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THE FREE EXERCISE CLAUSE: A STRUCTURAL OVERVIEW AND AN APPRAISAL OF RECENT DEVELOPMENTS

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I. INTRODUCTION

The free exercise clause, the second of the two religion clauses in the first amendment, is the focus of this Article. Since the early 1970's, the Burger Court has either promulgated or specifically reaffirmed almost all significant aspects of the doctrine surrounding this constitutional protection for religious freedom. Indeed, the Supreme Court, and the Burger Court in particular, has interpreted the free exercise clause to provide a virtually unique protection for religion, one that is markedly greater than the security that the Constitution provides for speech.

The purpose of this Article is four-fold: first, to identify several distinct kinds of government action that raise significant problems under the free exercise clause; second, to describe and appraise what the Burger Court has done with respect to this provision; third, to indicate a number of serious difficulties that arise from the Court's pronouncements in this area; and fourth, to suggest a better approach to resolving some of the problems.

II. NEUTRAL GOVERNMENT ACTIONS IMPLICATING FREE EXERCISE CONCERNS

The first general type of government action that presents a genuine issue under the free exercise clause is a regulation that has a secular purpose but that has an effect or impact that conflicts with the tenets of a particular religion. In this instance, the Court, drawing on a famous dictum in *Cantwell v. Connecticut*,¹ has distinguished between "freedom to believe and freedom to act."²

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1. 310 U.S. 296 (1940).

2. *Id.* at 303.

A. Laws With a Secular Purpose But an Impact on Religious Beliefs

Laws that regulate religious beliefs are very unusual. The Court has said that the Constitution absolutely forbids the federal or state governments from regulating religious beliefs.³ Probably the best illustration is *West Virginia State Board of Education v. Barnette*,⁴ in which several Jehovah's Witnesses challenged the obligation to salute the flag in public schools as being contrary to their religious beliefs concerning the worship of graven images.⁵ The Court persuasively reasoned that this was an effort by the State to force someone to embrace or express a belief.⁶

Barnette did not rest on the free exercise clause, but rather on the broader first amendment protection of freedom of expression.⁷ The rationale, however, is the same. It was repeated within the past decade in *Wooley v. Maynard*,⁸ in which the Court considered the claim of a Jehovah's Witness who did not want his license plate to bear the New Hampshire state motto, "Live Free or Die."⁹ The Court held that the first amendment freedom of speech barred the State from prosecuting him for covering the motto on his license plate, reasoning that the law was forcing him to embrace or express a belief.¹⁰

B. Laws With a Secular Purpose But an Impact on Religious Actions

The Supreme Court's most significant doctrinal pronouncement has come with respect to neutral, secular laws that regulate action. When the impact of such regulations conflicts with the tenets of a particular religion, by requiring persons to do something that their religion prohibits or by forbidding them from doing something that their religion demands, the Burger Court has found an abridgment

3. *Id.* at 303-04.

4. 319 U.S. 624 (1943).

5. *Id.* at 629.

6. *Id.* at 633-34.

7. *Id.* at 634-35.

8. 430 U.S. 705 (1977).

9. *Id.* at 707-08.

10. *Id.* at 714-15.

of religious liberty unless the government satisfies what, essentially, is a test of "strict scrutiny." Unless the government can show an overriding, substantial, compelling, or important interest that cannot be achieved by some narrower, alternative means, the individual is constitutionally entitled to an exemption from the regulation.¹¹

A leading Burger Court ruling, *Wisconsin v. Yoder*,¹² illustrates the point. Wisconsin had compulsory education until the age of sixteen. The Old Order Amish have a religious tenet, which the Court accepted as a good faith observance of their faith, that holds that sending Amish children to accredited public schools beyond the eighth grade would corrupt them, make them too worldly, and endanger their salvation. In *Yoder*, therefore, the Amish argued that they were entitled to an exemption from the compulsory education law.¹³ The Court, in a virtually unanimous decision, agreed. Weighing all the circumstances, the Court held that the State's interest was not strong enough to require the Amish to engage in conduct that was contrary to their religious beliefs.¹⁴

A contrast between the facts in *Yoder* and a hypothetical situation substantiates the point that the Constitution protects religion to a significantly greater extent than almost anything else—including the freedoms of expression and association, which we generally believe to be at the core of the democratic process. Suppose that Mrs. Yoder, the mother of these children, decided to run for elective office and urged that having her children out of school for a few months before the end of her campaign, working for her full time, was critical to her election chances. Suppose further that she took her children out of school and that the State attempted to prosecute her under the same Wisconsin statute challenged in *Yoder*. Finally, suppose that Mrs. Yoder then contended

11. With an important qualification discussed shortly, see *infra* pp. 946-48, I believe that this is an appropriate approach to this type of free exercise problem. Although refinement of this special "balancing" method is beyond the scope of this Article, and although I would substantially restrict the occasions for its use, see Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597-604, this analysis in my judgment affords religious freedom the substantive protection it properly deserves.

