the government should be considered “entitled” to have legislated as it did. This argument however will be vulnerable on two grounds. First, with respect to Mild Sunna FGM, it will be contended that the international ban does not reach this very minor form of the practice, as is suggested above. Secondly, international case law suggests that the lex posterior rule does not always apply, and that even if a treaty obligation mandates a certain domestic legislative action to repress an activity, it will be necessary for governments to craft such legislation proportionately.\footnote{To argue that the international law bans on FGM are immune to proportionality analysis under relevant limitations clauses in previous UN treaties, such as the ICCPR, is essentially a \textit{lex posterior} claim.\footnote{See \textit{Ross v Canada UN Doc CCPR/C/70/D/736/1997 (2000), Comm 736/1997 (26 October 1997) and Faurisson v France UN Doc CCPR/C/58/D/550/1993(1996), Comm 550/1993 (16 February 1996) for instances of the UN Human Rights Committee insisting that domestic legislation implementing bans on incitement of racial hatred under Art 20 ICCPR must meet proportionality requirements under Art 19. And for a general advocacy of the need for norms of international public law to conform to basic standards of proportionality under regional and international human rights instruments, see Erika de Wet “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order” (2006) 19 Leiden J Int’l L 611.}}
I will proceed on the assumption that the government will in fact be required to justify the bans on Mild and Traditional Sunna FGM under the proportionality limb of the Oakes test. I do not propose to go through each stage of the test methodically, as this will involve undue repetition of arguments that will have already been advanced in the first limb of the Oakes test, especially as they relate to equality. Instead a short summary of the possible arguments will suffice.

As argued by Davis with regard to Mild Sunna FGM in the US under her Lukumi-based analysis, it will surely be possible to claim that the banning of this less severe version of the practice does not fulfil the requirement that the rights in BORA be impaired as little as reasonably possible (Stage (b)(ii) of the Tipping analysis). Moreover, if one accepts that the aim of the ban is to prevent harm to girls and women, it is also arguable that banning a practice which leaves no visible marks and entails no mutilation (as that word is ordinarily understood) could not be regarded as furthering this objective in any meaningful sense (thus not meeting the standard that the provision must be rationally connected to the purpose of the legislation; Stage (b)(i)). The fact that male circumcision involves considerably more alteration and damage to the male genitals will also be relevant here, as it is to all parts of the Oakes test as applied to these facts. Finally, it will be contended that the last limb of the Oakes test (Stage (b)(iii)) is not satisfied: that the limit imposed on the right is not in due proportion to the importance of the objective. In Hansen, Tipping J maintains that this aspect of the test requires that the limiting provision must create “demonstrably greater social benefits” than the damage inflicted on the right.464 Once again the fact that there is no ban on male circumcision (or indeed on other culturally acceptable Western activities, such as genital piercing and tattooing, cosmetic labial trimmings and so on) suggests that it may be difficult to argue that there are any social benefits to be gained by banning Mild Sunna FGM. This final argument resembles of course the earlier claim that the ban cannot sensibly be regarded as addressing a “pressing and substantial objective”, as other analogous practices are not banned.465

A further dimension that could be injected into the defence submission at this point would be sociological evidence supporting the strategy (described at great length by Sarah Waldeck in her article on social norms, which is relied on elsewhere in this chapter466) that the best way to eradicate a deeply engrained cultural practice is not to ban it outright, but rather to introduce incremental measures, combining educative and, if necessary, relatively unobtrusive legislative means, to chip away at a dangerous custom over the long term.467 The steady decline in smoking prevalence in New Zealand is an example of this type of approach, as is the sharp drop in male circumcision rates in the Western world (except for the US) in the last fifty years. Thus an exemption for Mild Sunna FGM could be viewed as a mediating device to prevent dangerous backstreet FGM operations and bring the practice under proper medical control, and

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462 See text above accompanying ns 389-403.
463 Tipping J states the right must be impaired as little as “reasonably necessary”. Hansen, above n 328, [126]; see also Blanchard J at ibid [79].
464 Ibid [137].
465 Peter Hogg has noted the similarity between the two tests: “A judgment that the effects of the law were too severe would surely mean that the objective was not sufficiently important to justify limiting a Charter right.” Peter Hogg Constitutional Law of Canada (3rd ed, Carswell, Scarborough, 1992), [35.12].
467 This type of argument would come under the heading of “Brandeis brief” evidence, which is described in an extra-judicial piece by Richardson J on s 5 BORA as an “inquiry where the Court undertakes an extensive empirical examination supported by economic, statistical, and sociological data, makes a cost-benefit analysis of the effects of various policy choices and chooses the solution which best reflects a balancing of the values involved”. Sir Ivor Richardson “Rights Jurisprudence – Justice for All?” in P Joseph (ed) Essays on the Constitution (Brookers, Wellington, 1995) 82.
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as a way of providing a breathing space for affected communities until the practice eventually
dies out as members of the cultures that support FGM become more imbued with liberal values.

All these arguments illustrate how equality is a value that will permeate the entire s 5
analysis.\textsuperscript{468} It follows, therefore, that the arguments employed in Stage (a) of the Tipping
analysis are encountered again in Stage (b).\textsuperscript{469} The main difference, I suggest, is that Stage (a)
of the enquiry attracts more deference to Parliament’s choices than Stage (b). This is certainly
the view of Dennis, who postulates a very low standard of review of legislative aims, but then
spells out certain factors that might lead to the imposition of a stricter degree of scrutiny at the
second stage, when legislative means are examined.\textsuperscript{470} For example, and relevant to the enquiry
in this chapter, Dennis suggests that a “strong principle of deference would be
inappropriate…if there is no evidence that Parliament gave any thought to the presumption of
innocence when it enacted the reverse onus”.\textsuperscript{471} In such a case, Dennis suggests it is
appropriate for the courts to look at Hansard.\textsuperscript{472} Relating this observation to the case at hand, it
will be recalled that the New Zealand Parliament gave no thought to the right to manifest
religion under s 15 BORA at the time of the enactment of s 204A. Supporting this observation,
there was also no s 7 report by the Attorney-General, indicating further that the BORA issues I
have canvassed here were not considered at all, even in a rudimentary form. This lack of
parliamentary advertence, among other factors, might allow the courts to subject the anti-FGM
law to a more searching standard of scrutiny in the second stage of s 5 BORA analysis.

To conclude finally on the s 5 BORA analysis, I would argue that Mild Sunna FGM has a
strong chance of success at both stages of the Oakes test and that the prohibition of this
practice cannot be a justified limit. No doubt this conclusion would be sharply contested by
government, but it is difficult to see what medical grounds could be advanced to dispute it.\textsuperscript{473}
Certainly it is my view that a possible medical argument by the government would struggle, as
a matter of logic, to depict Mild Sunna FGM as a more dangerous procedure than male
circumcision.

Regarding Traditional Sunna FGM, however, it is probable that failure to challenge the law
successfully at Stage (a) would be fatal to its chances of prevailing at Stage (b). Concerning the
minimal impairment requirement, for example, it is very likely that a court would hold that the
decision of Parliament to ban this practice is a “reasonably necessary” restriction on that right
for three reasons. First, it is quite clearly banned by the international documents on FGM, as
was observed above in the analysis of Stage (a). Second, it could be credibly argued (as Davis
does) that surgery on infant female genitals entails greater risks\textsuperscript{474} than the equivalent male

\textsuperscript{468} Thus, Butler and Butler state that it is a “basic principle that limits must respect the right of non-
discrimination”. Butler & Butler NZBORA Commentary, above n 318, [6.11.23]
\textsuperscript{469} Anderson J finds this repetition unfortunate; see Hansen, above n 328, [270].
\textsuperscript{470} See Dennis “Reverse Onuses”, above n 452, 910.
\textsuperscript{471} Ibid.
\textsuperscript{472} Ibid n 52.
\textsuperscript{473} It is possible that a court, in conducting a s 5 BORA analysis, would decide ultimately to defer to Parliament’s
choice as a matter of judicial restraint. See EW Thomas “So-Called ‘Judicial Activism’ and the Ascendancy of
Judicial Constraints” (2005) 21 NZULR 685. In this article, Thomas notes that, unlike in the US, many matters
which dominate public debate (including separation of church and state, and abortion) have traditionally been
resolved in New Zealand “by the legislature or remain to be addressed by the legislature”. Ibid 690. A court might
therefore regard the challenge to FGM we are considering in this chapter to be a matter that is best left to
Parliament.
\textsuperscript{474} Some argue that “circumcision cannot be accomplished on young girls with the same degree of accuracy and
relative safety as it is done on young boys, due to the practical difficulty of distinguishing between the clitoris and
operation and therefore to prohibit procedures that involve removal of any tissue may qualify as a reasonable minimal impairment of the right. And third, Parliament has a certain margin of appreciation in making these types of borderline choices in criminal legislation. Accordingly, a court could detect a zone of discretion that would accommodate the decision to ban Traditional Sunna FGM. Having said that, however, one can imagine that expert medical testimony could be marshaled to show that Traditional Sunna FGM, conducted in a safe clinical environment, is a relatively harmless procedure, even compared to male circumcision.

3.2.3 Steps 4, 5, and 6 of the Tipping methodology

Having established that the intended meaning of s 204A as it pertains to Traditional Sunna FGM amounts to a reasonable limit on Nadifa’s parents’ right to manifest their religious beliefs, that meaning is therefore legitimised at Step 4 of the global Tipping methodology. As a result, the circumstances of Nadifa’s surgery fall foul of the criminal law and Dr Aziz and Nadifa’s parents could be liable for criminal sanction. No question under s 6 BORA arises under this analysis, and even if it did, it is hard to see how an alternative tenable meaning for s 204A, as it applies to Traditional Sunna FGM, could be ascertained.

Regarding Ayanna’s procedure, the consequence of a finding at Step 3 of the global Tipping methodology that the applied meaning of the term “mutilation” in s 204A(1) (ie, that it brings within the definition of FGM a symbolic pricking of the clitoris in a clinical setting that leaves no permanent mark) is an unjustified limitation on the religious right is that s 6 BORA is engaged. I demonstrated earlier in my interpretive analysis of s 204A(1) that “mutilation” can admit of both a wide and narrow meaning and that both these meanings are attainable by ordinary presumptions of statutory interpretation, including the approach set out in s 5 Interpretation Act 1999. Would a New Zealand court be prepared to read down s 204A(1) so that the narrow meaning of “mutilation” would then become the “intended meaning” of Parliament with the result that Ayanna’s surgery does not fall within the prohibition contained in the Act? The Supreme Court in Hansen has taken a very restrictive view of the power of s 6 to effect radical departures from meanings that would not otherwise be reached under ordinary statutory interpretation techniques. My analysis above, however, suggests that the narrow reading of “mutilation” can be reached without undue violence to the language of s 204. McGrath J in Hansen states that s 6 “does not justify the court taking up a meaning that is in conflict with s 5” and that any meaning that is attributed to a disputed term must be “reasonably available” on the “orthodox approach to interpretation”. The narrow meaning of “mutilation” conforms to these requirements. Therefore, it is certainly possible that a New Zealand court would hold that this meaning is “reasonably available”. Thus, if a court were to conclude that the meaning of “mutilation” advanced by the government is an unreasonable limit on the right in question, the court would be required to prefer this narrow meaning. If this
occurs, as I suggest it ought to, Dr Aziz and Ayanna’s parents would escape conviction with regard to Ayanna’s surgery.

4. Conclusion

The result in the hypothetical case that is argued for above suggests that it would in fact be possible to craft a limited exemption for FGM, at least in the circumstances of Ayanna’s surgery, though perhaps not Nadifa’s. In this respect, it would resemble the decision in Razamjoo, where Judge Moore in the District Court managed to accord a limited, though sufficient, degree of recognition for deeply held religious beliefs in the face of the expectations of broader society and the traditional workings of the adversarial court system. To allow Ayanna’s surgery would, moreover, replicate Judge Moore’s belief that cultural traditions which arguably conflict with Western norms of gender equality ought to be given time gradually to disappear when they involve no permanent damage to women’s rights. Also, to allow Ayanna’s surgery, but to send a strong message by upholding the prohibition with respect to Nadifa’s operation could be seen as a reasonable compromise.

Having said that, it is important to point out that throughout the analysis above there were many pressure points that, in truth, could have been decided either way if the matter were litigated. I shall give three examples. First, mainstream attitudes towards the medical efficacy of male circumcision are not easily dislodged. Indeed, it is because of the ingrained societal acceptance of MGM that I found it necessary to dwell longer than perhaps is normally considered decent in a legal treatise on the supposed medical benefits of male circumcision. Much of the defence argument relating to equality hinges on a determination that parents wishing to have their infant daughters circumcised and parents wishing to have their infant sons circumcised are relevantly similar in order to be accorded comparator group status. This is not something that can be taken for granted, especially given the very express ban on the practice of (at least in its more harmful forms) FGM at international law, which is to be contrasted with the more or less total lack of concerted global concern over MGM.

Second, it would be a unique result in New Zealand if the attack on the purpose of the anti-FGM legislation (using the hitherto innocuous first limb of the Oakes test) were to succeed. This would take judicial use of s 5 BORA into new territory. The reticence of the Supreme Court in Hansen regarding the potency of s 6 suggests that using BORA to question legislative ends is a judicial technique whose time may not yet have come in New Zealand. And finally, no doubt many eyebrows would be raised if judges were to use a statutory bill of rights to validate an unmistakably “foreign” religious practice in New Zealand in apparent defiance of a clear legislative statement banning the custom. Many factors like these could

480 See Razamjoo, above n 5, [75], where Moore DCJ notes the “struggle in the Western world during the 16th and 17th centuries to adapt its social and economic theories to accept innovation and change and the current tensions between traditional interpretations of the shari’a and international human rights. There is an emphasis on gradualism as the only way of achieving enduring change”. On the basis of this observation, Moore DCJ determined that gender equality concerns surrounding the burqa were not pertinent to the case at hand.

481 For this reason, a court dealing with the arguments advanced above might prefer to dodge the more adventurous and “constitutional” route of using the first limb of the Oakes test to declare a legislative aim invalid. As I have shown, however, the same result can be reached by applying the rational basis and minimal impairment tests, and a court might find that cohabitation with the legislative branch of government would be easier if it relied solely on these less constitutionally obtrusive modes of testing legislative means (as opposed to ends).

482 The Mount Maunganui Baptist Church foretold such an occurrence in its submission on the proposed supreme law Bill of Rights when it claimed that it would have the effect of giving “equal pre-eminence to values that are totally foreign to our society”. Ahdar Worlds Colliding, above n 228, 144-145.
thus intervene to frustrate the defence’s case. As Tipping J states in *Moonen*, “[o]f necessity value judgments will be involved”\(^{483}\) when s 5 BORA is engaged in a case, and no doubt any senior appellate court that had these facts brought before it and these arguments proposed from the bar would be deeply torn on several fronts. What other factors, then, could be taken into account from a broader perspective that would give a stronger mandate to a court to endorse Mild Sunna FGM?

An historically-minded court might feel more fortified in finding in favour of Dr Aziz and his patients by drawing assistance from modern attitudes towards a piece of legislation that was enacted early in New Zealand’s history and which shares (albeit more obviously) many of the defects that inhere in s 204A, were it to be read as banning all versions of FGM, including even minor nickings. The Tohunga Suppression Act 1907 (“TSA”) was identified in Chapter 3 as containing elements that go against the grain of the theory of religious freedom in New Zealand that is advanced in this thesis.\(^{484}\) Sir Geoffrey Palmer describes that Act as having as its *purpose* “the suppression of Maori culture” and argues that it would “clearly be contrary to the freedom of religion provisions of a Bill of Rights”.\(^{485}\) It is easy to see why Palmer believes this. The Act’s preamble spoke of “designing persons, commonly known as tohungas” who pretended to “possess supernatural powers in the treatment and cure of disease”; and then the operative provisions of the Act imposed criminal sanctions on “every person who gathers Maoris around him by practising on their superstition and incredulity”, or “misleads or attempts to mislead any Maori by professing or pretending to possess supernatural power in the treatment or cure of any disease”.\(^{486}\) The defects of the legislation are clear. First, it lacks any semblance of neutrality by its mention of the word “tohunga”, an inescapably religious term that pertains to only one sector of the religious population, which renders it automatically discriminatory. Second, it is underinclusive in that it omits to include within its ambit the activities of European New Zealander quack doctors, who were well known for presenting similar problems within the European population at the time. And third, the provisions could have achieved their aim by targeting the actual practices of the tohunga that were creating problems or addressing the crisis in Maori health that had led to a rise in demand for the healing powers of tohunga, rather than by enacting a flat prohibition on the existence of tohunga. Under a *Lukumi*-style analysis, this law would fail all aspects of the US Supreme Court’s test for assessing compliance with the First Amendment. Even at the time of its enactment the TSA attracted criticism, although it was not to be repealed for another fifty years.\(^{487}\)

A modern New Zealand court that elected to borrow the principle in *Lukumi*, and felt disposed to use the course open to it (as illustrated by the English cases of *Ghaidan* and *A v Home Secretary*) to declare limits on rights to be unjustified at the first limb of the *Oakes* test, might use the precedent of the TSA to bolster a decision to declare the anti-FGM Act an unjustified limit at this first hurdle. The opinion of Palmer (and of other respected New Zealand commentators on religious freedom issues\(^{488}\)) that the TSA had an illegitimate purpose, and the clear parallels between that Act and s 204A of the Crimes Act, with their common infirmities

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\(^{483}\) *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA), [18].

\(^{484}\) See section 2.2.2 in Chapter 3.


\(^{486}\) Tohunga Suppression Act 1907, s 2.

\(^{487}\) For example, Hone Heke attacked the discriminatory nature of the Act by calling for a similar ban on European charlatan doctors. In fact, he got his wish in 1908 with the passage of the Quackery Prevention Act 1908. See Derek Dow *Maori Health and Government Policy: 1840-1940* (Victoria University Press, Wellington, 1995) 129.

of underinclusiveness and overbreadth, might inspire a court to declare that BORA was
designed to prevent a total negation of a religious practice of the type effected by both these
Acts. It is also helpful, perhaps, that such a recourse to history is specifically mandated by the
Supreme Court Act 2003, which states in its purpose section that the new Court was being set
up in part to “enable important legal matters to be resolved with an understanding of New
Zealand conditions, history, and traditions”. The memory of the Tohunga Suppression Act
could therefore be evoked to provide a negative historical legislative precedent (in contrast to
the positive instances of legislation like the Contraception, Sterilisation and Abortion Act
1977) for what a theory of religious freedom in New Zealand should be about and thereby give
substantive content to the religious freedom protections in ss 13 and 15 BORA.

With history as a guide, therefore, the pervasive inequality of the prohibition on FGM that
Parliament enacted in 1995 with little thought towards its fairness or compatibility with BORA
ought to be enough for a court to feel motivated to send a clear message to legislators that this
Act was created with insufficient care and that it clashes with this country’s essential
commitment to religious equality. Writing in the seventeenth century, John Locke expressed
his prototypical version of this commitment in one of the memorable passages that grace his
classic liberal work on religious toleration, and provides a fitting note with which to conclude
this chapter:

Thus if solemn assemblies, observations of festivals, public worship be permitted to any one sort
of professors: all these things ought to be permitted to the presbyterians, independents,
anabaptists, Arminians, quakers, and others, with the same liberty. Nay, if we may openly speak
the truth, and as becomes one man to another, neither pagan, nor Mahometan, nor Jew, ought to
be excluded from the civil rights of the commonwealth.

I now conclude my analysis of how the Equal Regard reading of s 15 BORA, allied with the
interpretive methodology set out in ss 5 and 6, could be deployed to create space for citizens
who do not subscribe to this country’s traditional “Judeo-Christian” cultural matrix. This
chapter was concerned with a direct statutory rule that appears on its face to create an outright
prohibition of religious conduct. In the next chapter, I look at a somewhat different class of
legal prohibition, and one which may provide a different challenge to my analysis: that of an
entity using its powers derived from a delegation of parliamentary authority to prevent citizens
falling under its control from manifesting their religious beliefs in public.

489 Supreme Court Act 2003, s 3(1)(a)(ii).
490 John Locke A Letter Concerning Toleration (1689), reprinted in J Horton & S Mendus (eds) John Locke: A
491 The then Prime Minister Helen Clark explained in a speech in 2006 that New Zealand’s “predominantly Judeo-
Christian value system” needed to adjust itself to focus on the “paramount need for inclusion and respect for each
other in our diverse nation”. See Helen Clark “Regional Interfaith Dialogue Conference” (Speech delivered at
Cebu, Philippines, 14 March 2006); available at: <www.beehive.govt.nz/node/25175>. This chapter has been an
attempt, through the mediating lens of Equal Regard, to do this with respect to the assuredly non-Judeo-Christian
practice of female circumcision.
Chapter 6
Religious attire in New Zealand schools: the dog that didn’t bark

The [Education Act 1989] is informed by the democratic belief that responsibility is the great developer of the citizenry and that issues of local educational administration be best left for resolution through the individuality of local communities. A tendency to turn always to the law for resolution of these matters would be unwise and inappropriate. Support for decisions made within local schools must be found by means other than their vindication in Courts of law. (Justice Williams, New Zealand High Court, 1993)

No one should underrate a school child’s capacity to perceive and feel personal injustice. The Court must be conscious not only of a public interest in orderly education, but also of a need to protect the individual child, and that child’s confidence it can receive justice from authority. (Justice McGechan, New Zealand High Court, 1990)

1. Introduction

In this chapter I will demonstrate how the Equal Regard model for interpreting s 15 BORA could assist in resolving an issue that has bedevilled legislatures, administrators and courts in other Western jurisdictions, but which has attracted very little attention in this country. That is, whether students can insist on being granted religious exemptions from compulsory dress codes in New Zealand’s public educational institutions.

The very diversity of judicial decisions overseas illustrates that it is possible for courts in different jurisdictions to draw lines on the matter in different ways. In the international arena, for example, in 2005 the European Court of Human Rights declared that the decision of Turkey to ban Islamic headscarves in state universities was a justified limitation on the right to manifest religious belief under Art 9 of the European Convention. By contrast, in a case decided at around the same time and with similar facts, the UN Human Rights Committee held Uzbekistan to be in violation of the religious freedom protections contained in Arts 18(1) and 18(2) ICCPR. At the domestic level, in 2006 the UK House of Lords, applying Art 9 ECHR in

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1 Maddever v Umawera School Board of Trustees [1993] 2 NZLR 478 (HC), 508.
2 M and R v S and Board of Trustees of Palmerston North Boys’ High School [2003] NZAR 705 (HC), 723. Note that this decision was handed down on 5 December 1990, but was not reported until 13 years later.
3 See, eg: R (on the application of Begum) v Head Teacher and Governors of Denbigh High School [2007] 1 AC 100 (UK House of Lords upholds school decision to prohibit Muslim girl from wearing jilbab); R (on the application of Playfoot (a minor) (by her father and litigation friend Playfoot)) v Governing Body of Millais School [2007] EWHC 1698 (English High Court upholds school decision to prevent Christian girl from wearing chastity ring); R (X) by her Father and Litigation Friend v Y School [2007] EWHC 298 (English High Court upholds school decision to prohibit Muslim girl from wearing niqab – a veil obscuring face, save for eyes); MEC for Education: KwaZulu-Natal and Others v Pillay [2007] ZACC 21 (Constitutional Court of South Africa sets aside school governing body decision to prevent Indian/Hindu girl from wearing nose stud at school); Multani v Commission Scolaire Marguerite-Bourgeoys [2006] SCC 6 (Supreme Court of Canada sets aside school governing board’s decision preventing Sikh boy from wearing ceremonial dagger, or kirpan); Chalifoux v New Caney Independent School Dist 976 F Supp 659 (1997) (US District Court for Texas sets aside school’s decision to prevent Catholic students wearing rosaries); Jacobs v Clark County School Dist 526 F 3d 419 (2008) (US Court of Appeals for Ninth Circuit upholds school decision to prevent girl who is member of Church of Jesus Christ of Latter-Day Saints from wearing T-shirt expressing religious beliefs); Leyla Sahin v Turkey (2005) 41 EHRR 8 (European Court of Human Rights upholds university circular banning the wearing of Muslim headscarves from campus); Hudoyberganova v Uzbekistan UN Doc CCPR/C/82/D/931/2000 (18 January 2005) (UN Human Rights Committee declares decision of university to exclude woman wearing “hijab” to be violation of Art 18 ICCPR).
4 Leyla Sahin v Turkey (2005) 41 EHRR 8 (“Sahin”).
the British context, upheld the decision of a school board to prevent a girl from wearing a jilbab at her school, as this item conflicted with the school’s uniform code. This decision in turn appears sharply at odds with a finding by the Supreme Court of Canada that a school governing board, which had sought to prevent a Sikh boy from wearing a ceremonial dagger on the grounds that it posed a danger to other students, had violated that student’s right to freedom of religion under the Canadian Charter. What can explain the differences in these results?

Analysis of this conflicting body of jurisprudence indicates that precisely where the line is drawn will depend on a variety of factors. These considerations include: relevant constitutional and statutory law; historical and cultural understandings concerning church-state relationships in the relevant country (which may or may not be expressed as positive law) and their impact on the educational system; national policies regarding integration of immigrant cultures; politics; legal culture; the contingencies of litigation and so on. Moreover, further analysis indicates that what might at first glance seem like markedly different treatments between jurisdictions are in fact partly the product of subtly different fact situations that feed directly into any given result. In other national comparisons, however, it is evident that the variation in outcomes may depend on a court’s reading of the judicial role in interpreting human rights law in the given jurisdictions. It will also include the degree to which country-specific conceptions of “secularism” and “state neutrality” authorise courts to intrude upon private choices to manifest religious beliefs in public places. In countries such as France and Turkey, where an aggressive brand of “secularism” has been relied on as a legal justification for purging public institutions of religious expression, the results have been harsh for students wishing to wear religious garb at educational institutions. In countries where conceptions of “secularism” (and other like slogans) are not adjudged necessarily to require a religious vacuum in the public domain, and where public religious expression that is generated by private persons enjoys some constitutional protection, students will be more successful in arguing for their rights. Decisions in Canada and the US that preserve the rights of wearers of religious garb in schools exemplify this position.

The clash of values resulting from this issue has in many ways been the paradigmatic testing ground for the multiculturalist credentials of modern Western democracies in a time of greater religious pluralism. It pitches the tendency of liberal, post-Christian, societies to cabin

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6 R (on the application of Begum) v Head Teacher and Governors of Denbigh High School [2007] 1 AC 100 (“Begum”). The jilbab is a long loose-fitting cloak that conceals the whole body, reaching down to the ankles, but does not cover the face. The claimant in Begum stated that she was required by her Islamic beliefs to wear this garment.


8 This explains the views of the Human Rights Committee in Hudoybergenanova, where, unlike the Turkish government in Sahin, the state party failed to provide any justification for its policy of banning veils in universities. Moreover, the Committee members expressed confusion as to what form of the veil the author of the complaint wished to wear, as this information was not provided on the record. This left the Committee (by majority) with little choice but to find for the claimant. Because of the unsatisfactory nature of the pleadings in this case, the Committee was at pains to declare its views would have little precedential value. See Hudoybergenanova, above n 5, [6.2].

9 See, eg, Multani, above n 7, and Chalifoux v New Caney Independent School Dist 976 F Supp 659 (1997). See also, in the context of educational funding, Rosenberger v Rector & Visitors of University of Virginia 515 US 819 (1995), where the US Supreme Court quashed a university’s decision to deny funding to a Christian newspaper, because the institution already funded similar secular student groups in the same manner (ie, the provision of facilities to create published material).

religious expression within the private sphere against the practices of religiously motivated individuals who wish to manifest their (often non-Christian) beliefs in public while pursuing their right to education. It also sees, in the New Zealand context and others, a contest between democratically elected school boards which make rules in the form of dress codes for the welfare of the communities they serve, and students who may consider their individual rights to require primacy over the majoritarian interests reflected in these rules. Related to this is the question of how far the courts should go in disturbing the democratic decisions of schools that seek to ban religious dress. In jurisdictions where legislatures have chosen to decentralise educational administration, such as New Zealand and the UK, the courts have been reluctant to delve too deeply into the rationales behind decisions affecting the rights of students. By contrast, courts in countries with supreme law bills of rights, such as Canada the US and South Africa, which have also devolved many powers of school management to local control, have been more ready to scrutinise and look for evidence supporting these rationales.

And in yet another facet of the debate that tracks the Auckland “burqa” trial and the FGM analysis in Chapters 4 and 5 of this thesis, there is a possible clash between two major human rights imperatives – that of female gender equality, as recognised in certain provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women, which require states to modify or abolish customs based on patriarchal social norms, and the right of individual women and girls (who, according to the tenets of liberal feminism, are the involuntary objects of these norms) to manifest their religious beliefs in public, as guaranteed by Art 18 of the ICCPR and, in the New Zealand context, s 15 BORA. In the case of Turkey, for example, the European Court of Human Rights found that the right to gender equality was one factor weighing in favour of that country’s decision to ban veils from universities. Whether the wearing of veils should be equated with more obviously dangerous patriarchal practices, such as extreme forms of FGM, is of course a deeply controversial issue.

Whereas the wearing of religious garb in private – be this at home or in the general public arena – is well established as an unremarkable aspect of religious freedom, at least in countries within the Anglo-American liberal tradition, the situation in public schools is rather different.

12 See, eg, Begum, above n 6. In New Zealand there are no post-BORA cases dealing specifically with religious freedom in schools, but there is a persistent strand of jurisprudence according great deference to school choices in managing their own affairs with minimal judicial oversight; see, eg, Maddever v Umawera School Board of Trustees [1993] 2 NZLR 478, and discussion in John Caldwell “Judicial Review of School Discipline” (2006) 22 NZULR 240, 241-242.
13 The relevant provisions are Arts 2(f) & 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women (UN Doc A/34/46, entered into force 3 September 1981 (acceded to by New Zealand in 1985)), which are discussed in the previous chapter in this thesis on female circumcision; see Chapter 5, text accompanying ns 34-38. For example, Art 2(f) requires states parties: “To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”
14 See Frances Raday “Culture, religion, and gender” (2003) 1 Int J of Constitutional Law 663, 678, and my discussion of the issue in section 2.2.2 of Chapter 4.
15 Sahin, above n 4, [115]. The Court did not rely on CEDAW; it inferred the right from the European Convention itself.
17 Some Western countries outside the Anglo-American orbit, however, have sought to restrict the wearing of veils (in particular those covering the face) in open spaces, ostensibly as a public security measure. See the description of restrictions (proposed and current) in Italy, Belgium and Holland in Dominic McGoldrick Human Rights and Religion: The Islamic Headscarf Debate in Europe (Hart Publishing, Oxford, 2006) (“McGoldrick Islamic
This is because schools are not perfectly analogous to public streets or private dwellings: they are places where a degree of state control over the conduct of students for reasons of safety, general school order, and the rights of other students – who are compelled by compulsory educational laws to attend these institutions – is regarded as legitimate. Much of the overseas jurisprudence turns on the extent to which courts will defer to how schools calibrate these factors and, crucially, whether the balance struck by schools is applied equally to all students. It will be recalled from our discussion of FGM in Chapter 5 that arguments to the effect that mild forms of female circumcision ought to be banned because the social and emotional harm caused to women is repugnant to the modern liberal state’s commitment to gender equality are rendered moot by the failure of the New Zealand legislature to ban similar surgeries on male infants. It is anticipated that a similar analysis may be critical when considering attempts by schools to ban Muslim attire in New Zealand. Accordingly, this chapter will illustrate how the application of the Equal Regard principle by the courts in this country with respect to religious apparel issues in schools could, as was the case with my treatment of FGM, navigate through many of the opposing factors listed above and thereby achieve results that are fair to all involved.

