ASHES TO ASHES FOR THE FREE EXERCISE OF RELIGION:

THE TROUBLED LIFE AND SLOW DEATH OF A FIRST AMENDMENT FREEDOM

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INTRODUCTION.

The first amendment to the United States Constitution secures religious liberty, commanding that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[1] The proper scope of the first provision, the establishment clause, is disputed,[2] but it generally prevents government from discriminating on the basis of religion, financially supporting religion, or requiring adherence to an official religion. At the center of public debate over such issues as school

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[1]U.S. Const. amend. I. The first amendment applies as a restriction against actions only of the federal government, *see Permoli v. First Municipality of New Orleans*, 44 U.S (3 How.) 589 (1845) and *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 254 (1833). However, through a series of Supreme Court rulings culminating in the 1940's, the due process clause of the fourteenth amendment ("No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1, cl. 3) gradually "absorbed" the first amendment into its meaning, so the fourteenth amendment restricts state actions in precisely the same way the first amendment restricts those of the federal government. *See Everson v. Board of Education*, 330 U.S. 1 (1947) (upholding local school board's reimbursement of parents for costs of transporting children to public, private, and parochial schools via public transportation system), *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down licensing requirement for door-to-door solicitation), *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Jacobson v. Massachusetts*, 197 U.S. 10 (1905)

[2]Compare, *e.g.*, *Everson v. Board of Education*, 330 U.S. 1 (1947), *Engle v. Vitale*, 370 U.S. 421 (1962) (striking down nominally voluntary recitation of state-written prayer in public schools), *School District v. Schempp*, 374 U.S. 203 (1963) (striking down nominally voluntary Bible readings and recitation of Lord's Prayer in public schools), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down public salary supplements of teachers in parochial schools) with *Lynch v. Donnelly*, 465 U.S. 668, 687-699 (1984) (O'Connor, J., concurring) and *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

prayer[3] and educational voucher systems,[4] the establishment clause is probably the higher-profile of the two provisions. But the second one, the free exercise clause, is an important protector of religious liberty in its own right, "[f]or despite a general harmony between the two religious clauses . . ., the Free Exercise Clause no doubt has a reach of its own."[5] While the proper interpretation of this clause too is debated,[6] it generally prevents government from interfering with an individual's preferred form of worship. In highly simplified terms, the establishment clause prohibits government from forcing adherence to a particular religion, and the free exercise clause prevents government from obstructing adherence to a freely chosen religion.

Two general schools of thought have developed opposing views of the proper interpretation of the free exercise clause. By 1940, al most everyone agreed on two points: to meet the requirement of the free exercise clause, legislation had to have a secular purpose and had to be generally applica-

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[3]*See, e.g., School District v. Schempp*, 374 U.S. 203 (1963)

[4]*See, e.g., Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (striking down state policy providing tax deductions to parents who send their children to parochial schools)

[5]*Gillette v. United States*, 401 U.S. 437, 461 (1971)

[6]Compare, *e.g.*, *Minersville School District v. Gobitis*, 310 U.S. 586, 601 (1940) (Stone, J., dissenting) (upholding mandatory flag salute in public schools against free exercise challenge by Jehovah's Witnesses), *Braunfeld v. Brown*, 366 U.S. 599, 610 (1961) (Brennan, J., dissenting) (upholding application of Sunday Closing Law to orthodox Jewish merchant), *Sherbert v. Verner*, 374 U.S. 398 (1963) (overturning denial of unemployment compensation to Seventh-Day Adventist terminated because of refusal to work on Saturdays), *Wisconsin v. Yoder*, 406 U.S. 205 (1971) (exempting Amish from compliance with compulsory secondary education law), and *Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595, 1606 (1990) (O'Connor, J., concurring in result) (upholding denial of unemployment benefits to Native American terminated for sacramental use of peyote) with *Gobitis*, 310 U.S. at 586, *Braunfeld*, 366 U.S. at 599, *Thomas v. Review Board*, 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting) (striking down denial of unemployment benefits to Jehovah's Witness who quit his job when transferred to department producing tank turrets), and *Smith*, 110 S.Ct. at 1595.

ble.[7] In other words, legislation violated the free exercise clause if its purpose was the suppression or regulation of religious practices or if it discriminated on the basis of religion. Courts would strike down legislation that did not meet these standards. The primary disagreement in the free exercise field has centered around cases in which a religious adherent challenges a secular, general law that meets these standards yet still interferes with his ability to practice his religion.[8]

Some judges and legal scholars believe that the free exercise clause often requires courts to exempt religious objectors from compliance with general laws that interfere with their religious practices.[9] Justice Brennan described this pro-exemptions view as "nothing more than the governmental

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[7]*See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 586 (1940) and *Minersville School District v. Gobitis*, 3109 U.S. 586 (1940)

[8]*See, e.g.*, *Employment Div.*, *Dep't of Human Res. v. Smith*, 110 S.Ct. 1595 (1990), *Thomas v. Review Board*, 450 U.S. 490(1981), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Sherbert v. Verner*, 374 U.S. 398 (1963), *Braunfeld v. Brown*, 366 U.S. 599 (1961), *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)

[9]Infringements of free exercise can take two forms. Legislation may interfere with religious beliefs or with religious conduct, including both religiously motivated actions and abstinences. Since the Court's first significant free exercise case, it has consistently held that the Constitution protects religious belief absolutely but provides only qualified protection for religiously motivated conduct. For instance, Justice Roberts once wrote that "the [first a]mendment 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*, 310 U.S. 296, 303-04 (1940) (footnote omitted). In general, governmental interference with religious beliefs is never justified and is unconstitutional. *See also Employment Div.*, *Dep't of Human Res. v. Smith*, 110 S.Ct. 1595, 1599 (1990), *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), and *Reynolds v. United States*, 98 U.S. 145, 164 (1879) ("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."). Consequently, the debate over free exercise exemptions concerns only instances when legislation interferes with religiously motivated conduct. Issues surrounding free exercise protection of religious beliefs are beyond the scope of this paper.

obligation of neutrality in the face of religious differences. . . ."[10] For at least some of the advocates of this position, the pro-exemptions view is based on an assumption that the democratic process is structurally tilted in favor of mainstream religious sects.[11] Democratic governments, according to this outlook, will not normally pass a law interfering with mainline religious practices, but they may unknowingly enact legislation that obstructs the exercise of minority faiths. For instance, when Congress provided for the use social security numbers in its Food Stamp program, it ~~likely~~ probably did not realize that using a unique identifier would interfere with the spiritual development of some Native Americans for whom a number would be used.[12] Legislative bodies do not commission religious-impact statements for every bill they pass. Under a pro-exemptions view, the free exercise clause would often correct these oversights by excusing religious objectors from compliance with laws interfering with their unconventional religious practices.[13] Of course, the clause would also secure free exercise of religion when an insensitive or even oppressive legislature enacted a secular, general law fully aware that its provisions would obstruct the religious practices of some sects. The center-piece of this interpretation of the free exercise clause is a constitutional

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[10] *Sherbert v. Verner*, 374 U.S. 398 (1963)

[11] *See* S.D. Smith, *The Restoration of Tolerance*, 78 Calif. L. Rev. 305 (1990)

[12] *See Bowen v. Roy*, 476 U.S. 693 (1986) (upholding against free exercise challenge use of social security number in certain governmental programs)

[13] Not even Justices Brennan or Marshall, however, would have exempted Native Americans from laws requiring government to use social security numbers. *Id.*

right to exemption from religiously burdensome laws regardless of the motives of the legislative body which enacted them.[14]

Other judges and legal scholars, however, argue that government fulfills its "obligation of neutrality" merely by enacting generally applicable, secular laws.[15] They condemn exemptions as special treatment for minority religious sects, rather than "neutrality."[16] They also believe that the broad religious diversity of the United States makes any system of religious exemptions unmanageable.[17] Religious minorities could use the democratic process to gain statutory exemptions: These judges and scholars would respect any legislatively enacted system of exemptions. They simply do not believe that cutting exceptions from general laws is a proper role for the judiciary.[18]

The U.S. Supreme Court has considered the issue of exemptions from the time of its first significant free exercise case in 1879.[19] Though initially critical of the pro-exemptions view, the Court gradually adopted it. In 1940, the Court's free exercise doctrine began evolving toward an eventual

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[14]*See, e.g.*, *Thomas v. Review Board*, 450 U.S. 707 (1981), *Wisconsin v. Yoder*, 406 U.S. 205 (1971), and *Sherbert v. Verner*, 374 U.S. 398 (1963)

[15]*Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595 (1990), *Bowen v. Roy*, 476 U.S. 693 (1986) (Burger, C.J., plurality opinion), *Thomas v. Review Board*, 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting), and P. Kurland, *Of Church and State and the Supreme Court*, 29 U.Chi.L.Rev. 1 (1961)

[16]*See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)

[17]*See, e.g*, *Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595, 1605 (1990)

[18]*See, e.g.*, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting)

[19]*Reynolds v. United States*, 98 U.S. 145 (upholding federal anti-polygamy statute against Mormon's free exercise challenge)

acceptance of the constitutional right to religious exemptions,[20] and in 1963, the Court granted its first free exercise exemption.[21] By 1981, the Court had solidified the pro-exemptions approach, known as strict scrutiny, in the free exercise field.[22]

However, problems with the doctrine had been apparent since at least 1963, and they became increasingly obvious during the 1980's. Partly as a result of these problems and partly because of ideological shifts among the justices, the Court came full circle in *Employment Div., Dep't of Human Res. v. Smith* (*Smith II*) (1990) and abandoned both strict scrutiny and the pro-exemptions position in the free exercise field.[23]

In *Smith II*, two Native Americans challenged, as a violation of free exercise, Oregon's denial of their request for unemployment compensation. Their employer, a private drug rehabilitation organization, had fired them when it learned of their sacramental use of the illegal[24] drug peyote. Oregon denied their request for unemployment compensation, deeming their peyote use "misconduct." The Oregon Supreme Court eventually ruled that the free exercise clause demanded that sacramental use of peyote had to be exempted from the "misconduct" provision of the compensation regulations. But Oregon appealed, and in 1990, the U.S. Supreme Court ultimately upheld the state's denial of benefits.

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[20] *Cantwell v. Connecticut*, 310 U.S. 586 and *Minersville School District v. Gobitis*, 3109 U.S. 586

[21] *Sherbert v. Verner*, 374 U.S. 398

[22] *Thomas v. Review Board*, 450 U.S. 707

[23] *Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595

[24] Several western states, no doubt respectful of the religious practices of their Native American residents, had provided statutory exemptions from their drug laws for the sacramental use of peyote. *See Smith II*, 110 S.Ct. at 1606

Smith II was notable not so much because of its result but because it radically altered the method of adjudicating most free exercise claims. In short, it virtually eliminated constitutionally compelled religious exemptions and repudiated free exercise strict scrutiny. It represented one of those remarkable moments in constitutional history when a Supreme Court minority's position, developed in previous opinions, overtakes a former majority's views and becomes the new rule of constitutional law. While not directly overruling any precedents, the decision in *Smith II* so narrowed and reinterpreted previous rulings that the new doctrine it established virtually supplanted the pro-exemptions position embodied in the strict scrutiny approach.

This paper focuses on the erosion of strict scrutiny in the 1980's and attempts to explain how it happened. It is divided into five sections. Section one presents a detailed definition of strict scrutiny and explains some of its problems. Section two examines the background which led to the eventual establishment of strict scrutiny in the free exercise field in 1963. Section three explains how strict scrutiny was firmly installed as a free exercise doctrine in several cases from 1963 to 1981. Section four analyzes the erosion of free exercise strict scrutiny during the 1980's. And Section five illustrates its practical elimination in 1990. Finally, the paper concludes with some notes about the state of the free exercise clause after 1990.

§ 1. FREE EXERCISE STRICT SCRUTINY AND ITS PROBLEMS.

By requiring the courts to grant religious exemptions, strict scrutiny theoretically provided a very high level of protection for religious minorities. But the doctrine's comprehensive nature created serious problems that rendered the Supreme Court a less-than-zealous protector of religious liberty. In fact, after introducing strict scrutiny into the free exercise field in 1963, the Court declined to exempt religious objectors in many of the cases in which it heard free exercise challenges to general legislation.[25] This less than powerful record of judicial review suggests that the members of the Court, even those who most ardently supported free exercise strict scrutiny, had difficulties with the doctrine.

Several characteristics defined the doctrine of strict scrutiny in the free exercise field. When the Court formulated the approach in 1963, it was consolidating several judicial standards that had appeared separately in previous free exercise cases. In those cases the Court had begun to require government to meet two distinct criteria in order to justify an infringement of free exercise rights. In addition to the secular-purpose and general-applicability standards mentioned previously, the Court sometimes required that legislation be "narrowly drawn"[26] to achieve its goal while minimizing

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[25] *See, e.g, Bowen v. Roy*, 476 U.S. 693 (1986), *United States v. Lee*, 455 U.S. 252 (1982), and *Gillette v. United States*, 401 U.S. 437 (1971)

[26] *E.g., Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943)

any interference with religious practices. This rule later became known as the requirement of "least restrictive means"[27] because it required government to design its policies so that they used the legislative means which were least restrictive of religious exercise yet still able to fulfill the legislative end sought. In other cases the Court mentioned a fourth criterion. An interference with religious practices would be unconstitutional unless permitting the practices would substantially undermine government's ability to achieve some secular goal that it was seeking to fulfill.[28] Allowing the religious practice would have to do more than merely inconvenience government. Sometimes the Court stated a variation of this criterion, asserting that the secular goal itself had to be very important if the Court were to permit an interference with religious exercise.[29] Either formulation would require government to show an important reason for interfering with religious practices, a reason that the Court eventually labelled a "compelling state interest."[30]

It was not until the 1960's and 1970's, however, that the Court applied both the least-restrictive-means and compelling-interest standards in the same free exercise case. Only in *Sherbert v. Verner* (1963)[31] did the two criteria begin to coalesce into free exercise strict scrutiny, a comprehensive method for analyzing the constitutional challenges of religious objectors. Strict scrutiny had developed at an earlier date in other constitutional

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[27] *E.g., Thomas v. Review Board,* 450 U.S. 707, 718 (1981)

[28] *See, e.g., West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 639 (1943)

[29] *See, e.g., Minersville School District v. Gobitis,* 310 U.S. 586, 595 (1940)

[30] *Braunfeld v. Brown,* 366 U.S. 599, 613 (1961) (Brennan, J., dissenting)

[31] 374 U.S. 398

fields, such as equal protection,[32] but the Court did not begin using it to grant free exercise exemptions from general laws until 1963.[33] In fusing the least-restrictive-means and compelling-interest standards, strict scrutiny demanded more of legislation than merely a secular purpose and general applicability. Under strict scrutiny the burden of proof shifted to government,[34] which had to prove the constitutionality of legislation that interfered with religious practices. According to Chief Justice Burger, "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[35]

But the actual process of judicial decision-making under strict scrutiny was a bit more complex than his statement suggested. When the Court heard a case in which a religious adherent challenged a piece of legislation as burdening his free exercise of religion, the Court had to first determine if the legislation actually interfered with the challenger's practice of some tenet of faith. If the Court found that the legislation did in fact burden

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[32] *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944)

[33] *Sherbert v. Verner*, 374 U.S. 398

[34] In ordinary constitutional review the Court requires the challenger to prove that government has violated the Constitution. Under this rational-basis standard, the challenger has to show that the end sought by some piece of legislation is not constitutionally within the power of the enacting legislative body. Alternately, the challenger might demonstrate that the means which government adopted to meet its legislative goal bear no rational relationship to the achievement of that goal. This standard, very deferential to the decisions of legislative bodies, can be traced back at least to the Marshall Court. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."), *United States v. Fisher*, 6 U.S. (2 Cranch.) 358, 396 (1805) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."), and L. Tribe, *American Constitutional Law*, § 5-3, 300-05 (1987)

[35] *Thomas v. Review Board*, 450 U.S. 707, 718 (1981)

the claimant's religious exercises, the Court would then adopt a working assumption that exempting the religious objector from the challenged legislation would constitute an acceptable, least-restrictive means to secure the legislative goal.[36] To prevent the Court from granting a free exercise exemption, government had to demonstrate that there was some important reason, qualifying as a compelling state interest, for denying the exemption and permitting government to interfere with the religious practices. Justice Brennan explained this compelling-interest requirement in 1963, when the Court first applied strict scrutiny in the free exercise field. To justify the infringement of free exercise "no showing merely of a rational relationship to some colorable state interest would suffice."[37] Instead, "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'" of the free exercise of religion.[38] In other words, government had to show not only that the goal of its challenged legislative provision was "paramount" but also that permitting the religious practices which the provision infringed would pose some "grave" threat to government's ability to achieve its goal. Even if government could meet this test and justify some interference with the objector's religious practices, it would still have to show that it had chosen the legislative means which, next to a complete religious exemption, were the least restrictive of religious exercise and still achieved the legislative goal.[39] Strict scrutiny in the free exercise

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[36] *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (considering religious exemption as a less restrictive means)

[37] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)

[38] *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516 [1945])

[39] *Id.* at 407

field represented an intricate fusion of the least-restrictive-means and compelling-interest standards.

At least on paper, strict scrutiny looked like a powerful judicial doctrine. But its inherent power was troublesome for the Court. Strict scrutiny sometimes led the Court to overstate the negative potential of religious exemptions to avoid granting them in particular cases.[40] These loose applications of the doctrine threatened to undermine strict scrutiny itself by setting a practical standard that was less rigorous than the theoretical rules embodied in the doctrine. The reasons for these loose applications seemed grounded in four major problems with strict scrutiny in the free exercise field.

First, religious exemptions, like those constitutionally mandated under strict scrutiny, might contravene the establishment clause. The Court had also interpreted the establishment clause broadly, so that the government had to have a secular purpose for all its legislation and had to remain religiously neutral, never favoring religion over non-religion.[41] This establishment clause interpretation might seem to harmonize quite well with the free exercise clause since both doctrines would require the government to demonstrate a secular purpose and non-discrimination. However, the addition to free exercise jurisprudence of an exemption doctrine created a possibility that the religion clauses might sometimes contradict one another. For instance, some justices suggested that free exercise exemptions which the Court could order under strict scrutiny, would violate the establishment

[40] *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982)

[41] *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *School District v. Schempp*, 374 U.S. 203 (1963), and *Everson v. Board of Education*, 330 U.S. 1 (1947)

clause were they simply enacted by a legislative body.[42] The justices noted that the legislative body might have difficulty demonstrating a secular justification for the exemptions. The legislative exemptions might also either favor the exempted religion over other religions or favor religion in general over non-religion. Consequently, the Court would have to strike down on establishment grounds legislative exemptions similar to those the Court might mandate on free exercise grounds.[43]

Second, the Court reviewed several cases in which it could not honestly find a compelling state interest but also recognized that religious exemptions would be undesirable. Requiring a compelling interest seemed fine in theory, but in some of the Court's cases an exemption might have created serious administrative problems or might have significantly have limited governmental discretion over its own operations.[44] But administrative convenience had generally not been deemed sufficiently compelling to justify infringements of liberty.

Third, not inconsistent with the warnings of some anti-exemption judges and legal scholars, the broad religious diversity within the United States did

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[42] *See, e.g, Thomas v. Review Board*, 450 U.S. 707, 725 and 726 (1981) (Rehnquist, J., dissenting) and *Sherbert v. Verner*, 374 U.S. 398, 414-417 (1963) (Stewart, J., concurring)

[43] Establishment and free exercise doctrines, both taken to their logical extremes (and there was no theoretical reason not to do so), would create complete rigidity in the first amendment. The only constitutionally valid religious exemptions would be those which the free exercise clause required. Legislative bodies would be powerless to accommodate religious exercise beyond the mandates of the free exercise clause. This could lead to unacceptable results. For instance, if the free exercise clause did not require military draft exemptions (because of an obviously compelling interest), the establishment clause (it doctrines taken to the logical extreme) might preclude Congress from legislatively enacting them.

[44] *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 660 (1988) (upholding forest service administrative decision to build road through portion of national forest deemed sacred by Native Americans) and *Bowen v. Roy*, 476 U.S. 693 (1986)

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prove a dis-incentive upon liberal grants of religious exemptions. In several cases, the Court did not simply consider whether or not the religious adherents at issue should receive an exemption. Instead, the Court contemplated the domino effect that might result from granting an exemption to the members of the sect before them.[45] When the Court feared a flood of similar claims, it was reluctant to grant the exemption in the case at hand.