12. 406 U.S. 205 (1972).

13. *Id.* at 207-09.

14. *Id.* at 229-34.

at trial that Wisconsin's compulsory education requirement violated her freedom of expression and association because running for elective office is a pristine method of exercising that right. The Court almost certainly would give less than short shrift to that position. Thus, if the argument is made under the free exercise clause, it wins in the Supreme Court, virtually unanimously, yet when the argument is framed in terms of freedom of expression and association it appears to be a certain loser.

In addition to *Yoder*, the other famous decision that illustrates the Court's doctrinal framework is *Sherbert v. Verner*.¹⁵ That case involved a Seventh Day Adventist who worked in the textile mills in South Carolina. Seventh Day Adventists celebrate their Sabbath on Saturday. The mills had worked five days a week, Monday through Friday, but then had gone to a six-day week including Saturday. Sherbert had said that she could not work on Saturday because of her religious beliefs. She had been fired, and she had sought unemployment compensation.¹⁶ The rule was that she could not get unemployment compensation if she refused "suitable work."¹⁷ Although no textile mill would have employed Sherbert without requiring Saturday work, the state board had concluded that she had refused to accept suitable work and thus had denied her benefits.¹⁸ The Supreme Court held that the free exercise clause requires an exemption from this "suitable work" requirement so that she could receive unemployment compensation.¹⁹

III. DEFICIENCIES IN THE BURGER COURT'S APPROACH AND A PROPOSED ALTERNATIVE

The Court's decisions in *Yoder* and *Sherbert* highlight a major difficulty with the Court's approach under the religion clauses, one of both logic and policy. The problem arises from the Burger Court's interpretation of the other religion clause, the establishment clause. This difficulty is especially the result of the most

15. 374 U.S. 398 (1963). The Burger Court specifically reaffirmed *Sherbert* on nearly identical facts in *Thomas v. Review Board*, 450 U.S. 707 (1981).

16. 374 U.S. at 399-400.

17. *Id.* at 400-01.

18. *Id.* at 401.

19. *Id.* at 403-06.

significant part of the Court's approach to finding an abridgment of that provision—the firmly embedded principle that a religious purpose alone will make a law violative of the establishment clause.²⁰

As a matter of policy, this doctrine casts great doubt on many deeply ingrained practices in our country. The placement of "In God We Trust" on coins and currency, for example, seems to have no real purpose other than a religious one. Moreover, the proclamations by almost all our Presidents of national days of Thanksgiving to "Almighty God" only seem fairly characterized as having a religious purpose. If one takes seriously the Court's doctrine that a religious purpose alone produces a violation of the establishment clause, these and many other longstanding practices in our society must be held invalid.

How does the Court deal with this conflict between its doctrine and established national policies? Although a majority of the justices have applied this "religious purpose equals invalidity" principle strictly on several occasions,²¹ the Supreme Court simply ignores its own articulated test when it wishes to uphold a deeply engrained national practice that clashes with this doctrine. This tactic was illustrated vividly in *Marsh v. Chambers*,²² when the Court held that Nebraska's payment of \$320 per month to a chaplain to open each legislative day with a prayer did not violate the establishment clause.²³

More directly relevant for purposes of this Article, this principle is subject to even greater difficulty as a matter of logic, because it is at war with the Supreme Court's own doctrine under the free exercise clause. The Court's free exercise clause doctrine not only permits states to give exemptions to aid religion, but sometimes, as the Court's decisions in *Yoder* and *Sherbert* demonstrate, the rule requires states to give such exemptions. On the one hand, the

20. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("the statute must have a secular legislative purpose").

21. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (finding the one-minute period of silence for voluntary prayer in Alabama public schools unconstitutional); *Stone v. Graham*, 449 U.S. 39 (1980) (finding the posting of the Ten Commandments in Kentucky public school classrooms unconstitutional).

22. 463 U.S. 783 (1983).

23. *Id.*

Court has read the establishment clause as saying that if a law's purpose is to aid religion, it is unconstitutional. On the other hand, the Court has read the free exercise clause as saying that, under certain circumstances, the state must aid religion. Logically, the two theses are irreconcilable.

