Nebraska Law Review

Volume 94 | Issue 3 Article 4

2016

Free Exercise and Substantial Burdens under Federal Law

Mark Strasser
Capital University Law School, mstrasser@law.capital.edu

Mark Strasser*

Free Exercise and Substantial Burdens Under Federal Law

TABLE OF CONTENTS

I. INTRODUCTION

While the First Amendment protects religious freedom, the contours of the right to practice one's religion are not spelled out in the Constitution. A series of cases decided by the United States Supreme Court provides guidance with respect to the conditions under which laws burdening religious practices will not violate federal constitutional guarantees. Those guarantees are rather forgiving for neutral and general laws that incidentally burden religious practices, but statutes that target religious practices are unconstitutional unless narrowly tailored to promote compelling state interests.

Believing that the First Amendment as construed by the Court affords insufficient protection to free exercise, Congress passed two statutes to increase protections for religious practices—the Religious

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

Freedom Restoration Act (RFRA)[1] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[2] The protections provided by these statutes are triggered only when substantial burdens are imposed on religious practice,[3] and there is much disagreement about what qualifies as a substantial burden. The United States Supreme Court has sent mixed signals regarding how to define "substantial" under federal statutory and constitutional law, and the circuits have adopted different and conflicting tests with respect to which actions are sufficiently burdensome to trigger the relevant protections. Unless the Court acts soon to clarify the relevant tests, the circuits are likely to diverge even more, increasing the likelihood that the same religious practices will be protected in one circuit but not in another.

Part II of this Article discusses the developing free exercise jurisprudence with a special focus on what constitutes a substantial burden on religious practice. Part III examines which burdens on free exercise qualify as substantial under federal statutory law, and discusses some of the different tests used by circuits to determine whether a burden on free exercise triggers the statutory protections. The Article concludes by urging the Court to offer a clear standard that might be applied consistently, although noting that the Court's inconsistent application of free exercise guarantees does not inspire confidence that the Court will provide much useful guidance in this area anytime soon.

II. THE EVER-CHANGING FREE EXERCISE JURISPRUDENCE

Free exercise jurisprudence has been developing for more than a century, with one of the earlier cases—*Reynolds v. United States*[4]—setting the stage in a number of respects. The issues addressed in that case included the differing constitutional treatment of statutes adversely affecting religious belief versus statutes adversely affecting religious action, as well as the differing constitutional considerations implicated by statutes targeting religion for adverse treatment rather than merely incidentally burdening religious practice. Those issues have remained important in contemporary free exercise jurisprudence.

1. 42 U.S.C. §§ 2000bb to 2000bb-4 (1993).
2. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).
3. 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are . . . to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ."); 42 U.S.C. § 2000cc-1 ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution.").
4. 98 U.S. 145 (1878).

A. *Reynolds*

One of the earliest cases setting the tone for free exercise analysis was *Reynolds v. United States*, in which the Court examined the constitutionality of a federal polygamy prohibition containing no exemption for religiously motivated plural marriages.[5] The *Reynolds* Court acknowledged that "Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion,"[6] and the question at hand was "whether the law now under consideration comes within this prohibition."[7] To answer that question, the *Reynolds* Court attempted to ascertain "what is the religious freedom which has been guaranteed."[8]

While not explicitly announcing that it was using a Framers' Intent test, the *Reynolds* Court talked about the views of some Framers[9] and also considered the practices that had been prevalent at the time the First Amendment was adopted. At that time, all states prohibited polygamy,[10] which presumably meant that those framing and adopting the First Amendment saw no contradiction in guaranteeing free exercise while at the same time criminalizing plural marriage: "[I]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[11]

One issue raised in *Reynolds* (which continues to be important in the contemporary jurisprudence) was whether the statute at issue was targeting religion rather than incidentally affecting it.[12] The Court suggested the federal prohibition of polygamy did not target the

5. *See id.* at 166 ("[T]he statute . . . is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute.").
6. *Id.* at 162.
7. *Id.*
8. *Id.*
9. *See id.* at 164 (discussing Jefferson's interpretation: "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.").
10. *See id.* at 165 ("[T]here never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.").
11. *Id.*
12. *Compare* Todd M. Gillett, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 533 (2000) ("The anti-polygamy laws in *Reynolds* and *Davis v. Beason* were based on hatred of the Mormon Church."), *with* Marc O. DeGirolami, *Recoiling from Religion*, 43 SAN DIEGO L. REV. 619, 636 (2006) (discussing the view that the federal "statute did not target Mormons in particular, but merely expressed a neutral public policy preference against polygamy").

Church but was instead a statute of general applicability.[13] This meant that the issue presented was whether the Federal Constitution required that the practices of the Latter Day Saints be granted an exemption.[14] The Court offered a few reasons for why such an exemption was not required, noting that recognizing an exemption would allow religious and non-religious people to be treated differently for commission of the same act: "[T]hose who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free."[15] The Court feared that exempting those with sincere religious beliefs from the law "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,"[16] suggesting that the law should not impose burdens on the non-religious that the religious do not also have to bear.[17]

B. Modern Jurisprudence Suggesting No Exemptions Are Required

Reynolds suggests that while the First Amendment precludes the legal regulation of religious belief, lawmaking bodies have been "left free to reach actions which [a]re in violation of social duties or subversive of good order."[18] That attitude is also reflected in more modern jurisprudence. For example, in *Prince v. Massachusetts*,[19] the Court examined whether child labor laws[20] could be applied to children who were distributing religious tracts[21] pursuant to a religious calling.[22]

13. *Reynolds*, 98 U.S. at 166 ("[T]he statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.").
14. *Id.* ("This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute.").
15. *Id.*
16. *Id.* at 167.
17. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) ("[G]overnmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." (citing Wallace v. Jaffree*,* 472 U.S. 38, 52–55 (1985))).
18. *Reynolds*, 98 U.S. at 164.
19. 321 U.S. 158 (1944).
20. *See id.* at 160–61 ("No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." (quoting MASS. GEN. LAWS ch. 149, § 69 (1939))).
21. The Massachusetts Supreme Court construed the act of distributing religious tracts in exchange for money as falling within the statute's prohibition. *See id.* at 163 ("[T]he questions are no longer open whether what the child did was a 'sale' or an 'offer to sell' within section 69 or was 'work' within section 81. The state court's decision has foreclosed them adversely to appellant as a matter of state law.").

Sarah Prince, the plaintiff, had permitted Betty Simmons to hand out "Watchtower" and "Consolation" in exchange for donations.[23]

Prince argued that she had the constitutional right to permit her ward "to preach the gospel"[24] both because of her rights as a parent[25]—Prince had legal custody of Betty[26]—and by virtue of the constitutional protections for religious exercise.[27] The *Prince* Court recognized that the Constitution protects the "rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it."[28] But that did not mean that Sarah Prince could expose her child to the dangers that might be associated with handing out unpopular literature upon the streets.[29] That an adult could not be precluded from preaching in this way did not establish that children were also free to do so.[30] The Court held that no exception was required in this case for children who sought to distribute literature for religious reasons in exchange for donations.[31]

The Court continued the "No Exemption Required" approach in *Braunfeld v. Brown*,[32] which involved a challenge to a Pennsylvania Sunday closing law.[33] The appellants were Orthodox Jews who already closed their retail establishments from sundown Friday to sun-

22. *Id.* at 159 ("Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.").
23. *Id.* at 162 ("Betty held up in her hand, for passersby to see, copies of 'Watch Tower' and 'Consolation.' From her shoulder hung the usual canvas magazine bag, on which was printed 'Watchtower and Consolation 5¢ per copy.'").
24. *Id.* at 164.
25. *Id.* ("She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.").
26. *Id.* at 161 ("Mrs. Prince . . . has legal custody of Betty Simmons who lives with them.").
27. *Id.* at 164 ("[S]he rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states.").
28. *Id.* at 165 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).
29. *See id.* at 169–70 ("The zealous though lawful exercise of the right to engage in propagandizing the community . . . may . . . create situations . . . wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury.").
30. *Id.* at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.").
31. *Cf. id.* at 171 (noting that no children were permitted to do what Betty sought to do).
32. 366 U.S. 599 (1961).
33. *Id.* at 600 ("This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities.").

down Saturday because of their religious beliefs.[34] Closing their stores on Sunday in addition would put them at an economic disadvantage.[35] One owner testified that the Sunday closing law might cause him to go out of business.[36] The *Braunfeld* Court acknowledged that "appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate."[37]

In attempting to determine whether an exemption from the Sunday closing law was required for those whose religious observance required a day of rest on a different day of the week,[38] the Court reiterated a position that it had offered in *Reynolds*: "The freedom to hold religious *beliefs and opinions* is absolute."[39] However, that same degree of protection is not accorded to religious *practice*: "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[40] The Court explained that because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference,"[41] it would be unreasonable to "expect[ ], much less require[ ], that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."[42] Of course, that does not mean that all legislation adversely affecting religious practice will pass constitutional muster. "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."[43] Thus, where it is established that the statute at issue targets religious practice, it will be struck down unless it passes a daunting test.[44]

34. *Id.* at 601 ("Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday.").
35. *Id.* ("Sunday closing will result in impairing the ability of all appellants to earn a livelihood.").
36. *Id.* ("Sunday closing . . . will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment.").
37. *Id.* at 603.
38. *Id.* ("Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.").
39. *Id.* (emphasis added) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Reynolds v. United States, 98 U.S. 145, 166 (1878)).
40. *Id.*
41. *Id.* at 606.
42. *Id.*
43. *Id.* at 607.
44. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that inter-

Suppose, however, that there is insufficient evidence to establish that a burden placed on religious practice is invidiously discriminatory. The *Braunfeld* Court explained that "if the State regulates conduct by enacting a general law within its power . . . to advance the State's secular goals, the statute 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."[45] Thus, state regulations imposing indirect burdens will generally be upheld unless the state could achieve the goals at issue without burdening religion.

When suggesting that statutes indirectly burdening religion will be struck down if the state can achieve its goals in other ways, the *Braunfeld* Court was not thereby announcing a test that would be very difficult for states to meet when imposing burdens on religious practice. For example, the appellants argued that "the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday."[46] The Court noted both that a "number of States provide such an exemption,"[47] and that "this may well be the wiser solution to the problem."[48] But the focus of concern was "not with the wisdom of legislation but with its constitutional limitation."[49] The Court then discussed some of the possible benefits that might accrue by having a uniform day of rest, noting that "permit[ting] the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity."[50] Of course, the increase in commercial noise and activity would depend upon how many stores would remain open (i.e., those exempted by virtue of observing a different Sabbath day). If relatively few would remain open, then one might not expect the atmosphere of peacefulness and rest to be disturbed very much. However, if relatively few establishments were to take advantage of the exemption, then the Court worried that those who were open would reap unfair economic advantages. "To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day."[51]

---

est." (citing Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990))).

45. *Braunfeld*, 366 U.S. at 607 (citing Cantwell v. Connecticut, 310 U.S. 296, 304–05 (1940)).

46. *Id.* at 608.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 608–09.

There was no reason for the Court to hypothesize the kinds of competitive effects that Sunday closing laws with exemptions would have, because various states had enacted such laws. If the Court's suspicions about economic advantage were to have had some basis in fact, then one would have expected those states providing such exemptions to have had many problems. No such evidence was offered.[52]

In his concurring and dissenting opinion, Justice Brennan observed that the Court had "exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous."[53] Whether or not Justice Brennan's criticism was correct, *Braunfeld* suggests that the Constitution does not offer robust protection for free exercise, a position lent further support by the holding in a companion case challenging the Massachusetts Sunday closing law.[54]

In *Gallagher v. Crown Kosher Super Market, Inc.*, a supermarket almost exclusively selling kosher foods challenged the requirement that it be closed on Sundays.[55] Many of the hypothesized worries discussed in *Braunfeld* seemed inapplicable. For example, permitting this store to remain open would presumably not greatly increase commercial traffic and activity, since it would be the *only* store in the area open on Sunday.[56] Further, given that it almost exclusively sold kosher goods,[57] permitting the market to be open on Sunday would not seem to afford the store much, if any, advantage over its non-kosher competitors. Not only would the latter stores be open on Saturday while this store would be closed,[58] but the stores selling non-kosher foods would likely be less expensive anyway,[59] so non-kosher shoppers planning ahead might well choose to buy less expensive non-kosher goods on Saturday rather than kosher goods on Sunday.