Moreover, the Court also feared that some of the claims in this potential flood of litigation would be fraudulent.[46] A great deal of subjective judging in the religion field rendered strict scrutiny susceptible to abuse. People might seek to dodge compliance with laws they merely disliked by alleging infringements of bogus religions whose tenets happened to correspond to the provisions of the laws that the "religious adherents" disliked. Because the Court had no set constitutional definition for "religion," it referred to some very general standards in making basically ad hoc, case-by-case decisions as to whether a claimant's alleged non-traditional religion merited constitutional protection. The Court also had ruled that it would not determine the truth or falsity of an individual's professed religion, only the sincerity with which the adherent held his religious beliefs.[47] These two inherent limitations on the Court's judicial power in the religion field created a real danger that strict scrutiny might require the Court to exempt from governmental policies individuals whose fraudulent claims the Court might be unable to reject.

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[45] *See, e.g., United States v. Lee*, 455 U.S. 252 (1982) and *Gillette v. United States*, 401 U.S. 437 (1971)

[46] *See, e.g., Bowen v. Roy*, 476 U.S. 693 (1986) and *Gillette v. United States*, 401 U.S. 437 (1971)

[47] *See United States v. Ballard*, 322 U.S. 78 (1944)

The Court faced at least some of these problems with strict scrutiny in many of the free exercise cases it reviewed after adopting the doctrine in *Sherbert*. Mindful of these potential difficulties, it exercised great caution, and, consequently, its free exercise track record was not as anti-government under strict scrutiny as a mere reading of the doctrine's criteria might suggest that it would be.

But while doctrinal difficulties might singly justify an alteration of strict scrutiny, they are inadequate to explain the wholesale abandonment of the doctrine in 1990. In fact, they probably were not even the most significant reason for the eventual demise of strict scrutiny. More telling were the changes among the Court's members. At the same time the Court was cautiously recognizing problems with strict scrutiny, it was becoming more conservative and less supportive of an activist defense of religious liberty. The composition of the Court obviously changed between *Sherbert* in 1963 and *Smith II*[48] in 1990, and several key replacements helped to alter its mood toward free exercise protection.[49] More importantly, conversions of several justices from a pro-exemptions to an anti-exemptions position were also critical to the death of free exercise strict scrutiny.[50]

The combination of these factors led to the radical shift in *Smith II*. Throughout the 1980's, opposition to free exercise strict scrutiny grew as its flaws became increasingly apparent and the Court grew more conservative.

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[48]110 S.Ct. 1595

[49]For instance, Reagan's replacement of Chief Justice Burger with Chief Justice Rehnquist in 1986, providing an open slot for the appointment of Justice Scalia, resulted in a net loss of a free exercise moderate and a net gain of a no-exemptions vote.

[50]Several justices, including Justices Rehnquist and Stevens, though once endorsing free exercise strict scrutiny, converted to a no-exemptions position.

Finally, in *Smith II* the dissenting minority became a controlling majority, and the strict scrutiny doctrine cracked under pressure which had mounted for a decade. Justice Scalia, writing for a five-man majority in *Smith II*, announced that the Court would no longer apply strict scrutiny in virtually any free exercise cases.

But the new majority did not attempt to fashion a new doctrine which would correct some of the problems of the old one yet still provide significant free exercise protection. Scalia simply deleted the least-restrictive-means and compelling-interest requirements and virtually abandoned the policy of exempting religious objectors. Stripped of these standards, free exercise jurisprudence retained only the secular-purpose and general-applicability rules. As a result, the Court would uphold governmental interferences with religious practices unless the legislation was not generally applicable or its purpose was not secular. Since governmental bodies, at least in recent history, had almost never practiced this type of blatant religious discrimination, the practical effect of *Smith II* was the elimination of free exercise as a meaningful right. The new test so restricted the scope of the free exercise clause that were it deleted from the Constitution entirely, what little meaning it retained after *Smith II* would arguably be covered by other constitutional provisions.[51] Free exercise retained virtually no independent meaning.

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[51]Justice O'Connor warned in 1986 that the establishment of such a limited free exercise approach would "relegate[] a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause [of the fourteenth amendment] already provides." *Bowen v. Roy,* 476 U.S. 693, 727 (1986) (O'Connor, J., concurring and dissenting). In fact, to guard against non-secular legislative purposes and to protect religious beliefs as well as conduct, the Court would probably have to rely on the establishment clause and the freedoms of speech and press in addition to the equal protection clause.

§ 2. THE ORIGINS OF FREE EXERCISE STRICT SCRUTINY.

When the Court introduced strict scrutiny into free exercise jurisprudence in *Sherbert* (1963), it was not dealing with a new concept. Justice Stone had explained the philosophical justifications for such a protective standard as early as 1938,[52] and the Court had adopted the doctrine in equal protection jurisprudence nearly twenty years before *Sherbert*.[53] Dissenting justices in free exercise cases prior to 1963 had urged the Court to apply this approach in the field of religious liberty,[54] and from the earliest free exercise cases the Court had faced the question of religious exemptions.[55] Thus, the *Sherbert* Court was not working in a constitutional vacuum.

In the Court's first significant free exercise decision it soundly rejected any notion that the free exercise clause mandated religious exemptions from otherwise valid laws. In *Reynolds v. United States* (1879),[56] the Court held that a federal law prohibiting polygamy in the territories did not violate the free exercise rights of Mormons. Writing for a unanimous Court,

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[52] *See United States v. Carolene Products*, 304 U.S. 144, 152, n. 4

[53] *See Korematsu v. United States*, 323 U.S. 214 (1944)

[54] *See, e.g, Minersville School District v. Gobitis*, 310 U.S. 586, 603 (1940) (Stone, J., dissenting)

[55] *See, e.g, Reynolds v. United States*, 98 U.S. 145 (1879)

[56] 98 U.S. 145

Chief Justice Waite determined that polygamy was not a protected form of religious conduct and condemned the idea of mandatory exemptions.[57] The Court reaffirmed this categorical opposition to religious exemptions eleven years later in *Davis v. Beason.*[58] In fact, the unanimous Court rejection of religious exemptions continued well into the New Deal era. As late as 1934, for instance, Justice Cardozo warned of the potential dangers resulting from religious exemptions, noting that "[t]he right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government."[59]

Then came the judicial revolution of 1937, emphasizing the necessity for the Court to presume the validity of governmental policies, particularly New Deal economic regulations, until proven unconstitutional. However, in *United States v. Carolene Products* (1938),[60] Justice Stone remarked in passing in his famous footnote number four of the potential need for an exception to this policy of judicial restraint.[61] He suggested three occasions when the Court

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[57] *Id.* at 166-67 ("Can a man excuse his [illegal] practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.")

[58] 133 U.S. 333 (1890) (upholding territorial law denying suffrage to those who belonged to any organization advocating polygamy as a religious tenet)

[59] *Hamilton v. Regents of the University of California*, 293 U.S. 245, 268 (concurring opinion) (upholding university requirement of participation by male students in military science and tactics course)

[60] 304 U.S. 144 (upholding federal regulation against interstate commerce and fifth amendment challenge)

[61] He wrote:
"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

might shift to the government the burden of proving a statue's validity: (1) when the statute appeared on its face to violate the text of the Constitution, (2) when the statute restricted democratic processes, and (3) when the statute was directed against religious and other minority groups. From the theoretical foundation of this footnote eventually grew the strict scrutiny approach in both the equal protection and later the free exercise fields. In fact, early versions of the least-restrictive-means and compelling-interest standards appeared disparately in two free exercise cases in 1940,[62] but they did not fuse into a uniform doctrine in any single free exercise case.

A loose form of the least-restrictive-means standard did appear in *Cantwell v. Connecticut*[63]. In *Cantwell* three Jehovah's Witnesses challenged their convictions under a state law conditioning their right to solicit on a prior governmental conclusion that their religious cause was legitimate. Invalidating the statute as a censorship of religion and a prior restraint upon its free exercise, Justice Roberts stated for a unanimous Court that legislation must be "general and non-discriminatory"[64] to pass free exercise scrutiny. But he also asserted that "the power to regulate must be so

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"It is unnecessary to consider now whether legislation which restricts those political processes [like voting] which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth [a]mendment than are most other types of legislation. . . .

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . ., or national . . ., or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . ." *Id.* at 152, n. 4

[62] *Cantwell v. Connecticut*, 310 U.S. 296 and *Minersville School District v. Gobitis*, 310 U.S. 586

[63] 310 U.S. 296 (1940)

[64] *Id.* at 304

exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[65] While this criticism of "undue" infringements might not require the government to apply the means least restrictive of religious liberty, he was certainly moving the Court in that direction.

In the second case of 1940, *Minersville School District v. Gobitis*,[66] the Court hinted at a type of compelling-interest requirement. In this case the Court refused to exempt from mandatory flag salutes in public school two Jehovah's Witness children who believed that their religion prohibited such salutes. Justice Frankfurter, writing for a seven-person majority, seemed at first glance to apply only the secular-purpose and general-applicability standards.[67] But while Frankfurter cited *Reynolds*, *Davis*, and some other cases to support this free exercise approach, he noted that "[i]n all these cases the general laws in question . . . were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[68] He seemed to place some weight on his conclusion that the government interest at issue in the case (promoting national unity) was "inferior to none in the hierarchy of legal values."[69] Although he did assert that "[t]he mere possession of religious convictions

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[65] *Id.*

[66] 310 U.S. 586

[67] *Id.* at 594 (The Court had never held free exercise to be infringed by "legislation of general scope not directed at the doctrinal loyalties of particular sects. . . . Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.")

[68] *Id.*

[69] *Id.* at 595

which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities,"[70] Frankfurter seemed not to conclude simply that the mandatory flag salute was constitutional because it was a secular, general regulation. He had qualified his statement by referring to "the *relevant* concerns of a political society,"[71] and he stressed that the need to foster national unity was exceedingly important. The importance he attached to the governmental interest influenced his opinion. Such an influence, though not necessarily a requirement of a compelling state interest, foreshadowed such a standard.

Despite the Court's endorsement in *Cantwell* of loose form of the least-restrictive-means criterion, Frankfurter did not apply such a standard in *Gobitis*. Instead, he dodged the criterion, asserting that "the effective means for [attaining national unity] are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power."[72] Since the Court "possess[ed] no marked and certainly no controlling competence"[73] in educational matters, it should not make itself "the school board for the country."[74] The Court's willingness to require a narrowly tailored policy in *Cantwell* was missing in *Gobitis*, suggesting perhaps that such willingness depended on either the Court's self-perceived competence in any particular field or upon its view of the result it hoped to achieve in any particular case. At any rate, *Cantwell* contained a sort of least-restrictive-means

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[70] *Id.* at 594-95

[71] *Id.* (emphasis added)

[72] *Id.* at 598

[73] *Id.* at 597-98

[74] *Id.* at 598

standard but no requirement of a compelling interest, and in *Gobitis* the reverse was true. But neither of the cases of 1940 can be said to have completely endorsed a full strict scrutiny approach for free exercise claims.

Stone, however, relied on his footnote in *Carolene Products* to outline just such a doctrine in his dissenting opinion in *Gobitis*. He argued that the Court should hold a governmental policy unconstitutional, despite its general applicability and secular purpose, if "there were ways enough to secure the legitimate state end without infringing the asserted immunity" or if "the inconvenience caused by the inability to secure that end satisfactorily through other means, did not outweigh freedom of . . . religion."[75] The former of his rules implied a least-restrictive-means requirement and the latter suggested a standard of heightened importance along the lines of a compelling interest. But Stone's *Gobitis* dissent would have to wait twenty-three years before winning majority status in *Sherbert*.

Subsequent history soon justified Stone's strong support of religious liberty and his opposition to the *Gobitis* judgment. That decision endured for only three years. *Gobitis* immediately fueled a pre-existing nationwide movement against the Jehovah's Witnesses.[76] Compulsory flag salutes spread across the country and were "costing Witness children their right to public education in at least thirty-one states."[77] Perhaps as a result,[78] Justices Black, Douglas, and Murphy, who had joined Frankfurter's *Gobitis* opinion, switched sides in 1942 and declared in a dissenting opinion in *Jones*

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[75] *Id.* at 603 (dissenting opinion)

[76] D. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* 163-92 (1962)

[77] *Id.* at 187

[78] *Id.* at 206-07

v. Opelika[79] their belief that *Gobitis* had been wrongly decided. Roosevelt also replaced two other members of the Court between 1940 and 1942, elevating Stone to the Chief Justiceship in the process.[80] But even with conversions and replacements, Stone's position remained a minority view, five-to-four.[81]

As a result the Court split five-to-four in *Jones* and upheld the application to Jehovah's Witnesses of several local ordinances providing for flat-rate licensing taxes for itinerant merchants. Justice Reed, writing for the majority, assumed that the door-to-door religious solicitation of the Witnesses was commercial activity. He also argued that the generally applicable tax was more like a neutral time, place, or manner regulation of solicitation than a censorship or prohibition of religious exercise. He found the tax constitutional.

In dissent Stone and Murphy, joined by Black and Douglas, each contended that the tax was not a simple time, place, or manner regulation because it did not regulate anything. Nor was it a fee to offset the cost of the licensing system. For them, it was simply a revenue-generating measure, and as such was unconstitutional. They argued that the government could not place a general, revenue-generating tax on the exercise of a first amendment right, like the free exercise of religion. But the minority would have to await either another conversion by a member of the majority or a replacement on the Court before attaining majority status.

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[79]*Jones v. Opelika*, 316 U.S. 584, 623-24 (opinion of Black, J.)

[80]In 1941, Roosevelt replaced Justice McReynolds with Justice Byrnes, and he appointed Justice Jackson to fill Stone's seat when he elevated the latter to replace Chief Justice Hughes. *See* H. Abraham, *The Judicial Process*, 398-403 (1986). Byrnes and Jackson joined with Frankfurter on free exercise matters. *See Jones*, 316 U.S. 584.

[81]Roberts, Reed, Frankfurter, Byrnes, and Jackson, JJ., opposed Stone's broader reading of the free exercise clause while Black, Douglas, and Murphy, JJ., supported it. *See Jones*, 316 U.S. 584.

They did not have to wait very long. Justice Byrnes, appointed only in 1941, resigned at the start of the fall 1942 Term.[82] Roosevelt appointed D.C. Appeals Court Judge Wiley Rutledge[83] to fill Byrnes' vacant seat. There was little doubt about how Rutledge would have ruled in *Jones*; in Murphy's dissent in that case he had approvingly cited a dissenting opinion of Rutledge in similar case.[84] In fact, the Court granted the challengers in *Jones* a rehearing, and by February, 1943, the minority had become a five-person majority.

Before the end of that Term, the Court had vacated its previous judgment and re-decided *Jones* per curiam. In a case presenting the same issues, the Court explained its rationale and reaffirmed *Cantwell*'s least-restrictive-means requirement. In this case, *Murdock v. Pennsylvania* (1943),[85] the Court struck down a flat-rate licensing tax similar to the one at issue in *Jones*. Justice Douglas, writing for the majority, asserted that for Jehovah's Witnesses itinerant solicitation was more a religious activity than a commercial one. And he explained that because the "power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . .[, a] state may not impose a charge for the enjoyment of a right granted by the federal constitution."[86] Finally, Douglas answered Reed's contention that the tax was valid because it was simply a neutral regulatory device. Douglas asserted that the tax would not be valid even if did purport to regulate something because it was not "narrowly drawn to prevent or control abuses or evils

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[82] H. Abraham, *The Judicial Process*, 400 (1986)

[83] *Id.* at 400

[84] *Jones*, *supra*, n. _, at 614, n. 4

[85] 319 U.S. 105

[86] *Id.* at 112-13

arising from [door-to-door solicitation]. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied [the Witnesses] unless the tax is paid."[87] The indiscriminate nature of the tax rendered it unconstitutional: "A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares of hucksters and peddlers and treats them all alike."[88] Douglas seemed to adopt a least-restrictive-means requirement, the *Cantwell* standard that Frankfurter had refused to apply in *Gobitis*.

But the new majority was not content with that implicit repudiation of *Gobitis*. They explicitly overruled it in another case that term, *West Virginia State Board of Education v. Barnette* (1943).[89] This case presented the same situation the Court faced in *Gobitis:* Jehovah's Witness children sought free exercise exemptions from mandatory flag salutes in public school. Although the Court did overrule *Gobitis*, it did not decide *Barnette* on free exercise grounds and did not grant the children religious exemptions from the flag salutes. As a result, the Court's opinion in *Barnette* contributed only brief dicta to the development of free exercise doctrine.

Instead of deciding the case on free exercise grounds, the Court struck down mandatory flag salutes as a violation of the freedom of speech, concluding that the government could not compel any student, regardless of religious beliefs, to participate in these patriotic ceremonies. There were probably two reasons for this approach. First, *Gobitis* was only a three-year-old precedent, so overruling it would make the Court look suspiciously inconsis-

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[87] *Id.* at 117

[88] *Id.* at 115

[89] 319 U.S. 624 (1943) (striking down mandatory flag salutes in public schools)

tent. As a result, the majority may not have wanted to overturn *Gobitis*, which was decided by an eight-to-one margin, with the narrow five-to-four split of *Murdock*. Switching the decision to free speech grounds persuaded Justice Jackson, who had dissented in *Murdock*, to change sides. Perhaps not coincidentally, Jackson was assigned to write the opinion of the Court in *Barnette*. By taking the free speech approach, the majority was also able to exploit a point which Frankfurter's opinion in *Gobitis* had not carefully evaluated. Jackson explained in *Barnette* that Frankfurter had assumed "that power exists in the State to impose the flag salute upon school children in general" and then decided the religious question.[90] But in *Barnette* the Court decided that general power to require the salutes was forbidden by free speech, so there was no need to consider the question of religious exemptions from the unconstitutional mandatory flag salute.

Despite the Court's free speech basis for its decision in *Barnette*, Jackson sufficiently commented upon Frankfurter's reasoning in *Gobitis* to reveal that the new majority rejected his assertion that the Court should defer to the judgment of school boards because it lacked special competence in educational matters. Jackson first noted that school boards as well as Congress were bound by the Constitution, which it was the Court's duty to enforce. He then went on to refute Frankfurter further, asserting:

> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. . . . We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that

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[90] *Id.* at 635

> history authenticates as the function of this Court when liberty is infringed.[91]

To the extent that Frankfurter's deference on this point undermined an application of the least-restrictive-means standard in *Gobitis*, the new majority might be assumed to have supported that requirement in free exercise cases. But Jackson, who had mocked Douglas' application of that standard in *Murdock*,[92] did not invoke any "narrow tailoring" language in *Barnette*.

Jackson did imply in dicta the need for a version of a compelling-interest standard in free exercise jurisprudence. He argued that legitimate governmental regulation of certain issues included "power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting."[93] But this broad power did not extend into the first amendment arena: "[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may lawfully protect."[94] This passage represented the toughest statement in support of a standard like compelling-interest in the free exercise field that a Court majority had espoused up to that time. But, once again, neither *Barnette* nor *Murdock* explicitly combined both the least-restrictive-means and compelling-interest standards in one opinion as a comprehensive free exercise doctrine leading to the judicial granting of religious exemptions. That

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[91] *Id.* at 639

[92] *Murdock*, *supra*, n. _, at 178 (dissenting opinion) ("If the local authorities must draw closer aim at evils than they did in these cases I doubt that they ever can hit them.")

[93] *Id.* at 639

[94] *Id.* (emphasis added)

result would not occur until the Court explicitly introduced strict scrutiny into the free exercise field twenty years later.

Frankfurter, no doubt sensing that eventual result, filed a lengthy dissent addressing several issues related to strict scrutiny for free exercise claims and grants of religious exemptions from laws. He provided perhaps the most thoughtful and detailed statement of the position opposing strict scrutiny and free exercise exemptions that any justice has ever delivered. First, he objected to a system of review whereby challenges under one provision of the Constitution would be scrutinized more carefully than challenges under another. He wrote of the requirements of judicial restraint:

> There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has . . . the same constitutional dignity as the . . . freedom of speech or religious freedom.[95]

Frankfurter would not even admit a hierarchy of levels of scrutiny between purely economic challenges, once used by the Court to invalidate much of the New Deal, and first amendment freedoms.

In addition, he objected to the whole notion of Court-ordered exemptions from laws. The framers, he believed, had never intended the Court to participate in the legislative process. "It is . . . beyond our power to rewrite the state's requirement, by providing exemptions. . . . That wisdom might suggest the making of such accommodations . . . is outside our province to suggest. . . . A court can only strike down. . . . It cannot make exceptions to a

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[95]*Id.* at 648 (dissenting opinion)

general requirement."[96] He also argued that the framers never intended to exempt religious adherents from any law to which they objected. "The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."[97] Frankfurter went on to assert that if religious liberty meant religious adherents could object to generally applicable, secular requirements, then "instead of separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. . . . The validity of secular laws cannot be measured by their conformity to religious doctrines."[98] Finally, Frankfurter noted that a doctrine of exemptions could not work in a religiously pluralistic society. In short, he chastised the majority for simply reading into the Constitution their personal views of the wisdom of the mandatory flag salute.

