IN FAVOR OF RESTORING THE *SHERBERT* RULE—WITH QUALIFICATIONS

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I. INTRODUCTION

In 1963, in *Sherbert v. Verner*, the Supreme Court held that when generally applicable regulations of conduct that have been enacted for secular purposes conflict with the requirements of certain religions, the Free Exercise Clause requires an exemption, unless the law survives "strict scrutiny."[1] In 1990, in *Employment Division v. Smith*, the Court changed this rule in most circumstances, stating that the Free Exercise Clause is not violated by application of a neutral law to religiously motivated conduct.[2]

Part II of this Article points out that experience over a quarter of a century demonstrates that the *Sherbert* rule has been applied so as to provide a very diluted version of the traditional strict scrutiny criterion. Although the *Smith* rule contains many opportunities for exemptions to its approach, in the two decades since the ruling, the Court has done nothing to clarify its ambiguities.[3] Because active judicial review is required to secure religious liberty for nonmainstream religions, a clearly stated, but qualified version of true strict scrutiny—not a generally watered down one—is needed for vigorous protection of judicial review.[4] Part III proposes five qualifications that should satisfy this need.

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1. Sherbert v. Verner, 374 U.S. 398, 402-07 (1963).

2. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 878-80 (1990) [hereinafter Emp't Div. v. Smith], *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

3. *See infra* Part II.

4. *See infra* Part II.

II. HISTORY OF THE *SHERBERT* RULE

Two decades ago, the Supreme Court abandoned the principle established in *Sherbert* a quarter of a century earlier—that when government regulations of conduct that are generally applicable and enacted for secular or neutral purposes conflict with action or inaction demanded by the tenets of a particular religion, the Free Exercise Clause requires an exemption, unless the law survived a test that was fairly close to strict scrutiny.[5] The state would have to show that the exemption undermined an overriding, substantial, compelling, or important interest that could not be achieved by narrower alternative means.[6] Instead, the *Smith* Court held that the Free Exercise Clause does not bar application of a neutral, generally applicable law to religiously motivated action.[7]

Smith's idea of no official preference for religion over nonreligion responds to our nation's strong general commitment to equality. Beyond its intuitive appeal, this rule of "religion blindness" alleviates substantial problems that are present under other approaches, including mine. Most notably, it often eliminates the need to define "religion." That definition may be avoided as long as the government benefits or burdens are distributed more broadly—that is, so long as "religion" is included within a sufficiently larger category.

Nonetheless, further analysis of the *Smith* opinion undermines its seeming clarity, particularly its efforts to distinguish, rather than overrule, *Sherbert* and *Wisconsin v. Yoder*.[8] First, the Court noted that *Sherbert* and later unemployment compensation cases arose "in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct . . . [and] consideration of the particular circumstances behind an applicant's unemployment."[9] It then declared: "[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[10]

But "individualized" exemptions and the opportunity for consideration of particular circumstances exist for a great many types of regulations.[11] In fact, "most of the Supreme Court's free exercise cases [—including many finding no constitutional violation—] resemble the unemployment compensation cases in that they involve individuated governmental assessments of the claimant's

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5. *See supra* notes 1-2 and accompanying text.

6. *See Sherbert*, 374 U.S. at 406-07.

7. *See Smith*, 494 U.S. at 890.

8. *See id*. at 881-84; *Sherbert*, 374 U.S. 398; Wisconsin v. Yoder, 406 U.S. 205 (1972).

9. *Smith*, 494 U.S. 872, 884; *see also, e.g.*, Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981).

10. *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

11. *See infra* notes 12-15 and accompanying text.

circumstances."[12] To illustrate, the Oregon statute in *Smith* prohibited possession of a "controlled substance" unless prescribed by a doctor,[13] the Selective Service Act in *Gillette v. United States* exempted various groups, including those opposed to "war in any form,"[14] and the Sunday-closing law in *Braunfeld v. Brown* applied only to retail merchants selling specifically listed items.[15] Thus, as Michael McConnell concludes, "The unemployment cases cannot be distinguished on this ground."[16]

Second, *Smith* disposed of the non-unemployment compensation precedents by contending that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[17] This assertion holds true for many free speech and free exercise cases, such as *Cantwell v. Connecticut* and the *Flag Salute Cases*.[18] *Yoder*, however, cannot legitimately be described as involving a "hybrid" claim.[19] *Smith* states that the additional constitutional protection involved in *Yoder* was "the right of parents, acknowledged in *Pierce v. Society of Sisters*, . . . to direct the education of their children."[20] But *Yoder* expressly held that "parents do not have the right to violate the compulsory education laws for nonreligious reasons."[21] Moreover, attributing the result in *Yoder* to its combination of free exercise rights with the substantive due process right of parents to direct their children's education is especially ironic for *Smith*'s author, Justice Scalia, who rejects using the Due Process Clause "to invent new [constitutionally protected substantive interests]," especially, in respect to disobeying compulsory education laws, when there is "a societal tradition of enacting laws denying the interest."[22]

Third, significant ambiguities are also presented, as later applied in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, by the *Smith* Court's emphasis that the law must be neutral; government action that discriminates—singles out religion for adverse treatment—violates the Free Exercise Clause

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12. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1123 (1990) (emphasis omitted).

