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Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?

by DONALD L. BESCHLE*

Introduction

In the 1990 case of *Employment Division v. Smith*, a sharply divided Supreme Court abandoned the routine application of strict scrutiny when considering Free Exercise Clause claims seeking exemption from generally applicable legal duties or prohibitions. The Court returned to an older view of the Free Exercise Clause as protecting believers only from government acts that were aimed specifically at beliefs, and that grew out of hostility to the religion rather than a desire to further legitimate secular goals.

Reaction to *Smith* was largely negative, and legislative and state court responses followed, seeking to restore strict scrutiny as the appropriate standard when a free exercise exemption was denied. *Smith* was seen as an unfortunate decision reflecting insensitivity to the significance of the free exercise right. This article explores the possibility that *Smith* may have been less the result of that insensitivity than it was a response to the vast expansion of the concept of religion in constitutional law since the Court's first free exercise decisions employing strict scrutiny. This expansion made the application of strict scrutiny, at least as it is normally understood, wildly impractical.

At the same time, *Smith* seems to be an overreaction to the impracticability of applying a strong version of strict scrutiny to free exercise claims in a culture in which religion is defined in an extremely broad way. This article will suggest that courts should respond to the expansion of the scope of religion in recent decades by substituting the concept of conscience for a traditional or social science-based definition of religion. But this will require something

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less rigorous than strict scrutiny to be applied when the Free Exercise Clause is involved. This article suggests that applying a principle of proportionality in testing the refusal to grant an exemption on free exercise grounds is preferable to either the low-level scrutiny of *Smith* or the strong version of strict scrutiny enunciated (if not actively applied) in earlier decades.

Part I will briefly discuss the Supreme Court's treatment of free exercise cases since the late nineteenth century. Part II will discuss the Court's attempts to address the question of what qualifies as a religion for purposes of statutory or constitutional analysis, and how the Court's answer to that question complicated its commitment to the application of strict scrutiny to free exercise claims. Finally, Part III will suggest an approach to free exercise exemption that recognizes the expansive contemporary understanding of religious belief, and avoids both an unrealistic strict scrutiny approach and the low-level minimal scrutiny called for in *Smith*.

I. The Free Exercise Clause in the Supreme Court

The Supreme Court's free exercise jurisprudence has its origins in the national reaction, sometimes violent and overwhelmingly negative, toward the polygamy practiced and advocated by the Mormon Church in the nineteenth century.[1] Mormons settling in pre-statehood territories such as Utah and Idaho were subject to federally enacted criminal statutes, and thousands were prosecuted for violating federal statutes prohibiting polygamy.[2]

In 1878, the Court was confronted with the claim that such a conviction violated the defendant's free exercise rights by prohibiting the performance of a religious duty.[3] In beginning its analysis, the Court stated that its task was "to ascertain the meaning" of "religion" as used in the First Amendment and to determine the scope of "the religious freedom which has been guaranteed."[4] The first of these inquiries would seem to require the Court to decide whether the Church of Jesus Christ of Latter-day Saints actually qualified as a

1. Robert W. Gordon, *The Constitution of Liberal Order at the Troubled Beginnings of the Modern State*, 58 U. MIAMI L. REV. 373, 382 (2003) ("From 1860 to 1890, the federal government was mobilized to deploy an extraordinary arsenal of legal resources against Mormon families, churches, economic institutions and political arrangements.").

2. *Id.*

3. Reynolds v. United States, 98 U.S. 145 (1878).

4. *Id.* at 162.

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religion, but the Court did not pursue that inquiry, instead focusing on the scope of constitutionally protected religious freedom.

Drawing on a letter written by Thomas Jefferson, the Court made a distinction between the limitation on government's power "to intrude . . . into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency"[5] and the legitimate power of government "to interfere when principles break out into overt acts against peace and good order."[6] In short, the Free Exercise Clause protected belief and advocacy, but actions in pursuit of those beliefs could be prohibited if the prohibition satisfied the general constitutional requirements that later generations would refer to as the low-level "rational basis" test.[7]

This remained the standard for free exercise analysis for decades. Believers were successful in a number of cases that presented situations involving speech-related issues. In *Cantwell v. Connecticut*,[8] religious solicitors succeeded in challenging a local licensing system that permitted the administrator excessive discretion to label a cause as nonreligious.[9] In *West Virginia Board of Education v. Barnette*,[10] the Court invalidated a compulsory flag-salute requirement as applied to public school students who objected on religious grounds.[11]

Decisions involving religious advocacy were not always decided in favor of the believers, however. In *Chaplinsky v. New Hampshire*,[12] the defendant's conviction for hurling "fighting words" at a constable was affirmed with no particular attention given to the religious message being delivered by the street preacher.[13] And in *Prince v. Massachusetts*,[14] the Court rejected a free exercise challenge to a statute prohibiting the use of children in religious solicitations.[15]

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5. *Id.* at 163.

6. *Id.*

7. *See generally*, Symposium, *Equal Protection After the Rational Basis Era": Is It Time to Reassess the Current Standards of Review?*, 4 U. PA. J. CONST. LAW 235–449 (2002).

8. Cantwell v. Connecticut, 310 U.S. 296 (1940).

9. *Id.* at 307 (A license could not be conditioned on "a determination by state authority as to what is a religious cause.").

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

11. *Id.* at 642.

12. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

13. *Id.* at 570 ("[T]he trial court excluded, as immaterial, testimony relating to appellant's mission 'to preach the true facts of the Bible.'").

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

15. *Id.* at 160–61.

More significant than any individual case outcome, however, is the fact that any of these cases could have been decided without touching on the Free Exercise Clause at all. Each case presented free speech issues that could be resolved entirely by applying free-speech analytical tools; any mention of free exercise concerns added essentially nothing. Did the distinction drawn in 1878 between belief and expression on the one hand, and action on the other, essentially render the Free Exercise Clause redundant, especially in light of the Court's expansion of free speech protection that began in the 1930s?[16]

In 1963, the case of *Sherbert v. Verner*[17] presented a free exercise claim based entirely on conduct. A Seventh-Day Adventist was unable to qualify for unemployment benefits from South Carolina due to her refusal to accept jobs that would require Saturday work, which would violate Adventist principles.[18] The opinion/action distinction would likely have led to a decision favoring the state, after a finding that the failure to provide an exemption from the general duty to accept appropriate employment as a condition of receiving unemployment benefits satisfied the rational basis test. But the Court did not follow that path.

Instead, the Court noted that South Carolina had forced the applicant "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion."[19] When such a burden is placed on a believer, the Court held, it would be necessary for the state to justify it under the strict scrutiny analysis developed in equal protection cases.[20] The state would have to present a compelling state interest, and demonstrate that its refusal to accommodate was necessary to satisfy that interest.[21] The Court dismissed as unconvincing the State's suggestion that "fraudulent claims by unscrupulous claimants feigning religious objection," would threaten the unemployment compensation funds.[22]

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16. *See generally* Frank R. Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg*—and Beyond*, 1969 SUP. CT. REV. 41 (1969).

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

18. *Id.* at 399.

19. *Id.* at 404.

20. *Id.* at 406–07.

21. *Id.*

22. *Id.* at 407 ("For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative form of regulation would combat such abuses without infringing First-Amendment rights.").

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In the wake of *Sherbert*, the application of strict scrutiny to free exercise claims became the new norm, a norm that was most prominently restated in *Wisconsin v. Yoder*.[23] Members of Amish communities had no objection to sending their children to school through the eighth grade (typically until age fourteen), but objected to the requirement that their children attend public or private school until age sixteen.[24] The Amish maintained that the high schools their children would have to attend until age sixteen would impart values and skills likely to alienate the children from the Amish "church community separate and apart from the world and worldly influence,"[25] a concept "central to their faith."[26]

Applying strict scrutiny, the Court found that Wisconsin did have a compelling interest in seeing that young people had sufficient education to become productive members of society.[27] But, taking account of the history of Amish self-sufficiency and peaceful and law-abiding coexistence with the larger non-Amish world, the Court held that Wisconsin had failed to demonstrate that its insistence on two years of high school, with no exception for the Amish, was necessary to further that interest.[28]

Decades later, it is possible to look back on *Yoder* as a "hybrid" case,[29] one presenting not merely free exercise concerns, but also First Amendment speech claims, and family autonomy issues.[30] But when decided, it was regarded as a free exercise case, and a strong reaffirmation that *Sherbert* strict scrutiny was the appropriate free

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

24. *Id.* at 207.

