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Taking the Free Exercise Clause Seriously

Stephen Pepper

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I. INTRODUCTION

In earlier work I suggested that there is a wide range of alternative content for the first amendment's free exercise clause.[1]

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1. Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309.

History, language, and precedent have left the clause open for widely disparate interpretation. I also noted how this situation has left lower courts relatively unrestrained in deciding freedom of religion questions.[2] In an effort to outline both how and why we might take the free exercise clause more seriously than we have in the past, this article makes explicit some of my earlier implicit themes. It begins in section II below with a brief review of why both the language and history of the religion clauses point in this direction, and offers some speculation as to why, until very recently, a different direction has been taken which minimizes the effect of the free exercise clause.

In section III the article discusses the modern doctrine of the Supreme Court which has, in part, taken the free exercise clause seriously. In response to recent attempts by the Justice Department to reduce substantially the power given the clause in modern doctrine, a conceptual justification for a strong free exercise clause is provided. Finally, in section IV, some significant difficulties are identified which must be overcome if we choose to take the free exercise clause seriously.

II. Can It Mean So Much? Can It Mean So Little?

The text of the free exercise clause is singularly absolute: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[3] Other provisions in the Bill of Rights have buffering language: security against "*unreasonable* searches and seizures," "*due* process of law," "*excessive* bail," and "*cruel and unusual* punishments."[4] The other first amendment freedoms of speech and press share with religion this absoluteness. But freedom of speech and press are inherently limited because they protect only communication, while the term "exercise" denotes action.[5] Religious conduct is not inherently limited to communication, nor to worship, but can extend into all facets of human life. That the protection is unusually limited is clear within the text of the first amendment itself. Assembly for redress of grievances (a sort of speech plus conduct), is only protected if it is "peaceable." No similar limit is placed upon exercise of religion.

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2. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. Ky. L. Rev. 265 (1982).

3. U.S. Const. amend. I.

4. U.S. Const. amends. I, IV, V, VIII (emphasis added).

5. 3 The Oxford English Dictionary E-401, E-402 (1933).

Thus, the language of the free exercise clause seems to provide greater freedom from governmental interference and regulation than any segment of the Constitution. The natural contemporary reaction to this is disbelief. *Why* would the Constitution grant such extraordinary protection only to religious conduct? This reaction suggests that the free exercise clause may be an anachronism. Can that degree of favoritism for religion suggested by a textual approach be justified from the perspectives of history or political theory? One can, of course, read too much into language. But in this case there is some historical and conceptual support for what appears to be the plain meaning.

It is probable that those who framed and adopted the free exercise clause did not have a common point of view or intention.[6] It is now well known that there were at least two quite different streams of thought supporting freedom of religion and separation of church and state.[7] The radical protestant view perceived government, both its support as well as its possible hostility, as a threat to religion. In the vivid image of Roger Williams, this stance wished to separate the "garden of religion" from the "wilderness of civil government."[8]

Even though history cannot provide us with one answer, it is worth noting that the record does provide some support for concluding that the surprisingly absolute language of the free exercise clause was not inadvertent. It is particularly significant that part of this support comes from James Madison. No one had a more important role in framing the first amendment.[11] Madison's initial proposal—which eventually, in somewhat dif-

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6. Pepper, *supra* note 1, at 311-17.

7. *Id.* at 314 nn.19-22.

8. *See generally* M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGIONXISTENCE OF A DIVINE BEING IS RATIONALLY DEMONSTRABLE DO NOT BELIEVE THAT THE SPECIAL PLACE OF JESUS CHRIST IS ESTABLISHABLEFM] THE ENLIGHTENMENT-DEIST-RATIONALIST STREAM OF THOUGHT, WHILE CONTAINING SIGNIFICANT DIFFERENCES OF OPINION,[9]

9. Pexistence of a divine being is rationally demonstrable do not believe that the special place of Jesus Christ is establishabletoward the state. From this stance the goal was to protect the newly formed government from historically probable religious interference and possible domination. There were also those who supported the religion clauses merely as a federalism provisohn Witherspoon, the president of Princeton during Madison's time there (and apparently somewhat of a mentor for Madison) wach matters because they could not be confident their favored sect could win a national contest for support of the federal government.[10]

10. *Id.* at 312-314.

11. Everson v. Board of Educ., 330 U.S. 1, 33-41 (1947); W. MILLER, THE FIRST LIBERTY 77-150 (1985); 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 339-50 (1950).

ferent language, became the free exercise clause—would have bound the states as well as the federal government.[12] Moreover, Madison belonged to the Enlightenment-deist-rationalist stance, which perceived religion as a threat. Madison's educational background, however, was far more intricately connected to the Christian intellectual tradition than Jefferson's, and his "Enlightenment" approach was not as hostile to religion as Jefferson's.[13] Madison's final tutor at home in Virginia, who had a significant, lasting impact on him, was a graduate of Princeton (then called the College of New Jersey). Perhaps as a result, Madison, although from a patrician, Anglican family, attended, graduated from, and did post-graduate work at Princeton, and this appears to have influenced him greatly.[14] Princeton was then "a kind of West Point for dissenting Presbyterianism, opposed to ecclesiastical and political authority,"[15] and Madison was educated in a vibrant, politically active brand of dissenting protestantism. To the extent one can attribute the language of the free exercise clause to Madison, its absoluteness is consistent with a major strand of his intellectual background.

Madison manifested his position early in his career. George Mason drafted the original version of the religion clause of the 1776 Virginia Declaration of Rights, a portion of the newly-independent state's constitution. That version stated in part: "[A]ll men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society . . . ."[16] This version contained plenty of buffering language. But Madison objected, and his proposed language was quite different:

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12. R. MORGAN, THE SUPREME COURT AND RELIGION 21 (1972); 1 A. STOKES, *supra* note 11, at 345.

13. W. MILLER, *supra* note 11, at 87-95. Miller points out that "[t]here was a Christian Enlightenment alongside the secular" one, and that John Witherspoon, the president of Princeton during Madison's time there (and apparently somewhat of a mentor for Madison) was a product of the Scottish Enlightenment. *Id.* at 90. For Jefferson's views, see M. MALBIN, RELIGION AND POLITICS 27-36 (1978); Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57 (1976).

14. W. MILLER, *supra* note 11, at 88-90.

15. *Id.* at 88.

16. Hunt, *James Madison and Religious Liberty*, 1901 AM. HIST. A. ANN. REP. 165-66 (1902).

> [A]ll men are equally entitled to the full and free exercise of [religion], according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be . . . subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty and the existence of the State be manifestly endangered.[17]

Madison's version provided far broader protection for religious conduct—only the similar liberty of others, or the existence of the state, justify governmental interference. Madison's most complete declaration upon freedom of religion expresses a similar view. In the first substantive paragraph of his influential *Memorial and Remonstrance* he asserts that religious duties are "precedent, both in order of time and degree of obligation, to the claims of Civil Society." He concludes "that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is *wholly exempt* from its cognizance."[18] The absolute language of the free exercise clause is thus perfectly consistent both with Madison's earlier assertions on the subject and with the fabric of his intellectual background.[19]

It is also significant that Congress settled on the language of the clause when other, more restrictive models were available. During the same period it was drafting the first amendment, Congress, in the 1787 Ordinance for the Government of the Northwest Territory, provided that: "No person, *demeaning himself in a peaceable and orderly manner*, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory."[20] And Jefferson's Bill for Establishing Religious Freedom, first introduced in Virginia in 1779, and passed in 1785 largely as a result of Madison's *Remonstrance*, provided:

> [N]o man . . . shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious *opinions or belief*; but that all men

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17. *Id.* at 166-67. It is an interesting curiosity that this formulation is substantively similar to the Supreme Court's "compelling interest" balancing test.

18. J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, app. at 64 (1946) (Rutledge, J., dissenting) (emphasis added).

19. *See generally* R. KETCHAM, JAMES MADISON 47 (1971); W. MILLER, *supra* note 11, at 77-150.

20. 1 A. STOKES, *supra* note 11, at 480 (emphasis added).

> shall be *free to profess, and by argument to maintain, their opinions* in matters of religion, and that the same shall in no wise diminish, enlarge, or effect their civil capacities.[21]

Earlier in the same document, Jefferson argues that "the civil magistrate" ought not "to intrude his powers into the field of opinion," for "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . ."[22] Thus, although there was explicit limiting language available, Congress consciously chose to draft the free exercise clause broadly and without limits.

There is a conceptual point of view, consistent with the intellectual history of the period, from which such an expansive freedom of religion provision makes sense. It is fair to characterize the Constitution as essentially an Enlightenment document. Enlightenment thought was skeptical, rational, and scientific. Such a stance toward the world was made possible by secularization and was the cause of further secularization in western society. The American Constitution as a product of this point of view is rational, mechanistic, and extremely secular. No significant reference to religion or to God is in the document.[23] Yet, Enlightenment thought was hardly pervasive in the Colonies; we have already mentioned the radical Protestants,[24] and many states still had an established or quasi-established church or religion.[25] At the time of the framing of the Constitution and the

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21. *Id.* at 393-94 (emphasis added).

22. *Id.* at 393.

23. The records of the Continental Congress are liberally sprinkled with references to God, the Creator, Jesus Christ, and the Christian religion. The Declaration of Independence (a document intended to have propagandistic rather than formal legal impact) opens by invoking "Nature's God." The Constitutional text (which has ultimate legal significance) contains only three references to the deity, and two of these are quite remote: (1) the clause exempting Sundays as days to be counted in determining the period of time within which the President must exercise his veto; (2) the dating of the document as "in the year of our Lord one thousand seven hundred and eighty seven," and (3) the crucial clause of Article VI proscribing religious tests for office. The absence of any positive reference to God was not accidental. It was, Stokes tells us, much remarked on at the time and blamed on Jefferson by that dour Federalist Timothy Dwight, who was President of Yale.