13. *Smith*, 494 U.S. at 874.

14. Gillette v. United States, 401 U.S. 437, 440 (1971).

15. Braunfeld v. Brown, 366 U.S. 599, 600 (1961).

16. McConnell, *supra* note 12, at 1124.

17. *Smith*, 494 U.S. at 881.

18. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637-39 (1943); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940).

19. *See Smith*, 494 U.S. at 881 n.1.

20. *Id.* (citation omitted); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925).

21. McConnell, *supra* note 12, at 1121 (emphasis omitted); *see* Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972).

22. Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (emphasis omitted).

unless it survives strict scrutiny.[23] As all know, however, "discrimination" is not a self-defining term, but rather a highly complex concept.[24] Just a few examples make the point: If a state bars ingestion of all alcoholic beverages but exempts sacramental use, may it bar ingestion of all hallucinogenic substances without exempting sacramental use? If Oregon had permitted the medicinal use of peyote (or marijuana) in designated circumstances to relieve pain, would the law barring other uses of peyote—including sacramental use—be "generally applicable"?[25] Note as well in this context the potential relevance of the *Smith* Court's preservation of the "individualized" exemption ground.[26]

It may well be that a careful examination of lower court opinions applying *Smith* over the past twenty years would disclose that they have given it a generous interpretation, thus resulting in minimal adverse consequences for free exercise rights.[27] Moreover, the fact that *Smith* left virtually all possibilities for accommodation of free exercise interests with the majority-dominated political process does not mean that nonmainstream religions will end up with no meaningful protection. Consider the following evidence from Congress and state legislatures: In *Lyng v. Northwest Indian Cemetary Protective Ass'n*, the Court denied a plea by Native Americans to stop the construction of a forest service road through their sacred lands.[28] Although this minority religion lost in the courts, it prevailed in the Executive Branch; the road was administratively relocated after the lawsuit.[29] In *Goldman v. Weinberger*, the Court rejected an Orthodox-Jewish Air Force doctor's free exercise claim to wear a yarmulke while visiting patients in the hospital—an act that violated Air Force dress regulations.[30] Congress responded by creating an exemption allowing the practice.[31] Following the *United States v. Lee* decision, which denied an Amish employer's refusal to pay social security tax for his co-religionist employees because the Amish faith forbids both payment and receipt of social security benefits, Congress granted the Amish an exemption.[32] Moreover, while the Court ordered an exemption for the Amish from Wisconsin's mandatory school attendance law in *Yoder*, most states had already voluntarily accommodated the sect.[33] Although the Court refused a free exercise challenge by Sabbatarians to Sunday closing laws in *Braunfeld*, most

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23. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-34 (1993); *Smith*, 494 U.S. at 877-79.

24. *See* McConnell, *supra* note 12, at 1139-40.

25. *See id*. at 1120-21.

26. *See supra* notes 18-20 and accompanying text.

27. *See* Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1693-97 (2011).

28. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-42 (1988).

29. *Id.* at 444.

30. Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986).

31. *See* 10 U.S.C. § 774 (2006).

32. United States v. Lee, 455 U.S. 252, 260-61 (1982); *see* Exemption Act of 1988, 102 Stat. 3781 (current version at 26 U.S.C. § 3127 (2006)).

33. Wisconsin v. Yoder, 406 U.S. 205, 236 n.23 (1972).

states had already excused business owners who recognized a different Sabbath day and preferred to open on Sundays.[34] Indeed, despite the Court's failure to require an exemption from drug regulations for the sacramental use of peyote in *Smith*, twenty-three states and the federal government had already required it.[35] And after Oregon prevailed in *Smith*, its legislature chose to create an exception.[36]

Perhaps the strongest evidence against the proposition that "in practice . . . big religions win and small religions lose" under the Court's neutrality approach is the ill-fated Religious Freedom Restoration Act of 1993 (RFRA), which sought to restore the pre-*Smith* standard of free exercise protection.[37] The RFRA produced a truly extraordinary political coalition—bringing together such unlikely partners as Jerry Falwell and the ACLU—and passed through Congress with almost no opposition.[38] The RFRA clearly benefited those religions poorly represented in, and often overlooked by, the majoritarian political process.[39] The fact that "more than half the states appear[ed] to have adopted some version of the *Sherbert-Yoder* test" significantly ameliorated the RFRA's demise.[40]

Even accounting for this periodic sympathetic treatment of smaller religions in the political process, legislatures are highly imperfect protectors of individual constitutional rights.[41] They can be careless, insensitive, or even overtly hostile to a particular sectarian interest; they can be unaware of certain religious needs because a group is obscure or inadequately organized; or they may simply not have the time to consider a religious exemption request, all to the same effect.[42] As a consequence, there is too great a risk that minority faiths will suffer serious restrictions on their ability to follow their beliefs.[43] In sum:

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34. Braunfeld v. Brown, 366 U.S. 599, 608 & n.5 (1961).