One year after *Barnette*, the Court had another opportunity to formally adopt strict scrutiny in the free exercise field but did not clearly do so. In *Prince v. Massachusetts*,[99] a Jehovah's Witness, Sarah Prince, challenged her conviction under a child labor law. She had permitted her under-age niece (and ward), Betty, to accompany her in street solicitation activities. Prince argued that the law violated her right to instill her religion in Betty, and that it violated Betty's right to exercise that religion. She asked the Court to apply a strict scrutiny approach in evaluating her claim.

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[96] *Id.* at 651

[97] *Id.* at 653

[98] *Id.* at 654

[99] 321 U.S. 158

But the Court declined to apply strict scrutiny and upheld Prince's conviction on the grounds that the doctrine of *parens patriae* gave government greater power to restrict the activities of minors than those of adults. Justice Rutledge, writing for the Court, asserted that

> [t]he state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers *in a broad range of selection.*[100]

The Court was not willing to demand government to apply the least-restrictive means when the legislative end related to the protection of children. As Justice Jackson noted in dissent, the Court had "draw[n] a line based on age."[101] Rutledge did note that if the same statute had been applied to adults, it would be unconstitutional. This remark might be taken as an implicit endorsement of strict scrutiny in cases not involving children. But Justice Murphy, who in dissent cited both the *Carolene Products* footnote and *Barnette*'s "grave and immediate danger" dicta, was the only member of the Court to expressly sanction free exercise strict scrutiny.

The Court did not have another real chance to invoke strict scrutiny in the free exercise field until the early 1960's. Chief Justice Stone died two years after *Prince.* Truman's appointment of the more conservative Chief Justice Vinson to replace him probably returned Stone's free exercise majority to minority status and precluded any radical alteration of free exercise

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[100] *Id.* at 168 (emphasis added)

[101] *Id.* at 178

doctrine.[102] By 1949, Truman had replaced two more members of Stone's free exercise group, Justices Murphy and Rutledge, with more conservative justices.[103] This Court did not retreat and overturn *Murdock* or *Barnette*, but it did not measurably extend free exercise doctrine either.

About the closest the Vinson Court came to such an extension was *Niemotko v. Maryland*,[104] decided in 1951. In that case, the Court overturned the convictions of two Jehovah's Witnesses for disorderly conduct. The Witnesses had sought to hold religious meetings in a city park, but the Park Commissioner and city council denied their request. Although the city had no permit ordinance, it had traditionally operated under a permit system. The Witnesses held their meetings anyway, and their leaders were arrested. Although the Court discussed the lack of "narrowly drawn limitations" or any "substantial interest of the community,"[105] it based its decision on the equal protection clause, not free exercise. Moreover, the Court based its opinion in a similar case decided at the same time on free speech rather than free exercise grounds.[106]

During the subsequent decade, the Court did not decide any free exercise cases relevant to the development of strict scrutiny in that field. As of the late 1950's, it was clear that the free exercise clause demanded that governmental policies infringing religious exercises be generally applicable and have a secular aim. The Court had also created two disparate lines of cases endorsing tougher free exercise standards. One line, consisting of *Cantwell*

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[102] H. Abraham, *The Judicial Process*, 400 (1986)

[103] *Id.* at 400-01

[104] 340 U.S. 268

[105] *Id.* at 272

[106] *Kunz v. New York*, 340 U.S. 290

and *Murdock*, required the government to narrowly tailor its policies so as to minimize interference with religious exercise. This principle approximated a least-restrictive-means standard. At the same time, *Gobitis* and *Barnette* suggested that the government had to demonstrate some important interest to justify its infringements of religious liberty. And *Prince* tacitly endorsed a combination of the two lines. Apart from dissenting opinions, the Court never explicitly integrated the two rules into a comprehensive strict scrutiny doctrine in the free exercise field.

And in the first free exercise case of the 1960's, *Braunfeld v. Brown*,[107] the Court refused to apply strict scrutiny. In this case, the Court heard the challenge of an Orthodox Jewish merchant to Pennsylvania's Sunday Closing Law.[108] Abraham Braunfeld, already required by his religion to close his business on Friday night and Saturday, claimed that the state's requirement that he also close on Sunday threatened his ability to stay in business. As a result, Braunfeld argued, the state had violated his right to free exercise by forcing him to choose between his religious exercise and his business. Although a majority of justices could not agree on a rationale, the Court ruled, seven-to-two, that the interference was justified.

Chief Justice Warren announced the Court's judgment and filed a plurality opinion for himself and three other justices. He reaffirmed *Cantwell*'s least-restrictive-means standard but did not require Pennsylvania to demonstrate a compelling interest. Instead, he introduced a new distinction into

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[107] 366 U.S. 599 (1961)

[108] At the same time, other litigants challenged this and other laws as violations of the establishment clause and equal protection of the laws. The Court, however, upheld the Sunday Closing Law against both of these challenges. *McGowan v. Maryland*, 366 U.S. 420 (1961), *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961), and *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961)

free exercise jurisprudence. Warren distinguished between statutes that burdened free exercise directly from those which burdened it only indirectly. A direct burden referred to a governmental policy that absolutely prohibited some religious conduct while an indirect burden referred to one that only placed dis-incentives on the practice of some activity required by a challenger's religion. The Sunday Closing Law at issue did not mandate that Braunfeld open his business on his Sabbath, it only placed a dis-incentive upon his choice to close. As a result, it only indirectly burdened his religious practices. According to Warren, the Court would apply the *Cantwell* standard to governmental policies that burdened religious exercise only indirectly. It would not require government to also demonstrate a compelling interest to justify the indirect interference. It is important to note that Warren did not precisely explain what approach the Court would take when a policy burdened free exercise directly. He noted only that such instances required the "particularly delicate task" of making an "accommodation between the religious action and the exercise of state authority."[109] It was not clear whether or not he believed the Court should apply strict scrutiny in cases of direct burdens.

But Warren clearly outlined the Court's method of analysis in cases of indirect burdens. He obviously invoked the secular-purpose and general-applicability standards: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[110] Then Warren embraced the least-restrictive-means requirement when challenged legislation met these initial

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[109] *Braunfeld, supra*, n. _, at 605

[110] *Id.* at 607

standards: "[I]f the State regulated conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statue is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden. See Cantwell.* . . ."[111] Thus, Warren took *Cantwell* and carefully restated its requirements, adopting them as the free exercise test for policies which indirectly burdened religiously motivated activities.

But he held, unlike the *Cantwell* Court, that the challenged law met these standards, so he rejected Braunfeld's claim. Warren cited one of the other Sunday Closing cases decided on the same day, *McGowan v. Maryland*,[112] as support for the proposition that Sunday Closing Laws, though once religiously based, had evolved into generally applicable, secular regulations. And although Warren accepted Braunfeld's suggestion that a religious exemption might be a less restrictive means for some of the state's goals, he did not grant the exemption. Warren argued that the state's primary goal was to provide one commercial-free day to all its citizens and that exemptions, though less restrictive, would undermine the purpose of the statute. Forcing Braunfeld to comply with the Sunday Closing Law was therefore essential to achieve the legislative end. He also noted other problems that religious exemptions might create. But Warren did not apply the *Barnette* dicta and inquire about the importance of the legislative end itself. A compelling-interest showing was not part of the plurality's test.

In dissent, Justice Brennan, joined by Justice Stewart, asserted that the Court should have required Pennsylvania to justify its infringement with a compelling interest. Brennan first quoted Jackson's *Barnette* dicta which

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[111] *Id.* (emphasis added)

[112] *See supra*, n. _

suggested that government could infringe religious liberty "'only to prevent grave and immediate danger'" to state interests.[113] He also invoked Stone's *Carolene Products* footnote to support his position. Brennan asserted that these and other precedents showed that the Court had to apply strict scrutiny in evaluating free exercise claims, and he did so in his opinion. He suggested that Pennsylvania could provide religious exemptions and still achieve a goal of requiring each person to rest one day a week. Sabbatarians would simply rest on Saturday and opt to work on Sunday while everyone else rested on Sunday and remained free to work on Saturday. Brennan noted that a number of states applied this scheme without tremendous problems. Given this alternative, he could not conclude that the state's additional interest in providing a day of rest that was *uniform* was sufficiently compelling to justify the infringement of Braunfeld's religious exercise. That the burden on Braunfeld's religious practice was only indirect was irrelevant for Brennan. He argued that in the case of either a direct or an indirect burden, the free exercise clause required the Court to apply a compelling-interest standard in addition to the least-restrictive-means requirement that the plurality endorsed. Since Brennan concluded that religious exemptions would not present any "grave and immediate danger" to the state's interest in providing that everyone take a day off, and since the state's additional interest in enforcing uniformity was not compelling, Brennan and Stewart dissented.

Frankfurter filed an additional opinion concurring in the result. In this opinion, which justice Harlan joined, he outlined his own approach to free exercise claims:

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[113] *Braunfeld*, *supra*, n. _, at 612

> If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained.[114]

Frankfurter accepted a least-restrictive-means standard, but he qualified it by requiring that the less-restrictive means would still achieve the legislative end "with equal effect." He disapproved of Brennan's approach, whereby the Court would grant an exemption since the state would still be able to fulfill its general interest in a slightly less effective way. If the state's legislative goal was to provide a uniform day of rest, Frankfurter would evaluate that goal without reference to a less comprehensive goal that achieved almost the same results. To make the evaluation Frankfurter proposed a cost-benefit analysis to weigh the relative importance of the legislative end in the event that no less-restrictive means were available. He was willing to strike down a statute if the burden upon free exercise was greater than the benefit gained by achieving the "community interests"[115] represented by the statute. Frankfurter relied on arguments identical to Warren's to conclude that religious exemptions would not be effective alternative means but would frustrate the government's ability to achieve its secular end. Going beyond Warren, Frankfurter purported to balance the community benefit of

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[114] *McGowan v. Maryland*, *supra*, n. _, at 462 (Frankfurter, J., concurring in judgment)

[115] *Id.* at 522

the statute against the cost to the individual, and, not surprisingly, he found that the community benefits outweighed the individual costs.[116]

As a result of the fractured Court in *Braunfeld* and the new direct-indirect distinction of the plurality opinion, free exercise jurisprudence was less clear after *Braunfeld* than before the case was decided. The inability of any position to gain a majority suggested that *Braunfeld* would not become a very important precedent. In fact, within two years after the Court's decision in *Braunfeld*, Justice Goldberg had replaced Frankfurter, and Brennan had apparently persuaded Warren and two other members of the plurality to accept his free exercise position. When the Court decided *Sherbert* in 1963, it adopted Brennan's approach in *Braunfeld* as the majority position, seven-to-two. The opinion in *Sherbert*, which Brennan wrote, brought the compelling-interest and least-restrictive-means standards together, establishing strict scrutiny in the free exercise field for the first time.

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[116]Frankfurter did not specifically note how he weighed the individual costs of potential eternal damnation or bankruptcy for Braunfeld against the community interests of a day of rest. In fact, he seemed merely to downplay the individual costs and overstate the benefits. At the same time he warned against justices' applying their own personal opinions, a possibility to which his cost-benefit analysis seemed to provide an open invitation.

§ 3. THE RISE OF FREE EXERCISE STRICT SCRUTINY.

Although the Court introduced strict scrutiny into the free exercise field in *Sherbert* (1963),[117] it did not definitively establish the doctrine in this case. The Court's opinion in *Sherbert* left some questions regarding the proper application of strict scrutiny in the free exercise field. The Court gradually clarified its position on free exercise strict scrutiny over the subsequent years and fully installed the doctrine by 1981.[118]

In *Sherbert*, the Court heard the case of Adell Sherbert, a Seventh-Day Adventist who lost her job because she refused to work on Saturdays when her employer extended the work week of all its employees to six days. South Carolina denied her request for unemployment compensation. The state denied benefits to unemployed individuals who were not "available for work." Because Sherbert was willing to accept work only if it did not require Saturday labor, the state decided that she did not meet its employment availability requirement. She challenged the denial of unemployment benefits as a violation of her right to the free exercise of religion, and the Court agreed, applying strict scrutiny to do so.

Although a Court majority decided to rule in Sherbert's favor, it also apparently refused to overturn *Braunfeld*. This refusal created problems for

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[117] 374 U.S. 398

[118] *See Thomas v. Review Board*, 450 U.S. 707 (1981), *McDaniel v. Paty*, 435 U.S. 618 (1978), and *Wisconsin v. Yoder*, 406 U.S. 205 (1971)

Brennan, who wrote the majority opinion in *Sherbert*. His primary goal of course was to expressly install strict scrutiny in free exercise jurisprudence. But the Court majority constrained his ability to clearly establish that doctrine because Brennan also had to attempt to distinguish *Braunfeld* to maintain its validity. On the surface, Brennan's opinion read like a flow chart for deciding free exercise cases. But just underneath the surface lay contradictions and qualifications that undermined Brennan's goal of establishing strict scrutiny as the primary method of evaluating free exercise claims.

Brennan first noted that there were some forms of conduct, like polygamy, which the free exercise clause did not protect. In those cases, the Court would simply uphold any statute that prevented anyone, including a religious adherent, from performing such conduct as a religious rite or otherwise. Sherbert's abstinence from Saturday labor, however, was protected because it did not "pose[] some substantial threat to public safety, peace or order."[119] So government could not enact legislation aimed at preventing Sherbert from abstaining from Saturday labor. Any infringement of her religious practice had to be an incidental effect of a secular regulation, as it was in the case at hand.

Then, Brennan faced a problem. According to *Braunfeld*, if a generally applicable, secular policy indirectly burdened an individual's free exercise, it was not valid unless the government could show that it had employed the least-restrictive means possible to achieve its legislative end. If no less-restrictive means were available, however, *Braunfeld* did not sanction a free exercise approach under which the Court could also require the government to justify its indirect burden on free exercise by showing that it fulfilled some compelling interest. If the burden were direct, the Court might apply a

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[119] *Id.* at 403

compelling-interest standard, but *Braunfeld* was not clear on this point. At any rate, although *Sherbert* presented only an indirect burden, Brennan wanted to establish full strict scrutiny, including a compelling-interest standard.

In order to both sanction free exercise strict scrutiny and also respect *Braunfeld*, Brennan produced a vague opinion which could be read in two ways, depending on which passages were emphasized. On one level, he seemed to apply a full strict scrutiny approach, as though *Braunfeld* had never been decided. He first had to determine whether or not South Carolina's availability requirement, as interpreted by the state, burdened Sherbert's religion. Brennan decided that the denial of benefits, an indirect burden similar to the one in *Braunfeld*, did infringe Sherbert's free exercise rights. It forced her to choose between adhering to her tenet of faith, foregoing Saturday labor, and sacrificing benefits on one hand or violating a tenet of her religion in order to receive unemployment benefits. For Brennan, "such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship."[120] So he concluded that South Carolina's disqualification provision, when applied against Sherbert, did burden her right to free exercise, if only indirectly.

Brennan then seemed to completely ignore *Braunfeld*'s distinction between direct and indirect burdens, holding that South Carolina had to demonstrate that including Sherbert's religiously based abstinence within the meaning of the disqualification provision was justified by some compelling interest. This consideration would seem to contradict the rule of adjudication established in *Braunfeld* for instances of indirect burdens. At any rate, the state argued that protecting its unemployment compensation fund from fraudulent claims was compelling. But Brennan announced that the Court would not deter-

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[120] *Id.* at 404

mine whether or not any compelling interest existed because the state supreme court had not considered the question. Noting that many states provided exemptions for Sabbatarians, Brennan did make clear that the Court would not accept any asserted governmental interest as compelling. He remanded the case to the state court and implied that if that court did not exempt Sherbert from the disqualification provision, the Supreme Court would do so on appeal. Brennan declined to evaluate the assertion of compelling interest in deference to the state court, but his opinion expressly sanctioned the use of strict scrutiny in the free exercise field.

While on this superficial level Brennan's opinion appeared to represent a straightforward endorsement of strict scrutiny, it contained inconsistencies and qualifications just below the surface. These flaws in his ruling, resulting from his attempts to distinguish *Braunfeld*, rendered the opinion a less than clear approval of strict scrutiny. Although Brennan seemed to eliminate the distinction between direct and indirect burdens, he noted that *Braunfeld* was still valid because the burden in that case had been less direct than the one in *Sherbert*. But the directness of the burden was irrelevant under the test he applied in *Sherbert*, so he could not legitimately distinguish *Braunfeld* on that ground. And his contradictory statement left some question about the potential of continued soundness for the direct-indirect distinction in the free exercise field. Although the Court noted that the burden in *Sherbert* was indirect, it applied strict scrutiny to find it unconstitutional. But by also claiming that *Braunfeld* was still a valid precedent, the Court left open the possibility that some challenges to indirect burdens might be evaluated according to the less stringent doctrine applied in *Braunfeld*.[121]

Brennan also tried to distinguish *Braunfeld* in another way: by stretching the facts in *Sherbert* to suggest that the disqualification provision was not generally applicable but was in fact discriminatory. In *Braunfeld*, Warren had announced a specific test only for instances when some generally applicable and secular governmental policy indirectly burdened religious exercise. Warren, it will be recalled, did not clearly articulate standards for cases in which the burden was indirect but the legislation was discriminatory or nonsecular. Nor did he outline a precise judicial approach in cases of direct burdens on free exercise. Brennan apparently tried to cast the disqualification provision in *Sherbert* as discriminatory so as to avoid applying the *Braunfeld* test that did not include a compelling-interest standard. In fact, he quoted as relevant to *Sherbert* a portion of *Braunfeld* which suggested that discriminatory policies were always invalid, but he ignored the sentence immediately following the portion he quoted. That sentence outlined the least-restrictive-means approach for generally applicable policies but did not endorse a compelling-interest standard. Brennan seemed to be writing his *Sherbert* opinion so that if it were read on a deeper level, and were directly compared with *Braunfeld*, one might conclude that *Sherbert* defined strict scrutiny as the proper judicial approach when cases involved discriminatory or

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[121]It could be argued that Brennan's dispute with Chief Justice Warren's plurality opinion in *Braunfeld* was based not on the plurality's refusal to apply strict scrutiny but on their acceptance of the state's asserted interests as compelling when Brennan did not believe that they were. But this interpretation of the disagreement in *Braunfeld* does not comport with Warren's plurality opinion or with Brennan's urging from dissent that precedent required a showing of compelling interest. Given the clarity with which Warren outlined the criteria that the Court should apply in cases like *Braunfeld*, it would be a stretch to assume that the majority really used a compelling-interest standard but did not explicitly announce that they were using it.

non-secular legislation that indirectly burdened free exercise. In other words, Brennan would be filling one of the holes which Warren left open in *Braunfeld*.

Brennan's suggestion that the disqualifying provision was discriminatory was based on two propositions, neither of which were sound. First, he asserted that although the state court had held that Sherbert's religious reason for refusing Saturday work disqualified her, the court had not ruled out the possibility that it might exclude from the disqualification provision other, perhaps non-religious, personal reasons for refusing Saturday work. The state's decision to disqualify Sherbert might then constitute religious discrimination, and the provision might fail the general-applicability requirement. Justice Harlan objected in dissent to Brennan's assumption that "*some* day" the state court might "conclude that there is *some personal* reason" that would not disqualify an individual.[122] Harlan noted that the state court had never held any personal reason as an acceptable basis for someone to condition their availability for work. He suggested that the majority should not assume that it would ever do so.

Second, Brennan tried to show that the scheme was discriminatory by referring to another South Carolina law that protected individuals from being compelled to work on Sunday if such work would violate their religion. However, Harlan again effectively attacked Brennan's claim. He pointed out that this law was not part of the unemployment statutes at issue and in fact only had force in times of national emergency when the state authorized employers to operate on Sunday. Nevertheless, it seemed that Brennan was trying to paint the disqualification provision as discriminatory so that *Braunfeld* would not require him to apply a free exercise doctrine that

[122] *Id.* at 420, n. 1 (Harlan, J., dissenting)

excluded the compelling-interest standard. But Brennan did not incorporate his suggestion that the provision was discriminatory into his formulation of the strict scrutiny approach he sanctioned. His opinion did not even imply that the Court would apply strict scrutiny only if challenged legislation were discriminatory.

