# SCRAPPING STRICT REVIEW IN FREE EXERCISE CASES

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In theory, the Supreme Court has provided a "virtually unique protection for religious exercise, one substantially greater than for speech."[1] This protection takes the form of a strict scrutiny standard for general regulations adversely affecting religiously based actions or refusals to act. The Court, however, when confronted with objectionable consequences of the strict review standard, simply looks for and finds a way out.[2] I do not quarrel with the decision to back away from strict review. The Court was wrong from the start in heading down this path. It should, however, explicitly acknowledge the error and reformulate its overall approach to enforcing the free exercise guarantee.

## I

Several potential "outs" maintain nominal adherence to strict review. First, although establishment clause concerns have deterred the Court from overtly rejecting a free exercise claim as not truly "religious," the Court has given hints of this view.[3] Chief Justice Burger's majority opinions in *Wisconsin v. Yoder*,[4] and *Thomas v. Review Board of Indiana*,[5] accepted free exercise claims but with notes of caution. In *Yoder*, he emphasized that "we are not simply dealing with a way of life,"[6] such as Thoreau's. More recently, in *Thomas*, while he criticized the state court for too closely reviewing the religious claim of a Jehovah's Witness, he also stated that "[o]ne

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1. Choper, The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments, a paper presented at 1986 "Religion and the State" symposium, Institute of Bill of Rights Law, Marshall-Wythe School of Law, to be published in 27 WM. & MARY L. REV. — (1987) (forthcoming).

2. *Id.*

3. *See* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 590-91.

4. 406 U.S. 205 (1972).

5. 450 U.S. 707 (1981).

6. 406 U.S. at 235. Moreover, since the religious claim of the Amish was so "vital" to their faith, it was "one that probably [even] few other religious groups . . . could make." *Id.* at 236.

can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[7] This past term, the Chief Justice's plurality opinion in *Bowen v. Roy*[8] alluded to the fact that "[b]ased on recent conversations with an Abenaki chief," a Native American "had recently developed a religious objection to obtaining a Social Security number for Little Bird of the Snow [his two-year-old daughter]."[9] It is not overly cynical to suggest that the plurality viewed this claim as "bizarre." A later footnote pointed out that virtually every government action might be susceptible to some religious objection. For example, requiring the filing of a tax return on Wednesday (Woden's Day)[10] might violate Norse mythology. But, as in *Thomas*, there probably also was the recognition that it would have been inappropriate expressly to judge the substantiality of the religious claim.

It is also possible to escape strict review by finding that a contested regulation places only a slight burden on religious exercise. This was one ground on which the Court upheld denial of educational benefits to conscientious objectors in *Johnson v. Robison*.[11] Again, in *Bob Jones University v. United States*[12] the Court assessed the burden on free exercise. It upheld denial of tax-exempt status to religious colleges that engaged a racial discrimination. Although primarily relying on the government's compelling interest in eliminating all racial discrimination,[13] the Court also considered the burden on the schools. It noted that while there would be "substantial impact on the operation of private religious schools," denial of tax-exempt status "[would] not prevent those schools from observing their religious tenets."[14] Most recently, in *Tony and Susan Alamo Foundation v. Secretary of Labor*,[15] the Court found virtually no burden in a requirement that a religious foundation comply with

7. 450 U.S. at 715. Justice Stevens, however, concurring in Goldberg v. Weinberger, 106 S. Ct. 1310 (1986) and United States v. Lee, 455 U.S. 252, 263 n.2 (1982), stressed the inappropriateness of such judgments.

8. 106 S. Ct. 2147 (1986).

9. *Id.* at 2150.

10. *Id.* at 2156 n.17.

11. 415 U.S. 361 (1974).

12. 461 U.S. 574 (1983).

13. The Court assumed that the government's interest was equally strong no matter what the source of the discrimination. It is not evident, however, that the government has the identical interest in eliminating private discrimination as it clearly does in conforming to the requirements of the fifth and fourteenth amendments vis-à-vis governmental discrimination.

