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CONSTITUTIONALLY COMPELLED EXEMPTIONS AND THE FREE EXERCISE CLAUSE

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The problem of constitutionally compelled exemptions has perplexed the Court at various points throughout its constitutional jurisprudence. The problem may arise in such diverse contexts as freedom of speech, equal protection, and freedom of religion. Stated simply, a constitutionally compelled exemption exists whenever a facially constitutional law is held unconstitutional only as applied to particular groups or individuals because of the incidental effect of the law on the constitutional rights of those challenging it.[1]

The Court has three alternatives when faced with a law that has an incidental effect on constitutional rights. First, it may disregard the incidental effect and uphold the law in its entirety. This is the Court's most common response. In *Washington v. Davis*,[2] for example, the Court rejected the claim that a qualifying test administered to applicants for positions as police officers violated the equal protection clause because it had a disparate impact on black applicants. In *United States v. O'Brien*,[3] the Court rejected the claim that a federal statute prohibiting any person from destroying a draft card violated the freedom of speech because it prohibited individuals from burning their draft cards to symbolize their opposition to the draft. And in *United States v. Lee*,[4] the Court rejected the claim that a federal statute requiring employers to pay Social Security taxes violated the free exercise clause because it compelled payments from the Amish, whose religion forbade the payment of such taxes. The soundness of this first alternative

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1. For a general analysis of constitutionally compelled exemptions, see Stone & Marshall, Brown v. Socialist Workers: *Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583.

2. 426 U.S. 229 (1976).

3. 391 U.S. 367 (1968).

4. 455 U.S. 252 (1982).

turns, in each case, on the nature and severity of the effect on constitutional rights, the strength of the government interests, and the cost of invalidation.

The Court's second alternative is to invalidate the law in its entirety. In *Martin v. City of Struthers*,[5] for example, the Court invalidated a restriction on the door-to-door distribution of leaflets in part because the challenged law had a disproportionate impact upon those who, for reasons of finances or ideology, did not have access to more conventional means of communication. Similarly, in *Anderson v. Celebrezze*,[6] the Court invalidated restrictions on filing deadlines for access to the ballot in part because such deadlines fell unequally on new or small political parties or on independent candidates.

Martin and *Anderson* are rarities. In general, the Court is quite reluctant to adopt this second alternative. This reluctance is understandable. In most instances, laws that have only an incidental effect on constitutional rights impair such rights in only a very small percentage of their total applications. In cases like *O'Brien* and *Lee*, for example, the vast majority of all applications of the challenged laws did not implicate the freedoms of speech or religion in any way. In such circumstances, total invalidation would prevent government from achieving legitimate interests in the large number of situations involving no intrusion on constitutional rights. The cost of total invalidation in such circumstances might substantially outweigh the benefit.

The Court's third alternative is to create a constitutionally compelled exemption—that is, to hold the law invalid only insofar as it actually impairs constitutional rights. The Court occasionally adopts this approach. In *Brown v. Socialist Workers '74 Campaign Committee*,[7] for example, the Court held that, although government could constitutionally compel most political parties to disclose the names of campaign contributors, it could not constitutionally apply this law to the Socialist Workers Party, which would have been especially adversely affected by the disclosure

5. 319 U.S. 141 (1943).
6. 460 U.S. 780 (1983).
7. 459 U.S. 87 (1982).

requirements. Similarly, in *Wisconsin v. Yoder*,[8] the Court held that, although government could constitutionally require children of most religious faiths to attend school until the age of sixteen, it could not constitutionally apply this requirement to the Amish, whose religion prohibits them from sending their children to high school.