25. *Id.* at 210.

26. *Id.*

27. *Id.* at 221.

28. *Id.* at 234–36.

29. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651 (2011); *see infra*, note 50 and accompanying text.

30. In this sense, *Yoder* is similar to earlier cases that could be viewed as involving free exercise rights, or as primarily dealing with parental rights. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court struck down a statute requiring that all students attend public, rather than private, schools. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court upheld the application of a child-labor prohibition to a family's use of a nine-year-old girl to help distribute religious literature.

exercise standard.[31] In the decades immediately following *Yoder*, the Court continued to invoke the language of strict scrutiny in free exercise cases.[32]

But over time, it became obvious that this was perhaps a different strain of strict scrutiny from its application in classic contexts such as racial discrimination, where it approaches a rule of per se invalidity.[33] In cases involving a denial of unemployment benefits analogous to *Sherbert*, the application of strict scrutiny unsurprisingly led to victories for free exercise claimants.[34] But cases presenting different types of free exercise claims failed, despite serious questions about whether the government had satisfied strict-scrutiny standards. Is achieving the optimal pedestrian crowd flow at the Minnesota State Fair really a compelling state interest?[35] Is denying a military psychologist the right to wear a yarmulke on military bases necessary to preserve the government's compelling interest in consistent uniform standards?[36] These and other cases led commentators to note that free exercise strict scrutiny was rather feeble.[37]

When the Court considered *Employment Division v. Smith*,[38] there was little reason to anticipate a change in the articulated free exercise standard. Claimants were Native American Church members who ingested peyote for sacramental purposes.[39] Their peyote use led to their discharge from employment by a private drug rehabilitation program, and their inability to qualify for unemployment compensation because they had been dismissed for

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31. *See, e.g.*, Jesse Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943 (1986); SHAWN FRANCIS PETERS, THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION AND PARENTAL RIGHTS (2003).

32. *See infra*, notes 34–37.

33. Gerald Gunther describes strict scrutiny, as applied in its classic context of equal protection laws, to be "strict in theory and fatal in fact." Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

34. Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989).

35. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

36. Goldman v. Weinberger, 475 U.S. 503 (1986).

37. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 446–47(1994) (playing on Gunther's phrase, *supra* note 33, stated that post-*Sherbert* strict scrutiny had been "strict in theory but feeble in fact").

38. *Smith*, 494 U.S. at 872.

39. *Id.* at 874.

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misconduct.[40] The Oregon Supreme Court upheld their exemption claim based on the Free Exercise Clause.[41]

As a case involving unemployment compensation, *Smith* could be seen as squarely within the scope of *Sherbert*.[42] But unlike earlier unemployment-related cases, this one presented a "war on drugs" justification for the denial of the exemption.[43] The Court has shown little inclination to interfere with government efforts to fight illegal drug use, whether the issue presented involves the Fourth Amendment,[44] the First Amendment's Free Speech Clause,[45] or federalism.[46] Few would have expected Smith to prevail; most would have anticipated the Court to apply its "feeble" version of free exercise strict scrutiny and reverse the Oregon Supreme Court.

That is the route chosen by Justice O'Connor in a concurring opinion.[47] But a five-justice majority, led by Justice Scalia, took the opportunity to rework free exercise jurisprudence, in a way that largely returns to the standards of the nineteenth-century polygamy cases.[48] Justice Scalia notes that strict scrutiny might be the appropriate standard to assess a statute or government practice that singles out religious behavior for disadvantage not extended to similar, but nonreligious activity.[49] It also might be appropriate in cases presenting a "hybrid" of free exercise and other constitutional claims.[50] In all other cases, however, the low-level rational basis test would suffice.

Justice Scalia's contention that *Smith* was no change at all, but entirely consistent with precedent may not be entirely disingenuous, in light of the weak application of strict scrutiny in cases since

40. *Id.*

41. Smith v. Emp't Div., 307 Ore. 68, 763 P.2d 146 (1988).

42. *See supra* text accompanying notes 17–22.

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

44. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (minor traffic violation justified police stop in "high drug area," leading to observation of drugs in the vehicle).

45. *See* Morse v. Frederick, 551 U.S. 393 (2007) (holding that a school may discipline students for speech perceived as advocating drug use).

46. *See* Gonzalez v. Raich, 545 U.S. 1 (2005) (upholding federal drug laws in conflict with California's medical marijuana statutes).

47. *Smith*, 494 U.S. at 903–07 (O'Connor, J., concurring).

48. *Id.* at 879 (citing Reynolds v. United States, 98 U.S. 145 (1879)); *see supra* notes 1–6 and accompanying text.

49. *Smith*, 494 U.S. at 877.

50. *Id.* at 881–82.

Sherbert that do not involve unemployment.[51] And *Yoder*, perhaps the high-water mark for the Free Exercise Clause, can be reclassified as a "hybrid" case.[52] Most saw *Smith*, however, as much more than merely a shift to semantics more consistent with actual practice. "Hybrid" cases could presumably be decided without the free exercise element adding anything to the right with which it was paired. Despite frequent government victories, post-*Sherbert* cases at least articulated a role for the Free Exercise Clause beyond prohibiting active antireligious bias. While difficult to prove, it is quite possible that the articulated strict scrutiny standard caused the government to take free exercise claims seriously, if only to avoid the inconvenience and expense of litigation, even with a successful outcome.

While the academic response to *Smith* was mixed,[53] reaction in the political world was sharply negative. Religious conservatives saw a threat to believers,[54] while religious and secular liberals saw an unfortunate contraction of individual rights. Congress responded to *Smith* with the 1993 enactment of the Religious Freedom Restoration Act,[55] which essentially instructed federal courts to apply pre-*Smith* standards to free exercise claims. In its first encounter with the Act, the Supreme Court held in *City of Boerne v. Flores*,[56] that the Act was unconstitutional, at least insofar as it set a standard for review of state and local government actions.[57]

Congress had based the Act on its power to enforce the Fourteenth Amendment restrictions on state action.[58] Revisiting a longstanding debate concerning the scope of this authority, the Court held that it did not include the authority to define the scope of the right itself, a task entrusted to the courts, but only to provide

51. *See supra* notes 31–37 and accompanying text.

52. *See supra* note 30. Justice Scalia focuses on the parental rights aspect of *Yoder*, 494 U.S. at 881, footnote 1.

53. *Compare* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. (1990) (criticizing *Smith*), *and* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (criticizing *Smith*), *with* Gerald Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991) (defending *Smith*), *and* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine and the Public Good*, 2004 B.Y.U. L. REV. 1099 (defending *Smith*).

54. *See generally*, Bradley P. Jacob, *Free Exercise in the 'Lobbying Nineties,'* 84 NEB. L. REV. 795 (2006).

55. 42 U.S.C. §§ 2000bb *et seq.* (2011).

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

57. *Id.* at 536.

58. *Id.* at 529.

enforcement of the right as defined by the Court.[59] The scope of the Free Exercise Clause, as defined by the Court, extends no further than to protect against antireligious discrimination.[60] Here, the Court saw the Act as attempting to extend the scope of the right to include protection against application of neutral statutes of general application to religious believers in some circumstances.[61]

Smith and *City of Boerne*, then, might be seen as clarifying the world of free exercise jurisprudence, making resolution of free exercise claims a relatively simple matter. The 1993 case of *Church of Lukumi v. City of Hialeah*[62] conveniently provided an example of the type of free exercise claim that would be subject to strict scrutiny even after *Smith*. The city of Hialeah, Florida, in response to negative public reaction to Santeria[63] and its adherents' practice of sacrificing small animals, as well as popular discomfort with Santeria in general,[64] enacted a prohibition on animal practice.

While justified as an act against animal cruelty, the ordinance contained exceptions that resulted in its scope being limited to the practices of Santeria.[65] The Court saw this as the type of targeting of religious behaviors "stem[ming] from animosity to religion or distrust of its practices,"[66] that remained subject to strict scrutiny after *Smith*. For the religious believer seeking an exemption under the Free Exercise Clause, analysis should be simple. Is the government statute or practice, like the *Hialeah* ordinance, "an improper attempt to target [believers]" and their religious practices?[67] If so, success is likely; if not, failure seems nearly certain.

This simple bifurcation may be accurate with respect to the force of the Free Exercise Clause itself, but it leaves a number of alternative routes to success potentially open. *City of Boerne*

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59. *Id.* at 529–36.

