Missouri Law Review

Volume 66
Issue 1 *Winter 2001*

Article 7

Winter 2001

Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability

Brian A. Freeman

Expiating the Sins of *Yoder* and *Smith*: Toward a Unified Theory of First Amendment Exemptions From Neutral Laws of General Applicability

*Brian A. Freeman**

INTRODUCTION

For over fifty years, the United States Supreme Court has recognized the tension between the religion clauses of the First Amendment.[1] The Establishment Clause prohibits government from aiding religion; the Free Exercise Clause prohibits government from inhibiting religion.[2] Taken together, the two clauses mean that religion shall neither incur the government's hostility nor receive its support. "The [Free Exercise and Establishment] Clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden."[3] Thus, the government must remain neutral in religious matters.

The goal of government neutrality in religious matters is easier to state than to follow. This difficulty can be demonstrated by one simple example: to compel public school children to attend school on Christmas day, on pain of risking punishment for disobeying the compulsory education law that requires school attendance on days prescribed by government, arguably offends the Free Exercise Clause. Conversely, to close public schools on Christmas day puts the weight of the government behind a religious holiday, converting the holiday of religion into a holiday of the state, thereby arguably aiding or endorsing religion

---

 Professor of Law, Capital University Law School. A.B. 1962, Oberlin College; J.D. 1965, The Ohio State University. I am grateful to my Capital colleagues, Daniel T. Kobil and Susan Gilles, who reviewed earlier drafts of this Article, and to John C. Hartranft, Class of 2000, for his research assistance. I am also grateful for the encouragement and financial support for this Article provided by Capital Law School Dean Steven C. Bahls.

1. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. Philip B. Kurland, *Of Church and State and The Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

in violation of the Establishment Clause.[4] But so long as we have compulsory school attendance laws, the government must choose one course over the other.

In spite of the difficulty in achieving true government neutrality in religious matters, governmental adherence to this principle is essential in order to avoid the twin evils of aiding religion and infringing upon the free exercise of religion. Unfortunately, the Supreme Court appears to have lost sight of the goal of government neutrality in religious matters. Over the course of several decades, the Court has managed to weave a web of confusion around First Amendment religion issues, not only where tension exists between the Free Exercise and Establishment Clauses, but also where one of the Religion Clauses intersects with the First Amendment's Speech Clause[5] and other clauses protecting personal freedom. Some Justices argue that the Free Exercise Clause grants less freedom to religiously motivated conduct than the Speech Clause grants to identical conduct that is politically motivated; other Justices argue that religiously motivated conduct should receive more protection than politically motivated conduct.[6] At the same time, the Justices cannot agree on whether the Establishment Clause restricts religious speech in ways that political speech cannot be limited.[7]

The cause of the tensions between the several constitutional provisions is not difficult to understand. Rather than adopting an overarching neutrality theory that applies to both Religion Clauses, the Supreme Court instead has adopted different tests to determine if challenged government action violates one clause or another. Although the Court often refers to the neutrality objective of the Religion Clauses, it has not devised a single test that applies to both. Consequently, a decision to give maximum protection to one clause inevitably conflicts with the test used to judge the other, as the following two examples demonstrate.

For one example, assume that a state university funds non-religious publications of secular student organizations, but on Establishment Clause grounds does not fund religious publications of religious student organizations.[8]

---

4. For cases interpreting the Establishment Clause, see *Agostini v. Felton*, 521 U.S. 203 (1997) (using the endorsement and entanglement tests); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that coercion can violate the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (collapsing the purpose and effect prongs of *Lemon* into a single test of endorsement, which combined with the additional entanglement prong yields a two-part test of endorsement and entanglement); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (setting forth legislative purpose, primary effect, and administrative entanglement as a three-part test).

5. *See supra* note 2.

6. Compare the majority and dissenting opinions in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

7. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

8. *See Rosenberger*, 515 U.S. at 819.

By strictly adhering to the Establishment Clause, the state has imposed a non-neutral standard that favors non-religion over religion. This practice inhibits and discriminates against religious speech, arguably violating both the Free Exercise Clause and the Speech and Press Clauses of the First Amendment.

As a counter example, assume that on free exercise grounds Congress grants an exemption from compulsory military service to conscientious objectors whose objection is based on religious training and belief, but does not grant an exemption to those conscientious objectors whose objection is based on philosophical, moral, ethical, or personal grounds.[9] This effort to protect the free exercise of religion nevertheless cannot help but fail the "*Lemon* test" that, as regularly used from 1971 until recently, held that the Establishment Clause was violated by a challenged governmental action that had either the legislative purpose or primary effect of aiding religion.[10] It defies reality to argue that the legislatively-mandated draft exemption does not have the purpose or primary effect of giving a preference to religion over non-religion. While the first example discriminates against religious speech, the second example clearly favors religion; hence, neither example is neutral.

This Article explores the extent to which the Constitution requires exemptions from neutral laws of general applicability in order to protect the free exercise of religion. Part I sets forth the current Supreme Court jurisprudence in this area, focusing on the most recent cases, which suggest that only laws that are not neutral or generally applicable are subject to strict scrutiny; otherwise, the majority believes that neutral generally applicable laws are subject to rational basis review. Part I also includes a discussion of analogous First Amendment freedom of expression cases, especially the "expressive conduct" cases, in which the court uses intermediate scrutiny. Part II discusses the purpose of the Free Exercise Clause, the importance of government neutrality in religious matters and the freedom of conscience, and concludes by demonstrating how the Supreme Court's misunderstanding of these points has prevented it from formulating an overarching theory that harmonizes the two Religion Clauses. Finally, Part III urges that the principle of government neutrality in religious matters be the overriding concern, leading to the inescapable conclusion that conduct motivated by religious beliefs should be analyzed by the same standards as conduct motivated by philosophical, moral, and political beliefs. To maintain neutrality between religion and non-religion, exemptions from neutral laws of general applicability should be given to both or to neither. Neither the result, nor the level of scrutiny, should turn on whether the claimed reason for an exemption is religious or secular. Intermediate scrutiny is the level of scrutiny proposed for judging neutral, generally applicable laws that incidentally burden any type of belief—religious, ethical, philosophical, moral, or political.

---

9. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); *see infra* Part II.B.1.

10. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also supra* note 4.

I. CLAIMS OF EXEMPTION FOR CONDUCT MOTIVATED BY BELIEF: A SUMMARY OF RELEVANT SUPREME COURT CASES

On both religious and non-religious grounds, claims frequently are made that individuals should be exempt from laws prohibiting or requiring certain types of conduct. In spite of the government's obligation under the First Amendment to remain neutral in religious matters, the Supreme Court nevertheless has provided different treatment to claims based on religion under the Free Exercise Clause, and claims based on moral, ethical, philosophical, and political views under the Free Speech Clause.

A. Free Exercise Cases Before 1990

The Supreme Court's first free exercise case was *Reynolds v. United States*,[11] in which the Court upheld a federal statute prohibiting polygamy in federal territories. The statute was challenged by a Mormon who argued that his religion required him to have more than one wife. Speaking for the Court, Chief Justice Waite stated that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions."[12] Thus, the Court drew a bright-line distinction between belief and conduct: only the former is protected from abridgment by the government. Although freedom of religious belief is absolute, the Court held that the Free Exercise Clause does not exempt those whose conduct violates otherwise valid criminal laws.[13]

Cases involving state burdens on religious freedom were just as rare as cases involving federal burdens. Prior to 1940, the Fourteenth Amendment Due Process Clause was the primary source of what little protection from state abridgement was afforded to the free exercise of religion.[14] Then, in 1940, in *Cantwell v. Connecticut*,[15] the Court held for the first time that the Free Exercise Clause was "selectively incorporated" into the Fourteenth Amendment and therefore applicable against the states. Between 1940 and 1963, the Court

---

11. 98 U.S. 145 (1878).

12. *Id.* at 164.

13. *Id.* at 165. Similarly, many free expression cases draw a distinction between expression and conduct. That is why, in expressive conduct cases, laws whose purpose is unrelated to the expression of free expression receive less protection than do laws whose purpose is related to the suppression of free expression; these latter cases invoke strict scrutiny. *See infra* text accompanying notes 70-79. This distinction between conduct and belief or expression, although susceptible to vast oversimplification, can be an appropriate beginning in First Amendment analysis.

14. The most frequently cited case is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *But see infra* text accompanying notes 201-03 (providing an explanation of a more persuasive reading of *Pierce*).

15. 310 U.S. 296 (1940).

decided several free exercise cases,[16] but did not formulate a test to be used in those cases. Consequently, the Court did not measure Free Exercise Clause claims against any particular standard of judicial scrutiny.

The modern era of Free Exercise Clause jurisprudence began in 1963 with *Sherbert v. Verner*.[17] The employment of Adelle Sherbert, a Seventh Day Adventist, was terminated because she would not work on Saturday, her Sabbath.[18] She could not find other employment for the same reason. Her claim for unemployment compensation was denied because the state agency found that her circumstances fell within the statutory provision that denied benefits to those who, without good cause, did not accept employment.[19]

For the first time, the Court held that strict judicial scrutiny must apply in any case where a challenged law impairs the free exercise of religion. Justice Brennan, speaking for the Court, stated:

> If [the challenged action] is to withstand . . . constitutional challenge, it must be either because [that action] represents no infringement by the State of [the] constitutional rights of free exercise, or because any incidental burden on the free exercise of . . . religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[20]

In spite of this sweeping assertion that strict scrutiny applies to free exercise claims, the Court has not been faithful to the *Sherbert* test.[21]

B. Employment Division, Department of Human Resources v. Smith[22]

1. The Majority Opinion and the Standard of Scrutiny

Smith is now the controlling case regarding what level of scrutiny should be applied when reviewing a claim for an exemption from a valid, neutral law of general applicability for religiously motivated conduct.[23] In *Smith*, employees of a private drug rehabilitation agency were discharged because they ingested

---

16. *See, e.g.*, Follett v. Town of McCormick, 321 U.S. 573 (1944); Prince v. Massachusetts, 321 U.S. 158 (1944); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

17. 374 U.S. 398 (1963).

18. *Id.* at 399.

19. *Id.* at 401.

20. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

21. *See infra* text accompanying notes 177-80.

22. 494 U.S. 872 (1990).

23. None of the opinions in *Smith* defined the terms "neutral" and "general applicability." For a subsequent discussion of the meaning of these terms, see *infra* text accompanying notes 44-52.

peyote, a proscribed hallucinogenic drug, as part of a sacramental ritual in their Native American church.[24] Pursuant to state law, their applications for unemployment compensation were denied by the State of Oregon because their discharge was for work-related "misconduct."[25] The Supreme Court rejected claims that the denial of benefits violated the Free Exercise Clause rights of the discharged employees.[26] The majority opinion of Justice Scalia, speaking also for Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, held that, because the applicants violated a valid and neutral statute of general applicability, the Free Exercise Clause was not implicated and therefore strict judicial scrutiny[27] was inapplicable. Rather, Justice Scalia stated that the appropriate standard of review was rational basis review.[28]

Justice Scalia made a persuasive argument. He noted that for over one hundred years[29] the Court had "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with 'a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[30] The appropriate level of judicial scrutiny therefore should be determined by the

---

24. *See Smith*, 494 U.S. at 874.

25. *Id.*

26. *Id.* at 882.

27. Under strict scrutiny, which is the most stringent level of scrutiny, the law will be upheld only if it is necessary to promote a compelling governmental interest. The government has the burden of proving that its interest is vital or compelling, not merely legitimate, and that the law is necessary, not merely reasonably related, to the achievement of that end. It is unclear whether "necessary" means that there are "no less restrictive alternatives" that would suffice to achieve the end or only that the means must be "narrowly tailored" to achieve the end. Currently, the Court most often speaks of "narrowly tailored" means. *See, e.g.*, Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Ark. Writers' Project v. Ragland, 481 U.S. 221, 231 (1987) ("[T]he State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.")); *see also* Burson v. Freeman, 504 U.S. 191, 198 (1992). For a discussion of the difference between "least restrictive alternatives" and "narrowly tailored means," see *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *infra* note 89 and accompanying text.

28. *Id.* at 906-07. Under the minimal rational basis standard of review, a law will be upheld if it is rationally related to a legitimate governmental interest. The burden of proof is on the challenger; the law will be upheld unless no reasonable person could reasonably believe that the law in some way will promote a legitimate governmental end. It is a rare case where the law will not survive rational basis review. *See, e.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); Williamson v. Lee Optical, 348 U.S. 483 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). *But see, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

29. Since the decision of *Reynolds v. United States*, 98 U.S. 145 (1878).

30. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

purpose, not the incidental effect, of the statute: "[I]f prohibiting [or burdening] the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[31] Consequently, because the First Amendment has not been offended, a neutral law of general applicability is to be measured by the traditional rational basis standard of review; only if the law is not neutral or not of general applicability should strict scrutiny be used.[32]

2. The Concurring and Dissenting Opinions

Justices O'Connor, Brennan, Marshall, and Blackmun declined to join the majority opinion. They all insisted that the Free Exercise Clause was implicated and that strict scrutiny therefore was required.[33]

In her concurring opinion in *Smith*, Justice O'Connor categorically rejected Justice Scalia's analysis.[34] Conforming her opinion to the rhetoric, but not the reality, of prior cases,[35] Justice O'Connor accused the Court of having "depart[ed] from settled First Amendment jurisprudence."[36] She explained: "There is nothing talismanic about neutral laws of general applicability . . ., for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[37] Furthermore, she argued, not only does the Free Exercise Clause absolutely prohibit government regulation of religious belief, but also:

> [T]he 'free *exercise*' of religion often, if not invariably, requires the performance of (or abstention from) certain acts. . . . '[B]elief and

---

31. *Id.* at 878.

32. Justice Scalia was careful to limit his opinion in *Smith* to challenges to "valid and neutral laws of general applicability." He carefully avoided any claim that rational basis review would also apply in cases where the very purpose of the challenged law was to limit the free exercise of religion. However, two years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court, in an opinion joined almost entirely by Justice Scalia, held that strict scrutiny should apply in such an instance. *See infra* Part I.C.1. Thus, in Justice Scalia's view, and in the view of a majority of the Court, the level of judicial scrutiny—strict scrutiny or rational basis—is determined by whether the challenged law is a valid and neutral law of general applicability.

33. Justice O'Connor stated that a heightened standard of scrutiny test was met and therefore concurred in the judgment; the others believed that strict scrutiny was not met and therefore dissented. *See infra* text accompanying notes 34-39, 276-81.

34. *See Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

35. *See infra* text accompanying notes 177-80.

36. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring).

37. *Id.*

> action cannot be neatly confined in logic-tight compartments. Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.... [A] law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that persons's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons.[38]

Although Justice O'Connor conceded that "the freedom to act, unlike the freedom to believe, cannot be absolute," she added that the Court previously had required "the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."[39]

---

38. *Id.* at 893 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

39. *Id.* at 894. Although apparently using strict scrutiny, Justice O'Connor's opinion in its entirety also contains elements of intermediate scrutiny. *See infra* text accompanying notes 276-82.

Up to this point, Justice O'Connor's opinion was joined by Justices Brennan, Marshall, and Blackmun. Now, however, she struck out on her own. Although Justice O'Connor applied a heightened level of scrutiny, she nevertheless rejected the Free Exercise Clause claim. Noting that "Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous," she stated: "Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them." *Smith*, 494 U.S. at 905. Thus, Justice O'Connor concluded that "the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct 'will unduly interfere with fulfillment of the governmental interest.'" *Id.* at 907 (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).

Justice Blackmun wrote a dissenting opinion, joined by Justices Brennan and Marshall. He agreed with Justice O'Connor that the compelling interest test was the appropriate level of judicial review, but felt that the prohibition of the religious use of peyote in a sacramental ritual, unlike a more general prohibition of far more dangerous drugs by recreational users, failed to satisfy that standard. *Id.* at 907 (Blackmun, J., dissenting). Justice Blackmun noted that "[a]lmost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and have not found themselves overwhelmed by claims to other religious exemptions." *Id.* at 917.

3. Summary

Of the three opinions in the case, only that of Justice Scalia conforms to the First Amendment's goal of government neutrality in religion. Under his approach, religious and secular reasons are treated alike in determining whether individuals should receive an exemption from a valid and neutral law of general applicability. As will be discussed below,[40] however, Justice Scalia erred in applying rational basis review.

Justice Blackmun (and Justice O'Connor if she used strict scrutiny rather than intermediate scrutiny) evinced an approach that yields a distinctly non-neutral result. By applying strict judicial scrutiny only where religious claims are recognized as the basis for the requested exemptions, a preference would be given to religion over non-religion in determining whether exemptions from neutral laws of general applicability should be recognized. This preference comes dangerously close to offending the Establishment Clause.

C. *The Free Exercise Clause in the Aftermath of* Smith

1. Defining the Terms "Neutral" and "General Applicability" to Determine the Level of Scrutiny: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[41]

In the ten years since *Smith* was decided, the Supreme Court has decided only one free exercise case. In *Babalu Aye*, the Court unanimously struck down Hialeah city ordinances[42] that, as apparent from their text and operation, prohibited the killing of animals, but only if the animals were killed for religious reasons. Because the ordinances prohibited animal sacrifices only if performed for religious purposes, they were neither neutral nor generally applicable. Consequently, the Court applied strict scrutiny and invalidated the ordinances. Although Justice Kennedy's opinion of the Court was joined only by Justice

---

40. *See infra* text accompanying notes 170-72.

41. 508 U.S. 520 (1992). The Santeria religion practiced by the Church originated in the nineteenth century.

> When . . . members of the Yoruba people were brought as slaves from Western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting [fusion] is Santeria, 'the way of the saints.' The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints. . . . The basis of the Santeria religion is the nurture of a personal relationship with the *orishas*, and one of the principal forms of devotion is animal sacrifice.

Id. at 524.

42. For a discussion of the several city resolutions and ordinances, see *Babalu Aye*, 508 U.S. at 528-30; for the full text of the several resolutions and ordinances, see *id.* at 548-57 (Appendix to Opinion of the Court).

Stevens in its entirety, Chief Justice Rehnquist and Justices Scalia and Thomas joined in all but a brief discussion of equal protection.