How should this conflict be resolved? When should the Court hold that the free exercise clause requires religious exemption from an ordinary government regulation? There is a simple principle that would resolve all issues under the establishment clause and that would be central in approaching most basic issues under the free exercise clause. Government action should be held to violate the establishment clause if it meets two criteria: first, if its purpose is to aid religion; and second, if it significantly endangers religious liberty in some way by coercing, compromising, or influencing religious beliefs.

Under this approach, *Yoder* was correctly decided. Although an exemption for the Old Order Amish children did serve an exclusively religious purpose, it did not coerce, compromise, or influence anyone's religious beliefs. People were not lining up to join the Old Order Amish so they could get their children out of school before the age of sixteen. In the absence of proof of this kind, the exemption posed no danger to religious liberty, even though it served a religious purpose. Therefore, under my proposed approach, the Supreme Court's decision under the free exercise clause did not violate the establishment clause.

Sherbert, however, generates a different conclusion under my approach. The first part of the test yields the same result, because the purpose of giving Sherbert the money was solely to assist her religion. To illustrate, suppose Sherbert had said: "I used to work in the mills Monday through Friday. When they went to Saturday, I refused to work that day and was fired. I want unemployment compensation." When asked why she refused to work on Saturday, suppose she had responded, "Because I am a working mother with children in school. Having to be away Monday through Friday when they come home from school is bad enough. I want to spend Saturday and Sunday with them. I feel very strongly about this. It is a central part of my life." When asked if this involved her religion, suppose Sherbert had replied: "This has nothing to do with religion." Sherbert would get nowhere in the Supreme Court with

the argument that a denial of unemployment benefits under these circumstances violated her constitutional rights, at least under existing doctrine. The Court granted an exemption in *Sherbert* for religion alone.

The second criterion in my approach, however, yields a different result because, unlike the exemption in *Yoder*, the exemption in *Sherbert* required South Carolina to use compulsorily raised tax funds to assist religious ends. Most individuals would agree, in general, both as a matter of historical intent²⁴ and of contemporary values, that one of the principal purposes of the establishment clause is to prevent government from giving compulsorily raised tax funds to churches, whether a particular taxpayer agrees with those churches or disagrees with them. For the government to give a taxpayer's money to religion, even the religion of that taxpayer's choice, is a pristine violation of the establishment clause. A taxpayer's religious freedom is violated when the government forces support of the taxpayer's own religion, and the violation is even more egregious when the government forces support of someone else's religion. That is the consequence when the government distributes tax funds for religious purposes, in contrast to distribution for secular purposes, which implicates no such claim even when a taxpayer does not like the way government spends the money. I cannot distinguish the payment of funds to *Sherbert* from the grant of a million dollars to support the Presbyterian Church, which most people would agree is an obvious violation of the establishment clause.

Sherbert involved unemployment compensation to the Seventh Day Adventist religion, and *only* for religion. The purpose of the exemption, therefore, was religious. Further, the compelled compensation abridged religious liberty. Both criteria under my proposed approach for finding an establishment clause violation are met. In sum, the Court was doubly wrong in *Sherbert*. Not only was South Carolina's denial of unemployment compensation to *Sherbert* not a violation of the free exercise clause, it was a

24. See, e.g., Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 677-78 (1980); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L. J. 770, 776-77.

violation of the establishment clause for the Court to require the State to grant it to her.²⁵

25. Justice Rehnquist's dissent in *Thomas v. Review Board*, 450 U.S. 707 (1981), the Burger Court case that reaffirmed *Sherbert*, came close to this position, but did not adopt it. That case involved a Jehovah's Witness who had been working in a steel foundry in Indiana. He initially had been engaged in the production of raw steel, but he had been transferred to the manufacture of tank turrets, and he had quit on the ground that his religion forbade production of weapons. He then had applied for unemployment compensation, which the Review Board had denied on the ground that he had quit for a personal reason rather than for "good cause" in connection with his work. *Id.* at 710-12. The Supreme Court held that *Sherbert* governed this situation, and it reversed the Board's decision on the basis of the free exercise clause. *Id.* at 720.

Justice Rehnquist, however, believed that the State's refusal to give Thomas unemployment compensation did not violate the free exercise clause. Justice Rehnquist argued that the Indiana rule did not discriminate against Thomas because of his religion. In fact, it treated him the same as anyone else. Anyone who quit for personal reasons, whether because of a political objection to the manufacture of weapons, because of an ideological objection, or otherwise, would be denied unemployment compensation. Justice Rehnquist suggested that a law would violate the free exercise clause only if it singled out religion for adverse treatment—for example, if it permitted unemployment compensation to a person who quit his job for any reason except a religious one. *See id.* at 722-23 (Rehnquist, J., dissenting).