R. MORGAN, *supra* note 12, at 20.

24. M. HOWE, *supra* note 8; W. MILLER, *supra* note 11, at 153; Pepper, *supra* note 1, at 314-15.

25. State establishments survived until 1833 when Massachusetts ended its direct support of religion. 1 A. STOKES, *supra* note 11, at 426-27, 445.

Bill of Rights, the secular Enlightenment approach to the world was relatively new and still struggling with the preceding, dominant, underlying intellectual paradigm—a religious worldview based on faith, authority and the pervasive presence of a supernatural power and authority. The Constitution is designed according to the new secular paradigm, but through the mechanism of the free exercise clause it defers to the prior religious understanding. The brief but absolute words of the clause are a substantial accommodation to a powerful religious view.[26]

Looking at the clause in this way, as a mediation between a secular Enlightenment vision of government and a religious worldview, its absoluteness is coherent. Social contract imagery is apt: in matters of religion no consent was given to be governed by the mechanisms of the new Constitution; in the area of religion there was no consent to majority rule.[27] This seems consonant with the radical Protestant view of religion and government—the wilderness must be kept from the garden[28]—and with Madison's view, which recognized the primacy of religious authority over that of civil government.[29]

This concession may be hard to understand from the Enlightenment-deist-rationalist view—until it is coupled with the

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26. For the evocation of a similar function for the free exercise clause, see Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 25-35 (1983).

27. Madison articulates this position with striking clarity in the first substantive paragraph of his pivotal *Memorial and Remonstrance:*

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable . . . because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

J. MADISON, *supra* note 18, at 64 (footnote omitted).

28. M. HOWE, *supra* note 8, at 1-31; W. MILLER, *supra* note 11, at 153-224.

29. *See supra* note 27.

establishment clause. The *quid pro quo* for the extraordinary shelter of the free exercise clause is a balancing guaranty that the secular government created by the Constitution will remain secular. Religious conduct is privileged, but it must use private means to reach its goals; it cannot use the government.

If there is a border between the garden and the wilderness, if the line between religion and the state can be discerned, the functioning of such a scheme is conceivable,[30] but religion *mandates* conduct in this world, and the state's rules *govern* conduct in this world. The first major Supreme Court case dealt with a religious mandate to have plural wives, while the state ruled that only one was permissible.[31] More than a century later, a recent Supreme Court free exercise decision dealt with a state requirement that drivers' licenses bear the photograph of the licensee, as applied to one whose religious beliefs prohibit use of a photograph.[32] Is it an impingement on the free exercise of religion to enforce such rules on believers? Or, is it contrary to establishment clause principles to demand that the state apply different rules to religious believers?

These questions suggest the well-recognized fact that the logic of the two clauses is in conflict.[33] If the establishment clause focuses on the protection of government from the encroachment of the church (and is thus emblematic of the Enlightenment stream of thought), while the free exercise clause reflects more the radical Protestant view of protecting religion from the state, then the subsequent dominance of the establishment clause view will come as no surprise.[34] Secularization has continued apace in the intervening two centuries, and the strug-

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30. Jefferson, following Locke, perceived such a line. M. MALBIN, *supra* note 13, at 28-36; Little, *supra* note 13. For a view of this line from the other side, see Cover, *supra* note 26, at 27-30.

31. Reynolds v. United States, 98 U.S. 145 (1879).

32. Jensen v. Quaring, 105 S. Ct. 3492 (1985) (per curiam), *aff'g by an equally divided Court* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

33. *Pepper, supra* note 1, at 345-352; *see also* Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337.

34. There seems to have been far more establishment clause litigation than free exercise clause litigation. This is certainly so at the Supreme Court level, and from casual attention to reported appellate cases, seems to be so at all levels. The leading casebooks on constitutional law usually devote twice as many pages to the establishment clause as to free exercise; and the law review literature is even more skewed toward establishment analysis. More significantly, until recently the free exercise clause had been rendered vestigial, giving no protection not provided by the equal protection, free speech and free press provisions; while establishment clause doctrine had some real "bite." *See infra* notes 38-40 and accompanying text.

gle for predominance between a fundamentally religious and a fundamentally secular worldview is long since over in western intellectual, political and legal thought.[35] From a secular perspective, religion is not perceived as inherently valuable, vulnerable, or worthy of special protection or cultivation. From a modern Constitutional perspective, religion is more likely to be perceived as akin to race: of no intrinsic importance, but subject historically to abuse and persecution and therefore "inherently suspect" as a basis for governmental classification.[36] This point of view is comfortably concordant with both the dominant modern social scientific stance toward religion[37] and the modern intellectual discomfort with the root irrationality of much religious thought and many religious movements. For those who perceive in religion more of a threat than a promise (irrationality *en masse*), it is easy to emphasize the constraints of the establishment clause to the point of leaving little effective content for the free exercise clause.

Until 1963 this was, in effect, the Supreme Court's religion clause doctrine. In the first polygamy case the Court turned to Jefferson's dichotomy between belief and action, holding the free exercise clause to protect only belief.[38] And in the Jehovah's

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35. *See* Pepper, *supra* note 1, at 378 n.272. "The religious wars of the sixteenth and seventeenth centuries came to an end only when religion became sufficiently privatized so as not to remain an essential element of public order. New conceptions of the nation-state, and of constitutionalism, were called upon to provide order." Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123, 150.

36. The primary academic proponent of such a view is Philip Kurland, whose view reduces the free exercise clause to a category of suspect classification under the equal protection clause. *See* P. KURLAND, RELIGION AND THE LAW (1962), or his updated version, Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978) [hereinafter *Irrelevance*]. *See also* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 10, 88-101 (1980); Pepper, *supra* note 1, at 346-348, 353 n.196. Under this view, religiously neutral (in intention and language) governmental action is acceptable, regardless of how it may impinge on the religious conduct of a believer. The closest the Kurland approach has come to being expressed as Supreme Court doctrine is Justice Frankfurter's opinions in the flag salute cases. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Frankfurter, J., dissenting); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). *Cf.* Thomas v. Review Bd., 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting) (expressing a similar view allowing slightly more protection for free exercise). For a similar view which subsumes free exercise protection within that of free speech, see Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 713 (1986).

37. *See, e.g.*, J. YINGER, THE SCIENTIFIC STUDY OF RELIGION (1970).

38. Reynolds v. United States, 98 U.S. 145, 166-67 (1879); Pepper, *supra* note 1, at 317-26.

Witnesses cases it was never clear that the free exercise clause granted anything beyond the shelter for non-religious conduct provided by the speech, press and assembly clauses of the first amendment.[39] In dicta it was clear that laws intentionally discriminating *against* religion would violate the free exercise clause.[40] As the analysis implied above suggests, including religion with race as suspect classifications under the equal protection clause has the same effect under modern doctrine as does such a limited interpretation of the free exercise clause. But this would help neither the religious polygamist nor the believer opposed to pictures on drivers' licenses, because neither law is religiously discriminatory on its face or in its intent. Intentionally discriminating *in favor* of religion, or among religions, is prohibited by the establishment clause. Thus, congruent with a secular age, the establishment clause is a strong barrier to religious domination of the government, while the free exercise clause is reduced to a vestigial anachronism. But is this justifiable? Can the free exercise clause mean so little?

III. Taking Freedom of Religion Seriously

A. The Modern Court: The Sherbert-Yoder *Doctrine*

With *Sherbert v. Verner*[41] in 1963, and more forcefully with *Wisconsin v. Yoder*[42] in 1972, the Supreme Court indicated that the strong language of the free exercise clause was to be taken seriously even in cases involving no intentional discrimination against religion. Adell Sherbert lost her job and was unable to find another because she refused to work on Saturday, her Sabbath. The Supreme Court, by overturning the state's denial of worker compensation benefits in *Sherbert*, took the free exercise clause seriously in at least four significant ways.

First, the Court for the first time protected action beyond communication, beyond what the speech, press, and assembly clauses arguably protect. Sherbert's action was a refusal to work on a particular day, conduct not easily classifiable as primarily

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39. Pepper, *supra* note 1, at 326-31.

40. *See, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Frankfurter, J., dissenting); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

41. 374 U.S. 398 (1963).

42. 406 U.S. 205 (1972).

communicative. Thus, the Court acknowledged that "exercise" means more than just speech, press, or worship.[43]

Second, the state was not trying to force Sherbert to work on Saturday. It was merely withholding the benefit of twenty-six weeks of unemployment insurance. But once government moves from minimal to pervasive involvement in the lives of many of its citizens, it becomes obvious that if government can condition its many benefits (tax exemptions, licenses of all sorts, government employment, subsidized housing, crop supports, zoning and safety regulations, etc.) so as to limit the exercise of constitutional rights, many of these rights would essentially disappear.[44] This is known as the doctrine of unconstitutional conditions. In *Sherbert* the Court made clear that this doctrine applied to the free exercise clause:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.
>
> . . . .
>
> . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.[45]

Third, the Court affirmed that the absolute language of the clause meant something. No legal provision can in fact be absolute; there must always be a limit. In the years preceding *Sherbert* the Court had a great deal of experience struggling to define the limits of the "free speech" clause, phrased, as is the free exercise clause, without limits. The Court had come up with a balancing test, but one in which the thumb weighs heavily on the side of freedom of speech. In *Sherbert,* the Court applied this approach to the free exercise clause: the state must show a "compelling interest,"[46] and "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[47] Thus, the Court's articulated test appeared to give the clause real power.

