SMITH, *BALLARD*, AND THE RELIGIOUS INQUIRY EXCEPTION TO THE CRIMINAL LAW

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I. INTRODUCTION

Over twenty years ago, in *Employment Division v. Smith*, the United States Supreme Court held that the Free Exercise Clause does not provide constitutionally compelled exemptions for religious believers from compliance with the criminal law.[1] As the *Smith* Court stated, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[2]

Smith was extraordinarily controversial when decided.[3] A broad coalition of religious and nonreligious groups spanning across ideological lines condemned the decision as "disastrous for the free exercise of religion."[4]

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1. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (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 v. Smith], *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub.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)).

2. *Id.* (internal quotation marks omitted). In so holding, the Court abandoned the "compelling interest test" that it had previously used in adjudging free exercise cases. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963). The compelling interest test required that "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" *Id*. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

3. Nelson Tebbe, Smith *in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2056-57 (2011).

4. Linda Greenhouse, *Court Is Urged to Rehear Case on Ritual Drugs*, N.Y. TIMES, May 11, 1990, at A16, *available at* http://www.nytimes.com (search article title) (discussing the motion to the Court to reconsider the case that had been filed by a coalition of groups that included the American Jewish Congress, the National Council of Churches, the National Association of Evangelicals, the American Friends Service Committee, and the General Conference of Seventh-day Adventists, as well as nonreligious groups such as the American Civil Liberties Union, People for the American Way, and the Rutherford Institute). The *Times*

Leading academics argued that the opinion was not only wrong as a matter of constitutional understanding but was also flatly disingenuous.[5] Congress enacted two laws that attempted to reverse the effects of the decision,[6] and state legislatures joined in, passing a host of parallel state provisions attempting to achieve the same goal.[7]

Twenty years later, *Smith* remains contentious.[8] The decision still sparks heated critical response.[9] Opponents strive to undercut the decision and rebuild the jurisprudential framework that would, in some circumstances, allow religious believers to receive constitutionally compelled exemptions from neutral laws.[10] Symposia such as this one continue to debate whether "*Smith* [got] it right."

The sustained opposition to *Smith* is easily explained. The effects of the rule in *Smith* can be harsh. In *Smith* itself, the decision meant that Native Americans did not have a constitutional right to ingest peyote, although peyote use was a long-standing and central sacrament in the practices of the Native American Church,[11] and its illegalization threatened the continued viability of

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article quoted Oliver S. Thomas, general counsel of the Baptist Joint Committee on Public Affairs, as noting that all these diverse groups agree that the opinion was "disastrous for the free exercise of religion." *Id.*

5. *E.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 33; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990).

6. *See* 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)); Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc to 2000cc-5 (2006)). The application of RFRA to the states was later struck down in *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). *See generally* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (holding that the application of the RFPA continues to apply to the federal government). The Court upheld RLUIPA against an Establishment Clause challenge in *Cutter v. Wilkinson*, 544 U.S. 709, 724-26 (2005).

7. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 (2010) (compiling the state RFRA laws).

8. *See* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 925 (2000) ("Almost from the moment that the Supreme Court abandoned the religious exemption doctrine in *Employment Division v. Smith*, its defenders have worked to bring it back.").

9. *See, e.g.*, Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1755 (2011) ("Twenty years ago, the Supreme Court dealt a blow to religious liberty."); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 159 (2008) (contending that *Smith* was particularly harmful to the rights of religious minorities).

10. *E.g.*, William P. Marshall, Smith*,* Christian Legal Society*, and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1937-38 (2011) (noting that Justice Alito's dissent in *Christian Legal Society Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971 (2010) is, in effect, an argument for constitutionally compelled free speech exemptions from neutral laws for religious organizations). The Supreme Court may again revisit the question of constitutionally compelled exemptions from neutral laws this upcoming term when it decides whether there is a "ministerial exception" for religious organizations from civil rights laws. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (U.S. Mar. 28, 2011) (No. 10-553). The Court might, however, be able to avoid the constitutional question if it is able to decide the matter on statutory grounds.

11. *See* People v. Woody, 394 P.2d 813, 817-18 (1964) (noting the importance of the peyote sacrament to the Native American Church and tracing its history back to at least 1560).

the religion.[12] *Smith*, if taken seriously, would also mean that Catholics or Jews living in a community that forbade the sale and use of alcoholic products would have no free exercise right to use wine as part of their religious ceremonies.[13]

But although harsh with respect to religious belief, *Smith* is neutral between religion and nonreligion.[14] Its holding that religious believers are not entitled to constitutionally compelled exemptions treats religious adherents exactly the same as it treats nonreligious believers whose consciences and beliefs place them in conflict with the criminal law.[15] Neither is entitled to a constitutional defense.[16]