1.1 The bite in overseas controversies surrounding the Islamic veil

The general pattern in controversies abroad is that of disputes centring on school and university uniform rules that conflict with Islamic dress codes originating from the Qur’anic injunction of female, and male, modesty. In countries where the debate has occurred, it has raised many passions at both a philosophical and a more visceral level amongst public and private citizens, and has seen governmental officials, and even judges, offering barbed comments concerning respective national policies on the matter. This has been especially the case with France, where in 2004 the legislature controversially banned the wearing of “conspicuous” religious insignia by students in public schools. As a result of the legislation, many thousands of headscarf-wearing Muslim citizens took to the French streets in protest at what they saw as a clear-cut infringement of religious free exercise, a freedom that had been guaranteed by French governments, at least in theory, since the Revolution in the 18th century. At the same time, a majority of French citizens and legislators supported the law as being a correct rendering of

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*Headscarf*) 208-214. See also Lizzy Davies “France: Senate votes for Muslim face veil ban” *The Guardian* (UK, 14 September 2010).

18 Most of the literature concerning the issue has concentrated on the impact of school dress codes on Islamic practices. For a broad treatment of the debate in Europe exclusively within the context of the Muslim headscarf, see McGoldrick *Islamic Headscarf*, above n 17.

19 Law 2004-228 (15 March, 2004) (France). The law reads: “In public schools, the wearing of symbols or clothing by which students conspicuously manifest a religious appearance is forbidden.” Although the law appears non-discriminatory on its face, and has in fact been applied against, for example, Sikh students wishing to attend school wearing turbans, most acknowledge the ban was targeted primarily at Muslim girls who wished to wear veils. See, generally, Herman Salton *Veiled threats?: Islam, headscarves and religious freedom in America and France* (VDM Verlag, Saarbrücken, 2008).


21 See Declaration of the Rights of Man and of the Citizen 1789 (France), Art 10: “No one must be disturbed because of his opinions, even in religious matters, provided their expression does not trouble the public order established by law.”

22 The law was passed by large parliamentary majorities; by 494 votes to 36 in the French National Assembly and by 276 to 20 in the Senate. An opinion poll in 2003 showed that 72% of the French public favoured the ban, with 23% opposed. See T Jeremy Gunn “Religious Freedom and Laïcité: A Comparison of the United States and France” (2004) BYUL Rev 419 “Gunn ‘Religious Freedom and Laïcité’”), 422 & n 6.
the secular (“laïc”) provision in the French constitution, an interpretation that was also in tune with official policies regarding “integration” of immigrants from non-Christian countries. Indeed, in a speech that declared his intentions to initiate the legislation, President Jacques Chirac made much of the sacred constitutional status of laïcité and the new law’s consistency with French values and history, including the historical relationship of church and state in that country. For example, he described “laïcité” as being “inscribed in our traditions. It is at the heart of our republican identity;” and also as a “pillar” of the constitution, which was “at the core of our uniqueness as a Nation. These values spread our voice far and wide in the world. These are the values that create France”. He then went on to say that: “Laïcité guarantees freedom of conscience. It protects the freedom to believe or not to believe. It assures everyone of the possibility to express and practice their faith peaceably, freely, though without threatening others with one’s own convictions or beliefs.” And finally he concluded that laïcité is an “inspiring model for the entire world”.

The law elicited several international responses opposing President Chirac’s assertion that banning veils in schools was compatible with religious freedom. In Iraq, for example, an insurgent group resisting the US-led military invasion in 2003 kidnapped two French journalists, demanding as a ransom that the law be rescinded. More significantly, the French headscarf ban met with disapproval in the US, demonstrating a sharp difference in approach by two countries that share republican histories and have traditionally championed religious freedom. In an acerbic coda to his dissent in the US Supreme Court case of Locke v Davey, Justice Scalia could not resist comparing the majority opinion in that case with the (in his view) discriminatory French law just prior to its passage through the French Parliament:

Today’s holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers’ freedom of conscience forbids medicating the clergy at public expense? This may seem fanciful, but recall that France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today. See Sciolino, Chirac Backs Law To Keep Signs of Faith Out of School, N. Y. Times, Dec. 18, 2003, p. A17. When the public’s freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression.

23 See Constitution 1958 (France), Art 2: “France is a Republic that is indivisible, laïc [secular], democratic, and social.”
24 The decision on headscarves has been taken several steps further in recent years, with the chief judicial body of the French administrative apparatus, the Conseil D’Etat, endorsing the refusal of citizenship to a burqa-clad woman due to the perceived failure on her part to “assimilate” into French culture. A Chrisafis 'France rejects Muslim woman over radical practice of Islam’ The Guardian (UK, 12 July 2008). And in 2010, France enacted a law banning the wearing of face-concealing garments in any public place, a measure directed principally at the burqa. See Lizzy Davies “France: Senate votes for Muslim face veil ban” The Guardian (UK, 14 September 2010).
26 A Gentleman “Journalists’ plea to Chirac as deadline is extended” The Guardian (UK, 31 August 2004). The hostages were eventually released after a delegation of French Muslims travelled to Iraq to negotiate the matter.
27 (2004) 540 US 712. The case concerned a religious free exercise objection by a student to the decision of a state university to withhold a scholarship for him to pursue (in part) training in theology and the ministry. The majority of the justices held that no violation of the claimant’s right to free exercise of religion had occurred, and also that if the funding were extended to the student this would constitute an unconstitutional establishment of religion.
28 Ibid 734.
Justice Scalia’s words were then echoed by the American Commission of International Religious Freedom, which responded to the proposed law by urging the US government to protest at its apparent contravention of France’s international law obligations. The Commission followed up on its position by sending a delegation to France where presumably it made its views clear. A few months later, in what almost seemed a response to the French ban, the US Department of Justice intervened in litigation concerning one Nashala Hearn, an 11-year-old Muslim girl in Oklahoma who had been forbidden by staff at her school from wearing a hijab. The intervention, which included a pointed and lengthy submission outlining the Department’s views on First Amendment law as it affects religious expression by students in schools, resulted in the school district withdrawing from the case and offering the child’s family US$80,000 in compensation. Attorney-General John Ashcroft referred to this settlement during testimony at a Senate Judiciary Committee hearing on the “war on terror” and claimed it demonstrated the commitment of the US to religious freedom in contrast to tyrannical regimes around the world that did not protect this right. Ashcroft, as President Chirac had done in his speech lauding the French record on religious freedom, said the Oklahoma case stood for a distinctive American approach to religious liberty that was worth exporting to the rest of the world: “The war we are fighting is a war for Nashala and freedom-loving people everywhere. We continue to strive, after two centuries, to build that city upon a hill – a nation that values the religious liberty of a single young girl and the constitutional liberties of all its citizens.”

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29 The Commission, which is comprised of independent academics and human rights experts, was established by the International Religious Freedom Act 1998 (US) PL 105-292. Its task is to “monitor religious freedom in other countries and advise the President, Secretary of State, and Congress on how best to promote it”. See International Religious Freedom Commission Annual Report (2005) “About the Commission”.

30 See also the US State Department’s 2004 report on the state of religious freedom in France, which also offers (a more muted) criticism of the veil law: at <www.state.gov/g/drl/rls/irf/2004/35454.htm>. It is not clear whether the US government has officially taken France to task on this matter, although it appears from the report that US Embassy officials were in touch with French authorities on religious issues around the time of the ban. For the views of a US-based nongovernmental agency that was trenchant in its criticism of the French ban, see Human Rights Watch “France: Headscarf Ban Violates Religious Freedom” (27 February 2004) available at: <www.hrw.org/english/docs/2004/02/26/france7666.htm>.

31 Before the law was passed, John Hanford, the US Ambassador-at-Large for International Religious Freedom declared in the context of the French controversy that the right to wear religious garb in schools was “a basic right that should be protected”. An unnamed French official, bristling at this criticism, replied: “Never have you heard a French diplomat comment on an internal debate in the United States.” C Marquis “U.S. Chides France on Effort To Bar Religious Garb in Schools” New York Times (US, 19 December 2003).

32 A Muslim veil covering the hair but not the face. In this chapter, the words “hijab” and “Islamic (or Muslim) headscarf (or veil)” shall be used interchangeably.


35 He did not specifically refer to France in his speech, but referred instead to the former Taliban regime in Afghanistan in this respect. John Ashcroft “Prepared Testimony of Attorney General John Ashcroft ‘The Department of Justice’s Efforts to Combat Terrorism’” (Speech delivered to Senate Judiciary Committee, Washington DC, 8 June 2004); at <www.usdoj.gov/archive/ag/testimony/2004/060804agsenatejudiciarycommittee.htm>. Certainly the US media have made a comparison of the two countries’ approach to the headscarf issue; see B Knowlton “US takes Opposite Tack from France in Headscarf Debate” International Herald Tribune (US, 3 April 2004).

36 Ibid. The girl herself spoke on the same day in front of the full Senate, wearing her hijab, and thanked the US for respecting her rights.
In another iteration of the headscarf debate, and one with more serious domestic implications for the state involved, the Turkish government in 2008 overturned by constitutional amendment a ban on the wearing of the Muslim veil at universities.\footnote{BBC News “Turkey ends student headscarf ban” (22 February 2008) available at: <news.bbc.co.uk/2/hi/europe/7259694.stm>. This amendment was itself annulled by the Constitutional Court; see “A narrow scrape for democracy” The Economist (UK, 31 July 2008).} The prohibition on veils had previously been upheld by the country’s Constitutional Court and subsequently by the Grand Chamber of the European Court of Human Rights in 2005, which declared that the ban had not violated Art 9 of the European Convention on Human Rights.\footnote{Leyla Sahin v Turkey (2005) 41 EHRR 8.} As a consequence of this (as well as some other alleged governmental actions), a state prosecutor filed an indictment against members of the governing party for seeking to destroy the country’s secular heritage by attempting to establish sharia law in the country.\footnote{“See you in court” The Economist (UK, 19 March 2008).} This bid was ultimately unsuccessful,\footnote{“A narrow scrape for democracy” The Economist (UK, 31 July 2008).} but, if it had been upheld by the Turkish Constitutional Court, the party which formed the government that crafted the new law could have been outlawed and certain of its members, including the Prime Minister, could have been disqualified from political office for five years.\footnote{For discussion of the constitutional stand off in Turkey, see “A tragedy in the making” The Economist (UK, 12 June 2008). A previous Turkish political party (which was the forerunner of the current ruling party) was in fact disbarred from politics in 1998. This banning was validated by the European Court of Human Rights, which held that it was not an infringement on the right to freedom of association guaranteed in Art 11 ECHR; see Refah Partisi (Welfare Party) and others v Turkey (2003) 37 EHRR 1 (“Refah Partisi”). In this case, the European Court had accepted that the Refah Party’s attempt to reintroduce headscarves was evidence that the party was in the process of introducing sharia law to Turkey (see para [122]), indicating that similar activities by the current Turkish government must have come close to resulting in a repeat finding by the Constitutional Court.} In Turkey, the army and the Constitutional Court are regarded by many as the guarantors of last resort of the secularity of public institutions in that country, which, like France, has a strong secular clause in its constitution.\footnote{Constitution 1982 (Turkey), Art 2: “The Republic of Turkey is a democratic, secular (laik) and social State based on the rule of law that is respectful of human rights in a spirit of social peace, national solidarity and justice, adheres to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble.” The similarity to the French constitution’s phrasing of the secular principle is no coincidence, as it was borrowed from the French model; see Adrien Wing & Ozan Varol “Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example” (2006) 42 Tex Int’l LJ 1, 6.} By contrast, the ruling party is known to favour a mild reintroduction of Islamic values into state institutions, as it feels empowered to do by the electoral mandate it enjoys from the Muslim majority in that country. The potential for a major constitutional showdown in Turkey, in part inspired by the issue of Islamic headscarves, is thus very real.\footnote{The Turkish saga continues to this day. The Prime Minister responded to the Constitutional Court’s decision to disallow the headscarf amendment by proposing another amendment to the Constitution, this time allowing the Court’s membership to be expanded from 11 to 17. Presumably, this proposal, which was endorsed by a majority of 58% of the electorate, was intended to overturn the Court’s headscarf decision by “packing” the Court with pro-Islamic justices. See Can Yegisu “Turkey Packs the Court” New York Review of Books (22 September 2010).}
founded by Atatürk in 1923, and Islamic elements in government and in the general populace who have a different conception of what secularism should mean. As Wilfred McLay has explained, it is apparent that what is “meant by ‘secularism’ will depend upon the cultural and historical context in which the word is used”. For France and Turkey, the term, which appears in their respective constitutional texts, has been interpreted by members of ruling, including judicial and military, elites as mandating an aggressive forcing out of religion from the public square. For the US, where the word “secular” appears nowhere in any constitutional document, the state takes a more benign position towards private religious expression in the public sphere. We turn now to New Zealand, where the issue of veils in schools is free of the political frisson surrounding the matter in the Northern hemisphere.

1.2 The New Zealand situation: the dog that didn’t bark

The issue of religious dress in New Zealand educational settings has never been contested in court and has generated very little of the political heat that is evident in the national settings mentioned above. Apart from a sporadic and infrequent series of mediations conducted by the Human Rights Commission involving students who have objected to school dress codes, the New Zealand scene has been noticeably serene. It appears that many public schools are receptive to accommodating religious difference, even where school boards opt to impose a uniform code on the student body under their powers to make bylaws and to exercise control and management of schools under ss 72 and 75 Education Act 1989. Where disputes have arisen, it seems they have been quickly resolved by mediation, often in favour of the religious claimants. For example, at one school a female Muslim student wished to wear a longer skirt than school regulations allowed. After mediation by the Human Rights Commission, she was permitted to do so. This result is to be contrasted with the Begum litigation in the UK, where a similar request was refused by a school, with its decision being ultimately upheld by the House of Lords. That case attracted a great deal of media attention in the UK, whereas the New Zealand dispute passed by with little, if any, public comment (due of course in part to the mediation of the dispute being carried out confidentially). At any rate, it certainly has not been the case that politicians in this country have sought to make political capital out of the issue of whether Muslim students should be able to wear religious garb at school, as has occurred in the US, France and Turkey. This relaxed attitude has apparently transferred smoothly from the national political level to New Zealand school boards, which, being elected by and composed of their surrounding communities, are inherently political bodies that would be expected to reflect the concerns and fears of their constituents. There are, I suggest, two chief reasons for this.

First, one might point to the relatively low population base of Muslims in the country and the resultant lack of a perceived “Islamic threat” amongst the general public, despite greater sensitivity to the Muslim presence since the events of 11 September 2001 and the London

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45 A Secondary School Principals spokesman said in 2004 that religious dress is dealt with on a “school by school basis” and that in New Zealand there is a “variety of dress code, whether outright bans or an anything-goes policy”. Some schools apparently ban the outward display of crosses or taonga on the grounds that if these were permitted, then they would have to allow all such insignia, including the “marijuana leaf symbols of Rastafarians”. Nick Smith “Lifting the Veil” New Zealand Listener (27 November 2004).
47 Ibid [22].
48 C Dyer “Muslim girl loses Lords fight over jilbab” The Guardian (UK, 23 March 2006).
49 See Education Act 1989, pt 9, for the statutory regime regarding the election and composition of school boards.
bombings of 2005. The latest statistics disclose a population of about 35,000 Muslims resident in New Zealand, which is insignificant compared with, for example, France, where the current figure is put at around 5 million out of a total population of some 60 million. Moreover, the majority of Muslims living in New Zealand originate from South Asia, including many who emigrated from Fiji, with this latter subset being heavily involved in initial efforts at national leadership and who continue to hold many of these positions. Muslims from these geographical areas are considerably more “secularised” and “well educated” than those from the Middle East or Africa, who are likelier to espouse a more “fundamentalist” version of Islam. In France, by contrast, many of its Muslim citizens hail from the former colonial territories in North Africa, including Algeria, a Muslim country that fought a long war of independence against France in the 1950s and 1960s and which until recently was embroiled in a violent Islamic insurgency against a government that was installed by a military coup in 1991. The large population inflow from its former colonies from the 1960s onwards did much to create a “moral panic” in France, where it was feared by some that urban areas of metropolitan France might become dominated by immigrants who did not subscribe to French values. This perception was exacerbated by local resentment over the loss of the former colony of Algeria and also by terrorist incidents that occurred in France in the mid-1990s at the time that the issue of Muslim headscarves in schools was being hotly debated. No such conditions exist in New Zealand, which does not have an imperialist history and has had no incidents of terror inspired by Islam on its own soil. The result has been a reasonably tolerant reception of Muslims in New Zealand, a country where the general population has largely abandoned its own Christian roots, and is comfortable with an

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52 See William Shepard “Muslims in New Zealand” (1996) 16 Journal of Muslim Minority Affairs 211, 212; and Jan Ali “Islam and Muslims in Fiji” (2004) 24 Journal of Muslim Affairs 141. Muslims first came to Fiji as indentured labourers on 5-year contracts between 1879 and 1916. As such, their prime concern was more with material advancement than with a strict adherence to their faith, although Ali claims that since the 1970s Fijian Muslims have become more devout.
53 The current president of the Federation of Islamic Associations of New Zealand, Javed Khan, is a Fijian Indian, and the sole Muslim Member of Parliament is Dr Asrash Choudhary, originally from India and educated in both the UK and New Zealand.
54 Hence, former National party leader, Don Brash, said in an interview that he was in favour of Muslims immigrating from Fiji, as they had grown up in a secular state and tended to share New Zealand’s “bedrock values”, which he lists as: “accepting democracy and the rule of law, religious and personal freedom, and legal equality of the sexes”. See Bruce Ansley “So who do we keep out?” *New Zealand Listener* (2 September 2006).
55 This may be changing, as refugee intakes from countries such as Iraq and Somalia have led to an increase in the numbers of Muslims from the Middle East and other troubled areas of the globe where fundamentalist versions of Islam are more likely to be prevalent. In Christchurch, for example, there are more Muslims from the Middle East and Africa than from Fiji. See Bruce Ansley “Who’s moving in next door?” *New Zealand Listener* (2 September 2006). Some Muslim leaders in New Zealand have expressed concern about the arrival of more traditionalist exponents of Islam. See T Wall “Who did evicted mufti really threaten?” *Sunday Star-Times* (4 November 2007).
56 Fetzer & Soper *Muslims and the State*, above n 51, 63. Many immigrants also arrived during this period from other Muslim countries, such as Morocco and Tunisia.
58 The 2006 census reveals that 1,297,104 New Zealanders (out of a population of around 4 million) claimed to have “No religion”, with a further 492,321 either objecting to answer the question or not making any statement. Statistics New Zealand “Religious affiliation” (2006 census). Compare these figures with, for example, the 1896 census, which disclosed that some 95% of New Zealanders adhered to some form of the Christian religion; *New Zealand Official Yearbook 1900* (Wellington, Government Printer, 1900), appendix.
informal separation of church and state that is enforced haphazardly against the background of a society where there is little feeling of insecurity from the (as yet) small numbers of foreign religionists. Because of these sociological factors, it is perhaps safe to conclude that there is a general absence of the anti-Muslim feeling that is currently existent in France, which in turn has meant that there has been no clamour to make a national law on religious dress in schools; and nor have school boards been under any publicly acknowledged pressure to use their statutory powers to ban religious attire.

A second factor is the absence in New Zealand of a strong “secular” provision in the Education Act (or anywhere else in the statute book) and a lack of concern amongst the general public about addressing this omission. Again this can be contrasted with France, where all religion is expunged from its public schools, a state of affairs that is justified from a legal standpoint as a logical emanation of the secular clause in its constitution. New Zealand schools do not operate under similar constraints. The secular provision in the Education Act provides only that “teaching” in the country’s primary schools is to be of a “secular character”, a formulation that does not speak to the issue of religious dress. Moreover, the same statute allows religious instruction and observances under certain conditions, and schools are also required in their

59 Erich Kolig puts it like this: “A society, such as that of New Zealand, which has rejected its own traditional religiosity (by privatising religion and separating the state clearly from it – both major features of secularisation) perhaps finds it easier to accord tolerance to an alien, imported faith.” Erich Kolig “An Accord of Cautious Distance: Muslims in New Zealand, Ethnic Relations and Image Management” (2003) 5 New Zealand Journal of Asian Studies 24, 45.

60 See Knights “Religious Symbols”, above n 10, 507, where she states that the “secular approach” in France has meant that “religious schools in general do not receive state funding, and there is neither religious worship nor education in state schools”.

61 Note, however, that some doubt existed in France prior to the enactment of the headscarf ban in 2004 as to whether the secular provision in the Constitution extended to preventing students from expressing their beliefs at public schools in the form of religious attire. Indeed, a series of judicial opinions given by the Conseil d’Etat, beginning in 1989, had given qualified support to the wearing of religious garb. The first of these decisions stated: “In educational institutions, students’ wearing of symbols [signes] by which they intend to indicate their belonging to a particular religion is not in itself incompatible with the principle of laïcité since [this display] constitutes one’s exercise of liberty of expression and the right to indicate one’s religious beliefs; but this liberty does not permit students to display symbols of religious membership that, by their nature, by the conditions under which they are collectively or individually worn, or by their ostentatious or protesting character...disturb the normal functioning of public services.” Conseil D’Etat, Avis no 346.893 (27 November 1989); cited in Fetzer & Soper Muslims and the State, above n 51, 79. This effectively made the wearing of veils at schools possible under French law in 1989, and left the decision to the principals of schools. This line of decisions was, however, reversed after a commission was established by President Chirac to look into the issue. The so-called Stasi Commission reported in 2003 that the secular provision in the Constitution required that all “conspicuous” religious symbols be banned in French schools. The resulting legislation has been interpreted by a circular released by the French Education Ministry that appears to regard the legislation as banning the wearing of large symbols (“signs and attire, which, when displayed, led to the immediate recognition of a religious affiliation”), though leaving students free to wear smaller objects, eg, small Christian crosses, stars of David, or Muslim symbols, such as hands of Fatima (the daughter of the Prophet Muhammed). See Circulaire (18 May 2004) “Relative à la mise en oeuvre de la loi no 2004-228 du 15 mars 2004”, published in Journal Officiel (22 May 2005); cited in McGoldrick Islamic Headscarf, above n 17, 92.

62 Education Act 1964, s 77(b), provides: “[E]very State primary school shall be kept open 5 days in each week for at least 4 hours each day, of which hours 2 in the morning and 2 in the afternoon...and the teaching [[shall be]] entirely of a secular character.”

63 Education Act 1964, ss 78 & 78A. The Act does not facilitate religious instruction in non-primary schools, but does not actually prohibit such activities. Indeed, s 81 suggests that religious instruction may indeed be possible in secondary schools: “Nothing in this Act shall affect religious instruction or religious observances in schools other than State primary schools.” Religious instruction (ie, the act of religious teachers visiting schools to verse students in religious doctrine at certain times specified by school boards) does not, however, appear to take place in secondary schools, possibly due to other curriculum demands (see Paul Rishworth “Religious Issues in State Schools” in J Hannan, P Rishworth & P Walsh Education Law (Seminar, New Zealand Law Society, 2006) 87,
6. Religious attire in schools

charters to observe Maori culture, which in some cases has led to Maori religious observances (often involving a fusion of Maori and Christian rituals) becoming commonplace in state schools.\(^{64}\) The picture in New Zealand therefore is dramatically contrasted to France. The two countries, both of which are home to a large non-religious (or “secular”) minority that dominates political discourse, provide good examples of how nations that are outwardly “secular” can have very different religio-political landscapes when it comes to details at ground level.

The New Zealand legislative scene as it relates to religious expression in state schools reflects the country’s relatively benign historical record, in which the state was never aligned formally with any religious denomination\(^{65}\) and where there have been no religious wars.\(^{66}\) The result of this was that no “firewalls” between church and state in the form of constitutional or legislative measures imposing “secularism” or prohibiting the “establishment of religion” were regarded as necessary by the nation’s founders.\(^{67}\) France on the other hand has an extremely violent past and the modern state is regarded in part as a product of the protracted and forceful separation of the Catholic hierarchy from central government from the 18th to the 20th centuries.\(^{68}\) French law as it affects church and state is symptomatic of this history and could be characterised as an attempt to expel religious influence from public institutions and to entrench this hard-won separation by legislative acts, with the headscarf law of 2004 being a classic example of this.

107). On the other hand, religious observances, in the form of hymns and prayers typically led by principals at high school assemblies, do appear to be reasonably common. See John Gerritsen “State of grace” Education Review (23-29 June 2005).

\(^{64}\) Ibid. Selwyn College in Auckland, for example, has “readings, sometimes from religious sources, and karakia” at “special events”. According to Barlow, modern day Maori ceremonial incantations, such as karakia, “follow a Christian format and are offered to the Christian god”. Cleve Barlow *Tikanga whakaaro: key concepts in Maori culture* (Oxford University Press, Auckland, 1991) 557. For the statutory requirement that schools incorporate Maori culture in the school environment, see Education Act 1989, s 61(3): “A school charter must contain the following sections: (a) a section that includes – (i) the aim of developing, for the school, policies and practices that reflect New Zealand’s cultural diversity and the unique position of the Maori culture.” See discussion of this and other statutory provisions concerning Maori culture and their effect on the secularity of New Zealand law, in Fiona Wright “Law, Religion and Tikanga Māori” (2007) 5 NZJ Pub & Int’l L 261.

\(^{65}\) The main candidate for an alliance with the state was the Anglican Church, due to its established status in the UK, and the fact that Anglicans made up a majority of New Zealand’s population. However, the early leaders of the church consciously chose to remain separate from the state, in part because it was their wish to be free of secular interference; see, generally, Ian Breward *A History of the Churches in Australasia* (Oxford University Press, New York, 2001). I discuss historical matters more closely in section 2.2.2 of Chapter 3.


\(^{67}\) Some argue that New Zealand did not at its founding arrange for a “constitutional” separation of church and state for the simple reason that the state was already free from overt religious influence and no religious groups were regarded as aspiring to assert such a role. Even the influential rationalist community in nineteenth century New Zealand did not agitate for formal church-state barriers. See Peter Lineham “Freethinkers in Nineteenth-Century New Zealand” (1985) 19 NZJH 61, 76.

\(^{68}\) See Gunn “Religious Freedom and Laïcité”, above n 22, 438, where he describes the legislative attempt to separate church and state in France in 1795 as a reaction to widespread religious violence following the revolution. The revolution in France in 1789 was in part inspired by intense anticlericalism, because of the former monarchy’s close relationship with the Catholic Church. See also Beller “Headscarf Affair”, above n 57, 593, where she depicts the 1905 French law reinforcing the separation of church and state as being a reaction to the Catholic Church’s interference and collusion with the military during the so-called Dreyfus Affair, when a Jewish army captain was wrongly accused of spying for Germany.
New Zealand and France therefore are a good case study in opposites with respect to secularism and its legislative expression. Westerfield describes the two types as “liberal” and “fundamentalist” secularism. The former type, as typified in states like New Zealand, demands a reasonably forceful, though at times ad hoc, requirement that state institutions and those working within them remain separate from religion, while allowing ordinary citizens to express their religious beliefs in private and, crucially, in public. The latter type, by contrast, as exemplified in France and Turkey, enforces a strict secular zone not only on the state and its employees, but also on private citizens themselves when interacting with public institutions, such as schools.

An incidental consequence of the relative permissiveness of the New Zealand educational scene for the purposes of religious dress issues in schools is that legislatively sanctioned religious exercises at state schools implicitly create a degree of moral space in which minority groups ought to be able to practise their religious beliefs at schools. For school boards (or indeed the national legislature) to object to this by banning religious attire could be seen as hypocritical, especially in schools that hold religious observances in assemblies or allow outsiders to enter school for the purpose of instructing students in religion. It will be recalled from our discussion in Chapter 4, moreover, that the building of a Muslim prayer room at a state secondary school in Christchurch in 2003 was found not to contravene the relatively mild secular principle in the Education Act 1964.

Conversely, in France the general absence of such government-endorsed rituals made it easier for the legislature in that country to ban religious symbols at state schools. For this reason, as well as others, there appear to have been very few controversies over religious dress issues in New Zealand schools and there have been none of the instances of litigation that have become commonplace overseas.

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70 In Begum, above n 6, [3], the House of Lords considered it significant that the school in question had gained an exemption from the legislative requirement that British schools conduct a daily act of collective worship of “wholly or mainly of a broadly Christian character” (see School Standards and Framework Act 1998 (UK), s 70 & sch 20). This made it easier for the school to justify its decision to prevent one of its students from wearing a jilbab.
71 Teachers employed at the schools may also serve as religious instructors if they desire it and school committees approve of it; Education Act 1964, s 80.
72 See section 2.2.1 in Chapter 4, where I discuss the minimal effect of this mild secular principle in the context of the burqa trial (R v Razanjoo [2005] DCR 408) and also with regard to the saga surrounding the building of a Muslim prayer room at Hagley College in Christchurch in 2003. The latter dispute saw ACT party leader Rodney Hide challenge the expenditure of public moneys in this way at a state school on the grounds that it breached the “secular” principle contained in s 77(b) Education Act 1964 (see text of this provision in n 62 above). Hide brought this issue to the attention of the Auditor-General, who dismissed the claim on the basis that the secular clause only required “teaching” to be of a secular nature at state primary schools, and did not in any case stand for a broader secular principle governing the operation of the whole legislative framework for education in this country.
73 One might add that the legal system in New Zealand is oriented to resolve issues regarding religion in schools in confidential mediations conducted by the New Zealand Human Rights Commission, with a strong official preference to avoid litigation for reasons of cost and a perceived societal desire to avoid confrontation; see Rhonda Evans Case “Enforcing New Zealand’s Anti-Discrimination Laws: The State as Public Interest Litigator in New Zealand” in R Bigwood (ed) Public Interest Litigation (LexisNexis NZ, Wellington, 2006) 133 (“Case ‘NZ’s Anti-Discrimination Laws’”), 151. There have been a number of these mediations, many concerning parents who are unhappy when their children are subjected to prayers at assemblies, or are inadequately accommodated when excused during religious instruction. For one such case, see New Zealand Human Rights Commission 10 Human Rights Cases – 2007 (December 2007) 13, available at: <www.hrc.co.nz/hrc_new/hrc/cms/files/documents/10-Dec-2007_12-23-58_HRD_Case_Studies_2007.pdf>.
That is not to say, however, that such controversies have been non-existent. As a starting point for closer consideration of the matter in the New Zealand context, we turn now to consider one dispute that did in fact receive quasi-judicial treatment in the mid-1990s.

2. The case of the Muslim boy

In 1994 the Human Rights Commission conducted a mediation on a complaint by a male Muslim student in the fourth form at Mt Roskill Grammar, an Auckland secondary school. The boy claimed that the school was discriminating against his religious beliefs because its uniform policy required that he wore shorts until he entered the sixth and seventh form years, at which time male students were permitted to wear long trousers. Wearing long trousers would, according to the child’s parents, comply with the Islamic dress code, which prescribed that the boy’s legs be completely covered in order to preserve modesty.

The Commission determined that the complaint had substance, finding that the school’s uniform policy amounted to indirect discrimination under s 65 Human Rights Act 1993. In reaching this provisional conclusion, the Commission adopted a two-stage enquiry. First it was necessary to make a prima facie finding that the policy actually infringed the boy’s religious beliefs. If the answer to this question was in the affirmative, it was nevertheless open to the Commission to determine that the uniform code should be allowed to stand if the school proved that it had “good reason” for imposing the shorts requirement.

Regarding the first part of the test, the school argued that no relevant breach of the boy’s religious beliefs had occurred. It claimed the student had effectively “contracted out” of his rights by virtue of his being made aware of the uniform requirements at enrolment, at which


75 It is worth noting that the Islamic requirement of modesty is directed at both females and males; see The Qur’an Surah 24: 30. Esposito states: “Both male and female forms of traditional and contemporary Islamic dress conform to a general understanding of modesty based upon the hadith.” John Esposito The Oxford Encyclopedia of the Modern Islamic World (Oxford University Press, New York, 1995) Vol I (“Esposito Islamic Encyclopedia”), 384. See also reported testimony of Victoria University religious studies academic, Professor Paul Morris, in Police v Razamjoo [2005] DCR 408, [16].