Fourth, the Court backed this language by requiring proof from the state of its interest and the danger to that interest.

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43. 374 U.S. at 402-03.
44. *See infra* note 103 and accompanying text.
45. 374 U.S. at 404-06 (footnote omitted).
46. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
47. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

Speculation as to the effect of possible future fraudulent claims of a Saturday Sabbath was insufficient to carry the state's burden.[48]

A balancing test is inherently imprecise and subject to manipulation and distortion depending on the levels of generality chosen to be balanced.[49] In *Prince v. Massachusetts*,[50] for example, a Jehovah's Witness took her nine-year-old niece proselytizing on the street in the evening, a technical violation of the child labor law. The Court balanced the *individual* interests of child and aunt in religious and parental liberty against the *general* interest of the state in child labor laws: "the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth," and the interest in avoiding the "crippling effects of child employment."[51] When so expressed the general interest in child labor laws will prevail. What would have happened, however, if the *general* interest in religious liberty, the values underlying the free exercise clause, had been balanced against the *specific* harm threatened to society from the aunt taking her child proselytizing on the peaceful evening streets of Brockton, Massachusetts? For a balancing test to make any sense, relatively equal levels of generality or abstraction must be chosen for each side of the balance.

With the *Yoder* opinion the Court mandated just such an approach, and in doing so added a fifth significant element toward taking the free exercise clause seriously.[52] Amish parents refused to send their children to school for the final two years of compulsory education (ninth and tenth grades). Whatever "compelling interest" means, it would seem that compulsory education qualifies, and the Court recognized that public education ranked "at the very apex" of a state's functions.[53] But the Court held that the appropriate analysis applied not to this *general* interest, but to the far narrower interest in enforcing the compulsory education provision against those upon whom it is a significant burden on religious practice. The state's marginal interest in compulsory education of Amish children after the eighth

48. *Id.* at 407.
49. Pepper, *supra* note 1, at 341-44.
50. 321 U.S. 158 (1944).
51. *Id.* at 165, 168.
52. 406 U.S. 205 (1972).
53. *Id.* at 213.

grade should be weighed against the first amendment's grant of freedom of religion to the affected Amish. After careful analysis of these interests, the Court found the balance favored the Amish's free exercise right.

To recapitulate, the five significant elements of the *Sherbert-Yoder* doctrine are: First, action is protected—the ambit of the free exercise clause is not limited to speech, press or worship. Second, indirect governmental impingements on religion, such as denial or conditioning of benefits, are prohibited as well as direct prohibition or mandate of conduct (the unconstitutional conditions doctrine).[54] Third, the protection granted is "relatively absolute"—only extremely strong governmental interests justify impingement on religious conduct. Fourth, the burden of proof as to the governmental interests involved and the harm caused to those interests by sheltering the religious conduct at issue is on the government and facts rather than speculation will be required to show how the government's interests will be harmed. And fifth, harm to governmental interests must be measured at the margin—the effect of excepting religious claimants from the legal provision at issue is the measure, not the importance of the provision in general.

The fifth element is an application of a more general principle frequently referred to as the "least drastic means" component of the balancing test. Not only must the state show a "compelling" or extraordinarily important reason for the rule at issue, it must also show that there is no less drastic means to reach the interest that less severely affects the religious practice at issue.[55] *Sherbert* and *Yoder* held that exempting religious claimants from the law—judicially carving out an exception for affected religious believers—was a constitutionally compelled "less drastic means." The result is that the state must prove that such an

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54. For a general understanding of the unconstitutional conditions doctrine, see Elrod v. Burns, 427 U.S. 347 (1976); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963); Speiser v. Randall, 357 U.S. 513 (1958); Rubin, *The Resurrection of the Right-Privilege Distinction? A Critical Look at* Maher v. Roe *and* Bordenkircher v. Hayes, 7 HASTINGS CONST. L.Q. 165 (1979); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

55. "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." 374 U.S. at 407. *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 873 (2d ed. 1983).

exemption is not practicable before it can win a free exercise case, usually a very difficult task.

B. Justifying the Sherbert-Yoder *Doctrine: A Response to the Reagan Justice Department*

In two significant free exercise cases before the Supreme Court the last two terms, the Justice Department has attempted to dismantle the fifth element of the *Sherbert-Yoder* doctrine, the requirement that the governmental interest be measured at the margin. In *Jensen v. Quaring*,[56] Nebraska's requirement that a drivers' license bear a photograph of the licensee was challenged as applied to a woman whose religious beliefs forbade use of a photograph. In *Bowen v. Roy*,[57] the requirement that a social security number be obtained in order to receive welfare was challenged on the basis that identification by such a number was contrary to the claimant's religion. The Solicitor General argued in both cases that exemption should not be an option in applying the constitutional balance—that the governmental interest in having photos on drivers' licenses *in general* and in social security numbers *in general* be weighed against the burden on the religious practices of the very small minority with religious objections.[58] The obvious effect of this approach is to inflate the governmental interest to a high level of generality while confining the interest in religious freedom to a narrow focus,[59] in effect taking the thumb off the religious freedom side of the balance and moving it to the governmental interest side of the balance.[60]

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56. 105 S. Ct. 3492 (1985) (per curiam), *aff'g by an equally divided Court* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

57. 106 S. Ct. 2147 (1986).

58. Brief for the United States as Amicus Curiae at 1-15, Jensen v. Quaring, 105 S. Ct. 3492 (1985) (No. 83-1944) (per curiam).

59. *See generally* Pepper, *supra* note 1, at 339-44.

60. There is significant irony in the fact that the current Solicitor General, Charles Fried, subscribed to this argument in the *Bowen* brief. Over twenty years ago the same Charles Fried articulated the importance of *not* inflating the interest on one side of a constitutional balance while narrowly confining that on the other side:

> One thing is perfectly clear, that under no circumstances should the Court formulate the conflict in a particular case, or identify the elements of the balance to be struck, in such a way that the statement itself prejudices the decision. It would, indeed, be begging the question to purport to balance some highly generalized and obviously crucial interest, such as the right of the legislature to inform itself of matters bearing on national security, against some rather particular and narrowly conceived claim such as the right of a particular individual to withhold a particular, perhaps trivial, item of information from a committee on this occasion. Any such formulation, of course, seems to require

A portion of the government's argument on this issue leads us back to the absolute language of the free exercise clause, and to a conceptual approach to taking that language seriously. The Justice Department argued that weighing governmental interests on the margin gives disproportionate preference to small minorities over more substantial minorities. The Solicitor General's brief in each case stated:

> Essentially, the court has held that government must accommodate those individuals holding the most unique and idiosyncratic religious beliefs because the costs of exempting those few individuals from a facially neutral procedural requirement would be quite small. The logical corollary to this holding is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact would be deemed too great. In essence, the right to the free exercise of religious beliefs would shrink as the number of persons who share those beliefs grows. Such a result defies common sense.[61]

To the contrary, this result makes perfect sense; it is perfectly congruent with the notion of the Bill of Rights as a charter protecting the minority from majority rule. It is highly unlikely that an elected government would impose on "widely held" religious beliefs. If Catholic or Jewish beliefs prohibited photos on drivers' licenses, would they be required?

This constitutional logic is congruent with the possibility sketched above that the absolute language of the free exercise clause is premised on the notion that consent to majority rule in matters of religion has been withheld. If combined with an effective establishment clause, the minority will then have the same status as the majority in regard to any nexus between religious practice and governmental action. Assume that the establish-

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> only one answer, but it does so at the expense of ignoring the fact that the claim of the witness may be stated in equally generalized form, and therefore may perhaps take on equally impressive proportions. The Court should never cast the controversy in a form which conceals the conflict to be resolved, as it does whenever it inflates one part of the balance while leaving the other highly particular. This obvious requirement does not answer the really difficult question, which is at what level of generality should it consider *both* claims.

Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 763 (1963) (footnote omitted) (emphasis added). *Sherbert* had not been decided at that time. For an application of this insight to the free exercise cases, see Pepper, *supra* note 1, at 339-44 and Pepper, *supra* note 2.

61. Brief for Appellant at 35, Bowen v. Roy, 106 S. Ct. 2147 (1986) (84-780); *see also* Brief for the United States as Amicus Curiae, *supra* note 58, at 11-12.

ment clause prevents the majority from purposefully using the mechanisms of government to favor itself or disfavor minorities in religious matters. As a matter of political reality, the minority likewise will be unable to favor itself or disfavor others in religious matters. Thus, the religion clauses put minority and majority in the same position: neither can use the government for religious purposes.

But it should be noted that while the majority is unlikely to disadvantage itself intentionally in religious matters, it is also highly unlikely to do so inadvertently. To truly equalize the minority and majority, the religion clauses must reach not only purposeful favoring or disfavoring, but also the inadvertent.[62] Thus, the importance of something like the *Sherbert-Yoder* doctrine, of the requirement that even facially and intentionally neutral governmental action not impinge on the religious practice of minorities, becomes evident. The smaller the minority, the more likely the majority will inadvertently impose on its religious interests, and therefore the greater need for protection under the free exercise clause. Conversely, the larger the minority, the more likely that the restraint of the establishment clause will be appropriate rather than the protection of the free exercise clause. Consider the example of the large Catholic minority. During Prohibition it did not need the free exercise clause to protect importation and use of sacramental wine; such usage was excepted from Prohibition through the political process in Congress.[63] Conversely, the establishment clause has repeatedly been imposed by the Court on the results of the political process to limit public funding for private, predominantly Catholic, schools.[64]

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62. Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 291; Pepper, *supra* note 2, at 297-98; Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175, 1197-1208 (1983). It is interesting that the general, process-oriented theory of John Ely's DEMOCRACY AND DISTRUST, *supra* note 36, supports this understanding of the religion clauses, but when Ely deals specifically with the religion clause he appears to tilt toward the majority-oriented, establishment clause favorable point of view. *Id.* at 10, 88-101.