Justice Rehnquist then argued that the Court's decision conflicted with many of its establishment clause rulings. In *Thomas*, the Court, according to Justice Rehnquist, did not simply permit the State to aid religion, it actually required it to do so. Justice Rehnquist, who usually dissents from the Court's refusal to permit aid to parochial schools, questioned whether the Court could square its holding in *Thomas* with its position that the Constitution forbids most aid to parochial schools.

The Court, Justice Rehnquist noted, was holding that the Constitution required the government to give Thomas financial support through unemployment compensation because Thomas should not have to suffer the consequences of doing what his religion required. But, Justice Rehnquist contended, the Court should consider the situation of children whose religion requires them to attend not secularly oriented schools, but church-related schools, where religion will influence the education they receive. The point might well be made, Justice Rehnquist continued, that if a state must pay individuals such as Thomas and Sherbert to prevent them from being prejudiced financially for following the dictates of their religion, the Constitution also must require a state to provide financial assistance to parochial schools, because for a state to refuse to do so would prejudice those children whose religion requires them to attend such schools. Justice Rehnquist concluded that the Court not only has not held that the free exercise clause requires payments for children to go to parochial schools, but also that it often has ruled that a state that voluntarily makes such payments violates the establishment clause. *See id.* at 725-27.

I am quite sympathetic to Justice Rehnquist's suggestion. *See Choper, The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 270 n.59 (1968). Justice Rehnquist also said, however, that a state, if it wished, could give an individual such as Sherbert or Thomas an exemption without violating the religion clauses because, even though the state would be acting for a religious purpose, it merely would be "accommodating" the individual's religious choice rather than "inducing" it. 450 U.S. at 727. Although

IV. BURGER COURT VACILLATIONS

The decisions just discussed indicate that the Burger Court has interpreted the free exercise clause generously. This largess always has had limits, however, and recent evidence suggests that the Burger Court's benevolence may be substantially spent. In almost every Term since the high-water mark for the free exercise clause was reached in 1981,²⁶ the Court has treated religious freedom claims much less charitably. This Article, then, turns to the recent decisions in which the Court has found adequate government interests under the free exercise clause—that is, interests great enough to survive “strict scrutiny”—when religiously dictated actions and neutral government regulations have clashed.

As is often true in life, two major areas of concern in recent decisions have involved war and taxes. As for war, the Court in *Gillette v. United States*²⁷ repeated the oft-stated dictum that the government's strong interest in national security does not require an exemption from the draft for people opposed on religious grounds.²⁸ As for taxes, the Court in *United States v. Lee*²⁹ upheld the application of the Social Security tax to members of the Old Order Amish faith.³⁰

this comes very close to my view, I disagree with Justice Rehnquist on the facts of *Thomas* and *Sherbert* because, in those situations, religious freedom had been induced (or coerced) and not merely accommodated. By exempting *Sherbert* or *Thomas* from the requirements of the state law at issue in each of those cases, their states would be using tax funds for religious purposes. Unemployment compensation funds are compulsorily raised, and the fact that they have been paid by the individual does not differentiate them from any other government funds, which also have been paid in taxes by the individual. Using compulsorily raised funds to advance religious purposes would infringe the conscientious beliefs of the taxpayers who contributed to those funds.

For example, suppose someone says: “My church is located three miles from my home. I would like to ride a bus to church, but I can't afford the fare on the municipal bus system. I think the government ought to waive the fare for me to go to church.” Under Justice Rehnquist's rationale, if a municipally-owned bus company wanted to waive the fare to take people to churches, it could do so. According to Justice Rehnquist, the waiver would not “induce” religion, but would simply “accommodate” a religious choice that already had been made. That may be true, but the waiver also would result in what the religion clauses protect against—the use of tax funds for exclusively religious purposes.

26. See *Thomas v. Review Board*, 450 U.S. 707 (1981); *supra* note 25.

27. 401 U.S. 437 (1971).

28. *Id.* at 461-62.

29. 455 U.S. 252 (1982).