At first blush, this third alternative may seem a perfect middle ground. But it poses two significant difficulties. First, constitutionally compelled exemptions may create preferences that directly undermine the very constitutional guarantees that they are designed to protect. Suppose, for example, that in *Davis* the Court had adopted a constitutionally compelled exemption and had held that the government could use the qualifying test for white applicants but not for black applicants. This result would have created an express racial distinction between black and white applicants that might have been more threatening to the concerns underlying the equal protection clause than the challenged policy itself. Similarly, in *Brown*, the Court adopted a constitutionally compelled exemption that granted preferential treatment to the Socialist Workers Party but not to the Republican Party, the Democratic Party, the Libertarian Party, the Liberal Party, or the Conservative Party. In effect, the Court converted a content-neutral law into one based on viewpoint. In so doing, it turned topsy-turvy the usual presumptions of free speech jurisprudence.[9] And in *Yoder*, the Court adopted a constitutionally compelled exemption that granted preferential treatment to the Amish but not to Jews, Catholics, Episcopalians, Buddhists, or "Moonies." In effect, the Court converted a law that was neutral with respect to religion into one that treated one religion differently from all others, in seeming conflict with the central premise of the Court's establishment and free exercise jurisprudence.[10]

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8. 406 U.S. 205 (1972).

9. For further discussion of *Brown*, see Stone & Marshall, *supra* note 1.

10. Note that not all constitutionally compelled exemptions have this effect. In *O'Brien*, for example, a constitutionally compelled exemption for individuals who destroy their draft cards as a means of expression would not have adopted an explicitly viewpoint-based distinction. In such circumstances, the use of constitutionally compelled exemptions obviously is less problematic.

Second, constitutionally compelled exemptions may necessitate inquiries that may themselves undermine the very constitutional guarantees that the exemptions are designed to protect. Had the Court adopted a constitutionally compelled exemption in *Davis*, it then would have become necessary to determine whether particular applicants seeking to take advantage of the exemption were black or white. Such inquiries are constitutionally awkward, at best. Had the Court adopted a constitutionally compelled exemption in *O'Brien*, holding that the government could not constitutionally punish individuals who destroyed their draft cards to symbolize their opposition to the draft, it then would have become necessary to determine whether particular individuals seeking to take advantage of the exemption were engaged in speech or were mere impostors attempting to excuse otherwise unlawful conduct with a belated plea of "free expression." And in *Yoder*, the Court's adoption of a constitutionally compelled exemption has necessitated an inquiry into the sincerity of the professed religious belief of individuals who seek to take advantage of the exemption.

These two concerns suggest not that constitutionally compelled exemptions are unwarranted per se, but that they are more complex and more problematic than might appear at first. What initially seems like an ideal middle ground often may turn out to be the least desirable of the three alternatives.

The Court's willingness to adopt constitutionally compelled exemptions has varied significantly depending on the constitutional right at issue. It never has created a constitutionally compelled exemption in the equal protection context; it occasionally, but only rarely, has created such exemptions in the free speech context; and it frequently has created such exemptions in the free exercise context. The explanation lies in the Court's conception of the nature of the rights themselves.

In its interpretation of the equal protection clause, the Court has emphasized the issue of motivation. Although other factors, such as stigma, may affect the analysis, the core concern of the Court's equal protection jurisprudence is improper motivation.[11] The Court has essentially two ways to determine motiva-

11. *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

tion—presumption and direct proof. If a law expressly disadvantages blacks, the Court presumes that an improper motivation tainted the legislative process and requires government to rebut that presumption by proving that the racial classification is necessary to promote a compelling government interest, thus demonstrating that government would have adopted the classification even in the absence of improper motivation. On the other hand, if a law is facially neutral with respect to race, the Court presumes proper motivation, or at least does not presume improper motivation, even if the law has a disproportionate impact on blacks. In such circumstances, the Court requires the party challenging the law on racial grounds to prove bad motivation. Although the Court may treat disparate impact as evidence of improper motivation, it does not regard that impact alone as sufficient either to establish improper motivation or to require invalidation of the law.[12] Under this conception of the equal protection clause, a law that has only an incidental disproportionate impact on one race, or other "suspect" or "quasi-suspect" class, does not for that reason alone infringe a constitutional right. Thus, the question of constitutionally compelled exemptions need not be considered.