Of particular importance in *Babalu Aye* is that, for the first time in a First Amendment religion case, the Court attempted to define precisely the meaning of "neutral" and "generally applicable."[43] On the issue of the neutrality of the ordinances, Justice Kennedy, writing for the majority, examined the text of the ordinances and the circumstances surrounding their adoption. First, he examined the text of the ordinances, stating that "the minimum requirement of neutrality is that a law not discriminate on its face;"[44] he found that the Hialeah ordinances at issue used the words "sacrifice" and "ritual," which suggest a religious purpose. Even if the ordinances had been facially neutral, however, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[45] In this case, the religious ritual of animal sacrifice by members of the Santeria Church was almost the only conduct prohibited by the challenged ordinances. Furthermore, Justice Kennedy asserted that the "legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice,"[46] suggesting that the ordinances were overinclusive. Where laws "proscribe more religious conduct than is necessary to achieve their stated ends," Justice Kennedy was willing to infer, absent "persuasive indications to the contrary, that a law which visits 'gratuitous restrictions' on religious conduct, . . ., seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation."[47] Thus, the overinclusiveness of the regulations indicated that their purpose and effect were to target members of the Santeria Church for disfavored treatment, thereby discriminating against religion. Justice Kennedy summarized:

> The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral. . . .[48]

---

43. *Id.* at 546-48.
44. *Id.* at 533.
45. *Id.* at 534.
46. *Id.* at 538.
47. *Id.* (citation omitted).
48. *Id.* at 542.

Justice Kennedy also found that the laws were not of general applicability: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[49] Recognizing that the city can act to protect public health and prevent cruelty to animals, the challenged ordinances were held to be underinclusive for those ends, because "the ordinances [were] drafted with care to forbid few killings but those occasioned by religious sacrifice."[50] The very underinclusiveness of the ordinances demonstrated that they were not of general applicability.

Because the Hialeah ordinances were not neutral laws of general applicability, the Court held that strict judicial scrutiny should apply:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says." . . . A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.[51]

Thus, unlike *Smith*, the Court in *Babalu Aye* applied the strict scrutiny standard of review and invalidated the challenged ordinances. A bright-line distinction was made between neutral laws of general applicability that impose incidental burdens on the free exercise of religion and laws that are not neutral or that are not of general applicability.

Justice Scalia, who wrote for the majority in *Smith*, wrote an opinion, which was joined by Chief Justice Rehnquist, that concurred in all significant parts with Justice Kennedy's opinion. Justice Scalia indicated his view that "neutrality" and "general applicability" are not only interrelated, but substantially overlap. Justice Scalia would have preferred to draw a somewhat different distinction between the two than the distinction drawn by Justice Kennedy:

---

49. *Id.* at 543.

50. *Id.*

51. *Id.* at 546 (quoting Employment Div., Dep't Human Res. v. Smith, 494 U.S. 872, 888 (1990); McDaniel v. Paty, 435 U.S. 618, 628 (1978); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). In *Babalu Aye*, Justice Kennedy speaks of strict scrutiny requiring "narrowly tailored means" in preference to "least restrictive alternatives." In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), Justice Kennedy discussed the difference between the two and adopted "narrowly tailored means" as part of the test of intermediate scrutiny. *See infra* text accompanying note 89.

> [T]he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion . . .; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. But certainly a law that is not of general applicability (in the sense I have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability.[52]

Considering *Smith* and *Babalu Aye* together, the Court's position in Free Exercise Clause cases is clear. The level of judicial scrutiny—strict scrutiny or rational basis—is determined by whether or not the challenged law is a neutral law of general applicability.[53]

2. Religious Freedom Restoration Act and *City of Boerne v. Flores*[54]

In the aftermath of *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA")[55] by overwhelming majorities in both houses in an attempt to undo the impact of *Smith* and return to the reasoning of *Sherbert* and *Wisconsin v. Yoder*. RFRA was intended to restore the test of strict judicial scrutiny whenever a person's free exercise of religion was substantially burdened, even if the burden resulted from a neutral law of general applicability. RFRA provided that when the free exercise of religion was substantially burdened, any governmental body, whether federal or state, was required to prove that the burden it had imposed furthered a compelling governmental interest and that the burden was the least restrictive means to further that interest.

The constitutionality of RFRA was raised in *City of Boerne v. Flores*. A Catholic church in Boerne, Texas, had been denied permission to build an addition to the church, which previously had been designated an historic

---

52. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557 (1992).

53. Justice White joined the majority in the entire *Babalu Aye* opinion except for the discussion of the law's neutrality. Because he was in the majority in *Smith*, however, he apparently agreed with Justice Scalia's position. Justice Souter, who was not yet on the Court when *Smith* was decided, wrote a concurring opinion in which he questioned the validity of *Smith*. *See Babalu Aye*, 508 U.S. at 559-77. Justice Blackmun, with whom Justice O'Connor joined, concurred in the judgment; they reaffirmed their position that *Smith* was wrongly decided. *See id.* at 577-80.

54. 521 U.S. 507 (1997).

55. Pub. L. No. 103-141, 107 Stat. 1488 (1993). The Act passed in the House of Representatives by a voice vote. *See* 139 CONG. REC. H2363 (daily ed. May 11, 1993) (passing H.R. 1308). The Act passed in the Senate by a vote of 97 to 3. *See* 139 CONG. REC. S14471 (daily ed. Oct. 27, 1993) (Senate roll call vote No. 331 Leg. on H.R. 1308).

landmark.[56] The church claimed that the Free Exercise Clause gave it an exemption from an ordinance prohibiting alterations to historic landmarks, arguing that RFRA had overturned *Smith* and reinstated the strict scrutiny test of *Sherbert* and *Yoder*.[57] In ruling against the church on federalism grounds unrelated to the Free Exercise Clause or the thesis of this Article, a seven-Justice majority invalidated RFRA, at least insofar as it applied to states and their subdivisions, holding that its enactment exceeded the scope of Congress' powers under the Enforcement Clause of the Fourteenth Amendment.[58] Although the majority opinion addressed only the issue of the scope of congressional powers, and not the free exercise issue, the concurring and dissenting opinions did discuss free exercise.

Justice Stevens, who joined the majority opinion (and who had joined the majority in full in *Smith* and *Babalu Aye*), wrote a short concurring opinion stating his view that RFRA was a "'law respecting an establishment of religion'" in violation of the First Amendment.[59] He explained:

> If the historic landmark . . . happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid the enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. . . . [T]he statute has provided the Church with a legal weapon that no atheist or

---

56. *See Boerne*, 521 U.S. at 512.

57. *Id.*

58. *See* U.S. CONST. amend. XIV. Section 1 of the Amendment contains the Due Process Clause (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). Although the Bill of Rights applied only as limitations on the federal government, *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Due Process Clause of the post-Civil War Fourteenth Amendment has been held in a series of cases to have "selectively incorporated" most of the provisions of the Bill of Rights and applied them to the states and their subdivisions. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), is the case commonly cited as selectively incorporating the Free Exercise Clause into the Fourteenth Amendment. Under Section 5 of the Fourteenth Amendment ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."), Congress may enact legislation to enforce the substantive provisions of Sections 1 through 4. In *Boerne*, the church claimed that RFRA was an example of Congressional "enforcement" of the Free Exercise Clause as applied to the states and their subdivisions through Section 1 of the Fourteenth Amendment, and therefore the church claimed that it should receive an exemption from an historic landmark preservation law so that it could build an addition to accommodate more parishioners. *See Boerne*, 521 U.S. at 512.

59. *Boerne*, 521 U.S. at 536.

> agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.[60]

Justice Scalia, in a concurring opinion,[61] and Justice O'Connor, in a dissenting opinion,[62] engaged in a protracted debate as to the meaning of the Free Exercise Clause, reiterating many of the same arguments that they had made in *Smith*.

As the discussion in this part of the Article demonstrates, the Court has failed to develop a coherent theory to guide its decisions in cases where individuals claim a religiously-based exemption from the operation of law. Not only do the Justices disagree on the standard of scrutiny to be used in cases involving claims of exemptions from neutral laws of general applicability, but also they largely ignore the established jurisprudence surrounding analogous claims of exemption for conduct motivated by secular philosophical and political beliefs. A brief examination of analogous Speech Clause cases helps to explain this inconsistency.

D. Claims for Exemption for Philosophically or Politically Motivated Conduct

1. Expressive Conduct

The Free Exercise Clause is not the only constitutional provision on which to ground claims of exemption from valid neutral laws of general applicability. In somewhat different language, the same issue arises under the First Amendment's Speech Clause[63] when persons assert that they should not be punished for engaging in conduct that symbolizes or expresses an idea or belief.

The starting point for expressive conduct analysis is *United States v. O'Brien*,[64] in which the Supreme Court affirmed O'Brien's conviction for willfully destroying his draft card in violation of federal law.[65] O'Brien argued that he had burned his draft card at a rally to protest the Vietnam War and to influence others to adopt his antiwar stance, and that consequently his "symbolic speech" was protected by the Speech Clause.[66]

Speaking through Chief Justice Warren, the Court rejected O'Brien's argument. First, Chief Justice Warren acknowledged that "when 'speech' and

---

60. *Id.* at 537 (Stevens, J., concurring).

61. *Id.* (Scalia, J., concurring). Justice Stevens also joined this opinion.

62. *Id.* at 544 (O'Connor, J., dissenting). Justice Breyer joined this opinion on all but the issue of the powers of Congress.

63. *See supra* note 13.

64. 391 U.S. 367 (1968).

65. *Id.* at 372.

66. *Id.* at 376.

'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[67] He then announced what has become known as the four-part *O'Brien* test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[68]

The Court rejected the claim that, in light of another federal statute that made non-possession of a draft card a less serious offense, the purpose of the challenged federal statute was to punish persons for engaging in conduct that symbolized their political views. The Court also held that the other parts of the test were met, and consequently affirmed O'Brien's conviction.

The four-part *O'Brien* test is flawed. First, the first prong of the test is not a First Amendment issue. A bedrock principle of constitutional law is that all government regulations, whether or not they implicate the First Amendment or other constitutional rights, must be within the constitutional power of government; i.e., all laws must be passed pursuant to the enumerated or implied powers of the federal government or the police powers of the state. This principle simply has nothing to do with the First Amendment.

Second, the third prong of the *O'Brien* test determines the applicability of the second and fourth prongs, and thus is a preliminary inquiry that must be made before the remaining two prongs are examined. That this is the case is demonstrated by *Texas v. Johnson*,[69] which invalidated a state statute that prohibited defacing, damaging, or physically mistreating the American flag "in a way that the actor knows will seriously offend" any person "likely to observe or discover his action."[70] While agreeing with *O'Brien* that the "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," the Court qualified the government's greater ability to restrict expressive conduct:

> [The government] may not . . . proscribe particular conduct *because* it has expressive elements. "[W]hat may be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out

---

67. *Id.*
68. *Id.* at 377.
69. 491 U.S. 397 (1989).
70. *Id.* at 400.

> that conduct for proscription. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."[71]

Consequently, the Court noted that it has "limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which 'the governmental interest is unrelated to the suppression of free expression.'"[72] Therefore, because "*O'Brien*'s test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,'[73] [the Court has] highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule."[74]

Johnson is a necessary corrective of *O'Brien*. In expressive conduct cases, only if the purpose of the challenged law is "unrelated to the suppression of free expression" will the "relatively lenient" standard or "less demanding" rule apply.[75] But in relation to what standard is the *O'Brien* standard "relatively lenient"? And in relation to what rule is the *O'Brien* rule "less demanding"? As *Johnson* indicates, the *O'Brien* standard is lenient relative to, and less demanding than, strict scrutiny. Because the state's asserted interest "in preserving the flag as a symbol of nationhood and national unity" was "related 'to the suppression of free expression' within the meaning of *O'Brien*," the case was "outside of *O'Brien*'s test altogether."[76] Therefore, the Court stated, "[w]e must subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'"[77] Because strict scrutiny was not met, the statute was overturned and the conviction was reversed.

Thus, because the purpose of the challenged law in *Johnson* was related to the suppression of free expression, strict scrutiny applied. If, however, the purpose had been unrelated to the suppression of free expression, the "relatively lenient" standard or "less demanding" rule of *O'Brien* would have applied. This standard combines the second and fourth prongs of the four-part *O'Brien* test: If the government regulation furthers an important or substantial governmental interest, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest, then the law will be upheld. This test, called "intermediate scrutiny," is less demanding than strict scrutiny but more stringent than rational basis review. First, the regulation need

---

71. *Id.* at 406 (quoting Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984)).

72. *Id.* at 407 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

73. *See infra* text accompanying notes 80-90.

74. *Johnson*, 491 U.S. at 407 (quoting *Clark*, 468 U.S. at 298).

75. *Id.*

76. *Id.* at 410.

77. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

only further an important or substantial, but not compelling, governmental interest. Second, although strict scrutiny seems to be required by the "incidental restriction is no greater than is essential" language, intermediate scrutiny requires only "narrowly tailored" means, not the "least restrictive" means that *O'Brien* appears to suggest.[78] Indeed, to require the least restrictive means would be to obliterate the distinction in *Johnson* between regulations whose purposes are and are not related to the suppression of free expression. The Court in *Johnson* recognized this when it stated, as noted above, that the "relatively lenient" or "less demanding" rule of *O'Brien*'s test "in the last analysis is little, if any different, from the standard applied to time, place, or manner restrictions."[79] As discussed below, intermediate scrutiny is explicitly used in cases involving content-neutral time, place, and manner restrictions on speech.

2. Regulations of Time, Place, and Manner

The standards that apply to time, place, and manner restrictions are similar to the standards that apply to expressive conduct. Just as a determination of whether the challenged law is unrelated to the suppression of free expression dictates the level of judicial scrutiny in expressive conduct cases, so also a

---

78. Although the Supreme Court has not explicitly made this point in expressive conduct cases, other lines of cases invoking intermediate scrutiny have rejected "least restrictive means" analysis in favor of "narrowly tailored" analysis. With respect to commercial speech cases, see *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring). With respect to First Amendment cases examining regulations of time, place, and manner, see *infra* text accompanying notes 86-90. Paradoxically, the Court also has diluted strict scrutiny by replacing "least restrictive means" analysis with "narrowly tailored means" analysis. *See supra* note 27. Consequently, both strict scrutiny and intermediate scrutiny in First Amendment cases have rejected "least restrictive means" analysis in favor of "narrowly tailored means" analysis. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1982), Justice White, in the same paragraph, used "narrowly tailored means" analysis to define both intermediate and strict scrutiny:

> For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is *narrowly drawn* to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are *narrowly tailored* to serve a significant government interest, and leave open ample alternative channels of communication.

Id. at 45 (citations omitted) (emphasis added). In *Burson v. Freeman*, 504 U.S. 191, 197-98 (1992), Justice Blackmun also used "narrowly tailored means" analysis to define both intermediate and strict scrutiny. Conversely, equal protection cases that invoke intermediate scrutiny ask whether the challenged classification is "substantially related" to the accomplishment of the governmental objective. *See infra* note 85.

79. *See supra* note 73 and accompanying text.

determination as to whether a time, place, and manner regulation is "content-neutral" or "content-based" dictates the level of judicial scrutiny to be used in time, place, and manner cases. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[80] On the other hand, government can regulate the time, or the place, or the manner of exercising First Amendment freedoms.[81]

In *Turner Broadcasting System v. FCC*,[82] the Supreme Court held that, as a general rule, content-based restrictions on speech must meet strict scrutiny, whereas content-neutral regulations need only meet intermediate scrutiny. Speaking for the Court, Justice Kennedy explained:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. . . . For these reasons, the First Amendment, subject only to narrow and well-understood exceptions,[83] does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. In contrast, regulations that are

---

80. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

81. For example, although a city might regulate the time, place, manner, or duration of holding parades on public streets, the city almost always is constitutionally prohibited from regulating the content of the speech—the ideas or beliefs—expressed by the marchers. Parades involve both speech (the communication of a message) and conduct (the disruption of traffic). The government has important interests to serve in regulating conduct, but rarely has important interests to serve in regulating speech. Therefore, if the content of the speech is irrelevant to the regulation of time, place, or manner, the subject matter of the regulation is the conduct, but if the applicability of the regulation varies according to the content of the speech or the identity of the speaker, then the subject matter of the regulation is speech itself. *See* Forsyth County v. The Nationalist Movement, 505 U.S. 128 (1992).

82. 512 U.S. 622 (1994).

83. The exceptions referred to are categories of speech that, precisely because of their content, are deemed to receive no protection under the First Amendment. These categories of "unprotected speech" are speech inciting to imminent lawless action, *see, e.g.*, Brandenberg v. Ohio, 395 U.S. 444 (1969); fighting words, *see, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); defamation, *see., e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); obscenity, *see, e.g.*, Miller v. California, 413 U.S. 15 (1973); and commercial speech that proposes an unlawful activity or that is false or misleading, *see, e.g.*, Cent. Hudson Gas v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

> unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.[84]

Intermediate scrutiny has been phrased differently in different kinds of cases.[85] In speech cases, intermediate scrutiny generally can be said to require the challenged regulation to use narrowly tailored means to achieve a substantial state interest. *Perry Education Ass'n v. Perry Local Educators' Ass'n*[86] stated that, in a public forum, "[t]he State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[87] Similarly, *Ward v. Rock Against Racism*[88] explicitly used intermediate scrutiny, and discussed the meaning of the phrase "narrowly tailored."[89]

---

84. *Turner*, 512 U.S. at 641-42 (citing, among other cases, Texas v. Johnson, 491 U.S. 397 (1989), Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984)).

85. In equal protection cases, the standard is stated in words such as "substantially related to the achievement of an important governmental interest." *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

86. 460 U.S. 37 (1983).

87. *Id.* at 45.

88. 491 U.S. 781 (1989).

89. *Id.* at 798-800. Speaking for the Court, Justice Kennedy stated:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrowly tailoring is satisfied "so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.

Id. (quoting United States v. Albertini, 472 U.S. 675, 689 (1985) (citations and footnotes omitted)).