30. See *id.* at 258-61.

The decision in *Lee* was particularly significant because of its factual similarity to *Yoder*. In *Lee*, a member of the Old Order Amish employed several other members of that religion in his business. The employer had refused to pay Social Security taxes on his employees' wages.³¹ Because of a literal interpretation of the Bible, the Amish sincerely believe that a failure to provide for their own aged would be a sin. As a consequence, the Amish forbid both the paying of Social Security taxes, which ultimately are used for government care of the elderly, and the receipt of Social Security benefits.³² The Court stated that, under these circumstances, the issue was whether requiring the Amish to pay—or whether refusing to grant them an exemption—“is essential to accomplishing an overriding governmental interest.”³³ The Court unanimously held that it was, and therefore that the failure to grant an exemption did not violate the free exercise clause.³⁴

The result in *Lee* is problematic under the standard of strict scrutiny. The Court's first justification was that mandatory participation in the Social Security system is indispensable to the system's fiscal vitality.³⁵ At first blush, that is a perfectly plausible position, given the well known financial problems of the Social Security system and the efforts to get greater participation to help solve these difficulties. The Court did cite some statements from congressional reports to this effect,³⁶ but it certainly did not give the matter much scrutiny. Recall that the Amish religion forbids not merely the payment of Social Security taxes, but also the receipt of Social Security benefits.³⁷ In light of this fact, Justice Stevens persuasively contended in his separate concurrence that an exemption from both ends of the transaction for the Amish probably would save the government money in the long run.³⁸

Problems also arise with respect to the Court's second justification, the lack of any principled way to distinguish *Lee* from cases

31. *Id.* at 254.

32. *Id.* at 257.

33. *Id.* at 257-58.

34. *See id.* at 258-61.

35. *Id.* at 258.

36. *See id.*

37. *See supra* note 32 and accompanying text.

38. 455 U.S. at 262 (Stevens, J., concurring).

in which people have claimed religious exemptions from other taxes. In many instances, for example, courts denied exemptions to people who refused to pay a large proportion of their income tax because the proceeds of this tax go to support the Defense Department and they were religiously opposed to war.³⁹ Such cases, however, are quite easily distinguishable from *Lee*. In *Lee*, nothing indicated that an exemption for the Amish would have caused the Social Security system to suffer any net diminution of revenues. The Amish refused to pay in, but they also refused to take out. The same thing cannot be said when individuals withhold a fixed portion of their income taxes because that portion of the national budget goes for defense and those individuals are religiously opposed to war. In this situation, the government may well have a compelling interest in mandatory participation in the income tax system, because mandatory participation is necessary to the fiscal integrity of the government. That compelling interest, however, was not present in *Lee*.

The highly questionable result in *Lee* indicates the justices' discomfort with their own doctrine, which grants a very special right to people who claim exemption from secular government regulations because of their religious beliefs. The Court appeared to make clear in *Lee* that, in addition to war, it was going to draw a line at taxes, even though this position was very hard to justify under its doctrine.

In 1983, the Court produced a third example of a government interest strong enough to override a free exercise claim. *Bob Jones University v. United States*⁴⁰ involved the denial of tax exempt status to several private schools because they engaged in racial discrimination.⁴¹ The Court—without dissent on this point—agreed that there was a “compelling governmental interest” in eradicating racial discrimination in education, and that the government had “no ‘less restrictive means’ . . . available to achieve” that goal.⁴²

39. See, e.g., *First v. United States*, 547 F.2d 45, 46 (7th Cir. 1976); *Autenreith v. Cullen*, 418 F.2d 586, 587-88 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970).

40. 461 U.S. 574 (1983).

41. *Id.* at 583. One of the private schools had religious beliefs that required racial discrimination in admissions, while another had religious beliefs that barred any interracial dating or interracial marriage by students. *Id.* at 580.

42. *Id.* at 604.

The justices concluded, therefore, that the government's denial of tax exempt status to these schools did not violate the free exercise clause. Thus, after *Bob Jones University*, the Burger Court had identified three major government interests that will survive free exercise clause challenges: war, taxes, and the national policy against racial discrimination.⁴³

Two rulings, subsequent to *Bob Jones University* but prior to the Burger Court's final Term, further indicate the justices' greatly reduced enthusiasm for the "strict scrutiny" approach. Although the first decision, *Estate of Thornton v. Caldor, Inc.*,⁴⁴ did not directly implicate the free exercise clause, it is suggestive of the Court's attitude. *Thornton* involved a Connecticut statute that required private employers to give employees a day off on their Sabbath, regardless of the burden or inconvenience either to the employer or to other employees.⁴⁵ In a nearly unanimous decision, the Court held that this statute violated the establishment clause.⁴⁶ The Court reasoned that the law advanced a "particular religious practice," and that its grant of an "absolute and unqualified right not to work" abridged the constitutional separation of church and state.⁴⁷