52. *See id*. at 614–15 (Brennan, J., concurring in part and dissenting in part) ("We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's. . . . The Court conjures up several difficulties with such a system which seem to me more fanciful than real.").

53. *Id.*

54. *See* Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961).

55. *Id.* at 618 ("Crown Kosher Super Market, a corporation whose four stockholders, officers and directors are members of the Orthodox Jewish faith, which operates in Springfield, Massachusetts, and sells kosher meat and other food products that are almost exclusively kosher.").

56. *See id.* at 619 ("No other supermarket in the Springfield area had kept open on Sunday.").

57. *Id.* at 618.

58. *Id.* at 619 ("Since the Orthodox Jewish religion requires its members to refrain from any commercial activity on the Sabbath—from sundown on Friday until sundown on Saturday—Crown was not open during those hours.").

59. *See* Elijah L. Milne, *Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment*, 2 J. FOOD L. & POL'Y 61, 66 (2006) ("[K]osher food is often more expensive than non-kosher food . . . .").

The Court gave short shrift to Crown's free exercise claim, dispensing with it in two paragraphs.[60] Crown claimed that it "will be open only four and one-half days a week, thereby suffering extreme economic disadvantage."[61] But "[t]hese allegations [were] similar, although not as grave, as those made by appellants in *Braunfeld v. Brown*."[62] The Court reasoned that if the indirect burden on religion at issue in *Braunfeld* was permissible even though it might result in Braunfeld's losing his business,[63] then Crown's claims about economic disadvantage (not leading to financial ruin) could hardly win the day.

Yet, this analysis was at best incomplete because it focused exclusively on the costs associated with engaging in religious practice and failed to consider the state interests promoted by the legislation. While the Court may have been correct that the burden borne by Crown was less onerous than that borne by Braunfeld, the Court simply did not address whether the state interests implicated in *Braunfeld* were also implicated in *Gallagher*. By failing to do so, the Court implicitly suggested that if a state law is constitutional even though it burdens free exercise to such an extent that it causes an individual to go out of business, then any law imposing a lesser burden on free exercise of course also passes muster.

C. The Jurisprudence Does an About-Face

The Court seemed to do an about-face in *Sherbert v. Verner*.[64] At issue was whether South Carolina could deny Adell Sherbert unemployment compensation when her unemployment was due to her refusal to work on her Sabbath, Saturday.[65] The Court began its analysis by suggesting that if the denial of unemployment compensation was to withstand constitutional review, that would be either (1) "because her disqualification as a beneficiary represent[ed] no infringement by the State of her constitutional rights of free exercise,"[66] or (2) "because any incidental burden on the free exercise of appellant's religion [was] justified by a 'compelling state interest in the reg-

60. *See Gallagher*, 366 U.S. at 630–31.

61. *Id.* at 630.

62. *Id.* at 631 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).

63. *See supra* text accompanying note 36.

64. 374 U.S. 398 (1963).

65. *Id.* at 399–400 ("When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act."); *id.* at 401 ("The appellee Employment Security Commission . . . found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered.'").

66. *Id.* at 403.

ulation of a subject within the State's constitutional power to regulate.'"[67]

The Court quickly dismissed (1), believing it obvious that Sherbert's right to free exercise was burdened by the state.[68] But the difficulty presented in *Sherbert* was that the infringement there, like the infringement in *Braunfeld*, was only indirect. The state had not criminalized her refusal to work on Saturday, but had merely refused to construe her refusal to work for religious reasons as exempting her from the program requirement that she accept suitable work when offered.[69]

The *Sherbert* Court explained that the "appellant's declared ineligibility for benefits derives solely from the practice of her religion, [and] the pressure upon her to forego that practice is unmistakable."[70] Basically, South Carolina presented Sherbert with two options: (1) "follow[ ] the precepts of her religion and forfeit[ ] benefits,"[71] or (2) "abandon[ ] one of the precepts of her religion in order to accept work."[72]

The surprising aspect of the Court's analysis was not in its characterizing Sherbert's situation as one involving a forced choice, but rather its analysis of the import of her being forced to choose between her religion and unemployment benefits. Braunfeld had also been afforded a forced choice—he had to choose between observing the Sabbath and keeping his business[73]—but nonetheless was not afforded an exemption.[74]

Understanding that *Braunfeld* and *Gallagher* seemed difficult to reconcile with *Sherbert*, the *Sherbert* Court reasoned that the Sunday closing laws were "saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers."[75] Yet, many of the other states with Sunday closing laws had provided exemptions for those

67. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
68. *Id.* ("We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does.").
69. *See id.* ("[T]he consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week.").
70. *Id.* at 404.
71. *Id.*
72. *Id.*
73. Braunfeld v. Brown, 366 U.S. 599, 601 (1961) ("Sunday closing . . . will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment.").
74. *See id.* at 609 ("[W]e cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.").
75. *Sherbert*, 374 U.S. at 408.

observing a Sabbath on a different day of the week,[76] so the Court had to explain why Pennsylvania and Massachusetts did not have to provide such an exemption. "Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable."[77]

The Court's effort to distinguish *Braunfeld* and *Gallagher* was not persuasive. The "administrative problem of such magnitude"[78] to which the *Sherbert* Court referred was described by Justice Brennan in his *Braunfeld* concurrence and dissent as in reality a matter of "mere convenience."[79] The great "competitive advantage"[80] the *Sherbert* Court referenced was described by the appellants in *Braunfeld* as "compensating somewhat for . . . closing on Saturday,"[81] which hardly sounds like much of a windfall. Several Justices made clear that the efforts to differentiate between *Braunfeld* and *Sherbert* were unavailing.[82]

Sherbert seemed to represent an important shift from *Braunfeld* and *Gallagher*. The *Braunfeld* Court emphasized that "the statute at bar does not make unlawful any religious practices of appellants."[83] Instead "the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."[84] While burdened to some extent, those affected by the legislation were "not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution."[85] Further, the *Braunfeld* Court implied that as a general matter the Constitution should not be understood to preclude states from imposing indirect burdens on religious exercise. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would

76. *See supra* text accompanying note 47.
77. *Sherbert*, 374 U.S. at 408–09.
78. *Id.*
79. *Braunfeld*, 366 U.S. at 614 (Brennan, J., concurring in part and dissenting in part).
80. *Sherbert*, 374 U.S. at 409.
81. *Braunfeld*, 366 U.S. at 601.
82. *See Sherbert*, 374 U.S. at 417 (Stewart, J., concurring in the result) ("I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown*."); *id.* at 421 (Harlan, J., dissenting) ("[D]espite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown* . . . which held that it did not offend the 'Free Exercise' Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday.").
83. *Braunfeld*, 366 U.S. at 605.
84. *Id.*
85. *Id.*

radically restrict the operating latitude of the legislature."[86] The Court was not saying that indirect burdens are immune from scrutiny—"to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification."[87] Laws that invidiously discriminate against religions generally or against one religion in particular will not pass muster.[88] However, general laws that incidentally burden religion will not be struck down merely because they make religious observance a little more difficult unless the state could have achieved its goals without burdening religion.[89]

Sherbert set a much different tone. The Court recognized that the case before it was similar to *Braunfeld* in that the state practice at issue in *Sherbert* was an indirect burden on free exercise: "[T]he consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact."[90] Criminal laws were not at issue because "no criminal sanctions directly compel appellant to work a six-day week."[91] However, rather than suggest that a law imposing only an indirect burden would likely be upheld,[92] the Court instead noted that the fact that the burden was indirect "is only the beginning, not the end, of our inquiry."[93] This time, instead of characterizing the law as merely "operat[ing] so as to make the practice of their religious beliefs more expensive,"[94] the Court reasoned that the challenged statute "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[95]

When analyzing whether South Carolina's eligibility law passed constitutional muster, the Court sought to determine whether "some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appel-

86. *Id.* at 606.

87. *Id.* at 607.

88. *Id.* ("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.").

89. *See id.* ("But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute 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.").

90. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

91. *Id.*

92. *See supra* text accompanying note 82.

93. *Sherbert*, 374 U.S. at 403–04.

94. *Braunfeld*, 366 U.S. at 605.

95. *Sherbert*, 374 U.S. at 404.

lant's First Amendment right."[96] This approach was in direct contrast to what had been employed in assessing the constitutionality of the Sunday closing law. There, the Court admitted that it might be wiser to afford Sabbatarians an exemption, but reasoned that the Court's concern was "not with the wisdom of legislation but with its constitutional limitation."[97] Thus, the *Braunfeld* Court used a test far more deferential than the compelling interest test used in *Sherbert*. The *Braunfeld* Court seemed to require that strict scrutiny be satisfied before legislation imposing an indirect burden on free exercise could be struck down,[98] whereas the *Sherbert* Court seemed to require that strict scrutiny be satisfied before legislation indirectly burdening free exercise could be upheld.[99]

United States v. Seeger[100] seemed to provide further support that free exercise jurisprudence had undergone a sea-change, although the opinion was focused on the construction of a federal statute. "[T]he Universal Military Training and Service Act . . . exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[101] "Religious training and belief" was defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code."[102] The section was challenged as an alleged violation of First Amendment guarantees.[103]

Rather than address the constitutional issues, the Court explained that Congress "was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views."[104] But that was not all. The Court interpreted the exemption as being triggered whenever "a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[105] This meant that an

96. *Id.* at 406.
97. *Braunfeld*, 366 U.S. at 608.
98. *See id.* at 606 ("To strike down, *without the most critical scrutiny*, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." (emphasis added)).
99. *See supra* text accompanying note 82.
100. 380 U.S. 163 (1965).
101. *Id.* at 164–65 (citing 50 U.S.C. app. § 456(j) (1958)).
102. *Id.* at 165.
103. *Id.* ("The constitutional attack is launched under the First Amendment's Establishment and Free Exercise Clauses . . . .").
104. *Id.*
105. *Id.* at 166.

individual, Daniel Seeger, who had a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed"[106] could nonetheless qualify for the exemption.[107]

Seeger, who neither affirmed nor denied a belief in God's existence but instead "preferred to leave the question as to his belief in a Supreme Being open, rather than answer 'yes' or 'no,'"[108] nonetheless suggested that his refusal to participate in any war qualified as religious.[109] In contrast, the plaintiff in *Welsh v. United States*,[110] Elliot Welsh II, denied that his views were religious.[111] However, the Court did not accept his denial at face value, reasoning that "very few registrants are fully aware of the broad scope of the word 'religious' as used in s 6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption."[112] Concluding that section 6(j) "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war,"[113] the Court held that Welsh was also entitled to an exemption.[114]

Seeger and *Welsh* both suggest that free exercise protection is to be construed broadly.[115] While those cases involved statutory construction rather than constitutional interpretation,[116] many commentators

106. *Id.*
107. *Id.* at 187 ("In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption.").
108. *Id.* at 166.
109. *See id.* at 167 ("Seeger's counsel . . . contended that he was entitled to the exemption because 'under the present law Mr. Seeger's position would also include definitions of religion which have been stated more recently,' and could be 'accommodated' under the definition of religious training and belief in the Act.").
110. 398 U.S. 333 (1970).
111. *Id.* at 341 ("Welsh was far more insistent and explicit than Seeger in denying that his views were religious.").
112. *Id.*
113. *Id.* at 344.
114. *Id.* at 343 ("Welsh was clearly entitled to a conscientious objector exemption.").
115. *See* Jeffrey L. Oldham, Note, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 168 (2001) ("Several scholars have argued that the Religion Clauses were not intended to protect just religious beliefs . . . but instead were designed to protect a broader set of beliefs. . . . [T]his is what the Court effectively stated . . . in *Seeger* and *Welsh*—its broadest extensions of the First Amendment."); Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 353 (1984) (discussing "whether the expansive definitional approach of *Seeger* and *Welsh* is limited to the free exercise clause").
116. *See* Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 99 n.62 (1997) ("In *Seeger* and *Welsh*, the Court made clear that it was interpreting not

have interpreted those decisions as having constitutional import.[117] The Court seemed quite confident that forcing an individual who objected to all wars to participate in one would impose a heavy burden on that individual—the *Seeger* Court discussed Seeger's belief concerning "the tremendous 'spiritual' price man must pay for his willingness to destroy human life,"[118] and the *Welsh* Court noted that the section "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[119]

In cases where the Court upheld or extended the application of a conscientious objector exemption, one would expect the Court to say that forcing such individuals to participate in war constituted a great burden on free exercise. But one might expect the Court to adopt a different tack in a case holding that no exemption was required, conscientious objection to war notwithstanding. After all, the refusal to afford an exemption would be upheld only if no substantial burden were imposed or if the state interests were sufficiently important to justify the imposition of a substantial burden on free exercise.