14. 461 U.S. at 604.

15. 105 S. Ct. 1953 (1985).

minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act.

While something more than a de minimus burden ought to be required, it is difficult to perceive an intelligible framework within which the Court determines how much is enough. Moreover, given the strict review standard there is a strong incentive to find the burden too small in cases where the Court otherwise would have difficulty sustaining the regulation.

Finally, if the Court concludes that strict review is applicable, it may too readily accept the existence of a "compelling" governmental interest and the "necessity" of the particular regulation as a means of advancing that interest. This point was very effectively made by Justice Stevens in his *United States v. Lee* concurrence.[16] He observed that exempting Amish employers from payment of social security taxes easily could have been accomplished without detriment to the social security system. Therefore he suggested that the standard the Court actually applied placed "an almost insurmountable burden on any individual who objects [on free exercise grounds] to a valid and neutral law of general applicability."[17] *Yoder*, involving compulsory school attendance laws, was the Court's principal exception to this standard, and attempts to distinguish it were unconvincing. By contrast, he viewed *Thomas* and *Sherbert v. Verner*[18] as arguably distinguishable instances in which a higher standard properly was applied. This was because the decisions involved laws intended to provide a benefit to a limited class of otherwise disadvantaged persons.

Chief Justice Burger's opinion in *Bowen* argued for substitution of a deferential standard in one class of free exercise class—those involving challenges to generally applicable requirements for receipt of government benefits. *Bowen* was a free exercise challenge to the requirement that an applicant for AFDC benefits must furnish the state with his social security number. The Burger opinion drew a critical "distinction between governmental compulsion and conditions relating to governmental benefits."[19] Cases of direct compulsion, for example those involving criminal penalties, warranted strict review. But where the government decided to treat all benefit applicants alike the following standard applied:

> Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates

16. 455 U.S. at 262.
17. *Id.* at 263 n.3.
18. 374 U.S. 398 (1963).
19. 106 S. Ct. at 2155.

> that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest [i.e., the rational basis test].[20]

Thus, contrary to Justice Steven's position, the Burger opinion would retain strict review for cases of direct compulsion, such as *Yoder*. However, like Justice Stevens, Chief Justice Burger would continue the strict review standard in cases of the *Sherbert* and *Thomas* variety. He distinguished these as involving a " 'good cause' standard [that] created a mechanism for individualized exemptions." Where there was such a mechanism, the failure to extend an exemption to instances of religious hardship "suggests [an impermissible] discriminatory intent."[21]

The Chief Justice's proposal, involving a distinction between compulsion and denial of benefits, is objectionable unless one is prepared totally to repudiate the unconstitutional conditions doctrine.[22] The Burger opinion offers no reason why conditions on freedom of speech, for example, should be subjected to any greater scrutiny than conditions on free exercise of religion. If a denial of benefits is not as substantial an interference with free exercise as direct compulsion, the same would be true for freedom of speech or any other fundamental right. While I have reservations about the doctrine's present breadth of application,[23] I would not totally abandon it. Therefore, in free exercise cases, I would continue to apply the same standard to a general regulation that results in a denial of benefits as I would to one compelling or forbidding conduct and imposing sanctions for violation.

Justice Stevens endorses such uniformity under a standard by which "the objector . . . must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability."[24] However, he does not fully explain his rationale. The remainder of this article, by a reconciliation of free exercise with freedom of speech principles, explains why a somewhat more rigorous intermediate standard of review should be uniformly applied.

## II

Originally, the Court drew a major distinction between reli-

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20. *Id.* at 2156.

21. *Id.*

22. *Bowen*, 106 S. Ct. at 2168 (O'Connor, J., dissenting). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

23. These reservations, which I plan to discuss in a later article, relate to whether the doctrine should be uniformly applied without regard to the particular liberty at issue.