The purpose of the Connecticut statute plainly was religious, as were the actions required of Wisconsin and South Carolina by the Court in *Yoder* and *Sherbert*. Under my proposed approach, however, a religious purpose alone is not enough to trigger a violation of the establishment clause. The state action also must pose some meaningful danger to religious liberty. Because the opportunity to be excused from work on one's Sabbath would neither coerce nor influence people to join any religion or a particular religion, and

43. Although I agree that the strict scrutiny test developed in *Sherbert* and *Yoder* by no means dictates the result reached in rather conclusory fashion by the Court in *Bob Jones University*, see Freed & Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 SUP. CT. REV. 1, 20-30, I am in accord with the Court's ruling. If the government were to waive denial of tax exempt status only for those private schools whose racially discriminatory practices were founded on religious beliefs, this would result in the use of tax funds for religious purposes, and therefore should be held to violate the establishment clause.

44. 472 U.S. 703 (1985).

45. *Id.* at 2914-15.

46. *Id.* at 2918.

47. *Id.*

because no use of tax funds for religious purposes was involved, no danger to religious freedom was posed. As a result, the Connecticut statute should be viewed simply as an attempt to accommodate religion, and not as a violation of the establishment clause. The statute certainly imposed a potential cost on employers and employees—a burden or inconvenience to accommodate the religious beliefs of certain fellow workers. As long as the statute did not coerce, compromise, or influence religious choice, however, it should not have been found violative of the establishment clause.

The Court's second decision, *Quaring v. Peterson*,⁴⁸ appeared even more threatening to the future vitality of the free exercise clause; indeed, it could fairly be described as a potential coup de grace. That case involved a Nebraska rule requiring photographs on all driver's licenses, as applied to a person who sincerely believed that the Second Commandment's prohibition of "graven images" forbade her to be photographed.⁴⁹ The United States Court of Appeals for the Eighth Circuit held that Nebraska's refusal to grant a religious exemption from this rule violated the free exercise clause.⁵⁰ The Supreme Court granted certiorari but, with Justice Powell not participating, it affirmed by an equally divided Court, without opinion.⁵¹

Any reasonable application of the "strict scrutiny" test would produce a result vindicating the free exercise claim in *Quaring*. From the claimant's standpoint, the burden of not having a driver's license obviously was substantial, given the need to have a driver's license for employment purposes and other essential activities. Although the State's interest could not be characterized as frivolous, on the other hand, it surely could not be viewed as anything more than quite modest. For example, some states, including New York, have managed to find rapid means of identification other than a driver's license photograph. The fact that four justices of the Supreme Court would reject the free exercise claim in *Quaring*, therefore, boded poorly for robust enforcement of the free exercise clause in the future.

48. 472 U.S. 478 (1985) (per curiam).

49. *Quaring v. Peterson*, 728 F.2d 1121, 1123 (8th Cir. 1984), *aff'd by an equally divided Court per curiam sub. nom. Jensen v. Quaring*, 472 U.S. 478 (1985).

50. *Id.* at 1125.

51. 472 U.S. at 478.

The product of the Burger Court's final Term, however, flashed a contrary signal. The question presented in *Goldman v. Weinberger*,⁵² whether the Air Force may prohibit an Orthodox Jewish psychologist from wearing a yarmulke while in uniform on duty at a military hospital,⁵³ seemed answerable only in favor of the individual under the test of "strict scrutiny." Although a narrowly divided Court rejected the free exercise claim, it did so by putting the case in a special "military affairs" category,⁵⁴ which greatly limited the decision's more general precedential force. Of greater consequence for the continued vitality of the free exercise clause was a majority's invocation of the strict scrutiny approach in *Bowen v. Roy*⁵⁵ in holding that a person whose sincere Native American religious beliefs forbade the use of Social Security numbers was entitled to an exemption from the requirement that recipients of food stamps and Aid to Families with Dependent Children furnish their Social Security numbers.⁵⁶ The fact that Justice O'Connor, who would have sustained the free exercise claim in *Goldman*, authored the prevailing opinion in *Roy* may be of particular significance in the years ahead.

V. GOVERNMENT ACTIONS THAT EXPRESSLY DEAL WITH RELIGION

A. Laws That Treat Religion Adversely

Another kind of government action that raises serious problems under the free exercise clause is a regulation that explicitly singles out a particular religion, or religion generally, for adverse treatment. For example, an ordinance that required Catholics to stay

52. 106 S. Ct. 1310 (1986).

53. *Id.* at 1311.

54. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Parker v. Levy*, 417 U.S. 733 (1974).