35. *See* Emp't Div. v. Smith, 494 U.S. 872, 913 n.5 (1990) (Blackmun, J., dissenting).

36. *See* OR. REV. STAT. § 475.840 (2009).

37. Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CALIF. L. REV. 1059, 1063 (1999); *see* Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 20000bb-4 (2006). RFRA was partially struck down as unconstitutional, as applied to the states, in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

38. *See* Peter Steinfels, *Beliefs*, N.Y. TIMES, June 28, 1997, at A27. RFRA passed unanimously in the House of Representatives and drew only three negative votes in the Senate. Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 160 (1997). The political "coalition stretched from the American Civil Liberties Union to the Church of Jesus Christ of Latter-day Saints, from the Union of American Hebrew Congregations to the Southern Baptist Convention and the American Muslim Council." Steinfels, *supra*, at A27.

39. *See* Steinfels, *supra* note 38, at A27 (proposing that the RFRA was enacted in response to the political protection needed for small or unpopular religious groups).

40. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 212 (2004).

41. *See id.* at 210.

42. *See id.* at 204-05 ("A law that permits individualized exemptions lends itself to discrimination in administration, and because the allowance of such exemptions is likely to be dispersed in time and place, such discrimination will often be difficult to detect and prove.").

43. *See id.* at 183.

> [P]owerful and influential religions will usually receive adequate protection in the political arena. One rarely sees laws that force mainstream Protestants to violate their consciences. Judicially enforceable exemptions under the free exercise clause are therefore needed to ensure that unpopular or unfamiliar faiths will receive the same consideration afforded mainstream or generally respected religions by the representative branches.[44]

It must be acknowledged that despite the powerful protection for religious liberty articulated in *Sherbert*, it was fulfilled only in the unemployment compensation cases and in *Yoder*.[45] As described above, the Court's rulings against the Amish in *Lee* and the Orthodox Jews in *Goldman* sharply illustrate the watered-down version of the strict scrutiny test that evolved in this area.[46] As Justice Scalia argued, judicial application of strict scrutiny in this context, "across the board, to all actions thought to be religiously commanded[,]" would lead to alternatively undesirable results: either the degree of scrutiny would end up being diluted, or "judges [would] regularly balance against the importance of general laws the significance of religious practice[,]" a process that becomes increasingly unwanted "in direct proportion to society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[47] Indeed, the diversity of religious beliefs in the United States, which continues to increase, would make virtually "every regulation of conduct" open to challenge: "[R]eligious exemptions from civic obligations of almost every conceivable kind" could be constitutionally ordered.[48] Even the most common and mundane government requirements, such as photographs on driver's licenses,[49] acquisition of social security numbers,[50] and activities such as building roads[51] or running a selective service system,[52] can conflict with religious beliefs. To make the point most simply and forcefully, government regulations do not intrude on any other personal constitutional right with nearly such breadth. That many may approve of the results reached by courts granting exemptions from government regulations on free exercise grounds does not refute the point that the judiciary would be more deeply involved here than in virtually all other areas.

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44. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419-20 (1990).

45. *See* Emp't Div. v. Smith, 494 U.S. 872, 901 (1990).

46. *See id.* at 883-85. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 253 n.3 (1982) (Stevens, J., concurring)).

47. *Id.* at 888, 889 n.5.

48. *Id.* at 888.

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

50. *See* Bowen v. Roy, 476 U.S. 693, 695 (1986).

51. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 443 (1988).

52. *See* Gillette v. United States, 401 U.S. 437, 439 (1971).

The reality is that there is an irresistible need for placing limits on judicial power, and the absences of such constraints were a primary reason—if not the only cause—for the Court's rejection of *Sherbert*'s earlier, more protective Free Exercise Doctrine.[53] To respond to this imperative, let me suggest several qualifications of the strict scrutiny rule for applying the Free Exercise Clause. Although all are imperfect, some with greater difficulties than others, I believe that adoption of restrictions is crucial for vigorous judicial protection of religious liberty.