24. *Lee*, 455 U.S. at 262.

gious belief and conduct, finding one absolutely protected and the other subject to regulation on essentially a rational basis standard. *Reynolds v. United States*[25] (sustaining anti-polygamy laws) is a good example. Does anyone seriously entertain the idea that if the Court were to reconsider *Reynolds*, it would apply strict review to uphold the religiously dictated practice? As in recent decisions, it again would find a way out.

Of course, as Dean Choper has observed, if the free exercise clause is to have an independent meaning here, it must protect religiously based conduct not otherwise qualifying under the freedom of speech guarantee.[26] Further, I agree that it must accord this conduct a higher level of protection than that available under the due process clause's deferential rational basis standard. However, contrary to Dean Choper's position, application of strict review is unjustified.

Strict review should be confined to regulation of religious practices that are closely "akin"[27] to religious speech, that is, those highly unlikely to be regulated absent a purpose to suppress the particular religion. Such practices, for example wearing a cross or a Star of David or sprinkling someone in a baptismal ceremony, produce few if any external effects that are customarily the subject of legitimate regulation. These cases in essence are viewpoint-discrimination free speech cases like those involving outlawing display of a red flag[28] or prohibiting the wearing of black arm bands.[29]

By contrast, religiously based conduct such as handling poisonous snakes,[30] using drugs,[31] or refusing to send one's children to high school evoke societal health, safety and welfare concerns unrelated to the suppression of any religion. Whether or not any of this religiously based conduct having substantial externalities might qualify as "speech," it should be protected as "free exercise."[32]

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25. 98 U.S. 145 (1878).

26. Choper, *supra* note 3, at 581-84. The Court has equated free exercise activities with freedom of speech in Widmar v. Vincent, 454 U.S. 263, 269 (1981) (religious discussion and prayer meetings); Heffron v. Int'l Soc'y For Krishna Consc., 452 U.S. 640, 652 (1981) (distribution of religious literature and solicitation of funds).

27. *Cf.* Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969).

28. Stromberg v. California, 283 U.S. 359 (1931).

29. *Tinker*, 383 U.S. 503 (1969). *See* Choper, *supra* note 3, at 582.

30. Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976).

31. Gaskin v. State, 490 S.W.2d 521 (Tenn. 1973).

32. Professor Marshall has argued that aside from protecting religious autonomy and preventing direct discrimination against religious practices, free exercise should afford no independent protection to religiously based conduct. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 547 (1983). However, he suggests that this approach "would not be a major incursion on the existing case law" affording heightened protection to religious conscience since *Yoder*, *Sherbert*, and *Thomas* all arguably involve elements of freedom of speech. *Id.* at 584-85.

However, it should receive no more protection than would expressive conduct that does fall under the freedom of speech guarantee.[33] Accordingly, it would be appropriate to draw on the Court's freedom of speech approach in *United States v. O'Brien*,[34] the draft-card burning case. Assume, for example, that the defendant in *O'Brien* had burned his draft card because of a religious conviction that required him to do so. It would not have been logical for the Court then to have reached a different result upholding O'Brien's right to burn the card.

If the *O'Brien* standard had been applied to *Yoder* and *Sherbert*, the Court probably would have reached different results. The critical point in *Yoder* was that the state's interest in educating children became less compelling after the eighth grade. This in some ways is reminiscent of the application of the compelling interest standard in *Roe v. Wade*,[35] except there the state's interest became more rather than less compelling with the passage of time. Under *O'Brien*, the government's interest need not have been compelling, only "important" or "substantial." The desire to have better-educated citizens capable of choosing a variety of occupations and professions certainly would have met this standard, even for education past the eighth grade.

As for *Sherbert*, the government's important interest arguably was to ensure that unemployment compensation was paid only to people who truly could not find work, not to those who stayed home for any of a variety of personal reasons, including those based on religion. Applying *O'Brien*, this would seemingly justify denial of benefits to a claimant who refused Saturday work on a religious basis. Justice Rehnquist's dissent in *Thomas* observes, however, that the state policy in *Sherbert* seemed to allow other personal reasons for not working but not a religious one (i.e., the case involved impermissible discrimination against religion).[36] Also, in *Sherbert* the law made special provision for those who refused work on Sunday, again raising a problem of religious discrimination.