Gillette v. United States[120] involved individuals with sincere conscientious objections to participating in the Vietnam War in particular.[121] Louis Negre, a devout Catholic, followed his religious tradition of distinguishing between just and unjust wars and was only willing to participate in the former.[122] Once he concluded that the Vietnam War was unjust, he was precluded by conscience from participating in the war effort.[123] Guy Gillette would have been willing to participate in a defensive war sponsored by the United Nations, but believed the Viet-

---

the word 'religion' found in the Free Exercise Clause of the Constitution, but only the term 'religious training and belief' used in a congressional statute exempting conscientious objectors from military training and service.").

117. *Cf.* Michaelson, *supra* note 115, at 330 ("[C]ommentators uniformly . . . maintain that the *Seeger*-*Welsh* definition reflects constitutional, and not merely statutory, interpretation.").

118. United States v. Seeger, 380 U.S. 163, 187 (1965).

119. *Welsh*, 398 U.S. at 344.

120. 401 U.S. 437 (1971).

121. *Id.* at 439 ("These cases present the question whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service.").

122. *Id.* at 440–41 ("Negre, a devout Catholic, believes that it is his duty as a faithful Catholic to discriminate between 'just' and 'unjust' wars, and to forswear participation in the latter.").

123. *Id.* at 441 ("His assessment of the Vietnam conflict as an unjust war became clear in his mind after completion of infantry training, and Negre is now firmly of the view that any personal involvement in that war would contravene his conscience and 'all that I had been taught in my religious training.'").

nam War unjust "based on a humanist approach to religion."[124] The sincerity of these beliefs was not at issue.[125]

As an initial matter, the *Gillette* Court had to determine whether the current conscientious objector statute exempted Negre and Gillette.[126] Focusing on the text of the provision at issue, the Court construed the exemption as only applying to individuals objecting to war in any form.[127] Individuals with conscientious objections to participation in a particular war did not qualify for an exemption.[128] But the question then became whether the refusal to afford the exemption to those with religious objections to participating in the Vietnam War in particular passed constitutional muster. The Court accepted that "even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims."[129] Rather than question whether the requirement imposed a cognizable burden,[130] the Court noted instead that the requirements were not designed to burden religion[131] and that those burdens were justified by the importance of the state interests at issue.[132] Thus, the Court did not question whether forcing individuals to participate in a particular war against their religious convictions constituted a substantial burden, but instead held that the state had sufficiently important interests that justified maintaining a draft where only those objecting to all wars were exempted.[133]

---

124. *Id.* at 439.

125. *Id.* at 440 ("The denial of [Gillette's] exemption was upheld . . . not because of doubt about the sincerity or the religious character of petitioner's objection to military service . . . ."); *id.* ("[N]o question is raised as to the sincerity or the religious quality of this petitioner's views.").

126. *Id.* at 441.

127. *Id.* at 443 ("This language, on a straightforward reading, can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war.").

128. *Id.* at 447 ("[P]ersons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is 'religious' in character.").

129. *Id.* at 462.

130. *Cf. id.* at 460 ("[I]t is not inconsistent with orderly democratic government for individuals to be exempted by law, on account of special characteristics, from general duties of a burdensome nature.").

131. *Id.* at 462 ("The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice . . . .").

132. *Id.* ("The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned.").

133. *Id.* at 461 ("[O]ur analysis of [section] 6(j) for Establishment Clause purposes has revealed governmental interests of a kind and weight sufficient to justify under

Wisconsin v. Yoder[134] also seemed to involve robust protection of free exercise, although that case was characterized in *Employment Division v. Smith*[135] in a way belying that interpretation.[136] *Yoder* involved Amish families who refused to send their children to high school, notwithstanding state law that required children to attend school until reaching the age of sixteen.[137] The Amish parents objected because the values taught in that setting were "in marked variance with Amish values and the Amish way of life."[138] Public high school "emphasize[s] intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students,"[139] whereas in contrast "Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."[140] Sending Amish children to high school "takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life."[141] The Court summed up the burden imposed by the compulsory schooling provision by suggesting that "high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community."[142]

The *Yoder* Court reasoned that Wisconsin's requirement that students attend school beyond the eighth grade in contravention of religious beliefs would pass muster only if "the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[143] The Court noted the district court's "careful findings . . . that the Wisconsin compulsory

---

the Free Exercise Clause the impact of the conscription laws on those who object to particular wars.").

134. 406 U.S. 205 (1972).
135. 494 U.S. 872 (1990).
136. *Id.* at 881 ("The only decisions in which . . . the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children." (citing *Yoder*, 406 U.S. at 205)).
137. *Yoder*, 406 U.S. at 207 ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they complete the eighth grade.").
138. *Id.* at 211.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 211–12.
143. *Id.* at 214.

school-attendance law does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief,"[144] accepting that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs."[145] The Court then set out the standard that would have to be met to justify such a burdening of religion—"[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[146]

The *Yoder* Court understood that the burden imposed was a daunting one, and then sought to cabin the cases in which it would be triggered. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[147] However, after emphasizing the importance of the difference between the religious and the purely secular,[148] the Court failed to provide a helpful principle to distinguish between the two,[149] instead merely offering an example: "[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis."[150] Regrettably, no criteria were offered to help clarify how "Thoreau's choice was philosophical and personal rather than religious."[151] It was unclear from the opinion whether the Court was expressing disapproval of *Seeger*—there, the Court accepted that the beliefs at issue were religious in the relevant sense when Seeger cited the writings of "such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity without belief in God, except in the remotest sense."[152] But Plato, Aristotle, and Spinoza were all philosophers, so *Seeger* suggests that an individual's basing her opinions on philosophical writings helps make those sincere convictions religious in the relevant sense. Perhaps the *Yoder* Court was not rejecting that

144. *Id.* at 213 (internal quotation marks omitted).
145. *Id.* at 219.
146. *Id.* at 215.
147. *Id.*
148. *Id.* at 215–16 ("[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.").
149. *Id.* ("[A] determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question . . . .").
150. *Id.* at 216.
151. *Id.*
152. United States v. Seeger, 380 U.S. 163, 166 (1965) (internal quotation marks omitted).

philosophical analysis could be the basis of religious belief,[153] but was instead simply suggesting that idiosyncratic choices would not count as religious, since "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."

Once establishing that the law burdened religious exercise, the *Yoder* Court sought to determine whether the state had sufficiently important interests to justify the imposition of that burden.[154] For example, Wisconsin had argued that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"[155] and that "education prepares individuals to be self-reliant and self-sufficient participants in society."[156] While these were and are compelling interests,[157] a separate issue was whether the means chosen were sufficiently tailored to promote those ends.[158]

Children who remained in the Amish community would likely not benefit much from the extra couple of years of schooling.[159] Even those who would leave the Amish community might not gain that much from the additional year or two of education,[160] and those individuals might well flourish in any event "with their practical agricultural training and habits of industry and self-reliance."[161] The Court's focus on the additional benefit that high school students might receive from the extra year or two meant the Court closely examined whether the attendance requirement was sufficiently narrowly tai-

153. *Cf.* William C. French, *Natural Law and Ecological Responsibility: Drawing on the Thomistic Tradition*, 5 U. ST. THOMAS L.J. 12, 33 (2008) ("Most Catholics who sustain an interest in the natural law today follow the 'order of reason' view, which states that the natural law is primarily about the common structures of human reason by which all persons—regardless of culture or nation—are able to affirm and be guided.").

154. *Yoder*, 406 U.S. at 221 ("We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way.").

155. *Id.*

156. *Id.*

157. *See id.* ("We accept these propositions.").

158. *See id.* at 222.

159. *See id.* ("[C]ompulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but [not] . . . if the goal . . . [involves] the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.").

160. *See id.* ("[T]he evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests.").

161. *Id.* at 224.

lored to promote the state's compelling interests to justify the burden being placed on free exercise.[162]

D. An Implicit Modification of the Jurisprudence?

The Court *may* have modified what qualifies as a substantial burden for free exercise purposes in *Johnson v. Robison*,[163] although it is difficult to tell because that modification was at most implicit rather than explicit. At issue was whether conscientious objectors could be denied the education benefits that those who had been active in the military were entitled.[164] Congress created this benefit to ease the transition from military to civilian life.[165] While the lives of conscientious objectors who performed alternative service also had their lives disrupted,[166] the term of service was shorter than and different from the term of service of those who served in the military.[167]

The *Robison* Court rejected the claim that affording educational benefits to those in the military and not to those in alternative service was invidiously discriminatory. "When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."[168] The motivation behind the differentiation was not to target conscientious objectors—the Court rejected that there was "any legislative design to interfere with their free exercise of religion."[169] Instead, the "withholding of educational benefits involve[d] only an incidental burden upon appellee's free exercise of religion,"[170] because extending

162. *Id.* at 221 ("[W]e must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.").
163. 415 U.S. 361 (1974).
164. *Id.* at 362–63 ("A draftee accorded Class I—O conscientious objector status and completing performance of required alternative civilian service does not qualify . . . as a 'veteran who . . . served on active duty,' . . . and is therefore not an 'eligible veteran' entitled . . . to veterans' educational benefits.").
165. *Id.* at 379 ("Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty. Congress was acutely aware of the peculiar disabilities caused by military service, in consequence of which military servicemen have a special need for readjustment benefits.").
166. *Id.* at 378 (discussing "conscientious objectors who have performed alternative civilian service . . . [whose] lives . . . were . . . disrupted and . . . in need of readjustment").
167. *Id.* ("A conscientious objector performing alternative service is obligated to work for two years. Service in the Armed Forces, on the other hand, involves a six-year commitment.").
168. *Id.* at 383.
169. *Id.* at 385.
170. *Id.*

those benefits to conscientious objectors "would not rationally promote the Act's purposes."[171]

The provision of educational benefits was designed to "make military service more attractive,"[172] so an individual might be more willing to serve in the military if accorded those benefits.[173] However, one precluded by conscience from serving would presumably be unwilling to serve even if offered educational benefits. "[B]ecause a conscientious objector bases his refusal to serve in the Armed Forces upon deeply held religious beliefs, we will not assume that educational benefits will make military service more attractive to him."[174] The Court thereby implied that it was reasonable not to offer those benefits to conscientious objectors, because doing so would not have promoted the state's desired end.[175]

Yet, such an analysis might have led to a different outcome in *Sherbert*. The South Carolina Supreme Court had reasoned that the purpose behind the unemployment statute was to provide compensation for those laid off at work[176] and not those who "chose" not to work for compelling reasons such as the need to be home at certain times to care for children[177] or to avoid working on the Sabbath.[178] It was presumably reasonable for the state to refuse to award benefits to individuals choosing not to work, even if refusing for important reasons, in light of the state's goal of providing temporary compensation to those laid off. Further, there was no claim that the state intended to punish those of a particular religion or those who wished to be home with children during certain hours of the day, which made the burden incidental and indirect rather than targeted.[179] Indirect nature of the burden notwithstanding, the *Sherbert* Court struck down the refusal of unemployment compensation which had placed "the same kind of burden upon the free exercise of religion as would a fine imposed

171. *Id.*

172. *Id.* at 382.