60. *Id.* at 529 ("[A] law targeting religious beliefs as such is never permissible." (citing Church of Lukumi Babdu Aye v. Hialeah, 508 U.S. 520, 533 (1993))).

61. *Id.* at 532 (The Religious Freedom Restoration Act "appears . . . to attempt a substantive change in constitutional protections.").

62. *Hialeah*, 508 U.S. 520 (1993).

63. *Id.* at 524 ("When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretism, or fusion, is Santeria, "the way of the saints.").

64. *Id.* at 535–36.

65. *Id.* at 547.

66. *Id.* at 531–32.

67. *See supra* notes 56–61 and accompanying text.

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invalidated the application of the Religious Freedom Restoration Act to state and local action on the grounds that such an attempt by Congress exceeded its Fourteenth Amendment power.[68] It was, then, a decision based on federalism concerns. But Congress clearly has the authority to amend federal statutes to create exemptions, and the Act can be seen as grafting an exemption based on religious grounds to any federally imposed obligation, unless the denial can be justified under *Sherbert* analysis.[69]

Smith says nothing about the ability of states to grant broader free exercise rights to their citizens, and many states have acted, post-*Smith*, to impose strict-scrutiny standards for cases arising under the free exercise provisions of their own state constitutions.[70] While one might argue that state-mandated exemptions granted to believers would create problems with the First-Amendment Establishment Clause,[71] it seems clear that the Supreme Court is willing to allow states leeway in striking their own balance between establishment and free exercise.[72]

While *City of Boerne* eliminated the Fourteenth Amendment as a source of congressional power to expand free exercise protection, there are other grounds on which to base federal limitations of state power. Acting pursuant to its commerce and spending powers, Congress has enacted the Religious Land Use and Institutionalized Persons Act,[73] imposing strict-scrutiny standards on state government actions that impose substantial burdens through land use decisions or regulations of persons institutionalized in programs receiving federal funds.[74] While debate continues over the practical impact of these provisions, as well as their constitutionality,[75] they serve to not only

68. *See* Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418 (2006); *In re* Young, 141 F.3d 854 (8th Cir. 1998).

69. *Id.*

70. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275, 275 (1993); *see generally* Symposium: *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. 513 (1999).

71. *See* Estate of Thorton v. Caldor, Inc., 472 U.S. 703 (1985) (holding that a state statute providing employees the absolute right not to work on their chosen Sabbath violates Establishment Clause).

72. *See* Locke v. Davey, 540 U.S. 712 (2004) (room for "play in the joints" between the Establishment Clause and Free Exercise Clause).

73. 42 U.S.C. § 2000cc *et seq.* (2011).

74. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding the Act in a case brought by prisoners denied access to religious literature and ceremonial items).

75. *See, e.g.*, Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715 (1998) (supporting constitutionality); Daniel O. Conkle,

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complicate the jurisprudence of religiously based exemption claims, but also to illustrate the continued sense that *Smith* is an inadequate approach to the Free Exercise Clause.

Advocates and opponents of *Smith* present positions that seem both powerful and flawed. Are these polar opposites simply reflections of the tension between the two religion clauses of the First Amendment? Does that condemn us to either endorsing one position as less problematic (though not without serious flaws), or jumping back and forth as a way of attempting to balance? Is there a way out of this dilemma? Before directly addressing these questions, it will be instructive to return to a question that arises in both Establishment Clause and Free Exercise Clause cases, but continues to frustrate courts and commentators. That question concerns the definition of religion with which courts must work.

II. Religion: The Persistent Definitional Problem

In any Establishment Clause or Free Exercise Clause case, a court must determine whether the activity in question is, in fact, religious. Often the religious nature of the activity will be obvious, and no discussion of the issue will be necessary. But sometimes that will not be the case. Is yoga a religious activity that should not be taught in public schools?[76] Are individual beliefs, apart from any organized community, religious?[77] The scope of individual rights or government authority will frequently turn on the definition of "religion."

The Supreme Court's most extensive analysis of the definitional question came in cases presenting claims for conscientious objector status under the Selective Service Act[78] during the Vietnam War era. The Act exempted from combat training or service "those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[79] This type of exemption could trace its history to eighteenth-century

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Congressional Alternatives in the Wake of City of Boerne v. Flores*: The (Limited) Rule of Congress in Protecting Religious Liberty From State and Local Infringement*, 20 U. ARK. LITTLE ROCK L. REV. 633 (1998) (questioning constitutionality).

76. *See* Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979).

77. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989).

78. United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970).

79. *Seeger*, 380 U.S. at 164–65.

exemptions from militia service given by states to members of recognized "peace churches," such as the Quakers.[80]

The government's resort to the military draft for much of the twentieth century would raise questions concerning the proper scope of the conscientious objector category not only as a matter of policy, but also as a matter of constitutional law. The World War I Draft Act[81] granted conscientious objector status to members of any "well recognized religious sector organization [whose] creed or principles forbade its members to participate in war in any [form]."[82] Would limiting the exemption to members of particular religious groups create serious Establishment Clause problems?

Whether in response to constitutional issues or simply policy concerns, the World War II Draft Act eliminated the requirement that the applicant belong to a pacifist religion, replacing it with the requirement that the opposition to war be based on "religious training and belief."[83] At the same time, the 1940 Act specifically excluded from conscientious objector status those whose opposition to war was based on political, sociological or economic grounds, or from a "merely personal moral code."[84]

United States v. Seeger[85] presented the Court with the case of an applicant denied conscientious objector status on the grounds that he was agnostic about the existence of a "Supreme Being." Seeger rested his pacifism on his readings of philosophers such as Plato, Aristotle, and Spinoza, and the "religious faith in a purely ethical creed" derived from that reading, one "without belief in God, except in the remotest sense."[86] Thus, the issue as defined by the Court was a narrow one of statutory interpretation. The statute defined "religious training and belief" as "individual belief in a relation to a Supreme Being."[87] Did "Supreme Being," then, mean "the orthodox God or

80. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468–69 (1990).

81. Selective Draft Act of 1917, ch. 15, 40 Stat. 76.

82. *Id.* at 78. *See Seeger*, 380 U.S. at 171.

83. *Seeger*, 380 U.S. at 171–72. "[T]he consensus of the witnesses appearing before the congressional committees was that individual belief rather than membership in a church or sect—determined the duties that God imposed upon a person in his everyday conduct . . . ." *Id.* at 172.

84. *Id.* at 172 (quoting the 1948 amendment to the 1940 Act).

85. *Id.* at 163.

86. *Id.* at 166.

87. *Id.* at 165.

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the broader concept of a power or being" that demands subordination of other considerations?[88]

While the Court defined its task as one of statutory interpretation, it is not difficult to imagine that the justices considered the case's First-Amendment implications. In 1918, the Court upheld the constitutionality of the conscientious objector provisions of the 1917 Act,[89] but the Act was interpreted broadly, to include not only traditional pacifist church membership, but also "personal scruples" as qualifying for conscientious objection status.[90] Given the Court's commitment to religious neutrality between 1947 and 1965,[91] one might predict the Court would interpret the statute's "religious training and belief" language broadly, making it unnecessary to determine whether a religiously based category violated the Establishment Clause.[92]

Perhaps, then, it was unsurprising when the Court held that Seeger's claim fell within the statutory language. Citing not only legal sources, but also the work of twentieth-century theologians, the Court concluded that a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying" as religious was the correct standard, and that under that standard, Seeger had demonstrated religious belief.[93] In a concurring opinion, Justice Douglas touched on the increased religious pluralism of twentieth-century America, pointing in particular to Eastern religions that maintained a concept of ultimate reality quite different from the Western concept of a single, distinct transcendent being.[94]

The Court noted that Seeger had never claimed to be an atheist, and had always insisted that his position was, in fact, religious.[95] But

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88. *Id.* at 174.

89. Selective Draft Law Cases, 245 U.S. 366, 389–90 (1918).

90. *Seeger*, 380 U.S. at 171.

91. The modern consideration of the Establishment Clause began with *Everson v. Board of Education*, 330 U.S. 1 (1947) which, while upholding New Jersey's practice of providing free busing to both public and private schools, did so while enunciating strong separatist principles. Shortly before *Seeger*, the Court handed down its decisions banning prayer and devotional Bible reading from public schools. Engel v. Vitale, 370 U.S. 421, 425 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 224–225 (1963).

92. *Seeger*, 380 U.S. at 165–66.

93. *Id.* at 176.

94. *Id.* at 189–93 (Douglas, J., concurring).

95. *Id.* at 187.