Thus, in free speech cases, the Court has used all three levels of scrutiny. Where there is a regulation of content, or where the purpose of a regulation of conduct is to suppress free expression, strict scrutiny will be used and rarely will a regulation be upheld. If the challenged law constitutes a content-neutral regulation of the time, place, or manner of expressing freedom of speech, or if the regulation of expressive conduct is unrelated to the suppression of free speech, intermediate scrutiny will be used and the Court will apply a balancing test, often upholding the challenged regulation.[90] If freedom of expression is in no way implicated by the challenged regulation, the rational basis test will be used and the regulation will almost always be upheld.

Because the Court has used both levels of heightened scrutiny in freedom of expression cases, a superficial analysis might suggest that it would be logical to also use both standards of review in free exercise cases as well. However, as Part II demonstrates, the reach of the Free Exercise Clause is more limited than the Speech Clause. Unlike the Speech Clause, the Free Exercise Clause does not recognize exemptions from neutral laws of general applicability. Part III, however, sets forth a framework—based on other constitutional provisions (freedom of speech and substantive due process)—whereby persons might legitimately claim exemptions from neutral laws of general applicability.

II. THE PURPOSE OF THE FREE EXERCISE CLAUSE: GOVERNMENT NEUTRALITY IN RELIGION AND FREEDOM OF CONSCIENCE; AND THE ERRORS OF *SMITH*

The confusion surrounding claims of exemptions for religious reasons is exacerbated by two misunderstandings about the First Amendment. The first is a general confusion regarding the proper role of the Free Exercise Clause in constitutional jurisprudence. The second misunderstanding, related to the first, is the requirement of neutrality between religious and non-religious grounds for claimed exemptions. This Part addresses both in turn, and then explains how a proper understanding of these matters leads to the conclusion that the First Amendment's Speech Clause contains an implied right of conscience. Finally, this Part describes how misunderstandings of the Free Exercise Clause led to misguided conclusions on the part of all of the Justices in *Smith*.

---

90. Intermediate scrutiny also has been used in First Amendment cases involving commercial speech. *See, e.g.*, Cent. Hudson Gas v. Pub. Serv. Comm'n, 447 U.S. 557 (1980). *Central Hudson Gas* held that, if the speech at issue concerns a lawful activity and is not misleading, it receives First Amendment protection, and is subject to a standard of intermediate scrutiny that is not unlike that stated above. *Id.* at 564. The regulation must be narrowly tailored to further an important governmental interest. More recent cases, however, reveal that the Supreme Court is divided on what level of scrutiny should apply in commercial speech cases. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

A. The Purpose of the Free Exercise Clause

The critics of *Smith* bemoan the fact that the case did not apply strict scrutiny to neutral laws of general applicability that incidentally burdened religion.[91] This criticism cannot be addressed adequately without a brief examination of the historical purpose of the Free Exercise Clause. Only by an appreciation of this purpose can it be determined whether, in *Smith*, neutrality was achieved.

The primary historical purpose of the Free Exercise Clause was to invalidate laws that persecuted or singled out religion for unfavorable treatment. Because these laws are not neutral or of general applicability, strict scrutiny must be applied. Although the Hialeah ordinances invalidated in *Babalu Aye*[92] are rare examples of recent attempts by government to persecute disfavored religions,[93] persistent and pervasive religious persecution was still fresh in the minds of the Framers when the Constitution and Bill of Rights were adopted over two centuries ago. The English Civil War and "Glorious Revolution" of 1688 were caused as much by religious differences as by political differences.[94] The Roman Catholicism of James II (and the birth of a Catholic son by his second wife who took precedence over his Protestant daughters by his first wife) was perhaps the final straw that caused his overthrow and exile.[95] Even then, of course, England had not only established the Anglican Church of England but also had disenfranchised non-Christians and imposed disabilities on non-Protestants and even on dissenters—Protestants who were not members of the Church of England.[96] Religious tests and oaths for public office were required.[97] These were not neutral laws of general applicability; these were laws whose purpose was to persecute and burden those who did not conform to the religious norm imposed by Parliament.

In *Everson v. Board of Education*,[98] Justice Black vividly captured the oppressive environment of sixteenth and seventeenth century Europe, and followed with a description of religious persecution in colonial America:

---

91. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1992) (Souter, J., concurring); *id.* at 577 (Blackmun, J., concurring); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring); *id.* at 907 (Blackmun, J., dissenting).

92. *See supra* text accompanying notes 41-42.

93. Another such case is *McDaniel v. Paty*, 435 U.S. 618 (1978), which held that a law prohibiting clergy from holding public office violated the Free Exercise Clause.

94. *See* I BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES pt. III, at 269 (1968); II SCHWARTZ, *supra*, pt. III, at 650 (1968).

95. *See* MARK KISHLANSKY, A MONARCHY TRANSFORMED 267 (1996).

96. *Id.* at 263-64, 269-76.

97. *Id.*

98. 330 U.S. 1 (1947).

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast into jail, cruelly tortured and killed.... These practices of the old world were transplanted to and began to thrive in the soil of the new America. [There was] a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.[99]

Although religious tests for holding federal public office were prohibited in the United States by the original Constitution,[100] the Framers of the First Amendment went much further and provided protection for the general public from persecution and the imposition of burdens or disabilities by Congress. Although today government persecution of religion is rare, it was the principal fear of the Framers. Chief Justice Burger once referred to "the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment."[101]

Particularly instructive is Justice Jackson's opinion in *Douglas v. City of Jeannette*.[102] In a single brief passage of the opinion, Justice Jackson concisely managed to make three critical points: He defended the neutrality goal of the First Amendment; he discussed the historical purpose of the Free Exercise Clause; and he explained why the Framers believed that it was necessary to have

---

99. *Id.* at 9-10.

100. *See* U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

101. Bowen v. Ray, 476 U.S. 693, 703 (1986).

102. 319 U.S. 157 (1943) (Jackson, J., concurring in the result).

a Free Exercise Clause separate from the Speech and Press Clauses.[103] Specifically, Justice Jackson wrote:

> In my view, the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well.... I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups. It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy, because he failed to conform in mere belief, or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.[104]

Given the historical purpose of the Free Exercise Clause to prevent religious persecution, it becomes easy to address the *Smith* critics who insist that strict scrutiny be used in evaluating religious based exemptions to neutral laws of general applicability. Otherwise, these critics contend, the Free Exercise Clause is without any independent meaning.[105] There are several reasons that this argument is fallacious.

First, as Justice Jackson's statement shows, the Free Exercise Clause is not rendered redundant to the Speech and Press Clauses by *Smith*'s failure to subject a neutral law of general applicability to strict scrutiny. The history of religion, both in England and in the colonies, necessitated an explicit reaffirmance of the principle of non-persecution.[106]

---

103. *Id.* at 179.

104. *Id.*

105. *See, e.g.*, Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 718 (1986).

106. Arguably, there is another reason that the Free Exercise Clause and the Speech and Press Clauses are not redundant. The Free Exercise Clause has been held to severely limit government attempts to resolve property disputes between different elements of a religious denomination, *see* Jones v. Wolf, 443 U.S. 595 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969), or to review a church's decision to defrock a member of the clergy, *see* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). For a time, this doctrine of governmental non-intervention in internal church disputes had no equivalent secular counterpart under the Speech and Press Clauses. Recently, however, the Supreme Court has suggested that First Amendment freedom of association provides constitutional protection from government interference with the expressive activities of secular expressive associations.

Second, the redundancy among the various clauses of the First Amendment is not necessarily fatal. The Court consistently has refused to give more favored treatment to the press under the Press Clause than is accorded to ordinary persons under the Speech Clause.[107] It might be that the Framers intended considerable overlapping, if not complete redundancy, between all of the rights-protecting clauses of the First Amendment. Justice Jackson's statement could lead to the conclusion that the Framers might have believed that some redundancy was necessary to give the strongest possible statement disallowing religious persecution, in order "to assure religious teaching as much freedom as secular discussion."[108]

Third, even though laws persecuting or burdening religion while favoring non-religion might violate the Equal Protection Clause, any redundancy between the Free Exercise and Equal Protection Clauses is caused by the latter, not the former. The Equal Protection Clause is seventy-seven years more recent than the First Amendment. The fact that the Equal Protection Clause may prohibit what the Free Exercise Clause already prohibits is no reason to change the meaning of free exercise in order to come up with a new independent meaning. It is clear that the Free Exercise Clause itself rendered redundant the Religious Test Clause of Article VI,[109] but the Court has not attempted to re-define or broaden the meaning of that clause to give it independent meaning.

Fourth, construing the Free Exercise Clause to be devoid of any meaning other than non-persecution might render it relatively insignificant, but that would not render it unique. A Free Exercise Clause so interpreted would be just another provision of the Constitution that was inserted to address a problem that no longer exists. The Free Exercise Clause then would be similar to the Third

---

See generally Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (holding the Boy Scouts of America have a First Amendment expressive associational right to prohibit gays from serving as scoutmasters); Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557 (1995) (holding the private organizers of a St. Patrick's Day parade may, under the First Amendment, exclude a group of gays from marching in the parade). *But cf.* Roberts v. United States Jaycees, 468 U.S. 609 (1984) (holding state's compelling interest in prohibiting gender discrimination outweighed right of an association with both expressive and commercial activities to limit membership to men only).

107. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978) (reporters have no more right than other private persons to tour prisons); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring) ("[T]he history of the [press] clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege."); Branzburg v. Hayes, 408 U.S. 665 (1972) (reporters have no more privilege under the Press Clause to maintain confidentiality of sources than do other private persons under the Speech Clause). *But cf.* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

108. Douglas v. City of Jeannette, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in the result).

109. *See supra* note 100.

Amendment,[110] which prohibits the quartering of soldiers in private homes. Although in colonial times this was thought important enough to deserve its own constitutional amendment, today the Third Amendment is largely forgotten because of a long history of no government violations of this clause, thereby rendering it nothing more than an historic relic. If the Free Exercise Clause similarly fades into insignificance because governments no longer attempt to do that which the clause prohibits—the persecution of religion—we should celebrate, not bemoan, the fact that the government takes the Constitution seriously. We should not devise a novel interpretation simply to breathe new life into a moribund constitutional provision.

Finally, there is no evidence that the Framers of the First Amendment intended to provide exemptions for neutral, generally applicable laws. To be fair, there is also no evidence that the Framers intended to deny such exemptions. There simply is no record of the framer's intent on this issue. This should not be surprising. First, as noted above, the primary concern of the Framers was to prohibit religious persecution and burdens. Second, the First Amendment, in common with all of the first eight Amendments,[111] was intended to apply only to the federal government, not to the states, and federal regulations of private conduct were exceedingly rare. It follows that neutral laws of general applicability that imposed incidental burdens on religion were non-existent and probably not contemplated. To ascribe to the Framers an intent to prohibit neutral, generally applicable laws that incidentally burden religion lacks both authority and logic.

B. The Requirement of Government Neutrality as Between Religion and Non-Religion—Freedom of Conscience Based on the Speech Clause

The erroneous view that the Free Exercise Clause does more than prohibit governmental persecution of religion has led to the equally erroneous result that religion receives more protection under the First Amendment than expression. Under this misguided view, religious claims for exemption from neutral laws of general applicability are given more preference than similar claims based on moral, ethical, philosophical, and political views—a preference that offends the Establishment Clause. This Article therefore argues that the granting or denial of exemptions from neutral laws of general applicability cannot vary depending on the constitutional right underlying the claim. Whether free exercise of religion, freedom of expression, or substantive due process is the right that arguably is burdened, courts must treat all claims alike in order to maintain strict

110. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

111. Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

neutrality of government in religious matters. This was the fundamental error in all of the opinions in *Smith*.

Different governmental branches and agencies might create exemptions from neutral laws of general applicability. A legislature can devise a system under which case-by-case determinations can be made by administrative agencies to award individualized exemptions from duties or prohibitions imposed by the government.[112] In the absence of legislative exemptions, courts will be called upon to determine whether a claimed exemption is constitutionally required. However, any exemption must permit both religious and secular reasons to qualify as legitimate grounds for exemptions because there are important non-religious reasons why some persons will seek exemptions from compliance with government imposed duties or prohibitions.

For example, *Thomas v. Review Board of Indiana Employment Security Division*[113] held that the state could not deny unemployment compensation to a Seventh Day Adventist who was discharged because he refused to accept a transfer in a factory to a department that manufactured munitions.[114] Because the Review Board of the Indiana Employment Security Division found that Thomas' refusal to continue employment was without good cause, it denied him unemployment benefits.[115] The United States Supreme Court upheld his Free Exercise Clause challenge to the application of the state statute denying him benefits. The case is explainable on the grounds that the principle of government neutrality in religious matters demands that both religious and secular reasons qualify to permit applicants to receive unemployment compensation in spite of their good faith refusal to continue or seek employment.[116] Therefore, if the state considers secular reasons for an exemption, then the state also must consider religious reasons.

But the reverse situation is also true. If the state considers religious reasons for rejecting employment when offered, then the state also must consider secular reasons for rejecting employment. While the reasons a person rejects employment requiring the production of munitions might not be based on freedom of religion in a narrow sense, they may well be based on equally expressive secular beliefs; e.g., philosophical, moral, or even political. Conscientious objectors object to participation in the military (or producing munitions) because of the intensity of their beliefs, not their source.

---

112. *See infra* text accompanying notes 181-84.

113. 450 U.S. 707 (1981). *Thomas* is one of three unemployment compensation cases arising after, and based on, *Sherbert v. Verner*, 374 U.S. 398 (1963). *See infra* note 182.

114. *Thomas*, 450 U.S. at 720.

115. *Id.* at 712.

116. *See infra* text accompanying notes 183-84.

1. The Draft Exemption Cases as Precedent

Historically, the best known statutory exemption from neutral laws of general applicability is the exemption from compulsory military service. The Supreme Court has never held that the Constitution requires an exemption from compulsory military service to those who are opposed to participation in war. Yet every conscription statute ever enacted by Congress has contained some type of exemption. The first federal conscription statute was the 1864 Draft Act,[117] which "extended exemptions to those conscientious objectors who were members of religious denominations opposed to the bearing of arms and who were prohibited from doing so by the articles of faith of their denominations."[118] This exemption was clearly non-neutral. Not only did it deny conscientious objector status to those whose objection was not grounded on religious belief, but also it committed the sin of "preferentialism" by denying that status even to those whose objection was grounded on religious belief, if they were not members of a denomination possessing an article of faith opposing war. The 1864 Draft Act thus favored religion over non-religion, and favored some religions over others. Similarly, the Draft Act of 1917 gave draft exemptions to conscientious objectors who belonged to a "well-recognized religious sect or organization . . . whose existing creed or principles [forbade] its members to participate in war in any form . . . ."[119] This World War I statute suffered from the same infirmity as the Civil War statute.

In 1940, Congress broadened the exemption by granting conscientious objector status to those who, although not members of a particular denomination, opposed participation in war because they had individual views based on "religious training and belief."[120] In 1948, Congress amended the statute to define "religious training and belief" as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but [which does not include] essentially political, sociological, or philosophical views or a merely personal moral code."[121] This extension of the exemption was an attempt to eliminate preferentialism among different religions, but it retained the non-neutral distinction between religion and non-religion.

The Court recognized the lack of neutrality in several cases, interpreting the statute in such a way as to turn the intent of Congress upside-down, extending the exemption to those who clearly did not qualify under the plain meaning of

---

117. 13 Stat. 7, 9 (1864).

118. United States v. Seeger, 380 U.S. 163, 171 (1965) (citing SELECTIVE SERVICE SYSTEM MONOGRAPH NO. 11, CONSCIENTIOUS OBJECTOR 40-41 (1950)).

119. Draft Act of 1917, 40 Stat. 76, 78 (1917).

120. Selective Training & Service Act, 54 Stat. 889 (1940).

121. 50 U.S.C. § 301 (1948).

the statute or the intent of Congress. The Court in *United States v. Seeger*[122] defined "religious training and belief" as follows:

> Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.[123]

Although it eliminates preferentialism among different religions, Justice Clark's language in *Seeger* raised two questions: how should courts determine whether religious beliefs are sincere, and how should courts define "religion" so as to guarantee equal treatment. The task of draft boards and courts "is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious."[124] In defining "religion," Justice Clark noted that "[r]eligious experiences which are as real as life to some may be incomprehensible to others"[125] and that "the statute does not distinguish between externally and internally derived beliefs."[126] Accordingly, Justice Clark devoted several pages to the writings of various theologians and ethicists, including Dr. Paul Tillich, Bishop John A. T. Robinson, the Schema of the Vatican's Ecumenical Council ["Vatican II"], and Dr. David Saville Muzzey.[127] In determining whether a registrant's religious beliefs are sincere, Justice Clark stated:

> [W]e hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question of whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime

---

122. 380 U.S. 163 (1965).

123. *Id.* at 176.

124. *Id.* at 185.

125. *Id.* at 184 (quoting United States v. Ballard, 322 U.S. 78, 86 (1944)).

126. *Id.* at 186.

127. *Id.* at 180-83 & n.4. *See* II PAUL TILLICH, SYSTEMATIC THEOLOGY 12 (1957); JOHN A.T. ROBINSON, HONEST TO GOD 11, 13-14, 15-16 (1963); NAT'L CATHOLIC WELFARE CONFERENCE, PRESS DEP'T, COUNCIL DAYBOOK, VATICAN II: DRAFT DECLARATION ON THE CHURCH'S RELATIONS WITH NON-CHRISTIANS, 282 (Floyd Anderson ed., 3d Sess. 1965); DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION (1957).

> consideration to the validity of every claim for exemption as a conscientious objector. The Act provides a comprehensive scheme for assisting the Appeal Boards in making this determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing officers.[128]

Not only must the courts (with the help of the F.B.I.) decide whether a belief system constitutes "religion," but also they must determine if the claimant is sincere in professing this belief system. Yet, it is impossible for courts to determine the sincerity of a belief without an inquiry into the reasonableness—or truth—of the religion. In *Braunfeld v. Brown*,[129] the Supreme Court held that the Free Exercise Clause was not violated by failing to give Sabbatarians an exemption from Sunday closing laws.[130] Chief Justice Warren, speaking for a plurality, stated that such an exemption "might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a state might believe would itself run afoul of the spirit of constitutionally protected religious guarantees."[131] Years earlier, in *United States v. Ballard*,[132] Justice Jackson doubted that courts could inquire into religious sincerity without inquiring into religious truth: "If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer."[133] Professor William P. Marshall asked: "How can one evaluate the sincerity of a religious claim without evaluating its believability, and if the inquiry into believability is prohibited by the religion clauses, how can one question sincerity at all?"[134] The answer, of course, is that courts cannot properly inquire into either the truthfulness of a religious belief or the sincerity of its holder. Were there to be a serious inquiry into sincerity, we would be required to accept the unacceptable: the in-depth and perhaps contentious probing of witness's religious beliefs in direct and cross examination in a judicial or administrative proceeding. Certainly Chief Justice Warren was correct, then, when he suggested that such inquiries would "run afoul of the spirit of constitutionally protected religious guarantees."[135]

---

128. United States v. Seeger, 380 U.S. 163, 185 (1965).

129. 366 U.S. 599 (1961) (plurality opinion).