173. *See id.* ("[O]nce drafted, educational benefits may help make military service more palatable to a draftee and thus reduce a draftee's unwillingness to be a soldier.").

174. *Id.* at 382–83.

175. *Cf. id.* at 383 ("[T]he inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not . . . .").

176. *See* Sherbert v. Verner, 125 S.E.2d 737, 740 (S.C. 1962) (citing Judson Mills v. S.C. Unemployment Comp. Comm'n., 28 S.E.2d 535, 537 (S.C. 1944)), *rev'd*, 374 U.S. 398 (1963).

177. *See id.* at 742 (discussing Hartsville Cotton Mill v. S.C. Emp't Sec. Comm'n, 79 S.E.2d 381, 382 (S.C. 1953)).

178. *Id.* (citing Kut v. Albers Super Mkts., 66 N.E.2d 643, 644 (Ohio 1946)).

179. *Cf. Sherbert*, 374 U.S. at 403 (recognizing that the burden on Sherbert was "only an indirect result of welfare legislation within the State's general competence to enact").

against appellant for her Saturday worship."[180] South Carolina's approach was doomed once it was likened to a system that taxed based on religious belief.

In effect, Robison argued that his burden was analogous to being taxed for his religious beliefs since Congress effectively "increase[ed] the price he [the conscientious objector] must pay for adherence to his religious beliefs."[181] However, rather than compare the price imposed on Robison to the price imposed on Sherbert,[182] the Court instead noted that the statute at issue did "not require appellee and his class to make any choice comparable to that required of the petitioners in *Gillette*."[183] The Court's point was accurate in that the price of following one's conscience in *Gillette* was incarceration, whereas the price of following one's conscience in *Robison* was merely the opportunity cost associated with not having the government pay for one's education. But the Court did more than merely note that the comparative burden in *Gillette* was greater; in addition, the *Robison* Court implied that the government's interests at stake in *Robison* and *Gillette* were comparable—"the Government's substantial interest in raising and supporting armies, is of 'a kind and weight' clearly sufficient to sustain the challenged legislation . . . ."[184]

Yet, this was a surprising argument to make. In *Gillette*, the Court implied that requiring exemptions for individuals with conscientious objections about a particular war would put the fate of the whole draft at risk.[185] There was great importance in having "fair, evenhanded, and uniform decisionmaking"[186] with respect to who would be drafted and "the interest in fairness would be jeopardized by expansion [of the exemption] to include conscientious objection to a particular war."[187] The *Gillette* Court had taken seriously how expanding the exemption to those whose consciences forbade participation in a particular conflict might seriously impair "the Government's interest in procuring the manpower necessary for military purposes."[188]

Similar concerns were not implicated in *Robison*. Those whose educational benefits were at issue were already exempted from active military duty, and the Court expressly rejected that the provision of military benefits would affect the decisionmaking of those claiming a

180. *Id.* at 404.
181. Johnson v. Robison, 415 U.S. 361, 383 (1974).
182. *See id.* at 387 (Douglas, J., dissenting) (suggesting the *Sherbert* analysis was applicable in *Robison*).
183. *Id.* at 385.
184. *Id.* (citing U.S. CONST. art. I, § 8),
185. *But see infra* note 263 and accompanying text (offering a more critical view of this claim).
186. Gillette v. United States, 401 U.S. 437, 455 (1971).
187. *Id.*
188. *Id.* at 462.

conscientious objection.[189] But that means that the state's interest was not in whether the draft could survive,[190] but merely in whether the United States would have to bear the additional costs implicated in footing the educational costs of conscientious objectors. South Carolina's desire to limit its unemployment compensation costs did not prevent invalidation of its approach,[191] and it is not at all clear that protection of the federal fisc would have sufficed as a justification in *Robison*. It is thus difficult to tell whether the Court implicitly changed its analysis with respect to the kind of burden that will trigger free exercise guarantees[192] or whether instead the Court somehow thought the integrity of the (former) draft was predicated on conscientious objectors not receiving these education benefits.

E. Back to Robust Protection?

In a subsequent case, *Thomas v. Review Board of Indiana Employment Security Division*,[193] the Court made clear that the *Sherbet* analysis had continuing vitality. At issue was whether Eddie Thomas was entitled to unemployment compensation benefits when he quit his job rather than violate his conscience by working to produce weapons.[194] Although a friend, also a Jehovah's Witness, had told him that it was not unscriptural to perform the job at issue,[195] Thomas disagreed, believing that his friend's interpretation of religious duty was too lax.[196]

Using language that might well have led to a different result in *Robison*, the *Thomas* Court reasoned that "a burden upon religion exists"[197] if "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith"[198] or if the state "denies such a

189. *See supra* text accompanying note 174.
190. By the time the Court issued this decision, the United States had shifted policy and was using an all-volunteer army. *See* Christine Hunter Kellett, *Draft Registration and the Conscientious Objector: A Proposal to Accommodate Constitutional Values*, 15 COLUM. HUM. RTS. L. REV. 167, 168 n.9 (1984) ("The Congress went to an all-volunteer army and ended the draft in 1973.").
191. *Cf.* Sherbert v. Verner, 374 U.S. 398, 407 (1963) (discussing the "possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might . . . dilute the unemployment compensation fund").
192. *Cf.* Johnson v. Robison, 415 U.S. 361, 385 (1974) (questioning "if, indeed, any burden exists at all").
193. 450 U.S. 707 (1981).
194. *Id.* at 711 ("The hearing referee found that Thomas' religious beliefs specifically precluded him from producing or directly aiding in the manufacture of items used in warfare. He also found that Thomas had terminated his employment because of these religious convictions.").
195. *Id.*
196. *Id.* ("Thomas was not able to 'rest with' this view, however. He concluded that his friend's view was based upon a less strict reading of Witnesses' principles than his own.").
197. *Id.* at 718.
198. *Id.* at 717.

benefit because of conduct mandated by religious belief."[199] The test is not whether the individual changes his conduct or even whether he is likely to do so; instead, the question is whether the state puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[200] But if denying unemployment compensation imposed pressure on religious beliefs, then denying educational benefits might also be thought to impose pressure on those asserting conscientious objections.

That the state was imposing pressure on religious beliefs did not establish that the state's action was impermissible. The state can burden religious exercise if doing so "is the least restrictive means of achieving some compelling state interest."[201] But such a test is quite difficult to meet, and Indiana could not establish that its implicated state interests justified denial of unemployment compensation in that case.[202]

F. Tepid Protection?

The very next year, the Court again seemed to modify its approach. In *United States v. Lee*,[203] the Court examined whether an individual could be forced to participate in the social security system even if doing so violated his religious principles.[204] Edwin Lee "employed several other Amish to work on his farm and in his carpentry shop."[205] However, he refused as a matter of religious conviction[206] to pay the employer's share of social security and also refused to withhold from his employees' paychecks their share of social security.[207]

The *Lee* Court accepted that forcing Lee to participate in the social security system imposed a burden on his free exercise. "Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights."[208] The Court then articulated the test to determine whether such interference could pass constitu-

199. *Id.* at 717–18.
200. *Id.* at 718.
201. *Id.*
202. *Id.* at 719 ("Neither of the interests advanced is sufficiently compelling to justify the burden upon Thomas' religious liberty.").
203. 455 U.S. 252 (1982).
204. *Id*. at 254 ("[Edwin Lee] failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes.").
205. *Id.*
206. *See id.* at 255 ("[T]he Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system.").
207. *Id.* at 254.
208. *Id.* at 257.

tional muster. "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[209]

The state interest in maintaining the social security system is significant, because it "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees."[210] Further, "mandatory participation is indispensable to the fiscal vitality of the social security system,"[211] because "a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer."[212] Thus, the Court explained why it would not be workable to adopt a voluntary social security system, although Lee had merely suggested that he must be afforded an exemption as a matter of free exercise.[213]

The Court was fearful that recognizing an exemption for Lee would open up the floodgates—"[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[214] A ruling for Lee might not only have had implications for the social security program but for the tax system more generally. "There is no principled way . . . for purposes of this case to distinguish between general taxes and those imposed under the Social Security Act."[215] But if no principled distinction could be made, then the Court feared that there might be a whole host of challenges to tax laws. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax."[216]

That the Court was worrying about whether its decision would open up the floodgates is not surprising.[217] Nonetheless, the Court's analysis in *Lee* was rather surprising, given that an analogous argument might have required a very different result in both *Sherbert* and

209. *Id.* (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972)).
210. *Id.* at 258.
211. *Id.*
212. *Id.*
213. *Id.* at 255 (discussing Lee's "claim[ ] that imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees").
214. *Id.* at 259–60.
215. *Id.* at 260.
216. *Id.*
217. *Cf.* Schriro v. Landrigan, 550 U.S. 465, 499 (2007) (Stevens, J., dissenting) ("[T]he Court's decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation.").

Thomas. Given the diversity of religious beliefs in this country,[218] the Court might have feared opening the floodgates to recognize a whole host of required exemptions to the rule that individuals who voluntarily refused suitable employment could not receive unemployment compensation.

The *Lee* Court supported its refusal to recognize an exception for Amish employers by noting that Congress had exempted the self-employed from social security requirements.[219] That was "a narrow category which was readily identifiable."[220] While the Court did not explain why that group in particular had been singled out, one justification would be that where the individual is self-employed both the employer and the employee would share the religious beliefs in question. No conflict would arise because, for example, religious convictions prevented the employer but not the employee from participating in social security, and the provision mentioned by the Court expressly requires that exempted employees waive their rights to benefits.[221]

Yet, if this is why Congress limited the exemption, then there would seem to be good reason for the Court to say that the exemption had to be expanded slightly to cover exactly the kind of case before the Court in *Lee*, i.e., cases in which both the employer and all of the employees object to participation. The Court was confident that Congress was "sensitive to the needs flowing from the Free Exercise Clause"[222] and that its decision about where to draw the line must be given deference,[223] but no reasons were offered to justify deferring to Congress but not to state legislatures who also sought to draw a sensible line with respect to which individuals should receive unemployment compensation.

In his concurrence in *Lee*, Justice Stevens noted that as "a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case."[224] He also noted that

218. Braunfeld v. Brown, 366 U.S. 599, 606 (1961) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference.").

219. *Lee*, 455 U.S. at 260 ("Congress granted an exemption, on religious grounds, to self-employed Amish and others.").

220. *Id.* at 261.

221. *See* 26 U.S.C. § 1402(g)(1)(b) (2010) ("Such exemption may be granted only if the application contains or is accompanied by . . . his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person[.]").

222. *Lee*, 455 U.S. at 261.

223. *Id.* ("Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.").