76 The Commission decided that since the uniform code “made no mention of religion”, it was appropriate to consider the matter under the indirect discrimination head in s 65. Selene Mize describes “indirect” (as opposed to “direct”) discrimination as involving “application of some practice or requirement that is neutral on its face – which does not expressly make any distinction by reference to a prohibited ground – but which has the effect of treating an individual or group differently on one or more of those prohibited grounds”. Selene Mize “Indirect Discrimination Reconsidered” (2007) 1 NZ Law Review 27, 28.

77 A finding that a complaint had substance did not mean that the child had “won”. Rather it meant that the Commission would thereafter “use its best endeavours to reach a settlement in relation to the complaint”, which in fact occurred in this dispute before further proceedings could ensue. See Human Rights Act 1993, ss 75(c) & 81(2) (repealed).

78 As provided by s 65, which reads: “Indirect discrimination: Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part of this Act other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.”
time his mother had signed a form agreeing to abide by the school’s dress code. It also argued that the boy could have secured a modest appearance by wearing shorts down to his knees and then by pulling his socks up to the knee. Furthermore, the school suggested that wearing long trousers was not really a requirement of the Islamic faith, as a “vast number of Muslims in many countries, including New Zealand, did not conform to the practice of teenage boys having to wear long trousers”. As we have seen in previous chapters concerning the religious validity of the burqa and FGM (where theological arguments could be made that the practices are not actually required, or, in the case of FGM, even permitted, by the Muslim faith79), the school’s second and third contentions were rejected by the Commission. In order to engage the religious freedom protections of the Human Rights Act, the Commission was only concerned to determine whether the boy’s beliefs were “sincerely held”. Having interviewed the boy personally, as well as a sympathetic Muslim organisation, the Commission found this to be the case.80 As a result – and apparently regarding as irrelevant the school’s first claim that the child had waived his rights by enrolling with full knowledge of the uniform requirements – the Commission decided that the policy clearly had the effect of interfering with his religious belief.

Once this determination was made the onus fell on the defendant school to prove that it had “good reason” to require that its younger male students wore shorts.81 The school contended that the code was strictly enforced because “in a school with such diversity of race, culture and socio-economic background the uniform symbolises that despite differences…when the students come together they do so as equals”.82 In assessing this claim the Commission also took the school’s 1994 prospectus into account. The prospectus stated that the aim of the uniform was “a neat, well groomed appearance which fosters pride in the school and in the student”. The school’s arguments ran into difficulty, however, when it became apparent that it did not in fact adhere to the policy across the board, thus raising equality concerns. In this respect, the Commission noted that another student had been granted a dispensation from the shorts requirement for medical reasons. Moreover, it turned out that the school had allowed some Somali girls to wear headscarves in the past, which detracted further from the assertion that strict enforcement of the uniform policy was intended to make all students “equals”. Bearing these factors in mind, the Commission formed the view that allowing the complainant to wear long trousers could not “undermine” the “stated purposes of the uniform policy in any way”.83 Put another way, the Commission’s thinking seems to have been that it was difficult

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79 It will be recalled that Judge Moore merely enquired as to whether Mrs Salim subjectively believed that Islam required her to wear a burqa. Once he was satisfied in this regard, he considered that her right to manifest her religious beliefs under s 15 BORA had been engaged. See Chapter 4, section 2.1.1. No doubt it could be argued that Islam does not require boys to wear long trousers; in fact Esposito suggests this is the case: “Men cover their bodies from their waists to their knees”. Esposito Islamic Encyclopedia, above n 75, 384.

80 Regarding the school’s compromise solution that the boy could wear long socks and shorts so as to cover his legs, the Commission accepted the child’s subjective view that this would not satisfy Islamic modesty requirements, because “the thigh may be exposed when sitting or praying and socks reveal the body shape whereas trousers, being loose fitting, do not do this”.

81 For a full judicial consideration of whether “good reason” existed in a case of indirect discrimination under s 65, see the judgment of Cartwright J in Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218 (HC).

82 Indeed, Mt Roskill Grammar has an extraordinarily diverse student roll. The current ethnic breakdown is: New Zealand European/Pakeha 12%, Maori 4%, Indian 29%, Chinese 19%, other Asian 10%, Samoan 8%, Cook Island Maori 2%, other European 2%, Niuean 1%, other 4%. Education Review Office “Education Review Report: Mt Roskill Grammar School” (October 2007); available available at <www.ero.govt.nz/ero/publishing.nsf/Content/Home+Page>. Figures for 1994 are not available.

83 The Commission also remarked that the school’s position appeared to be at odds with the wider goals of the school, as stated in its Charter; for example, one of the “Goals and Objectives” expressed in the Charter was to
for the school to argue convincingly that giving an exemption to the boy would destroy the purposes of the uniform policy when in fact exemptions had already been granted for religious and non-religious reasons. Consequently, the Commission found that the school had not established good reason for insisting the complainant wore shorts, and so made a provisional determination that a violation of s 65 had occurred. The school might have chosen to pursue the matter further, but in keeping with the New Zealand tradition of avoiding protracted litigation in these matters, it elected to amend its dress code, allowing all Muslim boys to wear long trousers on request.

The Commission’s finding appears to be a textbook application of the Equal Regard principle that was employed in the previous chapter to carve out an exemption for Mild Sunna FGM, with the methodology employed by the US Supreme Court in *Lukumi* providing guidance. Returning again to US jurisprudence for assistance, a useful comparison of the Commission’s reasoning can be made with the US case of *Fraternal Order of Police v Newark*, a decision that is regarded as a direct progeny of *Lukumi*.

In *Newark*, the US Court of Appeals for the Third Circuit was asked to declare that the uniform policy of the Newark City Police Department infringed the constitutional right to religious free exercise of two Muslim police officers who wished to wear beards while on duty. The department had issued an order that all officers were to be clean-shaven. The two officers, backed by a local imam, cited Islamic scriptural references requiring male adherents to the Muslim faith to grow beards. The policy clearly conflicted with this religious tenet, thus establishing a prima facie case under the First Amendment. In court the department argued that its policy was designed to present to the public a “monolithic, highly disciplined force” and that “uniformity [of appearance] not only benefits the men and women that risk their lives on a daily basis, but offers the public a sense of security in having readily identifiable and trusted public servants”. It also claimed that allowing officers to wear beards for religious reasons would undermine the *esprit de corps* and morale of the officer body. Judge Alito noted, however, that the department had granted an exemption from the rule to officers who suffered from a medical condition that meant they could not shave. The judge considered that this exception had the effect of undermining the department’s stated reasons for the rule. For example, the court said it was “at a loss” to understand the department’s stance that the presence of officers wearing beards for religious reasons would adversely affect public order.

“enhance learning by ensuring that the school’s policies and practices seek to achieve equitable outcomes for students from all religions [sic], ethnic, cultural, social, family and class backgrounds”.

Indeed, on the back of this finding, the Proceedings Commissioner decided to issue formal proceedings at the Complaints Review Tribunal on behalf of the complainant. For the procedural route available in complaints under Part II of the Human Rights Act 1993 prior to changes made to the system in 2001, see Case “NZ’s Anti-Discrimination Laws”, above n 73, 147.

In fact, it is possible that the Commission were influenced by *Church of the Lukumi Babalu Aye, Inc v City of Hialeah* 508 US 520 (1993), which was decided in the previous year, and is the seminal example of the Equal Regard principle in action, as discussed in Chapter 3 (see section 4.1) of this thesis. 170 F 3d 359 (3rd Cir) (1999) (“Newark”).

Eisgruber and Sager refer often to *Newark* as a prime example of Equal Regard in action. See, eg, Christopher Eisgruber & Lawrence Sager *Religious Freedom and the Constitution* (Harvard University Press, Massachusetts, 2007) 90-93; and see my own discussion of *Newark’s* central importance in the Equal Regard jurisprudence, in Chapter 3, section 4.1.

That is, pseudo folliculitis barbae, or inflammation of the facial skin caused by shaving, and which is said to affect many male African-Americans.
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confidence in the force (and, a fortiori, weaken the uniformity of appearance of the force to the public, as well as damage the internal esprit de corps of the department) whereas the presence of police officers wearing beards for medical reasons would not. For this reason, Alito J, in a straightforward application of the Lukumi principle, concluded that the department’s policy could not survive scrutiny under the First Amendment.

The similarity of the reasonings of Judge Alito in Newark and the Human Rights Commission in the Muslim boy case are evident: when a dress code places a burden on a religious practice, but is not applied uniformly in other religious or non-religious (e.g., medical) circumstances, it ought not to be allowed to stand. In Newark the uniform policy would have survived if it had been genuinely applied across the board, and the same might be said for the dress code of Mt Roskill Grammar. The Commission’s treatment of the Mt Roskill case therefore accords squarely with the general theory of Equal Regard proposed in this thesis. That said, questions remain as to whether the fact that the Mt Roskill dispute took place in the context of a school ought to have led to a different result.

2.1 Did the Human Rights Commission “get it right”?

Despite the neat fit of the Commission’s argument with the proper treatment of religious freedom disputes advocated in this thesis, it has to be said that its findings glossed over a number of points that deserved greater scrutiny. Principally, the Commission could be criticised for displaying little sensitivity towards the special needs of schools generally and of Mt Roskill Grammar in particular. It paid no heed to a strand of New Zealand and overseas jurisprudence, prevalent both before and after the enactment of the Human Rights Act and BORA, which has traditionally accorded considerable deference to decisions of school boards. According to this view, schools are a special, or “organic”, environment reflecting a delicate balance between staff, students, parents, and the wider community that should not

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92 Newark, above n 86, 367.
93 Current Free Exercise Clause doctrine (since Employment Division, Department of Human Resources of Oregon v Smith 494 US 872 (1990)) subjects laws to a minimal “rational basis test” if they are applied across the board, even if they substantially burden a religious practice; see, generally, my discussion of the development of US law in Chapter 2.
94 One argument that Mt Roskill Grammar could have made was that the rule allowing long trousers to be worn by senior students served a legitimate educational purpose as it provided a “reward” for students progressing through the school system. Similarly, in Newark, Alito J considered that the fact that undercover police officers were not prohibited from wearing beards ought not to be regarded as undermining the rule against beards. It is suggested that Mt Roskill could have made an analogous argument concerning its uniform policy towards older students, although its policy was perhaps sufficiently undermined by the granting of exemptions in other contexts.
95 To be fair, the published findings of the Commission in no way are to be regarded as final “judgments” on discrimination complaints and nor are they presented as such. These findings are a product of the statutory framework existent at the time, which required the Commission to make a merely provisional assessment as to whether complaints have “substance”. Such findings were, by definition, loaded to an extent in favour of complainants as part of an overarching goal to encourage compromise by employers, schools, and other bodies and persons subject to the Act. This procedural step was repealed by the Human Rights Amendment Act 2001. As of 1 January 2002, the Commission no longer publishes findings on substantive claims on its website. For other implications of the 2001 amendments, in particular that state schools are no longer subject to the constraints on discrimination contained in Part 2 of the Human Rights Act 1993 (including s 65) but rather to the discrimination standard provided by s 19 BORA, see Paul Rishworth “Religious Issues in State Schools” in J Hannan, P Rishworth & P Walsh Education Law (Seminar, New Zealand Law Society, 2006) 87, 96-99.
96 The classic post-BORA exposition of this position is that of Williams J in Maddever v Umawera School Board of Trustees [1993] 2 NZLR 478, 508 (HC), a case dealing with the processes by which a principal and school board dealt with a school discipline matter.
97 This is the term used by Lord Hoffmann in R (on the application of L) v Governors of J School [2003] 1 All ER 1012, [34].
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casually be disturbed by outsiders (including judges or Human Rights Commissioners) who are not privy to the special circumstances of each school’s culture and do not have the specialised training and expertise of school boards, principals and staff. It might therefore be said that one instance of this “organicness” in the Muslim boy dispute was the school’s position that, given the extraordinary ethnic diversity of its roll, there should be a fairly strictly enforced dress code so as to forestall any sectarian or cultural divisions among the student body. For a court, or for that matter the Human Rights Commission, to second guess a school board’s estimation of the correct balance to be struck in this respect might be regarded as ill advised.

The case law proposing this deferential view begins in New Zealand in the 1970s, and sees its apogee with regard to religious apparel issues in a House of Lords judgment in 2006. In the 1974 case of Edwards v Onehunga School Board, the Court of Appeal was asked to consider whether a school rule governing hair length was a reasonable exercise of the relevant school board’s statutory powers of management. The complainant, a third form student at the school, had been suspended by the principal for repeated refusals to comply with the hair regulations. Excluding the child from the school, the board relied on s 130 Education Act 1964, which permitted suspension when a pupil’s behaviour amounted to “gross misconduct or incorrigible disobedience” that might be an “injurious or dangerous example to other pupils”. For his part, the boy claimed that the rules infringed his “personal liberty” and sought to have the rule declared ultra vires the provisions in the Education Act 1964 that delegated power to boards to make bylaws. The Court held that a rule restraining “undue eccentricity of appearance” fell reasonably within the scope of the power delegated by s 61 to the board regarding the “control and management of the school”. The bulk of the remaining discussion in the judgment concerned whether the rule was, as required by s 61(2), a “necessary and desirable” measure that was in the interests of the control and management of the school. In determining whether the regulations were necessary and desirable, the Court decided that this was to be discovered by an objective test. However, because of the lack of any evidence from the complainant directly questioning the necessity of the rule, the Court set great store in the fact that the regulation had been created by a “school board comprised of parents, men and women, presumably of the locality in which the school is situated, with all

99 I infer the non-sectarian aims of Mt Roskill Grammar’s uniform policy from its argument that “in a school with such diversity of race, culture and socio-economic background the uniform symbolises that despite differences…when the students come together they do so as equals”.
100 R (on the application of Begum) v Head Teacher and Governors of Denbigh High School [2007] 1 AC 100.
102 The regulations stipulated that boys could not wear their hair over their eyebrows, over the ears, or over the collar. The judgment does not specify which aspects of the rules were breached by the boy.
103 Education Act 1964, s 130(1).
104 See Education Act 1964, s 61(1)(a), which empowered governing bodies of secondary schools to exercise “control and management of the school”. For a similar finding giving great latitude to school principals and boards in managing school affairs, see Rich v Christchurch Girls’ High School Board of Governors [1974] 1 NZLR 1 (“Rich”), where the Court of Appeal held that the decision of a high school to hold religious observances at assemblies was a reasonable exercise of the powers conferred by s 61, particularly in view of the long-standing nature of the practice and the fact that any children objecting to such observances (as had occurred in this case) were, upon producing a letter from their parents, able to excuse themselves from attendance.
105 Edwards, above n 101, 243.
106 Section 61(2) provided that a school board “may make such bylaws as are necessary or desirable to enable it to exercise the duties and functions conferred on it by this Act, and to direct and control its secretary, teachers, and other officers, and the school”.
107 Based on the phrasing of s 61(2), which did not contain any words conferring subjective competence on the board (such as, eg, “in the opinion of the board is necessary”). Edwards, above n 101, 243.
their experience as parents and members of the board” who had “thought it was necessary to prescribe hair length”. Thus, the Court came to the slightly awkward view that the subjective opinion of the board was decisive evidence of the rule’s objective necessity, and found that the rule was valid overall. Moreover, as part of its subsequent consideration of whether the persistent defiance of the rule by the boy justified his suspension on the grounds that his behaviour was “incorrigible or disobedient” conduct that may be an “injurious or dangerous example” to others, the Court gave weight to the fact that to “allow the boy to have succeeded in the circumstances would have provided a very bad example for the rest of the school and militated against the maintenance of control and discipline”. And so, to the finding that the rule was “necessary” solely by virtue of its being formulated by a democratic body (ie, the school board), was added the further point that to allow the boy to escape suspension would have damaged the authority of the school’s management, in particular that of the principal. Edwards stands out therefore, albeit two decades previously, as a counterpoise to the student-friendly and individual rights-centred position of the Human Rights Commission in the Mt Roskill case.

There have been a number of legal developments since the 1970s that cause one to doubt whether a similar result would obtain today. However, despite this, Edwards remains a powerful authority in New Zealand, in part because it is the only reported case dealing with student expressive rights. In the event, however, that a dispute with similar facts to Edwards were to be litigated today, two new factors (which, it will be seen, pull in different directions) would need to be considered by a court. The first of these is the enactment of the Education Act 1989 and its potential importation of legislated human rights considerations into judicial review of the decisions of school boards. The second factor is the somewhat ambivalent response of the judiciary to these legislative changes in cases concerning student rights. We now consider these in turn.

First, the bylaw-empowering provision in the Education Act 1964 has been replaced by a differently worded section in the Education Act 1989. This change has significant implications in respect of school boards’ responsibilities towards student rights. Section 72 of the current Act provides:

Bylaws – Subject to any enactment, the general law of New Zealand, and the school’s charter, a school’s Board may make for the school any bylaws the Board thinks necessary or desirable for the control and management of the school.

At first glance, it seems clear the new provision has the effect of giving boards more freedom in determining what bylaws are needed to secure the running of schools, thanks to the delegation of greater discretion implied in the words, “any bylaws the board thinks necessary”. However, this broader independence is immediately qualified in the same section, where it explicitly subordinates the discretion to make bylaws to school charters, and, importantly, “any enactments”. These subordinating words require boards to consider

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108 Edwards, above n 101, 244.
109 For this point, see Caldwell “School Discipline”, above n 98, 241.
110 Edwards, above n 101, 244.
111 See also s 75, which grants boards “complete discretion to control the management” of schools as they think “fit”, subject again to other enactments and the general law of New Zealand. Note that the “general law of New Zealand” is regarded to be the common law.
112 Note that, regarding the goals expressed in charters, boards are responsible for adhering to these only to the Minister of Education, and the Minister alone is empowered to enforce compliance through court proceedings; Education Act 1989, s 64.
relevant human rights legislation when formulating bylaws; and they also provide a concomitant opportunity for parents and children to challenge school rules if they appear to infringe, for example, the right to freedom of expression or the right to manifestation of religious belief, as protected by BORA. This requirement of adherence to legislated human rights standards was, of course, not present when Edwards was decided in the 1970s.113

The revised section has the potential to subject all school board decisions affecting student rights to proportionality analysis by courts under the methodology distilled from the words of s 5 BORA, as has occurred in many other contexts where the courts have adopted the Canadian approach to assessing reasonable limits on rights in cases such as R v Oakes.114 Indeed there is academic commentary to the effect that this should be the case. In 1992, shortly after wide-ranging reforms to the educational system in 1989 (of which the revision contained in s 72 Education Act 1989 was a part) and also just after the enactment of BORA, a joint article by three legal commentators argued that the traditional administrative law stance of the courts to accord wide discretion to decision-makers acting under powers delegated by statute should now be subject to s 5 BORA considerations.115 The authors advocated that a BORA analysis ought thenceforth to be “logically prior” or “superimposed”116 on the less demanding administrative law scrutiny typified in cases like Edwards, where the discretionary decision of the public body in question had been considered presumptively valid and the onus had been on the complainant to prove unreasonableness under the relatively high thresholds pertaining in administrative law jurisprudence. Under the BORA regime, it was argued, decisions made under generally expressed statutory powers would now have to survive the proportionality enquiry mandated by s 5 BORA,117 with the consequence that where this standard was not met, a rights-offending rule (or rights-offending applications of a rule) would be “struck down”. Moreover, the authors went on to opine that: “[v]ague assertions of deference or non-justiciability have now to survive the transparent particularisation and weighing which s 5 requires”.118 The standard approach of administrative law analysis that we saw in Edwards, therefore, was to be subsumed by a more rights-centred enquiry, in which administrators would have to give reasons for their decisions, and these reasons would be assessed as to their proportionality in similar fashion to the analysis that was applied in Chapter 5 of this thesis to the law banning FGM. This could not be deflected by assertions that courts ought to defer to administrative bodies for reasons of their greater expertise or democratic credentials.119

The authors gave a hypothetical example of how this new regime might work in the school environment that is germane for our purposes.120 They considered an action of a school board

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116 Ibid 68 & 96.
117 Decisions made according to rules created by schools under the bylaw-making powers contained in ss 72 & 75 would not be saved by s 4 BORA (the provision that preserves “enactments” against invalidation even if they are inconsistent with BORA) as they do not constitute enactments. Rather, such decisions (or even the rules themselves) could be “struck down” if a complainant could show a prima facie breach of a BORA right had resulted from the school’s application of a rule, and the school could not successfully defend this application as a reasonable limit on the right under s 5 BORA. See ibid 68.
118 Ibid 96.
119 Ibid.
120 Ibid 93-96.
using its statutory powers of school management to remove history books from a school library that portrayed New Zealand’s involvement in World War II in an unfavourable light. As a starting point they noted the decision would arguably infringe students’ rights in that it would interfere with their right to “receive information”, as guaranteed by s 14 BORA. A possible justification for this action by the putative school board would be that the goal of “inculcating patriotism” justified the limitation on the pupils’ rights. The authors doubted, however, whether this would be a sufficiently strong interest to discharge the s 5 burden, in part because less restrictive means could be employed to achieve this goal. For example, the books could have been retained and access to them for students could have been provided under supervision, in which the content of the “unpatriotic” literature could have been debated.

This type of detailed analysis is to be contrasted with the Court of Appeal’s satisfaction in Edwards that the hair length rule was ipso facto valid because it had been made by a lawfully constituted school board pursuant to the power to make bylaws under s 61 Education Act 1964. In the library books example given above, the subjective belief of a board was not enough to save a rights-restricting decision. No doubt the authors of the 1992 article would argue that a modern litigation involving the same facts as Edwards would be subjected to a far more searching and objective review by the courts. It would certainly not start and end with a school board’s assertion of the need for a rule.

The proof of the methodology advanced in the article was, however, to be in the pudding. In the post-BORA High Court case of Maddever,121 Justice Williams explicitly endorsed the Court of Appeal’s solicitude in Edwards for the democratic decisions of school boards. In his view these decisions had a democratic legitimacy that placed them beyond the reach of judicial review, save for the most serious intrusions on student rights.122 For our purposes the case is interesting because the judge went out of his way to question the wisdom of the methodology advanced in the 1992 article as it pertains to exercises of statutory discretion by school boards.123 Before considering his comments in this respect, a brief summary of the grounds for the decision is necessary.

The case involved a parental complaint concerning the way a headmaster and board had dealt with the disciplining of a 10-year-old child who had been caught punching another student in the school playground. The child was not suspended, although he was withdrawn from the school by his parents when they became dissatisfied with certain actions of the school in relation to the matter. The principal had informed the parents about the incident and, after they expressed anger at the principal’s treatment of the child (they accused her of calling him violent), she chose to report the matter to the school board the next day. The board then resolved to endorse the principal’s actions. Williams J found no difficulty in rejecting each of the complaints directed at the school’s approach to disciplining the child and upholding the principal’s conduct. For example, the parents attempted to characterise the meeting of the school board as a “decision” and argued that, according to rules of natural justice, they were entitled to be notified of this meeting and to be able to attend it and make submissions. Williams J rejected this argument, as there were in his view no real statutory powers of decision being exercised and, moreover, there were no serious matters involved affecting the educational options or status of the child that warranted the imposition of procedural safeguards of this type.124 Also, Williams J noted that the incident had occurred three years

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121 Maddever v Umawera School Board of Trustees [1993] 2 NZLR 478 (HC) (“Maddever”).
122 Ibid 508.
123 Ibid.
124 Ibid 496.
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previously and that the child and the principal had since left the school, thus rendering any decision to grant relief futile and moot. Furthermore, the matter had been thoroughly investigated by the Ombudsman, who had found no substance in the complaint. All of these matters (and others) singly and collectively led to the judge refusing to intervene in favour of the complainants.

Given its inconsequential facts and the ease with which the complaint was dismissed, the case might have passed without much notice were it not for a number of pronouncements made in passing by Williams J that were of broader application and which remain potentially relevant to cases involving students’ expressive rights. His Honour contended in a section of the judgment entitled “Unsuitability of judicial review in relation to managerial role of school boards” that decisions made by school boards in managerial or administrative matters ought not to be questioned by the courts where these decisions do not “seriously” affect the rights of students. He explained his position principally by reference to the intention of Parliament in enacting the Education Act 1989, a major reform of the administration of education in the country, presented by the prime minister of the time under the moniker, “Tomorrow’s Schools”. Key among these intentions was the desire expressed in the 1988 Picot report (on which the law was based) to devolve greater democratic control of schools to the localities in which they existed and to move away from the heavily centralised system of the past. According to this vision, the main forum for oversight of school board decisions was thenceforth to be democratic, not judicial, in nature. Williams J deduced this from his assessment of the cumulative intent of the Act’s numerous specific provisions for student rights and democratic governance, which suggested to him that these ought to be virtually the only source of rights for students. Included among these were: provisions that required compulsory annual boards meetings, the presence of parents on boards of trustees, and frequent elections held for these trustees. These rights were further supplemented by other statutory checks on board powers and specific rights for students provided under the Act, which, taken as a whole, informed his impression that judicial oversight of board decisions was intended to be minimal and that other, chiefly democratic, means should be employed when challenging board decisions affecting students.

Having made this point after declining to grant relief to the complainant in the case at hand, Williams J noted the 1992 article cited above and the fact that his position might be “unattractive” to those who espoused a “robust expansion of judicial review” in light of BORA. The arguments put forward in the 1992 article certainly appear to contradict

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125 Ibid 502-503.
126 Ibid.
127 For commentary on the significance of Maddever, see Caldwell “School Discipline”, above n 98; and Paul Rishworth “Recent Developments in Education Law in New Zealand” (1996) 1 Austl & NZ JL & Educ 33, 37-39.
128 Ibid 508.
130 Ibid 505.
131 Ibid 506. See ss 92, 94, 96 & 100 Education Act 1989. Williams J also notes that: a malfunctioning board can be audited for financial probity (s 84(2)); the Education Review Office is required every 3 years to report on schools’ progress in eliminating “barriers to the progress of students” (s 230); and the Secretary of Education has powers to dissolve a board which is inactive or guilty of mismanagement or unlawful behaviour (ss 106 & 107).
132 Williams J lists as examples, ss 10, 14, 15, 18, 19 & 21 Education Act 1989. Section 19, for example, stipulates notice requirements and requires reasons to be given when schools expel or stand down students.
133 His Honour gleaned further support from an impressive array of both domestic and foreign academic and judicial commentary on the proper function of judicial review in a democracy. See ibid 507-508.
134 Ibid 508.
Williams J’s strongly articulated deferential approach to school board decisions and his carefully laid out argument that student rights should primarily be sought within the four corners of the Education Act 1989 and the limited catalogue of statutory rights contained therein. Some might say that Williams J’s position may not apply to bylaws or other decisions that interfere with student rights, as opposed to mere lapses in procedural steps in school expulsion cases (which was the issue in Maddever, although no expulsion had in fact taken place), but the judge seemed aware that a distinction of this type might be made and made it clear that judicial intervention in school decisions ought to be exercised infrequently and only with great caution, even in cases where a pupil’s rights were concerned.135 His conclusion on this matter included an endorsement of the Edwards decision and, like that judgment, is a vote of confidence in local democracy in the form of school boards of trustees. It is worth quoting at some length:136

Against this background, it seems clear that except in rare cases it would be wrong for the Court to intervene too readily in cases brought against boards of trustees in relation to purely managerial or administrative matters not seriously affecting the rights of students: see Edwards v Onehunga High School Board at pp 244-245. If such matters become contentious they should be negotiated, mediated and resolved at the local level. The legislation is informed by the democratic belief that responsibility is the great developer of the citizenry and that issues of local educational administration be best left for resolution through the individuality of local communities. A tendency to turn always to the law for resolution of these matters would be unwise and inappropriate. Support for decisions made within local schools must be found by means other than their vindication in Courts of law. To paraphrase the words of Frankfurter J in West Virginia State Board of Education v Barnette 319 US 624 (1943), 646, a persistent positive translation of the concepts of fairness, equity and justice into the convictions, habits and actions of a local school community will be the ultimate protection against maladministration and unfairness.

The Maddever decision therefore appears to breathe extra life into the 1970s-era decision of Edwards137 despite the subsequent enactment of human rights legislation, and in spite of even the implied reference to this legislation within the Education Act itself in ss 72 and 75.

There does, however, exist a different strand of case law that takes a different approach to student rights.138 In numerous cases in the 1990s and beyond the courts have chosen to look more closely at school decisions affecting the rights of students and have in some instances overturned these decisions.139 For example, in M and R v S and Palmerston North Boys’ High School,140 Justice McGechan quashed the decision of a school principal and board to discipline two students who had consumed alcohol on a school trip.141 The school rules had stipulated

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135 Ibid 509.
136 Ibid 508-509.
137 Williams J also cites with approval the other 1970s-era reported judgment of Rich v Christchurch Girls’ High School Board of Governors [1974] 1 NZLR 1. In this case, the Court of Appeal dismissed a complaint that a school principal ought not to have been present at a school board meeting that upheld the principal’s decision to suspend two girls for defying a school rule. The girls had argued that the principal ought not to have been present at this meeting, as she was in effect their accuser and this offended the natural justice principle of nemo debet esse iudex in sua causa. The Court held that s 198 Education Act 1964 entitled the principal to be present and refused to read in the natural justice requirement, stating that, in the interests of “practical efficiency”, it was more important that the principal be present than it was to observe “abstract justice” of this sort.
138 Caldwell tracks these opposing lines of jurisprudence; see, generally, Caldwell “School Discipline”, above n 98.
140 [2003] NZAR 705.
141 One student was eventually expelled by the board after initial suspension at the instigation of the principal, while the other was indefinitely suspended.
immediate suspension for the consumption of any alcohol and the school applied this rule, incorrectly in the judge’s view, without pausing to consider mitigating factors, such as the amount of liquor consumed (in both cases being less than a can of beer). McGechan J analysed the deliberative processes of the principal and board and determined that the decision was made in an inadequate way. The judge considered that insufficient discretion was exercised and the boys were treated in an automatic fashion by a “remorseless rule” without any consideration of their otherwise good behaviour or giving any thought to general principles of humanity and mercy. The judge was aware that his decision might be perceived as detrimental to school authority, but, unlike the Court of Appeal in Edwards, he believed that “justice and fairness” demanded the result.