III. SUGGESTED QUALIFICATIONS

Definition of "Religion": The most important—and probably most controversial—special feature involves the content of "religion" for purposes of the Free Exercise Clause. My view has been that a sincerely held belief in "extratemporal consequences"—that the results of actions taken pursuant or contrary to the dictates of a person's faith may well extend in some meaningful way beyond one's lifetime, either by affecting their own eternal existence or by producing a permanent and everlasting significance and place in reality for all persons that follow—is a sensible and desirable criterion for determining when the Free Exercise Clause should trigger judicial consideration of whether an exemption from general government regulations of conduct is constitutionally required.[54] In my view, the strong protection from government power to regulate conduct afforded by strict scrutiny should be reserved for those who personally believe, regardless of any formal religious affiliation, that departure from certain articles of faith will carry uniquely severe consequences extending beyond their present existence.

Cognizable Inquiry: Although our compassionate instincts are hurt when government rules produce legitimate feelings of alienation or offense by some people, I believe that an injury must be greater and more palpable than such "atmospheric burden" in order to find an abridgement of the Free Exercise Clause when the state acts for wholly neutral purposes and consequences.[55] To do otherwise works to deter effective protection by the courts.

Exemption Only: In all cases where the Court found a free exercise violation under *Sherbert*, the challengers simply sought exemptions for themselves.[56] In *Lyng*, by contrast, the Native Americans wanted the government to altogether abandon the route for the roadway it intended to build.[57] In practice, the Court has granted remedies that would force the

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53. *See supra* note 2 and accompanying text.

54. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597-601 (1982) (discussing the meaning of "extratemporal consequences" and their role with regards to the religion clauses).

55. *See* Ira C. Lupu, *Where Rights Begin: The Problems of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 987 (1989).

56. *See, e.g.*, *supra* notes 49-50, 52 and accompanying text.

57. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-43 (1988).

government to eliminate an entire program only when the government action has a religious purpose—not, as here, when the law is enacted for strictly secular reasons.

The matter of exemptions only is not uncomplicated, especially as to how to characterize action as "abandonment" rather than "exemption." For example, one might well question the difference between requiring the government to build a road a few miles away from its preferred site and requiring it to exempt certain individuals from an important general program like the military draft. Nonetheless, in order to restrict the policymaking role of judges when they enforce strict scrutiny in free exercise cases, I urge adoption of a rule that would preclude the judiciary from balancing the effect of the breadth of the remedy on the government's interest. Under my approach, those free exercise claims seeking relief that would require the government to abandon its program entirely would be distinguished and denied.

Alternative Burden: Just as Congress has demanded that religious objectors to military duty engage in alternative forms of service,[58] and state lawmaking bodies have required that Sabbatarians excused from Sunday closing laws must refrain from business on their Sabbath rather than on Sunday,[59] the Court should suggest or require that an alternative burden be imposed on those who would qualify for religious exemption. This would relieve pressures to violate their beliefs for members of religious faiths but would not markedly benefit them compared to others.

Establishment Clause: A constitutionally grounded point is that the exemption under the Free Exercise Clause may not violate the Establishment Clause.[60] It will do so under my system for judicial interpretation of the Religion Clauses if a government accommodation for either mainstream or minority religions is achieved at the expense of religious freedom. This takes place when favoring individuals because of their religious beliefs has the effect of (a) coercing or significantly influencing people either to violate their religious tenets, or to engage in religious activities or adopt religious beliefs when they would not otherwise do so, or (b) compelling people to afford financial support either to their own religion or to that of others.[61]

In sum, the substantial narrowing of the constitutional right caused by the qualifications just outlined, thus reducing the number of claims given protection, makes adoption of strict scrutiny—that the government interest in not granting an exemption must be necessary to a compelling interest—to be a particularly appropriate measure when compared with other, less protective levels of review.

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58. *See* Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) (1964 Supp. V).

59. *See* Braunfeld v. Brown, 366 U.S. 599, 608 & n.5 (1961).

60. *See* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 698 (1980).

61. *See id.* at 700.

The "rational basis" standard—denial of an exemption need only be rationally related to a constitutionally permissible state goal[62]—may be easily rejected because it affords no greater protection than the Due Process Clause already grants against government interference with any "liberty" or "property" interest. Thus, it would deprive the Free Exercise Clause of any independent force.

A conventional "balancing" approach, in which the Court weighs the strength of the state interest against the burden on religious exercise, is deficient, in my view, for several reasons. First, as I have noted, this involves a comparison of incommensurables that creates serious problems of judicial prerogative in constitutional adjudication. I believe it should be avoided at most costs. It must be conceded that no standard of judicial oversight (including the one I propose here) can wholly avoid the use of political policy criteria by courts. Still, the difference in degree of opportunity for such judgments between a straightforward process of interest-balancing and the test of strict scrutiny is so great as to effectively amount to a difference in kind.

IV. CONCLUSION

Neither the *Sherbert* nor *Smith* decisions satisfactorily secure religious freedom for the nation's smaller religions. The Court should adopt a different judicial approach as outlined above.

62. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).