224. *Id.* at 262 (Stevens, J., concurring in the judgment).

doing so would likely confer a fiscal benefit rather than impose a fiscal burden on the United States.[225] Nonetheless, he feared that recognizing an exemption in this case would open the door to other individuals claiming that they too should be exempted, and the difficulties in determining which other exemptions should be granted justified granting no exemption in this case.[226]

Tony & Susan Alamo Foundation v. Secretary of Labor[227] also involved both the employer and employees challenging the failure to afford an exemption as a matter of free exercise.[228] The Foundation had been accused of violating the Fair Standards Labor Act.[229] Those working for the Foundation were not paid wages but were given food, shelter, clothing, transportation, and medical care.[230]

The Court recognized that in this case those challenging the law were those whom it was designed to protect, but suggested that affording an exemption where employees were willing to work without being paid wages would give employers an unfair advantage. "If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."[231]

Of course, the issue was not whether employees must be willing to accept their wages as a general matter—here, the question was whether "imposition of the minimum wage . . . requirements will violate the rights of the associates to freely exercise their religion."[232] The Court noted that "the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."[233] Because wages need not be in the form of

225. *Id.* ("As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits.").
226. *Id.* at 263 ("I agree with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim.").
227. 471 U.S. 290 (1985).
228. *Id.* at 293 ("The associates who had testified at trial had vigorously protested the payment of wages, asserting that they considered themselves volunteers who were working only for religious and evangelical reasons."). It was not clear, however, whether all 300 associates viewed themselves as volunteers. *See id.*
229. *Id.* ("[T]the Secretary of Labor filed an action against the Foundation, the Alamos, and Larry La Roche, who was then the Foundation's vice president, alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act.").
230. *See id.*
231. *Id.* at 302 (citing Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981)).
232. *Id.* at 303.
233. *Id.*

cash but could instead simply be in benefits,[234] the Court could not see how the requirement imposed a burden on free exercise since "the associates [could] simply continue to be paid in the form of benefits."[235] Even "if the associates' beliefs precluded them from accepting the statutory amount, there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily."[236] The Court "therefore fail[ed] to perceive how application of the Act would interfere with the associates' right to freely exercise their religious beliefs."[237]

While the Court's point that associates could always voluntarily donate to the Foundation was eminently reasonable, it was nonetheless surprising in a number of respects. The relevant question was not whether the Court believed that application of the statute imposed a burden on the employees' religious beliefs, but whether the *employees* believed that. The *Thomas* Court suggested that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[238] Not only was it important to focus on the claimants' rather than the Justices' beliefs, but it might also have been important to focus on the contents of the particular beliefs at issue. Thus, if part of the belief was that the individuals should not *receive* "excess" wages rather than merely that they should not *keep* excess wages, then one would have expected the Court to discuss why the state had a compelling interest at stake and why allowing an exemption would have severely undermined that interest.[239]

The Court seemed to second-guess religious beliefs in *Bowen v. Roy*[240] as well. At issue was whether the provision of welfare benefits could be conditioned on acceptance of a Social Security number when use of that number would impose a burden on free exercise.[241] "Roy

234. *Id.* at 303–04 ("The Act, however, does not require the payment of cash wages. Section 203(m) defines 'wage' to include 'the reasonable cost . . . of furnishing [an] employee with board, lodging, or other facilities.'" (quoting 29 U.S.C. § 203(m) (1977))).

235. *Id.* at 304.

236. *Id.*

237. *Id.* at 304–05.

238. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

239. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) ("The governmental interest at stake here is compelling. . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs . . . [and] no 'less restrictive means,' are available to achieve the governmental interest." (citing *Thomas*, 450 U.S. at 718)).

240. 476 U.S. 693 (1986).

241. *Id.* at 695 ("The question presented is whether the Free Exercise Clause of the First Amendment compels the Government to accommodate a religiously based objection to the statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits . . . .").

objects to the statutory requirement that state agencies 'shall utilize' Social Security numbers not because it places any restriction on what he may believe or what he may do, but because he believes the use of the number may harm his daughter's spirit."[242] The Court was utterly unsympathetic to Roy's claim, noting that the Court had never "interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."[243] Yet, more had to be said to distinguish this case from the other free exercise precedent, since those cases were often about what the government can or cannot do. The *Roy* Court further explained: "The 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."[244] Thus, the Government may be barred from forcing individuals to perform particular actions in light of their religious beliefs, but individuals' religious beliefs cannot dictate the Government's particular "internal procedures."[245]

What then of the requirement that individuals provide social security numbers to the government in order to receive Aid to Families with Dependent Children (AFDC) benefits? The Court noted that "[t]he statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable."[246] Thus, there was no suggestion that the statute involved an "attempt by Congress to discriminate invidiously"[247] or an attempt to engage in the "covert suppression of particular religious beliefs."[248] That said, the requirement "may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons."[249] But this was an unusual interpretation of what was being asserted, because Roy argued that his conduct (provision of his daughter's social security number) would rob her of her spirit, which was something that he of course had religious compunctions about doing.

The Court understood that Roy was being asked to do something to which he had religious objections. However, it was not as if Roy was simply minding his own business when the Government spontaneously imposed this new requirement on him. Rather "it is appellees

242. *Id.* at 699.
243. *Id.*
244. *Id.*
245. *Id.* at 700.
246. *Id.* at 703.
247. *Id.*
248. *Id.*
249. *Id.*

who seek benefits from the Government and who assert that, because of certain religious beliefs, they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government."[250]

The Court seemed to make two related points. The government's imposition of a burden was only in response to Roy having sought something, and the burden itself was the denial of a benefit rather than, for example, the imposition of a criminal penalty. While benefits are important, the kind of burden imposed here was qualitatively different from the kind of burden imposed where the government criminalizes religious practice. "[W]e cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications."[251] That did not make the burden imposed in this kind of case immunized from review. "A governmental burden on religious liberty is not insulated from review simply because it is indirect."[252] Although "the nature of the burden is relevant to the standard the government must meet to justify the burden."[253]

Where the burden is indirect and there is no evidence of any intent to discriminate, neutral and generally applicable laws will be upheld as long as they are reasonably related to the promotion of legitimate government interests.[254] What about *Thomas* and *Sherbert*, which also involved individuals seeking benefits from the government?[255] In those cases, the state had "created a mechanism for individualized exemptions [and] [i]f a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."[256] Because the state was already willing to make judgements on a case-by-case basis, "it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption."[257] What about the state's decision with respect to whether it would create a process for case-by-case decision-making?

250. *Id.*
251. *Id.* at 704.
252. *Id.* at 706 (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981)).
253. *Id.* at 707.
254. *Id.* at 707–08 ("Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.").
255. *Cf. id.* at 733 (White, J., dissenting) ("Being of the view that *Thomas v. Review Bd. of Indiana Employment Security Div.* and *Sherbert v. Verner* control this case, I cannot join the Court's opinion and judgment." (citations omitted)).
256. *Id.* at 708 (majority opinion).
257. *Id.*

The Court explained that "a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference."[258] The Court concluded that the "Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs."[259] Yet, the unemployment compensation cases essentially required the government to afford compensation on the appellants' "own terms,"[260] and one reason that the states might not have wanted to afford such benefits to those refusing to work for religious reasons could have been reluctance to inquire "into the genuineness of each religious objection to such condition or restrictions."[261]

There was yet another respect in which the *Roy* analysis did not seem to account for prior jurisprudence. Consider *Gillette*, where the government was already doing a case-by-case analysis so that individuals with conscientious objections to all wars could escape active service. The Court suggested that the federal government had a compelling interest in not also affording an exemption to individuals with conscientious objections to a particular war, citing both fairness and manpower concerns. Yet, it may well be that the Court was too willing to accept the Government's asserted justifications without subjecting them to close examination. Many individuals would not have been able to establish their sincere *religious* objections to participating in that war in particular when the individualized review was performed, which would mean that many would not qualify for the exemption in any event. Further, servicemembers may well not have thought it any more unfair to exempt those with sincere conscientious objections to a particular war than to exempt those with sincere conscientious objections to all wars.[262] Prior case law did not privilege the case-by-case analysis offered by the *Roy* Court both in that neutral and general laws were not always given deference (as *Yoder* illustrates),[263] and in that laws with such exceptions did not employ the

258. *Id.* at 707.

259. *Id.* at 711–12.

260. *Id.* at 712.

261. *Id.* at 707.

262. *See* Michael J. Davidson, *War and the Doubtful Soldier*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 91, 139 (2005) ("An expansion of the conscientious objector exemption would comport with our deep-rooted tradition of accommodating those members of our citizenry with sincere moral or religious objections to participating in a war.").

263. *See supra* text accompanying notes 134–63 (discussing *Yoder*).

demanding scrutiny that the Court implied would be thereby triggered (as *Seeger* illustrates).[264]

The validity of the *Roy* analysis was questioned the very next year in *Hobbie v. Unemployment Appeals Commission of Florida*.[265] At issue was whether an individual who converted to the Seventh-day Adventist faith could be denied unemployment compensation when she refused to work on Saturdays.[266] The Court noted, "Under our precedents, the Appeals Commission's disqualification of appellant from receipt of benefits violates the Free Exercise Clause of the First Amendment, applicable to the States through the Fourteenth Amendment."[267] The Florida Appeals commission argued that "its justification should be determined under the less rigorous standard articulated in Chief Justice Burger's opinion in *Bowen v. Roy*.[268] Rather than explain why this case fell within the exception recognized under *Roy*,[269] the Court simply rejected the *Roy* analysis.[270]

Yet, the following year the Court decided *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[271] offering an analysis that was reminiscent of the analysis in *Roy*. At issue was whether the Forest Service could build a road through federal lands,[272] which would have resulted in great harm to lands held sacred by certain Native American tribes.[273] The tribes argued "the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G–O road or to engage in timber harvesting in the Chimney Rock area."[274]

When analyzing the challenge, the Court noted that "[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*."[275] While "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual

264. *See supra* text accompanying notes 100–18 (discussing *Seeger*).
265. 480 U.S. 136 (1987).
266. *Id.* at 138 ("[A]fter a meeting with Hobbie and her minister, the general manager informed appellant that she could either work her scheduled shifts or submit her resignation to the company. When Hobbie refused to do either, Lawton discharged her.").
267. *Id.* at 139–40 (citing Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981)).
268. *Id.* at 141 (citing Bowen v. Roy, 476 U.S. 693, 707–08 (1986)).
269. *See id.* at 147 (Powell, J., concurring in the judgment) ("The Court recognizes in a footnote that the reasoning of *Roy* does not apply to this case.").
270. *See id.* at 141–42 (majority opinion); *see also id.* at 147 (Powell, J., concurring in the judgment) ("[T]he Court reaches out to reject the reasoning of *Roy in toto*.").
271. 485 U.S. 439 (1988).
272. *See id.* at 442.
273. *See id.*
274. *Id.* at 447.
275. *Id.* at 449.

fulfillment according to their own religious beliefs,"[276] the Court reasoned that it could not be said that "the affected individuals [would] be coerced by the Government's action into violating their religious beliefs."[277] Further, it also could not be maintained that the "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[278]

While acknowledging "that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices,"[279] the Court explained that "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[280] The difficulty was that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[281] Indeed, the same government activities might promote the spiritual requirements of some groups while undermining the spiritual requirements of others.[282] The Court concluded, "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[283]

Yet, much of the Court's analysis was at best unpersuasive. For example, the Court's point that particular government policies might promote the spiritual interests of some and undermine the spiritual interests of others might be important were the question at hand which exceptionless policy should be adopted—there the government could not help but offend someone's religious beliefs. But individuals who request a free exercise exemption are not seeking implementation of an exceptionless policy; instead, they are seeking not to have a policy applied to them in particular because of their religious beliefs. Thus, the response to the point that a particular government policy might be compatible with the religious beliefs of some but incompatible with the religious beliefs of others is that the latter group might be exempted from the policy (unless doing so would itself be too costly).

In *Lyng*, respecting the religious wishes of the tribes would have meant stopping the logging and road-building altogether. If re-

276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 451.
280. *Id.* at 452.
281. *Id.*
282. *Id.* ("A broad range of government activities . . . will always be considered essential to the spiritual well-being of some citizens . . . . Others will find the very same activities deeply offensive, and perhaps incompatible with . . . the tenets of their religion.").
283. *Id.* at 453 (citing Bowen v. Roy, 476 U.S. 693, 724–27 (1986) (O'Connor, J., concurring in part and dissenting in part)).

fraining from engaging in those activities would have undermined a compelling state interest[284] then the Forest Service could have proceeded with its plans in any event. The Court seemed reluctant, however, to apply the compelling interest test when the Government's use of its own property was at issue.[285] Yet the unemployment compensation cases involved the Government's use of its own resources, although the resources in those cases did not involve land.