130. *Id.* at 609.

131. *Id.* (footnote omitted).

132. 322 U.S. 78, 92-95 (1944) (Jackson, J., dissenting), *rev'd on other grounds*, 329 U.S. 187 (1946).

133. *Id.* at 93.

134. William P. Marshall, *The Case Against the Constitutionality of Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 403 (1989-90).

135. Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (plurality opinion).

As difficult as it is to determine the sincerity of a person's religious beliefs, it may be even more difficult to define "religion." In his concurring opinion in *Seeger*, Justice Douglas was more candid than the majority:

> [It is] not a *tour de force* if we construe the words "Supreme Being" to include the cosmos, as well as an anthropomorphic entity. If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds.... [A] statute may be strained "in the candid service of avoiding a serious constitutional doubt."[136]

Although Justice Douglas cited only the Free Exercise Clause and equal protection as causing the "serious constitutional doubt" that would be raised by a narrow definition of "religious training and belief" and "Supreme Being," there can be no doubt but that the Establishment Clause also would be offended.

The Court broadened the definition of religion even more in *Welsh v. United States*.[137] Speaking for a plurality, Justice Black stated:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.[138]

Justice Black conceded that "Welsh's conscientious objection to war was undeniably based on his perception of world politics."[139] However, he stated:

---

136. United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring) (quoting United States v. Rumely, 345 U.S. 41, 47 (1953)).

137. 398 U.S. 333 (1970) (plurality opinion).

138. *Id.* at 340.

139. *Id.* at 342. Welsh had written to his draft board:

> I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*.

Id.

> [The] exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should [not] be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups [excluded] from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency.[140]

Justice Black drew a fine line. A claimant is entitled to a conscientious objector exemption if the objection "is founded to a *substantial* extent upon considerations of public policy" but not if the objection "rests *solely* upon considerations of policy."[141] In other words, views on public policy can be the *major* consideration driving the person's conscientious objection, so long as it is not the *only* consideration. If there is at least a modicum of "moral, ethical, or religious principle" to accompany public policy considerations, the claimant wins; if the objection "does not rest *at all* on moral, ethical, or religious principle," the claimant loses.[142] This fine line attempts to distinguish between claims for exemption based on religious (now including moral and ethical) beliefs and those based on political beliefs. The task of making this distinction is doomed. Reasonably intelligent claimants (or their advisors) will simply assert some moral, ethical, or religious principle to supplement their views of public policy. Only the most stringent of inquiries into the sincerity of the claimant, deeply probing his or her motivation and beliefs, might—but probably will not—enable the decisionmaker to reject the claim. It would be less intrusive, as well as less time consuming, simply to accept at face value the claimant's assertion of moral, ethical, or religious principle.

Concurring in the result in *Welsh*, Justice Harlan was brutally frank. Although he joined the Court's opinion in *Seeger*, he now admitted that he had made a mistake: "[T]he liberties taken with the statute both in *Seeger* and today's opinion cannot be justified in the name of . . . construing federal statutes in a manner that will avoid possible constitutional infirmities . . . ."[143] Rather, Justice Harlan stated that "limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment."[144]

---

140. *Id.* at 342-43.
141. *Id.* (emphasis added).
142. *Id.* (emphasis added).
143. *Id.* at 345 (Harlan, J., concurring in the result).
144. *Id.*

Justice Harlan, who earlier dissented in *Sherbert*,[145] stated his view that no draft exemptions for conscientious objectors are constitutionally required.[146] In his view, then, whether there are exemptions for conscientious objectors is not a matter of constitutional law, but a decision for Congress to make. And if Congress does choose to exempt conscientious objectors, Justice Harlan said:

> [I]t cannot draw a line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not . . . compatible with the Establishment Clause . . . . The implementation of the neutrality principle requires . . . "an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders."[147]

Thus, said Justice Harlan, the exemption if applied "must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held."[148]

The Court's opinions in *Seeger* and *Welsh* properly conformed to the principle of government neutrality in religion. Although the holdings were based on statutory interpretation, not constitutional principle, they nevertheless are instructive. Religion should not receive favored treatment, and religious beliefs should not be preferred over competing belief systems. If religion is preferred, this sends a message that religious beliefs are more valued, more important, and more enduring than secular beliefs. "[T]he claim that religion merits special tribute seems ill-founded in light of establishment and equality-of-ideas concerns."[149] Indeed, as Professor Marshall has noted:

> Not all religious beliefs are held with equal fervor by the religious adherent, nor are religious beliefs necessarily more deeply felt than secular beliefs. A person who has a secular, moral objection to killing in war and a religious objection to working on the Sabbath might well

---

145. *See* Sherbert v. Verner, 374 U.S. 398, 418 (1963) (Harlan, J., dissenting).

146. *See* Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) ("Congress . . . could, entirely consistently with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors. Such a course would be wholly 'neutral' and . . . would not offend the Free Exercise Clause . . . ."). The Supreme Court appeared to adopt this position, at least as to persons who object only to a particular war, in *Gillette v. United States*, 401 U.S. 437 (1971).

147. *Welsh*, 398 U.S. at 356-57 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970)).

148. *Id.* at 358.

149. Marshall, *supra* note 134, at 394.

> suffer a greater psychic harm in being forced to kill than in being forced to work.[150]

The draft exemption cases provide guidance for the creation of other religiously neutral exemptions from neutral laws of general applicability that incidentally burden religion, expression, and other fundamental rights. To avoid preferring religion, thereby raising issues of the Establishment Clause and content-based regulations of speech, the exemption must extend to beliefs that are moral, ethical, or philosophical, as well as those that are religious. And as *Welsh* shows, it is a thin line between moral, ethical, and philosophical concerns on one hand, and political ("public policy") considerations on the other. Little is gained from trying to draw a line just short of political beliefs. To include political beliefs along with religious, moral, ethical, and philosophical beliefs establishes, under the Speech Clause of the First Amendment, a broad freedom of conscience that guarantees that religion and speech are treated alike. In turn, this avoids the unwelcome thicket of inquiries into sincerity of belief and the definition of religion, thereby reinforcing the principle of government neutrality in religion.

2. Freedom of Conscience Under the Speech Clause

As the draft exemption cases note, true government neutrality between religion and non-religion can be achieved only if secular reasons, as well as religious reasons, are recognized as legitimate grounds for granting exemptions to neutral laws of general applicability. If only religious reasons for exemptions are permitted, the government has indicated a preference for religious values over secular values, thereby violating the Establishment Clause. Conversely, if only non-religious reasons for exemptions are permitted, the system is not neutral or generally applicable. Rather, it discriminates against religion which, under strict scrutiny, violates the Free Exercise Clause, the historical purpose of which is to disallow laws that persecute or single out religion for unfavorable treatment. Therefore, by recognizing freedom of conscience, the tension between the two religious clauses can be resolved, and the goal of government neutrality in religious matters can be achieved. But to be neutral, this freedom of conscience must be anchored in the Speech Clause, not the Free Exercise Clause.

The Court has taken some tentative, preliminary steps toward recognizing a freedom of conscience through the Speech Clause. That Clause has been interpreted to protect political beliefs from government abridgement. Thus, the government cannot discharge its employees because of their political beliefs;[151]

---

150. Marshall, *supra* note 134, at 384.

151. *See* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

base decisions on "promotions, transfers, and recalls after layoffs based on political affiliation or support;"[152] or terminate a relationship with an independent contractor for not supporting a political candidate or organization.[153]

So too the government cannot compel persons to express beliefs or ideas with which they disagree.[154] Thus, although compulsory flag salutes in public schools may offend the religious beliefs of Jehovah's Witnesses, the Court held in *West Virginia State Board of Education v. Barnette* that it is the Speech Clause that is offended by a compulsory flag salute.[155] The compulsory flag salute, said the Court, imposed an "affirmation of a belief and an attitude of mind."[156] Furthermore, the Court asserted that the compulsory flag salute "transcends constitutional limitations on [the government's] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[157]

Similarly, *Wooley v. Maynard*[158] held that Jehovah's Witnesses could not be punished for making illegible that portion of their New Hampshire license plate that contained the state motto, "Live Free or Die."[159] Although George and Maxine Maynard asserted that punishing them violated their rights to the free exercise of religion, the Court grounded its opinion on the Speech Clause. Noting that the Maynards found the state motto to be "morally, ethically, religiously, and politically objectionable,"[160] Chief Justice Burger stated that:

> [T]he right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of the mind."[161]

It is interesting that Chief Justice Burger grounded his opinion in *Wooley* broadly on the Speech Clause, not narrowly on the Free Exercise Clause. His decision to do so contrasts starkly with his earlier opinion in *Wisconsin v.*

---

152. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 75 (1990).
153. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).
154. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
155. 319 U.S. 624, 634 (1943).
156. *Id.* at 633.
157. *Id.* at 642.
158. 430 U.S. 705 (1977).
159. *Id.* at 713.
160. *Id.*
161. *Id.* at 714 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

Yoder,[162] in which he could not have made it more clear that only claims based on religion could be the basis for an exemption from compulsory education laws. Yet in *Wooley*, by speaking of "the right to proselytize religious, political, and ideological causes" and the "complementary components of the broader concept of freedom of the mind," Chief Justice Burger recognized the inherent unity of the First Amendment.[163]

Although Jehovah's Witnesses were the claimants in both *Barnette* and *Wooley*, it is significant that in both cases the Court preferred to rely on the Speech Clause, not the Free Exercise Clause. While both clauses yield the same outcome of protecting religion, only the use of the Speech Clause, not the Free Exercise Clause, serves the goal of government neutrality as between religion and non-religion. Furthermore, by relying on the Speech Clause rather than the Free Exercise Clause as the anchor for a freedom of conscience, the Court was able to avoid inquiries into the sincerity of the claimants' religious views and the definition of religion itself. As Professor William P. Marshall observed: "[I]n *Wooley*, the Court did not have to inquire into the genuineness and import of the challenger's objections to find the law constitutionally infirm. The mere fact that the dissident found the views the government sought to coerce abhorrent was sufficient to strike down the legislation."[164]

Professor Marshall has long held the view that free exercise is expression, and that the Speech Clause therefore includes a freedom of conscience:

> Generally, religious conscience is affirmed through expressive activities manifesting closely held religious beliefs, or is most substantially infringed when it is violated by laws requiring a contrary manifestation. Both of these aspects of religious conscience, however, are protected by free speech principles. Prayer, worship, and ritual are all protected within freedom of expression, and *Wooley v. Maynard* and its progeny accord a broad protection to religious conscience by recognizing a freedom from coercive beliefs.[165]

Barnette and *Wooley*, of course, created a freedom of conscience based on the Speech Clause in the context of freedom from state-compelled speech. Furthermore, they did not involve neutral laws of general applicability. By coercing individuals to utter specific words or to display a particular motto, the regulations were the antithesis of neutral. Content-based regulations of speech are one of the greatest evils that offend the First Amendment, and thus strict scrutiny, not intermediate scrutiny, is appropriate. Nevertheless, it is but a step

---

162. 406 U.S. 205 (1972); *see infra* text accompanying notes 204-08.

163. *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

164. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 589-90 (1983).

165. *Id.* at 588.

from holding that government-compelled speech violates a person's conscience to a holding that there is a broad right of conscience that may afford persons exemptions from neutral laws of general applicability when a constitutionally protected right other than free exercise of religion is incidentally burdened. This point was made by the Supreme Court in *Prince v. Massachusetts*,[166] in which the Court upheld the applicability of child labor laws to a nine year old girl who, at the behest of her aunt and guardian, engaged in the sale of religious literature for the Jehovah's Witnesses.[167] Sarah Prince conceded explicitly that the Press, and implicitly that the Speech Clause did not apply, and based her First Amendment claim entirely on the Free Exercise Clause.[168] The Court, speaking through Justice Rutledge, emphatically rejected the argument that the Free Exercise Clause is superior to the Speech and Press Clauses, and recognized the essential unity of the First Amendment:

> If by this position appellant seeks for freedom of [religious] conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First [Amendment] can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality can find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[169]

The failure of the Court to understand the proper role of the Free Exercise Clause, the slighting of the goal of government neutrality in religious matters, and the selective non-recognition of a freedom of conscience based on the Speech Clause all contributed to the erroneous conclusions reached by all of the Justices in *Smith*. Further analysis of this case therefore is necessary.

---

166. 321 U.S. 158 (1944).

167. *Id.* at 170.

168. *Id.* at 164.

169. *Id.* at 164-65. This unitary view of the First Amendment later was repeated in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). *Heffron* applied the Speech Clause, not the Free Exercise Clause, to a claim by a religious group to a right to distribute literature, sell literature, and solicit donations at a state fair. *See infra* text accompanying notes 235-41.

C. *The Errors of* Smith

In *Smith*, a majority of the Court applied rational basis review to claims of religiously-based exemptions from neutral laws of general applicability because of their belief that these claims were outside the scope of the protection of the Free Exercise Clause.[170] Although the Court is willing to use a balancing approach in cases where an individual asserts a free speech defense to his or her non-compliance with a regulation that is unrelated to the suppression of free expression,[171] the *Smith* majority preferred a categorical approach for individual claims involving free exercise exemptions from neutral laws of general applicability. In so doing, most of the Justices in the *Smith* majority apparently would give more protection (under a balancing approach) to politically motivated conduct than they would give (under a categorical approach) to religiously motivated conduct.[172] Clearly this is not neutral as between religion and non-religion. Although this approach avoids a potential violation of the Establishment Clause, the different analysis of speech and religion cases seems to be a clear violation of the non-discrimination/persecution principle of the Free Exercise Clause. Conversely, the dissenting Justices in *Smith* apparently would give more protection to religiously-motivated conduct than to expressive conduct.[173] This too is not neutral, for it offends the Establishment Clause.

In fairness to Justice Scalia, it must be noted that he was the only Justice in *Smith* who insisted on treating expressive conduct and religiously-motivated conduct alike. He likes applying the *O'Brien* test to expressive conduct cases no more than he likes applying the strict scrutiny test to cases involving religion-

---

170. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878 (1990).

171. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion) (stating that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment" and explicitly applying the four-part *O'Brien* test). Chief Justice Rehnquist's plurality opinion was joined by Justices Kennedy and O'Connor. Although Justices White and Stevens dissented in *Barnes* because they believed that the regulation was not unrelated to the suppression of free expression, they also would have used the *O'Brien* intermediate scrutiny test had they agreed that the regulation was unrelated to the suppression of free expression.

172. This includes Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, all of whom gave more protection (under intermediate scrutiny) to expressive conduct, *see, e.g.*, *Barnes*, 501 U.S. at 566, than they did (under rational basis scrutiny) to religiously-motivated conduct in *Smith*.

173. Justice O'Connor would invoke the compelling interest test in religion cases, thus perhaps giving more protection to free exercise claims than to expressive conduct. Justices Marshall, Blackmun, and Brennan (and perhaps the latter's successor, Justice Souter, *see* City of Boerne v. Flores, 521 U.S. 507, 565 (1997) (Souter, J., dissenting), would give more protection to religiously-motivated conduct (under strict scrutiny) than to expressive conduct (under intermediate scrutiny).

based claims of exemption from neutral laws of general applicability; he would apply rational basis review in both situations. Concurring in *Barnes v. Glen Theatre, Inc.*,[174] Justice Scalia stated that a statute prohibiting live nude dancing "must be upheld, not because it survives some lower level of First Amendment scrutiny [the *O'Brien* test], but because as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all."[175] Justice Scalia also has taken a similar position in a case arising under the Press Clause of the First Amendment:

> [G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.[176]

At least Justice Scalia is consistent. In no case arising under the First Amendment—speech, press, or religion—would he give any First Amendment protection to neutral laws of general applicability. Thus, his categorical approach avoids the error of other Justices in the majority in *Smith* of preferring non-religious reasons over religious reasons for seeking an exemption from neutral laws of general applicability, but he does so at the cost of giving absolutely no First Amendment protection, under any clause, to conduct motivated by religious, philosophical, or political considerations. At the same time, of course, he avoids the error made by the dissenting Justices in *Smith* of preferring religious reasons over non-religious reasons for seeking such exemptions.

In their insistence on using strict scrutiny, Justices O'Connor, Blackmun, Brennan, and Marshall conformed their opinions to the rhetoric, but not the substance, of Free Exercise Clause cases decided after 1963, when *Sherbert* first mandated that strict scrutiny was to be used in free exercise cases. Justice Scalia was surely correct in his *Smith* opinion when he noted that all of the Court's free exercise cases between *Sherbert* and *Smith* invariably claimed to be applying strict scrutiny, but in fact did not. In fact, in that twenty-seven year period, the Court decided seventeen free exercise cases. Although purporting to apply strict scrutiny in all of them, the religious claimant lost thirteen times.[177] Three of the four remaining cases dealt with claims for unemployment compensation and

---

174. 501 U.S. 560 (1991).

175. *Id.* at 572 (Scalia, J., concurring in the judgment).

176. Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991).

177. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992).

were indistinguishable from *Sherbert*; the fourth was *Yoder*.[178] This record of four wins and thirteen losses, in situations where the most stringent standard of judicial review is purportedly applied, stands in stark contrast to freedom of expression cases, where in only one case[179] has the Court purported to use strict scrutiny review and yet upheld the regulation. Similarly, in equal protection cases involving racial discrimination, the Court has only once, in a dubious case decided over fifty years ago,[180] upheld a racial classification or regulation when scrutinized under strict judicial scrutiny. Therefore, Justice Scalia is correct to assert that strict scrutiny in free exercise cases, unlike freedom of expression cases, is only the form, not the reality, of the Supreme Court's free exercise jurisprudence. His rationale for the outcome of the cases that upheld the free exercise claim, although not the stated basis for any of their holdings, is persuasive, and suggests alternative grounds for the decisions that are doctrinally more sound than the grounds actually used by the Court.