Flawed by Brennan's messy attempts to save *Braunfeld*, the *Sherbert* opinion left confusion in the free exercise field. While denying that *Braunfeld* was overruled, the Court adopted an approach that was at odds with that case unless *Sherbert* were narrowly read as filling a hole left by Warren in *Braunfeld.* But if *Sherbert* were read in such a way, it would produce several questions. The distinction between direct and indirect burdens might still be valid. After all, since *Sherbert* did not address a direct burden, its strict scrutiny doctrine might not apply in cases containing such a burden. And since *Sherbert* distinguished *Braunfeld* as presenting a less direct burden, it might suggest that when future courts heard free exercise challenges they might have to apply the less comprehensive test announced in *Braunfeld* when burdens could be deemed less direct than the one in *Sherbert. Sherbert* might also require that future courts distinguish between indirect burdens resulting from general laws and those arising from discriminatory legislation. Full strict scrutiny might apply only when legislation was discriminatory and placed indirect burdens on free exercise. Brennan's attempts to save *Braunfeld* substantially undermined his goal of firmly establishing strict scrutiny in *Sherbert* as the predominant doctrine in the free exercise field.

Justice Harlan dissented in *Sherbert.* He had joined Frankfurter's concurring opinion in *Braunfeld*, and with Frankfurter now retired Harlan led the anti-exemptions camp. He criticized the *Sherbert* majority for both contradicting *Braunfeld* and reaching an illegitimate result. He could not understand Brennan's position that the burden in *Braunfeld* was less direct than the one in *Sherbert*. After all, the Sunday Closing Law threatened to drive Braunfeld out of business, but Sherbert merely wanted to collect several weeks of unemployment compensation. Harlan thought that "any differences between this case and *Braunfeld* cut against [Sherbert]."[123] Justice Stewart, in a concurring opinion, made the same argument about *Braunfeld*'s burden.[124] Harlan also disagreed with the result of applying the strict scrutiny approach, a result he believed was discriminatory. He asserted that "[t]he meaning of today's holding . . . is that the State must furnish unemployment compensation benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. 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 . . . is not religiously motivated."[125] This "accommodation of religion"[126] would be "permissible"[127] if the legislature had chosen to enact it. But Harlan's point was that they had not, that

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[123] *Id.* at 421 (Harlan, J., dissenting)

[124] Brennan's majority opinion was flawed, but this criticism was not necessarily legitimate. Harlan and Stewart seemed to regard the severity of the burden and the directness of the burden as the same concept. But they are not necessarily synonymous. The consequences of the burden in *Braunfeld* were clearly more potentially severe than those in *Sherbert*. However, the burden in *Sherbert* might be considered more direct. In *Sherbert*, South Carolina denied Sherbert a governmental benefit, unemployment compensation. But in *Braunfeld*, the Sunday Closing Law limited Braunfeld's ability to reap economic benefits generated in the private sector. Government was responsible for the burden in both cases, but the burden in *Sherbert* could conceivable have been seen as more direct.

[125] *Id.* at 422 (Harlan, J., dissenting) (emphasis in original)

[126] *Id.*

[127] *Id.*

the unemployment compensation legislation had been designed and interpreted to provide assistance solely to individuals whose unemployment resulted from downturns in the business cycle. He simply believed that instances "in which the Constitution may require special treatment on account of religion are . . . few and far between. . . ."[128]

Although Harlan did not think exemptions were required, he did not believe legislatively crafted ones would violate the establishment clause. He did not assail the Court for fueling a conflict between the two religion clauses, but Justice Stewart did. Stewart, who had joined Brennan's dissent in *Braunfeld*, strongly supported the pro-exemptions position in the free exercise field. But he decried the "positively wooden"[129] interpretation he believed the Court had given the establishment clause in other cases, particularly in *School District v. Schempp*,[130] which the Court had decided on the same day as *Sherbert*. In that case the Court had concluded that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[131] Stewart asserted that as a result of this kind of construction of the establishment clause "there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause."[132] *Sherbert* was just such an instance. Stewart argued that under the Court's approach to the establishment clause, South Carolina should be

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[128]*Id.* at 423

[129]*Id.* at 414 (Stewart, J., concurring)

[130]374 U.S. 203 (1963)

[131]*Id.* at 222

[132]*Id.*

forced to treat Sherbert's religious reason for qualifying her employment availability in the same way it treated any other personal reason for qualifying availability. "To require South Carolina to so administer its laws as to pay public money to [Sherbert] is . . . clearly to require the State to violate the Establishment Clause as construed by this Court."[133] Since, he argued, the Court had disapproved of governmental support of religion, it contradicted the establishment clause when it ordered a free exercise exemption so that Sherbert could receive unemployment compensation. Because Stewart supported religious exemptions, he believed the Court should alter its interpretation of the establishment clause to eliminate the conflict between the two clauses and to clearly permit legislative bodies to respect religious diversity by granting statutory exemptions.

The majority's response to Stewart's criticism was anemic. The majority obviously did not want to engage in a careful scrutiny of their free exercise and establishment clause doctrines. Brennan, in the majority opinion, did not apply the *Schempp* doctrine to determine whether or not a religious exemption would in fact be unconstitutional. Instead, he simply called the exemption "nothing more than the governmental obligation of neutrality in the face of religious differences."[134] Douglas filed a concurrence to address the question of potential conflicts between *Sherbert* and the establishment clause. He asserted that

> [t]he fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the

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[133] *Id.* at 415

[134] *Id.* at 409 (opinion of the Court)

> government cannot do to the individual, not in terms of what the individual can exact from the government.[135]

For Douglas, Sherbert was not attempting to exact a sum from the state in order to better exercise her religion, she was simply seeking unemployment benefits as an unemployed worker. But he failed to address the fact that the state had disqualified her for benefits because her unemployment resulted from a personal objection. The Court had ruled that states could not deny compensation when unemployment resulted from religious practices. Brennan included statements similar to those of Douglas. He suggested that there was no conflict between the religion clauses because the Court had not required states to create unemployment compensation schemes for individuals who became unemployed because of adherence to their religious beliefs. The Court had simply ruled that if the states chose to create unemployment compensation systems, they could not deny compensation when unemployment resulted from religious practices. But Brennan's argument forced him to further explain that the case might have been decided differently or a conflict might have arisen if "an employee's religious convictions serve to make him a nonproductive member of society."[136] Harlan rightly attacked this "rather startling disclaimer"[137] in Brennan's opinion. Harlan believed that drawing such distinctions between types of religious adherents was very "inappropriate."[138] At any rate, the majority really did not address the thrust of the criticism, that the Court had apparently singled out Sherbert, to use Harlan's words, and excluded her from the disqualifying provision because her

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[135] *Id.* at 412 (Douglas, J., concurring)

[136] 374 U.S. at 410

[137] 374 U.S. at 420, n. 2

[138] *Id.*

personal reason for qualifying her availability was religious. That is the reason, Stewart argued, the exemption contradicted the establishment clause.

In sum, *Sherbert* stands as a confusing precedent. It did establish strict scrutiny in the free exercise field, but it also included contradictions and qualifications that left two main questions about the precise application of the doctrine. First, did strict scrutiny apply when free exercise burdens were direct as well as indirect? And, secondly, did the doctrine also apply when indirect burdens resulted from generally applicable secular regulations as well as allegedly discriminatory ones? The Court would suggest answers to these questions in subsequent cases, but the Court did not completely clarify the free exercise field until 1981.

In addition to the questions of application, *Sherbert* also intensified the potential conflict between the two religion clauses without effectively explaining a doctrinal solution to that problem. In a series of cases beginning in 1965 and dealing with draft exemptions, the potential for conflict became very real. But the Court again avoided directly addressing it.

These cases did not significantly add to the development of free exercise jurisprudence, but they did serve to point out the potential conflict between the two religion clauses in the area of religious draft exemptions. They also highlighted the Court's difficulties in defining religion. That definitional problem rendered the Court extremely cautious in evaluating claims in the religion fields. The draft cases were based on the conscientious objector provision of the federal selective service law. This provision provided that the draft law did not "require any person to be subject to combatant training and service in the armed forces . . . who, *by reason of religious training and belief,* is conscientiously opposed to participation in *war in any form.* Religious training and belief in this connection means an individual's belief in a relation to a *Supreme Being* involving duties superior to those arising from any human relation, but *does not include essentially political, sociological, or philosophical views or a merely personal moral code.*"[139] The qualifications in this conscientious objector provision raised potentially serious first amendment questions, but the Court generally avoided dealing with them. However, concurring and dissenting opinions, taken together, revealed the grave nature of the potential conflict between the clauses.

In *Seeger v. United States* (1965),[140] an individual who was convicted for refusing to submit to induction challenged the provision as a violation of the establishment clause, free exercise, and equal protection. The lower court had held that the provision's "Supreme Being" reference excluded Seeger's non-theistic religion, so he challenged the provision as religiously discriminatory. The Court dodged the constitutional issue, however, and held that even though the provision did mention "Supreme Being," its scope was not limited only to individuals who adhered to theistic religious sects. The Court gave a broad interpretation to the statutory definition of religion, requiring administrators of the provision to ask whether or not "the claimed belief occup[ied] the same place in the life of the objector as an orthodox belief in God h[eld] in the life of one clearly qualified for exemption."[141] Justice Douglas suggested in a concurring opinion that the free exercise clause and equal protection required the Court to apply this broad

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[139]Quoted in *Welsh v. United States*, 398 U.S. 333, 336 (1970) (emphasis added)

[140]380 U.S. 163

[141]*Id.* at 184

definition of religion.[142] But the definition was so broad that it might even have included the beliefs based on "political, sociological, or philosophical views" that the provision expressly excluded, though the Court claimed it did not.

The Court majority disintegrated while addressing the same issue in *Welsh v. United States* (1970).[143] In this case an individual who was convicted for refusing to submit to the draft challenged government's refusal to classify him as a conscientious objector. At first he denied that his beliefs were religious, having been formed "'by reading in the fields of history and sociology.'"[144] But in light of the Court's broad statutory interpretation of religious beliefs in *Seeger*, Welsh decided that his beliefs were in fact religious. A plurality of four, Justice Black writing the opinion, stretched the statutory provision to include Welsh's beliefs, which were clearly grounded in secular sources. The plurality again denied that it was effectively deleting the statutory exclusion of purely "political, sociological, or philosophical views." But it may have done just that.

Justice Harlan concurred in the result but refused to join the plurality's extension of the statutory definition of religion. He argued that the Court had effectively included non-religious beliefs within the meaning of the conscientious objector provision. Harlan concurred in the result because he analyzed the claim under the establishment clause. Although he believed that Congress would be upholding "neutrality" if it refused to grant any draft exemptions, Harlan concluded that once it chose to grant conscientious exemptions, Congress could not restrict the exemption system to include only

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[142] *Id.* at 188

[143] 396 U.S. 333

[144] *Id.* at 341 (quoting brief for appellant)

adherents to theistic faiths. Moreover, he held that Congress could not even limit the exemption to religiously motivated conscientious objection. For Harlan, once Congress decided to exempt conscientious objectors from military service, it could not discriminate against individuals whose conscientious objection to war was sincere though not grounded in religion. Harlan concluded that the non-discrimination requirement of the establishment clause rendered unconstitutional the exclusion of purely "political, sociological, or philosophical views" from the conscientious objector provision because it preferred religion over non-religion. He relied on *Schempp* and other cases to support his position.

Justice White, joined by Chief Justice Burger and Stewart, dissented. They believed that Welsh's beliefs were secular and consequently outside the scope of the conscientious objector provision. White's opinion primarily responded to Harlan's concurrence. White noted that Harlan's condemnation of religious exemptions as discrimination was unfounded since "the First Amendment itself contains a religious classification."[145] The potential for conflict between the religion clauses became clear in White's contemplation of the proper meaning of governmental "neutrality" toward religion:

> We have said that neither support nor hostility, but neutrality, is the goal of the First Amendment. "Neutrality," however, is not self-defining. If it is "favoritism" and not "neutrality" to exempt religious believers from the draft, is it "neutrality" and not "inhibition" of religion to compel religious believers to fight when they have special reasons for not doing so, reason to which the Constitution gives particular recognition?[146]

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[145] *Id.* at 372 (White, J., dissenting)

[146] *Id.*

It would be logically impossible to combine the strict establishment position of the Court in *Schempp* with the highly accommodating free exercise position in *Sherbert*. Either accommodations of religion were permissible under the establishment clause to some extent and the "wall of separation between Church and State"[147] could not be absolute, or the separation was complete and accommodation was impermissible. The Court admitted that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[148] The real problem seemed to be that if the Court's establishment clause precedents were taken to their logical extreme, they would prohibit both free exercise and statutory religious exemptions. To avoid this conclusion, the Court did not adhere rigidly to those precedents, but with no systematic way to determine when those precedents controlled and when they did not, the Court made ad hoc decisions, probably depending on the result the justices wanted to reach. The Court labelled some accommodations "benevolent neutrality"[149] while striking down others as "establishments of religion."[150] The problem was that establishment doctrine was theoretically absolute but its application was arbitrary. In theory free exercise exemptions would contravene establishment doctrine, but the Court chose not to apply the doctrine to reach that conclusion.[151]

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[147] *Everson v. Board of Education*, 330 U.S. 1 (1947) (quoting Thomas Jefferson)

[148] *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970)

[149] *Id.* at 669

[150] *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

[151] A detailed discussion of the potential conflict between the two clauses and their corresponding judicial doctrines is beyond the scope of this paper. These draft cases should demonstrate that the possibility is quite real.

An additional draft case further highlighted the potential for conflict. In *Gillette v. United States* (1971)[152] and an accompanying case,[153] the Court heard the appeals of two more individuals who were convicted for refusing to submit to induction. These individuals were "selective objectors": They believed that their religions prevented them from fighting in the Vietnam War because it was an unjust war. Since they did not oppose "participation in war in any form," they were outside the conscientious objector provision of the draft law. As a result, they argued that the provision violated both religion clauses because it discriminated among religious sects.

The Court obviously could not agree with them because it had painted itself into a corner with *Seeger* and *Welsh*. The Court had construed the conscientious objection provision so that it came perilously close to exempting from military service individuals who possessed non-religious objections to all war. If the Court were also to hold unconstitutional the distinction between comprehensive and selective objection, it would virtually transform the United States military into a volunteer force because consistency might then demand that non-religious, selective objectors could not be compelled to serve. If an individual's objection to the Vietnam War "occup[ied] the same place in the life of the objector as an orthodox belief in God h[eld] in the life of one who clearly qualified for exemption,"[154] he could be entitled to an exemption.

The Court devoted much of its *Gillette* opinion to the establishment question, but it also analyzed the free exercise claim. However, the Court did little to clarify the *Sherbert* opinion. Justice Marshall, writing the

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[152] 401 U.S. 437

[153] *Negre v. Larson*

[154] *Seeger*, 380 U.S. 163, 184 (1965)

opinion in *Gillette*, seemed partially to apply strict scrutiny but actually adopted a deferential stance toward Congress' asserted justifications for infringing free exercise. Marshall proposed several allegedly compelling interests which would justify the infringement.[155] He suggested that the "substantial governmental interests"[156] in "procuring . . . manpower"[157] and "weeding out 'spurious claims'"[158] justified the infringement of free exercise. The Court's fear of a flood of claims, both legitimate and fraudulent, restrained it in *Gillette*. But at least one lower court had found the manpower argument not to be compelling.[159] And concern about fraudulent claims was not a case-specific compelling interest but was an argument against religious exemptions *per se*. If the Court were going to accept that argument in *Gillette*, honesty should have demanded that it abandon strict scrutiny

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[155]It must be recalled that a conclusion about whether or not "rais[ing] and support[ing] armies," U.S. Const. art. I, § 8, cl. 12, was a compelling interest did not satisfy the strict scrutiny doctrine. Not only did the overall goal have to be compelling, but there also had to be a more specific, compelling reason not to exempt religious adherents whose free exercise a challenged statute burdened.

[156]*Id.* at 462

[157]*Id.* at 462

[158]*Id.* at 456

[159]In *United States v. McFadden*, 309 F.Supp. 502 (D. N. Calif. 1970) the district court heard a claim almost identical to that in *Negre* (*Gillette*'s companion case). It held that the free exercise clause required exemptions for selective objectors. The district judge noted that the pool of draft-age men would increase from 12½ million in 1965 to 18½ million by 1980, with that gain perhaps offsetting the exemption of selective objectors. He also suggested that before selective objectors were drafted, government ought to pursue the less-restrictive means of revoking college deferments (then numbering around two million) and should activate the additional two million men in the active and standby reserves. Although the district judge did not suggest the possibility of drafting women, that course too would provide a means less-restrictive of religious liberty than drafting selective objectors. It would also eliminate questions of sex discrimination and the draft. *See Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding requirement that only males register with the selective service system)

altogether, rather than selectively invoking as a compelling interest the judiciary's difficulties in identifying fraudulent religious claims.[160] Marshall also feared that requiring free exercise exemptions for selective objectors "would involve a real danger of erratic or even discriminatory decision-making in administrative practice."[161] While his concern was probably not completely unjustified, he was using this apprehension about hypothetical, administrative religious discrimination to justify an evident statutory discrimination on the basis of religious beliefs. But he did not view the case in this way because he applied a very restrictive notion of religious discrimination to the facts of the case and found that the conscientious objection provision was not discriminatory on its face.[162] Marshall also accepted government's assertion that exemptions for selective objectors might threaten the morale of those called to serve. Again, at least one district court had considered that argument and had determined that it was not

[160] The district court in *McFadden* also noted that the Supreme Court, in both *Sherbert* and *Seeger*, had already rejected the contention that preventing fraudulent claims was a sufficiently compelling interest to justify an infringement of free exercise. 309 F.Supp. 502, 508

[161] *Id.* at 455

[162] He denied that the draft law was facially discriminatory because it "does not discriminate on the basis of religious affiliation or religious belief, *apart of course from beliefs concerning war*. . . . [It] does not single out any religious organization or religious creed for special treatment." *Id.* at 450-51 (emphasis added). This incredibly narrow view of religious discrimination was so superficial as to be almost disingenuous. That the statute classified individuals on the basis of differences in their individual religious beliefs rather than differences in their sectarian affiliations does not seem especially significant. The statute granted an exemption to individuals whose religious beliefs led them to oppose all wars but denied the exemption to other individuals whose religious beliefs led them to oppose a particular war. The discrimination on the basis of religion was obvious.

compelling.[163] Some of the interests Marshall accepted as justifications of the infringement of free exercise might be seen as compelling, but not convincingly so. In fact, Marshall's shot-gun approach, accepting a myriad of compelling interests, might suggest that he was uncomfortable with relying on any one as being definitively compelling. Moreover, Marshall made no attempt to determine whether or not government could use some less restrictive means to achieve its goals.[164] Therefore, *Gillette* did not stand as a clear and strong application of strict scrutiny. It represented the Court's reluctance to grant exemptions in the face of several inherent problems with the doctrine, as well as the Court's great deference to Congress in military matters. *Gillette* really did not answer any of the questions arising out of *Sherbert* and, consequently, did not help to clarify free exercise jurisprudence.

However, in 1972, the Court decided *Wisconsin v. Yoder*[165] and made clear that strict scrutiny was a predominant free exercise approach. In this case Amish parents challenged Wisconsin's compulsory education law, under which the state had fined them for withdrawing their children from school before they reached the age of sixteen. The Amish parents believed that sending their children to secondary school would violate their religious tenets. They believed that while their children needed an elementary education, secondary education would instill in them the sinful values of the modern world and would lead them to abandon their faith. They sought religious exemptions from the compulsory education law. The Court, applying strict scrutiny, granted their request for exemptions.

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[163]The court in *McFadden* thought it "quite obvious that men who are drafted in opposition to deep-seated convictions do not make good soldiers" and would cause morale problems for the military. 309 F.Supp. 502, 507-08

[164]*See* n. _, *supra.*

[165]406 U.S. 205

In addition to providing a clear sanction of strict scrutiny generally, *Yoder* settled one of the issues left unclear by *Sherbert*. *Yoder* taught that when the Court heard a challenge to a statute which was generally applicable and burdened free exercise directly, it would apply strict scrutiny. *Sherbert* had already shown at least that the Court would also apply the doctrine when discriminatory legislation burdened free exercise only indirectly. The combination of *Yoder* and *Sherbert* would require the Court to additionally apply strict scrutiny when discriminatory legislation burdened free exercise directly. So the only real question remaining unanswered after *Yoder* was whether the Court would apply strict scrutiny when generally applicable legislation burdened free exercise only indirectly or retain the less strict *Braunfeld* test in those instances.

Chief Justice Burger, writing for the six-to-one majority in *Yoder*, reaffirmed a broad interpretation of *Sherbert*, noting that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[166] This sentence was but a restatement of the least-restrictive-means and compelling-interest standards. Furthermore, Burger swept aside contentions that because the compulsory attendance law was secular and generally applicable it did not violate Yoder's free exercise rights:

> [T]his case [cannot] be disposed of on the grounds that [the law] applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless

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[166] *Id.* at 215

> offend the constitutional requirement for governmental neutrality [toward religion] if it unduly burdens the free exercise of religion.[167]

So with *Yoder*, strict scrutiny was well on its way to becoming a comprehensive doctrine for evaluating most free exercise violations.