John Caldwell explains that the “longstanding” tradition of judicial deference to school authority that is exemplified in cases like Maddever is “unlikely to prove enduring”, and that the decision in M and R v S and PNBHS indicates a sea change in judicial attitudes. Caldwell points to changes in the socio-legal culture and a greater solicitude for the rights of children as individuals as factors underlying McGechan J’s decision. The Convention on the Rights of the Child, argues Caldwell, will play a key role in the change, even if it is not directly cited in the case law. In discussing the Convention, Caldwell notes several articles that could be directly relevant to any decisions made by schools in matters implicating child rights. For example, Art 3 of the Convention provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Caldwell comments that, although this article does not mean that the rights of individual children will be “necessarily exclusive”, it will mean that the earlier case law which dismisses “child rights” suits on the basis of school authority or autonomy might not “cohere well” with the Convention’s general philosophy of according greater autonomy to children. Caldwell then suggests that the obiter comments of Williams J in Maddever in regard to the authority of schools vis-à-vis students might hold less sway than previously if they are put before a court in the modern era. It is more likely, he continues, that future court decisions will

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143 Caldwell also indicates, in relation to the law relating to suspensions and other exclusions from school, changes to the Education Act 1989 in 1998, which specifically require schools, inter alia, to have regard to the rules of natural justice when disciplining children; see ibid 243-245.
144 Ibid 245-248.
145 United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990 (ratified by New Zealand 6 April 1993). The Convention also refers to the religious rights of children; see, eg, Art 30: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”
146 For a different view of the impact of the Convention, see Paul Rishworth “Stand down, suspension, exclusion and expulsion from a state school” in J Hannan, P Rishworth & P Walsh Education Law Update (Seminar, New Zealand Law Society, 2008) 53-55. Rishworth notes that the best interests of the child referred to in Art 3 are merely a primary consideration, not the primary consideration. Thus, it could be argued that it may be in the interests of a school as a whole (including other students in it) that a decision to remove a student, or to impose other rules on him or her, may be regarded as satisfying Art 3.
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seize on other comments by Williams J in the case that could be read as supporting an “expansive approach to judicial review”.\textsuperscript{148}

Caldwell’s article has received some judicial support,\textsuperscript{149} although it must be reiterated that there have as yet been no cases putting his thoughts to the test in a controversy involving student expressive rights. It is likely therefore that overseas decisions that deal with matters such as religious dress will play a large role in any judicial proceedings on the point. Due to the traditional reliance on British case law in New Zealand education law jurisprudence it is likely that one of the first ports of call for argument will be the case of \textit{Begum}, which was decided by the House of Lords in 2006. In this case, which conspicuously made no mention of the Convention on the Rights of the Child, the House of Lords upheld the decision of a school to prohibit a 12-year-old girl from wearing a jilbab at her school. In rejecting her claim under Art 9 of the European Convention on Human Rights, their Lordships used language which echoes that of Williams J in \textit{Maddever}. When asked to delve into the school’s reasons for prohibiting the garment the speeches of the majority judges on this point exhibited considerable deference to the school’s choice. Lord Hoffmann, for example, after noting that the school wished to prevent the girl from wearing the jilbab because to allow it would expose other Muslim girls to pressure from other Muslims both within and outside the school to wear it, ultimately chose not to assess the school’s decision on the merits. Instead, he said:\textsuperscript{150}

\begin{quote}
It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision.
\end{quote}

This school’s decision therefore survived, and Lord Hoffmann’s vindication of the authority and autonomy of schools on such matters sits squarely within the line of jurisprudence in this country that was endorsed in \textit{Edwards} and \textit{Maddever}. In \textit{Begum}, moreover, there was no serious or systematic proportionality enquiry along the lines suggested in the 1992 journal article discussed above; all the intricacies of a s 5 BORA enquiry that were advocated in the article were subsumed within the deference principle. Most importantly for our purposes, the House of Lords decision, as we shall see below, did not question at all the fact that the school already allowed other girls to wear Muslim dress at the school (it allowed other girls to wear the hijab, and also the shalwar kameeze, a garment that is favoured by Muslims from the Indian subcontinent). As we saw in the Muslim boy controversy, this factor was critical in the Human Rights Commission’s assessment in 1994 that Mt Roskill Grammar’s uniform policy was discriminatory. The case of \textit{Begum} therefore calls into question whether the Commission’s finding would be a correct statement of current law in this country.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{148} Ibid 248. Caldwell refers to Williams J’s comment that courts might intervene when school decisions “seriously” affect the rights of students. See \textit{Maddever}, above n 121, 509.
\item \textsuperscript{149} See \textit{J v Bovaird and Board of Trustees of Lynfield College} [2007] NZAR 660 (HC) [42]. Note, however, that this High Court judgment was appealed to the Court of Appeal and some aspects of the decision were overturned, although the final result was upheld. \textit{Bovaird and another v J Suing by his Litigation Guardian} [2008] NZCA 325 (27 August 2008).
\item \textsuperscript{150} \textit{R (on the application of Begum) v Head Teacher and Governors of Denbigh High School} [2007] 1 AC 100, [34].
\item \textsuperscript{151} \textit{Begum} was noted by Caldwell as a possible qualification of his thesis that judicial review of school decisions will become more intense in the more rights-friendly modern culture. Caldwell “School Discipline”, above n 98, 250. Moreover, \textit{Begum} has received some judicial support in the education law context in this country. See \textit{Bovaird and another v J Suing by his Litigation Guardian} [2008] NZCA 325 (27 August 2008), [53].
\end{itemize}
It is interesting to speculate whether the Commission’s findings would be affirmed if the same facts arose again and were contested in a court setting, with the school board relying on the Edwards-Maddever-Begum line of authority. One suspects that the school may have had difficulty, ultimately, in convincing a court that allowing the Muslim boy to wear long trousers really would have defeated the school’s purpose to present a “neat, well-groomed appearance” and that to do so would create sectarian resentments and vitiate the goal of creating an environment of “equals” in an ethnically diverse school. Long trousers, after all, were already part of the dress code, so as a matter of pure rationality this may have been problematic for the school. In these circumstances, the board would have had to rely on a great deal of deference for its views, based on its presumed expertise and democratic credentials. In short, I would suggest that the actual facts of the Muslim boy case favoured the complainant more than the school and this perhaps explains why the school decided to amend its uniform policy without litigating the matter further. In cases such as these, the specific facts are likely to have a major downstream effect on a court’s predisposition towards one side or another in a dispute over student rights in the school environment. In Begum, for instance, the House of Lords was careful to point out that its decision was highly facts-specific, and it is clear from the wide variance in outcomes worldwide in this area that the associated jurisprudence will inevitably reflect this.

The question remains, however, whether a fact situation that is more promising from a school’s perspective would prompt a different treatment in a court from that offered by the Human Rights Commission acting in its quasi-judicial function in the Muslim boy dispute. What would happen, for example, if a school like Mt Roskill, having relaxed its dress code to allow headscarves for Muslim girls and long trousers for all boys, were subsequently challenged by a student who wished to wear a religious garment that was not on the permitted list of items at all? This is what was at issue in Begum and in that case the school’s view ultimately prevailed. We turn now to consider the merits of the Begum decision in more detail, before assessing the likely persuasive power of the House of Lords’ reasoning in the New Zealand context in a case with similar facts.

3. The UK jilbab case (Begum) considered

The jilbab controversy at Denbigh High School in Luton, UK, first came to national attention in 2004 when the school refused to accommodate a pupil who wished to wear the garment.

152 In Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218 (HC), 242 & 243, Cartwright J explained that a policy can meet the “good reason” standard if the means chosen to pursue the objective of a limitation on a right are “suitable for attaining the objective pursued by the enterprise”, or, in other words, if the rule is “rationally connected” to achieving the goals of a limitation. The school may have struggled to show it met this rationality test in its position banning long trousers, even if it had not fatally compromised its policy by granting exemptions from the rule for medical reasons and for older students.

153 Whether a complainant asserting the same facts which were at issue in Edwards would be able to satisfy a modern court that his choice to have long hair ought to be regarded as within the scope of the right to freedom of expression in s 14 BORA would also be an interesting debate. In Edwards, the boy did not claim any special spiritual or expression-related significance to his actions. It had merely been said on his behalf that this “principle” may have been a simple desire to defy the school authorities. Edwards, above n 101, 240. That said, the tendency in modern New Zealand jurisprudence has been to accord a very wide scope to the right to freedom of expression; see, eg, Brooker v Police [2007] NZSC 30 (SC), and Hopkinson v Police [2004] 3 NZLR 704(HC).

154 Lord Bingham, for example, said: “It is important to stress at the outset that this case concerns a particular pupil and a particular school in a particular place at a particular time.” Begum, above n 6, [2].

155 These are indeed the current uniform requirements at Mt Roskill Grammar; see “MRGS Uniform 2008”, available at: <www.mrgs.school.nz/uploaded/Uniform2008.doc>.
This was in the same year that the French legislature passed its law banning the wearing of all conspicuous religious symbols by students in its state schools. Unlike the present situation in France, there has never been any statutory direction given to British schools on this matter, with the result that decisions on uniforms have been left chiefly to the schools themselves. Commentators have remarked on the different approaches to integration of immigrants in the two countries, with the UK taking a more multiculturalist, laissez-faire stance in contrast to the greater French emphasis on assimilation of foreign immigrants into the ideal of republican citizenship, with the centralised French state directly enforcing this ideal. Thus, viewed side by side, the French national veil law of 2004 and the British approach of leaving the matter to school boards provide a good example of the differing philosophies of the two countries in this respect.

In the 1990s, when the veil issue was being hotly debated in France and had been the subject of several judicial treatments and ministerial interventions, the matter appeared to attract very little concern in the UK. In one dispute in 1990 that was never litigated, the principal of a school in Cheshire sent home two Muslim girls for wearing headscarves in contravention of school rules. The headmaster claimed that the scarves were too long and free flowing, and so constituted a hazard in laboratory and gym classes. She also drew support for her position from the fact that the local Muslim council had not advocated the wearing of headscarves when consulted on the school’s uniform. After negative media reporting of the incident, however, the school governors reversed the principal’s decision and allowed the girls to attend school wearing veils, as long as they were in the school colours, trimmed in length and properly secured to address safety issues. This episode, when compared to the furore across the English Channel, suggested that the British multicultural model was more amenable to local solutions to the problem. In this respect therefore the British scene resembled the current situation in New Zealand regarding religious dress issues in schools: a small number of local disputes with few reaching the courts, and a willingness on the part of school authorities (and students) to compromise when conflicts do arise.

The relatively peaceful landscape in the UK was to change, however, at the start of the new century and began to resemble more the circumstances in France. The Begum litigation heralded a spike in cases regarding religious symbols in schools. This was no doubt due to pressures familiar to most Western countries at this time: an expanding population base of Muslims leading to greater visibility, and a rise in public awareness of their presence induced by the terrorist events of 2001 and 2005 in New York and London. These factors, alongside a

157 See McGoldrick Islamic Headscarf, above n 17, 64-73; Poulter, above n 16, 57-62.
158 After this consultation, the dress code allowed the wearing of a “shalwar”, described by Poulter as “loose-fitting trousers worn by large numbers of Asian women and girls in this country in pursuance of religious norms or cultural traditions”; Poulter “Headscarves in School”, above n 16, 65.
159 Ibid 67.
160 Prior to the enactment of the Human Rights Act 1998 (UK), there was one major litigated dispute. In Mandla v Dowell Lee [1983] 2 AC 548 (HL), the House of Lords ruled that a headmaster’s refusal to admit a Sikh pupil at his school because he wished to wear a turban contravened the Race Relations Act 1976 (UK). As Sikhs constituted an “ethnic” group for the purpose of the Act they were able to benefit from its protection. For discussion, see Poulter “Headscarves in School”, above n 16, 63.
161 See McGoldrick Islamic Headscarf, above n 17, 176-179, for discussion of the few incidents that did occur, all of which were successfully resolved by pragmatic compromises.
162 According to the 2001 census, there are 1.6 million Muslims resident in the UK, or nearly 3% of the population of 58 million; Office for National Statistics, UK Census 2001 “Religion in the UK”, available at: <www.statistics.gov.uk/cci/nugget.asp?id=293>.
perception that the multiculturalist policies of the British state had had the unintended effect of causing divisions in society,\(^{163}\) perhaps resulted in greater resistance in communities and in school governing boards to accommodate religious diversity, thus creating a more litigious environment. The sudden increase in litigation can also be attributed to a greater possibility of success in suing schools in the British courts since the enactment of the UK Human Rights Act 1998, which incorporated the European Convention on Human Rights into domestic law and thereby gave religious claimants more direct recourse to the religious freedom protections contained in Art 9 of the Convention.

The House of Lords’ decision in Begum is especially significant as it was the final word on the first judicial exploration in the UK of Art 9 that dealt with religious dress issues at schools and because it provided the basis for subsequent findings in lower courts. In two post-Begum High Court decisions,\(^{164}\) the religious claimants were unsuccessful and the rationales deployed by the judges in these cases suggest that future claims concerning all but the most egregious of interferences by schools with the religious practices of students would likely end with similarly negative judicial findings. Given that Begum is likely to be a highly persuasive authority should such issues come to court in New Zealand, it is worthwhile now to examine the Begum case in greater detail.

3.1 The Begum case

In March 2005, Shabina Begum was celebrating her success in a two-year legal campaign to assert her right to wear a jilbab at her local school. The English Court of Appeal (CA)\(^{165}\) had just quashed an earlier decision in the High Court (HC)\(^{166}\) which denied her claim that the school’s refusal to permit her to wear the garment was a violation of Art 9 of the European Convention on Human Rights. In a triumphant interview in the Guardian, Shabina described the result as a victory for all Muslims who wished to “preserve their identity and values despite prejudice and bigotry” and expressed dismay that something “as simple as the jilbab still takes two years to get okayed”.\(^{167}\) If things had rested there, Shabina’s win in the CA may have been viewed as sitting comfortably along the continuum of previous disputes in that country (with the Cheshire incident being a prominent example) where favourable results for religious claimants were achieved through negotiation and compromise.\(^{168}\) Unfortunately for Shabina, this was not to be.

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\(^{163}\) This perception has been promoted by statements from politicians; see, eg, Michael Portillo “Multiculturalism has Failed but Tolerance Can Save Us” The Sunday Times (UK, 17 July 2005); and also by government reports describing the potential negative effects of multiculturalism on social cohesion; see, eg, UK Home Office Community Cohesion: a Report of the Independent Review Team (January 2003), available at: <www.homeoffice.gov.uk/docs2/comm_cohesion2.html#top>.

\(^{164}\) The first concerned a Muslim girl’s wish to wear a niqab, or full-face veil; the second a Christian girl’s desire to wear a chastity ring at school. In both cases the High Court rejected the girls’ claims that a violation of Art 9 ECHR had occurred: see, respectively, R (X) by her Father and Litigation Friend v Y School [2007] EWHC 298; and R (on the application of Playfoot (a minor) (by her father and litigation friend Playfoot)) v Governing Body of Millais School [2007] EWHC 1698. Compare these decisions with a later case that was decided on different authority than Begum. In R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls’ High School [2008] EWHC 1865, a Sikh girl who wished to wear a kara (or religious bracelet) to school succeeded in overcoming her school’s objections, after invoking the Race Relations Act 1976 (UK) and the Equality Act 2006 (UK).

\(^{165}\) R (on the application of SB) v Governors of Denbigh High School [2005] 2 All ER 396 (“Begum CA”).

\(^{166}\) R (Begum) v Headteacher and Governors of Denbigh High School [2004] EWHC 1389 (“Begum HC”).

\(^{167}\) See interview with Shabina in D Aslam “I could scream with happiness. I’ve given hope and strength to Muslim women” The Guardian (UK, 3 March 2005).

\(^{168}\) Note that it is a slight mischaracterisation to say that Shabina “won” her case in the CA. The judgment itself had simply quashed the school’s decision, and asked it to reconsider the matter using a more rigorous, rights-
Instead of altering its uniform policy to incorporate the jilbab, as it was invited to do by the CA, the school chose to resist the 2005 finding and launched an appeal. A year later the House of Lords (HL)\(^9\) restored the HC decision and, in a series of speeches redolent with generous statements about school autonomy, endorsed Denbigh High School’s choice not to accommodate Shabina’s request to wear the jilbab. How did things change so much between 2005 and 2006?\(^9\) Our analysis considers first the CA’s reversal of the HC decision, before looking at the HL judgment and its vindication of a school’s general right to set its own boundaries on religious dress issues.

3.1.1 *The decision at first instance and its reversal in the Court of Appeal*

Shabina Begum entered Denbigh High School in 2000 at the age of 12.\(^7\) This secular coeducational state school boasted a very diverse roll, including 21 different ethnic groups, and 10 religious groupings, with 79% of the student body being Muslim. Of the racial groups present, Bangladeshi and Pakistani students predominated, comprising 71% of the total.\(^8\) Shabina herself was Muslim and was born in the UK to parents who had come from Bangladesh.\(^8\) The school’s diversity was reflected, for example, in the fact that four of the six parent members of the school’s governing board were Muslim, and also in that the school principal since 1991 was born of a Bengali Muslim family and had grown up in India, Pakistan and Bangladesh. Furthermore, due to its religious and ethnic diversity, the school was exempted from the statutory requirement that it engage in a daily act of collective worship wholly or mainly of a Christian character.\(^9\)

The school’s uniform code had been re-examined in 1993 by a working party comprised of board members who consulted parents, students, staff and the leaders of three local mosques. The working party recommended the continuation of the school’s flexible dress policy and the governing board approved this. The prime exception to the standard policy\(^9\) was the shalwar

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\(^7\) Unless otherwise indicated, the facts I rely on here are the “agreed facts” recounted by Lord Bingham in the House of Lords; see *Begum HL*, [1]-[19].

\(^8\) Ibid [73].

\(^9\) This fact is only mentioned in the HL judgment; *Begum HL*, [3] (per Lord Bingham).

\(^9\) The base uniform consisted of a skirt or trousers (for boys or girls) and a long-sleeved shirt to be worn with a tie, and v-neck jersey in cooler weather.
kameeze, which pre-existed the 1993 working party’s enquiry. The kameeze was a “sleeveless smock-like dress with a square neckline”, which showed the student’s collar and school tie and reached to the mid-calf. This was complemented by the shalwar, a garment of loose trousers that tapered at the ankles. This combination, which was endorsed by the local Mosques, had been worn by female students of the Muslim, Sikh and Hindu faiths without complaint for many years. Also, following requests made after the working party report, the governing board expanded the optional component of the uniform to include headscarves in the school colours.

The dress code was explained clearly to all pupils before entering the school, including Shabina, who wore the shalwar kameeze during her first two years of study. In September 2002, however, she arrived at school on the first day of a new term with her brother and another man. A “confrontational” meeting then took place with the deputy principal, during which the group insisted that she be permitted thereafter to wear the garment she had on that day, which was the jilbab. They said the shalwar kameeze was not suitable for maturing girls of the Islamic faith and that the jilbab was more appropriate, as it concealed more of the body and also the body shape. The deputy principal responded by saying she should go home and return to school wearing the correct uniform. They then left but Shabina was never to return to the school.

After this meeting, there ensued two years of negotiations during which no compromise was reached. The governing body of the school supported the initial stance of the deputy principal (and later the principal) and sought confirmation from independent Islamic authorities as to whether the uniform offended against the Muslim dress code and were assured that it did not. The school consistently invited Shabina to return to the school if she wore the prescribed uniform. For her part, Shabina gained statements from Islamic scholars who supported her position that the jilbab was required for girls of her age. In September 2004, shortly after the hearing of her case in the HC, Shabina was accepted to another local school that permitted her to wear the jilbab, though by this time she had missed two years of study.

Before Bennett J in the HC, Shabina sought a declaration that she had been unlawfully excluded from her school and that she had been denied her right to receive a suitable education,

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176 Begum HL, [6].
177 This was done on three occasions before initial attendance, including in a letter to parents.
178 Her brother was litigation friend in the dispute. Shabina’s widowed mother died in 2004.
179 It was never made clear in what sense the complainant and her companions’ conduct was “confrontational”, though at both first instance and in the HL numerous statements were made by the judges of both courts disapproving of the manner in which Shabina made her initial complaint; see, eg, Begum HC, [102] & HL, [50] & [80]. The deputy principal described, without more detail, the two men’s conduct as being “very forceful in their approach to me” and that they “talked of human rights and legal proceedings”. Moreover, he considered their request was “unreasonable as it verged on the threatening”, and that the timing was “unreasonable” because it had been made on the first day of term and not communicated earlier. The deputy principal’s statement is reproduced in Begum HC, [3]. In the CA it was merely noted that the deputy principal “felt that the young men were being unreasonable and threatening”; Begum CA, [15] (emphasis added).
180 The shalwar was unacceptable as it did not cover the arms and the shirt that was to be worn underneath it, although long-sleeved, was not sufficiently concealing. The kameeze was tapered at the ankles, thus revealing too much of the shape of the lower leg. The jilbab, being essentially a long loose-fitting cloak, leaving only the hands and head visible, suffered from none of these infirmities. See Begum CA, [31]-[48] for the fullest discussion in the three courts of the scriptural basis for Shabina’s religious belief and of the conflicting evidence by Islamic scholars on the issue.
as guaranteed by Art 2 of Protocol 1 ECHR. Furthermore, in what was to become the prime locus of dispute throughout the litigation, she sought a declaration that the school’s refusal to allow her to wear the jilbab was an unjustified interference with her right to manifest her religious belief in practice under Art 9 ECHR. She also sought an order from the Court that the school arrange for her reinstatement as a student and for damages.

Bennett J rejected all Shabina’s claims. First, he found that she had not been excluded from the school in any sense, as it was her choice either to wear the jilbab or observe the school uniform code, and since she knew she would not be allowed to attend Denbigh High while wearing this item then it was not possible for her to claim an exclusion had taken place. It was open to her to return any time she pleased, as long as she wore the correct uniform. The judge agreed with the school’s submission that because there had been no exclusion her case failed “at the outset”. Strictly speaking, under the terms of his own reasoning, Bennett J might have let matters rest there, but he chose to consider the other claims put before the Court.

The judge then evaluated Shabina’s claim under Art 9. Assuming arguendo that an exclusion had in fact occurred, Bennett J ultimately found that this was because she had failed to abide by the school’s rules, not because of her religious beliefs per se. Shabina had submitted that a prima facie interference with her right to manifest her religious beliefs had occurred because she had a genuine belief that her religion required her to wear the jilbab and the school had prevented her from manifesting this belief. This meant that Art 9 was engaged and that the onus then fell on the school to justify the interference. Relying on employment law cases from the European Court of Human Rights, the judge rejected this submission. This line of authority essentially holds that when an employee claims that a term of his contract conflicts with his religious practices this will not be sufficient to make out a claim of interference with his religious beliefs, as it would have been possible to manifest these beliefs by resigning and seeking employment elsewhere. Bennett J extended this authority to the situation of students in schools who effectively contract out of their rights to the extent that these clash with school rules. The right to manifest one’s religious beliefs is preserved in these circumstances by enrolling at another school where it is possible to exercise these beliefs. In Shabina’s case there were two such schools in the vicinity where she could have worn the jilbab. Therefore it was

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181 Article 2 of the Protocol provides: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

182 Article 9 reads: “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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

183 Begum HC, [63]. Bennett J used identical reasoning to reject Shabina’s claim under Art 2 of Protocol 1 ECHR; see ibid [93]-[104].

184 Begum HC, [69]. For support, Shabina cited, inter alia, Kokkinakis v Greece (1994) 17 EHRR 397 [31], where it was stated that actions, as well as beliefs were protected by the Convention: “Bearing witness in words and deeds is bound up with the existence of religious convictions.” The fact that the school rules interfered with Shabina’s religiously inspired wish to wear the jilbab therefore amounted to a prima facie breach of her rights.

185 Ibid [72]-[74]. The cases cited are: Stedman v UK (1997) 23 EHRR 168 (in which the European Commission of Human Rights found that no interference with a claimant’s rights had occurred where a woman objected under Art 9 to working on Sundays – which was required by her employment agreement – as this was her Sabbath. The fact that she could have resigned and sought work elsewhere meant that no breach had occurred); and Kontinnen v Finland (1996) 87 DR 68 (a similar case where a member of the Seventh Day Adventist Church objected to working on Saturdays. This claim also failed and formed the basis of the decision in Stedman v UK).

186 Ibid [33] & [73].
not possible to say that a breach of her rights under Art 9(1) had occurred, and so there was no need to consider whether the school’s uniform policy was justified under the proportionality test set out in Art 9(2).

Having made this determination, it was open to the judge to conclude the case. However, due to the extensive submissions forwarded by the parties on the matter, Bennett J elected to consider arguments made under Art 9(2) as to justification.  

The school offered two justifications for its policy. The first was that it was a necessary measure to ensure student health and safety, which the school argued was a legitimate aim under the Convention and a matter that it was required to regulate under domestic legislation. The jilbab, due to its length and free-flowing nature, could be dangerous for students who wore it while walking down staircases or participating in science or other classes where equipment could pose a hazard around loose clothing. This claim was rejected by the judge for two reasons. First, it appeared that this contention, though well supported on the record by statements of staff, was a mere assertion that was not backed up by sufficient evidence in the form of a risk assessment. Moreover, and further undermining these assertions, it turned out that other schools in the UK which permitted the jilbab, or allowed the wearing of long dresses by students or staff, had apparently had no problems of this sort at all. Bennett J therefore rejected this justification, agreeing with Shabina’s submission that it was “overblown” and declaring that it was “difficult to say realistically that, in the words of Art 9(2), the limitation was and is ‘necessary’ in the interests of public safety or for the protection of health”. This second reason was determinative of the matter, and is interesting for our purposes as it echoes the Equal Regard methodology deployed in the Muslim boy case, and also Newark, which were discussed above. It will be recalled that in these New Zealand and US cases, uniform policies that interfered with the rights of religious claimants but were not equally imposed on persons in analogous religious and non-religious situations were declared invalid. For similar reasons, Bennett J found the health and safety arguments invalid.

187 Article 9(2) provides: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

188 As a preliminary matter, the judge considered first whether the policy was “prescribed by law”, as required under Art 9(2). School rules that are not published in advance of their application, or are not sufficiently clear in their terms, are liable to fail under this part of Art 9(2) if they have the effect of interfering with a Convention right. In the case at hand, this requirement was easily satisfied: firstly, because schools are empowered by statute to make rules relating to behaviour and school uniform (see School Standards and Framework Act 1998 (UK) and the regulations made thereunder in 2002); and, secondly, because the uniform code made under this authority was clearly expressed (ie, it stipulated the shalwar kameeze and headscarves as the only exemption to the standard uniform) and was made known in advance to all students, including Shabina personally, both before and after entering the school. All three courts in the Begum litigation found that the policy comfortably survived scrutiny on this point: see Begum HC, [75]-[79]; Begum CA, [61], [83] & [90]; Begum HL, [26].

189 Begum HC, [88].

190 See statements by the deputy principal, the chair of the governing board, the principal, and the assistant head teacher, at ibid [12], [25], [27] & [83].

191 There is some ambiguity in the record as to whether such a risk assessment existed. See ibid [88], where Bennett J reports the submission by Shabina that no objective safety report on the jilbab had been made; but see ibid [83], where the assistant head teacher claims such assessments did exist.

192 Ibid [89]. For example, at Al Risaala school in London the jilbab is permitted to be worn in all areas of the curriculum, including science; and at Cheltenham Ladies’ College girls are allowed to wear long skirts, though it is unknown whether these are worn in all classes; ibid [87].


194 See discussion of Newark and the Muslim boy case in section 2 above.

195 See also Multani, above n 7, a Canadian Supreme Court case that implicitly used the Equal Regard formula exemplified in Newark to find in favour of a religious claimant in the school context where health and safety
6. Religious attire in schools

unconvincing regarding the jilbab. This finding as to health and safety is also significant in the context of the evidentiary standard required to make out a justificatory argument under Art 9(2). The fact that no objective report appears to have been submitted by the school clearly explaining and illustrating the inherent dangers of the jilbab’s physical design evidently rendered the school’s submission even more suspect, and suggests that a substantial evidentiary burden – going beyond mere assertions made by those in authority – would be placed on schools seeking to ban items from school for health and safety reasons where they are not self-evidently dangerous. Presumably, a similar standard would be expected for the other justificatory grounds in Art 9(2).

It transpired, however, that the finding as to health and safety was not fatal to the school’s Art 9(2) argument, as it was able to rely on a second justification that was accepted by Bennett J. This was to become the main area of debate in the subsequent judgments of the CA and the HL.

The school argued, and Bennett J agreed, that the strict enforcement of the uniform policy was “necessary” for the “protection of the rights and freedoms of others”. Denbigh High School was a “multi-cultural, multi-faith secular school” and the evidence put forward by the school clearly showed, to the satisfaction of the judge, that the uniform policy contributed to a “positive ethos” and feeling of “community identity” among those at an institution of this type. The shalwar kameeze was not just an item of clothing that satisfied the rights of Muslim students to manifest their religion, but was also worn by Hindus and Sikhs. This meant that at the school no external distinction could be made between the members of these three religious groupings, thus avoiding unwelcome divisions amongst the student body. The jilbab, were it to be permitted, would be regarded by non-Muslims as favouring that particular religion. Indeed some expressed fears that to allow the jilbab would embolden extremist elements in the community. Moreover, if the jilbab were forced on the school, pressure would be brought to bear on Muslim students to wear it, both from within and outside the school. The principal argued that the school provided a sanctuary from coercive elements of this sort from within the Muslim community and that if the jilbab were added to the uniform, then some girls would be deprived of this protective environment and “would feel abandoned by those upon whom they were relying to preserve their freedom to follow their own part of the Islamic tradition”.

The school uniform therefore was aimed at protecting the “rights and freedoms” of two groups of students, both Muslim and non-Muslim. In conclusion, Bennett J considered that the “proper running” of a racially and religiously diverse school was a legitimate aim under the Convention, and the limitation on Shabina’s rights (assuming that an interference in the arguments were offered as justification for banning a religious object. See discussion of Multani below in section 3.1.2(b).  

196 Begum HC [90].
197 Ibid.
198 Ibid, and see statement of school principal at para [82], in which she spoke of some non-Muslim students expressing fear of “people wearing the jilbab as that would identify them with extremists”.
199 After media publicity had been given to the case, the school was picketed by groups of young men who, according to the principal in her statement at para [82], appeared to be “from the more extreme Muslim traditions”. See also Begum CA, [54] concerning this picketing, at which leaflets were distributed to pupils that “exhorted Muslims not to send their children to secular schools”.
200 Ibid, and see statement of school principal at para [82]. This was the fear expressed by some Muslim girls who approached the principal after the Begum litigation received publicity. They voiced a concern that they might also be forced to wear the niqab (a veil covering much of the face) if a concession were made to allow the jilbab.
201 Ibid.
Convention sense existed) was proportionate to the aim pursued by the uniform code. In any case, the judge noted that the adoption of the shalwar kameez was supported by a substantial body of Muslim opinion in the community, despite the existence of a school of thought within part of that group that only the jilbab satisfied Islamic dress requirements. All these considerations led the judge to consider that the school’s uniform code was a “reasoned, balanced, proportionate policy” that supported a legitimate aim, and, hence, the school’s submissions under Art 9(2) succeeded.

Having failed to prevail on any of the issues at first instance, Shabina appealed, requesting a complete revisiting of the declarations that were denied in the HC. The CA was to take a diametrically opposed view to Bennett J on almost every point and unanimously overturned the lower court’s decision. The central error of the school, it turned out on appeal, was that it had not started from the premise that its policy was restricting the rights of an individual, which in the CA’s view it clearly was. This attitude, which coloured many aspects of the HC ruling, had infected the entire decision and is the key to understanding the different philosophies of the two decisions. We look now at the CA’s treatment of the two prime questions arising in the case under Art 9 ECHR: first whether an interference with Shabina’s right to manifest her religious beliefs had occurred; and second whether this was a justifiable limitation on the right.