The *Lyng* analysis raised another concern. When religious practices are substantially burdened, the Court will sometimes judge the constitutionality of the challenged action in light of the compelling interest test and at other times will not. But without some principle to determine when the state must meet that standard, there is a great danger that the Court would appear to respect the free exercise rights of some groups but not of others.[286]

Texas Monthly, Inc. v. Bullock[287] provided further clarification of the Court's understanding of free exercise guarantees. Texas had "exempt[ed] from its sales tax '[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.'"[288] The state justified its exemption by stating that it had a compelling interest in respecting free exercise guarantees.[289] However, the plurality noted that the Free Exercise Clause does not "prevent[ ] the State from eliminating altogether its exemption for religious publications,"[290] especially when there had been "no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity."[291] Even were such a claim made, the plurality noted that "a State's interest in the uniform collection of a sales tax appears comparable to the Federal Government's interest in the uniform collection of Social Security taxes."[292] By the same token, the Court in *Jimmy Swaggart Minis-*

284. *But see id.* at 465 (Brennan, J., dissenting) ("The Court does not for a moment suggest that the interests served by the G–O road are in any way compelling . . . .").

285. *See id.* at 453 (majority opinion).

286. *See* Rebekah J. French, *Free Exercise of Religion on the Public Lands*, 11 PUB. LAND L. REV. 197, 209 (1990) ("The Supreme Court's refusal to apply the traditional balancing test to free exercise claims brought by Native Americans demonstrates the extent of their hostility to the religious beliefs of that minority.").

287. 489 U.S. 1 (1989).

288. *Id.* at 5 (quoting TEX. TAX CODE ANN. § 151.312 (West 1982)).

289. *Id.* at 17 ("Texas claims that it has a compelling interest in avoiding violations of the Free Exercise and Establishment Clauses . . . .").

290. *Id.* at 18.

291. *Id.*

292. *Id.* at 19–20.

tries v. Board of Equalization of California[293] upheld California's "imposition of sales and use tax liability on [a religious organization's] sale of religious materials."[294] Here, too, the Court noted that there was "no evidence . . . that collection and payment of the tax violates appellant's sincere religious beliefs."[295]

The Court issued *Employment Division, Department of Human Resources of Oregon v. Smith*[296] the same year that it issued *Jimmy Swaggart Ministries*.[297] At issue was a claim for unemployment compensation by two drug counselors who had been fired from their jobs for using peyote sacramentally in accordance with their religious tradition.[298] The respondents argued "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons."[299] Basically, they suggested that the *Sherbert* balancing test should be used,[300] i.e., that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[301] The Court rejected this suggestion,[302] concluding, "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug."[303]

Ironically, the *Smith II* Court noted that "[t]he *Sherbert* test . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[304] In the case before the Court, however, the individualized assessment rule was allegedly inapplicable because the criminal law did not con-

293. 493 U.S. 378 (1990).
294. *Id.* at 384.
295. *Id.* at 391.
296. Emp't Div., Dep't of Human Res. of Or. v. Smith (*Smith II*), 494 U.S. 872 (1990).
297. Both were issued in 1990. *See supra* notes 293 & 296.
298. *Smith II*, 494 U.S. at 874 ("Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members.").
299. *Id.* at 878.
300. *Id.* at 882–83 ("Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*." (citation omitted)).
301. *Id.* at 883 (citing Sherbert v. Verner, 374 U.S. 398, 402–03 (1963)).
302. *Id.* at 884 ("Even 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.").
303. *Id.* at 890.
304. *Id.* at 884.

tain an exemption for religious use of peyote.[305] This was misleading in at least two respects. First, there was an exception under Oregon law if the substance was prescribed.[306] Second, the Oregon criminal law was not at issue before the Court because the respondents had never even been prosecuted.[307] What was at issue was the denial of employment benefits.[308] But the denial of unemployment benefits required individualized assessment, which would seem to implicate *Sherbert*'s individualized assessment rule.[309]

The Court denied that the individualized assessment rule was implicated. "[I]f a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct."[310] To support that claim, the Court cited its previous decision (*Smith I*) involving Smith and Black.[311]

In *Smith I*, the United States Supreme Court addressed the Oregon Supreme Court's holding that Smith and Black could not be denied unemployment benefits for the sacramental use of peyote, notwithstanding that individuals convicted of peyote possession could receive up to ten years in prison for that offense.[312] The *Smith I* Court rejected that "the illegality of an employee's misconduct is irrelevant to the analysis of the federal constitutional [free exercise] claim."[313] In a kind of "greater-includes-the-lesser approach,"[314] the *Smith I* Court reasoned that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without

305. *See id.* at 874 ("Oregon law prohibits the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner." (citing ORE. REV. STAT. § 475.992(4) (1987))).
306. *See id.*
307. *Id.* at 911 (Blackmun, J., dissenting) ("In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents . . . .").
308. *See id.* at 874–75 (majority opinion).
309. *See supra* note 300 and accompanying text.
310. *Smith II*, 494 U.S. at 875 (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith (*Smith I*), 485 U.S. 660, 670 (1988)).
311. *Id.* (citing *Smith I*, 485 U.S. at 670).
312. *Smith I*, 485 U.S. at 661–62 ("The Oregon Supreme Court held that this denial . . . violated the Free Exercise Clause of the First Amendment to the Federal Constitution. In reaching that conclusion the state court attached no significance to the fact that the possession of peyote is a felony under Oregon law punishable by imprisonment for up to 10 years.").
313. *Id.* at 670.
314. *Cf.* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–46 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ."). *But see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511 (1996) ("[T]he 'greater-includes-the-lesser' argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.").

violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct."[315] Indeed, the Court's holdings "in *Sherbert*, *Thomas*, and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct."[316] Bigamy, for example, "may be forbidden, even when the practice is dictated by sincere religious convictions."[317] But "[i]f a bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a marriage counselor who was discharged because he or she entered into a bigamous relationship."[318]

Applying its reasoning to the issue before it, the *Smith I* Court explained that "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."[319] But that would mean that if there was no exception for the sacramental use of peyote in Oregon, then "the State [would be] free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation."[320]

A few points might be made about the *Smith I* Court's reasoning. Basically the Court said the following: Suppose that Statute 1 criminalizes certain religious behavior. Suppose further that Statute 2 imposes a civil burden, e.g., the denial of benefits, on individuals engaging in that religious behavior. One would expect that if Statute 1 is constitutional because narrowly tailored to promote certain compelling interests, then Statute 2 would also be constitutional as long as it was also narrowly tailored to promote certain compelling interests.

Free exercise jurisprudence has long distinguished between direct burdens such as criminal sanctions and indirect burdens such as the denial of benefits. The latter is viewed as less onerous, so it is unsurprising for the Court to suggest that all else equal a less onerous penalty will not offend constitutional guarantees if indeed a greater penalty would not have violated those guarantees. The *Smith I* Court thus suggested that if refusing to afford an exemption for the sacramental use of peyote did not violate constitutional guarantees because narrowly tailored to promote compelling state interests, then a denial of unemployment compensation would also pass muster if narrowly tailored to promote compelling state interests.

315. *Smith I*, 485 U.S. at 670.
316. *Id.* at 671.
317. *Id.* (citing Reynolds v. United States, 98 U.S. 145 (1879)).
318. *Id.*
319. *Id.* at 672.
320. *Id.*

The *Smith II* Court modified the prevailing jurisprudence in two ways: First, the Court announced that the "narrowly tailored to promote compelling interests" test was not triggered when neutral and generally applicable laws burdening free exercise were at issue.[321] The Court thereby weakened free exercise protections.[322]

Second, the Court may even have weakened the very test that it announced, because the challenge in *Smith II* was to the refusal to use the narrowly tailored to promote compelling state interests test in a context (unemployment compensation benefits denial) in which a case-by-case approach was utilized.[323] The *Smith II* Court cited to the *Smith I* Court's approach, which basically said that if a greater free exercise burden is constitutional then a lesser burden is constitutional, too.[324] But that makes sense only when *all else is equal*. All else is not equal if the test for the case-by-case analysis differs from the test for neutral and generally applicable laws. Thus, if neutral and general (i.e., exceptionless) laws burdening free exercise do not trigger strict scrutiny but laws (containing exceptions) that substantially burden free exercise do trigger strict scrutiny, the fact that the former passes muster would not establish or even suggest that the latter should also pass muster.

Smith II has the potential to change the jurisprudence even more than is commonly appreciated. Suppose, for example, that a statute criminalizing particular activity would be rationally related to the promotion of legitimate goals and, further, that it would be rationally related to legitimate goals not to make an exception for religious practices. A state might choose not to criminalize that activity even though doing so would be constitutional. Arguably, the better greater-includes-the-lesser test is not whether the state in fact criminalizes particular conduct but whether it could do so without violating constitutional guarantees. Using that test, the state would be permitted to deny benefits (a lesser penalty) in cases in which an individual engaged in the activity at issue for religious reasons, even if in fact the state had not criminalized that activity.

Justice Scalia took something akin to this approach in his dissent in *Romer v. Evans*,[325] which involved a referendum that precluded the

321. John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 498–99 (2014) ("*Smith* also introduced another significant doctrinal change in free exercise law: the move from strict scrutiny to rational basis scrutiny for claims challenging generally applicable laws.").

322. *See* Conor B. Dugan, Note, *Religious Liberty in Spain and the United States: A Comparative Study*, 78 NOTRE DAME L. REV. 1675, 1718 (2003) ("[T]he *Smith* decision . . . weakened free exercise protections.").

323. *See* OR. REV. STAT. § 657.176(2) (2015) (specifying the conditions under which an individual would not be eligible to receive benefits).

324. *See supra* text accompanying note 314.

325. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

state of Colorado and its localities from affording anti-discrimination protection on the basis of sexual orientation.[326] At the time, the Court had not yet held that adult consensual relations are constitutionally protected.[327] Although Colorado had been one of the first states to repeal its sodomy law,[328] Justice Scalia nonetheless suggested that because the state *could have* passed such a law, the state was constitutionally permitted to pick out a group who would or might engage in sodomitical relations and preclude that group from receiving anti-discrimination protections.[329]

Suppose that Colorado had a law prohibiting sodomy at the time. Even so, it could not have punished individuals without proof of their having violated the law, i.e., those individuals could not have been criminally punished for their sodomitical "tendencies."[330] However, Justice Scalia suggested that individuals with such tendencies could have civil penalties imposed upon them without violating constitutional guarantees.[331]

Justice Scalia did not mention some of the implications of his position. At the time *Romer* was decided fornication could still be criminalized,[332] which would presumably mean that unmarried individuals who had a tendency or desire to have sexual relations with someone else who was unmarried could have civil penalties imposed upon them without constitutional guarantees thereby being violated.[333] Merely because a state had not chosen to impose criminal sanctions against fornicators would not preclude it from imposing civil disabilities on individuals with such tendencies. Of course, Justice Scalia's view has other implications, too. At the time, adultery could

326. *See id.* at 624 (majority opinion) (reproducing the language of the referendum entitled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation").

327. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

328. *See Romer*, 517 U.S. at 645 (Scalia, J., dissenting) ("Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so." (citing 1971 Colo. Sess. Laws 388)).

329. *Id.* at 642 ("If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.").

330. *See id.* ("[A] person of homosexual 'orientation' is someone who [may] not engage in homosexual conduct but merely has a tendency or desire to do so . . . .").

331. *Id.* ("[W]here criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct.").

332. *See* VA. CODE ANN. § 18.2-344 (West 2015) ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor."), *declared unconstitutional by* Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005).

333. *See* Mark Strasser, Lawrence *and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003, 1032 (2004) (applying "Justice Scalia's approach to the class of fornicators and those who have an 'orientation' to fornicate").

be punished criminally and likely still can be, even post-*Lawrence*.[334] This would presumably mean that a state would not be violating constitutional guarantees if it imposed civil penalties on anyone who had a desire or tendency to commit adultery. But if individuals might be viewed as having a desire to commit adultery even when not doing so,[335] then a whole host of individuals—both married and unmarried—might be subject to civil penalties without constitutional guarantees thereby being violated.