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33. *See Goldberg*, 106 S. Ct. at 1312-13 (applying the same deferential standard to a free exercise claim as it would to a free speech claim in a military context).

34. 391 U.S. 367 (1968). The Court established the following standard:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government 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.

*Id.* at 377.

35. 410 U.S. 113 (1973).

36. 450 U.S. at 723-24 n.1. In *Thomas*, by comparison, the state's policy was uniform. *Cf.* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

In *Jensen v. Quaring*[37] the driver's license picture decision, the Court split 4-4, thereby affirming the Eighth Circuit's acceptance of a free exercise claim. The Eighth Circuit described the state interests as "important" but not compelling.[38] This would satisfy the *O'Brien* test. The question of alternatives to requiring a driver's license photograph is more troublesome. The Eighth Circuit pointed out that New York State does not require such a picture as a means of rapid identification. However, as the court also noted, at least forty-seven states require photographs. While a least restrictive alternatives analysis defeated application of the photograph requirement in *Quaring*, *O'Brien*'s standard that the "incidental restriction be no greater than is essential to furtherance of the interest" is not as stringent[39] and probably would be met.

Finally, there is *Bowen*, the social security number case. Chief Justice Burger's opinion found that the number requirement "clearly promote[d] a legitimate and important public interest," namely, preventing fraud in benefit programs. In applying the "reasonable means" part of the suggested test, the plurality opinion explained in some detail the number's utility in curtailing fraud.[40] While there is a verbal difference between the plurality's standard and that in *O'Brien*, it is unlikely that application of the *O'Brien* standard would require a more persuasive showing of a means-ends relation.

It has been suggested that there is a significant difference between an *O'Brien* situation involving speech/conduct versus one involving religion/conduct.[41] To qualify for protection under the free exercise clause, the person's conduct must be religiously compelled, that is, in the person's mind there is no alternative course that will satisfy her religion's requirements. By comparison, someone like O'Brien had the choice of expressing his opposition to the draft by more conventional means such as distribution of a pamphlet.

There are several reasons why this distinction is not persuasive. First, a person like O'Brien wouldn't have burned his draft card as a symbolic protest if he believed that other available means of expres-

37. 105 S. Ct. 3492 (1985), *aff'g* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).
38. 728 F.2d 1121, 1126-27 (1984).
39. *See* United States v. Albertini, 105 S. Ct. 2897, 2906-07 (1985).
40. 106 S. Ct. at 2157.
41. Stone, oral comments on Dean Choper's paper, made at 1986 "Religion and the State" symposium, Institute of Bill of Rights Law, Marshall-Wythe School of Law. The paper embodying these comments, "Constitutionally Compelled Exemptions and the Free Exercise Clause," will be published in 27 Wm. & Mary L. Rev. — (1987).

Dean Choper would limit free exercise protection to "those who believe that departure from certain beliefs will carry uniquely severe consequences extending beyond the grave." *Supra* note 3, at 604.

sion were as effective. Often the symbolic protest will be the most effective means for the average person. Second, religions are not static, they often evolve to meet the strong demands of the society in which they happen to exist. For example, the Mormons eventually concluded that polygamy no longer was religiously compelled. Third, *O'Brien* itself never considered the availability of alternatives to the protester; rather, it looked at the government's regulatory alternatives. Fourth, while it is troublesome to compare the relative values of free speech and of free exercise, the ability to communicate views on issues of public policy by means having substantial external consequences is more vital to a democratic society than the ability to engage in religious practices having similar costs.

In conclusion, the Supreme Court has shown little enthusiasm for strict review in post-*Sherbert* and *Yoder* decisions. Arguably, it uses de facto the more lenient *O'Brien*-type middle-tier standard. The Court should make explicit this standard. The standard is supported in theory because it appropriately puts free exercise and free speech cases on the same plane. Moreover, it creates far fewer situations in which there is arguable tension between enforcement of the free exercise and establishment clauses.