The Court held that the state's compulsory attendance law was not essential to achieve some compelling interest. The state had argued that its interest in preparing the children to be self-reliant and to participate in the political process justified the requirement. Burger, noting that the Amish were "productive and law-abiding members of society,"[168] held that compelling Amish children to attend school was not essential to the achievement of this goal because the Amish lifestyle also generated the desired result. And to the state's argument that the children should be compelled to attend school in case they eventually rejected the Amish way of life, Burger similarly responded that he doubted that "Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings."[169] Since the Amish community would provide the children with a form of alternative vocational education, the Court concluded that the free exercise clause mandated a religious exemption for the Amish. The exemption would not undermine the state's goals, so it was an acceptable, less-restrictive means.

The state, however, countered with the *Prince* precedent, arguing that when the issue involved the welfare of children, the doctrine of *parens patriae* gave the state broader power than when only adults were involved. In

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[167] *Id.* at 220

[168] *Id.* at 222

[169] *Id.* at 224

Prince the Court had declined to apply strict scrutiny to a state's application of its child labor law against solicitation activities of Jehovah's Witnesses, though the majority implied that strict scrutiny might have been the approach applied if only adult conduct had been at issue. However, Burger cited Brennan's classification of *Prince* in his *Sherbert* opinion as a case presenting the regulation of conduct deemed a "substantial threat to public safety, peace or order." He concluded that *Yoder* was not a case "in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[170] Moreover, Burger noted, the parental right to privacy protected by the fourteenth amendment overrode the state's power under *parens patriae* since requiring Amish children to attend secondary school might have led to the eventual extinction of the faith itself. Therefore, *Prince* was not relevant.

The *Yoder* ruling apparently was qualified in a few important ways. If the Amish had objected to elementary education, for instance, the case might have turned out differently, as Burger implied and Justice White noted in a concurring opinion. But a different conclusion in such instances did not undermine the strict scrutiny approach. The Court could easily conclude that requiring elementary education was essential to achieve a compelling interest. In addition, Burger stressed that the children would receive vocational training in the Amish community, but this emphasis does not contradict a strict scrutiny approach either. Burger intended it to show that providing an exemption would not undermine the state's goals. *Yoder* definitively established strict scrutiny as the standard of review for free exercise claims.

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[170] *Id.* at 231

Burger qualified the opinion in additional ways. He spent a great deal of time emphasizing how old and respected the Amish religion was, and he carefully described the outlook and requirements of the faith. He made clear that there was no doubt that their objection to secondary education was "firmly grounded in . . . central religious concepts"[171] of the Amish faith. These qualifications, seemed to serve an unspoken purpose. The opinion fully endorsed strict scrutiny in general. Its support for that doctrine was unconditional. But the opinion also included so many specific references to the Amish way of life that its holding was somewhat restricted to the facts of the case. Religious objectors of other sects would have to do more than simply invoke the *Yoder* precedent to gain an exemption from compulsory education laws. Religious sects not as well established as the Amish or those which did not provide community bonds as strong as those of the Amish would probably not qualify for a free exercise exemption unless *Yoder* were extended. The Court was apparently concerned about generating a tide of new claims, reviewing claims made by adherents to obscure faiths, or facing the task of ferreting out fraudulent claims. Somewhat limiting the holding of *Yoder* to its specific facts, the Court guarded itself against these hypothetical situations.

Justice Douglas dissented in *Yoder* for two reasons. First, he believed that the Court should have based its opinion on the desires of the Amish children to stop attending school rather than on their parents desire to keep them within the community. Douglas feared that the parents might force the children into a lifestyle against their will and, by depriving them of secondary education, make it difficult for them to abandon that lifestyle. Douglas also criticized much of Burger's careful qualifying. Douglas thought

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[171] *Id.* at 210

"the emphasis of the Court on the 'law and order' record of the Amish . . . [was] quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be."[172] Douglas feared that the Court was narrowing its definition of legitimate religion by emphasizing the history and community bonds of the Amish. He disagreed with Burger's portrayal of the Amish lifestyle as "'idyllic agrarianism,'"[173] taking it as a way of deeming the Amish faith more entitled to free exercise exemptions than other religions.[174] Douglas wanted the Court to adopt as a first amendment standard, the broad interpretation of religion in *Seeger* and *Welsh*, which Douglas took to include personal philosophical views. As noted above, this broad definition of religion aggravated the potential conflict between the two religion clauses in the draft exemption cases, but Douglas did not comment on the possibility of increased clause conflict resulting from this definition.

Yoder, even with Burger's qualified stance, had illustrated full strict scrutiny in action. But two other cases from the same time period, *Cruz v. Beto* (1972) [175] and *Johnson v. Robison* (1974)[176] showed that the Court was not going to apply the doctrine to evaluate all instances of free exercise burdens.

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[172] *Id.* at 246

[173] *Id.* at n. 5 (quoting lower court judge)

[174] In an attempt to show that Amish society was no more perfect than any other, Douglas noted that adolescent drinking was common and that suicide was rates among the Amish were equivalent to those of American society in general. *Id.*

[175] 405 U.S. 319

[176] 415 U.S. 361

In *Cruz*, a Buddhist prison inmate alleged that prison officials discriminated against his religion by denying him opportunities to practice his religion. The lower courts had denied his challenge without a hearing. The Court vacated their judgment and remanded the case for further proceedings to determine if his right to free exercise was violated. The Court did not comment on the strict scrutiny approach. But noting the unique conditions of the prison environment, the Court suggested that the Constitution required prison administrators to provide "reasonable opportunities" for "all prisoners to exercise"[177] their religion. This statement implied that the courts did not have to apply strict scrutiny to allegations of free exercise burdens in prisons; they could apply a more lenient standard.

The Court suggested the same for military matters in *Robison*. In this case, an individual who had fulfilled alternative civilian service as a conscientious objector, challenged Congress' disqualification of conscientious objectors from receipt of veterans' educational benefits. The Court rejected his challenge without even mentioning strict scrutiny, let alone applying it. Although Justice Brennan, who wrote the opinion of the Court, was very vague in his free exercise analysis, he seemed only to apply a rational-relationship test while implying that government's interest was compelling. He noted that the burden in this case was far less severe than the one in *Gillette*, but he did not evaluate the obviously different justifications for the two dissimilar burdens. Instead, he noted that the aim of the secular, general law providing the benefits was not to interfere with free exercise, "because to do so would not rationally promote the its purposes."[178] He concluded that "in light of *Gillette*, the Government's substantial interest in raising and supporting

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[177] 405 U.S. at 322, n. 2

[178] *Robison*, 415 U.S. at 385

armies . . . is . . . clearly sufficient to sustain the challenged legislation. . . ."[179] Despite his suggestion that the government's interest was compelling (or "substantial"), Brennan did not apply strict scrutiny. The Court established a much more lenient standard for evaluating free exercise claims involving any legislation touching on military matters.

Douglas, the lone dissenter, attacked the majority and effectively pointed out its inconsistency with precedent. He noted that the law provided educational benefits to any veteran, regardless of whether he served in oversees combat or "lived with his family in a civilian community and worked from nine to five as a file clerk on a military base. . . ."[180] As Douglas protested, *Sherbert*, *Yoder*, and other cases demanded a different result in this case. He quite correctly could not conceive of any compelling reason to draw a line between "conscientious objectors who performed alternative civilian service and all other draftees."[181] The facts in *Robison* were strikingly similar to those in *Sherbert*. Yet in the latter case, the Court did not simply claim that the denial of unemployment benefits was constitutional because it was secular and not aimed at the suppression of religious exercise. As the author of *Sherbert*, Brennan knew that the only relevant difference between that case and *Robison* was that the latter intruded into the military sphere. Nevertheless, he completed the process in this case that Marshall had quietly begun in *Gillette*, cutting an exception in the free exercise clause for military regulations. The most incredible feature of *Robison* was that only one justice objected to it.

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[179] *Id.*

[180] *Id.* at 389

[181] *Id.* at 388-89

Despite the Court's restrictive decisions in *Cruz* and *Robison*, it continued to endorse free exercise strict scrutiny and resolve the doubts left by Brennan's *Sherbert* opinion. In fact, Brennan quietly slipped a major admission about that *Sherbert* opinion into his opinion in the Court's next major free exercise case, *McDaniel v. Paty* (1978).[182] In this case a preacher challenged a provision in Tennessee's constitutional convention call which prohibited ministers from serving as delegates to the convention. A plurality of four applied strict scrutiny to strike down the disqualification. Brennan concurred in the result, believing that the provision infringed religious belief rather than conduct. Since religious belief was protected absolutely, he believed the Court did not have to apply any judicial balancing test at all, it should just strike down the provision as unjustifiable. In his concurring opinion Brennan refuted a lower court, which had relied on *Braunfeld* to suggest that the indirect burden on free exercise in *McDaniel* was constitutional. In the course of this discussion Brennan stated in one sentence in a footnote that "[c]andor compels the acknowledgement that to the extent that *Braunfeld* conflicts with *Sherbert* in this regard, it was over-ruled."[183] Although this admission was not binding precedent because it was merely a comment in a concurring opinion, it was not disputed in *McDaniel* by any other justice on the Court. This minor point Brennan's opinion supports a view that after *Yoder* the Court probably considered strict scrutiny to be firmly established in the free exercise field. Moreover, the comment went part of the way toward answering the final question coming out of the *Sherbert* opinion: whether the Court would apply strict scrutiny or the more

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[182] 435 U.S. 618 (striking down Tennessee's policy of disqualifying ministers from serving as delegates to state constitutional convention)

[183] *Id.* at 633, n. 6

lenient *Braunfeld* test when secular, general laws indirectly burdened free exercise. The indirect burden in *McDaniel* resulted from a discriminatory law, so the Court's ruling could not remove that point left open in *Sherbert.*[184]

The Court did remove that lingering doubt about strict scrutiny three years later in *Thomas v. Review Board* (1981).[185] This case was similar to *Sherbert* in that it involved a denial of unemployment compensation to an individual whose unemployment resulted from his religious practices. Thomas was a Jehovah's Witness who quit his job when his company closed the roll foundry in which he worked and transferred him to a department that produced tank turrets. He quit his job because he believed that his religion forbade him from directly participating in war production and because there were no open positions in the company that were not directly involved in war production. Indiana denied his request for unemployment, but the Court reversed their decision.

Thomas differed from *Sherbert* in several important respects. First, Thomas had quit his job because of his religious beliefs, while Sherbert had been terminated because of hers. The Court, Chief Justice Burger writing for an eight-man majority, held this difference to be irrelevant. Burger reasoned that

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[184] *McDaniel* did seem to clear up one minor caveat lingering from the *Sherbert* opinion. Brennan had asserted in *Sherbert* that *Braunfeld* remained a valid precedent because the burden in that case was less direct than the one in *Sherbert.* The burden in *McDaniel*, involving no denial of a public, monetary benefit, might also be considered less direct than the one in *Sherbert.* Yet no justice even implied that the Court should compare the directness of the burden in *McDaniel* with the directness of the burdens in *Sherbert* and *Braunfeld* to determine whether strict scrutiny or the *Braunfeld* standard was applicable. The plurality simply cited *Sherbert* and *Yoder* and applied strict scrutiny, and Brennan conceded that *Sherbert* had overruled *Braunfeld*, at least in part. So *McDaniel* represented an implicit repudiation of Brennan's terse statement in *Sherbert* which was really never anything more than a flimsy excuse for not overruling *Braunfeld* in 1963.

[185] 450 U.S. 707

> [h]ad Thomas simply presented himself at the . . . plant turret line but refused to perform any assigned work, it must be assumed that he, like Sherbert, would have been terminated by the employer's action, if no other work was available. In both cases, the termination flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions.[186]

The Court extended *Sherbert* to include individuals who quit their jobs because new conditions rendered their work religiously unacceptable.

Thomas also diverged from *Sherbert* in another respect. Abstinence from Saturday labor was clearly a tenet of the Jehovah's Witness faith. However, Thomas and a co-worker in the turret plant, who was also a Jehovah's Witness, disagreed about whether or not producing tank turrets violated their religion. The co-worker had no religious objection to his job. The lower court also noted that "Thomas was 'struggling' with his beliefs and was not able to 'articulate' his belief precisely."[187] Because of these problems the lower court perceived in Thomas' assertions, its suggested that his objection was probably based more on personal rather than religious belief. But Burger held that courts should not "dissect" a claimant's beliefs because he "admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[188] Nor should courts take cognizance of "not uncommon" "[i]ntra-faith differences."[189] Burger clearly restated the Court's opposition to

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[186] *Id.* at 718

[187] *Id.* at 715

[188] *Id.*

[189] *Id.*

determining the truth or falsity of alleged religious beliefs and made clear that individual sincerity was the test, not intrafaith consistency.[190] Burger concluded that Thomas' motivations were religious.

Thomas differed from *Sherbert* in one final and important respect. Indiana's denial of compensation was not the result of religious discrimination. State courts had held that no personal reason for unemployment, religious or otherwise, entitled anyone to compensation.[191] *Thomas* presented the lone situation in which the Court had not clarified free exercise doctrine since the *Sherbert* opinion: an indirect burden resulting from a secular, general law. *Braunfeld* required that the Court use a doctrine that did not include the compelling-interest standard of strict scrutiny. Without even mentioning *Braunfeld* Burger cited *Sherbert* and *Yoder* and applied strict scrutiny. By closing the last caveat in Brennan's *Sherbert* opinion, the Court had at last undeniably overruled *Braunfeld sub silento*, stripping it of any legitimacy it still retained. Except for cases involving prisons or the military, courts were to use strict scrutiny to evaluate free exercise challenges grounded in religiously motivated conduct.

Finally, applying strict scrutiny, Burger held that neither of Indiana's asserted interests were sufficiently compelling to justify the infringement of

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[190] *Id.* at 715-16 ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. 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.")

[191] *id.* at 712 (The compensation statute "'is not intended to facilitate changing employment or to provide relief for those who quit work voluntarily for personal reasons. Voluntary unemployment is not compensable under the purpose of the Act, which is to provide benefits for persons unemployed through no fault of their own.'") (quoting Indiana Supreme Court)

religious liberty. As in the *Sherbert* case, the state argued that maintaining the integrity of its compensation fund was a compelling interest. And it also asserted that its interest in preventing employers from "probing"[192] into the religious beliefs of job applicants was compelling. Burger pointed out that neither the record not experience in states that granted religious exemptions supported either of Indiana's asserted interests. Consequently, Thomas was entitled to unemployment compensation. The Court also briefly addressed the possibility that the exemption violated the establishment clause, but Burger cited *Sherbert* and dismissed that contention.

It is clear that the Court did not introduce strict scrutiny in the free exercise field in one fell swoop. Components of the doctrine had developed gradually in free exercise cases since 1940. The Court fused those components in 1963 in *Sherbert*, but in attempting to save a precedent which did not even have a majority opinion, the Court left some questions about the use of strict scrutiny in free exercise cases. One by one, the Court dismissed the doubts left by *Sherbert*. The Court strongly endorsed free exercise scrutiny in *Yoder* in 1972 and completely adopted it in 1981.

At the same time, the Court became aware of some problems with applying strict scrutiny in the free exercise field. The potential for conflict between the two religion clauses of the first amendment became palpable for the Court in the draft-exemption cases of the early 1970's. The Court also contemplated the potential for a flood of claims, some of them fraudulent, in those cases as well as in *Yoder*. Perhaps because of these problems, the Court moved to isolate cases involving prisons and the military from the reach of free exercise strict scrutiny. But by 1981, the Court had really done nothing about the problems that strict scrutiny could entail. It denied the serious-

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[192] *Id.* at 719

ness of the clause conflict in both *Sherbert* and *Thomas*, avoiding it entirely in the draft-exemption cases by stretching the terms of the draft law to avoid the constitutional questions in those cases. The Court qualified its rulings, as in *Yoder*, or applied the compelling-interest standard liberally, as in *Gillette*, to guard against a potential flood of claims, including bogus ones.

The Court would not be able to continue "papering over"[193] the problems with the doctrine. The cases would get tougher in the 1980's and support for free exercise strict scrutiny would erode. In fact, while 1981 marked the final repudiation of *Braunfeld* and the full establishment of the *Sherbert* doctrine, it also marked the beginning of the end for free exercise strict scrutiny. In *Thomas*, Justice Rehnquist announced his opposition to the doctrine and outlined his plan for the religion clauses.[194] Within a decade he saw his plan more than fulfilled in the free exercise field,[195] and he may get the result he sought for the establishment clause in 1992.[196]

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[193] *Sherbert*, 374 U.S. 398, 413 (Stewart, J., concurring)

[194] *Thomas*, 450 U.S. at 720-727. Rehnquist sought to resurrect *Braunfeld* and to overturn the broad interpretation of the establishment clause grounded in *School District v. Schempp*, 374 U.S. 203 (1963) and *Everson v. Board of Education*, 330 U.S. 1 (1947). *See, infra*, § 4.

[195] *See Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595 (1990)

[196] *Lee v. Weisman*, 59 U.S.L.W. 2095 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-1014) (striking down benediction delivered by clergy at public school graduation ceremony as establishment of religion)

§ 4. THE EROSION OF FREE EXERCISE STRICT SCRUTINY.

In *McDaniel* (1978),[197] a plurality of justices noted their approval of a lower court's application of strict scrutiny to decide a free exercise challenge to a state law criminalizing the sacramental use of peyote.[198] Although they did not necessarily endorse the result of that court application of the doctrine, they did cite it approvingly as the correct approach to free exercise adjudication.[199] That plurality consisted of Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Four other justices--Brennan, Stewart, Marshall, and Blackmun--did not join the plurality's opinion, but as previous and subsequent cases showed, these four strongly supported free exercise strict scrutiny.[200] Only Justice White was reluctant to endorse

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[197]435 U.S. 618

[198]The case was *People v. Woody*, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964)

[199]435 U.S. at 628, n. 8 ("[T]he courts have . . . precluded the application of criminal sanctions to the religious use of peyote, *People v. Woody*, . . . or the religiously impelled refusal to comply with mandatory education laws past the eighth grade, *Wisconsin v. Yoder*. We need not pass on the conclusions reached in . . . *Woody*, which [was] not reviewed by this Court. Those cases are illustrative of the general nature of free exercise protections and the delicate balancing required by our decisions in *Sherbert* . . . and . . . *Yoder*, when an important state interest is shown.")

[200]Brennan and Stewart had first endorsed the doctrine in dissenting opinions in *Braunfeld v. Brown*, 366 U.S. 599, 610-16 (1961) (dissenting opinions), and each had continued to support it. *See, e,g.*, *Thomas v. Review Board*, 450 U.S. 707 (1981), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). Justices Marshall and Blackmun had also joined the majority in *Yoder* and continued to support strict scrutiny. *See Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595, 1615-23

free exercise strict scrutiny: His support wavered.[201] As of 1978, at least eight of the nine justices supported strict scrutiny in at least some instances.

Twelve years after *McDaniel*, the Court decided *Smith II*, involving a state's criminalization of sacramental peyote use. The Court upheld the prohibition, five-to-four, and virtually abolished strict scrutiny in the free exercise field. Reagan appointments to the Court, while certainly not irrelevant, do not fully explain this turnabout. Between 1978 and 1990, only three justices were replaced.[202] A more important factor in the doctrinal shift was the conversion of several justices from a pro-exemption to and anti-exemption position.[203] The potential difficulties with strict scrutiny also became more apparent as the Court faced challenges to tax laws, internal governmental policies, and federal land-use decisions. When the cases of the 1980's are viewed together, the gradual erosion of strict scrutiny becomes obvious. And that erosion began with Rehnquist's dissent in *Thomas*.

(1990) (Blackmun, J., dissenting).

[201]White joined Justice Harlan's dissent in *Sherbert v. Verner*, 374 U.S. 398, 418-23 (1963) but supported strict scrutiny in *Wisconsin v. Yoder*, 406 U.S. 205, 237-41 (1972) (White, J., concurring). He did not believe there was a free exercise violation in *McDaniel*, 435 U.S. at 643-46 (White, J., concurring) (White based his conclusion on equal protection). And during the 1980's he supported strict scrutiny in free exercise cases involving unemployment compensation, *see Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989), *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987), and *Thomas v. Review Board*, 450 U.S. 707 (1981), but not in some other free exercise cases. *See, e.g.*, *Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595 (1990) and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 660 (1988).

[202]Stewart in 1981 (by O'Connor); Burger in 1986 (by the elevation of Rehnquist, whose associate justice seat was filled by Scalia); and Powell in 1987 (by Kennedy, who did not take his seat until early 1988 because the Senate rejected Reagan's first choice for the seat, D.C. Appeals Court Judge Robert H. Bork, *see* R. Bork, *The Tempting of America*, 267-55 [1990]).