Regarding whether there had been a prima facie interference with Shabina’s right to manifest her religious beliefs, the Court found that the reliance of Bennett J on employment law cases in Europe in order to find that no such interference existed was mistaken. It was not plausible to equate the right of an employee to manifest his belief in the employment context with that of a student at a school. For Lord Justice Mummery, education at Denbigh High, or at any other school, was not a “contractual choice”. Rather there was a statutory duty to provide education to the pupils, a situation which differed from that of an employee who was free to change jobs, or not to have a job at all. The only enquiry that needed to be made to determine whether an interference had occurred was whether Shabina’s belief was genuine. This was not contested at any stage of the proceedings, even though the High Court had expressed scepticism about whether Shabina had freely chosen to believe that the jilbab was the appropriate dress for a Muslim girl of her age, given that her brother appeared to exert a strong influence over her conduct. Such doubts were, by contrast, absent from all the judgments in the CA. As to whether any public body, such as a school, should be able to pass

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202 Ibid [91].
203 Ibid.
204 We shall confine our discussion of the CA decision to the issue of whether Shabina’s rights under Art 9 had been violated. The other issues before the Court (ie, whether an unlawful exclusion had taken place and whether Shabina’s right to receive an education under Art 2 Protocol 1 ECHR had been violated) rose and fell on the CA’s determination of whether a violation of Art 9 had occurred. For that reason we put these issues aside, although the HL was to revisit them on appeal and reached a very different result from the CA.
205 Begum CA, [84] (per Mummery LJ).
206 Ibid. Hence, the employment cases cited by the school at first instance and reasserted at the CA (eg, Stedman v UK (1997) 23 EHRR 168) were deemed irrelevant. Brooke LJ said, without further discussion, that he did not “derive any assistance from the cases we were shown which related to employment disputes”; ibid [62].
207 See, eg, Begum HC [68]: “It might have been expected that it would be the claimant herself who would have given that evidence. One wonders why it should have been her brother who articulated what the claimant was perfectly capable of saying herself. Nevertheless, Mr Birks did not suggest that I should find that the claimant’s motives and beliefs were anything other than completely genuine and I have proceeded on that basis in this judgment.” Compare with the more respectful stance taken by Brooke LJ in Begum CA, [14]: “As [Shabina] grew older...she took an increasing interest in her religion, and she formed the view that the shalwar kameez was not an acceptable form of dress for mature Muslim women in public places.”
judgment on whether Shabina’s beliefs were legitimate, Lord Justice Booke, who authored the Court’s leading judgment, doubted the school’s competency to do this as a matter of Convention law. For support he quoted the case of Hasan v Bulgaria, where the European Court of Human Rights stated:

[The Court] recalls that, but for very exceptional cases, the right to freedom of religion as guaranteed under the convention excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate.

Bearing these factors in mind, Brooke LJ decided that “it follow[ed]” that the school’s decision to prevent Shabina from wearing the jilbab was, as a “matter of convention law”, a limitation on her right to manifest her religion, as protected under Art 9(1).

The school did not relitigate its argument as to health and safety but reasserted its position that the uniform code protected the rights and freedoms of other students in the furtherance of the legitimate aim of running a multi-faith secular school. Brooke LJ then laid out the school’s arguments, recounted above, and which were based on the reports of school staff. To summarise, these were: that Muslim girls would be pressured to wear the jilbab if it were part of the uniform; that it would create divisions within the school along religious lines; and that non-Muslim girls would feel that allowing the garment would privilege one religious group (ie, strict Muslims) and that the item was associated with extreme religious groups, which they feared.

Brooke LJ did not, as such, give any opinion on the strength of these arguments. Instead he devoted most of his discussion to the then recent Chamber judgment of the European Court of Human Rights in Sahin v Turkey, to which he had been referred in argument. In Sahin, the applicant had been refused access to Istanbul University because she was wearing an Islamic headscarf, which was prohibited by university regulations. Leyla Sahin accepted that the aims of the regulation were legitimate: that it was intended to protect the rights and freedoms of others and to protect public order. However, she resisted the Turkish government’s position that the means used to achieve these goals (ie, a ban on the wearing of the headscarf at universities) were necessary and proportionate. The applicant’s claim under Art 9 was ultimately rejected by the European Court, and so the case appeared, in the context of the

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208 Hasan v Bulgaria (2000) 10 BHRC 646, [78]; cited in Begum CA, [49].
209 Ibid.
210 Ibid.
211 Begum CA, [50]. Brooke LJ endorsed Bennett J’s rejection of this line of argument.
212 Ibid [51]-[58]. I note in passing a related argument, contained in the statement of the deputy head teacher (at para [55]), that to allow the jilbab would cause problems in teacher recruitment, as it was supposedly a secular school. The jilbab would send a message that the school favoured a particular faith, something that teachers would not wish to be associated with.
213 He merely summarised Bennett J’s conclusions on Art 9(2); see ibid [59]-[60].
214 Sahin v Turkey (2005) 41 EHR 109 App no 44774/98 (29 June 2004) (“Sahin”). Note that this decision was handed down after Bennett J’s judgment. This decision was later confirmed by the European Court, sitting in Grand Chamber in Sahin v Turkey (2007) 44 ECHR 5 (10 November 2005) (“Sahin Grand Chamber”). Reference was also made by Brooke LJ to Dahlab v Switzerland (2001) ECHR App no 42393/98 (admissibility decision). Dahlab differed from Sahin in that it involved the right of a school teacher (not a student) to wear a headscarf, but was relevant in that it dealt with matters of state neutrality towards religion in educational institutions.
215 These regulations banned the wearing of all religious and political insignia at the university; see Sahin Grand Chamber, above n 214, [47].
Begum litigation, to be a useful precedent for the school. However, after an examination of the European Court’s reasoning in Sahin, Brooke LJ determined that the case was so specific to the constitutional, social and historical circumstances of the Turkish state that the case’s applicability in the UK was questionable.

Superficially, one aspect of the Turkish government’s argument under Art 9(2) in Sahin bore a strong resemblance to the school’s contention in Begum that to allow the jilbab would expose Muslim girls to demands from within and outside the school to wear the garment. The Turkish government contended that national authorities in the country were entitled to ban the headscarf at universities because it was perceived by some as a compulsory religious duty, and that this might have an impact on those who chose not to wear it. This argument certainly was successful at the European Court, but, for Brooke LJ, its success may have depended less on its intrinsic force than certain background factors on which the argument was based. The European Court placed great weight throughout its judgment on the constitutional position of secularism in Turkey. The Court noted in this respect that the Turkish Constitutional Court, in its judgment of 1998 concerning the controversy at Istanbul University, had stated that the principle of secularism in Turkey was a guarantor of democratic values in that country against fundamentalist elements in the population. A significant aspect of religious freedom was protected by the secular clause of the constitution, in that the clause enabled measures to be taken against those who imposed external pressure on individuals regarding matters of religious conscience. This was especially important in a country such as Turkey, where, despite the fact that many citizens apparently held a strong attachment to the rights of women and a secular way of life, the majority of the population nevertheless adhered to the Islamic faith. Furthermore, there existed in Turkey extremist political groups which might seek to impose their way of life on society as a whole, using religious symbols as a rallying point to help bring this about. Hence, in one passage that neatly summed up its position (and which is quoted by Brooke LJ), the European Court had stated:

In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under art 9(2) of the convention.

Turkey, therefore, might be regarded as a special case, and this appears to be the main lesson drawn from Sahin by the CA. Brooke LJ was further fortified in his take on the case by the European Court’s position that state parties to the ECHR were to be accorded a wide degree of deference (or “margin of appreciation”, to use the expression favoured in ECHR jurisprudence)

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216 Ibid [108].
217 Ibid, para-phrasing Sahin Grand Chamber, above n 214, [99]; cited in Begum CA, [66].
218 Ibid [66]-[68]. Brooke LJ opined that the principle of gender equality (which was also advanced by Turkey to justify the nationwide uniform code) was subordinate to secularism, or indeed was derivative of it. Recall that Turkey, like France, contains a secular provision in its Constitution; see ns 23 & 42 above.
219 Begum CA, [68], quoting Sahin Grand Chamber, above n 214, [105]-[106].
220 Ibid [70], paraphrasing Sahin Grand Chamber, above n 214, [108].
221 Ibid, paraphrasing Sahin Grand Chamber, above n 214, [109]. Based on its historical experience, the Court considered that suppressing such extremist groups might be acceptable under the Convention (citing Refah Partisi (Welfare Party) and others v Turkey (2003) 37 EHRR 1, in which the Court supported a ban in Turkey of a political party espousing beliefs supposedly inimical to secularism. For discussion of the Refah Partisi case, see above, n 41, and accompanying text).
222 Sahin Grand Chamber, above n 214, [107]; cited in Begum CA, [66].
223 Begum CA, [67].
224 Begum CA, [67].
6. Religious attire in schools

in their implementation of Art 9. In accepting the Turkish government’s arguments that the prohibition on headscarves was a necessary measure under Art 9(2), the European Court noted the great diversity of approaches to Church and state matters throughout Europe, and also the wide variance in dealing with the headscarf in state institutions. Because there was no settled and uniform approach to the issue of religious apparel in schools across the continent, the European Court was reluctant to criticise the way Turkey had chosen to draw the lines on the issue. For Brooke LJ, the fact that the European Court had granted a wide margin of appreciation to Turkey meant that the persuasive power of Sahin in the British context was lessened.

Relating Sahin to the case at hand, Brooke LJ cast doubt, in light of the special conditions prevailing in Turkey, on the necessity of Denbigh High’s prohibition of the jilbab in the British context. The judge pointed to the fact that the UK, unlike Turkey, did not have a written constitution. Moreover, it was not possible to say that the UK was a secular country in the legal sense, as Turkey indubitably was. For example, in England and Wales there was a statutory requirement that each student should take part in a daily act of worship, and compulsory provision was also made for religious education in the curriculum. Furthermore, Denbigh High already had a non-secular uniform policy in that it allowed Muslim girls to wear the headscarf, whereas at Istanbul University there was an across the board prohibition on religious apparel. This last point, which recalls Mt Roskill’s Grammar’s uneven policy of allowing headscarves for Muslim girls but not long trousers for Muslim boys, was particularly important in Brooke LJ’s view:

The position of the school is already distinctive in the sense that despite its policy of inclusiveness it permits girls to wear a headscarf which is likely to identify them as Muslim. The central issue is therefore the more subtle one of whether, given that Muslim girls can already be identified in this way, it is necessary in a democratic society to place a particular restriction on those Muslim girls at this school who sincerely believe that when they arrive at the age of puberty they should cover themselves more comprehensively than is permitted by the school uniform policy.

Having raised the concern that the school’s uniform code was not enforced equally, Brooke LJ might have gone on (as Bennett J had done with respect to the health and safety argument) to conclude that it was not possible to say that the policy was “necessary” in a democratic society, as required under Art 9(2), and make a declaration that Shabina’s Art 9 rights had been violated. The judge stopped short of doing this, however. Instead, he declared that the decision making process of the school had had the effect of unlawfully denying Shabina’s right to manifest her religious beliefs and he invited the school to consider the matter again, using a more rights-centred approach to assessing the merits of Shabina’s claims under both steps of

225 Sahin Grand Chamber, above n 214, [102]: “A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions…and there is no uniform European conception of the requirements of ‘the protection of the rights of others’ and of ‘public order’.”

226 Sahin Grand Chamber above n 214, [114].

227 And, mutatis mutandis, Dahlab v Switzerland, where the European Court cited the constitutional requirement in Switzerland of denominational neutrality in all spheres of government as being a sufficient justification for preventing the claimant in that case (a primary school teacher) from wearing a headscarf while teaching.

228 Begum CA, [72]-[74] (per Brooke LJ); and see [94] (per Scott Baker LJ).


230 Begum CA, [74].
the Art 9 enquiry. The judge was especially critical of the fact that the school did not begin with the premise that Shabina had a right under English law and that the school had the burden of justifying any interference with that right. Rather, the school had “started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it she could go to another school”. 231 Brooke LJ then set out a 6-step decision making structure which the school (and other schools facing similar issues) should undertake in order to comply with Art 9, which I reproduce in full:232

(1) Has the claimant established that she has a relevant convention right which qualifies for protection under art 9(1)? (2) Subject to any justification that is established under art 9(2), has that convention right been violated? (3) Was the interference with her convention right prescribed by law in the convention sense of that expression? (4) Did the interference have a legitimate aim? (5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim? (6) Was the interference justified under art 9(2)?

Having set out this approach, the judge was at pains to point out that it would not be impossible for the school to reconsider its policy in light of the judgment and decide not to alter its uniform code significantly. 233 The policy had failed scrutiny, primarily, because the school had not directed itself properly at steps 1 and 2 (which are a paraphrase of Art 9(1) ECHR) of the process outlined above. It was open to the school therefore to redirect itself accordingly, accept the Court’s finding that an interference with Shabina’s rights had occurred, and then to reconsider (applying steps 4 to 6, which essentially break up the Art 9(2) enquiry into smaller parts) whether the policy could nevertheless be justified. Brooke LJ had indeed hinted that the reasons advanced for the uniform policy under Art 9(2) were in fact relevant matters to be factored into its reconsideration, and so it may well have been possible for the school to reassert its position that the policy was justified. 234 However, the judge went on to list a series of factors which the school should take into account during this process and which suggested that, in the Court’s view, the policy as it stood might well be very difficult to justify. Two of these appear to me to have been central. First, Brooke LJ said it would be important for the school to ask itself whether it was “appropriate to override the beliefs of very strict Muslims [ie, those who wished to wear the jilbab, as it covered more of the female body] given that liberal Muslims [ie, those for whom the shalwar kameeze and/or headscarf was sufficiently modest attire] have been permitted the dress code of their choice and the school’s uniform policy is not entirely secular”. 235 And second, it would be necessary for the school to re-evaluate whether it was appropriate to “take into account any, and if so which, of the concerns expressed by the school’s three witnesses as good reasons” for depriving Shabina of her rights under Art 9(1) and to consider what weight should be given to such concerns. This factor, it seems to me, required the school to ask itself whether concerns that might be compelling in Turkey (with its majority Muslim population, its history of political unrest surrounding the issue of fundamentalist Islam, and constitutionally mandated secularism) were sufficient to justify its

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231 Ibid [76].
232 Ibid [75].
233 Ibid [81]. The other judges made the same observation; at [87] (per Mummery LJ) & [92] (per Scott Baker LJ).
234 Ibid [72]: “[I]t is clear that a decision-maker is entitled to take into account worries like those expressed by the senior teaching staff of the school when it is deciding whether it is necessary to prohibit a person like the claimant from manifesting her religion or beliefs in public in the way in which she would wish.”
235 Ibid [81]. The other factors were: whether there were other religious groups that had similar claims to Shabina; whether accommodating other groups would affect the school’s policy of inclusiveness; whether any of the school’s arguments for maintaining its policy were “good reasons”, and what weight should be accorded these reasons; and whether the school could do more to reconcile the claims of students whose religious beliefs required them to dress modestly with its wish to retain “something resembling its current uniform policy”.
policy in the very different British context. Another consideration arising from this factor was whether the school had discharged its evidential burden in arguing that the policy was necessary for the rights and freedoms of other students. The fact that its health and safety argument was deemed insufficient in part because it was not backed up by any hard evidence of accidents involving the jilbab suggests that the Court may also have doubted whether the claim that community pressure on students to wear the jilbab was a genuine concern. Without such evidence, the argument might be vulnerable to attack as being merely the product of prejudice against those who wished to wear the jilbab, and there was some evidence that this may have partially informed the decision to ban the garment. In France, by contrast, the Stasi Commission had documented real acts of coercion and violence against Muslim female pupils inside and outside state schools to wear the veil as an integral part of its justification for recommending that that item be banned in French schools. Similar occurrences are entirely absent from the record in the Begum litigation. Whether the fact that a group of male Muslims had picketed the school during the controversy, an incident that is related in all the Begum judgments, would be enough to discharge this burden is a difficult question.

The combined inference from these two factors, I suggest, was that the policy failed to treat its pupils equally in respect of their religious beliefs, and that the school’s claims to be pursuing a policy of “inclusiveness” of all racial and religious groups (which I take to have been a proxy for a policy of “secularism”) by allowing some forms of Muslim dress to be worn, but not others, would therefore struggle to survive future judicial scrutiny. It is hard to imagine how the school could seriously address these questions without concluding that its uniform code failed the Art 9(2) enquiry; or at least this appears to have been the Court’s inclination as to how the questions should have been answered.

Finally, the CA held that, given the school’s failure to address Shabina’s complaint in the right way, it was not possible for the school to resist the declarations she sought, and found for her on all three claims put before the Court. The issue was therefore returned to the school for reconsideration.

236 The shalwar kameeze was apparently a garment popular in the South East Asian section of the community in Luton and therefore suited the 70% of students and staff at the school who were of Indian, Pakistani and Bangladeshi origins. Moreover, Shabina’s brother in his statement on the religious validity of Denbigh High’s dress code, claimed that the garment was a “Pakistani cultural dress”; see Begum HC, [67]. The jilbab, on the other hand, was associated with Arab parts of the world, which makes it arguable that simple racial prejudice lay behind the expressions by some pupils of fear of the garment’s associations with religious extremism; see Gareth Davies “Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v. Denbigh High School. Decision of 2 March 2005” (2005) 1 Eur Const LR 511, 526; and Tarlo “Stereotypes”, above n 171, 16, where she reports some Muslims claiming Shabina’s interpretation of religious dress to be “extreme”, ‘Arab’ and ‘archaic’.

237 The Stasi Commission conducted interviews in private with girls who claimed that they had been forced to wear the veil by fundamentalist elements inside and outside the school system; see B Stasi et al Rapport de la Commission de Réflexion sur l’Application du Principe de Laïcité dans le Républic (Documentation Française, Paris, 2004), 47. Note, however, that the Commission’s methodology in gathering evidence of coercion has been criticised, primarily as being too anecdotal in nature. See Gunn “Religious Freedom and Laïcité”, above n 22, 469: “The Stasi Commission…neither conducted its own scientific analysis of why French Muslim girls wear the headscarf nor reported that it had attempted to learn the answer through a conscientious review of the available social-science literature.”

238 Ibid [78]. Namely, that she had been unlawfully excluded from the school, that her rights under Art 9 had been unlawfully denied (principally because the school had not approached Art 9(1) correctly), and that she had been unlawfully denied access to suitable education. Due to the passage of time and to the fact she was attending another school, Shabina dropped her claim that an order be made for her reinstatement and for damages.
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The CA decision is striking in three major respects. First, it provides a stark contrast to the position in France, where the wearing of all conspicuous religious symbols in state schools is proscribed by a national law. The school in Begum, like many others throughout the UK, had clearly done much, while trying to maintain its standard uniform policy, to allow religious expression amongst its student body in pursuit of the background ethos of multiculturalism in the country. Despite this, the CA decided the school had not gone far enough and had not considered the relevant human rights issues adequately. The HC decision, on the other hand, mirrors the French position in some respects. In particular, Bennett J’s endorsement of the claim that the school was trying to provide a sanctuary for its students from fundamentalist forms of religion was a key ingredient behind the Stasi Commission’s recommendation that France ban all religious attire in its schools in 2004.

Second, by questioning the rationality of the school’s policy of inclusiveness in that it overrode the religious beliefs of one group of Muslims while accommodating another’s, the judgment fits well with the Equal Regard principle advanced in this thesis: policies that seek to further a recognisable aim must be applied equally among religious and non-religious groups; if they are not applied in this way, then they should be subjected to rigorous scrutiny as to their necessity. The two decisions provide very different approaches in this respect, with Bennett J accepting the school’s position almost at face value as being a “reasoned, balanced, proportionate” policy, while the CA was unimpressed by the uniform code’s inherent discriminatory aspects, due to its favouritism towards “liberal” Muslims. The CA’s stance also resonates with the position taken by the New Zealand Human Rights Commission towards the expressed aims of Mt Roskill Grammar’s uniform rules. Recall that the school in that case, similarly to Denbigh High, attempted to justify its uniform policy by saying that, “in a school with such diversity of race, culture and socio-economic background the uniform symbolises that despite differences…when the students come together they do so as equals”. Such an aim, in the opinion of both the CA and the Human Rights Commission, may be a laudable one, but it must be applied equally to all classes of students.

The final respect in which the CA judgment stood out was controversial, and attracted much academic comment. The 6-step process formulated by Brooke LJ had imported a novel procedural approach to determining rights cases in the UK, one which could conceivably have a great impact on all public bodies bound by the Human Rights Act 1998 (UK) (“UKHRA”). This approach received cautious support from Gareth Davies, who observed that by returning the matter to the school for consideration, the CA, in a manner that had its origins in administrative law, had skillfully avoided passing ultimate judgment on the school’s

239 See McGoldrick Islamic Headscarf, above n 17, 190.
242 Davies “Banning the Jilbab”, above n 236, 516: “The origin of the procedural approach is administrative law. There it is quite common to require decision makers to take the right factors into account and make their decisions in the right way. It is not just what is done, but why, that determines legality. Since this was in fact a case for judicial review of a decision by the school, the court thus applied administrative law concepts to the human rights context.” Poole describes the CA’s finding that the school had failed to adopt the right procedure and ask the right questions as “essentially a variant of the ‘failing to take relevant considerations into account’ principle of traditional…judicial review”. Poole “Of Headscarves”, above n 241, 689.
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decision. This had the advantage of preserving the democratic nature of decision making in this area. Moreover, the CA’s requirement that the school address Art 9 using a structured, procedural approach would have the downstream virtue, in other cases involving Convention rights, of “forcing authorities to discipline their thinking at the time that they make and enforce their rules”. This was preferable to schools making ad hoc decisions affecting the rights of students without carefully thinking through all the issues and then later, if their decisions were challenged in court, asking lawyers to put their arguments into the correct framework. The rigour required in the 6-step approach would therefore have the effect of reducing the likelihood of violations of rights occurring in the first place, and might be of great benefit to persons in Shabina’s position. Davies did, however, qualify his support of this approach. In particular, he cautioned that the imposition of procedural requirements could result in decisions by public bodies, such as schools, being subjected to a very minimal standard of review on the merits, as long as these bodies asked themselves the “right questions”. Given that the CA had indicated the school would be at liberty, having addressed itself to the new 6-step formula, nevertheless to arrive at the same result (ie, maintain the ban on the jilbab), this was a great concern for Davies. In his opinion, Shabina’s case was a strong one on its actual merits, and he suggested that the CA might have shirked its responsibility by referring the matter back to the school. An overly procedural approach could, in his view, see rights being relegated to marginal status.

In an article which was to prove influential in the final House of Lords judgment in Begum, Thomas Poole took the view that the procedural framework imposed on the school by the CA was utterly misguided. There was, Poole argued, “nothing in the Human Rights Act, the European Convention or Convention jurisprudence which would seem to require public authorities to act in this way”. Section 6 of the UKHRA, which states that it is unlawful for a “public authority to act in a way which is incompatible with a Convention right”, did not, in Poole’s opinion, require bodies such as schools to adopt court-like thought processes based on the highly structured proportionality enquiries engaged in by the European Court of Human Rights. Rather, its wording seemed simply to say that public bodies were obliged to honour the Convention rights in substance. That is, the manner in which decisions were made was irrelevant, as long as the result was Convention-compliant. This position, argued Poole, was borne out in the Convention case law itself, where decisions of the European Court were fixed exclusively on outcomes and tended to ignore defects in process. For Poole, to impose a

243 Davies “Banning the Jilbab”, above n 236, 517.
244 Ibid 515.
245 Ibid.
246 Ibid 517.
247 Linden and Hetherington avert to the danger that, hiding behind procedure, schools could safely disregard ECHR rights: “There is...a danger that the numerous situations and ways in which Convention issues may arise and the pressures on schools and local education authorities will lead to blunt-edged guidance and a ‘tick box’ mentality, which prevents real consideration of the issues, while at the same time cranking up the deference given by the courts and so shielding schools’ decisions from any effective review.” Linden & Hetherington “Denbigh High Case”, above n 241.
248 Poole “Of Headscarves”, above n 241, 690.
249 Ibid.
250 Davies describes thus the thitherto standard merits-based approach to adjudicating on a public body’s compliance with ECHR rights: “[T]he question is not what they were aiming at, but what they hit. One seeks to find objective ways to measure whether actions are acceptable, rather than asking whether the intentions of the party acting were ideal.” Davies “Banning the Jilbab”, above n 236, 515.
251 Poole cites for support Martins Casimiro and Cerveira Ferreira v Luxembourg (1999) App No 44888/98 (unreported). In this case, the Seventh Day Adventist applicants objected to their child being required to attend school on Saturdays (which was their Sabbath). The European Court found in favour of the State, and conspicuously determined the result on the merits, finding that the infringement on the claimants’ rights was
procedural framework on public bodies would erect a “new formalism” in the administrative decision making environment, and would require administrators to approach Convention issues in the shoes of judges. This was a predicament that administrators were ill equipped to handle, given the many pressures placed on them in terms of time and resources. The CA’s preference for judicialising the decision making process in this way would also have the undesired effect of schools and other public bodies having to seek expensive legal advice in order to comply with the UKHRA.

3.1.2 The jilbab at the House of Lords

Against the background of much academic and political debate, the school decided to appeal to the House of Lords. It argued that the HC decision was correct and that of the CA was wrong. Its arguments were to be accepted at the HL. Shabina’s celebrations after her victory at the CA in 2005 therefore proved to be short lived.

(a) New arguments in the House of Lords

The Secretary of State for Education intervened on the school’s behalf and made several submissions at the hearing of the case in February 2006. These submissions augmented the school’s argument (which essentially reiterated the position taken in the lower courts) in several qualitative ways that were to prove decisive. Citing Poole’s article, the minister argued that the CA had erred fundamentally in its approach to the UKHRA in that it focused on the quality of the decision-making process of the school, rather than on the substantive merits of the decision. The proportionality test mandated under Art 9(2) was an objective, not a procedural one. Thus, an objectively justifiable policy ought not to be held in breach of the ECHR because a decision maker had not turned his mind to the correct legal questions arising under a particular article of the Convention. Moreover, the CA had not exercised an appropriate level of deference to the school’s decision.

As for the CA’s distinguishing of Sahin from the Begum case, which, it will be recalled, was based partly on the fact that Turkey was a secular state and the UK was not, the minister argued that this distinction was factually correct but was ultimately irrelevant to the case at hand. It was, she said, the school, not the UK, which was the relevant public authority for the purposes of s 6 UKHRA. Denbigh High was a non-denominational school and had been granted an exemption from the collective worship requirements under British legislation; it was justified for the protection of the rights and freedoms of others – principally the right to education of other students at the school. Nowhere in the judgment does the Court consider that deficiencies in the school managers’ decision-making process (which on the record was clearly sub-standard when measured against the proportionality-type inquiry mandated by the CA in Begum) amounted to an infringement of Art 9. Poole “Of Headscarves”, above n 241, 692.

The school received support from across the political spectrum. The Secretary of State for Education intervened in the House of Lords in favour of the school; see A Frean “Minister backs school hijab [sic] appeal” The Times (UK, 30 July 2005). Shadow Education spokesman, Tim Collins, said it was for “schools alone” to decide their uniform codes, and that the CA ruling strengthened the case for “fundamental change or repeal [of the HRA]”. BBC News “Schoolgirl wins Muslim gown case” (2 March 2005); available at: <news.bbc.co.uk/1/hi/england/beds/bucks/herts/4310545.stm>.

For a summary of both the school’s and Shabina’s submissions (which are not publicly available), see McGoldrick Islamic Headscarf, above n 17, 190-193; see also the Appeal Cases report of the case, which contains a précis of submissions.
therefore not unlike a "‘microcosm of Turkey’". 257 Thus, the justifications as to the rights and freedoms of others and gender equality that were successful in Sahin were equally applicable to the Begum case.

Shabina repeated her claims from the lower courts, and supported the CA’s emphasis on the procedural dimension of Art 9. She also engaged fully on the merits of her case, and appeared to build on certain remarks in the CA judgment that emphasised the discriminatory nature of the school’s policy. 258 For her, the uniform code undermined rather than advanced multiculturalism in that it sought to create a monoculture of Muslims by unfairly excluding those who adhered to stricter views on Islamic dress requirements. She accepted that a “communal ethos” could be promoted in the school by banning all religious apparel, but not by favouring some versions of religious manifestation over others, which was the chief defect of the policy. In any case, the goal of removing distinctions between religious believers was manifestly not achieved, in that some girls already distinguished themselves by, for example, wearing the hijab, but not the shalwar kameez (or by wearing other permutations of the permitted uniform) and so were able to make sartorial statements as to their religious beliefs while at school, whereas she was denied this freedom. Furthermore, she argued that it was the headscarf which was the most controversial form of Muslim dress, and yet the school permitted that to be worn. Why did community pressure to wear the jilbab amount to coercion, whereas there was, presumably, similar pressure placed upon girls to wear the hijab or shalwar kameez? In light of these points, all of which are similar to arguments advanced in this thesis under the Equal Regard theory, Shabina combined her Art 9 argument with an appeal to the Art 14 ECHR right against religious discrimination. 259

Shabina also noted that the school relied on justifications similar to those of another school in the 1980s that refused to admit a Sikh student because he wished to wear a turban. In Mandla v Dowell Lee, 260 the HL (similarly to the New Zealand Human Rights Commission in the Muslim boy dispute) rejected out of hand a Birmingham school’s argument that banning the turban was justified, as it would “minimise external differences between races and social classes”. 261 Shabina said the Begum court should follow its own precedent and dismiss Denbigh High’s attempt to run the same argument. Finally, she asked how it was possible for the school to argue that it was “necessary in a democratic society” to prohibit the jilbab when other schools in Luton permitted it. The real threat, she believed, was not from jilbab-wearers, but from the intolerance of those who were prejudiced towards those who donned the garment. In sum, therefore, Shabina contended that it defied logic, and her reading of the Art 9, for the school to argue that it was banning the jilbab in the interests of equality or multiculturalism.

(b) The House of Lords decides

257 McGoldrick Islamic Headscarf, above n 17, 191, citing submission of the Education Secretary.
258 On discrimination, see also Davies “Banning the Jilbab”, above n 236, 524-528.
259 Article 14 reads: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
260 [1983] 2 AC 548. The case was decided under the Race Relations Act 1976 (UK), as Sikhs, unlike “Muslims”, constituted a racial or ethnic group.
261 Ibid 566. Like Denbigh High, the school had a diverse student roll. Out of 300 pupils, 200 were English and of the remainder, “five were Sikhs, 34 Hindus, 16 Persians, six negroes, seven Chinese and 15 from European countries”. Note that the HL rejected the “minimising external differences” justification for banning the turban without even discussing its merits.
The school’s appeal was unanimously allowed. Three members of the Court considered that no prima facie interference with Shabina’s rights under Art 9(1) had taken place, and so, albeit with a more refined discussion of the European authorities on the point, restored Bennett J’s finding at first instance. Although it was therefore unnecessary for their Lordships to consider whether the school’s policy was an unjustified interference with her rights, four of them essayed opinions on the Art 9(2) enquiry. They all concluded that the policy was a necessary and proportionate measure that addressed the rights and freedoms of other students at the school. Bennett J’s finding as to justification was again subjected to more detailed consideration, and from subtly different angles in their Lordships’ speeches, but was ultimately reaffirmed. By contrast, as we shall see below, the CA did not fare at all well in their Lordships’ appraisals, with every major point made by the judges in that court being rejected.

**Interference**

Lords Bingham, Hoffmann and Scott all held that, on the facts of the case, no interference with Shabina’s right to manifest her religious beliefs had occurred. Lord Bingham phrased the position in the clearest terms:

> The [European Court and Commission of Human Rights have] not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.

Because Shabina and her family had been informed in advance of the uniform requirements at Denbigh High and had complied with these for two years before deciding that the jilbab was her preferred way of practising her religious beliefs, and because there were other schools in the vicinity she could attend without difficulty (and which would accommodate her beliefs), it could not be said that an interference, in the Convention sense of that word, had taken place. Shabina’s entire Art 9 claim therefore failed at this preliminary stage.

Their Lordships were particularly scathing of the CA’s contrary finding that an interference had occurred. Recall that Brooke LJ, in steps 1 and 2 of the 6-step test he provided for the school, had in fact told the school what he thought was the correct answer to the interference question. For him, because Shabina held a sincere belief that the jilbab was required by her religion, and because, applying Hasan v Bulgaria, it was not for organs of the state to pass judgment on the legitimacy of people’s religious beliefs, the fact that the school prohibited her from wearing the jilbab (while allowing “liberal” Muslims to wear the hijab and/or shalwar kameeze) was sufficient grounds to determine a limitation had taken place. Lord Hoffmann – who derided the 6-step test as an “examination paper” – said that the CA had been too quick to find an interference. It had ignored the relevant European and British jurisprudence on the

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262 The fifth, Lord Nicholls, concurred with the reasons given by Lords Bingham and Hoffmann that the school’s uniform code was justified, although he offered no considered remarks.
263 Begum HL, [23].
264 Ibid [25] (per Lord Bingham); [50] (per Lord Hoffmann); [89] (per Lord Scott).
265 That is: “(1) Has the claimant established that she has a relevant convention right which qualifies for protection under Art 9(1)? (2) Subject to any justification that is established under Art 9(2), has that convention right been violated?”
266 Note that the CA uses the word limitation (which is the term used in Art 9 itself) to describe a prima facie incursion on the Art 9 right; whereas the HL prefers the noun “interference”.
267 Begum HL, [66].
point, and in doing so had “failed” its own “examination” by “giving the wrong answer to question (2)” of the 6-step test.