63. National Prohibition Act, 27 U.S.C. § 12 (1927), *repealed by* Liquor Law Repeal and Enforcement Act, ch. 740, title I, § 1, 49 Stat. 872.

64. The Supreme Court opinions are surveyed in J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1030-42 (2d ed. 1983). *See also* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985). The Supreme Court's polygamy cases also appear to be a singular failure to enforce the protection of the free exercise clause. The Mormon minority quite clearly was being imposed upon in their religious practice, whether intentionally or inadvertently. The legislation at issue in the *Reynolds* case was neutral on its face, and big-

This view suggests that there are lines between where courts should protect minority religious practices from governmental interference under the rubric of the free exercise clause, and where they should prevent majority or substantial minority usage of government for religious purposes under the establishment clause. The constitutional logic does not, however, locate these lines for us.[65] But it does give us an approach, and makes sense of some things that are otherwise difficult to understand. For example, Professor Kurland has long ridiculed the tension between the modern Court's free exercise and establishment clause doctrines, noting that the outcome of a case is determined by "labeling" it as a free exercise or establishment clause case rather than by analysis[66] and also observing that "the smaller the clerical establishment the greater the exemption from the establishment clause."[67] Both of these make some sense when viewed from the perspective presented here.

Dean Choper has argued that the notion of putting the majority and minority in the same position in regard to the nexus between government and religion "assumes the validity of certain advantages that religious majorities may create for themselves."[68] This criticism ignores the limit of the establishment clause, which remains on minorities as well as majorities under the "equalizing" approach presented above. It does highlight, however, that the approach does not indicate where the lines should be. Also, the discussion above assumed that courts would protect religious minorities by enforcing the free exercise clause. Dean Choper's criticism demonstrates the difficulties of line-drawing when legislators or agencies exempt religious believers

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amy laws were traditional long before the advent of the Latter-day Saints. But the federal bigamy legislation imposed upon the territories was directly aimed at the Mormon practice of polygamy. Pepper, *supra* note 1, at 317-26. Conversely, Utah laws providing for "released time" from public school for religious education during time periods when non-participants are required to remain in school (enabling the widespread practice of "seminary" classes closely coordinated with public education) are a clear example of the majority using government for its religious purposes, and thus are appropriate candidates for the limitation of the establishment clause. *See* Zorach v. Clauson, 343 U.S. 306, 315, 323 (1952) (Black, J., and Jackson, J., dissenting in separate opinions). *Contra*, Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981); Comment, *supra* note 62, at 1199-1200.

65. For an excellent effort at such line-drawing based on this view, see Comment, *supra* note 62, at 1195-1205.

66. *Irrelevance*, *supra* note 36, at 15.

67. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 243 (1973).

68. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 693 (1980).

from otherwise religiously neutral laws (for example, the traditional provisions in the draft laws for conscientious objectors). Is this appropriate deference to the free exercise clause or a violation of the establishment clause? I think one can frame answers to these questions,[69] but the majority-minority equalizing approach and the notion that in matters of religion consent to be governed has been withheld do not themselves indicate where the lines are to be drawn.

C. *The Modern Court: The Instability of the* Sherbert-Yoder *Doctrine*

What I have termed the *Sherbert-Yoder* doctrine is an approach under which the modern Court takes the language of the free exercise clause seriously and gives the clause great power. As I have elaborated elsewhere, this doctrine has not been applied consistently by the Court in the relatively few free exercise cases it has decided in the last twenty-five years.[70] Both *Sherbert* and *Yoder* have twins, remarkably similar on the facts, which are decided differently.[71] Also, both cases have dicta (in *Yoder* quite extensive dicta) which substantially undercut the articulated doctrine.[72] A few examples of recent free exercise cases will demonstrate the situation and indicate some problems that come from taking the free exercise clause seriously.

1. *The most recent cases:* Jensen v. Quaring, Bowen v. Roy, *and* Goldman v. Weinberger

In *Jensen v. Quaring*,[73] the recent drivers' license case mentioned above, the Court split four to four, and affirmed the Eighth Circuit's decision requiring Nebraska to make a photo-

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69. Cases in which the establishment clause was properly used to invalidate government actions can be divided into two groups: those in which it was not shown that prior government action unduly burdened the free exercise of religion, and those in which a free exercise violation was present, but government action went beyond simply remedying the violation. Comment, *supra* note 62, at 1199; *See* also Lupu, *Keeping The Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 766 (1986).

70. Pepper, *supra* note 1, at 338 n.131; Pepper, *supra* note 2.

71. The *Sherbert* twin is Braunfeld v. Brown, 366 U.S. 599 (1961); the *Yoder* twin is United States v. Lee, 455 U.S. 252 (1982).

72. *See* Pepper, *supra* note 1, at 330-35.

73. 105 S. Ct. 3492 (1985) (per curiam), *aff'g by an equally divided Court* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

less drivers' license available.[74] That four Supreme Court votes supported Nebraska's law is astonishing if the *Sherbert-Yoder* doctrine is indeed constitutional law. Consider the five *Sherbert-Yoder* elements identified above as they apply to *Quaring*.

First, conduct beyond communication was involved—Mrs. Quaring refused to have her photo on a drivers' license—and the law was religiously neutral. Thus, the doctrine was triggered.

Second, the state was not forcing Mrs. Quaring to violate her religious beliefs. The imposition was indirect, conditioning the privilege of a drivers' license on the violation of a religious command. It would be difficult to find a better example of why the unconstitutional conditions doctrine is a necessity if the Bill of Rights is to retain vigor in the age of the bureaucratic state. Most people find it necessary to drive in order to participate in modern American society. Permanent inability to drive would be a more serious penalty for most than would a substantial fine or a modest term of confinement.

Third, if the thumb is on the believer's side of the balance, then the state needs a very strong reason for absolutely requiring a photograph. It is difficult to envision Nebraska having such a reason. New York until recently managed without requiring photos on licenses.[75] Nebraska itself has several exceptions.[76] And an alternative identification system for the probably small number of religious dissenters would seem not too difficult to conceive or onerously expensive to implement in an age of computers.

Fourth, the state provided no evidence that its interests would be harmed. At oral argument Justice Rehnquist asked about the problem posed by those with ulterior motives who might insincerely claim a photoless license.[77] Under the fourth element his question triggers others which it is the state's obli-

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74. Earlier drivers' license cases reached conflicting conclusions. *See* Dennis v. Charnes, 571 F. Supp. 462 (D. Colo. 1983); Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363, *cert. denied*, 444 U.S. 885 (1979) (criticized in Note, *State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type* — Johnson v. Motor Vehicles Division, 1980 B.Y.U. L. REV. 471); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 269 Ind. 361, 380 N.E.2d 1225 (1978).

75. Quaring v. Peterson, 728 F.2d 1121, 1126 n.5 (8th Cir. 1984), *aff'd sub nom.* Jensen v. Quaring, 105 S. Ct. 3492 (1985) (per curiam).

76. *Id.* at 1126-27. Learners' permits, for example, probably put far more photoless licenses on the road than a "sincere religious objection" exception.

77. Transcript of Oral Argument at 23, Jensen v. Quaring, 105 S. Ct. 3492 (1985) (No. 83-1944) (per curiam).

gation to answer. How many people will there be in this category? *What* ulterior motives? What state interests would be threatened, and in what degree, by these bad actors? The state answered none of these questions, providing no evidence of abuse. Many states allow photoless licenses for objectors, and no evidence of abuse was put forward. If the free exercise clause is to be taken seriously, at the least *real* and not imaginary governmental interests would go into any balancing test. To paraphrase Jefferson,[78] it is time to curtail religious liberty when real harm has eventuated (or is genuinely perceivable as about to occur), not when it remains imaginary. Requiring the state to show evidence of harm to its interests rather than speculation and anxiety may be the most important element of the *Sherbert-Yoder* doctrine.[79]

And fifth, the number of persons religiously opposed to the use of photographs is small. The marginal effect of exempting this group on the various state interests served by the photograph requirement is likewise small. On the other side of the balance, to comply with the law believers must either refrain from driving or violate their religious conviction.

If one takes the free exercise clause seriously, if the thumb is on the religious freedom side of the balance, ought this to have been a hard case, a four-to-four case?

Bowen v. Roy,[80] the recent social security number case, was quite similar to *Quaring*, so an explication of each element of the *Sherbert-Yoder* doctrine will not be repeated. Roy, a Native American, had a sincere religious objection to obtaining a social security number for his daughter, Little Bird of the Snow. Having a social security number is a statutory requirement for receiving federal welfare benefits. The case is more difficult than *Quaring* because loss of welfare is probably less of a burden or

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78. *See supra* text accompanying note 22.