Welsh v. United States[96] presented a conscientious objector claim by an applicant who had struck the word "religious" from his application, and had stated that his pacifism was derived from readings in history and sociology. As the case progressed through the legal system, Welsh stated that his objection to the characterization of his views as religious had rested upon his narrow interpretation of the term, and that when told of the *Seeger* conception of religion, he could comfortably regard his pacifism as religiously based.[97] Still, his claim was more clearly nontheistic than Seeger's. Nevertheless, the Court found that Welsh's beliefs were "held False . . . with the strength of more traditional religious convictions"[98] and were sufficient to qualify him for conscientious objector status. Justice Harlan found the Court's attempt to bring nontheists within the statute unconvincing, but concurred on the grounds that to fail to extend the exemption to nontheistic views would violate the Establishment Clause.[99]

Subsequent cases continued to define the scope of religious belief favorably to free exercise claimants, beyond the confines of the Selective Service Act. In *Thomas v. Review Board*,[100] a Jehovah's Witness challenged Indiana's denial of unemployment benefits to him following his dismissal from work for refusing to work on weapons production.[101] Despite evidence that working on weapons was not clearly prohibited to Jehovah's Witnesses,[102] the Court held that he did not quit for merely "personal reasons," but rather for religious reasons, and was therefore within the scope of *Sherbert*.[103] In other words, the individual's religious beliefs need not be clearly the dominant view of his religious community. Thus, for example, a Catholic pacifist's views remain religious despite going further than the dominant "just war" tradition of the Church.[104]

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96. Welsh v. United States, 398 U.S. 333 (1970).

97. *Id.* at 341–42.

98. *Id.* at 343.

99. *Id.* at 356–61 (Harlan, J. concurring).

100. Thomas v. Review Bd., 450 U.S. 707 (1981).

101. *Id.* at 710.

102. *Id.* at 715. Jehovah's Witnesses other than Thomas did not find the work unacceptable. *Id.*

103. *Id.* at 716.

104. *Id.* at 715–16 ("The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."). Under the statute, objection to only "unjust war" does not qualify for conscientious objector status. *See* Gillette v. United States, 401 U.S. 437, 443 (1971).

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Then in *Frazee v. Illinois Department of Employment Security*,[105] the Court made it clear that religious belief did not depend on membership in any defined religious body. Frazee was denied unemployment compensation due to his refusal to accept employment that would require Sunday work.[106] Frazee described himself as a Christian, but did not claim membership in any church or sect.[107] He did not point to the teachings of any "established religious body,"[108] but instead relied on his individual take on his Christian duty.[109] The Court held that adherence to or membership in any recognized body was unnecessary. Instead, the determinative question was one of Franzee's sincerity.[110] Finding that Frazee was sincere in his individualized religious commitment, the Court held that he was entitled to compensation.[111]

The *Frazee* Court's emphasis on the applicant's sincerity traces its significance back to *United States v. Ballard*.[112] Ballard was convicted of mail fraud for his use of the mails to solicit contributions for membership in his "I Am" movement.[113] Ballard claimed to be a divine messenger who had the power to cure disease, and who had in fact cured hundreds.[114] The question before the Supreme Court was whether the truth of Ballard's claim should be a proper matter for the jury.[115] Wary of weighing the truth claim of any religious believer, the Court held that the conviction could stand only if the jury found that Ballard's beliefs in his own power were not sincere.[116] The point of the sincerity inquiry in *Ballard* was not exactly the same as the inquiry in *Frazee*. In *Ballard*, sincerity was obviously relevant (whether or not determinative) in establishing the mental state necessary for fraud. But the relationship between sincerity and whether a claim should be classified as religious seems far less clear.

105. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989).

106. *Id.* at 830.

107. *Id.* at 834.

108. *Id.* at 831.

109. *Id.*

110. *Id.* at 834.

111. *Id.*

112. United States v. Ballard, 322 U.S. 78 (1944).

113. *Id.* at 79.

114. *Id.* at 79–80.

115. *Id.* at 85–86.

116. *Id.* at 84. Dissenting justices noted the difficulty of separating the question of the truth of a statement from one's belief in it. *See id.* at 88–92 (Stone, C.J., dissenting); *id.* at 92–95 (Jackson, J., dissenting).

It is not difficult to understand why the Court might have imported the sincerity test from its *Ballard* context into *Frazee.* History is replete with examples of new religious ideas being disparaged as not worthy of recognition as religions at all because of their novelty and their dissimilarity to then-dominant religions. The Romans regarded early Christians as atheists due to the Christian rejection of the gods of the Pantheon.[117] Is Buddhism, lacking a clear concept of a transcendent God (or gods) a religion or a philosophy?[118] During the eighteenth and nineteenth century in the young United States, Deists, Universalists, Transcendentalists, and others were labeled as atheists and even new religions that self-described themselves as Christian, such as the Mormon church, were regarded with suspicion, if not outright hostility.[119]

And yet, how broadly can the concept of religion be stretched? It is one thing to accept the presence of a new and different sect in the community, but the stakes are raised when the consequences that flow from recognition as religious include exemption from obligations that bind the community at large, exemptions that might be of great value to any citizen. While not impossible to disprove,[120] sincerity is difficult to challenge, especially under the *Ballard* injunction to refrain from measuring the truth claim of the individual.

The question of whether beliefs are sincere seems separate from the question of whether a belief system qualifies as a religion. But when put in this context of someone seeking an exemption from a legal duty, the connection becomes evident. Even those who are open to creating exemptions for religious believers may hesitate if they fear that undeserving, insincere claimants will abuse the exemption. And this fear can be effectively invoked to oppose the recognition of the exemption itself, even for the sincere.

This point can be illustrated by an example from the earliest days of American church-state relations. In the early nineteenth century,

117. *See generally* KAREN ARMSTRONG, THE CASE FOR GOD xvi–xvii (2010).

118. *See Seeger*, 380 U.S. at 180–85.

119. *See generally* STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA *passim* (2010). *See especially id.* at 81–118 (documenting the denunciation of Deists and other liberal religionists as "atheists" or "infidels" during the early years of the nineteenth century).

120. *See, e.g.*, Hansard v. Johns-Manville Products Corp., 1973 WL 129 (E.D. Tex. 1993) (sincerity claim rejected when it conflicted with the plaintiff's actions); Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2005) (Marine rejected for conscientious-objection discharge upon finding that his recent experience of "finding Jesus" left him with a very "immature,' "not well developed" faith).

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debate sharpened in the last few states that maintained systems of taxation for the support of an established religion.[121] Lyman Beecher, perhaps the most prominent of that era's defenders of state establishments, was critical of those who supported exemption from the tax designated for support of the established church on the grounds that their conscience led them to adhere to a different sect.[122]

One of Beecher's arguments was that accommodating the sincere religious dissents of a few would open the floodgates for exemption of those merely seeking to avoid a tax. An exemption that "accommodates the conscientious feelings of one" also "accommodates the angry, revengeful, avaricious, and irreligious feelings of fifty."[123] On a broader plane, this early debate illustrates the early connection between free exercise and nonestablishment principles; here the free exercise claim is to be free of obligations imposed by the established church through its relationship with the state.[124] But the same fear of extending exemption to those who do not truly deserve it can be seen centuries later in the debate over the scope of a religiously based free exercise exemption.

A narrow interpretation of the scope of the Free Exercise Clause might rest on nonestablishment principles, seeing exemption as undue favoritism to religion. Clearly, that concern has been in the background of the cases that call for a broad definition of religion.[125] But to what extent has the danger of extending exemption to the insincere also been present? And as the definition of religion expands, doesn't the danger of bad faith claimants inevitably expand?

The *Sherbert* decision came at a transitional moment in American culture, one that saw great changes in religion as well as other areas of life. The "Sixties," which as a cultural era, is usually seen as dating from the 1963 assassination of President Kennedy,[126] would see a flurry of interest in Eastern religion and dissident theologies, along with developments in mainstream religious bodies, such as the aftermath of the Vatican Council in the Catholic Church

121. *See* GREEN, *supra* note 119, at 119–145.

122. *Id.* at 129–30.

123. *Id.* at 129.

124. *Id.* at 119–145.

125. *See, e.g.*, *Welsh*, 398 U.S. at 356–61(Harlan, J., concurring).