It was indeed interesting that the CA had not considered the HL case of Williamson, which was decided the previous year and contained a full treatment of the threshold issue of interference in the European case law. In that case the preliminary enquiry under Art 9(1) involved two steps. The first of these was to ascertain whether a sincere belief was held by a religious claimant that he or she should act in a certain way, and whether such an action was sufficiently motivated by the religious belief to qualify for consideration under Art 9. If the answer to these questions was in the affirmative, then Art 9 was deemed to be “engaged”, as it was in Williamson. The next step was to determine whether an “interference” with this belief had occurred. It was not enough for the religious claimants in Williamson to point to a provision in the statute book (which they did) that prohibited the activity they wished to engage in. It was necessary to determine whether there were other means reasonably available to the claimants to manifest their rights in contexts where the statutory ban did not operate. These alternative avenues must not be “unrealistic”, and if they were, then an interference with the right would be declared. In Williamson the religious claimants argued that a statutory ban on corporal punishment in all British schools limited their right to have their children physically chastised while at school in line with their religious convictions. The HL determined that alternative means of exercising this religious belief were not in fact realistic, and so a prima facie interference with the right was held to have taken place in that case.

In the opinion of the majority of the HL in Begum, the CA adequately covered the initial issue of whether Art 9 was “engaged”, but did not correctly address the second step of this enquiry, which was where the real bite lay in Art 9 jurisprudence in both Europe and the UK. Instead, as we have seen, the CA distinguished the line of European jurisprudence that held an interference does not occur when a religious claimant freely enters into an employment contract that he later considers to conflict with his religious beliefs. A student enrolling in a school could not, according to the CA, be equated with an employee entering a work contract, and so an interference with a student’s right to manifest his or her religious beliefs in the face of school rules is more readily inferred than in the case of employees. Having distinguished

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268 Ibid [68].
269 Regina (Williamson and others) v Secretary of State for Education and Employment [2005] 2 AC 246 (“Williamson”).
270 See discussion in ibid [22]-[37] (per Lord Nicholls).
272 The use of corporal punishment was banned in British schools by s 548 Education Act 1996 (UK).
273 Williamson, above n 269, [41].
274 Ibid [40]-[41]. It was argued unsuccessfully that parents who wished to have their children punished for misdemeanours at school in accordance with their religious beliefs could satisfy their beliefs by attending school on request to administer the punishment themselves, or by waiting until their children returned home from school before doing so; or by educating their children at home.
275 Begum HL, [55] (per Lord Hoffmann).
276 On occasion, however, religious claimants do fail the engagement step, most notably in Arrowsmith v UK (1978) 3 EHRR 218, where it was held that Pacifism qualified as a “belief” under Art 9, but that distributing leaflets in protest at a particular armed conflict (and which leaflets did not as such contain expressions of pacifist views) was not “intimately linked” to the belief. See discussion of the Arrowsmith test in Chapter 4, text accompanying ns 46-50. See also R (on the application of Playfoot (a minor) (by her father and litigation friend Playfoot)) v Governing Body of Millais School [2007] EWHC 1698 [22]-[23], an English High Court decision, where the wearing of a “chastity ring” by a girl who sought an exemption from a school rule prohibiting jewellery was not deemed (applying Arrowsmith) to be “intimately linked” to a religious belief in chastity before marriage. The girl’s Art 9 claim failed at the engagement step, and the judge did not therefore consider justifications for the rule under Art 9(2).
these cases the CA declared that a limitation on Shabina’s rights had occurred and then went on to consider justification under Art 9(2). Lords Bingham and Hoffmann, however, explained in Begum that it was wrong to say the non-interference principle was restricted to employment cases and pointed to a string of decisions outside the employment field that used the same principle to dismiss manifestation of religion claims. For example, a religious claimant had been denied a graduation certificate because she refused to be photographed while not wearing an Islamic headscarf. The European Commission of Human Rights found no interference with her rights under Art 9, because: by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs.

Lord Bingham described Karaduman as a “strong case”. No doubt this was because it applied in an education setting the same principle seen in the employment case law on Art 9. This indicated that Mummery LJ’s attempt to distinguish the employment cases was misguided. In the opinion of the HL, this meant Shabina’s claim failed, as she could not establish an interference had occurred. As seen above, the facts of the case revealed that she had freely enrolled in Denbigh High School and knew that the jilbab was not a permitted item of clothing. Moreover, there was “no real difficulty” for her to attend another school where she could wear the item, which in fact she managed to do during the litigation. Simply put, and unlike the religious claimants in Williamson, it was not unrealistic for her to manifest her religious beliefs elsewhere, and therefore her Art 9 claim failed.

The minority in the HL took a different view. Lord Nicholls said that the majority had “overestimate[d] the ease with which Shabina could move to another, more suitable school and underestimate[d] the disruption this would be likely to cause her education”. In his view, moving schools was not a simple matter, and therefore an interference had occurred. It followed that it was his belief that in cases of this type schools should be required to explain and justify their decisions. Baroness Hale agreed with Lord Nicholls on the point. She cast doubt on the ability of children, as opposed to adults, to exercise fully autonomous choices regarding their religious beliefs and noted that these are apt to evolve over time. Moreover, it was the choice of her parent or guardian that Shabina attended the school, so it would be harsh to impose the consequences of this choice on her. More sensitivity was required on the issue,

277 Begum HL, [56]-[57].
278 Ibid [51]-[55] (per Lord Hoffmann); & [22]-[24] (per Lord Bingham).
279 (1993) 74 DR 93 (“Karaduman”).
281 Ibid. Lords Bingham and Hoffmann (at paras [22]-[24] & [51]-[55]) cited Karaduman and other European cases (Lord Scott, at [87], cited only Karaduman on this point) where claimants had failed at the first step of Art 9, both within and outside the field of employment: see, eg, Kalac v Turkey (1997) 27 EHRR 552 (Turkish army member compulsorily retired because he had become involved in religious sect; claim failed because he knew in advance of joining the army that this was a banned activity); Jewish Liturgical Association Chi’are Shalom Ve Tszedek v France (2000) 9 BHRC 27 (religious claim by Jewish group that French authorities prohibited them from slaughtering animals in accordance with their opinion of what the ritual required; claim failed because it was possible for them to import suitable meat from Belgium).
282 See Ibid [56]-[57] for Lord Hoffmann’s critique of Mummery LJ’s position, which he describes as “confusing”.
283 Ibid [25] (per Lord Bingham); & see [52] (per Lord Hoffmann), [89] (per Lord Scott).
284 Begum HL, [41].
and therefore she felt that the prohibition on the jilbab “may still count as an interference”.\footnote{Ibid [92]-[93].} Like Lord Nicholls, she thought that the school ought to be required to justify its policy.

Strictly speaking, the HL, having obtained a majority on the interference point, did not need to address issues arising under Art 9(2). However, out of deference to the minority, and perhaps because of the wider importance of the issue, the majority also turned their minds to matters of justification.

**Justification**

Lords Bingham and Hoffman delivered the leading speeches on issues arising under Art 9(2) and were joined in their complementary reasonings\footnote{Lord Bingham expressly associated himself with the reasons given by Lord Hoffmann for dismissing the case, implying they should be read together; ibid [40].} by Lord Nicholls.\footnote{Lord Nicholls, who considered that an interference had occurred, offered no further detailed comment in the case, save to voice his concurrence with Lords Bingham and Hoffmann on the issue of justification; ibid [41]. Lord Scott’s speech was conspicuously not joined by any other of their Lordships, though he agreed in the result on the issue of interference. He did not contribute to the discussion on justification. Baroness Hale agreed in the result that the interference was justified, but advanced different reasons, which are discussed below.} They found that even if the school had interfered with Shabina’s rights, it was fully justified in doing so. They did not offer comment on the gender equality argument put forward by the school, but found it was sufficient to say the policy protected the rights and freedoms of other students, which is a permissible goal under Art 9(2).

Regarding the CA’s procedural approach, Lords Bingham and Hoffmann accepted the Education Secretary’s (and Thomas Poole’s)\footnote{Lord Bingham expressly cites and endorses Poole’s negative appraisal of the CA’s Art 9 “checklist” for the school. Ibid [28] & [31].} critique and overturned the CA judgment on the point.\footnote{Baroness Hale and Lord Scott offered no comments on the CA’s approach; but in finding the school’s actions to be justified under Art 9(2) they both implied that the CA was mistaken in its procedural solution to the case.} It was unreasonable for courts to impose on non-lawyers, such as school principals, the highly structured analysis followed by judges in Art 9 cases. Quoting Poole, Lord Bingham said this would be to “introduce a ‘new formalism’ and would be a ‘‘recipe for judicialisation on an unprecedented scale’’.\footnote{Baroness Hale and Lord Scott offered no comments on the CA’s approach; but in finding the school’s actions to be justified under Art 9(2) they both implied that the CA was mistaken in its procedural solution to the case.} To ask schools to make their decisions with “textbooks on human rights law at their elbows”\footnote{Ibid [31] (per Lord Bingham).} was not required by Art 9. What was required was that schools make the right decisions on substance; that is, to decide whether rights were in fact violated. How schools made these decisions was not the concern of the courts. Quoting Davies, Lord Bingham opined that the “‘[r]etreat to procedure’”\footnote{Ibid [68] (per Lord Hoffmann).} entailed in referring questions concerning ECHR rights back to schools in the manner ordered by the CA, would see the courts unacceptably “‘avoiding difficult questions’”.\footnote{Ibid [30]; citing Davies “Banning the Jilbab”, above n 236, 517.} This was not how the UKHRA was intended to work, especially given the direction in s 6 of that statute, which appears to require public bodies simply to arrive at ECHR-compliant results. Instead, decisions that conflicted with Convention rights must be “judged objectively” by the courts.

The next question was to ascertain just how “objectively” the decision of Denbigh High School to prohibit the jilbab would be adjudged. The minister had argued that the CA was wrong in distinguishing Sahin as being a Turkey-specific decision on the grounds that it dealt with a country that had a strong secular clause in its constitution and had a different history with

\footnote{Ibid [92]-[93].}
regard to religious fundamentalism than the UK. Therefore, the Turkish government’s argument that its ban on the headscarf was a proportionate measure designed to protect the rights of others, which succeeded in the European Court, should also be considered an adequate argument in the UK. The HL agreed with this submission. Lord Hoffmann stated that the CA’s distinction of the British and Turkish circumstances “miss[ed] the point”.293 The fact that the UK was not a secular state was immaterial. In the UK there was no national rule on secularism, or indeed regarding religious dress in schools. Instead Parliament had delegated the power to decide these matters to individual schools. Thus, it seemed for his Lordship that the minister’s argument that Denbigh High was “not unlike a microcosm of Turkey” was a good one. This analogy received further force perhaps from the fact that Denbigh High had been granted an exemption from the national requirement that schools have a daily act of collective worship.294 Therefore, the justifications advanced by the school in maintaining its policy were to be accorded a similar level of deference to that afforded by the European Court of Human Rights to Turkey in its decision, made at the national level, to ban religious attire from universities.295 From this standpoint it was therefore a simple matter for his Lordship to find that the justification advanced by Turkey in Sahin for its ban on headscarves (and the evidence supporting it) would be a valuable guideline in assessing Denbigh High’s arguments under Art 9(2). As a result, the case of Sahin, which the CA had attempted to isolate as a decision peculiar to the Turkish national context, was to be the main precedent for their Lordships in disposing of Shabina’s case.

Having accepted that protecting the rights and freedoms of others was a legitimate aim of the school’s policy,296 the next issue was the standard of proof required to show that the policy was a necessary and proportionate measure to achieve this aim. The CA had voiced considerable doubt as to whether the reasons put forward by the school would be sufficient in this respect, and had asked the school to reconsider them, especially in light of the policy’s discriminatory impact. We have seen how Shabina’s submissions attempted to latch on to the CA’s observations in this respect.

Unfortunately for Shabina, the HL was not to accord these arguments any weight at all. Lord Bingham’s speech began promisingly from Shabina’s point of view with a strong statement that, when assessing the proportionality of measures that interfere with Convention rights, the courts “must go beyond [the approach] traditionally adopted to judicial review in a domestic setting” and must do so “objectively”. However, his Lordship then proceeded to do nothing of the kind, and devoted no meaningful attention to Shabina’s equality arguments, which might have been thought to assist in an “objective” consideration of this type. Instead, his Lordship turned immediately to the “valuable guidance” of the Grand Chamber judgment in Sahin. In that case, the European Court had noted the necessity in some cases to restrict the freedom to manifest religious belief in the name of “religious harmony”, and that the state would be accorded a wide latitude in the drawing of lines in the matter because of the “variations in practice and tradition” among European states. After approving of these broad statements, his Lordship then briefly related Shabina’s equality-based complaint that the school had allowed the headscarf but not the jilbab, which was in any case allowed in other schools. His response was that this complaint was unsustainable for the somewhat opaque reason that the headscarf had been permitted in 1993 after wide consultation, and had not been opposed, whereas

293 Ibid [50].
295 Ibid.
296 Ibid [26] (per Lord Bingham), [58] (per Lord Hoffmann), [94] (per Baroness Hale). Like Leyla Sahin, Shabina did not contest whether the aim of the policy was legitimate.
Shabina’s request to wear the jilbab had been. Moreover, the school had not rejected her request out of hand, but had consulted on the matter widely. It was up to schools to decide what uniform served its “wider educational purposes”, and this might vary greatly depending on the “composition of their student bodies and other matters”. These deferential comments were the forerunner to Lord Bingham’s concluding comment that:

It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision.

In a matter of three paragraphs, therefore, Lord Bingham’s “objective” enquiry, after glancing tentatively at Shabina’s equality complaint, made a swift retreat to deference. It seemed that for him, as long as a school had not acted high-handedly, had consulted affected groups, and offered some reasons for its policy, it could make almost any uniform code it liked, because Parliament said it could. This policy could be made along mainstream religious lines in tune with the majority’s wishes (in Denbigh High’s case, these were the mainstream or liberal Muslim views on Islamic dress requirements). No real consideration of Shabina’s equality claim was undertaken. It did not need to be.

Lord Hoffmann essentially repeated Lord Bingham’s stand on the degree of deference to be accorded public bodies that are delegated power to make decisions by Parliament. Whereas the CA had thought that the level of deference given to the Turkish government’s decision to ban the veil was not suitable in the UK context, Lord Hoffmann considered that the area of judgment left to the school to make its uniform choice was a mirror image of the Turkish government’s margin of appreciation in Sähin. For this reason, the evidence given by the school supporting its decision to ban the jilbab was judged sufficient by his Lordship, who said that Bennett J at first instance had “ample material” to find that the policy protected the rights and freedoms of students and staff who voiced concerns about what would happen if the school permitted the garment.

Lord Hoffmann did, however, consider Shabina’s equality argument, but the manner in which he dismissed it was peremptory. Her lawyer, in classic Equal Regard fashion, had argued that the uniform policy’s objectives were “undermined” by allowing headscarves, as this identified the wearers as Muslims, and so it would make no difference if the school permitted jilbabs as well. In his Lordship’s view, however, this argument took no account of girls who thought that to allow the garment would result in them being pressurised to wear it, or that it signified adherence to an extreme version of the Islamic religion. This was a valid point perhaps, but his Lordship evidently stopped well short of genuinely balancing the two competing interests against one another. This would have entailed casting a more critical eye over the school’s reasons for its policy. He did not consider, for example, whether the presence of the Islamic headscarf and shalwar kameez on the list of permitted items in the school dress code would also result in reluctant Muslim girls being pressurised to wear those garments. In Sähin the headscarf was regarded as a talisman of Islamic fundamentalism in Turkey. Why was the headscarf not a similar concern in the UK? From the Equal Regard perspective, the avoidance of questions like this is to abdicate the judicial role. With respect, it is difficult to escape

297 Ibid [34].
298 Shabina’s invocation of the 1983 HL decision of Mandla v Dowell Lee, in which a school’s argument that restrictive dress codes had the beneficial effect of creating a school of “equals” had been rejected by the HL, was not discussed at all.
making the observation that Lord Hoffmann, and the other members of the Court, may have preferred not to ask these questions and found it convenient to sweep them under the carpet of judicial deference to the administrative arm of government.

Shabina’s “Equal Regard” argument therefore failed without receiving a considered response. It seemed that deference to the school’s choices, based on their democratic credentials and special expertise, and backed up by a modicum of second-hand statements by students that presumably belonged to the majority Muslim grouping in the school who were comfortable with the shalwar kameeze and headscarf, acted as an effective solvent of the Equal Regard principle. Their Lordships’ swift, not to say results-driven, defeat of this line of argument is in striking contrast with the Human Rights Commission’s approach in the Muslim boy case in 1994, where, consciously or not, the Commission had found the Equal Regard argument to be dispositive in that case.

The Multani case: a deus ex machina from Canada?

Shabina made one final argument. In the almost simultaneously decided case of Multani v Commission Scolaire Marguerite-Bourgeoys, the Supreme Court of Canada addressed an issue that had certain similarities to the Begum litigation. At first glance the facts of Multani appeared to present a weaker case for the religious claimant in question, and yet the Supreme Court found in his favour. It involved a complaint by a 12-year-old Sikh boy who had been refused permission to wear a ceremonial Sikh dagger, or kirpan, at school, as the school code prohibited the carrying of “weapons and dangerous objects” on its premises. The boy had accepted a compromise where he would wear the dagger in a sealed pouch underneath his outer garments, instead of in full view outside his clothing, as was traditional. This solution was initially endorsed by the school board but overruled by the superior governing board for the district, which insisted that the boy wear a non-metallic replica of a kirpan in the form of a pendant. Gurbaj Singh challenged this new compromise under s 2(a) of the Canadian Charter of Rights and Freedoms as being an unreasonable infringement of his freedom of religion. Gurbaj considered that wearing a metal kirpan was required by his faith and was not prepared to make any further compromises.

In keeping with the more relaxed standards of the North American courts, the Supreme Court held that the governing board’s insistence on a non-metallic kirpan in the form of a pendant was a prima facie infringement of the boy’s rights. The Court then turned to consideration of whether this was nevertheless a justified limitation under s 1 of the Canadian

300 [2006] 1 SCR 256 (SCC) (“Multani”). This decision was handed down on 2 March 2006, falling between the second and third hearing dates for the Begum case in the House of Lords.
302 Section 2(a) reads in relevant part: “2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.”
303 See my comparison of the North American and European courts in assessing this preliminary issue in Chapter 4, section 2.1.1.
304 Multani, above n 300, [36] (per Charron J).
Charter. As in the first instance decision in Begum, a health and safety argument advanced by the school to justify its policy failed. The school unsurprisingly contended that the interests of other students in being able to attend a safe school environment free of weapons ought to trump the Sikh boy’s religious freedom claim. The Supreme Court, however, pointed out that many other potentially dangerous objects were permitted on the school property, such as baseball bats and compasses. The kirpan, which would be concealed from view and was not easily accessible, would in their view create no greater risk than these other secular items. The Court felt fortified in this view by the fact that there had been no reported incidents of kirpan-related violence in any Canadian school. As in the Begum case, the health and safety argument was therefore dismissed.

For our purposes, the school governing board’s next argument was more interesting, and was probably the reason that Shabina placed Multani before the HL. This was that allowing the metal kirpan would cause psychological harm to other students. The governing board backed up this position with claims that have clear parallels with the school’s argument in the Begum litigation. Based on the affidavit of a “psychoeducator”, the governing board submitted that the “presence of kirpans in schools will contribute to a poisoning of the school environment”. If Gurbaj were allowed to carry the item it could have a “ripple effect” in that other students would feel the need to arm themselves. The kirpan was a “symbol of violence” that “sent[ed] the message that using force [was] the way to assert rights and resolve conflict”. Moreover, to permit the item would slight the feelings of other students, who would regard an accommodation of Gurbaj’s beliefs as “special treatment”. Some students, according to the affidavit of the expert witness, already felt that Muslim girls who were able to wear veils were being unfairly privileged, as they themselves were not allowed to wear caps or scarves.

The Supreme Court did not accept any of these claims. While it acknowledged that freedom of religion could be limited for the protection of the rights of others, the Court found that this claim was not made out in the case at hand. For the Court, evidence as to the symbolic religious nature of the kirpan fatally contradicted the governing board’s “assertion” that the item was a symbol of violence. Justice Charron felt, moreover, this claim was “disrespectful to believers in the Sikh religion”, and noted that the claimant himself had exhibited no behavioural problems at all while at the school and that the proper way to view the kirpan was therefore as a religious item, not as a totem of violence. The evidence of the expert witness was dismissed as merely a “personal opinion”, the product of his predisposition that the kirpan was “by its true nature, a weapon”. Regarding the asserted unfairness to non-Sikh students of

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305 Section 1 reads: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

306 Multani, above n 300, [46] (per Charron J).

307 Ibid.

308 Ibid [59].

309 Ibid [70].

310 Ibid [68].

311 Ibid [70].

312 Ibid [72].

313 Ibid. It is important to note, that, unlike Begum, the students who gave opinions in the expert witness’s report did not attend Gurbaj’s school; it was instead a more general survey. Moreover, the survey did not specifically address the issue of the kirpan, but of weapons in schools generally.

314 Ibid [26].

315 Ibid [71].

316 Ibid.

317 Ibid [74].
allowing the kirpan for Sikhs while not allowing them to carry knives or wear secular items like baseball caps, Charron J believed it was the responsibility of schools to instill in their students the value of religious tolerance.\textsuperscript{318} To create an absolute prohibition of the kirpan would “stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others”.\textsuperscript{319} For the Court, therefore, objections to the presence of the kirpan were not to be addressed by banning the item, but by educating those who felt uncomfortable around it. Vague fears of danger, or the assertions of educators, psychologists and students that the presence of such an item would poison the school environment were not sufficient to overcome the sincere religious claims of Gurbaj Singh. To hold otherwise, opined the Court, would send students the “message that some religious practices do not merit the same protection as others”\textsuperscript{320}

The Canadian Supreme Court’s stance is in striking counterpoise to the HL’s school-friendly approach in \textit{Begum}. Whereas the fears of students and staff at Denbigh High were accorded decisive weight in their Lordships’ speeches,\textsuperscript{321} the Canadian Supreme Court took the position that such concerns should be addressed by educating the students in the value of religious tolerance, not by caving in to their wishes and banning a religious item that is considered sacred by a minority group. Furthermore, the Canadian approach was solicitous of the actual motives of the religious claimant. In the HL, these were subordinate to the beliefs of majority adherents to the Muslim faith that the jilbab was a symbol of extremist Islam, even though there is no suggestion on the record that Shabina was a disruptive presence at the school or sought to proselytise this view. And as for the fear that students at Denbigh High would be pressurised by their families and other persons within and outside the school, it was of apparently no concern to the Canadian Supreme Court that the 12-year-old Gurbaj might have been forced by his family to insist on wearing the kirpan. It was assumed, given that no evidence suggested otherwise, that he wished to wear the item as an expression of his autonomous religious belief. In the HL, Shabina’s wishes were of no consequence beyond the initial enquiry into whether an interference had occurred. During the consideration of justifications for the ban on the jilbab, it was the rights of other students not to wear the garment that became paramount.

Unfortunately for Shabina, the HL dismissed her last-ditch reference to \textit{Multani}. Lord Bingham, without more comment, declined to take any guidance from the decision, simply stating that it was a “case decided, on quite different facts, under the Canadian Charter of Rights and Freedoms. It does not cause me to alter the conclusion I have expressed”.\textsuperscript{322} Thus, \textit{Multani} was easily distinguishable on the basis that it emanated from a different legal system\textsuperscript{323} and involved a different factual matrix.\textsuperscript{324} For the HL, therefore, there were more lessons to be learned from Turkey than from Canada. And so Shabina’s case foundered at the

\textsuperscript{318} Ibid [76].
\textsuperscript{319} Ibid [78].
\textsuperscript{320} Ibid [79].
\textsuperscript{321} See \textit{Begum} HL [65] (per Lord Hoffmann), [98] (per Baroness Hale).
\textsuperscript{322} Ibid [34].
\textsuperscript{323} Note that the HL was of course under no obligation to consider, or even distinguish, \textit{Multani}, as it was a decision made by a foreign court. The HL’s only obligation regarding non-British jurisprudence is that it “must take into account” any decisions of the European Court of Human Rights; see Human Rights Act 1998 (UK), s 2.
\textsuperscript{324} As to the differences in facts, Gurbaj Singh was unable to attend any public school wearing the kirpan and had been forced to attend a private school in order to do so. For their Lordships, perhaps this was a key ingredient in the \textit{Multani} case, especially with respect to the question of interference. The fact that Gurbaj was prepared to compromise when the initial disagreement arose may also have been important. Shabina, on the other hand, refused any compromise, and in any case was able to wear the jilbab at another local public school.
final appellate level in the UK and Denbigh High School’s uniform code survived intact after four years of litigation.

3.2 Final comments on Begum

As mentioned above, the Begum decision has become the prime precedent for judicial consideration of Art 9 claims in British schools. In R (X) by her Father and Litigation Friend v Y School,\(^\text{325}\) for example, a schoolgirl, who wished to wear a niqab (a veil covering the whole face, except for the eyes) but was refused permission to do so by her school, failed in her Art 9 claim at the English High Court. Applying Begum, Justice Silber held that no interference with the student’s rights had occurred because she could have attended another local school where this garment was permitted. The judge also said that, even if an interference had occurred, this was a proportionate measure for protecting the rights and freedoms of others. As in Begum, the school’s claim that to permit the garment would result in other students being pressurised to wear it was accepted, as was the argument that the all-concealing nature of the niqab posed a security risk, because it would allow intruders to enter the school in disguise. Also accepted was the school’s claim, which mirrored that of Denbigh High, that the uniform promoted “‘uniformity and an ethos of equality and cohesion’”. The Begum case was cited liberally throughout Silber J’s judgment, which noted that a “recurring theme in Begum was to permit a margin of appreciation or discretion to the school”. With respect to the argument that other girls would be forced to wear the garment if it were made an official part of the school uniform, it was pointed out by counsel for the claimant that, unlike in Begum, there was no evidence at all from other girls to this effect. The judge did not consider this to be problematic, however. He ruled that the head teacher “will know how her pupils might react and it would be wrong for me to overrule her”.\(^\text{326}\) Hence, any searching scrutiny into the evidence supporting the school’s reasons for disallowing the niqab on this ground was deemed unnecessary, and the religious claim failed.

The Begum decision was not greeted with unanimous approval.\(^\text{327}\) Following up on his qualified approval of the CA decision, Gareth Davies makes several pointed remarks on the HL judgments that have already been touched on here.\(^\text{328}\) Chief among these is his concern that the decision appears to favour majority factions of a religion at the expense of minority groups. For him, to allow schools to pick and choose between different versions of Islam is an unfortunate aspect of the case that received insufficient attention in the HL. Davies argues that allowing schools to determine which forms of religious dress contribute to ethereal notions such as social cohesion and what the correct interpretation of religious scriptures should be is unwise. Would a court accept as satisfactory a public body, such as a school, deciding as a matter of public policy that a “Catholic reading of the Bible” was good grounds for restricting

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\(^{325}\) [2007] EWHC 298 (“Niqab case”).

\(^{326}\) Ibid [91].

\(^{327}\) See J Shepherd “School Uniform dissent” The Guardian (UK, 9 October 2007).

the activities of those within its control who subscribed to a “contrary Protestant view” of the
same religious text? Moreover, was it wise to allow the statements of certain teenage
members of the majority Muslim group in the school to carry the day in the HL? Davies
considers both questions to require a negative response. For him, the HL had overstated the
area of discretion that should be given to the school at the expense of any meaningful
examination of whether the correct factors were considered in exercising its discretion. The
Niqab case, which followed soon after Begum, would seem to indicate that judicial scrutiny of
school uniform policies in the post-Begum environment would be even less rigorous than that
of the HL. At least their Lordships were able to refer to some evidence. Now it seemed that all
that a school needed to do was assert a legitimate aim and for this to be fronted by a
“convincing” and “thoughtful” head teacher.

The Equal Regard model advanced in this thesis is designed primarily to prevent
discriminatory choices of this sort being made. The Begum decision does not accord any
weight at all to the equality concerns that I argue ought to be at the core of a worthwhile
religious freedom guarantee in a constitutional document. The Begum decision appears,
moreover, to be at odds with the earlier aspirational statement of the same court in Williamson,
that “in matters of human rights the court should not show liberal tolerance only to tolerant
liberals”. In reply, it might be said that the “illiberal” parents who wished to have their
children physically chastised at school lost their case too. The answer to that, however, is that
the ban on corporal punishment in British schools was immaculate in terms of its Equal Regard
credentials: the law was imposed equally throughout all British schools without exception and
so deserved to survive scrutiny. The policy in Begum by contrast played favourites between
liberal and strict Muslim views of what Islam requires, and the “tolerant liberals” were easy
victors in that case.

Approaching Begum from another direction, it is essential to remember that, unlike in France
and Turkey, the person who lost the case was still able to, and in fact did, attend a nearby
educational institution that allowed the jilbab. Their Lordships were obviously aware of this,
and it also leads to a further point. If Shabina had won her case it would have been open to
schools to “equalise down” and ban all items of religious dress, thus creating a “net loss” for
Muslims in the UK, including Shabina. Their Lordships may also have been aware, relatedly,
that a win for Shabina could have spelt the end for school uniforms in Britain, as it would have
meant that any school uniform could be challenged by any student who did not like it and
could assert a genuine religious belief.

A final observation to make is that Lord Bingham’s distinction of Multani was probably a valid
one. Gurbaj Singh, it should be noted, was prepared from the outset to compromise his beliefs.
It is difficult to imagine that even the Canadian Supreme Court would have allowed him to
succeed if he had insisted on wearing his kirpan in full view of all other students at his school,
ready to be quickly unsheathed. Perhaps Gurbaj would also have succeeded at the HL, as it will
be recalled that their Lordships were noticeably peevish at what they saw as Shabina’s

329 Davies “Religious Clothing”, above n 328, 431.
330 Ibid 430.
331 Ibid 432. See also Fenwick Civil Liberties, above n 328, 275.
332 Silber J used these words to explain his faith in the judgment of the head teacher in the Niqab case. See Niqab case, above n 325, [92].
333 Williamson, above n 269, [60] (per Lord Walker). In the same vein, Rivers suggests that Begum “justifies state intervention to liberate those who, by failing to sign up to the gender-equality programme, are unwittingly colluding in fundamentalism”. Julian Rivers “Law, Religion and Gender Equality” (2007) 9 Ecc LJ 24, 36.
reluctance to compromise her beliefs, as Gurbaj had done. As for how Shabina would have fared in Canada, it is intriguing to ponder whether a failure to rise to Canadian standards of civility would have wrecked her case.\footnote{The Supreme Court in \textit{Multani} constantly referred to Gurbaj’s willingness to compromise, which is to be contrasted with the HL’s references to Shabina’s intransigence. See Carissima Mathen “Developments in Constitutional Law: The 2005-2006 Term” (2006) 35 SCLR 17, 78. Nonetheless, the Canadian approach seems far more attuned to an individualist conception of s 2(a) of the Charter and a presumptive reluctance to give way to majoritarian interests where a minority religionist’s rights are at stake, regardless of her behaviour towards authority.}

Finally, it is worth pointing out that the Canadian Charter contains the following command: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”\footnote{Canadian Charter, s 27. This section was curiously unmentioned in \textit{Multani}, though it received some treatment in several of the Canadian judgments on which \textit{Multani} was premised; see, eg, \textit{R v Big M Drug Mart Ltd} [1985] 1 SCR 295, 297 & 338.} The UKHRA has no similar provision. It is of course not impossible to infer “multiculturalism” from a statutory bill of rights which does not in fact use that word, but it is surely more difficult to do so than it is in Canada with its supreme law guarantee of multiculturalism. It is therefore not surprising that the Canadian courts are probably more assiduous in protecting the individual rights of its minority citizens. The UK, by contrast, has a considerably more amorphous attachment to multiculturalism and has perhaps a more inconsistent record of recognising this ideal.