79. The *Sherbert* Court explicitly ruled out such speculation as a basis for the state's interest. "[A] possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might . . . dilute the unemployment compensation fund" was not sufficient—the state had the burden of proving such fears were warranted. 374 U.S. at 407. Similarly, speculation about the negative consequences of exempting the Amish from two years of mandatory education, which was not supported by proof, was found insufficient in *Yoder*. 406 U.S. at 221-29. What the Court was saying in these cases seems perfectly sensible: government cannot impose upon an individual's exercise of a constitutional right merely by reciting speculation that society's interest will be severely harmed; it must come forward with some evidence.

80. 106 S. Ct. 2147 (1986).

penalty than permanent inability to drive (element two). More significantly, welfare involves a nationwide bureaucracy much larger in scope and complexity than any one state's drivers' license system. Thus the burden on government of devising an alternative identification system for religious dissenters (perhaps based on name combined with age and consecutive geographic locations) is much larger than in *Quaring*, even though relatively few dissenters are involved (elements three and five). These are relatively modest differences from *Quaring*, particularly in the absence of data concerning the number of potential dissenters claiming the exemption, any documented abuse in jurisdictions in which it has been mandated,[81] and any unsuccessful attempts at alternate identifiers for religious dissenters. Perhaps speculation on potential problems is more credible here than in *Quaring*, but the crucial point is that it remains speculation (element four). If we take the free exercise clause seriously, do we impose serious burdens on religious belief because we are anxious about what might happen in other cases or because it involves some effort to deal with the problem?

The four-to-four split in *Quaring* (Justice Powell not participating) suggested that the demise of the *Sherbert-Yoder* doctrine might be forthcoming in *Bowen v. Roy*. But the doctrine survived. *Roy* resulted in five opinions, none drawing a majority of the Court.[82] Justices Burger, Powell and Rehnquist appeared willing to follow the Justice Department's approach.[83] Justices O'Connor, Marshall, Brennan and Blackmun appeared solidly committed to the *Sherbert-Yoder* approach. Justices White and Stevens were somewhere in between.

Essentially, the Court reached two decisions, one on each of two parts of the injunction issued by the District Court:

> *First*, the Secretary of Health and Human Services was "permanently restrained from making any use of the social security number which was issued in the name of Little Bird of the Snow Roy and from disseminating the number to any agency, individual, business entity, or any other third party." *Second*,

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81. Stevens v. Burger, 428 F. Supp. 896 (E.D.N.Y. 1977), a social security number case similar to *Quaring*, was decided in favor of the religious claimant. Government witnesses in the *Quaring* trial were unable to testify as to any negative impact from that decision. Brief for Appellees at 34 n.29, Bowen v. Roy, 106 S. Ct. 2147 (1986) (No. 84-780).

82. 106 S. Ct. at 2147.

83. *See supra* text accompanying notes 56-69.

> the federal and state defendants were enjoined until Little Bird of the Snow's 16th birthday from denying Roy cash assistance, medical assistance, and food stamps "because of the [appellees'] refusal to provide a social security number for her."[84]

The first aspect of the injunction arose as an issue only on the last day of trial, when it was discovered that Little Bird of the Snow did in fact have a social security number in government records.[85] Eight Justices agreed (spread across four opinions) that once the government had such a number, the *government* could use it.[86] How the government conducts "its own internal affairs" need not comport with the individual religious views of citizens.[87] *Sherbert*, *Yoder*, and most free exercise cases arise when *conduct* or proposed *conduct* by the believer results in governmental conduct disadvantaging that believer.[88] On this first aspect of the case, however, no conduct by Roy makes any difference; the government already has the number, and only conduct by the government is at issue. The overturning of the first element of the district court injunction is therefore of no great precedential importance.[89]

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84. 106 S. Ct. at 2151 (emphasis in original).

85. *Id.* at 2150-51.

86. Justice White, in a lone dissent, would have affirmed *both* parts of the injunction on the authority of *Sherbert* and Thomas v. Review Bd., 450 U.S. 707 (1981) (an employment compensation opinion reaffirming *Sherbert* on very similar facts). 106 S. Ct. at 2169.

87. 106 S. Ct. at 2152.

88. *See, e.g.*, cases discussed in Pepper, *supra* note 2.

89. Even this aspect of the case is not as clear as the eight justices assume. A portion of the Burger opinion in which the eight join states:

> Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

106 S. Ct. at 2152. The difficulty lies in determining what is "internal" to the government and what is external in that it affects the religious believer. The size or color of a government filing cabinet is in no way specifically connected to any particular citizen; issuing, using, and communicating a number to identify a particular individual is far more connected to that individual. How ought one categorize the question of a believer's access to a religiously sacred site that happens to be on government land? That question is far removed from filing cabinets; it has a clear external impact on religious believers. Yet, because it is government property, it could be characterized as a matter of "internal" government "procedures." For an extensive discussion of two American Indian sacred site cases, see Pepper, *supra* note 2, at 277-99 (discussing Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981)). This part of the

The second, and more important, element of the injunction dealt with whether Roy had to "provide" a social security number for his daughter in order to receive welfare benefits for her, conduct contrary to his religious beliefs. Chief Justice Burger, joined by Justices Rehnquist and Powell, would have retreated substantially from the *Sherbert-Yoder* doctrine, framing a new, drastically limited approach,[90] and would have reversed as to this second part of the injunction, as well as to the first part. Justices Stevens and Blackmun would hold that reversing on the first element of the injunction rendered the second element moot. Justice Blackmun, however, opined that if it were not moot, "a straightforward application of *Sherbert*, *Thomas*, and . . . *Yoder*" determined the case in favor of Roy "for the reasons expressed by Justice O'Connor."[91] Justice O'Connor's opinion in which Justices Brennan and Marshall (and, but for mootness, Justice Blackmun) joined, would have affirmed the second part of the injunction. Justice O'Connor's opinion vigorously reaffirmed the *Sherbert-Yoder* doctrine:

> I would apply our long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.
>
> . . . .
>
> . . . This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," or represents "the least restrictive means of achieving some compelling state interest."[92]

Justice White would also have affirmed the second part of the injunction on the authority of *Sherbert* and *Thomas*.[93] Thus, five Justices would find it unconstitutional to require Roy to provide a social security number for his daughter as a condition to receiving welfare benefits.

Roy opinion was distinguished in a recent indian sacred site case. *Northwest Indian Cemetary Protective v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986).

90. This part of the opinion, 106 S. Ct. at 2153-56 (1986) (Burger, C.J., Powell & Rehnquist, JJ., concurring as to Part III of the opinion), appears to be the most explicit and substantial attack upon the unconstitutional conditions doctrine in recent Supreme Court writing. Although the doctrine has been eroding, the Court has never explicitly recognized the fact. *See infra* notes 102-06 and accompanying text.

91. 106 S. Ct. at 2160.

92. *Id.* at 2166-67 (citations omitted).

93. *Id.*

Why, then, was there not a majority opinion from the five, which would have changed both the structure and to some extent the message of the case?[94] First, Justice Blackmun would not join Justice O'Connor's opinion due to his conclusion that it decided a moot issue. Second, Justice White wrote a separate, very brief dissent, and would not join Justice O'Connor's opinion for unarticulated reasons. Justice White joined Justice Harlan's dissent in *Sherbert*,[95] and wrote a concurrence in *Yoder* which emphasized how close the question was.[96] His short, cryptic, dissent in *Roy*, coupled with his refusal to join Justice O'Connor's opinion, would thus suggest that his position in *Roy* results from the bind of precedent rather than agreement with the *Sherbert-Yoder* doctrine. One could, therefore, conjecture from the *Roy* opinion that the four to four vote in *Quaring* was probably made up of Justices Burger, Rehnquist, White and Stevens[97] on one side, with Justices O'Connor, Blackmun, Marshall and Brennan on the other. Chief Justice Burger has left the Court, but his view (at least in *Roy*) appears to have been taken by Justice Powell, leaving a four to four split on the application of the *Sherbert-Yoder* doctrine to such simple cases as *Quaring*. The impact of Justice Scalia remains to be seen.

Goldman v. Weinberger[98] involved the claim by an Orthodox Jew (and ordained rabbi) that the free exercise clause encompassed a right to wear a yarmulke while in uniform and on duty as an Air Force officer, contrary to the Air Force's interpretation of its regulations prohibiting such conduct. Constitutional rights cases arising out of institutions such as prisons and the military tell much less about the nature and extent of the right in question than they do about the deference of courts to the nature of the institution in question.[99] That the Air Force won

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94. A similar question can be asked about an establishment clause case decided a few months before *Roy*—Witters v. Washington Dept. of Servs. for the Blind, 106 S. Ct. 748 (1986). Five justices filed three concurring opinions, the main point of which seems to be that the opinion of the Court (per Marshall, J.) unjustifiably failed to rely on Mueller v. Allen, 463 U.S. 388 (1983), a controversial five to four decision. Why Justices O'Connor and White did not join Justice Powell's concurrence to form a five-Justice majority to reinforce the vitality of *Mueller* is unclear.

95. 374 U.S. at 418. *See supra* note 93 and accompanying text.

96. 406 U.S. at 237; Pepper, *supra* note 1, at 344.

97. This placement of Justice Stevens is not merely the result of elimination. See his concurrences in Goldman v. Weinberger, 106 S. Ct. 1310 (1986), and United States v. Lee, 455 U.S. 252 (1982).

98. 106 S. Ct. 1310 (1986).

99. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984); Greer v. Spock, 424 U.S. 828

its demand for uniformity in the *Goldman* case, therefore, will be of little precedential value in free exercise matters not involving such institutions, and is of little significance in predicting the stability of the *Sherbert-Yoder* doctrine.[100] Of as much significance is that four Justices took the free exercise clause seriously enough to dissent in *Goldman*.[101]

2. Bob Jones *and* Lee

In *Bob Jones University v. United States*,[102] the Court affirmed IRS denial of the University's tax exempt status resulting from religiously based racial discrimination. Among the lengthy treatments of statutory issues, the brief passage on the free exercise clause is difficult to locate. There is no citation to or discussion of the unconstitutional conditions doctrine (*Sherbert-Yoder*'s second element), despite the fact that tax status is crucial to enterprises dependent upon contributed funds, crucial that is to almost all private cultural and education institutions.[103] The Court recognized the "compelling" and "overriding" nature of the government's general interest "in eradicating racial discrimination in education,"[104] but never narrowed that general governmental interest as it did in *Yoder*. The Court asserted that "no 'less restrictive means' . . . are available,"[105] but

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(1976). Public schools, however, are public institutions of an entirely different kind. For a discussion of an interesting free exercise claim by a public school teacher, see Pepper, *supra* note 2, at 268-77.

100. Justice Rehnquist's opinion for the Court stated: "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." 106 S. Ct. at 1313. This statement answered petitioners "argument" that the issue "should . . . be analyzed under the standard enunciated in *Sherbert v. Verner* . . . ." *Id.* at 1312.

101. The dissenters were Justices O'Connor, Blackmun, Marshall and Brennan, all but Justice Marshall writing an opinion. This is the same group identified above as the four Justices probably voting to uphold the Eighth Circuit in *Quaring*. *See supra* text accompanying note 97.

102. 461 U.S. 574 (1983).

103. Justice O'Connor's opinion in *Roy* explicitly recognized the modern importance of the unconstitutional conditions doctrine:

> Even if the Founding Fathers did not live in a society with the "broad range of benefits [and] complex programs" that the Federal Government administers today, *ante*, at 2156 (opinion of Burger, C.J.), they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause.

106 S. Ct. at 2169.

104. 461 U.S. at 604.

105. *Id.* (citations omitted).

did not provide any analysis to support that conclusion; it never applied the fifth element of the *Sherbert-Yoder* doctrine. No effort was made to measure the likely effect of exemption for religious dissenters on the government's generally very strong interest. Certainly Bob Jones University itself continuing as tax exempt would have no generalized devastating effect on racial integration in education. How many similarly situated institutions are there? More important, how many institutions would make insincere claims of a religious basis for racial discrimination if an exemption were recognized? And would it be possible (and at what expense) to limit an exemption to that very small group with a genuinely religious basis for racial discrimination? The *Bob Jones* case is extraordinarily difficult; two constitutional interests of the highest order clash.[106] It is difficult to discern what *result* taking the free exercise clause seriously in *Bob Jones* would lead to, but it would lead to a quite different *opinion*.[107] The *Sherbert-Yoder* doctrine involves a careful narrowing and weighing of interests, as exemplified by the *Yoder* opinion itself, not the conclusory work exhibited in *Bob Jones*.

The last case I will mention which demonstrates the lack of consistency in the Court's use of the *Sherbert-Yoder* doctrine is *United States v. Lee*.[108] Based on the same religious mandate as the one involved in *Yoder*, to live "separate and apart from the world," an Amish employer refused to comply with various obligations under the Social Security Act, including payment of taxes for his employees (who were also Amish). Statutory exemption from social security tax obligations is provided to self-employed Amish because of their religious beliefs, but employers and employees have not been granted similar shelter. While the social security system as a whole probably qualifies as an "overriding" or "compelling" governmental interest, nothing in the opinion indicated that exempting Amish employers who employ only Amish would be so different from the already existing exemption for the self-employed as to significantly harm the system as a whole. Also, the opinion recites no evidence brought

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106. Justice O'Connor in *Roy* distinguished that case from *Bob Jones* on the basis that "the interest that the Court in *Bob Jones University* balanced against asserted religious interests was not merely a compelling governmental interest but a *constitutional* interest." 106 S. Ct. at 2167-68.

107. *See* Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 90 TEX. L. REV. 259 (1982).

108. 455 U.S. 252 (1982); *see* Pepper, *supra* note 2, at 299-302.

forward by the government to show what effect exemption for the claimant and those similarly situated would have. Under the *Sherbert-Yoder* doctrine, the balance would appear to be in the religious claimant's favor.

But, as in *Bob Jones*, the Court did not narrow the governmental interest to the marginal effect of exempting religious objectors. Instead, the Court inflated the governmental interest to the "tax system" as a whole. It refused to consider the difference between social security and income taxes. And it did not recognize any difference between employers of persons who share the religious tenet against participation in Social Security and those who employ persons who believe differently.

Lee, *Bob Jones*, *Quaring*, and *Roy* show a troubling inconsistency in the Court's use of the *Sherbert-Yoder* doctrine. The next section of this article briefly canvasses some of the difficulties involved in taking the free exercise clause seriously, difficulties not yet dealt with by the Court, and therefore possibly part of the reason behind the confused state of freedom of religion jurisprudence.

IV. Some Problems With Taking Freedom of Religion Seriously

A. Sincerity

> In a world in which many people wish to engage in racial discrimination in private school admissions, granting a religious exemption from the otherwise applicable denial of tax-exempt status will provide a significant incentive to strategic claims of religious scruples. The government is then put to the uncomfortable choice either of allowing itself to be lied to or of setting up a process to assay the sincerity of religious claims.[109]

Lurking behind the inconsistency in the last twenty-five years of Supreme Court free exercise doctrine may be an unwillingness to confront the likelihood of insincere claims seeking shelter under the free exercise clause. *Yoder*, *Sherbert*, *Lee*, *Bob Jones*, *Quaring*, and *Roy* all involved situations in which the sincerity of the religious claim was undisputed. The outcome in these cases might be explained by the variable likelihood of fraudulent claims under the circumstances. And the likelihood

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109. Freed & Polsby, *Race Religion and Public Policy:* Bob Jones University v. United States, 1983 Sup. Ct. Rev. 1, 26.

of fraudulent claims will turn on whether more may be lost by following the religious mandate at issue than may be gained by avoiding the legal provision in question. In *Yoder*, *Sherbert*, *Quaring*, and *Roy* it would seem that from the perspective of the vast majority more might be lost by the religious adherent—a free public education, a steady job, a hassle-free driver's license or hassle-free welfare—than is gained, and thus fraudulent claims are less likely. To the contrary, in *Lee* and *Bob Jones*, more may be gained—not paying taxes, discriminating racially while maintaining tax exempt status—than is lost, so the probability of insincere claims of religious belief is greater.

The tendency of our courts and bureaucracies is to avoid questions of religious sincerity.[110] Determinations of sincerity are inherently uncertain; the question is internal to the claimant rather than external, and objective indicia can therefore only be suggestive, not determinative, of sincere belief. Moreover, religious beliefs tend to be matters of faith, by their nature beyond reason. That which one person finds personally beyond belief is easy to project as unbelievable by any credible person. If "x" is unbelievable, can one trust a person who says "x" is the truth? Governmental determinations of religious sincerity thus threaten to result in the very abuses that the religion clauses were, at least in part, designed to prevent. Being subjected by one's government to a false charge of lying about one's religious beliefs is itself a serious wrong.

Unfortunately, if the free exercise clause has power, if it gives meaningful shelter from government in things that matter, that shelter will be coveted. Avoiding the sincerity issue can be done in only two ways. First, the free exercise clause can be given so little content that the problem becomes insignificant.

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110. In most freedom of religion cases, the sincerity of the claimant is granted by the government. Only a few reported cases adjudicating disputed sincerity can be found. *See, e.g.*, United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964); Dobkin v. District of Columbia, 194 A.2d 657 (D.C. 1963); Ideal Life Church v. County of Washington, 304 N.W.2d 308, 317 (Minn. 1981) (Wahl, J., concurring); Heins, *"Other People's Faiths": The Scientology Litigation and the Justificiality of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153, 168-72, 182-89 (1981); Note, *Mail Order Ministries, the Religious Purpose Exemption, and the Constitution*, 33 TAX LAW. 959 (1978-80). The principal exception, where the issue of sincerity seems not to have been avoided, is conscientious objection to the military draft. *See, e.g.*, Bortree v. Resor, 445 F.2d 776 (D.C. Cir. 1971); Gruca v. Secretary of the Army, 436 F.2d 239 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 978 (1971); Bates v. Commander, 413 F.2d 475 (1st Cir. 1969); United States v. Gearey, 379 F.2d 915 (2d Cir.), *cert. denied*, 389 U.S. 959 (1967).

As noted above,[111] this was in effect the situation before the 1963 *Sherbert* decision, and is concordant with a secular age which views religion as a bother, something inherently irrational, prone to prejudice and strife, and therefore a basis upon which government should not draw lines. The second alternative is to avoid the issue by assuming the sincerity of all claims to religious belief. As the Supreme Court in *Reynolds* observed, this approach would "permit every citizen to become a law unto himself."[112] One can imagine the judge's query and response: "You were driving 95 miles per hour because your religious beliefs mandated such conduct? Fine, the free exercise clause prevents prosecution." This alternative is really no different than the first. Sincerity can only be assumed if nothing very important is at issue.