Justice Scalia's view did not win the day in *Romer*.[336] Nonetheless, his approach could be imported into the free exercise context. The constitutionality of criminalizing particular conduct (even if the state had not in fact criminalized it) would entail that the state did not violate constitutional guarantees by imposing civil burdens on individuals performing that conduct, even if they were doing so for religious reasons. Such a view would make free exercise protections even weaker than they already are.

III. THE CONGRESSIONAL RESPONSE TO THE COURT'S FREE EXERCISE JURISPRUDENCE

Congress reacted to *Smith* by passing two statutes, the Religious Freedom Restoration Act (RFRA)[337] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[338] Both statutes were designed to protect free exercise under certain conditions. RLUIPA applies to both state and federal governments, although only with respect to certain issues,[339] whereas RFRA applies only to federal law.[340]

334. Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 101 (2011) ("[T]he *Lawrence* majority's statement that, as a general rule, states cannot regulate private sexual behavior 'absent injury to a person or abuse of an institution the law protects' leaves ample room for states to criminalize adultery[.]" (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003))).

335. *Cf.* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 299 (2004) ("President Jimmy Carter, who managed to avoid the notorious adultery recently associated with President Bill Clinton, famously admitted to lusting 'in his heart.'").

336. *See Romer*, 517 U.S. at 635 ("Amendment 2 violates the Equal Protection Clause.").

337. 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

338. 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

339. *See infra* text accompanying notes 342–43.

340. *See infra* text accompanying notes 355–63 (discussing how the United States Supreme Court limited RFRA's application to only federal law).

A. RLUIPA

The Court explained in *Cutter v. Wilkinson*[341] that Congress passed the Religious Land Use and Institutionalized Persons Act to target religious exercise in two distinct areas: Section 2 of the Act concerns "land-use regulation,"[342] and Section 3 targets "religious exercise by institutionalized persons."[343] The latter section was at issue in *Cutter*, which involved a challenge under RLUIPA to the alleged refusal of Ohio prison officials to accommodate the religious exercise of certain adherents of nonmainstream religions.[344]

The provision regarding the religious exercise of institutionalized persons provided that "'[n]o . . . government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,' unless the government shows that the burden furthers 'a compelling governmental interest' and does so by 'the least restrictive means.'"[345] Religious exercise includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[346]

The Court explained that RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."[347] Rejecting that RLUIPA would "elevate accommodation of religious observances over an institution's need to maintain order and safety,"[348] the Court was confident that "RLUIPA would . . . be applied in an appropriately balanced way, with particular sensitivity to security concerns."[349] The Court rejected a challenge to RLUIPA's constitutionality under the Establishment Clause, and remanded the case for further proceedings.[350]

RLUIPA and RFRA share certain features, for example, the definition of the exercise of religion.[351] That definition "include[s] 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[352] Both statutes preclude the federal government

341. 544 U.S. 709 (2005).
342. *Id.* at 715 (citing 42 U.S.C. § 2000cc).
343. *Id.* (citing 42 U.S.C. § 2000cc-1).
344. *Id.* at 712.
345. *Id.* at 715 (quoting 42 U.S.C. § 2000cc-1(a)(1)–(2)).
346. *Id.* (quoting 42 U.S.C. § 2000cc-5(7)(A)).
347. *Id.* at 721.
348. *Id.* at 722.
349. *Id.*
350. *Id.* at 726.
351. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014) ("RLUIPA amended RFRA's definition of the 'exercise of religion.'" (citing 42 U.S.C. § 2000bb-2(4) (1993))).
352. *Id.* at 2762 (quoting 42 U.S.C. § 2000cc-5(7)(A) (2000)).

from substantially burdening free exercise without adequate justification.[353]

B. RFRA

In *City of Boerne v. Flores*,[354] the Court noted the legislative intent behind RFRA: "Congress enacted RFRA in direct response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*."[355]

> [RFRA] prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[356]

The *Boerne* Court discussed RFRA's wide reach: "RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment."[357] The Court explained that this means "[a]ny law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion."[358]

There were at least two difficulties posed by the law. First, "If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest."[359] Thus, the state faces a daunting test in those instances in which a substantial burden has been imposed.

If it were difficult for an individual to establish that his or her free exercise had been substantially burdened, then RFRA's protections would not often be triggered. But that suggests the second difficulty. "Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest."[360] The Court believed that "[i]t is a reality of the modern regulatory state that numerous state

353. *See id.* at 2761 ("RFRA provides that 'Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.'" (quoting 42 U.S.C. § 2000bb–1(a))); *see also* Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) ("Section 3 [of RLUIPA] mirrors RFRA and provides that '[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability . . . .'" (quoting 42 U.S.C. § 2000cc-1(a))).

354. 521 U.S. 507 (1997).

355. *Id.* at 512 ("Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dep't. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).").

356. *Id.* at 515–16 (quoting 42 U.S.C. § 2000bb-1).

357. *Id.* at 532 (citing 42 U.S.C. § 2000bb-3(a)).

358. *Id.*

359. *Id.* at 533–34.

360. *Id.* at 534.

laws . . . impose a substantial burden on a large class of individuals."[361]

The Court struck down RFRA as applied to the states as a violation of federalism guarantees.[362] A separate issue was the degree to which RFRA applied to the actions of the federal government.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[363] the Court explained that "the Religious Freedom Restoration Act of 1993 . . . prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest."[364] At issue was whether the Federal Government could prevent a spiritist sect, the O Centro Espírita Beneficente Uniã do Vegetal (UDV), from importing hoasca.[365] Hoasca is a "sacramental tea made from two plants unique to the Amazon region. One of the plants, psychotria viridis, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, banisteriopsis caapi."[366]

Admitting that its act substantially burdened the free exercise interests of the UDV,[367] the Government nonetheless contended that "applying the Controlled Substances Act in this case was the least restrictive means of advancing . . . compelling governmental interests."[368] The Court reasoned that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[369] To support that analysis, the Court noted that "RFRA expressly adopted the compelling interest test 'as set forth in *Sher-*

361. *Id.* at 535.

362. *See id.* at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."); *see also* Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) ("In *City of Boerne,* this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment." (citing *Boerne*, 521 U.S. at 532–36)).

363. 546 U.S. 418 (2006).

364. *Id.* at 423 (quoting 42 U.S.C. § 2000bb-1(b) (1993)).

365. *Id.* at 425 ("In 1999, United States Customs inspectors intercepted a shipment to the American UDV containing three drums of *hoasca*. . . . The inspectors seized the intercepted shipment and threatened the UDV with prosecution.").

366. *Id.*

367. *Id.* at 426 ("[T]he Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV.").

368. *Id.*

369. *Id.* at 430–31 (citing 42 U.S.C. § 2000bb-1(b)).

bert . . . and . . . *Yoder*.'"[370] The Court then noted the "well-established peyote exception"[371] to the Controlled Substances Act.[372] While not doubting that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA,"[373] the Court held that the Government had not met its burden to justify precluding the UDV from receiving or using the hoasca.[374]

Boerne and *Gonzales* together suggest that RFRA applies to federal[375] but not state[376] law, and that RFRA may require an individualized assessment to determine whether the Government has sufficiently important interests to justify imposing a burden on an individual's free exercise.[377] *Boerne* suggests that a claim that the challenged law substantially burdens a religious practice "will often be difficult to contest."[378] Regrettably, the *Boerne* Court provided no clarification about the possible bases for challenging such an assertion.

In *Burwell v. Hobby Lobby Stores, Inc.*,[379] the Court focused on whether the Affordable Care Act substantially burdened the free exercise rights of certain for-profit corporations.[380] These for-profits objected to providing health insurance that might result in the destruction of an embryo,[381] and then suggested that "the HHS [Health and Human Services] mandate demands that they engage in conduct that seriously violates their religious beliefs."[382] The Court

370. *Id.* at 431 (citations omitted) (citing 42 U.S.C. § 2000bb(b)(1)).
371. *Id.* at 434.
372. *See* 21 C.F.R. § 1307.31 (1985) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law."). The *Gonzales* Court cited to this provision. *See Gonzales*, 546 U.S. at 434.
373. *Gonzales*, 546 U.S. at 436.
374. *Id.* at 439 ("[W]e conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*.").
375. *See supra* note 364 and accompanying text.
376. *See supra* note 362 and accompanying text.
377. *See supra* note 369 and accompanying text.
378. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
379. 134 S. Ct. 2751 (2014).
380. *Id.* at 2775 ("Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate 'substantially burden[s]' the exercise of religion." (citing 42 U.S.C. § 2000bb-1(a)) (1993))).
381. *Id.* ("They therefore object on religious grounds to providing health insurance that covers methods of birth control that . . . may result in the destruction of an embryo.").
382. *Id.*

also noted that the refusal to engage in the required conduct might result in "substantial" fines,[383] suggesting that the serious violation of religious beliefs and the significant penalties for non-compliance *each* established that the Affordable Car Act substantially burdened free exercise.

It was not clear that the insurance requirement forced corporations to violate their religious beliefs. At most, the corporations were required to provide insurance for their employees, who might themselves decide to use that insurance to pay for particular health care needs. So *Hobby Lobby* raised two distinct questions: whether for-profit corporations are protected by RFRA,[384] and whether the insurance requirement substantially burdened free exercise.[385]

Once it declared that for-profit corporations are protected by RFRA,[386] the Court next focused on whether the insurance requirement burdened free exercise. HHS argued that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated" to constitute a substantial burden.[387] The Court interpreted that argument to suggest the religious belief asserted was not reasonable.[388] But that interpretation misconstrued the claim, which instead posited that paying for insurance was not sufficiently closely connected to the religious beliefs asserted for ACA to be construed as substantially burdening free exercise.[389]

Perhaps seeking to provide an additional basis upon which to find that the corporations' religious exercise was substantially burdened, the Court accepted "that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for [the objecting corporations] to provide the coverage."[390] Further, deference to the professed beliefs was required—these "companies sincerely believe that providing the

383. *See id.* at 2776.
384. *Id.* at 2767 ("The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.").
385. *Id.* at 2775 ("Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate 'substantially burden[s]' the exercise of religion." (citing 42 U.S.C. § 2000bb-1(a))).
386. *Id.* ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").
387. *Id.* at 2777.
388. *Id.* at 2778 ("This argument . . . addresses . . . whether the religious belief asserted in a RFRA case is reasonable.").
389. *See id.* at 2777 ("[T]he end that they find to be morally wrong (destruction of an embryo) is simply too attenuated.").
390. *Id.* at 2778.

insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial."[391]

Once it established the federal statute substantially burdened free exercise, the Court then focused on whether the government regulations were closely tailored enough to promote sufficiently important interests. The Court granted for the sake of argument that the implicated governmental interest was compelling,[392] and then examined whether the requirement was sufficiently narrowly tailored to pass muster. Concluding it was not,[393] the Court noted that there was another way that women could receive insurance coverage for their contraceptive needs. "The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[394]

The *Hobby Lobby* Court was not thereby suggesting that any and all costs could be shifted onto the Government, since "cost may be an important factor in the least-restrictive-means analysis."[395] However, saying that the Government was not always required to absorb all costs did not mean that the Government would never be required to do so, since "both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."[396]

To support its claim that requiring the Government to shoulder the costs at issue would not be particularly onerous, the *Hobby Lobby* Court noted how the Government already shouldered such costs when the religious beliefs of non-profit corporations were at issue.[397] Such an analysis at least suggests that where Congress has already recognized an exception, the Court will not hesitate to expand it a little to protect free exercise.