To conclude our examination of the \textit{Begum} case, the most important point for our purposes is that it is now the law of the land in the UK,\footnote{Shabina did not appeal the decision to the European Court of Human Rights. If she had, perhaps the most fertile ground of argument would have been to focus on the discriminatory aspects of the school policy and not on Art 9 per se. This is the most obvious distinction that can be made with \textit{Sahin} and the French legislative ban. Despite what one might think of those two iterations of the “headscarf ban” in Europe, they appear, on their face at least, to apply a (virtually) across the board prohibition on religious attire at educational institutions. From our discussion here it seems unarguable that Denbigh High by contrast adopted a much more selective view as to what articles of Muslim attire were acceptable and which were not. However, given the tendency of the European Court on Human Rights in recent years (as illustrated most piquantly in \textit{Refah Partisi}) to adopt a hostile attitude to Islam, it may be that Shabina decided to cut her losses and to get on with her life. On the anti-Islam undercurrents of \textit{Refah Partisi, Sahin}, and \textit{Begum}, see, generally, Finnis “Discrimination between Faiths”, above n 299.} and, given the status of the court that delivered the decision, it would likely be a significant persuasive precedent in any judicial deliberation of a similar controversy in New Zealand. As discussed earlier, \textit{Begum} has an affinity with a line of jurisprudence in this country which accords great discretion to schools in managing their own affairs, with \textit{Maddever} being pre-eminent among them. No doubt \textit{Begum} provides a shot in the arm to Williams J’s pronouncements in that case, which had seemed to be falling out of favour.

We turn now to consider how a New Zealand court might deal with a fact situation where a school seeks to rely on \textit{Begum} as persuasive authority for restricting the religious dress choices of its students.

\section*{4. Deference versus Equal Regard: a jilbab case in New Zealand}

We return now to New Zealand and a hypothetical case where a Muslim girl (let us say her name is Karima and that she is a refugee from Algeria) has enrolled at a co-educational state secondary school with a high percentage of Muslims on its roll. In keeping with this, the school has exercised its discretionary powers to institute a uniform policy that takes into account its...
Religiously diverse intake. It allows long trousers for all boys, as well as long dresses and headscarves for girls who wish to wear them for religious reasons. These items are to be in the school colours and are to conform to certain specifications as to material and shape. The school arrived at this policy after consultation with local religious leaders and other community members, and also, perhaps, after being made aware of the Human Rights Commission mediation of the Muslim boy dispute. It also made this choice in the belief that it thereby fulfilled its duty under its charter, which requires that the school “[e]nhance learning by ensuring that the school’s policies and practices seek to achieve equitable outcomes for students from all religious, ethnic, cultural, social, family and class backgrounds”. The contents of the uniform code are made known in a circular to all prospective students in advance of their first day at school. The school performs well in all the indicators of academic success and is free of any inter-communal strife. It attributes its success in part to its uniform policy, which it believes is a key facilitator of social cohesion and school pride. The school principal is a Muslim of Fijian Indian descent, as are several of the parent trustees. The school does not include any form of spiritual activities at its daily assemblies.

At the age of 14, Karima decides that, as a maturing Muslim girl, her religious beliefs require that she wear a jilbab, a garment that is common in her native Algeria. Her parents support her decision and accompany her to school on the first day of a new term. They meet the school principal who informs them that she cannot attend unless she wears the correct uniform. It is suggested to the group that the school uniform, which permits a long dress, adequately provides a degree of modesty that is comparable to the jilbab. Karima and her parents disagree, saying that the jilbab conceals more of the body shape than a dress. The meeting degenerates into threats of legal proceedings and Karima departs the premises with her parents and does not return. Subsequently a group of Algerian men picket the school and demand that Karima be permitted to wear the jilbab. Several pupils comment they were harassed by the protesters, and others say they hope an accommodation will not be made for Karima, as they would feel pressure to wear the garment from other students, as well as from members of their own community, who might say they were “bad Muslims” if they did not.

The impasse continues. Education ministry officials urge Karima to consider attending a different school in the area that has no dress code at all and which has said it would allow her to wear the jilbab. She refuses to change schools. Karima and her parents file suit in the High Court for judicial review of the school’s decision not to allow her to attend wearing the garment. They claim this is an unjustified infringement of her right to manifest her religious beliefs under s 15 BORA.

4.1 Is the school's decision a prima facie breach of Karima's rights?

It is likely the school will concede that Karima’s rights are “engaged”, in that she has a sincere religious belief that her religion requires her to wear the jilbab and that the uniform rule conflicts with this.\(^{338}\) However, citing Williamson, it will argue that freedom to manifest one’s religious beliefs is a qualified right, and can be subjected to time and place restrictions: “What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his

\(^{338}\) It may try to argue that Karima could preserve her modesty by wearing the long dress that is allowed by the school code, and cite an endorsement by a local imam that the code complies with Islamic dress requirements. As we have seen before, however, in the Muslim boy case, and in Begum and Multani, it is almost certain that a court will accept a religious claimant’s subjective beliefs that certain conduct is required by her religion.
6. Religious attire in schools

beliefs in practice.” It will then argue, relying on Begum, that no actual infringement has taken place in law. This is because she enrolled at the school with full knowledge of the dress requirements, and because there was a nearby school available that allowed the jilbab. Thus, it could not be said that an infringement has taken place, and her claim should fail at the first stage of an enquiry under s 15 BORA.

It is suggested that this submission would not succeed in a New Zealand court. In the limited indigenous case law on the point it has almost always been held that a policy or law that conflicts with a sincere religious belief automatically counts as an infringement that must be justified under s 5 BORA. In Razamjoo, for example, Judge Moore found that to ask two prosecution witnesses to unveil in open court while testifying would be a prima facie infringement for s 15 purposes. All that mattered was whether they had a sincere belief that to unveil in public was unacceptable. The judge cited US case law on the point and considered that no further enquiry was needed. The school might respond that Karima’s case is different, however. In Razamjoo, there were no other avenues for the religious claimants to exercise their right, as the court hearing was a one-off event, and so the judge had no choice but to find an interference in that case. By contrast, it would undoubtedly be possible for Karima to attend a different school where she could manifest her religious beliefs, and so the answer to the question is not so straightforward. A New Zealand court has never had to rule on this matter, although as we have seen above, the Human Rights Commission found that an interference had occurred in very similar circumstances in the Mt Roskill dispute.

It is difficult to predict what a court would make of such a submission. A judge might think that reliance on the UK case law would be an attractive and robust way to dispose of Karima’s case without having to engage in the difficult proportionality enquiry that necessarily follows a finding of a prima facie infringement. It is suggested, however, that any temptation to follow the European jurisprudence on interference ought to be resisted. This is in part because British judges are required to consider a different international instrument from their counterparts in New Zealand. Section 2 of the UKHRA requires the UK judiciary to “take into account” any pertinent decisions of the European Court of Human Rights. As we have seen in the discussion of Begum, their Lordships accordingly derived their test for assessing whether an interference had occurred in Shabina’s case from a line of European jurisprudence that erects a high barrier in front of religious claimants who claim their Art 9 rights have been limited when it is apparent that they could easily change their circumstances (ie, resign from their employment, or change schools) in such a way that they could manifest their beliefs elsewhere. The New Zealand courts are of course not bound by the UKHRA. Instead, the relevant New Zealand

339 Williamson, above n 269, [38].
340 See, eg, Razamjoo [2005] DCR 408 (District Court, Auckland); Feau v Department of Social Welfare (1995) 2 HRNZ 528 (HC). But see Re J (An infant): B and B v Director-General of Social Welfare [1996] 2 NZLR 134 (CA) (“Re J”), where a religious claim was defeated at the initial stage in a s 15 case. In Re J the rights of religious parents to withhold medical treatment for their child was accepted as being a manifestation of religious belief; but it was held that this belief did not fall within the scope of s 15, as it conflicted with their child’s right to life. This case would not appear to be relevant to Karima’s situation.
342 In Begum, Lord Hoffmann distinguished Sahin from the facts in Shabina’s case. The European Court of Human Rights “assumed” that an infringement of Leyla Sahin’s rights had occurred because there was an across the board ban on all veils at Turkish universities. Sahin Grand Chamber, above n 214, [78]. There was no alternative university that Sahin could have attended. Therefore a prima facie breach of her rights was assumed to exist in that case. In Shabina’s case there was another local school she could attend, so the HL held that no infringement had taken place. See Begum HL, [59] (per Lord Hoffmann).
343 See discussion of this issue in the text above accompanying ns 185, 206 & 276-283.
treaty is the ICCPR, and it is to this document and its various interpretations by the UN Human Rights Committee that a New Zealand court should turn if it chooses to seek international guidance on the matter. After many years of supervising state implementation of Art 18 ICCPR, the Human Rights Committee has never held that a prima facie breach of the right to manifest a religious belief does not occur when there are reasonable alternative ways that a claimant could exercise his or her beliefs. In *General Comment 22*, the Committee explicitly lists religious headcoverings as deserving of Art 18 protection, and in the Committee’s jurisprudence the two available cases involving religious headgear disclose that the Committee does not place a heavy burden on claimants at the preliminary stage of an Art 18 enquiry. In *Bhinder v Canada*, for example, the Canadian government argued that a law requiring hard hats to be worn by workers for the federal government did not breach the complainant’s right to religious freedom (a practising Sikh who wished instead to wear a turban), as he was free to resign and seek suitable employment elsewhere. Interestingly, the government cited the European case of *Ahmad v UK* in support of this proposition, a decision that was also cited by the majority in *Begum* to make the identical point. The Human Rights Committee, however, did not engage at all with this submission, and merely noted that the law was a justified limitation on the claimant’s beliefs under Art 18(3). Also, in the recent decision of *Hudoyberganova* the Committee found no difficulty in declaring that the decision of the Uzbekistan government to ban certain forms of the Islamic headscarf from state universities was a breach of the claimant’s rights at the level of a prima facie interference. There was no suggestion that anything more was required of the claimants in either of these cases in order to establish that a prima facie breach of their rights had occurred. It would seem then that the UN Human Rights Committee does not follow the restrictive standards in the European case law on this point, as exemplified in *Ahmad v UK* and *Begum*.

To conclude on this matter, it is suggested that a New Zealand court would most likely follow the Human Rights Committee’s lead on the issue of interference. If a New Zealand judge were instead to follow the reasoning of the majority in *Begum* and declare that no initial interference had occurred with Karima’s right to manifest her beliefs, it is very likely that this would provide a colourable ground for her to author a complaint to the Human Rights Committee under the communications procedure contained in the First Optional Protocol of the ICCPR. As a final observation, it should also be pointed out that their Lordships were deeply divided on this point, with Lord Nicholls and Baroness Hale disagreeing with the majority position.
that it would not be difficult for Shabina to change schools. For them, an interference had occurred due to the special difficulties faced by children when moving schools. The New Zealand courts, not being bound to follow the majority finding in the HL on interference, might decide that the reasoning of the minority in Begum has more intrinsic appeal and so elect to follow its inclination on the matter. 354

Whether or not a New Zealand court chose to follow the Human Rights Committee guidance, or the findings of the minority in Begum, or indeed the autochthonous case law that adheres to the North American approach to determining this preliminary matter, it would seem overwhelmingly to be the case that an interference ought to be declared with respect to Karima’s claim. This was also the approach taken by the Human Rights Commission in the Mt Roskill Grammar case, which appears to be correct, based on the most relevant authorities in this country. I will therefore proceed on that basis.

4.2 Given that an interference has occurred, would the school be able nevertheless to argue that it was a justified one?

It is on this point that the real debate on Karima’s complaint would descend. I will assume that no health and safety argument will be made along the lines that the jilbab, due to its free flowing nature, poses a hazard around certain school equipment, as this does not appear to be a problem in the neighbouring school which would have accepted Karima, and where jilbabs are permitted. I suggest also that banning the jilbab because it is a symbol of gender inequality would also not be regarded as a legitimate aim. In Begum their Lordships did not find for the school on this basis, presumably because they, like Judge Tulkens who made this point in her dissent in Sahin, felt that an appeal to gender equality should only be made by those who would benefit from it. 355 As Judge Tulkens put it: “Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them.” 356 I would suggest that in an advanced liberal democracy, it would be best to avoid a “paternalist” attitude to gender equality issues in marginal cases of this type where it is difficult to quantify harm from a practice, even where it may be conceded it is enforced by patriarchal elements in society. 357

Having tentatively disposed of these possible arguments for banning the jilbab, the only plausible remaining ground is that to prohibit the garment would be to protect the rights and freedoms of others, which was the sole justificatory aim that enjoyed success in Begum (and,

354 See also Gerald Davies’ argument that the majority in Begum erroneously applied the European jurisprudence on interference under Art 9. For Davies, the fact that the school allowed some forms of religious dress to be worn and not others meant that an interference ought to have been declared for this reason alone. Davies “Religious Clothing”, above n 328, 428.
355 Sahin Grand Chamber, above n 214, [11]-[12] (per Judge Tulkens, dissenting). In Begum their Lordships did not comment at all on the school’s submission that the ban on the jilbab would enhance gender equality, but made no mention of Judge Tulkens’ views on the matter. Baroness Hale did, however, discuss the patriarchal pressures put on girls in some cultures to wear certain garments but ultimately found that the ban on the jilbab was justified as it protected the rights of other students, and not gender equality per se. See Davies “Religious Clothing”, above n 328, 430.
356 Sahin Grand Chamber, above n 214, [12].
357 The main concern is where one would stop if a precedent were made in this regard to ban the jilbab. Assuredly, there are Christian and Jewish sartorial items that are imposed on children by their parents (not to mention the Islamic headscarf itself). See Gerald Davies “(Not Yet) Taking Rights Seriously: the House of Lords in Begum v. Head teacher and Governors of Denbigh High School” (2006) Human Rights and Human Welfare Online Working Paper No 37 (“Davies ‘(Not Yet) Taking Rights Seriously’”), available at: <www.du.edu/gsis/hrhw/working>.
notably, failure in *Multani*). There can be no doubt that protecting the rights and freedoms of others would be a legitimate aim in New Zealand. Section 5 BORA does not specifically provide for this aim, but it can be inferred from its presence in Art 18(3) ICCPR, which lists the permissible grounds on which the right to manifest religious belief can be limited under the Covenant: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” In interpreting BORA, the courts have made frequent recourse to the text of the ICCPR, on which BORA was partly based. It is likely therefore that a New Zealand court would accept that protecting the rights and freedoms of other students at Karima’s school would be a legitimate aim of the school uniform policy.

The critical question would then arise as to whether the measures used by the school would be adjudged necessary and proportionate in a democratic society, as required by s 5 BORA. And within this question would lie issues as to the extent that a New Zealand court would defer to the expertise of educators in making these decisions, and, relatedly, what standard of proof would these educators have to meet in discharging the justificatory burden. In *Begum* the standard of proof was very low, with their Lordships giving great latitude to those immediately in charge at Denbigh High in their assessment of the level of risk associated with allowing the jilbab, which, it was said, symbolised religious fundamentalism. By contrast, in *Multani* the standard of proof was set considerably higher and the Supreme Court of Canada did not attach much credence to the claims of the governing board, or expert evidence, that the kirpan would “poison” the school environment as it was a symbol of violence. In *Multani* the motivation of the claimant was held to outweigh the unsubstantiated fears of others. The Supreme Court of Canada therefore said it was incumbent on schools to educate students on the multicultural values underpinning Canadian society and to welcome the kirpan. In *Begum*, the beliefs of Shabina were secondary to the (largely) unsubstantiated fears of others. The HL therefore found that “cultural and religious diversity” at Denbigh High was sufficiently “respected by allowing girls to wear either a skirt, trousers, or the shalwar kameeze, and by allowing those who wished to do so to wear the hijab”. It would seem then that multiculturalism, like secularism, can mean different things in different countries.

I turn now to consider the arguments that would be advanced by both sides in Karima’s case.

4.2.1 Arguments as to justification

(a) The school’s position

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358 See, eg, *R v Goodwin* [1993] 2 NZLR 390 (CA), *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA), and *Hansen*, above n 114. The reliance by the New Zealand courts on the ICCPR text and Human Rights Committee jurisprudence to interpret provisions in BORA is justified, in these cases and others, by the fact that the long title to BORA confirms that one of the purposes of its enactment was to “affirm New Zealand’s commitment to the [ICCPR]”.

359 See, eg, *Re J*, above 341, 145, where the Court of Appeal reproduces the text of Art 18(3) during its discussion of a religious freedom claim under BORA. And see discussion of the use of the ICCPR as an interpretation aid in Andrew Butler & Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) 78-81; and section 3 in Chapter 3 of this thesis.

360 Section 5 BORA reads: “Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society.”

361 *Begum* HL, [98] (per Baroness Hale).
The school will argue that the approach laid out in *Begum*\(^\text{362}\) is also the appropriate method for determining the result in Karima’s case. It will say that the decision not to allow the jilbab is a necessary and proportionate measure designed to protect the rights and freedoms of other students at the school. Statements by these students will be advanced to the effect that if the jilbab is allowed they will feel compelled to wear the garment by peer pressure from other Muslim students in the school and also by members of their own families and community outside the school, as shown by the demonstration held by male Algerians at the school gates. They will also express fears that the garment is associated with an extreme form of Islam.\(^\text{363}\)

Arguments by the claimant that the school rule discriminated against strict Muslims would, as held by Lord Hoffmann in *Begum*, be subordinate to these two central reasons.

The principal will support these claims by contending the uniform is a critical device for ensuring school cohesion and pride, and that its success is reflected in the school’s academic excellence and lack of sectarian divisions. She will also point out that the uniform was crafted after careful consultation with leaders in the community and was not imposed in a high-handed way, and that being a Muslim herself she has a good understanding of Islamic dress requirements. Finally she will note that the school is a state institution which is neutral towards religion, as is shown by the fact that no religious activities are conducted at school assemblies.\(^\text{364}\)

Regarding the standard of evidence required, it will be argued that the principal’s statements as to the necessity of the rule ought to be regarded by the courts as sufficient in themselves, even without the supporting evidence of students. In the *Niqab* case, there were no supporting statements by students at all and the English High Court was convinced by the principal’s considered opinion alone, backed up by the school board. Citing Silber J in the *Niqab* case, it will be suggested that it “would be irresponsible of any court lacking the experience, background and detailed knowledge of the head teacher…to overrule their judgment on a matter as sensitive as this.”\(^\text{365}\)

In New Zealand, the scant authority on issues of this type indicates that the courts here are also very reluctant to intervene in school decisions that have been made thoughtfully and after community involvement. The school will refer to the comments of Williams J in *Maddever* to underscore this view, as well as to the sole case in New Zealand on student expressive rights, which has never been overruled. In *Edwards*, the Court of Appeal found (in 1974) that the democratic decision of the school board to set rules

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\(^\text{362}\) It is important to note that, in the strict sense, Shabina’s case failed because a majority of their Lordships found that no prima facie interference with her rights had occurred. Hence, the opinions in *Begum* on the school’s justification of its policy under Art 9(2) are not technically to be regarded as forming part of the ratio of the case.

\(^\text{363}\) These are the two reasons that were explicitly accepted by the HL in *Begum*. See Lord Hoffmann (whose opinion was joined by Lords Bingham and Nicholls). *Begum* HL [65] (per Lord Hoffmann). Baroness Hale appeared to believe that the best reason was that schoolgirls would feel pressurised to wear the garment if it were permitted in the school. *Begum* HL, [98] (per Baroness Hale). Lord Scott expressed no views on this issue, though he expressly associated himself with the judgments of Lords Bingham and Hoffmann.

\(^\text{364}\) These subsidiary arguments were all noted by their Lordships in *Begum* in passing. It appears that they contributed to the reasonableness of Denbigh High’s decision to ban the jilbab, though it is difficult to quantify to what extent these factors form part of the case’s ratio. What would happen for instance if the school was regressing in terms of its academic results and ethnic harmony? Or if it opened each day with an act of collective worship in the Christian (or other) religion? Lord Bingham prefaced his speech with the caveat that the decision hinged on the case’s particular facts (at para [2]), which indicates that such factors may become important in a subsequent case if they differ from those in *Begum*. Davies hints that their Lordships’ comments as to the excellence of the school’s head teacher, her understanding of the Muslim religion, the school’s ethnic tranquillity, and its fine academic record are really a smokescreen for the lack of concrete evidence proving that the ban on the jilbab was necessary; see Davies “Religious Clothing”, above n 328, 426, and, generally, Davies “(Not Yet) Taking Rights Seriously”, above n 358.

\(^\text{365}\) *Niqab* case, above n 325, [92], quoting Lord Bingham in *Begum* HL, [34].
on hair length was sufficient evidence of its objective necessity. This case was endorsed in Maddever, which, significantly, was a decision given after BORA was enacted in 1990. The school will argue therefore that Edwards is still good law, and that Begum is obviously a judgment that is in tune with the New Zealand jurisprudence on this issue, especially with regard to its espousal of deference to schools in managing their internal affairs, which has much in common with Williams J’s oft-quoted statement in Maddever to the same effect.\textsuperscript{366} Finally, it will be emphasised that schools are “different” from other bodies that have been delegated power to exercise control over individuals by Parliament.\textsuperscript{367} They constitute an “organic” environment reflecting a unique relationship between staff, students and the communities they serve. To disturb decisions made by democratically elected boards of trustees and principals acting within their area of expertise\textsuperscript{368} would be inappropriate and would have an adverse impact on school discipline and on the authority of principals and boards.\textsuperscript{369} Moreover, the school will argue that the policy is in keeping with the commitment to multiculturalism contained in its charter, and that it is best placed to draw the lines in a sensitive and complicated “multicultural” matter such as school uniforms.\textsuperscript{370} To honour that value is not the same thing as caving in to every minority interest.

In any case, the school will conclude that BORA, not being a supreme law document like otherwise comparable bills of rights in the US and Canada, does not give the New Zealand courts the mandate to engage in this type of activity. It is, like the UKHRA, a “parliamentary” bill of rights, and, accordingly, a “domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms”.\textsuperscript{371} It is incorrect in law to say that a court is abdicating its role by deferring to the decisions of schools in debatable choices as to policy. In fact, when a court recognises an area of judgment by another branch of government as being to an extent immune from searching judicial review due to its democratic make-up or special expertise, it is more accurate to say that “it is not showing deference. It is deciding the law.”\textsuperscript{372}

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\textsuperscript{366} See, eg, Maddever, above n 121, 509: “A tendency to turn always to the law for resolution of these matters would be unwise and inappropriate. Support for decisions made within local schools must be found by means other than their vindication in Courts of law.”

\textsuperscript{367} Comparison will perhaps be made with discipline in prisons, where the courts have intervened decisively when natural justice has been denied to prisoners; see Drew v Attorney-General [2002] 1 NZLR 58 (CA).

\textsuperscript{368} The school might cite Cropp v A Judicial Committee [2008] NZSC 46 (“Cropp”) in regard to the expertise of its staff in educational matters. In Cropp, the Supreme Court endorsed the decision of a horse racing body empowered by statute to implement measures to ensure racecourse safety when it enforced drug tests on jockeys outside normal race days. As part of its finding that these tests did not amount to an unreasonable search or seizure under s 21 BORA, Blanchard J (at para [36]) noted his predisposition to defer to the body’s greater expertise in racecourse safety: “[T]he Courts are generally slow to interfere with the exercise of wide powers to make regulations or their equivalents. That will be likely to be the approach taken when the maker is possessed of specialised knowledge or expertise.”

\textsuperscript{369} As noted in Begum HL, [34], where Lord Bingham acknowledges that, “acceding to the respondent’s request would or might have significant adverse repercussions”.

\textsuperscript{370} It will cite Baroness Hale’s evaluation that the similar uniform at Denbigh High was a “thoughtful and proportionate response to reconciling the complexities of the situation” and that it respected “cultural and religious diversity”. Begum HL, [98].

\textsuperscript{371} Ibid [64] (per Lord Hoffmann).

\textsuperscript{372} R (ProLife Alliance) v British Broadcasting Corporation [2004] 1 AC 185 [76] (per Lord Hoffmann). See also his Lordship’s prefatory remarks on legal discourse about deference in the UK, at ibid [75]: “I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.”
(b) Karima’s argument

Karima will reply that the results in *Begum* and the *Niqab case*, were, by the express words of the judges who decided those cases, highly sensitive to the specific matrix of facts, place, and time put before them. They therefore ought not to be applied automatically in New Zealand, even though the bare facts in Karima’s case bear a strong resemblance to those in *Begum*. The approach of the Human Rights Commission in the Muslim boy dispute was more in tune with the New Zealand situation and ought to be followed by the court. Like *Sahin*, the British cases were decided on the basis of historical and political shifts in the respective countries within the European context of fears of Islamic fundamentalism and real terrorist events. New Zealand, being far removed from these pressures, ought to follow the more measured responses of the Canadian and US courts, which operate within immigrant societies where the individual rights of its citizens are given full equal respect, and where multiculturalism, especially in the case of Canada, is regarded as a key background element of the culture, as it is in New Zealand.

Karima will then offer the same argument put forward by Shabina in the HL. She will say that the policy, while directed at a legitimate aim, is not achieved in a proportionate way. How can the decision to ban the jilbab be described as “necessary”, or as meeting a “pressing social need” when the same garment is allowed in a neighbouring school? Moreover, how can the school argue that banning the jilbab was necessary because allowing it would result in pressures being placed on girls to wear it when the school already permitted the Islamic headscarf to be worn? In France and Turkey it was the headscarf (as well as the jilbab, and all other religious insignia) that was banned from their educational institutions, so why is the headscarf not considered to be a dangerous item at Karima’s school? Furthermore, if long dresses are permitted at the school, why should Karima not be permitted to wear a jilbab, which, in its physical sense, is essentially a dress?

As we concluded in our assessment of the anti-FGM law in Chapter 6, it will be argued that the policy therefore ought to fail either the rational connection or minimal impairment standards in s 5 BORA analysis, as it cannot be said to have been formulated in a rational or non-discriminatory way. If, as argued in this thesis, it is true that the core of the guarantee contained in s 15 BORA is that policies or laws directed unequally at the analogous conduct of persons belonging to different religions ought be subjected to the most rigorous scrutiny, then the school’s policy should fail, as it does not meet this standard.

To assist this view, Karima will refer to US case law that espouses the Equal Regard method, including *Lukumi* and *Newark*. She will also, in the context of the expressive rights of students at school, draw to the court’s attention to *Axson-Flynn v Johnson*. In this case, a student at a university in Utah cited her Mormon beliefs as requiring her to withdraw from a theatre course

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373 These are the words used by the Supreme Court in *Hansen* as part of its determination of whether a legislative policy pursued a legitimate aim in that case. These terms are taken from the Canadian jurisprudence on s 1 of the Canadian Charter and also from the limitations clauses contained in the ICCPR. See, eg, *Hansen*, above n 114, [18], [42], [203].
374 *Sahin* focussed on a circular banning beards and veils from a particular Turkish state university. The same university banned all other religious and political insignia as well. See *Sahin* Grand Chamber, above n 192, [16] & [47].
375 Note that the presence of a long dress is the only substantial difference between the uniform code of Karima’s school and Denbigh High. I adopt for the purposes of this chapter the actual dress code of Mt Roskill grammar School, which was redrawn after the Muslim boy dispute; see “MRGS Uniform 2008”, available at: <www.mrgs.school.nz/uploaded/Uniform2008.doc>.
in which she was expected to utter profanities that were contained in a script. It turned out that the university had allowed a Jewish student to be absent from a class in the same course, as this person wished to take a day off to celebrate Yom Kippur. Also, the student had apparently been previously allowed to absent herself from classes that offended her beliefs. These two exemptions meant that the university’s policy was subjected to strict scrutiny, and the Tenth Circuit Court of Appeals accordingly held that the policy did not pass muster under the First Amendment.

Regarding claims that girls would be coerced to wear the garment by peer pressure from fellow students, it will be argued that this problem should be met by sanctioning the bullies who do this, not by punishing Karima, who by all accounts wears the garment purely out of religious modesty and has never personally caused any disruption to the school’s educational mission. As the Canadian Supreme Court said in Multani, the school’s main response should be to teach its students about the values of religious tolerance, and not set a bad example by banning an item that is worn by a minority group within the Muslim religion while allowing pupils of mainstream faiths (and none) to wear the garments that suit them. The failure to discharge an evidential burden showing that real harm would be caused to the school environment (either in a physical or psychological sense) by allowing the kirpan in Multani was the decisive factor in that case, and Karima will argue that similar shortcomings in her school’s justifications for banning the jilbab ought to lead to the failure of its policy as well. No doubt Karima will also cite the US case law on this evidential point, which resembles Multani in the standards it places on schools that seek to restrict the wearing of religious apparel. In Chalifoux v New Caney, for example, a school prohibition on the wearing of rosaries by students was declared invalid because the school could not demonstrate any likelihood of substantial interference with school activities. In the US jurisprudence, which tends to characterise religious garb at schools as

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377 This case, along with Lukumi and Newark, was cited by the US Department of Justice in the Nashala Hearn controversy in Oklahoma. See discussion in the text above accompanying ns 32-36. The USDOJ claimed that Axson-Flynn “directly controlled” Nashala’s case. See US Department of Justice Submission, above n 33, n 4, 12-14. Nashala was not permitted to wear a Muslim veil because, according to the school, it would disrupt the learning environment. It transpired that other students at her school benefited from exemptions to the school’s “no headgear” policy; for example, children undergoing chemotherapy were allowed to wear caps to shield hair loss, and there were other exemptions on special days, such as Halloween; see ibid 14.

378 Schools are, for example, required to ensure that no “physical or mental harm” befalls people at a place of work who are not employees. Health and Safety in Employment Act 1992, ss 8 & 15. Schools are also deemed to have incorporated in their charters the goal of providing a “safe physical and emotional environment”. See M Kazmierow & P Walsh “Bullying in Schools and the Law” in J Hannan, P Rishworth & P Walsh Education Law – Continuing Challenges (Seminar, New Zealand Law Society, 2004), ch 5. As regards the protestors outside the school gates, presumably they are within their rights to make a complaint about the school uniform in this way; for a recent judgment upholding the freedom of expression claim of a person protesting about police conduct in a public street outside a police woman’s residence, see Brooker v Police [2007] NZSC 30.

379 Karima’s evidence has already been accepted in this regard during the enquiry into whether an interference has occurred. This might be a point of distinction with Begum, where a majority of their Lordships did not find an interference. This finding, I suggest, haunted the Art 9(2) discussion, where the judges constantly made references to the fact that the school had formed its own, “reasonable”, opinion as to what Islamic modesty requires, and to the fact that Shabina may have been pressured by her family to wear the garment. See, eg, Lord Scott at Begum HL., [83]: “The notion that the shalwar kameeze school uniform would not accord with essential requirements of Islamic modesty for teenage girls seems to me an extraordinary one. There was nothing unreasonable, and therefore nothing unlawful, about the school’s uniform policy.”

380 976 F Supp 659 (USDC, Texas) (1997) (“Chalifoux”). Rosaries were banned because they were considered “gang-related apparel” (apparently some members of one gang had worn them as an identifying symbol). For discussion of the religious expression rights of US students, see Kent Greenawalt Does God Belong in Public Schools? (Princeton University Press, Princeton, 2005) (“Greenawalt Public Schools”) 172-173.