In his attempt to reconcile the holding in *Smith* to prior cases—both before and after *Sherbert*—that upheld free exercise claims, Justice Scalia asserted that these few cases shared one of two characteristics. Some of the cases examined state unemployment compensation laws that denied benefits to applicants who were unwilling to work under conditions forbidden by their respective religions. Most of the remaining cases were "hybrid" cases that involved free exercise rights coupled with other fundamental rights that were unrelated to the free exercise of religion, usually freedom of speech.

1. Unemployment Compensation Cases

One line of cases giving religiously motivated conduct an exemption from neutral laws of general applicability examines the denial of unemployment compensation to applicants who are unwilling to work under conditions forbidden by their respective religions. The leading case is *Sherbert v. Verner*,[181] in which the Supreme Court held that the Free Exercise Clause was violated by the denial of unemployment compensation to a Seventh Day Adventist whose inability to find employment resulted from her refusal to work on Saturday, the day of her Sabbath. Following the same rationale, three subsequent cases, all

178. *See infra* note 182.

179. *See* Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion). *Burson* upheld a Tennessee statute prohibiting campaigning at polling places. Although Justice Blackmun claimed to be using strict scrutiny, Justice Stevens' dissent persuasively argues otherwise, concluding that the plurality's "exacting scrutiny" actually was "toothless." *Id.* at 226.

180. *See* Korematsu v. United States, 323 U.S. 214 (1944). Ironically, this first case to apply strict scrutiny in cases involving racial or national origin classifications upheld the relocation of Japanese Americans during World War II.

181. 374 U.S. 398 (1963).

decided in the 1980's also held that the Free Exercise Clause was violated by the denial of unemployment compensation in similar situations.[182]

Justice Scalia in his *Smith* opinion noted that, under the unemployment statutes at issue in *Sherbert* and its progeny, "a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions."[183] Therefore, said Justice Scalia, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[184] With this characterization, Justice Scalia engaged in revisionism. A close reading of all four unemployment compensation cases demonstrates that the rationale advanced by Justice Scalia was not the stated ground for any of the decisions. Not one of the cases suggested that exemptions for religious reasons had to be given because exemptions were being given for secular reasons. The tenor of all four cases was that, whether or not exemptions are given for non-religious reasons, exemptions for religious reasons are constitutionally required by the Free Exercise Clause.

In spite of his revisionism, however, Justice Scalia's characterization of the unemployment compensation cases nevertheless was particularly apt in that it provided a more sound and persuasive rationale by which to explain these cases. Although all four cases purported to use strict scrutiny to invalidate a neutral generally applicable law, the cases actually could have been, and should have been, decided on the narrower grounds proposed by Justice Scalia: If the state has an unemployment compensation program, and if the state affords individualized hearings to examine whether the grounds for not working affords a person an exemption, then religious as well as secular reasons must be examined to determine if an applicant has declined employment "with good cause."[185] Were this the basis for the decision in all four cases, the cases would

---

182. *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (Christian who refused to work on Sundays); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (Seventh-Day Adventist who refused to work on Saturday); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (Jehovah's Witness who refused to work in a factory that manufactured munitions).

183. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

184. *Id.* (citing *Bowen*, 476 U.S. at 708).

185. Justice Scalia appears to have adopted the reasoning earlier expressed by Justice Stevens. Explicitly referring to those same unemployment compensation cases, Justice Stevens earlier had stated:

> In each case the treatment of the religious objection to the new job requirements as though it were tantamount to a physical impairment that made it impossible for the employee to continue to work under changed circumstances could be viewed as a protection against unequal treatment

not stand for the proposition that the Free Exercise Clause demands that religiously motivated conduct receive an exemption from neutral laws of general applicability. Rather, these cases would reinforce the argument that religion and non-religion should be treated alike: both religious and secular reasons can qualify to permit applicants to receive unemployment compensation in spite of their refusal to continue or seek employment.

It should not matter whether Eddie Thomas's refusal to work in a munitions factory was because he was a Jehovah's Witness who for purely religious reasons was conscientiously opposed to any participation in military activities[185] or whether, like Messrs. Seeger and Welsh in the Vietnam era draft exemption cases, his refusal was anchored on his deeply held, intense beliefs against participation in war of any kind.[187] Similarly, just as some applicants cannot be denied unemployment compensation because of their refusal to work on their respective Sabbath, others should not be denied compensation because their refusal to work on a Saturday or Sunday is based on secular reasons, e.g., a non-custodial parent who is able to see his or her children only on week-ends, and who holds a strong secular conviction that he or she must spend considerable time on weekends with the children. Although it might be less common for secular reasons than for religious reasons to justify a refusal to work on Saturday or Sunday, at least the possibility must remain open in order to maintain

---

rather than a grant of favored treatment for the members of the religious sect. United States v. Lee, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring).

Similarly, in *Bowen v. Roy*, 476 U.S. 693, 722 n.17 (1986) (Stevens, J., concurring), Justice Stevens asserted that "the granting of a religious exemption was necessary to prevent the treatment of religious claims less favorably than other claims." In *Bowen*, Justice Stevens discussed whether the federal government could impose an obligation on a Native American to provide a social security number or file other required forms in order to receive cash assistance, medical assistance, and food stamps when the Native American asserted a religion-based objection. *Id.* at 716-23. Noting that others might "[find] difficulty in providing [the required] information on pertinent forms," Justice Stevens observed:

> Current regulations suggest that assistance for such difficulties may well be available in the programs at issue, particularly for those with mental, physical, and linguistic handicaps that prevent completion of the required forms, or other required steps in the application process. To the extent that other food stamp and welfare applicants are, in fact, offered exceptions and special assistance in response to their inability to "provide" required information, it would seem that a religious inability should be given no less deference. For our recent free exercise cases suggest that religious claims should not be disadvantaged in relation to other claims.

Id. at 720-22 (footnotes omitted).

186. *See Thomas*, 450 U.S. at 707.

187. *See* United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970); *see also supra* text accompanying notes 122-50.

neutrality as between religion and non-religion in the allowance of exemptions from neutral laws of general applicability.

It is significant that Justice Scalia limited the appropriateness of using strict scrutiny, in cases where there is a claim of a religiously based-exemption from a neutral law of general applicability, to situations where the law creates "a mechanism for individual exemptions;" the state must consider religious along with non-religious reasons for quitting or refusing work. This process is neutral between religion and non-religion, and stands in stark contrast with *Estate of Thornton v. Caldor, Inc.*,[188] which held that the Establishment Clause was violated by a statute that provided that no person could be required by an employer to work on his or her Sabbath:

> The statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath. . . . The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace [without taking] account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath.[189]

The vice of the statute was to favor absolutely all religious reasons, over all other, non-religious, reasons for not working on the Sabbath. This statute was not neutral; it violated the Establishment Clause. Thus Justice Scalia was right: In spite of its expansive language, *Sherbert* and its progeny should not be understood as justifying an exception to the requirement of government neutrality in religion; rather, viewed in its proper context, those cases reinforce the neutrality requirement. Religious and secular reasons must be considered equally in granting exceptions to requirements that employees work on particular days of the week.

It is important to understand accurately what Justice Scalia meant by the statement that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[190] If he had meant that any refusal to exempt a person for reasons of religious hardship must be measured by strict scrutiny, he would have defeated his objective. For example, zoning ordinances, landmark preservation laws, and other land use regulations typically provide for variances granted as "individual exemptions" on a case-by-case basis. Clearly Justice Scalia would not apply strict scrutiny to a decision of the Boerne, Texas zoning commission to deny a variance sought by a church so that, for its asserted religious reasons,

---

188. 472 U.S. 703 (1985).

189. *Id.* at 709.

190. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

it could build an addition to its "landmark" church to accommodate more worshipers.[191]

Rather, Justice Scalia meant that the categorical refusal to give any consideration to religious hardship whatsoever, while giving consideration to non-religious reasons for seeking an exemption, triggers strict scrutiny. This reasoning is sensible. Either government must consider both religious and non-religious reasons in a system of individualized exemptions, or it must consider neither, in which case the state will have no system for individualized exemptions. It is not neutral to consider non-religious reasons and not religious reasons, or vice versa. If the system of exemptions is not neutral between religion and non-religion, the validity of the non-neutral system itself should be measured by strict scrutiny. But if the system is neutral, and both religious and non-religious reasons are equally considered, then the individual decision itself to deny an exemption need not be measured by strict scrutiny. Intermediate scrutiny is ideal for a judicial examination of these individual decisions.

2. "Hybrid" Cases

In his examination of the "hybrid" cases, Justice Scalia asserted that close examination of those cases yielded the conclusion that it was the "other" constitutional right, not the Free Exercise Clause, that led the Court to invoke strict scrutiny and invalidate the challenged law. Some of the hybrid cases were decided solely on the basis of the Speech Clause;[192] the Free Exercise Clause played no role in their outcome. Although those challenging the government action usually invoked both the Free Exercise Clause and the Speech Clause, the Court carefully relied only on the Speech Clause in these cases, not reaching the free exercise issue.

Other similar cases were decided on a combination of both free exercise and freedom of expression grounds.[193] In all of these "hybrid" cases where the

---

191. *See* City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Scalia, J., concurring) (repeating his arguments made in *Smith*).

192. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (striking down the compulsory display of the state slogan on New Hampshire license plates, "Live Free or Die," that offended the religious beliefs of those challenging the law); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down a compulsory flag salute statute that offended the religious beliefs of Jehovah's Witnesses).

193. *Compare* Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a system of licensing for religious and charitable solicitation where the licensing public official had arbitrary discretion to grant or withhold licenses), *with* Follett v. Town of McCormick, 321 U.S. 573 (1944), Murdock v. Pennsylvania, 319 U.S. 105 (1943) (both involving a tax on solicitation as applied to the dissemination of religious ideas), Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939), *and* Lovell v. City of Griffin, 303 U.S. 444 (1938) (where only the Speech Clause was used to invalidate similar arbitrary licensing of speech for a religious and a non-religious organization respectively).

Supreme Court held that an exemption from a neutral law of general applicability was required, the Speech (or Press) Clause was or could have been the sole basis for the decision.[194] All of these cited cases were decided before *Sherbert* held that strict scrutiny was to be used in free exercise cases.

Justice Scalia was accurate in noting that virtually all of the non-unemployment compensation cases that upheld claims for exemption from neutral laws of general applicability implicated the Speech and Press Clause of the First Amendment. Many of these cases, decided in the 1930's and 1940's, were called "The Jehovah's Witnesses Cases" to identify and signify the belief system of those who raised the claims.[195] Even where the Free Exercise Clause was cited, however, the Speech Clause alone would have been sufficient to justify the outcome. Justice Scalia was not the first to acknowledge this point. In 1973, Professor Leo Pfeffer examined the Jehovah's Witnesses cases and noted:

> The chronicle can be summed up briefly and starkly: In every case in which a claim under the free exercise clause was upheld, it was bracketed with a free speech or free press claim; conversely, whenever free exercise stood alone it was unsuccessful. Realistically, free exercise did not have a separate but equal existence, or even one that was separate and unequal; it had practically no existence at all.[196]

Justice Scalia's use of the word "hybrid" was unfortunate, for it suggests that, while neither the Free Exercise Clause nor the "other" right standing alone justifies an exemption from a neutral generally applicable law, the combination of the two rights does justify such an exemption. This comes perilously close to an argument that the "hybrid" right is found not in any specific constitutional provision, but in the peripheries, penumbras, and emanations of several constitutional provisions. Fortunately, this argument, advanced by Justice Douglas in *Griswold v. Connecticut*,[197] has since been abandoned. Furthermore, Justice Scalia's argument is conceptually flawed in that it implies that, while rational basis review is to be used where either free exercise or the "other" right stands alone, when the two are combined it suddenly becomes appropriate to use strict scrutiny. Yet, we know that rational basis is not the appropriate test to use in judging the validity of regulations of free speech or press; when that right is implicated the level of scrutiny—usually strict scrutiny—does not vary depending on its combination with another right.

---

194. Thus, Justice Scalia supports the thesis that Professor Marshall has long advanced. *See* Marshall, *supra* note 164; Marshall, *supra* note 134.

195. *See, e.g.*, *Barnette*, 319 U.S. at 624; *Cantwell*, 310 U.S. at 296; *Lovell*, 303 U.S. at 444.

196. Leo Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1130 (1973).

197. 381 U.S. 479 (1965).

Justice Scalia's invention of the "hybrid" theory was disingenuous. He would have been more forthcoming had he stated the simple truth that in all of the cases noted, at least those where the "other" right was freedom of speech or press, the "other" right was itself fully sufficient to invalidate the governmental action, with no need to rely, even in part, on the Free Exercise Clause. As Professor Pfeffer noted, the Free Exercise Clause "had practically no existence at all" in these cases.[198]

This explanation of the "hybrid" cases that implicated freedom of expression leaves only two other "hybrid" cases identified by Justice Scalia that do not involve the Speech (or Press) Clause as the "other" constitutional right: *Pierce v. Society of the Sisters*[199] and *Yoder*, both of which were cited by Justice Scalia as implicating "the right of parents . . . to direct the education of their children . . . ."[200] *Pierce* is an anomaly that easily can be disposed of once it is recognized that it was a typical case of the *Lochner* era.[201] Frequently cited as holding that states must permit compulsory school attendance laws to be fulfilled through attendance at parochial schools, *Pierce* actually was decided on the basis of the now-discredited "liberty of contract" doctrine that parochial schools have an economic right to engage in the business of education. Although Justice McReynolds in dicta, limited to a single paragraph, referred to the "liberty of parents and guardians to direct the upbringing and education of children under their control,"[202] substantive due process in 1925 did not extend much beyond economic rights. More to the point of *Pierce* and this Article, and in line with the prevailing liberty of contract jurisprudence prevailing at that time, Justice McReynolds stated:

> Appellees are corporations . . . [that] have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. . . .
>
> . . . .
>
> [Appellees] asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in . . . [many] cases where

198. Pfeffer, *supra* note 196, at 1130.

199. 268 U.S. 510 (1925).

200. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990).

201. *See* Lochner v. New York, 198 U.S. 45 (1905). *Lochner* is considered to be the high-water mark of the liberty of contract-substantive due process doctrine that was in vogue in the first third of the twentieth century. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 480-86 (1997).

202. *Pierce*, 268 U.S. at 534-35.

> injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.[203]

Without a doubt, then, "liberty of contract" was the true basis for the holding, not any right to an exemption of religiously motivated conduct from neutral laws of general applicability. Furthermore, *Pierce* was decided decades before the strict scrutiny standard of judicial review was first applied to Free Exercise Clause cases in *Sherbert.* Indeed, *Pierce* was decided before *Cantwell* selectively incorporated the Free Exercise Clause into the Fourteenth Amendment.

Therefore, *Pierce* furnishes no authority for the existence of a substantive due process right of parents to direct the education of their children. Consequently, only *Yoder* squarely stands for the proposition that strict scrutiny is to be used whenever there is a claim of a religiously based Free Exercise Clause exemption from a neutral law of general applicability. *Yoder* invalidated a Wisconsin compulsory school attendance law as applied to Old Order Amish who, for religious reasons, refused to send their children to school past the eighth grade.[204] *Yoder* is far more difficult to pass off as a "hybrid" case than those cases implicating freedom of expression as the "other" constitutional right. Certainly the Court in *Yoder* referred to no right other than free exercise. Just as *Yoder* misrepresented *Pierce* by stating that "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children,"[205] so too Justice Scalia misrepresented *Yoder*'s reference to the "interests of parenthood"[206] by claiming that *Yoder* was a "hybrid" case involving "the right of parents . . . to direct the education of their children."[207] This was not so. Indeed, by its insistence on limiting its holding to the facts, the *Yoder* Court made it clear that non-religious reasons never would suffice to grant a similar exemption to others. Speaking for the Court, Chief Justice Burger stated:

> 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 protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief . . . may present a most delicate question, the 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. Thus, if

---

203. *Id.* at 535-36 (citations omitted).
204. *See* Wisconsin v. Yoder, 406 U.S. 205, 209 (1972).
205. *Id.* at 233.
206. *Id.*
207. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990).

> the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[208]

Even a cursory reading of Chief Justice Burger's opinion yields the inescapable conclusion that this was no "hybrid" right to which he referred. He could not have been more clear that claims based on religion, and only claims based on religion, could ever be the basis for such an exemption. Although it might have been preferable from a standpoint of doctrinal consistency for the Court to have based its decision on a broader substantive due process "right of parents to direct the education of their children," that is not what the Court did. Indeed, the Court went out of its way to explicitly disavow any broader rationale. Nevertheless, Justice Scalia asserted that in *Yoder*, as in the other just-discussed cases, it was the "other" constitutional right, not the right to free exercise of religion, that was dispositive.

Yoder was the one free exercise case that did not fit Justice Scalia's model. Unlike the unemployment compensation cases, *Yoder* could not logically be squared with his conclusion that the Free Exercise Clause is not implicated by neutral generally applicable laws. Thus, the "hybrid" theory attempted to distinguish that which could not be distinguished. It is clear that Justice Scalia did not think that *Yoder* ever should have been tied to the Free Exercise Clause in the first place; his invention of the "hybrid" theory was an attempt to disconnect the case from its First Amendment moorings. It may well be that the "hybrid" theory is nothing more than "an unprincipled attempt to pretend that *Yoder* survived *Smith*."[209]

Although it was disingenuous of Justice Scalia to characterize *Yoder* as a "hybrid" case, he was right to reject its rationale. While the *Yoder* Court's *opinion* can be described only as a free exercise case, the *result* logically can be explained only as a case involving the substantive due process right of parents to control the education of their children. Chief Justice Burger's reasoning is utterly inconsistent with the goal of achieving neutrality under the First Amendment.