55. 106 S. Ct. 2147 (1986).

56. The district court found that an exemption in cases of this kind "would require no modifications to the . . . [government's] computer systems, would require at the most some minor extra expenditures of time by . . . [government] employees and would require no discrete financial expenditure," and that the government's "interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number" for the claimant. *Roy v. Cohen*, 590 F. Supp. 600, 607 (M.D. Pa. 1984), *vacated sub nom.* *Bowen v. Roy*, 106 S. Ct. 2147 (1986).

Consistent with my position in *Sherbert* and *Thomas*, I believe that the exemption required by the Court in *Roy* violates the establishment clause because it involves the use of tax funds to promote religious purposes.

off the streets, or forbade people from attending the church of their choice, would fall into this category. The Burger Court decision that best illustrates the proposition that such laws almost always are forbidden is *McDaniel v. Paty*,⁵⁷ which involved a Tennessee statute that disqualified clergy from either serving in the legislature or acting as delegates to a state constitutional convention.⁵⁸ Statutes that on their face put one or all religions in a disadvantageous position are quite unusual. *McDaniel* is important not so much for the Court's rationale, which was muddled by several opinions, but rather for the Court's unanimous finding that the law was invalid.⁵⁹

B. Laws That Prefer Some Religions Over Others

Government action that expressly deals with the subject of religion and effectively grants a preference among religious faiths also raises problems under the free exercise clause. The leading case is *Larson v. Valente*.⁶⁰ That case involved a Minnesota statute that imposed registration and reporting requirements on charitable organizations to prevent fraudulent solicitations and related abuses, but that exempted religious organizations that solicited more than fifty percent of their funds from their members.⁶¹ The effect of this statute was to exempt the Catholic Church from the onerous registration and reporting requirements, because it raised more than half of its money from its members, but not to exempt the Unification Church, the followers of the Reverend Moon, because it solicited more than half of its funds from nonmembers.⁶² The Court held that the Minnesota statute violated the establishment clause,⁶³ relying on a famous dictum in *Everson v. Board of*

57. 435 U.S. 618 (1978).

58. *Id.* at 621.

59. *Id.* at 629.

60. 456 U.S. 228 (1982).

61. *Id.* at 231-32.

62. *Id.* at 234.

63. *Id.* at 246.

*Education*⁶⁴ that the establishment clause bars the preference of one religion over another.⁶⁵

Larson should be seen as a free exercise clause decision parading in an establishment clause disguise. This criticism of the basis for the Court's ruling is not just caused by a sense of aesthetics; rather, it further illustrates the confusion that the Court has created with respect to establishment clause and free exercise clause doctrine. Regardless of the historical relevance that the establishment clause may have had with respect to official governmental designation of a particular religious denomination for special treatment, the Court admitted in *Larson* that its modern three-prong establishment clause test was not really fashioned for the problem of discrimination or preference among religions. Rather, the Court correctly observed that its establishment clause analysis mainly has been concerned with aid to religion generally.⁶⁶ In fact, the Court in *Larson* virtually ignored the purpose and effect prongs of the three-prong test, although it did throw in the entanglement prong at the end of the opinion.⁶⁷ The Court reasoned that allowing laws to discriminate among religions would produce politicization of religion, pointing to evidence in *Larson* that showed some real effort in the Minnesota legislature to ensure that the Catholic Church was not subject to the reporting and registration requirements but that the Unification Church was.⁶⁸

The major thrust of the Court's opinion, however, involved using what had become the classic free exercise clause analysis, conceding that discrimination among religions "is inextricably connected with the continuing vitality of the Free Exercise Clause."⁶⁹ The Court actually held that discrimination among religions must

64. 330 U.S. 1 (1947).

65. *Id.* at 15. *Everson*, the Supreme Court's first major establishment clause decision, was decided a quarter century before the Burger Court developed its three-part test for establishment clause problems in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor prohibits religion; finally, the statute must not foster 'an excessive governmental entanglement with religion.'" (citation omitted)).

66. 456 U.S. at 252.

67. *See id.* at 252-53.

68. *Id.* at 254.

69. *Id.* at 245.

survive strict scrutiny.⁷⁰ *Larson* was an easy case under this free exercise clause/strict scrutiny analysis. The Court was willing to assume that the State had a "compelling" interest in preventing fraudulent solicitation of the public.⁷¹ Strict scrutiny, however, also requires the state to have had no narrower means available, and the Court felt that the "fifty percent rule" was neither necessary nor "closely fitted" to achieving the state goal.⁷² Therefore, the Court held the law invalid.