[203]*E.g.* Rehnquist, Stevens, Burger, and Powell.

Rehnquist had been appointed to the Court in 1972, so he had not participated in the decision in *Yoder*.[204] He had joined Burger's plurality opinion in *McDaniel*, which applied strict scrutiny to evaluate an indirect burden arising out of religious discrimination. The facts of *McDaniel* made it an "easy" free exercise case, but the plurality endorsed strict scrutiny in more difficult cases in that opinion. Although the extent of Rehnquist's support for free exercise strict scrutiny was unclear, he had not commented disapprovingly of it in any opinion.

But in *Thomas*,[205] Rehnquist broke with the majority and announced his opposition to the application of strict scrutiny in this case. He criticized the majority for failing to adequately address the "tension," as the majority put it,[206] which he believed had three causes. Two of his asserted causes, the application of the first amendment through the fourteenth to state (as opposed to only federal) activities and the growth of social welfare legislation, were not truly causes for the conflict, though they did increase the opportunities for its occurrence. Rehnquist's third cause, which really was the source of the problem, was the Court's interpretation of the clauses: "By broadly construing both Clauses, the Court has consistently narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny."[207] His solution was to restrict the interpretations of *both* clauses.

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[204] 406 U.S. 205 (1971)

[205] 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting)

[206] 450 U.S. at 719 ("There is, in a sense, a 'benefit' to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two Religion Clauses which the Court resolved in *Sherbert*. . . .")

[207] *Id.* at 721.

For the free exercise clause, Rehnquist "would accept" the *Braunfeld* decision, which the Court in *Thomas* was, over Rehnquist's dissent, finally laying to rest. Rehnquist asserted that "[w]here, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group."[208] But this position was not the *Braunfeld* doctrine. That case had required government to fulfill the least-restrictive-means requirement as well as the general-applicability and secular-purpose standards. Although Rehnquist would be satisfied with *Braunfeld*, he really wanted to push free exercise jurisprudence back to its status prior even to *Cantwell v. Connecticut* (1940).[209] And that is precisely what the Court ultimately did in *Smith II* (1990).[210] He would also radically restrict the scope of the establishment clause.[211]

His criticism of the Court's weak attempt to address the issue of clause conflict was effective. In *Lemon v. Kurtzman* (1973),[212] the Court had compiled its establishment clause requirements from previous cases[213] into

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[208] *Id.* at 723

[209] 310 U.S. 296

[210] 110 S.Ct. 1595

[211] He believed the establishment clause should be interpreted only to prevent government from "'throwing the weight of secular authorit[ies] behind the dissemination of religious tenets." *Thomas*, 450 U.S. at 726 (quoting *McCollum v. Board of Education*, 333 U.S. 203, 248 [1948] [Reed, J., dissenting]). This reinterpretation would not be pushing back establishment clause doctrine, for the Court had never interpreted that clause so narrowly. *See Everson v. Board of Education*, 330 U.S. 1 (1947)

[212] 403 U.S. 602

[213] These cases included *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) and *School District v. Schempp*, 374 U.S. 203 (1963).

a three-pronged judicial test.[214] Rehnquist correctly pointed out that the majority dodged the possibility that a free exercise exemption for *Thomas* conflicted with the establishment clause. The majority declined to apply the *Lemon* test to evaluate that claim.

But even if the free exercise exemption violated the terms of the *Lemon* test, which the Court never admitted, it would not necessarily be invalid. Rehnquist's solution to the clause conflict, radically cut back the scope of both clauses, went well beyond what was necessary to cure the problem. The conflict could be resolved either by eliminating free exercise exemptions alone or by loosening the strict rules of the *Lemon* test to permit some governmental accommodation of religion. However, easing the conflict did not require either clause to be stripped down to the degree Rehnquist desired. And any solution only needed to modify one of the clauses, not both.[215] Rehnquist's failure to mention the availability of narrower solutions to the problem of clause conflict suggested that he was driven by ideological considerations more than true concern about the problem at issue. In other words, clause conflict was a screen for an agenda designed to drastically roll-back the protections provided by both of the religion clauses. Recognizing Rehnquist's motivations, however, does not eliminate the existence of real conflict between the clauses that the Court refused to adequately address.

An additional decline in support for free exercise strict scrutiny had been possible in 1981, as Justice Stewart, a strong supporter of the doctrine,

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[214]To pass establishment clause scrutiny legislation first had "have a secular 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.'" *Lemon*, 403 at 612-13 (1971) (quoting *Walz*, 397 U.S. 664 [1970]).

[215]*See* P. Kurland, *Of Church and State and the Supreme Court*, 29 U.Chi.L.Rev. 1 (1962)

retired from the Court. However, Reagan's replacement for Stewart, Justice O'Connor, eventually proved to support strict scrutiny in the free exercise field almost as strongly as Stewart had.[216]

In the following year, however, support for free exercise strict scrutiny did erode further. *United States v. Lee* (1982)[217] was another case involving the Amish. Although the Court had granted them a limited exemption from compulsory education laws in *Yoder*[218] a decade earlier, the Court was hostile to their request in *Lee* for a free exercise exemption from the payment of social security payroll taxes. In fact, the Court strained its analysis in the case to avoid granting the exemption. Most importantly, Justice Stevens, who had joined both the plurality in *McDaniel* and the majority in *Thomas*, defected to the Rehnquist camp. He endorsed Rehnquist's position in an opinion concurring in the result in *Lee*.

The Amish challengers in *Lee* objected to participation in the social security system because their religious beliefs prohibited it. They noted that Congress had statutorily provided for the exemption of self-employed members of the Amish faith but had not extended the statutory exemption to Amish employers and employees generally. Burger, writing for the majority, did not extend the exemption judicially either. He applied strict scrutiny, but, as Stevens noted in dissent, Burger manipulated the governmental interests to avoid granting the exemption. There really was no compelling reason not to grant it.

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[216] *See Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595, 1606-15 (1990) (O'Connor, J., concurring in result) and *Bowen v. Roy*, 476 U.S. 693, 724-34 (1986) (O'Connor, J., concurring and dissenting).

[217] 455 U.S. 252

[218] 406 U.S. 205 (1972)

Burger cited *Braunfeld* several times without qualification, but at the same time he restated the terms of strict scrutiny and nominally applied the doctrine, not noting any contradiction. Moreover, his application of strict scrutiny was inept. His first conclusion was that the government had a "high"[219] interest in assuring mandatory participation in the system, for "a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer."[220] So he apparently found that government had a compelling reason not to make the system voluntary. But that conclusion was fairly irrelevant to this case because the Amish had not asked the Court to make the system voluntary; they had merely requested a narrow religious exemption. Strict scrutiny required that the over-arching goal, providing for the welfare of retired workers, had to be compelling, which it obviously was, and that government had to present some compelling reason for denying a religious exemption to the Amish challengers. Burger suggested that "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[221] He was attempting to invoke the Court's fear of a flood of claims. But even with the great religious diversity of the United States, Burger identified only two sects whose religious tenets the tax might violate, the Amish and members of the Sai Baba faith.[222] The Amish had only qualified for the statutory exemption because they were members of "a religious community having its own

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[219] *Id.* at 259

[220] *Id.* at 258

[221] *Id.* at 260-61

[222] *Id.* at 257, n. 6. (citing *Henson v. Commissioner*, 66 T.C. 835 (1976))

'welfare' system."[223] Since Sai Baba did not provide its own welfare system, a lower court had held that its members did not qualify for the statutory exemption.

Under strict scrutiny, faithfully applied, Burger should have granted the exemption. As Stevens pointed out in his concurrence, Congress had already exempted self-employed Amish with no alleged negative impact on the social security system. He also noted that exempting the Amish would mean not only that they would not have to pay the tax but also that they would forego the receipt of any benefits. The latter, Stevens suggested, would more than offset the former. Moreover, since the Amish were members of a religious community which maintained its own type of welfare system, government's interest in comprehensive coverage would not be undermined to any greater degree than the state's interest in education was subverted by the exemption for the Amish in *Yoder*.

But instead of applying this line of reasoning, Burger actually grounded his decision in considerations which were not presented in the case. He argued that there was no way to distinguish the claim in *Lee* from a request for a religious exemption from the payment of *income* taxes. The Court was clearly not willing to entertain countless challenges to the income tax system by countless religious adherents presenting an array of objections. But again, this consideration was irrelevant to the decision in *Lee*. The Amish adherents had not challenged the income tax. Even if they did, Stevens noted in his concurrence, their claim could easily be distinguished from the claim against the social security tax. The latter tax was designed to fund a specific program, social security. Since the Amish had a local system which fulfilled the same interest that government sought to achieve with social

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[223] *Id.* at 261

security, they could be exempted from participation in the entire program. However, the income tax was quite different. Stevens pointed out that "in the typical case the taxpayer is not in any position to supply the government with an equivalent substitute for the objectionable use of his money."[224] And since the federal budget contained so many different elements, portions of it would probably conflict with the religious principles of hundreds of thousands of people. Government could argue that granting far-reaching religious objections from the income tax would utterly cripple its ability to achieve any of its legitimate and compelling goals. That real possibility would surely be deemed a compelling interest. Burger's resolution of the social security issue on the basis of his actual deciding of the income-tax issue was a clear evasion of the real strict scrutiny considerations in *Lee*. Stevens was right in this respect.

However, Stevens would not have reached the conclusion that he suggested the Court should have reached under strict scrutiny. He used his concurring opinion to announce his opposition to the doctrine in the free exercise field. He believed that the Court's precedents more realistically required the Court to apply "a standard that places an almost insurmountable burden on any individual who [on free exercise grounds] objects to a valid and neutral law of general applicability."[225] Besides *Gillette*, which was actually been based on a nominal yet lenient application of strict scrutiny similar to that one in *Lee*, he relied on no case decided after *Sherbert* to support his argument. Nor did he mention *Cantwell*, *Barnette*, *Murdock*, or *Gobitis*. But cases that figured prominently in Stevens' list of citations were *Braunfeld*, the plurality decision which the acceptance of strict scrutiny had implicitly

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[224] *Id.* at 262, n. 1 (Stevens, J., concurring in result)

[225] *Id.* at 263, n. 3

overruled; *Prince* (1944),[226] which had been based on the distinction between adults and minors that *Sherbert* and *Yoder* had substantially undercut; and *Reynolds* (1879),[227] an archaic, virtually indecipherable opinion that had not suggested even the general-applicability or secular-purpose standards. Yet Stevens claimed that he believed his standard had a firmer grounding in precedent than did strict scrutiny. He admitted that the approach he espoused did conflict with *Sherbert*, *Yoder*, and *Thomas.* But he argued that in light of *Lee*, the Court's decision in *Yoder*, which involved a similar claim, should be considered an anomaly. He also suggested that *Sherbert* and *Yoder* could be distinguished. At any rate, he preferred his lenient doctrine[228] because he believed it would "keep[] the government . . . out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."[229] It seemed that Stevens was not motivated, as Rehnquist was, by ideological considerations. Stevens feared exemptions would be seen as religious discrimination. He supported a strict view of neutrality that would maintain the strict *Lemon* test for establishment clause cases while scaling back the free exercise clause to lessen the clause confli

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[226]321 U.S. 158

[227]98 U.S. 145

[228]It was actually Rehnquist's lenient doctrine. *See Thomas*, 450 U.S. at 720-27 (Rehnquist, J., dissenting)

[229]*Id.* at n. 2.

[230]*See* P. Kurland, *Of Church and State and the Supreme Court*, 29 U.Chi.L.Rev. 1 (1962) (advocating rigorous establishment clause standards combined with elimination of free exercise exemptions to achieve governmental neutrality toward religion)

Interestingly, Rehnquist, despite his vehement protests against strict scrutiny in *Thomas*, joined the majority in *Lee*. Apparently he had no problem joining an opinion that at least nominally sanctioned strict scrutiny if it reached the result he sought with his anti-exemptions free exercise doctrine. One might have expected him to join Stevens' concurrence or file one of his own tersely referring readers to his *Thomas* dissent.

For several years after 1982, the Court did not decide any cases significant to the development of strict scrutiny in the free exercise field. The Court did apply the doctrine in *Bob Jones University v. United States* (1983),[231] concluding that government's interest in eradicating racial discrimination in private education was sufficiently compelling to justify a revocation of tax-exempt status for private, religious schools, even though their racially discriminatory policies were based on sincere religious beliefs. Rehnquist dissented, but he disputed a statutory interpretation of the majority rather than their application of strict scrutiny.

The Court also decided *Susan and Tony Alamo Foundation v. Sec. of Labor* (1985).[232] In this case the Court held that religious followers who worked for a religious enterprise and received room and board but no wages were "employees" for the purposes of federal minimum-wage and maximum-hour requirements because their services were economic. The foundation claimed that applying the labor requirements to the foundation would violate the free exercise rights of the followers, who believed their religion forbade them from accepting wages from the enterprise. The Court unanimously held that no free exercise analysis was necessary since the labor regulations, if applied to the foundation, would not require any significant change in the found-

[231] 461 U.S. 574

[232] 471 U.S. 290

ation's policy of providing room and board. Federal rules permitted the substitution of these tangible items for wages. Since the followers objected only to wages, their religious exercise would not be violated by application of the labor standards.

Through 1985, support for free exercise strict scrutiny had not noticeably shifted since the Court handed down *Lee*. Six justices--Burger, Brennan, Marshall, Blackmun, Powell, and O'Connor--presumably still endorsed the doctrine. Although not objecting to the application of the doctrine in *Bob Jones University*, in which the Court had not granted an exemption, Rehnquist and Stevens definitely opposed strict scrutiny and had endorsed a no-exemptions alternative.[233] And Justice White's position remained unclear. He had not explicitly objected to strict scrutiny itself since he joined Harlan's dissent in *Sherbert* in 1963. And he had joined in the Court's applications of the doctrine since 1981. Nevertheless, he had expressed extreme caution when he joined the Court's opinion in *Yoder* in 1972. And he had found no infringement of free exercise in *McDaniel* in 1978, when he based his opinion on equal protection. His support for strict scrutiny in the free exercise field did not seem totally reliable. So strict scrutiny still commanded a six- or seven-person majority by the end of 1985.

However, that margin slipped significantly in *Bowen v. Roy* (1986).[234] Two more justices--*Chief Justice* Burger and Justice Powell--endorsed the no-exemptions, strict-neutrality position for at least some types of free

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[233]The free exercise considerations in *Bob Jones University* were not a prominent feature of that case. The judicial disagreement centered on whether or not the IRS had statutory authority to promulgate a policy tying tax-exempt status to considerations of racial discrimination. As a result, the actions of Stevens, who joined the majority opinion, and Rehnquist, whose dissent was silence on the matter of strict scrutiny, should not be taken to suggest that they had changed their positions on the free exercise doctrine.

[234]476 U.S. 693

exercise burdens. And the Court provided a major clarification of *Sherbert*, somewhat limiting its reach.

In *Roy*, a Native American parent challenged the government's requirement that he supply a social security number for his daughter in order to receive food stamps and other public assistance. He also objected to the government's use of any social security number which he might supply or which the government might simply assign to his daughter. His religious beliefs suggested that because the social security number was a unique identifier representing his daughter, use of the number would "'rob [her] spirit'"[235] and restrict her "spiritual power."[236] The lower court learned during the trial that the government had already assigned his daughter, named Little Bird of the Snow, a social security number. The government then contended that the case was moot because the damage to her spirit had already occurred, but Roy argued that it was the actual use of the number, not merely the assignment, which would be detrimental to his daughter's spiritual development. The lower court, finding no compelling reason to deny Roy an exemption from the number requirement, ordered the government not to use the number assigned to Little Bird of the Snow and barred the government from denying public assistance to Roy because of his refusal to supply a social security number. The government appealed the lower court's injunction.

Eight justices agreed that the first part of the court's order, forbidding the government from using the already-assigned number, should be overturned. A portion of Burger's opinion announced the decision of the Court in this matter. The reasoning constituted a slight revision of the scope of free exercise strict scrutiny. Burger cited Douglas concurring opinion in *Sherbert*

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[235] *Id.* at 698 (quoting Roy)

[236] *Id.*

in which he had asserted "'[t]he 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.'"[237] Upon this rationale, the Court concluded that

> [t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [Roy] engage in any set form of religious observance, so [Roy] may not demand that the Government join in [his] chosen religious practices. . . . Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."[238]

Use of the assigned social security number was an internal affair, so the free exercise clause did not prevent government from using the number which it had already assigned to Little Bird of the Snow.

But applying Douglas' concurrence to get this result was a bit of a sleight-of-hand maneuver. Douglas had not drawn a distinction between internal and external affairs of government. His point in his concurrence was simply that the free exercise clause did not require the government to subsidize Sherbert's Saturday abstinence from labor. It only required a religious exemption for Sabbatarians from the disqualification provisions of unemployment compensation legislation which government might or might not choose to enact. He was actually trying to deal with Stewart's assertion in

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[237] *Id.* at 700 (quoting 374 U.S. 398, 412)

[238] *Id.* at 700

Sherbert that granting the exemption contradicted the establishment-clause ban on financial support of religion. One would be hard-pressed to argue that Douglas, who had supported free exercise exemptions in cases even when no one else did,[239] would have endorsed Burger's use of his *Sherbert* concurrence to justify a limitation on free exercise review. The Court simply used Douglas' statement to modify *Sherbert* slightly. No opinion in that case (or in any subsequent case) suggested the existence of any internal affairs exception to the scope of the free exercise clause. The Court fabricated it in *Roy* perhaps to avoid having to grant an exemption. The lower court had held that exempting Roy from the number requirement would create some administrative difficulties but that they would not constitute a compelling reason for denying the exemption. A majority of the justices might have had a hard time disputing that conclusion. And without modifying free exercise doctrine the way they did, their only alternative to granting the exemption would be handing down another *Lee* opinion.

With the primary issue settled, the Court still had to contend with the other part of the lower court injunction, which prevented the government from denying Roy public assistance because of a refusal to supply a number himself. Even though the government had already assigned Little Bird of the Snow a number and could use it, there was some question as to whether the government might still require Roy to supply it with a number for his daughter before granting public assistance. The Court majority disintegrated over this issue. Three justices believed the government could deny benefits if Roy refused to supply a number. Three believed that it could not. Two would not consider the question. And White simply noted that *Sherbert* and *Thomas* controlled this

[239] *See Gillette v. United States*, 401 U.S. 437, 463-75 (1971) and *Johnson v. Robison*, 415 U.S. 361, 386-90 (1974)

case and dissented from everything the other justices had held on both issues. Burger vacated the lower court decision and remanded the case to the lower court without giving it any clear signal on the second matter.

Burger's plurality opinion, which Powell and Rehnquist joined, apparently represented an attempt to compromise on free exercise jurisprudence by retaining strict scrutiny in some cases while applying a pre-*Cantwell*[240] doctrine in cases similar to *Braunfeld* (1961). In *Braunfeld*, it will be recalled, a plurality of the Court declined to apply strict scrutiny to evaluate a free exercise claim resulting from an indirect burden arising from a generally applicable, secular regulation: the Sunday Closing Law. Although the *Braunfeld* plurality did apply *Cantwell*'s least-restrictive-means requirement, they did not invoke the compelling-interest standard which was the heart of strict scrutiny.[241] Burger pointed out that the burden in Roy was also indirect and non-discriminatory, but he did not suggest that the Court should apply the *Braunfeld* test in such cases. Burger wanted to apply only a rational-basis version of strict neutrality. If the legislation had a secular purpose and if it was generally applicable, then it did not violate free exercise if it "is a reasonable means of promoting a legitimate public interest."[242] Burger did not include even the least-restrictive-means standard of *Cantwell* and *Braunfeld.* He did imply, however, that if legislation burdened free exercise directly or was discriminatory, it should be evaluated under strict scrutiny. Burger simply held that government could deny benefits if Roy refused to supply a new social security number because the number requirement "promotes a legitimate and important public interest

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[240] *See Cantwell v. Connecticut*, 310 U.S. 296 (1940)

[241] *See Braunfeld v. Brown*, 366 U.S. 599 (1961)

[242] *Id.* at 708

[in] preventing fraud . . . ."[243] and "is a reasonable means of promoting that goal."[244]

Burger incredibly asserted that his proposed doctrine was no modification of free exercise jurisprudence but was instead endorsed by precedent. Burger relied heavily on one case, *Hamilton v. Regents of the University of California* (1934).[245] There are two reasons that Burger's reliance on that case was unsound. In *Hamilton*, several college students challenged a university requirement that all males complete a specified number of courses in military science and tactics. Because the university was an arm of the state, the free exercise clause did not apply to its actions, and *Hamilton* preceded the Court's incorporation of the free exercise clause into the meaning of the fourteenth amendment as a restriction on state actions. The Court evaluated the students' claim under a very generalized notion that the fourteenth amendment protected against state infringement "the right to entertain [religious] beliefs, to adhere to [religious] principles and to teach [religious] doctrines."[246] It would be wrong to assert that *Hamilton* represented the incorporation into the fourteenth amendment of the full protective scope of the free exercise clause. *Hamilton* did not even suggest that the fourteenth amendment protections included the secular-purpose or general-applicability standards. A reliance on *Hamilton* was also troublesome because that case was based on a distinction between rights and privileges. While the Court admitted that the students possessed at least some type of right to religious liberty, it held that such a right was irrelevant because the

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[243] *Id.* at 709

[244] *Id.* at 710

[245] 293 U.S. 245

[246] 293 U.S. at 262

students did not also possess a right to attend college. Higher education was merely a privilege provided by the state. The Court had abandoned this archaic division long before *Roy* was decided. Brennan even explicitly noted the invalidity of that distinction in *Sherbert*.[247] Nevertheless, Burger relied on *Hamilton* to suggest that precedent supported his view that the Court should recognize a distinction between direct and indirect burdens.