The language from *Yoder* quoted above condemns the opinion. It was bad enough that Chief Justice Burger needlessly favored religion over non-religion in finding an exemption from compulsory school attendance laws. Even worse, the Chief Justice expressed a strong preference for some religions over others.

---

208. *Yoder*, 406 U.S. at 215-16.

209. Ira C. Lupu, Employment Division v. Smith *and the Decline of the Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259, 267.

From a reading of his opinion, it appears that few other religious groups could successfully make the argument of the Amish. Chief Justice Burger devoted a major part of his opinion to the inseparability and interdependence of the Amish faith and way of life. Under his fact-bound reasoning, very few religions—and no secular associations—could claim the constitutional protection that the Court gave to the Amish in *Yoder*. Perhaps worst of all, the Chief Justice did not even consider the possibility that there might be devout individuals, not members of an organized religious denomination, who for either religious or non-religious reasons oppose compulsory school attendance.

Therefore, not only did *Yoder* commit the sin of preferring religion over non-religion, but also it committed the sin of "preferentialism" by preferring some religions over other religions. The case is utterly inconsistent with the Establishment Clause. This was of no worry to Chief Justice Burger, who cavalierly brushed off the problem:

> The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.[210]

It would have been much more sound constitutionally had *Yoder* explicitly relied on a substantive due process "right of parents to direct the education of their children," with no need to combine it with, or even to refer to, the right of free exercise of religion. The exemption mandated by the Court could easily have been extended to other religious groups and individuals, and to non-religious groups and individuals, including those who for a wide variety of religious and secular reasons have deeply-held beliefs in "home-schooling"—perhaps even extending to Henry David Thoreau and his children at Walden Pond. The exemption would have been broader, and would have avoided the constitutional difficulties in preferring religious to secular reasons to require an exemption from compulsory school attendance. It would, in other words, have been neutral.[211]

Alternatively, Chief Justice Burger could have relied upon an implied right of conscience under the First Amendment Speech Clause to give an exemption to both religious and non-religious groups and individuals. Professor Marshall made this point long before *Smith*:

---

210. Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972).

211. Chief Justice Burger may have invoked the narrow free exercise view rather than the broad substantive due process view because the latter would have conflicted with his narrow view of abortion rights. *Roe v. Wade*, 410 U.S. 113 (1973), was pending at the time.

> The claim cited in *Yoder*, freedom from compulsory education, is so akin to what has traditionally been considered a free expression claim that it is questionable whether the case was properly decided on free exercise grounds. First, the Amish sought to have their children free from the influence of secular education, which implicated their associational rights in being forced to attend a public school. Second, as noted by Professor Pfeffer, the issue in *Yoder* might well be described as the freedom to learn, or perhaps not to learn, a right traditionally in the province of the Speech Clause.[212]

III. TOWARD A UNIFIED THEORY OF THE FIRST AMENDMENT: HARMONIZING RELIGIOUS, PHILOSOPHICAL, AND POLITICAL CLAIMS OF EXEMPTION FROM NEUTRAL LAWS OF GENERAL APPLICABILITY

As Part I indicates, the Supreme Court has used different methods of analysis in examining religiously-based and politically-based claims of exemptions from neutral laws of general applicability. The Court is deeply divided on what standard of review to use when evaluating religiously-based claims; the majority uses rational basis review and the minority prefers strict scrutiny. On the other hand, the Court appears to have settled on intermediate scrutiny when evaluating politically-based claims.

The examination in Part II of the historical purpose of the Free Exercise Clause concludes that the clause was intended to prohibit religious persecution and to invalidate laws that single out religion for unfavorable treatment, not neutral laws of general applicability that incidentally (non-purposefully) burden religious freedom. Thus, in reviewing neutral laws of general applicability solely on Free Exercise Clause grounds, Justice Scalia's opinion in *Smith* held that rational basis review is appropriate. However, Part I.D. demonstrates that the courts, applying the Speech Clause, use intermediate scrutiny when examining expressive conduct claims where the regulation is unrelated to the suppression of free expression, and when examining content-neutral time, place, and manner regulations. If the Court is to remain neutral in religious matters, neither preferring nor penalizing religion, the Court should adopt intermediate scrutiny in all cases involving claims of exemption from neutral laws of general applicability that incidentally burden the right of conscience implicitly protected by the Speech Clause. The same level of review should apply whether the basis for the claim is religious or secular.[213]

---

212. Marshall, *supra* note 164, at 585 (citing Pfeffer, *supra* note 196, at 1120).

213. Of course, under the neutrality principle the Supreme Court could decide to use rational basis review in all cases involving claims of exemption from neutral, generally applicable laws. This is the position of Justice Scalia. *See supra* text accompanying notes 175-76.

It remains to describe how the approach advanced in this Article will work in practice. The following is an attempt to set forth a unified and cohesive mode of analysis that legislatures and courts can use to determine whether to grant religiously-neutral exemptions to neutral laws of general applicability.

Critical to this analysis is the need to determine what level of judicial scrutiny to apply. All authorities agree that if the First Amendment is not implicated at all by a regulation of conduct (and assuming no other constitutional rights are implicated), the appropriate standard of review is the rational basis test, under which virtually all regulations will be upheld.[214] At the other extreme, most authorities agree that strict scrutiny is to be used in cases where the challenged regulation is not neutral or generally applicable. *Babalu Aye* and *Johnson* stand for the identical proposition: the government cannot single out, for disfavored treatment, belief or expression with which the government—presumably speaking for a majority of the people—disagrees.[215]

Similarly, in both religion cases and expression cases, the Court should apply the same standard of review whenever an individual claims an exemption from a neutral, generally applicable law. Because the individual's action combines both protected belief or expression and unprotected conduct, an intermediate standard of review is appropriate. The Court should ask whether the government's interest is significant or important, and whether the regulation, using narrowly tailored means, is substantially related to the accomplishment of that objective.

A. Taking Purpose Seriously

Because the purpose of a challenged law determines whether it is neutral and generally applicable, which in turn dictates the level of scrutiny, it is essential that courts take seriously the need to carefully and thoroughly evaluate the purpose of the challenged law. The problem in *O'Brien* was that the Court abdicated its responsibility. Although the heart of the *O'Brien* test was the critical judgment of whether the challenged regulation was "unrelated to the suppression of free expression,"[216] the Court merely accepted the government's unsubstantiated assertions at face value. There is little doubt but that the purpose of the statute was to punish persons who burned or otherwise destroyed their draft cards as a means of political protest, but the Court refused to inquire into the actual purpose. Chief Justice Warren, speaking for the Court, stated: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . Inquiries into congressional motives or purposes are a hazardous

214. *See supra* note 28.

215. *See supra* text accompanying notes 41-51, 69-74.

216. United States v. O'Brien, 391 U.S. 367, 377 (1968).

matter."[217] If the Court will do no more than accept at face value the government's assertion of its purpose, then it will be a rare case where the government is so artless or naïve as to ascribe an illicit motive to itself. The result will be that the government, merely by positing a purpose unrelated to the suppression of free expression, always can avoid strict scrutiny of its regulations so long as there is merely the pretext of neutrality and general applicability.

The Court corrected itself in *Johnson*. Holding that flag burning was expressive conduct—conduct that expresses an idea or belief—Justice Brennan, for the Court, stated: "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[218] In answering this question, Justice Brennan noted that:

> Texas concedes as much: "[The statute] reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals."[219]

Given the wording of the statute and the concession by the State of Texas, it was not difficult to discern the purpose. The result easily followed: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[220]

A storm of criticism was directed at the Court for its opinion in *Johnson*. In an attempt to dampen an effort to amend the Constitution to permit the punishment of flag burning, Congress enacted the Flag Protection Act of 1989, which made it a federal offense to knowingly mutilate, deface, defile, burn, or trample upon the American flag, with the sole exception of "disposal of the flag when it has become worn or soiled."[221] Under the federal statute, punishment was not limited to situations where the conduct would offend others. Still, by the same division of the Court, the statute was invalidated. Although conceding that the statute "proscribe[d] conduct (other than disposal) that damages or mistreats

---

217. *Id.* at 383 (citing cases refusing to inquire into the motives of Congress when determining if a federal statute falls within its enumerated powers such as the commerce and taxing powers).

218. Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974) (holding that the First Amendment protected the sewing of a peace symbol to the American flag)).

219. *Id.* at 411 (quoting Petitioners' Brief at 44, Texas v. Johnson, 491 U.S. 397 (1989) (No. 88-155).

220. *Id.* at 414.

221. 18 U.S.C. § 700 (a)(2) (1989).

a flag, without regard to the actor's motive, his intended message, or the likely effects of his conduct on onlookers," and that the statute "contains no explicit content-based limitation on the scope of prohibited conduct," the Court in *United States v. Eichman* held that "it is nevertheless clear that the Government's asserted interest is 'related to the suppression of free expression.'"[222] Thus, "[a]lthough Congress cast the [Act] in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: It suppresses expression out of concern for its likely communicative impact."[223] In other words, even if the statute is carefully drafted to appear to be neutral and generally applicable on its face, the actual purpose will be determinative.

The same form of analysis used in *Eichman* should be followed in cases where an individual claims that the purpose of a law is to impede his or her free exercise of religion. As difficult as it may be to discern the actual purpose of a challenged law, the Court must carefully examine all relevant circumstances to determine that purpose. The task of determining a law's purpose in order to determine the level of judicial scrutiny is not novel or uncommon. The examination required in First Amendment cases is not unlike that used in equal protection cases where a law that is facially neutral and applied neutrally imposes a disproportionate burden on a protected class; only if the finding of disparate impact is coupled with a finding of discriminatory intent or purpose is a level of scrutiny higher than rational basis review triggered. For example, in *Washington v. Davis*,[224] the Court reviewed the constitutionality of a Washington, D.C. regulation that required all applicants for positions in the police department to pass a written test of verbal skills. The regulation was racially neutral on its face and as applied, but a disproportionately high percentage of minority applicants failed the test. The racially disparate impact or effect, standing alone, was not sufficient to use a standard of review other than rational basis; it was also necessary to find a racially discriminatory intent or purpose.[225] The Court carefully examined the purpose of the regulation and determined that it was to improve the quality of police officers, not to discriminate against minority applicants. Thus, the Court refused to use strict scrutiny, the usual level of scrutiny in racial discrimination cases, and instead used rational basis review and upheld the regulation. It was the object, intent, or purpose of the law that determined the level of judicial scrutiny, not the incidental effect.

Another equal protection case, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[226] provided the framework for an inquiry into

---

222. United States v. Eichman, 496 U.S. 310, 315 (1990) (quoting Texas v. Johnson, 491 U.S. 397, 410 (1989)).

223. *Id.* at 317.

224. 426 U.S. 229 (1976).

225. *Id.* at 239, 242.

226. 429 U.S. 252, 266-68 (1977).

purpose. For the Court, Justice Powell said that a determination of purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[227] He noted:

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes.... Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.[228]

In these cases involving racially disparate impact, the determination of purpose determines the level of judicial scrutiny. If there is a finding of racially discriminatory intent or purpose, strict scrutiny is used and the law is invariably invalidated. But if, as in both *Davis* and *Arlington Heights*, there was no discriminatory purpose or intent, then rational basis review is used and the regulation is upheld.[229]

In a part of his *Babalu Aye* opinion joined only by Justice Stevens, Justice Kennedy explicitly adopted the "disparate impact" rationale of equal protection cases, thereby demonstrating a willingness to examine the decisionmaker's purpose:

> Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to

---

227. *Id.* at 266.

228. *Id.* at 267-68 (citations omitted).

229. The same analysis has been used in gender discrimination cases where a denial of equal protection is alleged. The normal level of scrutiny in gender discrimination cases is intermediate, not strict, scrutiny. *See* Craig v. Boren, 429 U.S. 190 (1976). Therefore, in cases where a law has a disparate impact on one gender, intermediate scrutiny will be triggered only if there is a finding of discriminatory intent or purpose. Otherwise, as in the racial impact cases, rational basis review will be used. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

> the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object.[230]

The disparate impact cases provide clear guidance for determining the actual purpose of challenged legislation. If through a close examination courts can identify racial or gender discrimination, courts also should be able to discern attempts to impair religious freedom and freedom of speech and press. The phrase "religious or political belief" easily can be substituted for "race" in the *Arlington Heights* type of inquiry.[231]

After determining the purpose of the law from which a religious exemption is claimed, the Court then is in a position to determine if the law is neutral and of general applicability. If the purpose is to impede religion, as in *Babalu Aye*,[232] then the law is not neutral and generally applicable. Strict scrutiny therefore must be applied and, in all but the rarest of cases, the regulation should be struck down as violative of the non-persecution principle of the Free Exercise Clause. However, if the purpose is neutral and generally applicable, as in *Smith*, the Court should invoke the implied freedom of conscience of the Speech Clause, apply intermediate scrutiny, and carefully balance the competing interests.[233]

---

230. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1992) (citing *Arlington Heights*, 429 U.S. at 266; *Feeney*, 442 U.S. at 279).

231. In Establishment Clause cases applying the *Lemon* test, *see* Lemon v. Kurtzman, 403 U.S. 602 (1971), Chief Justice Rehnquist and Justice Scalia both oppose any judicial inquiry into legislative purpose. *See* Edward v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is . . . almost always an impossible task. The number of possible motivations . . . is not binary, or indeed even infinite. . . . To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting) (The first prong of *Lemon*, requiring an inquiry into purpose, is "a constitutional theory [that] has no basis in the history of the [First Amendment] . . ., is difficult to apply and yields unprincipled results."). If they are unwilling to identify legislative purpose in Establishment Clause cases, it is no wonder that Chief Justice Rehnquist and Justice Scalia refused to join that part of Justice Kennedy's *Babalu Aye* opinion that discussed purpose.

232. *See supra* text accompanying notes 41-51.

233. Beginning free exercise inquiries with an examination of purpose also lends a certain symmetry to Religion Clause cases. Purpose is the first inquiry undertaken in Establishment Clause cases under the *Lemon* test. *See supra* note 4. Even under Justice O'Connor's "endorsement" test, purpose along with effect is examined to determine if government is "endorsing" religion. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

B. Evaluating Rights Incidentally Burdened

It is not enough that a challenged regulation is determined to be neutral and of general applicability. In order to trigger intermediate instead of rational basis scrutiny, the challenged regulation must impose an incidental burden on the exercise of a constitutional right other than free exercise because, as Part II indicated, that Clause standing alone affords no protection from neutral, generally applicable regulations. Furthermore, in applying intermediate scrutiny, the equal treatment of religion and non-religion must be assured—which can be assured only by analyzing the claimant's asserted right under a constitutional provision other than the Free Exercise Clause. Two such provisions come to mind: freedom of conscience under the Speech and Press Clauses, and substantive due process. An analysis of each illustrates the advantages that each possesses over an ambiguous free exercise right to exemptions from neutral, generally applicable but incidentally burdensome regulations.

1. Freedoms of Speech and Press

The Speech and Press Clauses afford considerable authority for the process of evaluating neutral laws of general applicability that incidentally burden protected freedoms in a religiously-neutral fashion. State restrictions on expressive conduct, literature distribution, door-to-door solicitation of funds, proselytizing in public places, parades, rallies, and similar communicative activities should be analyzed as freedom of conscience cases under the Speech Clause. Because such regulations of time, place, and manner must be content-neutral, equality of treatment as between religion and non-religion is assured. There is no need to invoke the Free Exercise Clause—indeed to do so will result in rejection of the claim, as that Clause does not afford protection from neutral laws of general applicability.[234]

Particularly illustrative is *Heffron v. International Society for Krishna Consciousness, Inc.* ("ISKCON").[235] At issue was Minnesota State Fair Rule 6.05, which required the distribution and sale of literature and the solicitation of donations from fixed booths rented on a first-come, first-served basis.[236] ISKCON claimed that "the Rule would suppress the practice of Sankirtan, one of its religious rituals, which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion."[237] The Minnesota Supreme Court had held "that enforcement of Rule 6.05 against members of ISKCON would violate their constitutionally

234. *See supra* text accompanying notes 192-98.
235. 452 U.S. 640 (1981).
236. *Id.* at 642-43.
237. *Id.* at 645.

guaranteed right to free exercise of religion."[238] The Minnesota Supreme Court also held that the application of Rule 6.05 was not "essential" to further the state's interests, which could have been served by less restrictive means.[239] The United States Supreme Court reversed, noting that any judicial decision, like the fair rule itself, applied not only to this one religious organization, but to all similarly situated organizations:

> The Minnesota Supreme Court took too narrow a view of the State's interest.... The justification for the rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds [although not as part of a ritual]. Nor... do religious organizations enjoy rights to communicate, distribute, and solicit... superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations... are entitled to rights equal to those of religious groups to enter a public forum and spread their views....[240]

Finally, the Supreme Court indicated "it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds" if Rule 6.05 were invalidated.[241]

It is significant that the Supreme Court based its decision on the Speech Clause, not the Free Exercise Clause. The Court was adamant that it was not only religious groups, but all groups—secular as well as religious—that had to be considered in analyzing the regulation. Furthermore, because this was a neutral law of general applicability, the Court held that intermediate scrutiny, not strict scrutiny, was appropriate.

In this regard, *Heffron* exhibited an interesting phenomenon. When the Minnesota Supreme Court looked at the facts narrowly and determined that it was only the members of ISKCON who wanted to distribute, sell, and solicit on the state fair grounds, the court had little difficulty holding in their favor. After all, members of just one group—well known, if unorthodox in their activities—did not present great dangers of fraud or impediment to pedestrian movement. No other religions are known to require its members, as a religious ritual, to distribute and sell religious literature and to solicit donations. Thus, the

---

238. Int'l Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79 (Minn. 1980), *cert. granted*, 449 U.S. 1109, *rev'd*, 452 U.S. 640 (1981).

239. *Id.* at 84.

240. *Heffron*, 452 U.S. at 652-53.

241. *Id.* at 654.