Yet, the *Hobby Lobby* Court itself demonstrated the difficulties that might arise when applying the Court's suggested analysis. The Court offered an example of a case in which an exemption would *not* be required, focusing on *Lee*. The Court noted that *Lee* was a free ex-

391. *Id.* at 2779.
392. *Id.* at 2780 ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.").
393. *See id.* ("The least-restrictive-means standard is exceptionally demanding and it is not satisfied here." (citing City of Boerne v. Flores, 521 U.S. 507, 532 (1997))).
394. *Id.*
395. *Id.* at 2781.
396. *Id.* (citing 42 U.S.C. § 2000cc-3(c) (2000)).
397. *Id.* at 2782 ("HHS has already established an accommodation for nonprofit organizations with religious objections.").

ercise case rather than a RFRA case,[398] but then examined it as if it were a RFRA case for purposes of illustration.[399]

The Court explained that no exemption would be made under RFRA in a case like *Lee*—"[I]f the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes."[400] But this was simply wrong given that Congress had exempted the self-employed Amish from paying social security taxes,[401] which the *Lee* Court had itself recognized.[402] It would have been relatively easy and non-burdensome to expand the exemption to cases involving Amish employers and employees where all parties refused to participate in social security.[403]

One would have expected the *Hobby Lobby* Court to say that the exemption at issue in *Lee* could have been expanded a little bit, just as the exemption was expanded a little (to include religious for-profits) in *Hobby Lobby*. That the Court would not have held that RFRA required the exemption in *Lee* suggests that the Court is not as serious as it claims about doing a case-by-case analysis or, perhaps, that the inconsistent application under the Free Exercise Clause will now be the preferred method under RFRA and RLUIPA.

C. The Circuits' Quandary

Both RFRA and RLUIPA protections are only triggered when a substantial burden is imposed on religious exercise. While the Court has made clear that what qualifies as a substantial burden is the same under both laws,[404] it has not spelled out the criteria for determining when a burden qualifies as substantial.[405] This is problematic, because the definition of substantial burden in RFRA and RLUIPA is determined in accordance with free exercise jurispru-

398. *Id.* at 2784 ("*Lee* was a free-exercise, not a RFRA, case . . . .").

399. *See supra* text accompanying notes 397–400.

400. *Hobby Lobby*, 134 S. Ct. at 2784.

401. *See supra* note 219 and accompanying text.

402. *See supra* note 219 and accompanying text.

403. Justice Stevens hypothesized that doing so might have saved the government money. *See supra* note 225 and accompanying text.

404. *See* Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) ("Section 3 [of RLUIPA] mirrors RFRA and provides that '[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability . . . .'" (quoting 42 U.S.C. § 2000cc-1(a))).

405. Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813–14 (8th Cir. 2008) ("When the significance of a religious belief is not at issue, the same definition of 'substantial burden' applies under the Free Exercise Clause, RFRA and RLUIPA." (citing Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 988 (8th Cir. 2004))).

dence[406] and the Court has offered mixed signals about what counts as a substantial burden in the free exercise context.[407] Because of those mixed signals, the circuit courts have developed differing approaches to determine when free exercise has been substantially burdened.

In *Adkins v. Kaspar*,[408] the Fifth Circuit outlined some of the differing approaches used by the circuit courts to determine whether free exercise has been substantially burdened. The court explained that notwithstanding "RLUIPA's eschewing the requirement of centrality in the definition of religious exercise, the Eighth Circuit adopted the same definition that it had employed in RFRA cases, requiring the burdensome practice to affect a 'central tenet' or fundamental aspect of the religious belief."[409] In contrast, the Seventh Circuit suggested that a practice "that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[410] The Ninth Circuit "defined a 'substantial burden' as one that imposes 'a significantly great restriction or onus upon such exercise.'"[411] These approaches might be contrasted with that of the Eleventh Circuit, which "declined to adopt the Seventh Circuit's definition, holding instead that a 'substantial burden' is one that results 'from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.'"[412]

Two points can be made about the circuits using different tests. First, it is not as if the circuits have adopted different tests because of a lack of knowledge regarding other tests that might be employed. Consider *Civil Liberties for Urban Believers v. City of Chicago*.[413] The Seventh Circuit realized that "the meaning of 'substantial burden on religious exercise' could be read to include the effect of any regulation that 'inhibits or constrains the use, building, or conversion of real

406. *See* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 996–97 (7th Cir. 2006) ("RLUIPA's legislative history indicates that the term 'substantial burden' was intended to be interpreted by reference to First Amendment jurisprudence[.]" (citing 146 CONG. REC. S7774–01 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy))).

407. Washington v. Klem, 497 F.3d 272, 278 (3d Cir. 2007) ("Supreme Court precedent with respect to the definition of 'substantial burden" in the Free Exercise Clause context has not always been consistent.").

408. 393 F.3d 559 (5th Cir. 2004).

409. *Id*. at 568 (citing *Murphy*, 372 F.3d at 988, *cert. denied*, 543 U.S. 991 (2004)).

410. *Id.* (citing Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004)).

411. *Id.* (citing San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)).

412. *Id.* at 568–69 (citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005)).

413. 342 F.3d 752.

property for the purpose of religious exercise.'"[414] However, the court reasoned that "[a]pplication of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word 'substantial.'"[415] That was "because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means."[416] Because such a forgiving standard would write "substantial" out of the text, the Seventh Circuit concluded that "in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[417]

The Seventh Circuit feared that too deferential a standard would mean that even insubstantial burdens would trigger the relevant test.[418] However, even when a circuit has adopted an apparently less demanding standard with respect to what qualifies as a substantial burden, a court might nonetheless interpret that standard in a way that proves to be much more demanding than might originally have been thought. Consider *Midrash Sephardi, Inc. v. Town of Surfside*,[419] in which the Eleventh Circuit offered a seemingly less demanding standard for a burden to qualify as substantial. The court said that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[420]

The issue in *Midrash Sephardi* was whether a synagogue, which leased space in one area of town,[421] could be required to move to a different location because of a zoning requirement. Because of a religious requirement that individuals walk to services on the Sabbath and holidays,[422] moving the synagogue would make it very difficult for

414. *Id.* at 761 (citing Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996)).

415. *Id.*

416. *Id.*

417. *Id.*

418. *See supra* text accompanying notes 415–17.

419. 366 F.3d 1214 (11th Cir. 2004).

420. *Id.* at 1227.

421. *Id.* at 1220 ("Midrash was formed in 1995 and leases the second floor of 9592 Harding Avenue from Ohio Savings Bank.").

422. *Id.* at 1221 ("Orthodox Judaism forbids adherents to use cars or other means of transportation during the weekly Sabbath and religious holidays; thus, adherents prefer to gather for worship and religious study in synagogues close enough to their homes to allow them to walk to services.").

some of the congregants to attend services, e.g., the old or infirm.[423] This would affect not only the individual congregant's religious exercise, but might also affect the health of the congregation as a whole if enough congregants were dissuaded from attending services.[424] In addition, it was not clear that there was any suitable location for the synagogue within the area zoned for houses of worship.[425]

The Eleventh Circuit noted that under RLUIPA "an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity."[426] Notwithstanding the difficulties posed by "Floridian heat and humidity [for those aged and infirm who] . . . walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of RLUIPA."[427] The court offered the consolation that "congregants wishing to practice Orthodox Judaism [can] . . . move where [the] synagogues are located."[428] Apparently, the burden imposed by having to acquire a new home or by simply forgoing attending services on the Sabbath did not constitute "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[429] While the Eleventh Circuit's substantial burden test seems more forgiving on its face, a separate issue involves how that test is then applied in practice.

The Ninth Circuit also declines to use the Seventh Circuit standard. In *International Church of Foursquare Gospel v. City of San Leandro*,[430] the Ninth Circuit rejected the applicability of *Civil Liberties for Urban Believers* (which used the Seventh Circuit test)[431] for determining whether a substantial burden had been placed on a religious institution precluded from building a church in the only suitable place in the city.[432] The court remanded the case for a determination of

423. *See id.* at 1227–28 ("[T]hey suggest that the additional blocks would greatly burden congregants who are ill, young or very old.").

424. *Id.* at 1227 ("[T]he significant decrease in attendance would require . . . ceas[ing] operations altogether.").

425. *Id.* at 1221 (noting the congregation's claim that "any attempt to relocate in the permitted RD–1 district would be futile because suitable land is unavailable").

426. *Id.* at 1227 (citing Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995)).

427. *Id.* at 1228.

428. *Id.*

429. *Id.* at 1227.

430. 673 F.3d 1059, 1069 (9th Cir. 2011) ("This higher standard [used in *Civil Liberties for Urban Believers*] has been rejected in this circuit." (citing Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 989 n.12 (9th Cir. 2006))).

431. *See id.* at 1068–69.

432. *See id.* at 1068 ("The Church's realtor presented significant evidence that no other suitable properties existed: he examined each of the 196 parcels rezoned for assembly use, and found them unsuitable for the needs of a large religious congregation.").

whether the city had used the least restrictive means to promote a compelling interest.[433] In contrast, the Eleventh Circuit, which also does not use the Seventh Circuit test,[434] nonetheless rejected the argument that a substantial burden had been placed on a religious institution even though there seemed to be no suitable location for the synagogue in the only area where the local zoning law permitted it to go.[435]

It is unsurprising that the circuits have developed differing interpretations of RLUIPA, given the lack of guidance from the Court. That might happen even if the circuits agreed about the relevant criteria, e.g., some circuits might emphasize certain factors while others might emphasize other factors. But the different tests cannot merely be attributed to contrasting emphases and the Court has done too little to provide helpful guidance. Indeed, the Court has refused to grant certiorari in several of the cases that apply differing tests,[436] almost guaranteeing that the same federal law will offer protection in some circuits but not in others even if the factual scenarios are relevantly similar.

IV. CONCLUSION

There is no clear understanding of what counts as a substantial burden on religious exercise under federal law. That is due in part to the Court's inconsistent approach in the free exercise jurisprudence and to its insufficient guidance with respect to the proper interpretation of RFRA and RLUIPA. This is unacceptable, because it almost guarantees that the circuits applying the same law will arrive at differing conclusions in relatively similar cases.

There is yet another potential difficulty that seems underappreciated. The Court has suggested that RFRA and RLUIPA use the same standard to determine whether a substantial burden has been imposed on religious exercise.[437] But in *Hobby Lobby*, the Court was very deferential with respect to whether individual religious practices had been substantially burdened. The Court suggested both that it was not for the Court to judge whether beliefs were mistaken or insubstantial,[438] and that it would be a substantial burden for the government to require actions that would amount to a perceived serious

433. *Id.* at 1071.

434. *See supra* note 412 and accompanying text.

435. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1220 (11th Cir. 2004) (noting the congregation's claim that "any attempt to relocate in the permitted RD–1 district would be futile because suitable land is unavailable").

436. *See supra* text accompanying notes 409–10 & 412.

437. *See supra* text accompanying note 353.

438. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2779 (2014).

violation of religious belief.[439] Together, these propositions suggest that substantial deference is owed to claims that particular requirements substantially burden religious exercise, which in effect makes it very easy for a claimant to satisfy the substantial burden test.

The government can impose substantial burdens on free exercise if the government requirement is narrowly tailored to promote compelling interests. But this is a very difficult test to meet, and *Hobby Lobby*, if taken seriously, could require a radical reinterpretation of federal law. As the Court has repeatedly recognized, a whole host of laws might substantially burden someone's sincerely held religious beliefs,[440] especially if deference must be given to what constitutes a substantial burden. The Court should make clear at its earliest opportunity whether federal law should be understood to have incorporated this major change.

If the Court's free exercise jurisprudence is any guide, *Hobby Lobby* will not require a major shift in our understanding of federal law. Instead, it will be trotted out in particular cases and ignored in others, replicating the Court's free exercise practice of offering incompatible analyses to decide cases in light of some unarticulated guide. Those hoping for consistent application of a clearly stated principle in cases implicating federal constitutional or statutory law are unlikely to see those hopes realized. Instead, the Court will only make an increasingly chaotic area of law even more chaotic. Both individuals and the country as a whole deserve more from the Court. If history is any guide, however, they are unlikely to get it.

439. *Id.* at 2775.
440. *See supra* text accompanying note 216 & 281.