381 Chalifoux, above n 381, 666; citing Tinker v Des Moines 393 US 503 (1969), 513 (“Tinker”).
raising both freedom of speech and freedom of religion issues, the courts are extremely reluctant to accord any evidential weight at all to concerns expressed by persons at schools that an expressive activity enjoying constitutional protection will cause psychological harm. A school uniform policy that is based on “undifferentiated fear or apprehension of disturbance”, such as peer pressure to wear an item that has been permitted by the school, or worries that an item is associated with “religious fundamentalism”, or might be a symbol of gender inequality, will almost certainly not survive judicial scrutiny in the US. For a US court to give weight to feelings like these would be, in the words of Scalia J in Locke v Davey, to invoke the “public’s freedom of conscience” to “justify the denial of equal treatment”.

Finally, Karima will perhaps cite the famous dictum in Tinker v Des Moines that school pupils do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”. Recent New Zealand case law indicates that the courts in this country, contrary to older precedents like Edwards and Maddever, are beginning to move towards a greater solicitude for student rights, due in part to greater awareness of child welfare, as reflected in the New Zealand government’s ratification of the Convention on the Rights of the Child. It is possible that the school will argue that the extant jurisprudence in New Zealand is devoted purely to ensuring natural justice requirements are infused into school decision-making and that Edwards remains the relevant precedent for expressive rights in this country. The Education Act 1989, it will be suggested, makes explicit statutory reference to upholding these “process” rights, and that explains the existence of judgments overturning school decisions in most cases. To this, Karima will reply, first, that ss 72 and 75 Education Act 1989 make school decisions explicitly “subject to any enactment” (emphasis added), which clearly should bring all of BORA into play. Moreover, in D v AGS, a case in which Justice Smellie considered a claim that a school policy violated s 9 BORA, the judge did not dismiss the BORA argument out of hand; rather he said that the facts “thrown up” by the case were probably not the sort of events that Parliament intended to be caught by s 9 when it enacted BORA. Karima will then attribute the admittedly meagre record in the case law to the fact that these issues are rare in

382 In Chalifoux, for example, it was held that the actions of wearing rosaries “was ‘akin to pure speech’” (Chalifoux, above n 381, 666, citing Tinker, above n 382, 505) and that the “rosary [was] deeply rooted in Catholic beliefs”; Chalifoux, above n 381, 670. In Chalifoux, therefore, both free speech and free exercise claims existed and so the school policy was subjected to strict scrutiny under the “hybrid rights” exception to the general rule in Employment Division, Department of Human Resources of Oregon v Smith 494 US 872 (1990).

383 Tinker, above n 382, 508. In this famous case, the US Supreme Court quashed a school’s decision to ban the wearing of black armbands by students as a protest against the Vietnam War.

384 See Greanawalt Public Schools, above n 381, 173, n 47.

385 The USDOJ cited the Tinker line of cases in its successful intervention in the Nashala Hearn dispute. It seems that Nashala was asked to remove her veil (which she had been thitherto permitted to wear) on the anniversary of the September 11 attacks, indicating that fear of Islamic fundamentalism was partly, or even wholly, behind the decision to ban the garment; see US Department of Justice Submission, above n 33, 5.

386 (2004) 540 US 712, 734. For a US perspective on the Begum case, see Martha Nussbaum Liberty of Conscience: In Defense of America’s Tradition of Religious Equality (Basic Books, New York, 2008) 349-352. For Nussbaum, the only “compelling interest” offered by their Lordships to prevent Shabina wearing a jilbab was an “interest in homogeneity”. Allowing the shalwar kameeze to be worn was in her view a discriminatory dispensation towards mainstream Muslims that would not survive scrutiny in a US court.

387 Tinker, above n 382, 506.

388 From July 1999, amendments to the Education Act 1989 came into force which required that any decisions to suspend or expel etc a student must “ensure that individual cases are dealt with in accordance with the principles of natural justice”. Education Act 1989, s 13(c).

389 D v M and Board of Trustees of Auckland Grammar School [2003] NZAR Lexis 62 (“D v AGS”), 39. The case concerned a student who claimed, inter alia, that his expulsion for smoking cannabis amounted to “disproportionately severe treatment or punishment” under s 9 BORA. It is surely unsurprising that the judge was not persuaded that his claim fell within the scope of s 9.
6. Religious attire in schools

New Zealand, due to the only very recent influx of immigrants from countries “like Algeria”. The small number of cases dealing with substantive BORA rights in schools is a product of this reality, not an indicator that the courts consider the decisions of schools to operate within a “black box”. Finally, she will argue that the preferred methodology for assessing the proportionality of measures limiting the expressive rights of students is that advanced in the 1992 article by McLean, Rishworth and Taggart.390

It is therefore not to the conservative statements of Williams J in Maddever that courts should turn when orienting themselves to issues such as Karima’s, but rather to those of McGechan J, in a case where he expresses a more child-rights centred view: “No one should underate a school child’s capacity to perceive and feel personal injustice. The Court must be conscious not only of a public interest in orderly education, but also of a need to protect the individual child, and that child’s confidence it can receive justice from authority.”391

4.3 A putative court decides Karima’s claim under s 15 BORA

Any court faced with these arguments would have to make some difficult choices. The “easy” route would be to follow the Begum judgment verbatim, and find for the school, based on its own assessment of what its locality requires in the way of a uniform policy that takes into account religious diversity. This would not involve engaging in any meaningful scrutiny of, for example, the school’s choice to craft a uniform that suited the majority of its Muslim students, who happen mostly to come from the Indian subcontinent or from Fiji.

The court would defend this position, perhaps, by pointing to the similarities in the constitutional status of BORA and the UKHRA. Both of these human rights documents have ordinary statutory status, and ought not to be regarded as a conduit for every judicial interpretation on religious freedom in the US Constitution or the Canadian Charter.392 Hence, it would be arguable that BORA, being a “parliamentary” bill of rights, cannot be expected to act as an automatic trump of other laws on the statute book, even in an interpretive function. The White Paper, for example, made it tolerably clear that the bill of rights which was being proposed for New Zealand in the 1980s was not intended to incorporate the entire corpus of First Amendment case law. For example, and pertinently to the case at hand, the White Paper distinguished the proposed scope of s 13 BORA393 from that espoused in the First Amendment case law on establishment.394 In the US, the Establishment Clause has been used to deny state aid to religious schools and to prevent prayers or bible readings in schools. The authors of the White Paper did not consider it wise to include an “Establishment Clause” in the Bill of Rights, which would expose to judicial scrutiny New Zealand legislation that allowed these practices.

391 M and R v S and Board of Trustees of Palmerston North Boys’ High School [2003] NZAR 705 (HC), 723. Note that this decision was in fact handed down in 1990, three years before Maddever was decided, but, curiously, was not reported until 2003. This was indirectly requested by another judge (and the Ombudsman) who felt it deserved better publicity in the legal community and who described it as “[p]re-eminent” authority among the other reported judgments on school management issues, including Maddever; see comments of Smellie J in D v AGS, above n 390, 21.
392 Or for that matter the South African Constitution. In the school uniform context, see MEC for Education: KwaZulu-Natal and Others v Pillay [2007] ZACC 21 (CCSA).
393 Section 13 guarantees the internal aspect of right to freedom of thought conscience and religion, as opposed to the outward manifestation of religious beliefs. There is some commentary to the effect that s 13 may incorporate some of the US case law on establishment. See discussion in Chapter 4, section 2.1.1.
394 A Bill of Rights for New Zealand: a white paper (Government Printer, Wellington, 1985) [10.60].
to occur. The final version of s 13 that was passed in 1990, therefore, ought not to be regarded as providing a ground for challenging the content of the Education Act 1989 or the Private Schools Conditional Integration Act 1975, insofar as they permit state funding of religious schools or religious activities in public schools.\(^{395}\) A court might infer then that the guarantee in s 15 of the right to manifest religious belief ought not to be used as a tool to question school choices as to uniform, which, like the choice of secondary schools to conduct prayers at assembly, is most likely a power that has been delegated to schools under ss 72 and 75 Education Act 1989.

The Education Act, as argued cogently by Williams J in *Maddever*, might be regarded by the court as creating a finite package of powers, duties and rights that is not easily augmented by recourse to human rights legislation. In its constant attention to the needs of schools, Parliament has seen fit to legislate when it has seemed necessary to address rights issues in schools, and courts should stay out of this quintessentially democratic process. The Education reforms of 1999, for example, in which the right to natural justice was recognised in s 13(c),\(^{396}\) indicate that Parliament’s main concern has been to inculcate democratic or process oriented values into the management decisions of schools. It has never as such legislated for any of the “substantive” rights contained in BORA, such as those involving the expressive freedoms of students. The implication from this is that schools should be given a relatively free hand in making choices as to the substance of their policies, including school uniforms. The main check on these choices is intended to be the democratic one of elections for trustees, and procedural rights for students who are disciplined by their schools.\(^ {397}\) Courts should be very reluctant to get involved in questions on which reasonable people can differ, such as how a uniform should incorporate values like multiculturalism and religious freedom.\(^ {398}\) It is better to leave these things up to school boards and other bodies, including Parliament, that are responsible for monitoring performance. As Justice Keith said in *Daniels*:\(^ {399}\)

> In addition to the system created by and under the Education Acts to promote education, external scrutiny is provided by the Ombudsmen, the Controller and Auditor-General, the responsibility of Ministers to the House, the parliamentary processes of scrutiny including the estimates and financial and annual reports, professional and public scrutiny and comment, and international review through bodies such as the OECD.

Having made these points a court would then comment on matters of expertise, citing perhaps *Cropp*,\(^ {400}\) as standing for a presumptive reluctance of courts to intrude on matters that lie within a public body’s special competence. The court might then proceed to conduct a minimal

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396 See discussion of these reforms in the text above accompanying n 389.

397 In making this point the court would rely on decisions such as *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) (“*Daniels*”), in which Keith J refused to read in a “free standing right” to “free” and “equal” education in ss 3 & 8 Education Act 1989. Instead the rights of which ss 3 & 8 speak are those already provided within the specific provisions of the Education Act. For commentary on *Daniels*, and the “process” oriented jurisprudence of Keith J, see Claudia Geiringer “Parsing Sir Kenneth Keith’s Taxonomy of Human Rights” in R Bigwood (ed) *Public Interest Litigation* (LexisNexis NZ, Wellington, 2006) 179.

398 For academic support of this view, see, eg, Paul Rishworth “Guiding Principles in Education Law” in P Rishworth and P Walsh *Education Law* (Seminar, New Zealand Law Society, 1999), 14: “[S]hort of a substantial intrusion into student rights, it ought not to be expected that courts should draw lines where there are reasonable opinions to be taken on either side of an issue.”

399 *Daniels*, above n 398, [78]. Because of his findings in this respect, Keith J did not comment on BORA submissions made in this case.

400 *Cropp v A Judicial Committee* [2008] NZSC 46; and also similar expressions of deference due to expertise in *Begum*. 
6. Religious attire in schools

review of the school’s decision in deciding to prohibit the jilbab. Like the HL in Begum, it will note that the policy was not grasped from thin air; it was arrived at after consultation with affected communities, and the human rights implications were also considered, in that it took into account the Human Rights Commission’s findings in the Muslim boy case. An argument that the school did not conduct a full proportionality enquiry into religious freedom in the same way that a court might have done will not move the court. This was the approach of the CA in Begum that was flatly rejected in the HL, as it would also be in New Zealand.\textsuperscript{401}

Next, the court would find that the decision by the school not to relax its policy by allowing the jilbab was in pursuance of the legitimate aim of protecting the rights of other students. Statements by students in this respect will be noted as evidence that this decision was made in a “thoughtful” and proportionate manner, as will the general success of the school, and the fact that the principal and some members of the board are Muslims. The fact that the policy differentiated between different sects of the Islamic religion will be subsumed by these factors. The Equal Regard argument will not be considered in any depth.

The decision therefore would be validated and the objection dismissed on the basis of the court’s evaluation of its constitutional role in balancing the spheres of the executive, legislative and judicial branches of government. The court’s review will extend no further than examining whether the process rights of students have been met and that the school has managed to appeal to some legitimate aim that is recognised in case law, or in a human rights instrument.\textsuperscript{402} It will reject appeals to US and Canadian jurisprudence on the basis that these decisions were made on the back of very different constitutional documents and that education law in New Zealand is governed largely by statutory guidelines. Appeals to the effect that the decision does not take into account the multicultural nature of New Zealand society will be rejected. It might also be said that “multiculturalism”, unlike in Canada with its interpretive command in s 27 of the Charter, has been “decentralised” with respect to New Zealand schools, which are better placed to make assessments of this sort. Citing Lord Bingham in Begum, it will be said that, “[d]ifferent schools have different uniform policies, no doubt influenced by the composition of their pupil bodies and a range of other matters”.\textsuperscript{403} By making a reasonable assessment of what multiculturalism demands in its catchment area, the school will have satisfied the commitment to diversity contained in its charter.

The court would gain further confidence in its position by the obiter dicta of Justice Tipping in Hansen, where he approves of the statements by Lord Hoffmann in Begum to the effect that in human rights matters it is necessary for the courts to respect an “area of discretion” to the appropriate branches of government.\textsuperscript{404}

\textsuperscript{401} The court might cite Puli’uvea v Removal Review Authority (1996) 14 FRNZ 322 (CA), 326 for New Zealand authority on the point.

\textsuperscript{402} This may not be an entirely hollow enquiry. In the Niqab case, for example, the school’s claim that its choice to ban the niqab (a full-face veil) on the basis that it retarded the claimant’s learning ability was rejected, as it could not be said that this reason furthered the legitimate aim of protecting the rights of other students. Niqab case, above n 325, [89]; but see Hudoyberganova v Uzbekistan UN Doc CCPR/C/82/D/931/2000 (18 January 2005) (Individual opinion by Committee member Ms Ruth Wedgwood), where one member of the HRC opined in obiter dicta comments that banning full-face veils at schools in order to improve teacher-student contact could qualify as a legitimate aim under Art 18(3) ICCPR.

\textsuperscript{403} Begum HL, [33].

\textsuperscript{404} Hansen, above n 114, [117] (per Tipping J). Note, however, the intriguing citation by the same judge (at para [120]) of Multani in his discussion of the correct methodology to use in s 5 BORA analysis. The Hansen case concerned a challenge to primary legislation, and is not directly on point to the case at hand.
This, one suspects, is how a New Zealand court would deal with the novel issue of religious attire in schools. For the purposes of this thesis, however, it would be very unsatisfactory for the Equal Regard argument not to be given a proper airing in the decision. If it happened that the Equal Regard principle were accepted in the New Zealand courts as the main ingredient of the guarantee in s 15 (as I argue in this thesis that it should be) then a judgment that gave no thought to Karima’s submissions in this regard would be very unsatisfactory indeed. At the very least, the discriminatory aspects of the policy should be spelt out and considered.\(^\text{405}\) It may even be the case, perhaps, that a court could plausibly distinguish Karima’s situation from the Muslim boy dispute at Mt Roskill Grammar. In the latter case, it will be recalled, the boy was simply asking to be allowed to wear the same uniform as older pupils (long trousers). Karima, on the other hand, was requesting that she be permitted to wear an entirely different garment.\(^\text{406}\) There is some evidence in the US case law that suggests Karima might fail to make out an Equal Regard case. In Riback v Las Vegas Metropolitan Police Dept,\(^\text{407}\) a Jewish police officer claimed that the decision of his police department under its uniform code to prevent him from wearing a religious beard and yarmulke violated the First Amendment. He succeeded in having the department’s policy on beards declared unconstitutional, because, in a straightforward application of Newark,\(^\text{408}\) the department allowed other officers to wear beards for medical reasons. As a result, the stated reasons for their policy were undermined by the medical exemption given to other officers. Regarding his wish to wear a yarmulke, however, Riback failed in his claim because it appeared that the policy of prohibiting all non-uniform hats was applied across the board.\(^\text{409}\) Applying the Smith standard of review, the policy easily survived rational basis review. This was despite Riback’s claim that the policy ought to be subjected to strict scrutiny because the department permitted officers to display religious symbols on their desks and others had in the past worn Christian pins on their uniforms.\(^\text{410}\) This aspect of his claim was unsuccessful, however, because, according to the judge, the only part of the department’s policy that was under review was its no-headgear rule, which was applied in a neutral and uniform manner. Other expressions of religious belief that did not contradict the no-headgear rule were regarded as irrelevant. The significance of Riback for our purposes could be that Karima’s jilbab is a garment which, like Riback’s yarmulke, is arguably quite unlike any of the permitted items in the school’s uniform code. This is to be compared for example with the Muslim boy case, where the claimant simply wished to wear an item that was already permitted for other pupils at his school (ie, long trousers). Karima could reply perhaps that a jilbab is essentially a long dress, which is in fact permitted by the school. However, this

\(^{405}\) Rishworth makes this point: “It would surely be wrong for judges to decline to make any enquiry at all, thereby leaving student rights to the mercy of an elected majority on a school board, simply because board members were elected by their community.” Even where courts chose to defer, says Rishworth, “it is important…that schools should be forced to articulate reasons for their actions and explain why it was necessary to infringe student rights...”. Paul Rishworth “Recent Developments in Education Law in New Zealand” (1996) 1 Austl & NZ JL & Educ 33, 38.

\(^{406}\) It might be possible to distinguish Multani in this regard as well. In Multani, the religious claimant was prepared to compromise by altering his normal religious practice by wearing the kirpan in a sewn pouch inside his clothes. If, as is assumed here, Karima refused to make any alterations to her jilbab so that it conformed more closely to the school’s prescribed uniform (which included a long dress) it may be possible for a court to say that she did not make a reasonable attempt at compromise, and therefore Multani would not be an appropriate precedent for a New Zealand court to follow.


\(^{408}\) See discussion of Newark in the text above accompanying ns 85-93.

\(^{409}\) Police caps were required to be worn when on duty outside the police station, and officers were to go bare-headed when indoors.

\(^{410}\) Recall that under strict scrutiny, laws and policies that burden a religious practice must be furthering a “compelling interest”. When a rule already allows religious and secular exemptions, it is very difficult for a policy to survive this level of scrutiny, as the exemptions have the effect of rendering the reasons proffered for the rule unconvincing. See my discussion of the Lukumi-Newark methodology in section 4 of Chapter 3.
objection is probably not as certain as in the Muslim boy case. By way of comparison, it would be a much easier case from the Equal Regard point of view if, say, a school allowed schoolgirls belonging to the Exclusive Brethren to wear their veils but did not allow Muslim girls to wear theirs. A possible retort for Karima perhaps would be that in *Riback* the impugned law was clearly a neutral and uniformly applied one and its impact on the police officer was merely incidental. In her case, the school had actually picked and chosen among different types of religious garments and so it ought to be much more difficult for the school to justify its policy than it was for the police department.

It is also worth noting that the exact facts of the case may be crucial in a court’s assessment of Karima’s case. In *Begum* one of the more confusing aspects of their Lordships’ reasoning was the seemingly peripheral comments they made on matters such as the fact that Denbigh High was a “good school” that was free of ethnic strife and had an improving academic record under the current management. What would have happened in the judgment if it had turned out the school was suffering from sectarian strife and had dropped off in its academic achievements during the time of the no-jilbab policy? And what if the school in fact did not have an exemption from the collective worship requirements under British law? Would a combination of some or all of these factors have meant that the ban on the jilbab would have failed? Or would their Lordships’ espousal of deference for the democratic credentials and expertise of the school board and principal have overcome all these problems? It is difficult to predict what the effect of variations in factors like these would be. It is likely that the presence or absence of these peripheral factors might have a great bearing on Karima’s Equal Regard argument.

It is not proposed to comment further here on the Equal Regard aspect of Karima’s case, save to say that it is likely to be a contestable area of debate if a court were prepared to entertain argument on the point. My main point is that it is a debate that should at least be attempted. If a court decided that Karima’s Equal Regard claim had merit but nevertheless chose to defer to the decision of the school, this would perhaps be acceptable from the Equal Regard point of view. At least this would mean that Karima had her day in court and her religious beliefs would have been accorded a minimum of equal concern and respect. A leap to deference instead of conducting a thorough enquiry would certainly not satisfy Equal Regard, and would, in my view, point to a sinister development in s 15 jurisprudence. In *Begum*, the most their Lordships were prepared to do for Shabina was to paraphrase her discrimination argument before hastening, in a conclusory manner, to dismiss it. I suspect that this was because their Lordships knew in their hearts that this aspect of Shabina’s case was a very good one. It also explains perhaps why there was no meaningful comparison of the facts in *Sahin* and *Begum*, which one might have expected, given that their Lordships expressly relied on that case. In *Sahin*, regardless of what one thinks of the Turkish government’s ban on the headscarf and other religious insignia on its university campuses, at least the impugned rule appeared to have been imposed in an equal manner. Denbigh High’s decision, by contrast, clearly picked and chose between different religious beliefs. It will be recalled that the school argued in the HL

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412 Tom Lewis offers a similar thought in his discussion of *Begum* (and *Sahin*): “[I]t is submitted that the very least that can be expected from the courts in their adjudication on such matters is that they use the tools of their trade and conduct a meaningful enquiry into the alleged breach of rights.” Lewis “What not to wear”, above n 328, 414.  
413 Unless one regards the rule as favouring people whose beliefs (or lack thereof) do not require the wearing of any religious garb. This would be the mode of analysis in the US, where the “…First Amendment mandates government neutrality between religion and religion, and between *religion and nonreligion*”. *Epperson v Arkansas* 393 US 97, 104 (1968) (emphasis added).
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that Denbigh High was not “unlike a microcosm of Turkey”. This submission glossed over the fact that in Turkey the jilbab and the veil were both proscribed at state universities.⁴¹⁴ The obvious and vital distinction between the facts of Sahin and Begum should have been explored, in my view.

The correct way to view Begum, in the end, might therefore be to say that it shows that in Europe certain versions of the Islamic religion are beyond the pale.⁴¹⁵ Tom Lewis, for one, appears to be aware of this and suggests that the more honest route would be, in light of decisions like Begum, for the European states to amend Art 9 with a prohibition on “extreme” versions of Muslim dress. This would be preferable to allowing or encouraging courts to avoid conducting a thorough analysis of all the issues in the cases that have come before them concerning Muslim attire. To do otherwise, says Lewis, would be to “side step” the real issues and to bring the “Convention system for the protection of human rights into disrepute”.⁴¹⁶

To conclude, one wonders whether it is really necessary for the courts in New Zealand to take the same view as those in Europe. As argued here, it is perfectly possible for a court to make an open and honest appraisal of the issues in Karima’s case without avoiding the matter altogether. The North American jurisprudence on the issue shows how this can be done. Some might say that in a legal system such as New Zealand’s, where BORA is a mere statute that has to jockey with other legislation for primacy, the correct judicial approach to reviewing school decisions is for the courts to withdraw from any scrutiny unless there is a statutory mandate within the Education Act 1989 that permits this. I suggest this will be acceptable in some cases,⁴¹⁷ but I contend here that deference to school decisions ought to come at the end of a judicial treatment and not be used as a substitute for the reasoning that should help to inform a decision.⁴¹⁸ And when a school policy or rule implicates s 15 BORA, the Equal Regard principle should form an integral part of these deliberations, where appropriate. This was lacking in Begum, but there is no reason why the same thing should happen in New Zealand.

⁴¹⁴ A more apt national comparison may be with Uzbekistan, where the government allows some forms of the headscarf in its schools and universities, but not others. In that country, “foreign” or “Arab” headscarves that are clasped at the front or cover the face are prohibited, but traditional Uzbek-patterned scarves are permitted. See McGoldrick Islamic Headscarf, above n 17, 226.
⁴¹⁵ See Finnis "Discrimination between Faiths", above n 299.
⁴¹⁶ Lewis “What not to wear”, above n 328, 414. For a similar observation on the underlying motives in Begum, see Finnis “Discrimination between Faiths”, above n 299, n 26, where he notes that the UK has, in “a recent plain albeit limited acknowledgement of [the fact that some religions are ‘different’]”, actually legislated against certain religious beliefs, in the Equality Act 2006 (UK). See s 52(4)(g), which authorises some immigration decisions to be taken on the grounds that “(ii)...a religion or belief is not to be treated in the same way as certain other religions or beliefs”.
⁴¹⁷ In Bovaird and another v J Suing by his Litigation Guardian [2008] NZCA 325 (27 August 2008), the Court of Appeal relied on Begum as authority for overturning part of a High Court decision to invalidate a suspension of a child for smoking cannabis. The High Court had held that failure to have an adult present when a student is pressed by school staff to admit to a serious breach of school rules (especially where the breach involves criminal conduct) could be a violation of the child’s right to natural justice under s 13(c) Education Act 1989. The Court of Appeal considered that to require schools to ensure that an adult was present during the early stages of a disciplinary investigation would be to over-complicate the initial decision-making process in suspension cases and did not take into account the special nature of the school environment. See paras [40]-[54] of the judgment, and especially [53], citing Lord Bingham, Begum HL, [31].
⁴¹⁸ For an strong advocacy of this view, see Robert Kirkness “The Impact of the Bill of Rights on Administrative Law – some comments” in G Illingworth (Chair) “Using the Bill of Rights in Civil and Criminal Litigation” (New Zealand Law Society Seminar, July 2008) 137, 141-142.
5. Conclusion

It is hard to avoid the observation that the Sahin, Begum and Niqab case decisions were made against the backdrop of real terrorist events in Europe that were committed by fundamentalist Islamic groups.\(^{419}\) No episodes of violence of this provenance have ever occurred in New Zealand, a country where, ironically, one of the very few instances of terrorist violence was in fact conducted by the “indivisible, laïc, democratic, and social” Republic of France.\(^{420}\) In the meantime, the New Zealand legal system continues to avoid any of the high profile litigation that has occurred overseas regarding religious apparel at schools. This is due no doubt to the country’s reliance on a web of dispute resolution processes that are designed to head off protracted litigations of the sort that occurred in Begum, and also perhaps to the good sense of educators in this country and, for better or worse, a general cultural disposition to back away from conflict and to forge ad hoc compromises. By contrast, the matter is, if anything, becoming more fraught in France and Turkey. In October 2010, the French legislature passed a law banning the wearing of face-covering garments in all public places. The situation in Turkey following the Sahin case is becoming very serious, with the Prime Minister of that country recently creating a mechanism whereby he can appoint judges to its Constitutional Court who might be more sympathetic to the constitutional amendment passed by referendum to overturn the Sahin litigation.\(^{421}\) While such overt pressures on core constitutional values like personal liberty and judicial independence continue to be absent from the New Zealand religio-political scene, it will, nevertheless, be very interesting to see what happens when, inevitably, the New Zealand courts are faced with challenges to school uniform rules by determined religious litigants.

Finally, the reader may consider that my conclusions here on the matter of religious attire in schools are something of a damp squib, as I have made it clear that deference to school decisions may act as a powerful trump over the right of students to manifest their religious beliefs, while offering an apparently weak proviso that courts must at least consider the Equal Regard principle en route to giving way to the democratic decisions of school boards. I do not see it that way. I believe that, if the reading of s 15 BORA advanced in this thesis is in fact adopted by the courts, it will be a very difficult feat for the courts to retreat behind deference once a school decision has been identified as defective for Equal Regard purposes. In Begum, the HL was able to ignore the non-discrimination principle, because, conceptually, their Lordships viewed it as only one of a cluster of values that underlie Art 9 ECHR. Indeed, as I have demonstrated in this chapter, the HL may in fact have used these other values, perhaps unconsciously, as a means of avoiding the discrimination issue altogether.\(^{422}\)

\(^{419}\) In the Niqab case, Silber J noted that the claimant’s criticism of the fact that the niqab used to be permitted at the school did not take account of the fact that “matters have moved on with a greater number of Muslim girls at the school and increased concern for security”. Niqab case, above n 325, [134]. In Begum, Lord Bingham prefaced his speech with the observation that his decision ought to be taken as not only specific to its facts but also to the time. Begum HL, [3].

\(^{420}\) In 1985, French secret service agents blew up the Greenpeace vessel, The Rainbow Warrior, while it was docked in Auckland, killing a person on board. Michael King The Penguin History of New Zealand (Penguin, Auckland, 2003) 443.

\(^{421}\) See Can Yegisu “Turkey Packs the Court” New York Review of Books (September 22 2010).

\(^{422}\) In a recent extra-judicial speech, the Chief Justice of the New Zealand Supreme Court extolled the special virtues brought by female judges to the bench. The Chief Justice expressly mentioned Brenda Hale as an example of the phenomenon, saying it is possible to see in Hale’s judgments an “emphasis on human dignity; a greater scrupulousness not to wound or slight; a willingness to express doubt and to revise opinions previously held; and a sense of obligation to explore underlying principle in order to lay out the full reasons for decision and clear away suggestions of an undeclared major premise”. Rt Hon Dame Sian Elias “Address to the Australian Women
If, on the other hand, the courts decide that Equal Regard is the only principle that s 15 BORA legally protects, it will be much harder – impossible, or so I predict – to ignore. This is why Richard Duncan, in his article on the Lukumi-Newark methodology and its effects on the US free exercise scene, calls the post-Smith regime for protecting religious freedom a “leaner and meaner, religious-liberty-protecting machine”. Relatedly, as Mark Tushnet has observed in his defence of the formal neutrality reading of the Free Exercise Clause, one of the real benefits of this ostensibly narrow formula is that it will embolden courts to go against mainstream presuppositions and laws by applying Equal Regard in a predictable and relatively mechanical way that ought to leave judges free of criticism in the aftermath of controversial decisions.

The very first successful Free Exercise Clause claim by a non-Christian group in the US Supreme Court occurred in Lukumi under the new formal neutrality regime, and is an exhibit par excellence of how Equal Regard can give judges the courage to protect the unpopular activities of discrete and insular minorities against majoritarian prejudice. It is also an example of how the best way to protect rights may be to do so by not trying to protect everything that could conceivably count as a right. Equal Regard is perhaps best viewed as a quid pro quo – a giving up of a substantive liberty regime, which can never in any event be enforced rigorously, in exchange for genuinely strong protection across a relatively narrow core aspect of the right to religious freedom. By contrast, the balancing test mandated by a regime of substantive neutrality, as we saw in Chapter 2, is intrinsically prone to all manner of manipulation by judges. The criticisms levelled at the US Supreme Court in the Sherbert era on this point led to an unbecoming timidity on the part of the US judiciary in the area of Free Exercise Clause litigation, to the extent that even claims that were arguable under Equal Regard principles failed on most occasions.

I anticipate, therefore, that, once they are identified and proven, violations of the non-discrimination principle will be very hard for state actors in this country to rebut, and that the courts will not be reluctant to pursue such conclusions to their logical end by announcing suitable remedies. As I contended earlier in this thesis, this somewhat counterintuitive factor is one of the most persuasive arguments in favour of applying the Equal Regard formula to the guarantee that is affirmed in section 15 of the New Zealand Bill of Rights Act 1990.

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424. See Mark Tushnet “‘Of Church and State and the Supreme Court’: Kurland Revisited” (1989) Sup Ct Rev 373, 374-376; and Antonin Scalia “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175, 1180: “While announcing a firm rule of decision can...inhibit courts, strangely enough it can embolden them as well.”
425. The best example of this is, perhaps, Hernandez v Commissioner of Internal Revenue 490 US 680 (1989), where the US Supreme Court expressed extreme scepticism about the seriousness of the religious practices of Scientology (particularly the “auditing” programmes administered by the Church) before stating that the government in any case had a “compelling interest” in the uniform levying of taxes – from which the Church had sought tax deductions with respect to moneys received in return for auditing. While engaging in the ostensibly generous substantive neutrality analysis, the Court overlooked the fact that most mainstream churches routinely got deductions for analogous quid pro quo exchanges of this sort (eg, pew rents in the Catholic Church).
426. See text in Chapter 3, accompanying ns 476-483.
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