Suppose, however, that the Court found that a law having a disproportionate impact on blacks actually was motivated by constitutionally impermissible considerations. Would the appropriate remedy be total invalidation or a constitutionally compelled exemption? Interestingly, the very structure of equal protection analysis virtually precludes the use of constitutionally compelled exemptions. If government's interest in applying the law to whites is less than compelling, the Court will opt for total invalidation rather than create an expressly racial exemption. If government's interest in applying the law to whites is compelling, the Court will not find a bad motivation. As a result, the very nature of the constitutional right effectively moots the issue of constitutionally compelled exemptions.

Much of the Court's free speech jurisprudence, like its equal protection jurisprudence, turns on considerations of inequality and improper motivation. Indeed, the Court's emphasis on improper

12. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

motivation explains much of its core distinction between content-based and content-neutral restrictions of speech.[13] As a consequence, most of the preceding analysis of the equal protection clause applies as well to facially neutral laws that have an incidental effect on free speech. Insofar as such laws are challenged on grounds relating to improper motivation, only proof of actual improper motivation will suffice.[14]

Unlike the equal protection clause, however, the right to free speech is not limited to considerations of inequality. To the contrary, a separate component of the right to free speech exists that is wholly distinct from considerations of inequality and improper motivation. Even content-neutral laws that do not pose issues of inequality or improper motivation may violate the free speech guarantee if they unreasonably restrict the opportunity for free expression. In *Buckley v. Valeo*,[15] for example, the Court invalidated a federal statute restricting the amount of money individuals could spend in support of political campaigns because such restrictions constrict the total amount of free expression.

To what extent does this non-equality-based component of the right to free speech require the creation of constitutionally compelled exemptions? In answering this question, the Court's analysis of content-neutral restrictions may be helpful. When it assesses the constitutionality of such restrictions, the Court balances several factors, one of which is the existence of alternative means of communication. In *Heffron v. International Society for Krishna Consciousness, Inc.*,[16] for example, the Court upheld a Minnesota State Fair rule prohibiting all peripatetic distribution of leaflets on the grounds of the State Fair in part because the challenged rule left open alternative means of expression. Similarly, in *Buckley*, the Court upheld limitations on campaign contributions in part because the overall effect of the limitations merely was to require candidates and contributors to shift to alternative means of financing and expression rather than to "reduce the total amount of

13. *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

14. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S. Ct. 3439 (1985); Wayte v. United States, 470 U.S. 598 (1985).

15. 424 U.S. 1 (1976).

16. 452 U.S. 640 (1981).

money potentially available to promote political expression."[17] And Justice Harlan made clear in his concurring opinion in *O'Brien* that, although an incidental restriction upon free expression may be invalid if it effectively prevents "a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate," the restriction at issue posed no such problem because O'Brien "manifestly could have conveyed his message in many ways other than by burning his draft card."[18]

The Court's emphasis on alternative means of communication suggests that its conception of the right to free speech focuses primarily on the right to communicate effectively rather than on the right to choose any particular means of communication. Under this view, the free speech guarantee does not accord special protection to the speaker's preference for one means of communication over another, so long as the overall ability to communicate is not impaired. Although the Court may consider a speaker's preference for a particular means of expression in deciding on the adequacy of alternatives, it does not accord that preference appreciable independent constitutional significance.

This conception of the free speech guarantee is at least arguably consistent with both the self-governance and self-fulfillment rationales for free expression. As Alexander Meiklejohn observed, the critical concern under the self-governance rationale is that everything worth saying be said, not that each individual have a personal right to use the particular means of expression the individual prefers.[19] And the critical concern under the self-fulfillment rationale is that all persons must have the opportunity to express their autonomously formulated thoughts and opinions, not that all persons must have the opportunity to express those views by whatever means they choose. Under the self-fulfillment rationale, the freedom effectively to express one's views, not the freedom to choose the means by which one expresses those views, is central.

Given this conception of the free speech guarantee, it is not surprising that the Court only rarely has created constitutionally compelled exemptions from laws having only an incidental effect on

17. 424 U.S. at 22.

18. 391 U.S. at 388-89 (Harlan, J., concurring).

19. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

free expression. The Court creates such exemptions only when the incidental effect of the regulation significantly impairs the speaker's ability to communicate effectively. Because most laws having only an incidental effect on free expression leave open ample alternative means of communication, constitutionally compelled exemptions in the free speech context are few and far between.

This understanding of the Court's free speech jurisprudence is confirmed by the very nature of its decisions adopting constitutionally compelled exemptions. The only free speech cases in which the Court has adopted such exemptions have involved circumstances in which the incidental effect was so severe that it could have excluded particular ideas or viewpoints from public debate. As the Court observed in *Brown*, for example, compelled disclosure of the names of contributors to the Socialist Workers Party could "cripple" the organization's "ability to operate effectively" and deter membership and contributions to such an extent that the movement could not survive.[20]

In the free speech context, then, the Court creates constitutionally compelled exemptions only when the challenged law seriously interferes with the ability of a group or individual effectively to contribute to public debate. It does not create such exemptions merely because the law prevents a group or individual from using a preferred means of expression.[21]

In its free exercise jurisprudence, the Court frequently has adopted constitutionally compelled exemptions. Indeed, in cases such as *Yoder*, *Sherbert v. Verner*,[22] and *Thomas v. Review Board*,[23] the Court has held that laws having only an incidental effect on religion cannot be applied to religious activity unless they serve important or compelling government interests and are narrowly drawn to serve those interests.

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20. 459 U.S. at 98. The Court has created a constitutionally compelled exemption in the free speech context in only two other cases: Bates v. City of Little Rock, 361 U.S. 516 (1960), and NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

21. *See* Stone & Marshall, *supra* note 1, at 607-13. For a more thorough analysis, see Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. ___ (1987) (forthcoming).

22. 374 U.S. 398 (1963).

23. 450 U.S. 707 (1981).

Why is the Court so much more willing to adopt constitutionally compelled exemptions under the free exercise clause than under the free speech clause? Why, in other words, is the Court so much more troubled by a law that requires Amish parents to send their children to school than by a law that prohibits draft protesters from burning their draft cards? The answer, again, turns on differences in the nature of the rights.

As we have seen in the free speech context, the Court does not accord much constitutional importance to the desire of a speaker to burn a draft card so long as alternative means of expression remain available. In the Court's view, a law that incidentally prevents speakers from using their preferred means of expression does not pose a serious threat to freedom of expression. In the free exercise context, however, the Court attaches considerable importance to the desire of Amish parents not to send their children to school. Even a law that only incidentally interferes with this desire poses a serious threat to freedom of religion. The Court, in other words, gives greater protection to religious choice than to expressive choice. The Court views the choice in the speech context as one made independently by the speaker. It is a tactical and strategic preference. The Court views the decision in the religion context differently. It is made not as a matter of preference, but as a matter of duty to higher authority. If government requires Amish parents to send their children to school, it is not frustrating a mere tactical or strategic preference, but compelling conduct that is incompatible with religious duty. Unlike the conflict between law and preference in the free speech context, the Court sees the conflict between law and duty in the religion context as cutting to the very core of the free exercise guarantee. This difference explains the Court's greater willingness to adopt constitutionally compelled exemptions under the free exercise clause.

Several observations follow more or less directly from the preceding analysis. First, in light of the rationale for constitutionally compelled exemptions under the free exercise clause, the Court should create such exemptions only if the challenged law requires conduct that is directly incompatible with religious *duty*. Mere preference is not enough. Constitutionally compelled exemptions are constitutionally problematic. They should be reserved for cases of genuine conflict between legal and religious duty.

Second, although the Court is more willing to adopt constitutionally compelled exemptions in the free exercise context than in the free speech context, the difference should not be exaggerated. The Court frequently states that laws having even an incidental effect on religious activity must pass strict scrutiny. If one looks to the Court's results rather than to its rhetoric, however, one sees that the actual scrutiny is often far from strict. Only a most diluted form of strict scrutiny could have produced the results in *Lee*, *Jensen v. Quaring*,[24] and *Goldman v. Weinberger*.[25] In truth, the Court's analysis in the free exercise context reflects intermediate scrutiny, at most.