The dissenting justices in *Larson* did not really dispute this application of the doctrine to the facts. Rather, the burden of the dissenting opinion's argument was that the Court's test was too stringent. Moreover, although Justice White did not put it quite this way, he essentially agreed with the point, suggested above, that the majority had imported a free exercise clause test into an establishment clause case. In my view, however, the Court's misstep was in viewing the challenge in *Larson* as raising an establishment clause issue to begin with.

The major disagreement between the majority and dissent concerned whether this law discriminated among religions or simply was a neutral law with a disparate impact on different religious groups. The Court adopted the former view. Justice White argued in his dissent, however, that the Minnesota law did not explicitly distinguish between religions.⁷³ He pointed out that the law named no churches. Rather, it stated general, neutral characteristics describing which religions would be exempt and which would not.⁷⁴

To agree with the dissent's analysis that this law did not explicitly distinguish between religious sects, however, is not to say how the law should have been treated. Although the Minnesota statute did not specifically give preference to some religions over others, it did expressly deal with the subject of religion, and it resulted in favoring some and disfavoring others. In my view, it should have been as vulnerable—that is, subject to the same level of scrutiny—as a general, neutral law that says nothing about religion but

70. *Id.* at 246.

71. *Id.* at 248.

72. *Id.* at 251.

73. *Id.* at 261-62 (White, J., dissenting).

74. *Id.*

that happens to have an adverse impact on some faiths, like the Wisconsin compulsory education law at issue in *Yoder*.

The problem is that when the Court has invoked the establishment clause, it has applied a much more lenient test to laws that expressly deal with religion and subject some faiths to discriminatory treatment than it has applied under the free exercise clause to general, neutral laws that come into conflict with religious beliefs. In *Gillette v. United States*,⁷⁵ for example, the Court applied a less stringent test to a provision in the Selective Service Act that exempted from the draft individuals who, because of religious training and belief, were opposed to "war in any form," but did not exempt individuals who were opposed only to "unjust wars."⁷⁶ The Court reasoned that this law did not discriminate on the basis of religious affiliation. That is true. The Selective Service Act did not say, for example, that Quakers are exempt and Catholics are not. The law, however, did plainly discriminate on the basis of the kind of religious beliefs one had—beliefs opposed to all wars rather than beliefs opposed only to unjust wars.

In *Gillette*, the Court treated the "gist of the constitutional complaint" as falling under the establishment clause.⁷⁷ The Court characterized the statute as a neutral law with a disparate impact, and ruled that as long as Congress had a "valid secular reason" for the law, that law could survive an establishment clause challenge.⁷⁸ The Court readily found a valid secular basis—ease of administration of the draft system. Thus, the Court found no violation of the establishment clause despite the law's discrimination among religious beliefs.⁷⁹

Given the Court's contemporary doctrinal treatment of the religion clauses, *Gillette* may be viewed more helpfully as a free exercise case. And, employing a free exercise clause analysis, the Court may well have decided the case correctly. In reality, the Court did not sustain the draft law merely on the basis of some valid secular purpose. If that were all that the Court had required in *Larson*, for example, it would have had no problem upholding the Minnesota

75. 401 U.S. 437 (1971).

76. *Id.* at 440.

77. *Id.* at 449.

78. *Id.* at 454-60.

79. *Id.* at 462.

statute challenged in that case. Surely some secular basis is available to distinguish between groups that raise more than fifty percent of their funds from the outside and groups that do not. The religious organizations in the former category reasonably may be thought to pose a greater danger of fraud, which may not provide compelling justification for the classification, but which does represent some valid neutral basis for it.

In reality, I believe that the Selective Service Act survived strict scrutiny in *Gillette*. The powerful government interest in raising an army and the difficulties in administering a draft exemption based on "just war" beliefs may well have justified the conclusion that the statutory discrimination among religious beliefs was based on a compelling or essential or overriding government interest.⁸⁰

In sum, the doctrine in *Gillette*, that a valid secular basis for de facto religious discrimination is enough to sustain it under the establishment clause, plainly supports Justice White's dissent in *Larson*. The *Gillette* doctrine, however, effectively has been abandoned, and rightly so. Laws that explicitly deal with the subject of religion, and result in a preference of some religions over others, fall into a separate category of government action that ought to be treated under the free exercise clause. Although the Court in *Larson* did not purport to analyze the statute in that case under the free exercise clause, it explicitly employed a rationale that does. Both the result and most of the rationale in that case, therefore, were eminently sensible.

80. *But cf. Greenawalt, All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 68-82.