Burger also misapplied more recent cases which suggested that strict scrutiny applied to all free exercise burdens. Any cases, like *Yoder* or *Lee*, in which the Court reviewed direct burdens on free exercise, Burger dismissed as inapplicable to *Roy* despite language in those decision that did not limit the scope of strict scrutiny only to instances of direct burdens. In addition, he tried to distinguish *Sherbert* and *Thomas* by arguing that free exercise was violated in those cases because the states had provided individualized systems of review in their unemployment compensation statutes but had not granted religious exemptions in those administrative processes. Burger claimed that the Court applied strict scrutiny because the refusals to accommodate religious beliefs administratively suggested "discriminatory intent."[248] Brennan had suggested that the statute in *Sherbert* might be discriminatory, but his formulation of strict scrutiny had not relied on that showing. And in *Thomas*, the state did not exempt any personal reasons for unemployment, religious or otherwise, from the disqualification provision in its compensation statute. The Court had simply not drawn a distinction

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[247]374 U.S. at 404 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."). *See also* n. 6 (collecting cases). Even the plurality in *Braunfeld* had not drawn that distinction. Chief Justice Warren had required government to apply the least-restrictive-means even though operating a business was a privilege. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

[248]*Roy*, 476 U.S. at 708

between direct and indirect burdens or generally-applicable and discriminatory legislation in its past formulations of strict scrutiny.[249] Perhaps, Burger's most confusing misapplication of a precedent involved the recently decided *Bob Jones University* case. In that case the Court, with Burger even writing the opinion, had applied strict scrutiny and found a compelling interest in that case to justify an indirect burden on free exercise. That case, despite Burger's apparent belief that it somehow supported his proposition, did not distinguish between direct and indirect burdens: It applied strict scrutiny to an indirect burden.

Burger apparently was attempting to rewrite free exercise doctrine in *Roy*. Perhaps, he was attempting to strike a compromise between the Rehnquist-Stevens no-exemption position and the Brennan pro-exemptions view. After all, Burger seemed to suggest that strict scrutiny and exemptions were acceptable when free exercise was burdened directly or when indirect burdens resulted from discrimination. He apparently would only apply his highly deferential, strict-neutrality standard when indirect burdens resulted from non-discrimina-

[249]Burger himself had even written the *Yoder* opinion, in which he asserted that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. In other words, the Court had to apply strict scrutiny when free exercise was burdened. He also wrote that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U.S. at 220. He dismissed the notion that legislation had to be discriminatory to violate free exercise. This passage taken with the other one does not support his new-found proposition that direct and indirect burdens merited different standards of review. He did not qualify his language in the first passage by adding "unless the legitimate burden in only indirect." And the "unduly burdens" reference is not equivalent to "directly burdens." The term "unduly" can more safely be taken to mean, as it did in *Cantwell*, 310 U.S. at 304, that burdens on free exercise were invalid if government could have applied legislative means which were less restrictive. The language in every case since at least *Sherbert* cuts against Burger's proposition.

tory legislation. He invoked some theoretical justifications for his adaptation of free exercise doctrine:

> [G]iven the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental neutral restraints on the free exercise of religion are inescapable.[250]

Clearly, Burger was responding to the potential of a flood of disparate claims. Also, in presuming that "neutrality" was possible, he was rejecting the pro-exemptions assumption that the democratic process was structurally tilted toward mainstream religions.

O'Connor, joined by Brennan and Marshall, attacked Burger's plurality opinion. She asserted that the test Burger proposed

> 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. . . . Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.[251]

She specifically criticized Burger's reliance on *Hamilton* and *Bob Jones University*. And in the process she decided the case differently, providing one of the clearest articulations of the strict scrutiny doctrine of any opinion since ***Sherbert***. She pointed out that under strict scrutiny government had to show both a compelling interest and what she called a "constitutional interest."[252] She believed that the governmental interest in preventing

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[250] *Id.* at 712.

[251] 476 U.S. at 727 (concurring and dissenting opinion)

[252] *Id.* at 730 (emphasis omitted)

fraud in public benefits programs was compelling, but that showing did not decide the case. O'Connor explained:

> If the Government could meet its compelling needs only by refusing to grant a religious exemption, and chose a narrowly tailored means to do so, then the Government would prevail. But the Government has failed to show that granting a religious exemption to those who legitimately object to providing a Social Security number will do any harm to its compelling interest in preventing welfare fraud.[253]

This last requirement was what she meant by a "constitutional" interest. Government had to show that its overriding purpose was compelling but also that it had a compelling reason for denying a religious exemption. She held that in Roy's case, government could not present the latter, restating the view that administrative inconvenience generally did not rise to the level of compelling interest.[254] She would have upheld the part of the lower court's order forbidding government from denying benefits because Roy might again refuse to provide a number. In other words, government's assigning and use of a number were internal affairs that did not violate Roy's free exercise rights, but government could not constitutionally compel Roy to supply a number for his daughter himself.

Finally, Blackmun and Stevens would not consider the second question in the case because they believed its was either moot or not ripe for adjudication. They had no reason to believe that the government, since it already had

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[253] *Id.* at 732

[254] *Id.* at 730-31 (Burger "appears to believe that the added inconvenience to the State of administering a selective exemption overbalances any burden on individual religious exercise. But this Court has held that administrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude.")

a social security number for Little Bird of the Snow and since the Court had just held that it could use that number, would attempt to force Roy to supply them with a number. They believed the government would simply grant the benefits and use the number it already had. Nevertheless, Blackmun endorsed O'Connor's opinion and conclusion.[255] And Stevens, who had announced his opposition to strict scrutiny in *Lee*, was silent regarding Burger's proposed free exercise modification, but he did restate his belief[256] that *Sherbert* and *Thomas* could be distinguished from other cases involving indirect burdens. Burger had relied on a version of the same proposition in his plurality opinion. In response, Blackmun noted that he rejected Stevens' "narrow view of *Sherbert* and *Thomas*."[257]

By 1986, free exercise strict scrutiny faced serious opposition on the Court. Two justices, Rehnquist and Stevens, had announced complete opposition to the doctrine. Two more, Burger and Powell, wanted to limit the instances in which it would be applied. Four still supported the doctrine. So White became a swing vote in free exercise cases. In *Roy* he had not joined either the Burger opinion scaling back strict scrutiny or the O'Connor opinion strongly endorsing it. It was not clear what White's motives were. In fact, another 1986 case showed that he was not an avid supporter of strict scrutiny.

At the same time that some members of the Court were trying to limit strict scrutiny in *Roy*, they explicitly restricted the scope of free exercise

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[255]With Blackmun's endorsement and White's simple reliance on *Sherbert* and *Thomas*, O'Connor was able to note in her opinion that a majority of the Court in *Roy* believed that *Sherbert* and *Thomas* mandated the answer to the second inquiry. 476 U.S. at 731.

[256]He had first articulated the position in his dissent in *Lee*.

[257]*Id.* at 716, n. 2.

in military matters. In *Gillette* (1971),[258] it will be recalled, the Court applied strict scrutiny leniently to deny selective religious objectors exemptions from the military draft. And three years later, in *Robison*,[259] the Court refused to extend veterans' educational benefits to conscientious objectors who performed alternate civilian service. The Court handed down a vague opinion with language that sometimes sounded like the Court was applying strict scrutiny but sometimes like it was merely using a reasonable standard, much like the one Burger articulated in *Roy*. In 1986, the Court ruled in another case involving military matters, *Goldman v. Weinberger*.[260] And the Court left no doubt that strict scrutiny did not apply in cases relating to the military.

In this case an orthodox Jew, who was serving in the Air Force as a psychologist, sought a free exercise exemption from the military dress code which forbade him from wearing a yarmulke. The Air Force's rule permitted religious adherents to wear religious items that were covered by the regular uniform, a class of items that did not include a yarmulke. But Goldman had, nevertheless, worn a yarmulke for several years while on duty in his job at a military hospital, and it had caused no problems.

A five-person majority, consisting of Burger, White, Powell, Rehnquist, and Stevens, refused to exempt him from the regulation so that he could wear a yarmulke. Rehnquist, writing for the majority, reasoned that the Court "must give great deference to the professional judgment of military authorities concerning the relative importance of a military interest."[261] Rehnquist

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[258] 401 U.S. 437

[259] 415 U.S. 361 (1974)

[260] 475 U.S. 503

[261] *Id.* at 507

suggested that the military's interest in maintaining uniformity and minimizing individuality justified the regulation, although Rehnquist in no way suggested that the interest was compelling. He did not apply strict scrutiny. He contended that the Court had to be "far more deferential" to military regulations challenged on first amendment grounds than to civilian statutes, because "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state."[262] The requirement of uniform appearance helped the military to "foster instinctive obedience, unity, commitment, and esprit de corps"[263] by subverting individual differences among soldiers. Rehnquist concluded that the visibility requirement "reasonably and evenhandedly regulate[d] dress in the interest of the military's perceived need for uniformity."[264] Rehnquist had not articulated a precise judicial test to apply when soldiers challenged military rules under the free exercise clause. But he seemed to suggest that as long as a rule was generally applicable and reasonably related to some goal that was legitimate "in the professional judgment of military authorities" it was not unconsitutional.

Brennan and O'Connor filed biting dissents criticizing the majority. Brennan accused Rehnquist of applying a "subrational-basis standard" with "absolute, uncritical deference"[265] to military authorities "by eliminating, in all but name only, judicial review of military regulations that interfere with fundamental constitutional rights of service personnel."[266]

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[262] *Id.*

[263] *Id.*

[264] *Id.* at 510

[265] *Id.* at 515 (dissenting opinion)

[266] *Id.*

And O'Connor accused him of applying no standard at all. She simply argued that there was no reason to apply a standard other than strict scrutiny.[267] Brennan also suggested that strict scrutiny should be applied, but he asserted that the Air Force had not even met a minimal standard of credibility.[268] Noting that military regulations did not require complete uniformity anyway, Brennan believed the Air force could permit visible religious garments, like yarmulkes, as long as they were "consistent with a polished, professional military appearance."[269]

Neither Stevens, who filed a concurring opinion, nor Blackmun, who also dissented, liked Brennan's standard. Stevens feared that Brennan's test would encourage military authorities to draw distinctions between religious adherents based on more than just the appearance of the item they sought to wear.[270] Blackmun also feared unconventional religious requirements would be discriminated against precisely because they were less "familiar to the average observer."[271] He dissented, though, because he did not believe the

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[267]*Id.* at 528-33 ("Napoleon may have been correct to assert that, in the military sphere, morale is to all other factors as three is to one, but contradicted assertions of necessity by the military do not on the scales of justices bear a similarly disproportionate weight to sincere religious beliefs of the individual.") (citation omitted).

[268]He mocked the reasoning which the Air Force supplied and Rehnquist accepted: "Non-Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slop toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies. The contention . . . surpasses belief." *Id.* at 516-17.

[269]*Id.* at 520.

[270]*Id.* at 513 ("[T]he difference between a turban or a dreadlock, on the one hand, and a yarmulke on the other, is not merely a difference in 'appearance'--it is also the difference between and Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other.").

[271]*Id.* at 527.

Air Force had empirically demonstrated that such a large number of personnel would seek religious exemptions from the dress code that any substantial problems would result.

The concerns about discrimination expressed by Blackmun and particularly Stevens gave Brennan an opportunity to clearly explain the view that governmental policies were inherently tilted to favor mainstream religions. He strongly pressed this position:

> The visibility test permits *only* individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties. In my view, the Constitution requires the selection of criteria that permit the greatest possible number of persons to practice their faiths freely.[272]

With this statement, Brennan struck at the core of the philosophical disagreement concerning considerations of judicial difficulties in defining religions and ferreting out false claims. Some judges and legal scholars, Stevens included, sought to eliminate all free exercise exemptions in part because the courts could not ensure that every conceivable religious objector would be fairly accommodated. Brennan, while no doubt cognizant of the limits of judicial power, supported exemptions, even if the most obscure faiths might not receive a fair hearing, because he sought to maximize opportunities for religious exercises. And given the structural favoritism for mainstream religion anyway, Brennan saw no merit in a position which called for no exemptions in the name of neutrality:

> What puzzles me is the implication that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for

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[272] *Id.* at 521-22

example, Sikhs is *more* troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other. . . . The practical effect of this [visibility] categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths. . . . Justice Stevens believes that this standard advances an interest in the "uniform treatment" of all religions. . . . [T]hat uniformity is illusory, unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices. . . . A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."[273]

Brennan in this opinion provided the clearest ever Court statement of the philosophical justifications for the pro-exemptions approach. He even noted that members of a minority faith were constitutionally entitled to free exercise exemptions when burdens on their practices are "the result of insensitivity rather than design. . . ."[274] But his words had not been sufficient to sway the majority, not even Justice White.

In the 1970's, the Court had seemed to consider prisons and the military somewhat similarly in that the Court should maintain a greater degree of

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[273] *Id.* at 521, 522, and 524.

[274] *Id.* at 524.

deference to the governing authorities of the institutions.[275] In light of that past recognition, it should not be surprising that one year after *Goldman* the Court decided a free exercise case involving prisoners and declined to apply strict scrutiny.

In this case, *O'Lone v. Estate of Shabazz* (1987),[276] a majority led by Rehnquist disagreed with a minority led by Brennan about the proper standard to apply to prison circumstances. This case was not especially significant to the development of strict scrutiny since neither Rehnquist nor Brennan suggested that the Court apply it. And the Court of course had already suggested in 1972[277] that a narrower free exercise standard should be used in prison cases. The dispute in this case really resembled a less controversial version of *Goldman*, with Brennan arguing that the Court should apply more than the bare minimum standard adopted by the Rehnquist majority.[278] The only real broader significance this case holds for the development of strict scrutiny is that Brennan emphasized the centrality of the impaired religious practice to the prisoners' religion. The Brennan wing of the Court later began to invoke a similar centrality standard in mainstream free exercise cases at the next Term.[279]

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[275] Compare *Robison*, 415 U.S. 361 (1974) and *Gillette v. United States*, 401 U.S. 437 (1971) with *Cruz v. Beto*, 405 U.S. 319 (1972).

[276] 482 U.S. 342.

[277] *Cruz v. Beto*, 405 U.S. 319 (1972).

[278] They debate actually centered on the proper interpretation of the prison standard which the Court had adopted in a case from another field in the same year. *See Turner v. Safley*, 107 S.Ct. 2254 (1987).

[279] *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 660 (1988).

The Court also heard another unemployment compensation claim in 1987. In *Hobbie v. Unemployment Appeals Comm'n*,[280] another Seventh-Day Adventist was denied benefits when she was fired from her job for refusing to work on Saturday. *Hobbie* differed from *Sherbert* only in that the religious objector had converted to the Seventh-Day Adventist faith after beginning her job, so she, rather than the employer, was "'the agent of change.'"[281] Also the disqualification was only partial. The Court held, eight-to-one, that there was "no meaningful distinction among the situations of Sherbert, Thomas, and Hobbie."[282] Only Rehnquist dissented, adhering to his *Thomas* opinion.

Apart from its reaffirmance of *Sherbert* and *Thomas*, the *Hobbie* opinion added one other development to the evolution of strict scrutiny. Brennan, in his opinion for the Court, mentioned Burger's contention in *Roy* that strict scrutiny should not be applied to cases involving indirect burdens. But Brennan asserted that "[f]ive Justices expressly rejected this argument in *Roy* [and] [w]e reject the argument again today. Powell, who had sided with Burger in *Roy*, refused to join Brennan's opinion. He noted that Burger had distinguished *Sherbert* and *Thomas* so that Brennan had no reason to even consider much less reject Burger's test.[283] Stevens also filed a separate concurring opinion, once more pressing his position that the exemptions in *Sherbert* and *Thomas* were only necessary to maintain equal treatment.[284]

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[280] 480 U.S. 136.

[281] 107 S.Ct. 1046, 1055

[282] *Id.* at 1049.

[283] Burger had stepped down in 1986, so he was not on the Court for the *Hobbie* case.

[284] He had made the same argument in his *Lee* dissent and in his *Roy* concurrence.

Any seeming reinvigoration of support for strict scrutiny in *Hobbie* was misleading. Burger had not remained on the Court to hear the *Hobbie* case. He stepped down in 1986. Reagan elevated Rehnquist to replace him and appointed Justice Scalia to fill Rehnquist's associate justice seat. Although Scalia joined Brennan's majority opinion in *Hobbie*, he soon proved that he was no friend of strict scrutiny.[285] The replacement of Burger proved to be very significant. Where Burger had tried to formulate a free exercise compromise in *Roy*, the new Chief was not at all interested in preserving strict scrutiny. The replacement of Burger's more moderate voice with Rehnquist's and the filling of Rehnquist's seat with an ideological mate shifted the Court further from a pro-exemptions stance. In addition, Powell's moderate vote was replaced in 1988 by Justice Kennedy's, which in free exercise cases was eventually cast with Rehnquist and Scalia.[286] As a result of these changes in the Court's membership, the Brennan-O'Connor pro-exemptions wing of the Court did not loose any members. Marshall and Blackmun remained on the Court. But the anti-exemptions wing became more categorically opposed to strict scrutiny. Burger and Powell had been the only justices seeking to moderate free exercise doctrine while retaining strict scrutiny in a significant class of cases. After 1987, the pro-compromise moderates were gone. By 1988, then, the Court was sharply divided: four justices favored strict scrutiny, four opposed it, and White held the balance of power.

In 1988, the Court scaled back strict scrutiny again by extending the internal-affairs exception that it had created in *Roy* (1986).[287] In *Lyng*

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[285]*See Employment Div., Dep't of Human Res. v. Smith*, 110 S.Ct. 1595 (1990)

[286]*Id.*

[287]476 U.S. 693 (1986)

v. Northwest Indian Cemetery Protective Ass'n (*Northwest Indian*),[288] a Native American group challenged the U.S. Forest Service's decision to build a road through an area of a national forest. The area, known to the Native Americans as the "high country," was central to their religious practices. Construction of the road through the "high country" would so disrupt the area that it would seriously frustrate the tribes' ability to practice their *cite-specific* religion. The Court held that government use of public lands was an internal affair which objectors could not challenge on free exercise grounds.

Justice O'Connor wrote the opinion for a five-to-three majority. She and White broke from the Brennan camp in this case, and Kennedy did not participate. She believed that her opinion was a straightforward extension of the logic of *Roy*. She noted that in neither *Roy* nor *Northwest Indian* "would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[289] The majority placed heavy weight on the fact that government was not forcing a choice on the Native Americans, as it had done in *Sherbert* and the other free exercise precedents. They were not being coerced into violating any tenets of faith. Sherbert had to choose between her Saturday abstinence and unemployment benefits. The government policy in *Northwest Indian* did not present the objectors with such a choice. The government was simply building a road on its land.

The majority was also influenced by two other factors. First, the challengers asked the Court to distinguish *Roy* on the ground that the burden

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[288] 108 S.Ct. 1319

[289] *Id.* at 1325

on religious exercise in *Northwest Indian* was much greater than the burden was in *Roy*. But O'Connor noted that the Court could not delve into the truth or falsity of religious beliefs. Inherent limits to judicial power in the religion field prevented the Court from getting inside the religions of challengers and determining whether the injury in one case would be more severe than the injury in another. Second, the majority was constrained by the possibility of future claims, more demanding than the one in this case. O'Connor noted that the Native Americans might decide that they could not practice their religion if outsiders were permitted in the area. She was not willing to set a precedent which might have led eventually to granting tribes "*de facto* beneficial ownership of some rather spacious tracts of public property."[290] She further noted that even granting the claim in this case would significantly impair governmental property rights by forbidding the construction of a road anywhere in a 17,000 acre area. The Court could not grant such a religious veto over land-use decisions of the U.S. Forest Service.