Third, in considering the necessity for constitutionally compelled exemptions, the Court should pay careful attention to the constitutional dangers of such exemptions: the creation of express preferences for certain religous faiths; the need to inquire into sincerity; and the risk of "coercing, compromising, or influencing religious beliefs."[26] On the other hand, the Court must recognize that the adoption of constitutionally compelled exemptions does not produce an "irreconcilable tension"[27] between the free exercise and establishment clauses. Rather, the perceived tension can be eliminated without any sacrifice of principle simply by interpreting "the establishment clause to prohibit all statutes that have a religious purpose, except for statutes with the purpose of accommodating religion in ways required by the free exercise clause."[28]

Finally, it is worth noting the special embarrassment that exists when free speech and free exercise claims coalesce. In *Heffron*, for example, the Minnesota Supreme Court held that a State Fair rule

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24. 472 U.S. 478 (1985), *aff'g by an equally divided Court per curiam* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) (upholding a state rule requiring photographs on all driver's licenses, as applied to a person whose sincerely held religious beliefs forbade her to be photographed).

25. 106 S. Ct. 1310 (1986) (upholding an Air Force regulation prohibiting the wearing of unauthorized headgear while on duty, as applied to an Orthodox Jew who was ordered not to wear a yarmulke).

26. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 948 (1986).

27. *See id.* at 947-48.

28. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1007 (1986). For a similar analysis in the free speech context, see Stone & Marshall, *supra* note 1, at 602-04.

prohibiting peripatetic distribution of leaflets on the grounds of the Fair unconstitutionally restricted the Krishnas' religious practice of *sankirtan*, a religious ritual which enjoins members of the Krishna faith to go into public places to distribute religious literature. The Minnesota court therefore adopted a constitutionally compelled exemption granting the Krishnas a special right to leaflet on the fairgrounds.[29] The United States Supreme Court reversed. The Court maintained that "religious organizations [do not] enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize."[30] The Court therefore applied conventional public forum analysis and held that the challenged rule was a reasonable time, place, and manner regulation of expressive activity.[31]

The Court's unwillingness in *Heffron* to treat free exercise rights differently from free speech rights can be explained on one of two grounds. First, the Court may have assumed that, although *sankirtan* is a religious duty, the Krishnas had no duty to perform *sankirtan* on the grounds of the State Fair. Under this view, the free exercise claim is based on a preference rather than a duty and thus should be treated no differently from a conventional free speech claim. This, of course, is consistent with the view of the free exercise clause suggested above.

Second, the Court may have been loathe to grant a preference to religious activity that is not granted to essentially identical political activity. Although such a result would seem to flow naturally from the differences in the Court's free exercise and free speech jurisprudence, the Court's reluctance to reach this result is evident not only in *Heffron*, but also in a host of other decisions. The Court's arguably problematic[32] reliance on the establishment rather than the free exercise clause in *Larson v. Valente*,[33] for example, perhaps best can be explained by the Court's unwillingness to grant a special exemption to religious activity that would not be

29. *See* International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79 (Minn. 1980), *rev'd*, 452 U.S. 640 (1981).

30. 452 U.S. at 652-53.

31. *Id.* at 654-55.

32. *See* Choper, *supra* note 26, at 958-60.

33. 456 U.S. 228 (1982).

granted to essentially identical political activity. Similarly, the Court's reliance on the free speech clause rather than the free exercise clause in cases like *West Virginia State Board of Education v. Barnette*[34] and *Wooley v. Maynard*[35] may reflect its discomfort with the prospect of granting a special exemption to religious but not political objectors. The real tension posed by the Court's free exercise jurisprudence, then, ultimately may lie not in its conflict with the establishment clause, but in its seemingly justified but nonetheless discomforting grant of greater protection to religious expression than to political expression.[36]

34. 319 U.S. 624 (1943).

35. 430 U.S. 705 (1977).

36. For recent analysis of free exercise and free speech values, see Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986); Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779 (1986).