126. See generally the essays contained in THE AGE OF PROTEST (Walt Anderson ed., 1969).

that would make the American religious landscape much more diverse.[127]

But the years immediately preceding the cultural Sixties have been described as ones of exceptional religious consensus. The most prominent study of American religion during the post-World War II period, Will Herberg's *Protestant Catholic Jew*,[128] found an exceptionally high level of religious activity, with in excess of ninety percent of the population self-identifying as an adherent of one of the three religious traditions named in the book's title.[129] Yet the specifics of the religious traditions, Herberg found, tended to fade in favor of a public "religion of religion," a degree of public piety that insisted on public displays of theism, and expected that that theism would fit comfortably into one of the three named traditions, but had little to do with the specific tenets of those traditions.[130]

A postwar consensus about the importance of religion would lend support to claims of free exercise exemptions. At the same time, the overwhelming identification of religion with the three branches of Judeo-Christian history would make the specter of abuse of free exercise exemptions by those who were not genuinely religious seem of minimal importance. But would this be true as cultural attitudes toward religion shifted? Could *Sherbert*, supplemented by the definition of religion put forward in the draft exemption cases, survive?

In pointing to belief systems outside the Judeo-Christian tradition that would nevertheless be considered religions, the Court in the 1960s mentioned Eastern traditions such as Buddhism, which few would exclude from the category.[131] Consensus is less likely to arise when the belief system is without a long history and millions of adherents worldwide. One such example is the status of Scientology, a movement that grew out of the mid-twentieth century writings of L.

127. *See generally* DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION (2001).

128. WILL HERBERG, PROTESTANT-CATHOLIC-JEW (rev. ed. 1960).

129. *Id.* at 46.

130. Herberg found that the specific tenets of the three religions were, in the background, while the "common religion" of Americans, the "American Way of Life," was in the forefront. *Id.* at 72–90.

131. Thus, despite their very small numbers in 1960s America, Buddhists and Hindus were easily recognized as religious by the Court in its discussion of Seeger's claim. *Seeger*, 380 U.S. at 174–75.

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Ron Hubbard and was not labeled a church until 1955,[132] has been at issue not only within the United States but in foreign courts as well.[133] Despite the novelty of the Church and the distance between its teachings and traditional faiths, American courts have recognized it as a religion.

In contrast to the short history of Scientology stand some belief systems that, while far outside the mainstream of American religion, can draw on long histories. The Wiccan faith, "a matriarchal religion which originated in Europe," includes "belief in a deity," has its own ceremonies and festivals,[134] and seems to satisfy any reasonably liberal definition of religion. Does this assessment extend to, for instance, Satanism, the worship of a deity opposed to the Judeo-Christian God? Self-described Satanists have described their belief systems in radically different ways. One Eleventh Circuit case presented a Satanist who maintained that "hatred of one's enemies is of utmost importance; revenge should be a top priority."[135] In contrast, one district court considered a self-described Satanist who maintained that Satanism was "a humanistic ethical system which would never allow for violence," and that included "compassion rituals" that allowed him to free himself of pent-up anger.[136] Does this wide divergence challenge the status of Satanism as a religion, or does the principle of *Frazee*[137] permit individual conceptions to qualify regardless of their labels?

Even when dealing with a relatively coherent system such as Scientology, it is difficult to avoid the suspicion that there lurks a sincerity issue, that the religious label is being invoked simply to obtain some secular benefit or immunity. And as religious claims become even farther removed from the mainstream, and individuals seek exemptions seemingly far removed from the classic model of the religious pacifist, skeptical views of the sincerity of claims will inevitably increase.

Several litigants have attempted to gain free exercise exemptions for marijuana use, usually without success. Unlike the Native

132. *See* Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969), *cert denied* 396 U.S. 963 (1969).

133. *Id.* See also the summary of Italian Supreme Court's Decision on Scientology *in* NORMAN DORSEN, MICHAEL ROSENFELD, ANDRES SAJO & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1018–20 (2010).

134. *See* Roberts v. Ravenswood Church of Wicca, 292 S.E.2d 657, 656–59 (1982).

135. McCorkle v. Johnson, 881 F.2d 993, 996 (11th Cir. 1989).

136. Howard v. United States, 864 F. Supp. 1019, 1022 (D. Colo. 1994).

137. *See supra* notes 105–11 and accompanying text.

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American religionists in *Smith*,[138] these defendants have been unable to point to a long-established and well-defined faith community tradition. Rather they have framed their claims in ways ranging from those having a tenuous relationship to a recognized religious tradition,[139] to those having idiosyncratic views of the demands of a mainstream religion,[140] to those claims that are clearly based on individual beliefs. Possibly the best example is the 'Church of Marijuana' at issue in *United States v. Meyers*.[141] The Church had no structure and apparently no ceremonies apart from smoking marijuana, and no doctrine apart from working for its legalization.[142] The Tenth Circuit held that while it found Meyers' views "sincere," those views did not constitute a religion.[143] *Meyers* shows that courts have been able to reject some free exercise claims as nonreligious, despite the broad language of the Supreme Court draft cases. Other examples also exist. In *Church of the Chosen People v. United States*,[144] the district court rejected a claim for tax-exempt status to an organization on the grounds that its advocacy of same-sex relationships was a secular, rather than a religious pursuit.[145] And, in a case involving what is perhaps the most idiosyncratic religious claim to make it into the federal reporter system, the district court in *Brown v. Pena*[146] rejected the contention that an employee allegedly fired because he believed a certain brand of cat food was essential to his well-being was dismissed because of that "religious" belief.[147]

But if these cases make administering the "religion/nonreligion" question seem easy, what are we to make of cases that present worldviews surely more disturbing than a belief in the ultimate power of cat food? The Ku Klux Klan has famously styled itself as a body

138. *See supra* notes 38–50 and accompanying text.

139. *See, e.g.*, United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996) (defendant founded the "Church of Marijuana").

140. *See, e.g.*, State v. Pederson, 679 N.W.2d 368 (Minn. Ct. App. 2004) ("Messianic Jew" believes that the Bible authorizes the use of marijuana).

141. *Meyers*, 95 F.3d at 1475.

142. United States v. Meyers, 906 F. Supp. 1494, 1504–09 (D. Wyo. 1995) (comparing the attributes of Meyers' church with those of recognized religions).

143. *Meyers*, 95 F.3d at 1484.

144. Church of the Chosen People v. United States, 548 F. Supp. 1247 (D. Minn. 1982).

145. *Id.* at 1253 ("The plaintiff's ideology did not address the fundamental and ultimate questions concerning the human condition, such as the nature of good and evil, right and wrong, life and death.").

146. Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977).

147. *Id.* at 1384–85.

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advancing Christian values and its cross-burning activity as a religious ritual.[148] In *Peterson v. Wilmur Communications*,[149] the district court accepted plaintiff's argument that his demotion at work due to his adherence to the white supremacist belief system "Creativity" violated his Title VII right to be free of religious discrimination in the workplace.[150] Drawing on Supreme Court precedent, the Court held that "[s]o long as the belief is sincerely held and is religious *in the plaintiff's scheme of things*, the belief is religious regardless of whether it is 'acceptable, logical, consistent, or comprehensible to others.'"[151]

Thus, the issue of classifying a belief system as a religion will not lead to quick and clear answers. Using too stringent a test creates the likelihood that a religion will be dismissed simply because of its novelty, or worse, due to its unpopularity. Using too liberal a test creates the possibility that the category will be exploited for secular advantage. It is likely that one of the factors motivating the *Smith* majority was that it makes classifying the belief system largely irrelevant and unnecessary in cases where free exercise exemptions are sought. Of course, it will still be necessary to ask the question of whether something qualifies as religious in other contexts, such as Establishment Clause cases,[152] but those cases do not present the same dangers of misclassification as do free exercise claims. But *Smith's* insistence that a neutral statute need not be applied differently to religious believers faces widespread opposition. Is there a way to resolve the free exercise problem that avoids the dangers of overprotecting or underprotecting conscientious objectors from generally imposed obligations?

III. Proportionality as an Alternative to *Smith* and *Sherbert*

Sherbert was decided at the end of a period of exceptionally high acceptance of traditional Judeo-Christian religious beliefs.[153] But 1963 also saw the start of a series of cultural transformations that included the growth or emergence of religion outside of that broad tradition, and increased attention to the presence of nontheistic philosophies

148. *See* Commonwealth v. Lower, 2 Pa. D. & C.4th 107 (1989).

149. Peterson v. Wilmur Commc'ns, 205 F. Supp. 2d 1014 (E.D. Wisc. 2002).

150. *Id.* at 1024–25.

151. *Id.* at 1022 (emphasis added).