Minnesota Supreme Court felt comfortable in applying strict scrutiny and invalidating the regulation as applied to the one, and probably only, group that would seek to distribute, sell, and solicit as a religious ritual. On the other hand, the United States Supreme Court correctly recognized that it was not just the rights of ISKCON that were at issue; other religious and secular groups would have the same right to distribute, sell, and solicit. The more persons and groups who engage in such activity in a confined space, the greater the dangers of fraud and impediments to pedestrian movement, and thus the greater the interests of the state in preventing those dangers. Consequently, and perhaps inevitably, expanding the scope of constitutional protection to include persons and groups whose belief system is not based on religion could dilute that protection by lowering the level of scrutiny, as intermediate scrutiny is far more flexible to deal with these problems than is strict scrutiny. Although *Heffron* examined a free speech case, the same phenomenon also would be present when other constitutional rights are implicated, such as substantive due process.

2. Substantive Due Process

Similarly, substantive due process often can be used in preference to the Free Exercise Clause to assure that religious and non-religious claims are treated alike when exemptions from neutral generally applicable laws are claimed. This rationale would have been a preferred (because it is principled) basis for the Supreme Court's opinion in *Yoder*. If there is a due process right of parents to control the education of their children, it should not matter whether the parents' views are based on religion, philosophy, or pragmatism. The due process right of parents to direct the education of their children is no more than one aspect of the broader substantive due process right of persons to make decisions regarding procreation,[242] child bearing,[243] child rearing,[244] family living arrangements,[245] and other aspects of family life.[246] The presence or absence of a religious basis for these decisions should be constitutionally irrelevant. Either these personal rights are protected for all persons, or for none. The following example is illustrative.

One of the three United States Supreme Court unemployment cases decided in the wake of *Sherbert* was *Thomas v. Review Board of Indiana Employment Security Division*,[247] in which the Review Board of the Indiana Employment

242. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

243. *See* Roe v. Wade, 410 U.S. 113 (1973).

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

245. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

246. This right also may be characterized as the right of "intimate association." Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

247. 450 U.S. 707 (1981). *Thomas* is one of the three unemployment compensation cases arising after, and based on, *Sherbert v. Verner*, 374 U.S. 398 (1963). *See supra* note 182.

Security Division (the "Board") denied unemployment compensation to a Seventh Day Adventist whose employment was terminated when he refused to accept a transfer to a department in a factory that manufactured munitions. Interestingly, the same Board, in *Gray v. Dobbs House, Inc.*,[248] denied benefits to a restaurant cook who left her employment after being transferred from the 6:00 a.m.-3:00 p.m. shift to the 2:30 p.m.-10:30 p.m. shift.[249] Because Gray could not find adequate child care for her children after the school day ended, she terminated her employment and applied for unemployment compensation.[250] Both the Board and the state court of appeals held that Gray's reasons for leaving her employment did not constitute "good cause in connection with the work."[251] Considering both *Thomas* and *Gray* together, it is clear that the Board did apply a neutral policy of general applicability—it did not extend "the construction of 'good cause' to include purely personal and subjective reasons which are unique to the employee."[252] Because the Board and the Indiana Court of Appeals considered both religious beliefs and parental obligations to be "purely personal and subjective reasons which are unique to the employee," both were held to be outside the meaning of "good cause in connection with the work."[253] Therefore, as the unemployment compensation regulations were neutral and generally applicable, treating religious and secular claims alike, the Indiana court was right not to use strict scrutiny in *Gray*. However, because parental and family rights were incidentally burdened, this might have been a good case in which to apply intermediate scrutiny.

The claimant, Gray, appeared to be concerned primarily with the logistics of arranging child care for her children and transportation to and from work for herself, and therefore perhaps an application of intermediate scrutiny would not have disturbed the Board's determination that she was not eligible for unemployment benefits. But other parents might have far stronger claims. Consider the single parent who, for either religious or secular reasons, has an intense, deeply held commitment—under the substantive due process right of family life—to spending the late afternoons and evenings with his or her children. The single parent may want to engage in daily evening prayer with his or her children, or may want to spend several hours supervising homework, building familial bonds, or both. Therefore, the parent declines or resigns from employment when work at those times is required. Intermediate scrutiny of the denial of benefits would permit a sensitive balancing of the individual and state interests. Although Gray might lose on her claim, the other single parent might prevail—as did Thomas.

---

248. 357 N.E.2d 900 (Ind. Ct. App. 1976).
249. *Id.* at 902.
250. *Id.*
251. *Id.*
252. *Id.* at 903 (quoting Geckler v. Review Bd., 193 N.E.2d 357, 369 (1963)).
253. *Id.* at 902-03.

Candor compels the recognition that the Supreme Court never has explicitly invoked intermediate scrutiny to judge substantive due process issues. But there is no good reason why, if intermediate scrutiny can be used where neutral laws of general applicability incidentally burden freedom of speech and press, it cannot also be used where neutral laws of general applicability incidentally burden substantive due process rights (or, for that matter, fundamental rights protected by equal protection). Indeed, it may well be that, without admitting it, the Court already uses a method of analysis similar to intermediate scrutiny in some substantive due process cases. For example, even though the fundamental "right of privacy" is implicit in the Fifth and Fourteenth Amendment's Due Process Clauses,[254] not all limitations on that right are judged under the strict scrutiny standard of review. Although *Zablocki v. Redhail*[255] held that the right of privacy encompassed the right to marry, Justice Marshall, speaking for the Court, stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous [i.e., strict] scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.[256]

Justice Marshall did not provide a principled basis to distinguish between the two types of regulations that he recognized: regulations that "interfere directly and substantially with the right to marry," and "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship."[257] However, by making the distinction, Justice Marshall admits to varying the level of scrutiny depending, at least in part, on the degree of the burden placed on the substantive due process right. This suggests balancing, and opens the door to intermediate scrutiny.[258]

---

254. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

255. 434 U.S. 374, 390-91 (1978). *Zablocki* struck down a Wisconsin statute that prohibited marriage without court consent by a "Wisconsin resident having minor issue not in his custody and which he is under an obligation to support by any court order or judgment." *Id.* at 375 (quoting WIS. STAT. § 245.10(1), (4), (5) (1973)).

256. *Id.* at 386-87.

257. *Id.*

258. In fairness to Justice Marshall, it must be noted that he and Justice Stevens, at least in equal protection cases, rejected the three-tier level of scrutiny in favor of a "sliding scale" that would balance both the importance of the interest affected, the basis

Justice Powell, concurring in the judgment in *Zablocki*, was more explicit. Disagreeing with Justice Marshall's distinction between two types of regulation, Justice Powell stated:

> [T]he degree of "direct" interference with the decision to marry or to divorce is unlikely to provide either guidance for state legislatures or a basis for judicial oversight.
>
> . . . .
>
> [I]t is fair to say that there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government. But the Court has yet to hold that all regulation touching upon marriage implicates a "fundamental right" triggering the most exacting [i.e., strict] judicial scrutiny.
>
> . . . .
>
> [Rather], "when the government intrudes on choices concerning family living arrangements" in a manner which is contrary to deeply rooted traditions . . . the means chosen by the State . . . must bear a "fair and substantial relation" to the object of the legislation.[259]

Justice Powell's "fair and substantial relation" language was derived from *Reed v. Reed*,[260] the first modern gender discrimination case that has since evolved into the more recent *Craig v. Boren* formulation of "substantially related to the achievement of an important governmental interest."[261] Thus, in this case that combined elements of substantive due process and the fundamental rights prong of equal protection, Justice Powell invoked what later came to be called intermediate scrutiny.[262]

Another example of the Supreme Court's implicit invocation of intermediate scrutiny in substantive due process cases is the current trend,

---

for the classification, and the importance of the government's interest. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109-10 (1973) (Marshall, J., dissenting).

259. *Zablocki*, 434 U.S. at 397-400 (Powell, J., concurring) (footnotes and citations omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 499, 503-04 (1977) (plurality opinion); Reed v. Reed, 404 U.S. 71, 76 (1971)).

260. 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

261. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

262. Justice Powell would deny using intermediate scrutiny. He believed that the "fair and substantial" relation test was simply a variation of rational basis review (albeit "with a bite"). *Id.* at 210-11 n.* (Powell, J., concurring).

attributed primarily to Justice O'Connor, in abortion cases. The joint opinion in *Planned Parenthood v. Casey*[263] rejected strict scrutiny in favor of a test of whether the abortion regulation imposed an "undue burden" on a pregnant woman's access to abortion:

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is . . . an infringement of that right [citing access to the ballot cases]. The fact that a law which serves a valid purpose, not one designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of [protected] liberty . . . .[264]

The joint opinion further explained that "[a] finding of an undue burden is a shorthand for a conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking the abortion of a non-viable fetus."[265]

In applying the novel "undue burden" standard, the joint opinion declined to articulate any specific level of scrutiny. Apparently, under the "undue burden" test, the first task of a reviewing court is to examine the purpose and effect of the regulation. If either the purpose or effect of the regulation is to place a "substantial obstacle in the path of a woman seeking [an] abortion," then the "burden" is "undue" and strict scrutiny is called for. But if neither the purpose nor effect is to impose a "substantial obstacle," then a lower level of scrutiny—intermediate or rational basis—is invoked. By examining the purpose (as well as the effect) of a regulation of abortion, the Court in *Planned Parenthood* clearly opened the door to the possibility of utilizing intermediate scrutiny of abortion regulations that do not have as their purpose the imposition of a "substantial obstacle" on a woman's right to an abortion.

The use of intermediate scrutiny in appropriate substantive due process cases would be consistent with the approach advanced in this Article for the examination of regulations that burden all First Amendment freedoms. If the purpose of the regulation is to burden a protected constitutional right, be it religious freedom in *Babalu Aye*, freedom of speech in *Texas v. Johnson*, or abortion in *Roe v. Wade*,[266] strict scrutiny is to be used to invalidate the regulation. Conversely, if the purpose of a neutral generally applicable law is not to burden a protected constitutional right, incidental burdens on the right

263. 505 U.S. 833 (1992).
264. *Id.* at 873-74.
265. *Id.* at 867.
266. 410 U.S. 113 (1973).

should be judged by intermediate scrutiny. As explained in Part II, however, it is not the Free Exercise Clause that is to be invoked. Rather, it is the Speech Clause of the First Amendment with its implied right of conscience, or the Due Process Clauses of the Fifth or Fourteenth Amendments, that will form the basis for a constitutional analysis of a neutral law of general applicability that incidentally burdens constitutionally protected rights.

C. Applying Intermediate Scrutiny to Prior Supreme Court Cases

Since 1963, when *Sherbert* first held that strict scrutiny is the appropriate standard of judicial review in free exercise cases, the Supreme Court has decided twenty free exercise cases, including *Sherbert.* Thirteen of these cases, purporting to use strict scrutiny, rejected Free Exercise Clause challenges.[267] Obviously, had intermediate scrutiny been used instead of strict scrutiny, the result in all thirteen cases would have been the same. If a challenged regulation can survive strict scrutiny, then surely it can survive a lower level of scrutiny. Four cases (*Sherbert* and three others[268]) upheld Free Exercise Clause challenges to the denial of unemployment compensation. For reasons stated earlier,[269] these cases were correctly decided because "where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[270] *Babalu Aye* was the only case to examine a statute that purposefully penalized a particular theological belief. Because the regulation was not neutral or generally applicable, the Court rightly applied strict scrutiny and held the ordinances unconstitutional.

Thus, of the twenty free exercise cases decided in 1963 and thereafter, eighteen of the cases would not have been affected by the mode of analysis advocated in this Article. Only two cases remain: *Yoder,* which applied strict scrutiny and upheld a free exercise challenge to a neutral law of general applicability, and *Smith,* which applied rational basis review and rejected a free exercise challenge to a neutral law of general applicability. Both should have been analyzed using intermediate scrutiny, which may or may not have changed the outcome.

---

267. *See supra* text accompanying notes 177-80.

268. *See supra* note 182.

269. *See supra* text accompanying notes 181-91.

270. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

1. *Wisconsin v. Yoder*

As explained above,[271] in *Yoder*, members of the Old Order Amish faith opposed compulsory education after the eighth grade. Because Chief Justice Burger determined that the application of the law to the Amish violated their free exercise rights, he applied strict scrutiny and held that Wisconsin's neutral generally applicable compulsory education law could not constitutionally be applied to Old Order Amish.[272] In so doing, the Chief Justice focused on the practices of the Old Order Amish—practices that are shared by few if any other religious or non-religious organizations. Thus, Chief Justice Burger repudiated the principle of government neutrality in religious matters. Not only did he needlessly favor religion over non-religion, but also he manifested a preference for one religion over others.

The similarity of *Yoder* to *Heffron* is striking. Reviewing this neutral law of general applicability that incidentally burdened a religious group, the Court rejected free exercise analysis and strict scrutiny used by the Minnesota Supreme Court, and instead invoked the Speech Clause and applied intermediate scrutiny.[273] The same analysis used in *Heffron* should have been used in *Yoder* to the challenge to compulsory school attendance. Just as the Court in *Heffron* based its decision on the Speech Clause instead of the Free Exercise Clause, so too the Court in *Yoder* should have based its decision on the Due Process Clause instead of the Free Exercise Clause. The substantive due process right of parents to control the education of their children would have been a preferred—and more principled—basis for the decision in *Yoder*.[274] The Old Order Amish should have received no benefit that was not also provided to other religious and non-religious organizations and individuals who, on grounds of conscience—religious, moral, ethical, philosophical or political—opposed compulsory education after the eighth grade. Furthermore, just as the Court used intermediate scrutiny in *Heffron*, so too should the Court have used intermediate scrutiny in *Yoder*.

It is important to recall that the focus on different rights in *Heffron* by the Minnesota Supreme Court (free exercise) and the United States Supreme Court (free speech) resulted in different levels of scrutiny. The Minnesota Supreme Court decided the case on free exercise grounds, and recognized that ISKCON was probably the only religious group to require its members, as a religious ritual, to distribute and sell literature and to solicit donations. Thus, it was not

---

271. *See supra* text accompanying notes 204-12.

272. *See* Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972).

273. *See* Heffron v. Int'l Soc'y of Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981); *see also* Prince v. Massachusetts, 321 U.S. 158 (1944); *supra* notes 166-69, 235-41 and accompanying text.

274. Alternatively, the Court could have relied upon the Speech Clause to give an exemption from compulsory school attendance to both religious and non-religious groups and persons. *See supra* note 212 and accompanying text.

difficult to apply strict scrutiny and exempt a single organization from the state fair rule. However, the United States Supreme Court recognized that its holding in the case also must apply to other religious and non-religious organizations and individuals who might have wanted to distribute, sell, and solicit. Therefore, in order to prevent the potential disruption of the fair that would be caused by blanket exemptions to all who wanted to distribute, sell, and solicit, the Court applied intermediate scrutiny. This permitted the Court to carefully review the facts and sensitively balance the competing interests of the individuals and the government.

The same mode of analysis should apply in cases challenging compulsory education. Under this approach, *Yoder* was correctly decided. But also under this approach, other parents also would be exempted from compulsory education laws, even though they are neutral and generally applicable. Christian fundamentalists might object to public education because they perceive that public education is secular, opposed to family values, and anti-religion. Parents, whether religious or not, may believe that public schools—and even private schools—are unsafe, posing a threat to the physical safety of their children. Some may believe that illegal drugs are too prevalent in all schools. Some may believe that schools in their community are academically deficient. The list is endless. For a myriad of complex reasons, parents might prefer home schooling to organized education. In each and every case, the reviewing court, applying intermediate scrutiny, carefully must examine all claims—whether based on religious or secular beliefs—and sensitively balance the competing interests.

2. *Employment Division, Department of Human Resources v. Smith*

In deciding to use rational basis review in *Smith*, the outcome of the case was a foregone conclusion; the majority of the Court gave maximum deference to the state and upheld the challenged regulation. Similarly, by their insistence on using strict scrutiny, dissenting Justices Blackmun, Brennan, and Marshall almost inevitably concluded that the denial of an exemption from a prohibition on the use of peyote was not necessary to serve the compelling state interest of curbing "the vast and violent traffic in illegal narcotics that plagues this country."[275]

Closest to but still off the mark in *Smith* was the concurring opinion of Justice O'Connor. In common with Justices Blackmun, Brennan, and Marshall (all of whom joined the portion of Justice O'Connor's opinion explaining the appropriate level of scrutiny), Justice O'Connor insisted that "the compelling interest test" was the appropriate test.[276] Nevertheless, a close reading of her opinion suggests that perhaps she favored something less than strict scrutiny.

---

275. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 916 (1990) (Blackmun, J., dissenting).

276. *Id.* at 894, 895, 897, 900, 901 (O'Connor, J., concurring).

Although asserting that the state's interest must be compelling, nowhere in her opinion did Justice O'Connor insist that the state use the least restrictive means. Rather, on several occasions she used the term "narrowly tailored,"[277] which is the language of both strict and intermediate scrutiny.[278] Furthermore, rejecting the *Smith* majority's "categorical rule" that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'"[279] Justice O'Connor asserted that:

> [I]n each of the . . . cases cited by the Court in favor of its categorical rule . . . , we rejected the particular constitutional claims before us only after carefully weighing the competing interests. . . . [T]he First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. . . . [D]elicate balancing [is] required by our decisions in *Sherbert* and *Yoder*.[280]

Justice O'Connor also recognized the similarity between religion and speech claims: "Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than a categorical, approach."[281] Finally, she noted "that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."[282]

Justice O'Connor's constant references to case-by-case determinations, sensitivity to the facts of particular claims, the careful weighing of competing interests, delicate balancing, and sensible balances evokes an intermediate standard of review, not strict scrutiny. A careful reading of the last part of Justice O'Connor's opinion (which no other Justices joined), in which she carefully balanced the competing interests, reinforces the view that, although she referred to "the compelling interest test," which suggests strict scrutiny, in reality she was using intermediate scrutiny. Had she truly used strict scrutiny, it is difficult to understand how she could conclude that the denial of an exemption from a prohibition of the use of peyote (in which there is little illegal traffic), as distinguished from the use of heroin, cocaine, or even marijuana (in which there is significant illegal traffic), served a compelling interest. It is even more difficult to understand how she could decide that broadly proscribing the use of drugs such as peyote, for which there is little market, is a narrowly tailored (let alone the least restrictive) means of prohibiting the illegal trafficking of the more

---

277. *Id.* at 894, 895.

278. *See supra* note 78.

279. *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

280. *Id.* at 896, 899 (O'Connor, J., concurring).

281. *Id.* at 902 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986); United States v. O'Brien, 391 U.S. 367, 377 (1968)).