Taking the free exercise clause seriously means coming to terms with the sincerity issue rather than avoiding it.[113] Two major possibilities present themselves. First, one can attempt to distinguish between situations in which "strategic behavior" is likely to occur and those in which it is less likely, and allow substantial free exercise protection only in the latter. As noted above, the Supreme Court's recent decisions could be explained in this manner, although it is not the reason articulated by the Court. This can only be done by degree, however. While few of us desire to educate our children at home, there are some who wish to do so. Under the *Yoder* opinion, only a religious motivation will protect such conduct, and those whose motivation is secular may feign a religious mandate to come under the protection of the free exercise clause. Similarly, while most of us prefer not to lose our jobs, many do at one time or another want to quit. Under *Sherbert*, only a religious basis for voluntarily quitting will provide unemployment insurance benefits. On the other side of the spectrum, avoiding taxes appeals to almost all of us. Free exercise protection would be much more limited on this latter side of the spectrum. This "likelihood of strategic behavior" criterion would protect a meaningful amount of religious conduct and at the same time avoid large scale determinations of sincerity. A great deal of religious conduct would nonetheless remain unprotected.The observation above about taxes suggests a

111. *See supra* text accompanying notes 33-40.

112. 98 U.S. 145, 167 (1879).

113. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 859-65 (1978).

narrower version of this alternative which would leave more conduct protected. Taxation may simply be a singular area in regard to the probability of insincere claims.[114] Taxation may therefore be an area where the free exercise clause simply must be circumscribed to a far greater extent than in other areas such as employment or social welfare legislation. The *Lee* case might be justifiable on this basis.[115] Even among taxes, however, further narrowing might be possible: strategic behavior emulating *Lee* in social security employer's taxes is likely to be minute compared with such behavior in the income tax situation.[116] If the narrowing moves to just income taxes, then incursion on freedom of religion is relatively small.

The second major possibility is to deal with the sincerity problem directly.[117] Judging credibility is a staple of the adjudicatory and administrative processes, and there is no reason why the burden of proof on this issue ought not be on the claimant. Consistency of the claimed belief with past conduct, with current conduct other than that at issue, and corroborating witnesses are among the many possible approaches to proving sincerity. Incorrectly denying some sincere persons shelter for their religious conduct, an occasionally necessary result if sincerity is to be judged, will simply be a cost of granting a meaningful constitutional privilege in this area.

Dealing directly with sincerity will also be administratively costly. We are not in the habit, however, of deleting provisions from the Bill of Rights because of administrative inconvenience, and how costly it would be remains unclear. In *Quaring*, the drivers' license case, Nebraska could simply require a form, an interview, and an automatic granting of the request. If the number of requests is large enough to suggest the occurrence of stra-

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114. Exemplary are the recent tax "scams" based on alleged religious belief. *See* Ideal Life Church v. County of Washington, 304 N.W.2d 308 (Minn. 1981); Heins, *supra* note 110.

115. Pepper, *supra* note 2, at 301-02.

116. *Id.* at 300-01. *Cf.* United States v. Lee, 455 U.S. at 261 (Stevens, J., concurring) (extending existing exemption from self-employed to claimant would probably benefit the government financially).

117. In *United States v. Ballard*, 322 U.S. 78 (1944), the Court held that the *truth* of defendants' religious beliefs was beyond judicial determination, but that the sincerity with which they held those beliefs could be determined in their trial for fraud. The justiciability of the sincerity of belief of those claiming conscientious objector status seems to have been assumed by the Supreme Court in the draft cases, *see, e.g.*, Welsh v. United States, 398 U.S. 333, 338-39 (1970); United States v. Seeger, 380 U.S. 163, 185 (1965), as it has been in the Court's free exercise opinions.

tegic behavior, then the state has two options: (1) construct a more costly administrative procedure to more accurately measure sincerity, or (2) deny all further requests anticipating further free exercise clause litigation in which the state will now have something more than speculation and anxiety to support its concern about false claims.[118] In *Bob Jones*, strategic behavior is so likely that a substantial administrative procedure would be needed, but the IRS already has it. Thus, the added expenses would be increasing the number of proceedings and educating agents to be sensitive and effective in determining sincerity.[119]

Even if the first possibility (the "likelihood of strategic behavior" criterion) is used, the second alternative of dealing directly with sincerity will remain a necessity. It will just have to happen less frequently because the vast majority will have no motivation to assert a religious claim unless they indeed have a religious motivation. The difficulties involved in determining sincerity—particularly its consanguinity to the kind of religious discrimination that the religious clauses were intended to eliminate—are the kind of problems that apparently lead to substantial misgivings concerning the *Sherbert-Yoder* doctrine on the part of two Justices likely to be "swing" votes on future free exercise matters—Justices Stevens and White.[120] They prefer a neutrality-based approach that is loathe to distinguish between religious believers and unbelievers,[121] or among religious beliefs[122]—perceiving in such line-drawing a preference for some

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118. In a number of areas where religious beliefs overlap with secular self-interest, and where the sincerity of religious belief may be harder to define than the sectarian belief in the sanctity of the Sabbath, the government may invoke both administrative difficulty and the broad possibility of error as legitimate factors militating against an exemption.

Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 335 (1969) (quoted in Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 783 n.117 (1984)).

119. An example of the IRS undertaking a similar task through guidelines in the Internal Revenue Manual is examined in Note, *supra* note 110.

120. *See* Bowen v. Roy, 106 S. Ct. 2147, 2160 (1986) (Stevens J., concurring); *id.* at 2169 (White, J., dissenting); Goldman v. Weinberger, 106 S. Ct. 1310, 1314 (1986) (Stevens, J., concurring, joined by White & Powell, JJ.); United States v. Lee, 455 U.S. 252, 263-64, n.3 (1982) (Stevens, J., concurring); McDaniel v. Paty, 435 U.S. 618, 643 (1978) (White, J., concurring); Sherbert v. Verner, 374 U.S. 398, 418 (1963) (Harlan, J., dissenting, joined by White, J.).

121. The *Sherbert-Yoder* doctrine exempts some religious believers from governmental obligations which others must meet.

122. A balancing test may come out differently for differently situated religious believers.

The very strength of Captain Goldman's claim creates the danger that a

believers which is prohibited by the establishment clause.[123]

One problem with such a view, as pointed out earlier, is that the free exercise clause itself—the text of the Constitution—grants a preference for religion.[124] There is no parallel guaranty for the free exercise of "philosophy, business, athletics, recreation, education, agriculture, art, science, or sex,"[125] or even, one might add, politics. Another problem is that in their zeal to protect from discrimination those who might fall outside the line of protection, those who adopt this approach put *all* religious believers outside the line.[126] It seems odd to protect some who might unjustly be denied the affirmative protection of the free exercise clause by denying such protection to all. Of course, one might do so—as perhaps these Justices would—not to protect those few, but to protect the polity from getting into the "business of evaluating the relative merits of differing religious claims."[127] But this reason assumes that establishment clause concerns—neutrality concerns—are paramount over freedom of religion concerns, an assumption not self-evident from the history or text of the first amendment. A justification for such a "neutrality" resolution to the tension between the clauses is still

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> similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed." If exceptions from dress code regulations are to be granted on the basis of a multifactored test such as that proposed by Justice BRENNAN, inevitably the decisionmaker's evaluation of the character and the sincerity of the requestor's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance"—it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.

Goldman v. Weinberger, 106 S. Ct. 1310, 1316 (1986) (Stevens, J., concurring, joined by White & Powell, JJ.) (citation omitted).

123. "The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude." 455 U.S. at 263 n.2 (Stevens, J., concurring).

124. *See supra* text accompanying notes 3-40.

125. Pepper, *supra* note 1, at 346.

126. I believe, however, that a standard that placed an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this Court's holdings than does the standard articulated by the Court today.

455 U.S. at 263 n.3 (Stevens, J., concurring).

127. *Id.* at 263 n.2 (Stevens, J., concurring).

needed, preferably a justification not relying solely on the two hundred years of secularization since the drafting of the first amendment.[128]

B. Definition of Religion

Taking the free exercise clause seriously also entails deciding what qualifies as "religion." As with the sincerity issue, courts and administrative agencies have attempted to avoid the question, and for much the same reasons. Governmental definition of religion, putting an imprimatur on it, would seem to be one of the abuses the religion clauses were adopted to prevent. But the analysis here tracks that of the sincerity issue above. If anything claimed to be religion is religion, the free exercise clause makes everyone a "law unto himself,"[129] and it will be given only a trivial scope.[130] If the definition is too narrow, then the establishment clause is violated.[131]

To avoid repetition, it should be noted that most of the remarks concerning the sincerity issue apply with equal force to the definition-of-religion problem. There is a great deal of writing, some of it by participants in this symposium, which delves into the extremely difficult definition problem; the issue will not be surveyed here.[132] However, one observation concerning the attractiveness of a very broad definition of religion deserves attention.

With the massive growth of government and its seeming pervasive intrusiveness, efforts have been made to find constitutional shelter for some core area of individual liberty.[133] This effort has been most successful under the rubric of "privacy" or the new "substantive due process,"[134] but the textual and historic weakness of that basis has caused a great contemporary re-

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128. *See supra* text accompanying notes 3-40.

129. Reynolds v. United States, 98 U.S. 145, 167 (1879).

130. Choper, *Defining 'Religion' in the First Amendment*, 1982 U. ILL. L. REV. 579, 591-93; Pepper, *supra* note 1, at 355-57.

131. Pepper, *supra* note 1, at 355-57.

132. *See, e.g.*, Choper, *supra* note 130; Greenawalt, *supra* note 118; Pepper, *supra* note 1, at 353-64.

133. *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 564-75, 886-990 (1978).

134. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). *But cf.* Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (refusal to extend protection to private, consensual homosexual conduct).

thinking of constitutional jurisprudence.[135] If the term "religion" is given a broad definition in the context of a free exercise clause which provides significant shelter (a free exercise clause "taken seriously"), then a core area of liberty (call it, perhaps, "conscience") could be protected from government intrusion. Deriving this core area of shelter from the free exercise clause provides a far sounder textual and historic basis than do "privacy" and "substantive due process."[136] An expanded understanding of "religion" used in this way may make sense both in terms of a significant portion of the original motivation for the clause and the subsequent secularization of society.[137] This approach is also attractive because it locates in the first amendment a cluster of "core" rights which bridge to and build upon one another in a potentially coherent and synergistic fashion. Along this same line, and for the same reasons, one sees increasing efforts to find constitutional shelter or recognition for groups, "communities" and "mediating institutions."[138] Here again, if religion is defined broadly, the free exercise clause provides textual and historic support.

C. Limits

Absolute freedom cannot be tolerated, even in the name of religion, even if the text of the free exercise clause has no qualifiers, and even if consent to be governed has not been given.[139] Freedom of speech doctrine has been struggling for sixty years to determine the limits of the unqualified freedom granted in the first amendment.[140] Taking the free exercise clause seriously requires that limits be determined and articulated.

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135. *See, e.g.*, J. ELY, *supra* note 36; B. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFIN, CONSTITUTIONAL LAW 454-556 (6th ed. 1986); M. PERRY, *supra* note 133; *Judicial Review and the Constitution: The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Perspectives on the Religion Clauses of the First Amendment*, 1986 B.Y.U. L. REV. 245.

136. *See supra* text accompanying notes 5-29.

137. *See supra* text accompanying notes 11-29, 33-40.

138. *See* Cover, *supra* note 26; Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953); Phillips, *Thomas Hill Green, Positive Freedom and the United States Supreme Court*, 25 EMORY L.J. 63 (1976); Tushnet, *supra* note 36, at 730-37.

139. *See* Pepper, *The Case of the Human Sacrifice: In the Supreme Court of the New States, Spring Term 2383*, State v. Williams, 23 ARIZ. L. REV. 897 (1981).

140. *See* G. GUNTHER, CONSTITUTIONAL LAW 972-1462 (11th ed. 1985).

1. The rights of others

A promising starting point is Madison's early formulation placing the limits of religious conduct at "the preservation of equal liberty" or the "existence of the state."[141] The latter phrase I shall equate with "compelling" or "overriding" interests, and discuss below. The former, "equal liberty," I take to mean the rights of others. The free exercise clause is written to limit governmental conduct and to give shelter from governmental impingement; it is not a license to impinge on private third parties. For example, if your religious shrine is in my backyard, your free exercise right does not trump my property right and allow you to trespass. On the other hand, if your religious shrine is on government property, the free exercise clause may well give you a preferential right of access that others do not share and that the government must recognize.[142] Another example is suggested by the *Lee* case.[143] If Lee had refused to make social security tax contributions for employees who did not share his conscientious objection to the social security system, then his conduct would not be between just himself and the government, but would also invade the private rights of third parties. The opinion of the Court speculates on this possibility, but does not clarify whether it is the case.[144]

Such a private/public dichotomy is important because it narrows the scope of religious freedom to a manageable size. Damage to governmental interests may damage others. For example, my child's ignorance may make the economy less productive (*Yoder*), or my refusal to pay a tax may make your contribution greater (*Lee*).[145] But these harms are indirect and partial—they are general harms, and hence their effect on any individual is diluted. In *Sherbert*, *Yoder*, *Lee*, *Bob Jones*, *Quaring*, and *Roy*, granting the claimed exemption does no direct harm to any identifiable third party. My religious obligation to trespass on your backyard or my religious obligation to indoctri-

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141. *See supra* text accompanying note 17.

142. Pepper, *supra* note 2, at 290-99 (discussing Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981)).

143. 455 U.S. 252 (1982).

144. *Id.* at 260-61.

145. For an interesting "mixed" case, see Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (Jehovah's Witness school teacher fired for refusing to lead class in pledge of allegiance and teach class concepts that offended her religion) (discussed in Pepper, *supra* note 2, at 274-76).

nate your child[146] are quite different. The free exercise clause is written in terms of a right as against the collective, not against individuals. This line may not be as clear or automatic as one would like, but it is an important line that can be drawn.[147] (That is, it can be drawn if one resists a *Shelley v. Kraemer*-like[148] first step down a truly slippery slope: when I call on the government to enforce my property right in my backyard against your use of a religious shrine, there ought not be a balancing process between property rights and religious liberty; it must be seen as my *private* right, not a governmental interest, at issue.[149])

2. *Governmental interests*

Leaving aside "compelling" and "overriding" interest rhetoric, it is worth noting that the actual harm threatened in the *Yoder* and *Sherbert* cases was entirely speculative and abstract.[150] The state would have to pay Adell Sherbert's twenty-six weeks of benefits, but that is all. The children not going to school in *Yoder* were not being harmed in any concrete, measurable way. *Quaring* and *Roy* similarly involved no demonstrable or quantifiable harm to the government's interests; speculation as to probable or possible injury was all that was brought forward.[151] So far, with the exception of *Bob Jones*, contemporary Supreme Court free exercise cases are a tempest in a teapot.[152] At this point in the development of doctrine, taking the free exercise clause more seriously may require only a relatively light thumb on the balance. Assuming the other elements of the *Sherbert-Yoder* doctrine are applied,[153] significant protection for religious conduct would be provided merely by requiring under the

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146. Flynn, *Christian Zealots Go Too Far When It Comes to Kids*, Denver Post, June 20, 1985, at B1, col. 1 (neighbors took an eight-year-old child to an alleged "church carnival," which in actuality was a church service at which the child was directed to stand, announce she was a Jew, and was told by minister to, among other things, pray to Jesus as soon as she returned home).

147. Pepper, *supra* note 2, at 274, 289-90.

148. 334 U.S. 1 (1948).

149. *See* Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982).

150. Pepper, *supra* note 2, at 274.

151. *See supra* text accompanying notes 70-101.

152. Tushnet, *supra* note 36, at 723-25 (marginality principle). From the individual claimant's or small minority's point of view, this is, of course, not true.

153. *See supra* text accompanying notes 41-55.

third element[154] that government show a non-speculative, identifiable, measurable, non-trivial injury to a legitimate interest.[155]

A second step would be to rule out administrative inconvenience and administrative costs as interests sufficient to justify impingement on religious conduct unless they are substantial in proportion to the overall administrative costs of the governmental program or conduct at issue. This modest step would protect freedom of religion in many situations, including *Quaring*, *Roy*, *Lee*, and possibly even *Bob Jones*. The *Bob Jones* example, of course, highlights the costs of discerning insincerity and the question of determining what is the "government program or conduct" against which the substantiality of the costs should be measured. If it is the IRS as a whole, the costs are not likely to be "substantial in proportion;" but the appropriate "governmental program" probably ought to be defined more narrowly in this case. Perhaps another way of formulating this guide is that primarily bureaucratic values—such as uniformity, routinization, and mechanization—ought to be viewed with skepticism as justifications for impingement on the constitutional right of religious liberty.

If the line is merely drawn here and goes no further, freedom of religion will be given substantial protection from governmental impingement. Where to draw the line beyond this modest point is a complex question. Elsewhere, I have examined some provocative lower court cases that push one's thought toward possible limits.[156]

V. Conclusion

This paper opened with the observation that the text of the first amendment's free exercise clause provides the greatest protection for freedom of action of any provision in the Constitution—no other liberty is as absolutely protected as the liberty of religion. From a modern perspective this degree of shelter is difficult to take seriously.

Until a little more than twenty years ago, the Supreme Court had given the free exercise clause little or no effect; it had

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154. *See supra* notes 54, 75-76 and accompanying text.

155. One such governmental interest, of course, is the "equal rights of others," discussed in the immediately preceding sub-section. "Non-trivial, non-speculative, direct injury to third parties resulting from religious conduct may be a useful criterion for removing free exercise clause protection." Pepper, *supra* note 2, at 275.

156. *Id. See also* Pepper, *supra* note 139.

not taken the clause as seriously as its plain meaning would suggest. In the last twenty-plus years the Court constructed, but applied only fitfully, the *Sherbert-Yoder* doctrine, which invested the free exercise clause with substantial power. In the past three years the Reagan Justice Department has attempted to undo that doctrine and relegate the free exercise clause to an essentially vestigial position in the constitutional scheme. The observations and arguments presented here have been an effort to respond to the Justice Department, an effort to suggest both why and how we might take what the clause appears to say more seriously.

Historical as well as textual support for substantial freedom for religious conduct exists, as does an historical explanation of why establishment clause concerns came to dominate liberty concerns in constitutional adjudication of matters involving religion and government. Text, history, and principle support a perception which finds in the religion clauses a guaranty that minority and majority will be placed in the same position in regard to any nexus between religion and government. As developed above, this requires not only that intentional religious discrimination by government be prohibited, but also that indirect and unintended government incursion upon the religious conduct of individuals and minorities be found constitutionally impermissible. Once the free exercise clause is taken seriously in this way, substantial problems of application are encountered. Issues of sincerity of religious motivation, definition of religion, and limits on religious freedom must be addressed.

The effort here has been to be suggestive. A few significant ideas have been highlighted and a sketch has been drawn, but a full justification and blueprint await another day. The conclusion to be drawn from this sketch of the "how" and the "why" of taking freedom of religion seriously is that the Constitution itself suggests it ought to be done, and it can be done with few, if any, negative consequences.