152. *See, e.g.*, Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (transcendental meditation in public schools). *See also* HERBERG, *supra* note 128.

153. *See* HERBERG, *supra* note 128.

among Americans. Establishment Clause concerns would require that the definition of religion be expanded to accommodate those belief systems in free exercise claims. But this would create its own problems.

The broad, imprecise formula for defining religion set forth in the Vietnam War-era draft cases, with the overlay of the significance of "sincerity" noted as early as *Ballard*[154] created the possibility that the number of individuals who claimed the protection of the Free Exercise Clause would increase dramatically. Surely the clause could not have meant to grant any citizen the right to an exemption from any obligation he sincerely found offensive, so it should not be surprising that post-*Sherbert* decisions applied an unusually deferential version of "strict scrutiny" to deny exemption while accepting the religious nature of the claim.[155]

Perhaps, then, *Smith* was, if not inevitable, at least unsurprising. Concern that even sincere religious believers should still comply with generally applicable social obligations could easily be compounded with unspoken concerns that a broad free exercise right of exemption might be extended to those who, whether sincere or cynical, were outside the scope of those the Free Exercise Clause was intended to protect. But the strong negative reaction to *Smith*, evident not only in public opinion, but in legislative and state constitutional insistence on *Sherbert* standards,[156] resulted in there being a patchwork of free exercise standards across the states, and across specific issues. A simple return to *Sherbert* standards, at the state or national level, merely returns us to the pre-*Smith* quandary of trying to avoid overprotection by either manipulating the definition of religion or applying a remarkably weak version of strict scrutiny. Is there a way out of this dilemma other than accepting *Smith* and relying on legislative decisions concerning exemptions?

Any solution will require examination of two issues: the definitional problem concerning the eligibility of belief systems for free exercise protection, and the question of the proper standard of review in free exercise claims once a claimant establishes the threshold showing of eligibility. The interplay of how these two questions are resolved will need to avoid the pitfalls of both *Smith* and *Sherbert*.

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154. *See supra* notes 112–16 and accompanying text.

155. *See supra* notes 33–37 and accompanying text.

156. *See supra* notes 53–57, and notes 70–75, along with accompanying text.

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Much has been written on the question of the proper definition of religion for use in Religion Clause jurisprudence.[157] Unsurprisingly, no clear test has emerged. Instead, we have been left with a list of identifying characteristics of religion, derived as much from sociology or anthropology as theology,[158] with no consensus as to which of these characteristics are necessary or sufficient. And, since the definitional problem will arise in both free exercise and Establishment Clause settings,[159] a threshold question will need to be resolved. Are we to employ a single definition for use in both clauses, or do free-exercise and establishment cases call for different approaches to identifying religion?

The text of the First Amendment seems to contemplate a single definition, but some have recognized that while the clauses obviously overlap in their concerns, they diverge to some extent as well, particularly when the question is one of free exercise exemptions.[160] Nineteenth-century state law cases that sought exemption from government-imposed duties often involved state-imposed religious duties such as the payment of taxes for the support of established churches.[161] In such cases, the exemption, often sought by an adherent of a nonestablished religion rather than a nonbeliever, could be seen as advancing both free exercise and nonestablishment principles.[162]

Modern free exercise cases rarely, if ever, have a convergence of free exercise and nonestablishment principles. In contrast, the opponents of a free exercise exemption will contend that to recognize the exemption from a duty that is itself secular would threaten Establishment Clause values.[163] With the values expressed in the two clauses diverging in this way, it may be necessary to reexamine the idea that the definition of religion should be the same for each clause. What definition is best suited to protect the values of each clause?

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157. *See, e.g.*, Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); George C. Freeman III, *The Misguided Search for the Constitution's Definition of "Religion,"* 71 GEO. L. J. 1519 (1983).

158. *See Meyers*, 906 F. Supp. at 1502–03.

159. *See, e.g.*, *Malnak*, 592 F.2d 197; Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987) (rejecting the claim that "secularism" and related doctrines were "religions").

160. *See* Justice Harlan's concurring opinion in *Welsh*, 398 U.S. at 356–61.

161. *See* GREEN, *supra* note 119, at 119–45.

162. *Id.* at 123–128.

163. For an example of an attempt to accommodate religion that goes too far and threatens Establishment Clause concerns, see Estate of Thorton v. Caldor, 472 U.S. 703 (1989).

The Establishment Clause seeks to keep government away from matters beyond its legitimate secular concerns. The Free Exercise Clause, if it adds anything at all to the Establishment Clause,[164] will have some effect even in cases where the statute or practice in question does not exceed the scope of government's legitimate concerns. In these cases, the claimant seeks exemption, not invalidation of the government act. Granting an exemption from a government-imposed religious duty to an adherent of a dissenting religion poses no establishment claim issues, but granting an exemption from a secular duty does create a potential Establishment Clause problem. One way to resolve this problem is to take the position in *Smith*, and deny the exemption. If that route were rejected, it would seem inevitable that courts would have to adopt the strategy taken in the draft cases and greatly expand the scope of the concept of religion, not only for that statute, but for the Free Exercise Clause as well.

Establishment Clause cases testing the boundaries of legitimate government action may continue to require courts to mull over the definition of religion by employing a list of characteristics drawn from social science.[165] But in free exercise cases, this can be avoided, and the outcomes of cases can remain consistent, if—for free exercise purposes—conscience is used as a synonym for religion. A number of national constitutions and international documents pertaining to individual rights in the post-World War II era refer to both religion and conscience, making it clear that the right, however it might be defined, need not be confined to those qualifying by adherence to a recognized church or sect.[166]

Both the 1948 Universal Declaration of Human Rights[167] and the 1966 International Covenant on Civil and Political Rights[168] adopted by the U.N. General Assembly provide that everyone has "the right

164. The overlap of the Establishment Clause and free exercise principles is so clear that we see Establishment Clause issues in United States constitutional law also present in the freedom of religion jurisprudence of Canada, a nation with no nonestablishment provision in its constitutional documents. *See* Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 L. PA. J. CONST. L. 451, 474–484 (2002).

165. *See Meyers*, 906 F. Supp. at 1502–03.

166. *See infra* notes 168–174 and accompanying text.

167. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/811 at 71 (1948).

168. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

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to freedom of thought, conscience and religion."[169] The same language is contained in the European Convention on Human Rights.[170] The Canadian Charter of Rights and Freedoms provides that "[e]veryone has . . . freedom of conscience and religion."[171] The South African constitution protects "freedom of conscience, religion, thought, belief and opinion."[172] Germany's Basic Law ensures "[f]reedom of faith and of conscience, and freedom to profess a religious or philosophical creed."[173] The problem of defining religion is thus avoided by making the right, whatever its boundaries might be, available not only to conventional believers, but also to those with conscience-based nonreligious beliefs.[174]

At first glance, these foreign sources, which explicitly make religion and conscience equivalent, if not synonymous, might seem to hold little relevance to the First Amendment.[175] But First Amendment history itself may suggest that the Free Exercise Clause was thought to protect a range of beliefs beyond conventional religion.[176]

Drafts of what would become the First Amendment referred to "the full and equal rights of conscience," rather than the "free exercise" of religion.[177] The House of Representatives voted to approve language that included both phrases: "Congress shall make no law establishing religion or to prevent the free exercise thereof, or to infringe the rights of conscience."[178] The "rights of conscience" phrase was not included in the final version that emerged from a

169. Universal Declaration of Human Rights, art. 18, *supra*, note 167 at 74; International Covenant on Civil and Political Rights, art. 18, *supra* note 168 at 55.

170. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221, 230 (*entered into force* Sept. 3, 1953).

171. Canadian Charter of Rights and Freedoms, Canada Act, 1982, Sec. 2(a).

172. S. AFR. CONST. 1996, s. 15(1).

173. Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany], art. 4 (1). Translation available in ALAN BROWNSTEIN & LESLIE GIELOW JACOBS, GLOBAL ISSUES IN FREEDOM OF SPEECH AND RELIGION 124 (2009).

174. R. v. Big M Drug Mart [1985] I.S.C.R. 295, ¶ 123 (Canada) ("Religious beliefs and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious nonbelief . . . .").

175. U.S. Const. amend. I.

176. *See generally* GREEN, *supra* note 119, at 53–77.

177. *Id.* at 64.

178. *Id.* at 66.

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House-Senate conference committee.[179] Still, the attention paid to individual conscience during the framing of the Amendment suggests that concern extended beyond the protection of the beliefs held by members of conventional religious bodies.