282. *Id.*

dangerous addictive drugs such as heroin and cocaine. But because intermediate scrutiny gives much discretion to the judiciary to determine if the government's interest is "important, substantial, or significant," and to determine if the means are sufficiently "narrowly tailored," Justice O'Connor's conclusion is far more compatible with intermediate scrutiny than it is with strict scrutiny. Thus, although Justice O'Connor did not explicitly use intermediate scrutiny, her approach certainly suggests an appropriate outcome had that test been applied to the facts of *Smith*.

3. *City of Boerne v. Flores*

Although not decided on First Amendment grounds, the Free Exercise Clause was implicated in *Boerne*.[283] In that case, a Catholic church in Boerne, Texas, had been denied permission to build an addition to the church, which previously had received the designation of an "historic landmark."[284] Although the decision was based on a finding that the Religious Freedom Restoration Act was unconstitutional because it was outside the scope of the enumerated powers of Congress,[285] several Justices discussed the underlying free exercise issue and the appropriate level of scrutiny that should be applied. Justices Scalia and Stevens adhered to their view in *Smith* "that the Constitution's Free Exercise Clause 'does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."'"[286] Justice O'Connor, joined by Justice Breyer, who came to the Court after *Smith* was decided, also adhered to her views in *Smith*. Again, Justice O'Connor would require the "government to justify [a challenged] law with a compelling state interest and to use means narrowly tailored to achieve that interest."[287]

It is particularly noteworthy that, in her argument that religiously-based claims of exemptions from neutral laws of general applicability deserved constitutional protection, Justice O'Connor equated religion with speech, demanding that both be accorded constitutional protection using heightened scrutiny:

> Certainly, it is in no way anomalous to accord heightened protection to a right identified in the text of the First Amendment. For example, it has long been the Court's position that freedom of speech—a right

283. *See supra* text accompanying notes 55-62.

284. *See* City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

285. *Id.* at 511.

286. *Id.* at 537 (Scalia, J., concurring) (quoting Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990); United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

287. *Id.* at 546 (O'Connor, J., dissenting).

> enumerated only in a few words after the right to free exercise—has special constitutional status. Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect.[288]

Not only is it "altogether reasonable to conclude that both should be treated with the highest degree of respect," but also that both be treated with *equal* respect and be adjudicated under the *same* level of judicial scrutiny—strict scrutiny where the purpose of the challenged law is to restrict speech or religion, and intermediate scrutiny where an exemption is claimed from a neutral law of general applicability.[289] Once again, Justice O'Connor hints at a mode of analysis that is neutral as between religion and non-religion.

Although none of the Justices discussed the applicability of the intermediate standard of review to the facts of *Boerne*, this analysis would not be difficult. Once again, because the challenge is to a neutral law of general applicability,[290] the Free Exercise Clause furnishes no independent authority to invalidate the law.[291] However, the Speech Clause, with its implied right of conscience, easily could have been asserted. In *Boerne*, the church argued that it needed to build an addition to accommodate more parishioners who desired to attend religious services in the church. Similarly, the owner of an auditorium or theater might argue that an expansion is needed to accommodate more persons who desire to attend the auditorium or theater for political rallies or drama productions. A newspaper might argue that an addition is needed to its printing plant to print more newspapers to accommodate an increased number of subscribers. The principle of government neutrality in religious matters requires that all three claims be treated alike.

The issue in all three cases should be whether the First Amendment requires that buildings used for First Amendment purposes be exempt from neutral laws that are generally applicable to all historic landmarks. If the historic preservation law includes a system of individualized hearings on whether to grant exemptions from the operation of the law, then religious and secular reasons both must be considered by the agency empowered to grant exemptions.[292] If no exemptions are permitted by the law, then the reviewing court should apply intermediate scrutiny, carefully examine the facts, and sensitively balance the competing interests. It is difficult to see how the church, the auditorium, or the printing plant could be treated differently from each other from a First Amendment standpoint. Using intermediate scrutiny, all First Amendment uses of property

---

288. *Id.* at 564-65.
289. *Id.*
290. *But see infra* text accompanying notes 294-95.
291. *See supra* text accompanying notes 158-69.
292. *See supra* text accompanying notes 181-84.

with landmark designations should receive more protection than economic uses of similar property. Depending on a "case-by-case determination of the question, sensitive to the facts of each particular claim,"[293] some First Amendment uses might be granted an exemption from neutral landmark preservation laws of general applicability; others might not.

It should be noted that neither substantive due process nor the Takings Clause of the Fifth Amendment,[294] to the extent that they protect property rights rather than personal rights, affords special protection to the church, the auditorium, the newspaper's printing plant, or any other user of property. Although landmark designation laws, in common with zoning and other land use regulations, typically are neutral as between religion and non-religion, and as between different ideas and beliefs of the owners or occupants, they are not neutral with regard to the property itself. By their very nature, land use regulations are neither neutral nor generally applicable—different types of property are treated differently. But because the grounds for distinction do not implicate any constitutional rights other than property rights, the grounds for different treatment are not subjected to heightened review except to determine whether there is a compensable taking and, if so, the consequences thereof,[295] which presents issues beyond the scope of this Article. If land use regulations that are not neutral or generally applicable are judged by rational basis review, then neutral land use laws of general applicability should not receive heightened scrutiny.

Conversely, perhaps substantive due process would demand the use of intermediate scrutiny to examine the denial of an exemption from a land use regulation that burdens a personal right protected under substantive due process. For example, an abortion clinic housed in a landmarked building may seek an exemption from a landmark law to permit the construction of an addition to accommodate an increased number of physicians, staff, and patients. Just as

---

293. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring).

294. U.S. CONST. amend. V ("... nor shall private property be taken for public use, without just compensation").

295. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). For example, in determining when government conditions on development are considered to be a taking, in *Dolan* the Supreme Court applied a two-part test. First, there must be a nexus between the legitimate state interest and the permit condition. *See Dolan*, 512 U.S. at 386. Second, the conditions must be "roughly proportionate" to the government's justifications for the conditions. *Id.* at 391. Although the Court said that this was a test of reasonableness, it used the term "rough proportionality" to prevent confusion with the rational basis test. *Id.* Furthermore, the Court stated that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* This suggests intermediate scrutiny.

those occupants of landmarked buildings who use their buildings to exercise First Amendment rights should be able to invoke intermediate scrutiny to measure their claims for exemptions to land use regulations, so too should owners or occupants who use their buildings to exercise fundamental substantive due process rights.

D. Applying Intermediate Scrutiny to Other Cases

In her opinion in *Boerne*, Justice O'Connor cited four lower court decisions, decided in the aftermath of *Smith*, that rejected Free Exercise Clause claims to neutral laws of general applicability.[296] A review of these cases shows that all of them could have had different outcomes had the courts followed the approach urged here.

1. *Yang v. Sturner*[297]

In *Yang v. Sturner*, a federal district judge permitted a suit to be brought against a medical examiner who conducted an autopsy of the plaintiffs' deceased son. The Yangs, who immigrated from Laos, "adhere[d] to the religious beliefs of the Hmongs, one of which prohibit[ed] any mutilation of the body, including autopsies or the removal of organs during an autopsy."[298] The autopsy was conducted pursuant to a neutral, generally applicable law that authorized autopsies in situations similar to those at issue in this case, and the Yangs were not notified of the autopsy in advance or asked for their permission.[299] Applying strict scrutiny, the district court held for the plaintiffs.[300] Pending a hearing on damages, the Supreme Court issued its opinion in *Smith*. The district court then withdrew its prior opinion and, claiming to adhere to *Smith*, held that the neutral, generally applicable law's impairment of religious freedom did not rise to a level that offended the Constitution.[301]

Yang was a case that, like *Yoder*, could have been decided on substantive due process grounds. Perhaps there should be a generally recognized right to bodily integrity; the right to control one's body is suggested by cases and commentators advocating judicial recognition of the right to refuse medical

296. *See* City of Boerne v. Flores, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting).

297. 728 F. Supp. 845 (D.R.I. 1990).

298. *Id.* at 846.

299. *Id.*

300. *Id.* at 857.

301. *See* Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

treatment,[302] the right to an abortion,[303] the right to die,[304] and the right to physician-assisted suicide.[305] To be sure, the Court's record on these matters is mixed. However, it is not the purpose of this Article to advocate for or against such a right. Rather, the point is that, to the extent courts grant exemptions from neutral laws of general applicability to laws mandating medical treatment or otherwise interfering with bodily integrity and personal autonomy, such exemptions cannot be limited to those based on religious belief. If the religious beliefs of a Jehovah's Witness necessitate an exemption from compulsory medical attention statutes, so too should exemptions be given to others who, because of non-religious beliefs and value systems, also resist such government encroachments over their bodies. The district court in *Yang* could have based its opinion on the view that substantive due process necessitates the use of intermediate scrutiny to determine if the performance of an autopsy was narrowly tailored to serve an important or substantial state interest in determining the cause of death of a young man who apparently was in good health but where there was no suspicion of foul play. Although other obstacles might preclude a decision in favor of the parents,[306] at least the district court could have grounded its decision on a religiously neutral principle of constitutional law.

2. *Cornerstone Bible Church v. City of Hastings*[307]

Cornerstone Bible Church v. City of Hastings examined a Downtown Revitalization Plan, designed to preserve and restore the central business district where churches were not permitted.[308] However, there was evidence that other non-commercial uses were permitted in the downtown area, including Alcoholics Anonymous, a pregnancy counseling center, the American Legion, the Veterans of Foreign Wars, and the Masonic Lodge.[309] Applying the categorical rule of *Smith*, the Eighth Circuit rejected the claim that the denial of an exemption from the neutral and generally applicable zoning law offended the Free Exercise

---

302. *See* Jacobson v. Massachusetts, 197 U.S. 110 (1905).

303. *See* Roe v. Wade, 410 U.S. 113 (1973).

304. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

305. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

306. The Supreme Court in *Cruzan* did not permit parents of a patient in a persistent vegetative state to act as surrogates to exercise a personal right of the patient, at least where state law required clear and convincing evidence of the personal views of the patient. *See Cruzan*, 497 U.S. at 285-86. By analogy, the Court might hold that, in the absence of evidence as to the decedent's views about autopsies, the decedent's family cannot make the decision, as the surrogates of the decedent, to either permit or object to the autopsy.

307. 948 F.2d 464 (8th Cir. 1991).

308. *Id.* at 466.

309. *Id.* at 468.

Clause.[310] Nevertheless that court remanded the case to the district court[311] for a determination of whether, under either the Speech Clause alone or conjoined with the Free Exercise Clause in a "hybrid" claim, the zoning ordinance was a content neutral regulation of the time, place, and manner of exercising First Amendment rights.[312] This was precisely the correct approach.[313] Because organizations that were religious, political, or ideological in character were permitted to be housed in the downtown area, the regulation apparently was not content neutral from a First Amendment standpoint. Consequently, strict scrutiny would be the appropriate standard of scrutiny, and the unequal treatment between Cornerstone Bible Church and the other organizations probably cannot be justified.

3. *St. Bartholomew's Church v. City of New York*[314]

In *St. Bartholomew's Church v. City of New York*, a church brought suit against New York City's Landmarks Preservation Commission, which had denied the church permission to construct either a fifty-nine or, alternatively, a forty-seven story office tower in place of the church's adjacent community house.[315] Both the church and the community house had been designated landmarks.[316] Had it not been for the Free Exercise Clause claim, the case would have been on all fours with the Supreme Court's 1978 decision in *Penn Central Transportation Co. v. New York City*.[317] Using rational basis review, *Penn Central* upheld the authority of the city to enact the landmark preservations law, rejecting due process and Takings Clause objections to the denial of permission to construct either a fifty-five, or, alternatively, a fifty-three story office tower on top of Penn Central station.[318]

The free exercise issue in *St. Bartholomew's Church* was indistinguishable from the issue underlying *Boerne*.[319] Because the law was neutral and of general applicability, the Second Circuit in *St. Bartholomew's Church* applied the rationale of *Smith*, decided several months earlier, and denied an exemption that was claimed on free exercise grounds.[320] Although the court observed that "[i]t is obvious that the Landmarks Law has drastically restricted the Church's ability

310. *Id.* at 470-71.
311. There is no reported decision of the district court following the remand.
312. *Cornerstone*, 948 F.2d at 470-71.
313. *See supra* text accompanying notes 290-93.
314. 914 F.2d 348 (2d Cir. 1990).
315. *Id.* at 351.
316. *Id.*
317. 438 U.S. 104 (1978).
318. *Id.* at 138.
319. *See supra* text accompanying notes 283-95.
320. *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 351 (2d Cir. 1990).

to raise revenues to carry out [and expand] its various charitable and ministerial programs," the court made no effort to determine if other secular organizations protected by the First Amendment also were burdened by the Landmarks Law.[321] Had the court found that these protected secular organizations were equally burdened, it should have followed the precedent of *Heffron*,[322] applied intermediate scrutiny, and engaged in a fact-sensitive balancing of the competing interests, which could have resulted in a different outcome.

4. *Minnesota v. Hershberger*[323]

In *Minnesota v. Hershberger* (*Hershberger I*), the Minnesota Supreme Court held that the Free Exercise Clause required that Amish be exempt from a requirement that they exhibit a "slow moving vehicle" ("SMV") emblem on the back of their horse-drawn buggies.[324] Because the Amish had a sincere religious belief prohibiting them from exhibiting the emblem,[325] the Minnesota Supreme Court applied strict scrutiny.[326] The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Minnesota Supreme Court.[327] On remand,[328] the Minnesota Supreme Court held that the SMV law, as applied to the Amish, violated the "freedom of conscience" protected by the Minnesota Constitution.[329] Thus, there was no need to reconsider the federal constitutional issue.

Viewed as a First Amendment freedom of speech case, *Hershberger* is strikingly similar to *Wooley*,[330] which held that a Jehovah's Witness could not be punished for making illegible that portion of his New Hampshire automobile license plate that contained the state motto "Live Free or Die." Noting that the Maynards found the state motto to be "morally, ethically, religiously, and politically abhorrent,"[331] the Supreme Court held that the right not to be compelled to express ideas with which one disagreed was part of "the broader

---

321. *Id.* at 355.

322. *See supra* text accompanying note 235-41.

323. 444 N.W.2d 282 (Minn. 1989).

324. *Id.* at 289.

325. The Amish asserted that "the 'loud' colors required and the 'worldly symbols' the triangular shape represent[ed] to them conflict[ed] with the admonitions found in Apostle Paul's Epistles." *Id.* at 284. To the Amish, compliance with the law "would be putting their faith in 'worldly symbols' rather than in God." *Id.*

326. *Id.* at 285.

327. *See* Minnesota v. Hershberger, 495 U.S. 901 (1990).

328. *See* Minnesota v. Hershberger (Hershberger II), 462 N.W.2d 393 (Minn. 1990).

329. MINN. CONST. art. I, § 16.

330. *See supra* text accompanying notes 158-61.

331. Wooley v. Maynard, 430 U.S. 705, 713 (1977).

concept of 'individual freedom of [the] mind,'"[332] thereby recognizing the inherent unity of the First Amendment.

Just as the Court preferred to rely on the Speech Clause rather than the Free Exercise Clause in *Wooley*, so too the Minnesota Supreme Court in *Hershberger I* should have relied on the Speech Clause rather than the Free Exercise Clause. In so doing, the Minnesota court could have ensured that religious and secular objections to compelled speech were treated similarly. Because the laws in both cases compelled owners of automobiles and buggies to express ideas and convey messages to which they objected, the laws regulated speech itself. Because both laws were not merely neutral and generally applicable regulations of conduct that only incidentally burdened speech, strict rather than intermediate scrutiny was appropriate.

CONCLUSION

Although the Religion Clauses of the First Amendment require the government to remain neutral in religious matters, the United States Supreme Court has completely abdicated its constitutionally imposed responsibility to safeguard this bedrock principle of American constitutional law. By using different tests in Free Exercise Clause and Establishment Clause cases, and in free exercise and free speech cases, the Court has utterly failed to set forth a comprehensive over-arching theory of the First Amendment. Government neutrality in matters of religion is hardly more than an aspiration, if the Court even continues to aspire to this principle.

The muddled analysis of the Court is nowhere more apparent than in cases involving claims of exemptions from neutral laws of general applicability that incidentally, in a non-purposeful manner, burden religious, moral, ethical, philosophical, and political belief. If the law burdens political beliefs, the Justices overwhelmingly favor using intermediate scrutiny, which necessitates a delicate and sensitive balancing of competing interests. But if the law burdens religious beliefs, the Court is deeply divided between two groups of Justices who use the polar extremes of rational basis scrutiny and strict scrutiny. The problem is exacerbated by the Court's failure to articulate, in a principled manner, the differences between strict and intermediate scrutiny.

This Article has attempted to suggest a mode of analysis that would recognize the essential unity of the First Amendment and bring some consistency to this area of constitutional jurisprudence. The goal of government neutrality in religious matters can be achieved by recognizing the meaning of the First Amendment's Free Exercise and Speech Clauses. First, this requires a recognition that the core meaning of "free exercise of religion" is limited primarily to freedom from religious persecution by government. Second, courts

---

332. *Id.* at 714 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

must recognize that the Speech Clause contains a necessarily implied "freedom of conscience" that is broad enough to encompass all beliefs, religious and secular.

The First Amendment, properly understood, therefore requires a careful identification of the purpose of the challenged law. If the purpose of the law is to burden constitutionally-protected freedoms, strict scrutiny should be used and, in all but the rarest of instances, the law should be invalidated. If the purpose is not to burden protected freedoms, intermediate scrutiny should be applied to all claims of exemption from neutral laws of general applicability. The name and character of the right burdened—freedom of religion, freedom of expression, or fundamental unenumerated freedoms protected by substantive due process—should not be material. In this way, religiously motivated conduct will be no more protected and no less protected than conduct motivated by philosophical, moral, ethical, and political beliefs. Consequently there is no need to define the meaning of "religion" or determine the sincerity (and therefore the veracity) of religious beliefs.

Adopting this mode of analysis would accomplish a major step forward in eliminating the internal inconsistencies of the First Amendment. In turn, this will begin to harmonize the various provisions of our Constitution's foremost protection of individual rights.