Brennan, joined by Marshall and Blackmun, dissented. He argued that the Court should apply strict scrutiny in this case. He disputed O'Connor's assertion that unless government coerced or penalized an individual's exercise of religion the free exercise clause was not violated. He argued that anytime government hampered an individual's ability to exercise his religion, it violated free exercise. However, O'Connor rightly pointed out that Brennan had torn a quote from *Yoder* out of context to support his position. He claimed that the Court's decision in that case was based on the potential that secondary education for Amish children threatened the continued existence of the Amish faith. In fact, the Court placed much more emphasis on the coercive

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[290] *Id.* at 1327.

nature of the compulsory education law in *Yoder*. It compelled the Amish parents to violate a tenet of faith. The governmental policy in *Northwest Indian* did not coerce the Native Americans, either directly or indirectly, to do anything.

Brennan also argued that the Court could determine which public lands were "central" or "indispensable"[291] to certain Native American religions and apply strict scrutiny only to interferences with those areas. Again, O'Connor warned against judging the truth or falsity of religious beliefs. She suggested that if the Court adopted Brennan's position, it might find itself in disagreement with religious adherents and end up ruling that they "misunderstand their own religious beliefs."[292]

However, Brennan did present a legitimate argument regarding *Roy*. It could be distinguished, he believed, because the activity in that case was completely internal while the activity in *Northwest Indian* was external. And obviously the activities in the two cases were of different natures. O'Connor did not adequately refute this contention. She suggested that the use of the social security number in *Roy* could not be considered any more internal than the activity in this case. The effect in *Roy* was to drain the spirit of Roy's daughter; that effect, O'Connor suggested, could not be considered internal. However, the Court had noted in *Roy* that in judging constitutional claims "the Constitution, rather than an individual's religion, must supply the frame of reference."[293] To argue that the activity in *Roy* was as external as that in *Northwest Indian*, O'Connor had to do exactly what she had stridently opposed doing--get inside the religion of the challenger to evaluate the

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[291] *Id.* at 1338.

[292] *Id.* at 1330.

[293] *Roy*, 476 U.S. at 701, n. 6.

claim. From an objective "frame of reference," the manipulation of a number in a governmental computer system is clearly more internal than building a road through a national forest, even if the road is wholly within the boundaries of public property. The Court could have drawn a distinction, but it may not have been enough to change the outcome.

This case might have presented a perfect situation for a modified free exercise doctrine. O'Connor noted that the Forest Service had evaluated several proposed routes for the road and had chosen the one which it believed interfered with the religious practices of Native Americans the least. This fact of the case might have suggested a compromise. In cases like *Northwest Indian* and, perhaps, even *Roy*, where a governmental activity will have a negative impact on religious practices but does not coerce anyone into violating their tenets of faith, the Court might require government to use the least restrictive means available without substantially undermining its interests or increasing its costs. But the Court might not require government to demonstrate that its interest was compelling. It is questionable whether or not the governmental interest in constructing the road in *Northwest Indian* could have been considered compelling. But if the Forest Service had not chosen to try to accommodate the Native Americans religious practices as best it could, it should have been required to do so by the free exercise clause.

In another Native American case decided at the same time as *Northwest Indian*, the Court cut back free exercise strict scrutiny in yet another way. In *Employment Div., Dep't of Human Res. v. Smith* (1988) (*Smith I*)[294] the Court first reviewed the case involving sacramental use of peyote. It will be recalled that two Native American's were fired from their jobs with a private drug rehabilitation center when the center learned of their religious use of

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[294] 108 S.Ct. 1444

peyote. Oregon denied their request for unemployment compensation because it deemed their sacramental drug use to be "misconduct" within the meaning of a disqualification provision of the state's compensation statute. The Court decided a narrow issue in this first review of the case and remanded it for further proceedings.

The Court split in the same manner that it had in *Northwest Indian*. O'Connor and White joined Rehnquist, Stevens, and Scalia in the majority, and Brennan, Marshall, and Blackmun dissented. Having not taken his seat until after oral argument, Kennedy, again, did not participate. Also, again, the majority did not apply strict scrutiny, while Brennan, in dissent, argued that it should have.

Stevens, who wrote the majority opinion, asserted that *Sherbert*, *Thomas*, and *Hobbie* did not control the case, because the conduct engaged in by the religious objectors in those cases had not been illegal. The majority simply held that if Oregon exempted the religious possession or use of peyote from its general drug laws, then the Native Americans' conduct

> may well be entitled to constitutional protection. On the other hand, if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon. If that is the case, the State is free to withhold unemployment compensation. . . .[295]

So the majority ruled that if a state has validly prohibited some form of conduct, then religious objectors who are fired for participating in that conduct can be disqualified from receiving unemployment benefits, even if their participation was required by their religion. But the prohibition

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[295] *Id.* at 1451.

itself would have to be consistent with the free exercise clause. Because the Court was not certain if Oregon provided an exemption for sacramental peyote use, it remanded the case to the state supreme court for a decision on this issue.

Brennan wrote the dissenting opinion, arguing that the Court should have simply applied strict scrutiny and decided the case. He explained that law enforcement was not the purpose of Oregon's unemployment compensation law, so preventing illegal activity could not be considered a compelling interest. Protecting the unemployment fund from fraudulent claims was the only conceivable governmental interest justifying the disqualification, and *Sherbert*, *Thomas*, and *Hobbie* forced the Court to conclude that protecting the fund was not a compelling interest. But the majority opted, instead, to foreclose the potential for strict scrutiny analysis in another class of free exercise claims.

One year after *Smith I*, the Court decided yet another unemployment compensation claim. In this case, *Frazee v. Illinois Dep't of Employment Sec.* (1989),[296] a unanimous Court held that Illinois could not disqualify an individual from receiving benefits because his religious objections were not grounded in the tenets of an organized sect. The claimant declined to take a job which was offered him because it would have required him to work on Sunday. Because he called himself merely a Christian but did not claim any denominational affiliation, he was denied benefits. The Court simply held that affiliation with an organized religion was not necessary for one's beliefs to qualify for free exercise protection.

So in the last free exercise case of the 1980's, the Court unanimously extended previous free exercise rulings. But that positive note for free

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[296] 109 S.Ct. 1514.

exercise belied the harsh realities of the 1980's. During that decade the Court had cut several exceptions in the strict scrutiny doctrine. Apart from military and prison cases, the doctrine did not apply when internal governmental affairs interfered with individuals' religious development, and it did not apply when an individual's religious practices were legitimately made criminal. More importantly support for strict scrutiny and free exercise exemptions had eroded from almost unanimous support in 1978 to a bare majority of justices, if that by the end of the 1980's. No, the Court's unanimous support for strict scrutiny in *Frazee* was far from representative of the 1980's trend. The unanimity was also only a brief period of calm before the storm. The *Smith* case would soon return from the lower court.

§ 5. THE DEMISE OF FREE EXERCISE STRICT SCRUTINY.

As the Court entered the 1990's, it remained deeply divided over free exercise strict scrutiny. Brennan, Marshall, and Blackmun still strongly backed the doctrine, and O'Connor returned to this position after her brief foray into the Rehnquist camp. Rehnquist, Stevens, Scalia, and Kennedy also formed a powerful bloc in opposition to strict scrutiny. But White, the perennial free exercise vacillator, finally appeared to decide against strict scrutiny in 1990. He firmly joined with the Rehnquist bloc to virtually abolish free exercise strict scrutiny in what surely must have been one of the most disingenuous, results-oriented opinions in recent history. The case was the Court's final decision in the *Smith* case,[297] which had returned from the lower court. With Scalia writing the opinion, a bare majority of justices effectively read the free exercise clause out of the Constitution, misrepresenting precedents all along the way.

The Court faced the question in *Smith II* of whether or not the free exercise clause required the Court to exempt Native Americans from Oregon's ban on peyote use, including use for religious purposes. Since several states had statutory exemptions for sacramental peyote use[298] and apparently encountered no significant problems with the policy, the Court might have applied strict scrutiny and held that the free exercise clause required an

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[297] *Employment Div., Dep't of Human Res. v. Smith,* 110 S.Ct. 1595

[298] *See Smith II*, 110 S.Ct. at 1606 (citing statutes).

exemption from Oregon's law for Native Americans' religious practices.[299] Or the Court might simply have applied strict scrutiny and determined that preventing drug use was a compelling interest which justified the infringement of Native American free exercise rights.[300] Alternatively, it could have applied that portion of Brennan's *Sherbert* opinion which noted that prohibitions of conduct posing an inherent, substantial risk to public safety could be upheld without the necessity of applying a strict standard of review.[301] But the majority did not opt for any of these approaches to this case.

Instead, over the vigorous dissents of O'Connor and Blackmun, Scalia deleted strict scrutiny from free exercise jurisprudence and neatly erased it from history. He established a standard of review which had absolutely no basis whatsoever in free exercise precedents. Under the new approach, generally applicable, secular laws were immune from any free exercise challenge no matter how severely they might burden an individual's religion.[302] The strict scrutiny standards of compelling-interest and least-restrictive-means were eliminated. The Court would no longer grant free exercise exemptions from these laws, and would not grant religious exemptions in general, except from a narrowly specified range of cases. In reaching his result, Scalia misrepresented or misapplied more than a half-dozen free exercise precedents.

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[299]This method of basing a free exercise conclusion in part on the experiences of states with statutory exemptions has been applied before. *See, e.g, Sherbert v. Verner*, 374 U.S. 398, 407, n. 7 (1963).

[300]O'Connor took this course in her opinion concurring in the result. *Id.* at 1613-15

[301]374 U.S. at 403 ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious principles. . . . The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.")

[302]1595 U.S. at 1599.

He simply dismissed several major precedents from the free exercise field, calling them "hybrid situations."[303] In *Yoder*, the Court had granted the Amish a free exercise exemption from Wisconsin's generally applicable, secular compulsory education law that imposed criminal sanctions on parents who kept their children out of school. Because of the nature of that statute, disposing of *Yoder*, which clearly endorsed strict scrutiny, was the most pressing item on Scalia's agenda. He asserted that *Yoder* had been based on both the free exercise clause and the parental right to privacy. As a result, it was not a pure free exercise case but was a "hybrid." *Yoder* had been based in part on parental privacy, but the opinion was clearly divided into two segments. One applied strict scrutiny to deal with the free exercise challenge to the compulsory law itself. After the Court found that no compelling reason existed for denying an exemption, it had to deal with the state's additional claim that since the case involved children, *parens patriae* allowed the state to assert power over the Amish children. The Court clearly used the parental right to privacy to dispose of that state claim. They were distinct sections of the opinion, not inseparably intertwined, as Scalia implied. In fact, since children were not involved in *Smith II*, the parental privacy section of *Yoder* was irrelevant, and its free exercise portion should have controlled. It required the Court to apply strict scrutiny to the drug law.

Scalia also dismissed *Cantwell*[304] and *Murdock*,[305] both of which endorsed the least-restrictive-means standard, as "hybrids." But *Cantwell* also had combined two distinct challenges. A statute providing for administrative censorship of religion was struck down on free exercise grounds. And

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[303] *Id.* at 1602.

[304] *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

[305] *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)

the Court applied free speech and free exercise to invalidate the conviction of a Jehovah's Witness for a common-law breach of the peace. As in *Yoder*, the opinion contained a clear free exercise segment. Moreover *Cantwell*, as well as *Yoder*, had been cited by courts in free exercise cases for years. *Murdock* was the closest to a "hybrid" situation. But Scalia's classification is not even legitimate for that case. In *Murdock* the Court invalidated a statute that required individual's to pay a flat-rate licensing tax to solicit. The Court noted that it interfered with both free exercise and free press rights, but nowhere in its ruling was a hint that only the presence of both issues led to the result. In fact, in the mid-1940's the Court tended to lump first amendment liberties together in their opinions. For instance, Justice Rutledge wrote during this period that "[I]t may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. . . . All are interwoven."[306] Scalia's dismissal of these precedents was illegitimate.

With *Yoder* eliminated, Scalia set out to argue that precedents suggested that strict scrutiny was limited to the unemployment compensation field. He correctly pointed out that the Court had only "purported" to apply the doctrine in *Gillette* and *Lee*. But he went beyond this point, suggesting that outside the unemployment compensation field the Court had either only "purported" to apply the doctrine or had not applied it at all. He misrepresented precedents to support this proposition. He presented *Roy* and *Northwest Indian* as though they were typical free exercise cases, merely commenting that "we declined to apply *Sherbert*'s analysis"[307] in them. He even had the gall to imply that O'Connor was obviously mistaken in claiming that *Roy* and *Northwest*

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[306] *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944)

[307] 110 S.Ct. at 1602.

Indian could be distinguished "on the ground that those cases involved the government's conduct of its own internal affairs. . . ."[308] Scalia knew full well that the internal-affairs exception was *precisely* the doctrine upon which those cases had been decided. He also paraded *Goldman* and *Shabazz*, when he knew that the Court did not apply strict scrutiny in those cases because of their special circumstances, military and penal. The debate in those cases had *centered* on what type of more deferential standard the Court should apply because of the special circumstances. None of the cases he cited overruled the general rule that strict scrutiny applied in free exercise challenges. They each constituted narrowly defined exceptions for special instances. He also neglected to mention that the Court had truly applied strict scrutiny in *Bob Jones University* (1983) and found a legitimate compelling interest. It was a straightforward application.

As for the unemployment compensation cases, Scalia drew a bold line around them, highlighting them as special instances in which the Court had honestly applied strict scrutiny. He relied on Burger's restricted view of the cases in the *Roy* plurality opinion to set them apart. Burger's position had been that strict scrutiny applied in instances of direct burdens and in cases where indirect burdens were discriminatory. The Court applied strict scrutiny in unemployment compensation cases because the state's refusal to accommodate religious practices, even though it had established a system of individualized review, suggested a discriminatory intent on the part of the states. Burger set aside cases where general laws burdened free exercise indirectly for evaluation under a standard less rigorous than strict scrutiny. Scalia adapted this view, suggesting that strict scrutiny "was developed in a

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[308] *Id.* at 1603, n. 2.

context that lent itself to individualized governmental assessment."[309] So under Scalia's rules, strict scrutiny was clearly applied in cases where government had established "a system of individualized exemptions."[310] The result of Scalia's twisting of precedents was a portrayal of strict scrutiny as the doctrine of special instances and his own strict-neutrality as the norm. The true picture was one of strict scrutiny as the free exercise norm with narrowly defined exceptions for internal governmental affairs and military and prison situations. After he related his distorted view of history, Scalia was able to assert that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. . . . We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges."[311] The Court had held in *Smith I* that if Oregon's criminal ban on peyote use was constitutional, so was its denial of unemployment benefits to the Native American challengers in the *Smith* case. Well, applying the new strict-neutrality doctrine, Scalia refused to exempt Native Americans from Oregon's ban on peyote use and consequently upheld the denial of benefits.

Scalia provided a few theoretical justifications for his position. He noted that

> [a]ny society adopting such a system [of exemptions] would be courting anarchy, but that danger increases in direct proportion

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[309] *Id.* at 1603.

[310] *Id.*

[311] *Id.*

> to the society's diversity of religious beliefs, and it's determination to coerce or suppress none of them.[312]

Scalia was correct in pointing out that increased religious diversity could and in fact had placed the threat of anarchy in the minds of justices purporting to apply strict scrutiny. Whether or not that was a realistic threat was another matter. But his solution seemed to be that the greater the diversity, the greater the level of forced conformity, which seems like a prescription for trouble. Moreover, he sought to avoid a doctrine that would require the Court to constantly analyze legislation for compelling interests in the face of free exercise challenges. He concluded his opinion with little sympathy for members of religious minorities:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[313]

Although Scalia fashioned a strict-neutrality test in *Smith II*, he realized that strict neutrality actually meant structural discrimination against minority sects. It simply was not an important enough consideration to involve the courts in its resolution. And on that note, he abolished strict scrutiny.

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[312] *Id.* at 1605.

[313] *Id.* at 1606.

CONCLUDING REMARKS.

In an opinion founded on misrepresentation, the Court killed free exercise strict scrutiny in one stroke. With it really went the free exercise clause, as well. Strict scrutiny had given the clause a unique scope of its own. It had been important as a balancing force against the structural discrimination of majority rule, which even Scalia tacitly acknowledged to be real. Without the doctrine, the clause itself was reduced to a protection against religious discrimination, a spare equal protection clause. The free exercise clause no longer had any independent meaning.

There were obviously problems with strict scrutiny. Its mandated exemptions might conflict with the establishment clause. But it seems that any resolution of that conflict should have come at the expense of the establishment clause. To resolve the conflict by altering free exercise doctrine required the radical surgery Scalia administered in *Smith II*. No free exercise policy short of the elimination of exemptions would have definitively brought it into line with the commands of establishment clause doctrine. But only slight modification of the interpretation of that clause would have permitted the fullest construction of free exercise. The problem with clause conflict, it seems, is how to distinguish between acceptable forms of accommodation of religion from unacceptable forms establishment clause doctrine that in the abstract recoqnizes none.

A second fundamental problem with free exercise strict scrutiny centered around the inherent limitations on the Court's ability to evaluate religious claims. Part of the problem is that it has difficulty defining religion and recognizing marginal sects. But this problem seems to be a bit overstated. As Brennan pointed out in *Goldman*, a rule that appears to be neutral can often favor the Christian mainstream. That results from the structural bias of democracy. And he asked of Stevens, how one discriminatory rule was fairer than another. People who argue that the Court should not grant any exemptions because its cannot be absolutely certain it will never overlook one sect are following Stevens' reasoning. They fail to recognize that a no-exemptions policy also results in discrimination. Recognizing judicial limitations and the possibilities of discrimination under both approaches, Brennan sought to maximize religious liberty. Under such a theory the Court should not be deterred from granting free exercise exemptions because it might overlook an obscure faith. It should accommodate every belief it can genuinely recognize as legitimate. This approach might result in a small amount of judicial discrimination, but a no-exemptions policy would subject every clearly legitimate yet non-mainstream faith to the structural discrimination of democracy simply because a few fringe religions might not be judicially recognizable. That position does not seem rational.

Another part of the problem is that the Court cannot always ferret out fraudulent religious claims. But there are ways around this difficulty. Many claims are clearly legitimate. In almost every free exercise case reaching the Supreme Court, the government had not challenged the religious objectors sincerity of belief. Other claims are fairly easy to reject as motivated by secular concerns.[314] The problem arises with the claims that fall in the indeterminate zone in the middle. However, the Court could establish a policy to avoid in depth examination of those claims. It could opt to simply accept any claim which it cannot reasonably conclude to be bogus. That policy would grant exemptions in some bogus claims, but it would also lessen the invasiveness of the examination of sincerity, to which some justices, most notably Stevens, have objected.[315]

But these considerations did not seem to be driving the erosion of strict scrutiny in the 1980's. Instead, changes in the political climate, the ideological agendas of some justices, and changes in Court membership more adequately account for the eventual demise of the doctrine. And the unfortunate result may be not only structural bias in the democratic process but intentional suppression. The strict scrutiny doctrine and religious exemptions evolved gradually as the Court gained experience in the free exercise field. The suppression of Jehovah's Witnesses in the 1940's was one experience that probably shaped the outlooks of at least three justices. They ultimately decided that the *Gobitis*[316] decision, implicitly sanctioning such discrimination, had been wrongly decided.[317]

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[314] *See, e.g., Davis v. Page*, 385 F.Supp. 395 (1974) (rejecting parents challenge to school curriculum requirements when parent's initial written objection was based primarily on consideration of personal or political preferences)

[315] In fact, in *United States v. Ballard*, 322 U.S. 78, 92-95 (1944) (holding courts could not determine truth or falsity of religious beliefs, only the sincerity with which they are held) (Jackson, J., dissenting), Justice Jackson argued that courts should not even investigate sincerity, but should accept religious claims at face value.

[316] 310 U.S. 586 (1940)

[317] *See Jones v. Opelika*, 316 U.S. 584, 611-12 (1942) (Black, J., dissenting)

The new doctrine Scalia fashioned in *Smith II* had no analogue in history, so its potential impact on society is not clear. However, the closest approximation to the *Smith II* test is probably the *Gobitis* decision. But even in that case, it will be recalled, Frankfurter was influenced by the importance of the asserted government interest. That case fueled the spread of discrimination against the Jehovah's Witnesses in the early 1940's. And in the 1990's, there are a host of religious minorities, like Native Americans, who could easily become the modern counterpart to the Jehovah's Witnesses of the 1940's. The Rehnquist wing of the Court may have given history a chance to repeat itself.