It might be said that when used in a world where avowed atheists were few, the right of conscience would be assumed to refer to the belief system of some conventional religion. But when Deists, Unitarians, and Universalists were regarded as "atheists,"[180] to include them within the scope of the right was to expand the protection beyond the boundaries that all would concede included religion. Of course, to define broadly the scope of those protected is not to define the scope of the right, particularly as it pertains to exemptions.

As we have seen, early invocation of free exercise exemption claims in the states tended to center on exemption from government-imposed religious deities, such as payment of taxes for the support of recognized churches.[181] In such cases, the nonestablishment principle and the free exercise principle are in full harmony, and expansion of free exercise protection only strengthens nonestablishment protection. But when the free exercise principle is employed to seek exemption from secular duties, that harmony is absent.

As Justice Harlan recognized in the 1960s draft cases, exemptions from secular duties on religious grounds, whether legislatively or judicially authorized, raise Establishment Clause concerns that can be addressed only by expanding the concept of religion. Religion becomes conscience, bounded only by the requirement of sincerity.[182] But if this broad expansion of the free exercise right is combined with a vigorous enforcement of the right, the result begins to resemble an individual right of nullification. In light of this, it is hardly surprising that *Smith* rejected strict scrutiny, and returned free exercise to its pre-*Sherbert* state. Might there be a way to respond to the widespread opposition to *Smith's* minimal scrutiny without embracing strict scrutiny?

That alternative might be found in the explicit recognition of the utility of the principle of proportionality in constitutional analysis.

179. *Id.* at 67.

180. These charges were common in the early nineteenth century by opponents of Jefferson and Jackson. *Id.* at 86–87, 106–110.

181. *See supra* text accompanying notes 121–24.

182. *See supra* text accompanying notes 112–120.

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Since the first enunciation of the strict-scrutiny test,[183] constitutional analysis has largely consisted of dividing claims into those subjecting government to strict scrutiny, a test which would result in something close to per se invalidity, and those requiring government to satisfy only a low-level rationality test, one which would result in something close to per se validity for government action. Perceived and applied in this way, the strict scrutiny/rational scrutiny dichotomy produced, at least on the surface, a reassuring sense of predictability.

Recent decades, however, have seen the Supreme Court move away from the all-or-nothing approach to constitutional questions. Most obvious has been the adoption of new "intermediate scrutiny" tests, most prominently employed in gender discrimination cases.[184] But even cases employing the language of the old two-tier model have yielded some surprises. The Court has found in the context of affirmative action that strict scrutiny is not a per se test, rather it is one that government can satisfy.[185] Conversely, when assessing statutes criminalizing homosexual behavior, the Court has shown that low-level scrutiny does not always result in a win for government.[186]

A sense that courts should avoid automatic application of extremely strong strict scrutiny or extremely weak low-level scrutiny is evident in a wide range of Supreme Court decisions in recent decades.[187] Cases involving abortion rights,[188] commercial speech,[189] civil damages[190] and criminal punishment[191] have all stressed the importance of weighing with some care the substantiality of the government interest and the individual interest in each case.

183. Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding that racial restrictions are "immediately suspect" and therefore subjected to "the most rigid scrutiny," justified only by "pressing public necessity").

184. *See* Craig v. Boren, 429 U.S. 190 (1976).

185. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (finding an affirmative-action program to satisfy strict scrutiny).

186. Lawrence v. Texas, 539 U.S. 558 (2003).

187. *See generally*, E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 51–90 (2009).

188. *See* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992) (introducing "undue burden" inquiry in abortion cases).

189. *See* Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm., 447 U.S. 557 (1980) (weighing speech right against substantial government interest in the restrictions).

190. *See* BMW of North Am., Inc. v. Gore, 517 U.S. 568 (1996) (invalidating punitive damage award as excessive).

191. *See* Coker v. Georgia, 433 U.S. 584 (1977) (death penalty ruled excessive and unconstitutional in non-homicide case).

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Proportionality is essentially a balancing test. As such, it will sacrifice a certain degree of predictability, but will do so in response to the recognition that competing constitutional values are at stake. Writing about free speech cases, Justice Breyer has noted:

> [W]here a law significantly implicates competing constitutionally protected interests in complex ways . . . the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionally. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).[192]

Justice Breyer's recognition of "competing constitutionally protected interests" in free-speech cases can certainly be extended to free exercise claims, where the respect for conscience coexists with the Establishment Clause and its call for government neutrality toward religion.

As mentioned above, some form of proportionality, has found its way into a range of constitutional cases under the banner of intermediate scrutiny,[193] "rational basis with teeth,"[194] and strict scrutiny that does not mean automatic invalidation of government action.[195] But there are also examples of the Court explicitly adopting proportionality as a constitutional requirement. Punitive damages must be reasonably related (i.e., proportional) to a defendant's actual or potential harm.[196] Conditions placed on land-use permits by government must satisfy a test of "rough proportionality" to the impact of the development on the government interest threatened.[197]

Proportionality has been evident in at least a few cases involving criminal punishment. In *Coker v. Georgia*,[198] the Court invalidated a death sentence imposed for rape rather than murder, noting that a criminal punishment is unconstitutional if it "is grossly out of

192. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

193. *See Craig*, 428 U.S 190.

194. *See Lawrence*, 539 U.S. 558.

195. *See Grutter*, 539 U.S. 306.

196. *See BMW*, 517 U.S. at 580; State Farm v. Campbell, 538 U.S. 408 at 426 (2003).

197. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

198. Coker v. Georgia, 433 U.S. 584 (1977).

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proportion to the severity of the crime."[199] And in *Solem v. Helm*,[200] the Court held sentencing a defendant to life without the possibility of parole under South Dakota's "three strikes" statute was unconstitutionally disproportionate to the nonviolent crimes the defendant committed.[201] The extent of the *Solem* holding was called into question in *Harmelin v. Michigan*,[202] where the Court upheld a sentence of life without parole for a first offender possessing 672 grams of cocaine.[203] Justice Scalia, joined by Justice Rehnquist, maintained that *Solem* was simply wrongly decided.[204] Three concurring justices stated that there was a "narrow" proportionality principle in criminal punishment cases, but found that it was not violated here. Four dissenters insisted on the application of *Solem*, and would have found the sentence unconstitutionally disproportionate.[205]

Thus, whether under the name of proportionality or of some sort of intermediate scrutiny, proportionately review is hardly a new concept in America constitutional law. At the same time, *Harmelin* also shows the unease, or in the case of Justice Scalia, the outright hostility to proportionality by those who prefer clear rules that limit indeterminacy. How would proportionality work in free exercise cases? Some examples may be found in the jurisprudence of other nations, with constitutional protection of freedom of religion and systems of judicial review.

The Canadian Charter of Rights and Freedoms expressly provides for a form of proportionality in section 1.[206] It provides that Charter rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

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199. *Id.* at 592.

200. Solem v. Helm, 463 U.S. 277 (1983).

201. *Id.* at 279–80. Justice Powell presented a lengthy discussion of the history of the principle of proportionality in criminal sentencing in common law and constitutional history. *Id.* at 284–95.

202. Harmelin v. Michigan, 501 U.S. 957 (1990).

203. *Id.* at 961.

204. *Id.* at 965 (Scalia, J., joined only by Rehnquist, CJ).

205. *Id.* at 997 (Kennedy, J., joined by O'Connor, J., and Souter, J.) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompass a narrow proportionality principle."); *id.* at 1012 (White, J., dissenting) ("[T]here can be no doubt that prior decisions of this Court have construed [the Eighth Amendment] to include a proportionality principle.").

206. Canadian Charter of Rights and Freedoms, Part I, § 1 of the Constitution Act, 1982. *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

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society."[207] The Supreme Court of Canada has held that this imposes "a form of proportionality test" that requires the state to justify that its action pursues a substantial objective, that the means employed "impair as little as possible the right or freedom in question,"[208] and that there is proportionality between the benefit to the government interest and the negative effect on the individual.[209] In *Multani v. Commission scholaire Marguerite-Bourgeoys*,[210] the test was applied to determine that a public school student who, as a devout Sikh, was required to wear a ceremonial metal dagger, known as a Kirpan, under his clothing at all times, could not be absolutely prohibited from wearing it at school.[211] At the same time, conditions could be placed on the Kirpan, such as having it secured in a wooden sheath and "a sturdy cloth envelope," to assure a safe school environment.[212] The Canadian Charter of Rights and Freedoms has no establishment clause, but courts have applied freedom of conscience provisions and the proportionality test to prohibit Christian prayer and Bible reading in public schools,[213] and to strike down a statutory ban on Sunday business transactions.[214]

On the other hand, application of the proportionality test does not invariably lead to stronger protection of individual rights than found in modern American law. For example, In *Hill v. Church of Scientology,*[215] the Supreme Court of Canada refused to adopt the "actual malice" requirement used in certain United States[216] defamation cases.[217] And that Court has been more willing to permit government action against "hate speech" than have American courts.[218] But proportionality does not lead to consistently narrow construction of individual rights claims in free-speech cases either. The Supreme Court of Canada has set down a test for legal protection

207. *Id.*

208. R. v. Oakes, [1986] 1 S.C.R. 103 ¶ 74 (Can.) (internal quotation marks omitted).

209. *Id.* at ¶ 74–75.

210. Multani v. Comm'n scholaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (Can.).

211. *Id.* at ¶¶ 77–79.

212. *Id.* at ¶¶ 8, 79.

213. Zylberberg v. Sudbury Bd. of Ed., [1988] 52 D.L.R. 4th 577 ¶ 83 (Ont. Can.).

214. Edwards Books & Art., Ltd. v. R. [1986] 2 S.C.R. 713 ¶ 157–164 (Can.); R. v. Big M Drug Mart, Ltd. [1985] 1 S.C.R. 295 ¶ 151–52 (Can.).

215. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130 (Can.).

216. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964).

217. *Hill*, [1995] 2 S.C.R. 1130 at ¶¶ 127–141.

218. *See* R. v. Keegstra [1990] 3 S.C.R. 697 (Can.).

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of pornographic or obscene material that is in some respects more protective, in other respects less protective, than the test used in the United States.[219]

Perhaps more interesting than the Canadian example for our purposes is the judgment of the Constitutional Court of South Africa in *Prince v. President of the Cape Law Society*.[220] In a case remarkably similar to *Smith*, the appellant had been barred from admission to the practice of law because he had been convicted of illegal possession of marijuana, and insisted he would continue to use marijuana as required by his Rastafarian religious belief.[221]

The Court engaged in an "evaluation of proportionality"[222] as called for by the provision of the South Africa Constitution that provides:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
>
> a. The nature of the right;
> b. The importance of the purpose of the limitation;
> c. The nature and extent of the limitation;
> d. The relation between the limitation and its purpose and
> e. Less restrictive means to achieve the purpose.[223]

Applying this standard, the Court rejected the appellant's claim for a religiously based exemption.[224] In doing so, the majority explicitly rejected the majority view of the United States Supreme Court in *Smith*,[225] endorsing instead the *Smith* minority approach, which the South African Court characterized as a "balancing analysis."[226] That the Court struck the balance in this case in favor of the government is evidence that proportionality does not necessarily

219. *Compare* R. v. Butler, [1992] 1 S.C.R. 452 (Can.), *with* Miller v. California, 413 U.S. 15 (1973), *and* Am. Booksellers v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.* 475 U.S. 1001 (1986).

220. Prince v. President, Cape Law Soc'y, 2002 (2) 794 SA (CC) (S. Afr.).

221. *Id.* at ¶ 142.

222. *Id.* at ¶128 (majority opinion by Cheskalson, J.).

223. S. AFR. CONST. 1996, §36.

224. *Id.* at ¶ 139.

225. *See supra* text accompanying notes 38–43.

226. *Prince* at ¶ 128.

result in greatly enhanced protection for the individual. Although he wrote in dissent, Justice Sachs no doubt expressed the view of the South Africa Court as to the value of proportionality:

> Limitations analysis under our Constitution is based not on formal or categorical reasoning but on processes of balancing and proportionality as required by section 36. This Court has accordingly rejected the view of the majority in the United States Supreme Court that it is an inevitable outcome of democracy that in a multi-faith society, minority religions may find themselves without remedy against burdens imposed upon them by formally neutral laws. Equally, on the other hand, it would not accept as an inevitable outcome of constitutionalism that each and every statutory restriction on religious practice must be invalidated. On the contrary, limitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights.[227]

In one sense, the call to substitute a proportionality test, either under that name, or under the banner of intermediate scrutiny, is quite modest. In fact, it likely would not require overturning any significant Supreme Court decision on free exercise during the last fifty years. As noted above, free exercise cases in the years between *Yoder* and *Smith* applied a remarkably weak form of strict scrutiny.[228] Justice Scalia's contention in *Smith* that strict scrutiny was never the standard used by the Court is not entirely disingenuous. Even the cases seen as representing polar opposites, *Sherbert* and *Smith*, can be reconciled under proportionality analysis. *Sherbert* can be seen as representing a trivial burden on the integrity of South Carolina's unemployment compensation system, easily outweighed by the burden on religious duty.[229] And as illustrated by Justice O'Connor's concurrence in *Smith*,[230] as well as the South African Court's decision in *Prince*, proportionality might well result in the same rejection of the free exercise claim in *Smith* or similar cases.

227. *Prince* at ¶ 155 (Sachs, J., dissenting).

228. *See supra* text accompanying notes 35–37.

229. *Sherbert*, 374 U.S. at 407 ("[A]ppellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections . . . might . . . dilute the unemployment compensation fund . . . . [There] is no proof [in the record] whatever to warrant such fears . . . .").

230. *Smith*, 494 U.S. at 903–07 (O'Connor, J., concurring).

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But even if it would lead to few, if any, different judicial outcomes in prominent free exercise cases, proportionality should serve the purpose of requiring legislative and administrative bodies to at least take seriously claims for free exercise exemptions, rather than quickly dismissing them, confident that the rational basis analysis of *Smith* would lead to quick rejection of any such claims. When, to use South Africa Justice Sach's image, "the irresistible force of democracy and general law enforcement" clashes "against the immovable object of constitutionalism and protection of fundamental rights,"[231] neither side deservers automatic deference.

Conclusion

Sherbert adopted strict scrutiny as the appropriate standard for free exercise claims at the end of an era of overwhelming consensus behind the "religion of religion,"[232] with religion understood as those faiths falling comfortably into the Protestant-Catholic-Jew triad described by Will Herberg. With this as background, it would seem unthreatening to extend strong constitutional protection to those who claimed the kind of exemptions that were before the *Sherbert* Court and in similar historically recurring situations.

But the explosion of religious diversity that began in the 1960s did not only create the need for courts to make nonobvious decisions concerning the definition of religion. It also created a range of unusual exemption claims, some of which would pose much greater threats to legitimate social goals than exemption from mandatory work on one's Sabbath. The expanded criteria for defining religion that emerged from the VietnamWar-era draft cases, likely inevitable in light of the implicit Establishment Clause difficulties in limiting exemption to traditional religious denominations, only exacerbated the situation.

It should come as little surprise, then, that free-exercise strict scrutiny would be applied in a far more deferential way than that test is normally used. Justice Scalia is justified in maintaining that strict scrutiny was never really the free-exercise standard when used in cases assessing statutes of general application, if we view strict

231. *Prince* at ¶ 155 (Sachs, J., disserting). Justice Sachs notes that an overly dismissive judicial attitude toward free exercise claims will, in practice disproportionately harm minority faiths, since "major faiths" can exercise political power to secure legislative exemptions. *Id.* at ¶ 158–160. Thus, the apparent neutrality of a *Smith*-like approach masks a bias against the unfamiliar.

232. *See* HERBERG, *supra* note 128, at 84–89.

scrutiny in its traditional role as a standard of near per se invalidity. But was his alternative, the low-level scrutiny of *Smith*, the proper alternative?

The extensive legislative and state court activity aimed at restoring *Sherbert* standards to free-exercise analysis stands as powerful evidence that *Smith* insufficiently protects free-exercise values. But if a return to *Sherbert* means adoption of a rigidly applied strict scrutiny test, it is as likely to be impracticable as it was in pre-*Smith* years. A more feasible alternative would include two elements. First, recognition that, for free-exercise exemption purposes (though not for Establishment Clause purposes), religion in today's diverse world is a synonym for conscience. Essentially, this simply recognizes what has already occurred in case law. Second, the proper analytical tool is neither the overly deferential low-level test of *Smith*, nor traditional rigorous strict scrutiny. Instead, a proportionality test, whether under the label of proportionality, intermediate scrutiny, or another title, should be applied. This will likely be insufficient to satisfy those who regarded the pre-Smith "strict scrutiny" as too weak, but it would require government to give more weight to free-exercise exemption claims than the rules established in *Smith*.

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