I have spent significant time defending *Smith* exactly on these grounds[17]—*Smith* is correct precisely because it rejects the premise that the Free Exercise Clause requires that religious believers should receive constitutionally compelled exemptions from neutral laws that are not available to those persons presenting parallel nonreligious beliefs.[18] As I have maintained, preferring religion to nonreligion in this manner is inconsistent with the constitutional principle of the equality of ideas embedded in the speech clause.[19]

There is, however, an area in religion clause jurisprudence in which religious and nonreligious criminal defendants are treated differently. Over forty-five years before *Smith,* in *United States v. Ballard*, the Court held that the First Amendment prevents the government from questioning the validity of religious beliefs.[20] This aspect of the religion clause doctrine arguably *does* further a preference for religious over nonreligious believers because it means that religious believers may have defenses to certain criminal prosecutions that are unavailable to nonreligious defendants.[21] In prosecuting a faith healer for

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12. *See* GARRETT EPPS, PEYOTE VS. THE STATE: RELIGIOUS FREEDOM ON TRIAL 102-17 (Univ. of Okla. Press, Paperback ed. 2009) (2001) (offering an in-depth and critical account of the *Smith* litigation, including its effects on the Native American religion).

13. *See, e.g.*, Arnold H. Loewy, *Rejecting Both* Smith *and RFRA*, 44 TEX. TECH L. REV. 231 (2011).

14. *See* Emp't Div. v. Smith, 494 U.S. 872, 880-82 (1990). *But see* Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1818 (2011) (arguing that the effects of *Smith* were not as dire as predicted).

15. *See Smith*, 494 U.S. at 888-90.

16. *See id.*

17. *See, e.g.*, William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 198 (2000) [hereinafter Marshall, *Equality*]; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-13 (1991) [hereinafter Marshall, *In Defense of* Smith].

18. I should note, however, that *Smith* itself was not overtly based on equality grounds. Justice Scalia's opinion instead rested primarily on his assertion that allowing exemptions from the criminal law based upon a defendant's religious belief would allow every person to "become a law unto himself." *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)). Other commentators, however, have also defended *Smith* on equality grounds. *See, e.g.*, Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 555-57 (1998); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247-50 (1994).

19. *See* Marshall, *In Defense of* Smith, *supra* note 17, at 319-23.

20. *See* United States v. Ballard, 322 U.S. 78, 86 (1994). *Ballard* does not make clear whether the decision is based on the Free Exercise Clause, the Establishment Clause, or both.

21. *See* Marshall, *In Defense of* Smith, *supra* note 17, at 195-96.

religious fraud, for example, the government may not ask the jury to evaluate whether the defendant intended to defraud on the basis of the veracity of the defendant's purportedly fraudulent assertions.[22] No similar disability is imposed upon the government, in contrast, in prosecuting fraud based upon a defendant's nonreligious statements that, for example, the elixir she is selling can cure the victim's ills.[23] That is, in cases not implicating religious belief, the government may prove intent to defraud by showing that a defendant's statement "if you buy this elixir, it will cure you" is not a credible assertion.[24] The government cannot, however, prove fraud in its case against the faith healer by showing that the defendant's religiously based assertion "if you give me money, God will cure you" is similarly noncredible.[25]

This Article addresses the relationship between *Smith* and *Ballard*. As I hope to explain, their superficial asymmetry—religion is not entitled to special exemption from the criminal law (the equality principle), but religious adherents may be uniquely entitled to not have the validity of their beliefs questioned (the no-inquiry principle)—is actually compatible.[26] Indeed, as I will show, one of the foundational bases of the *Smith* opinion was the Court's desire to avoid the kind of inquiry into the validity of religious belief with which *Ballard* was so concerned.[27]

Part II of this Article provides the necessary background by canvassing the Court's free exercise jurisprudence. Part III then revisits one of the Court's pre-*Smith* decisions, *Thomas v. Review Board*.[28] After discussing the *Thomas* opinion, the section argues that the facts of the case were such that it set the stage for both the *Smith* decision and also for the continued vitality of *Ballard*. Part IV focuses on *Ballard* and the reasons that support the no-inquiry principle. Part V then discusses whether *Smith* and *Ballard* are reconcilable. It contends that even though *Ballard*'s prohibition on the government's inquiry into the validity of religious belief uniquely benefits religion, that benefit is justified. Unlike the free exercise claim that religious beliefs are entitled to special exemption because they are uniquely constitutionally significant, the advantages to religion that are the products of the no-inquiry principle are based upon concerns of the harms raised by government inquiry and not the purported constitutional value of the belief itself.[29] The section accordingly concludes that *Smith* and *Ballard* are both consistent and correctly decided.

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22. *See Ballard*, 322 U.S. at 86.

23. *See* Manta v. Chertoff, 518 F.3d 1134, 1142 (2008) (stating that "intent to defraud may be inferred from circumstantial evidence").

24. *See id.*

25. *See Ballard*, 322 U.S. at 89.

26. This Article expands upon the relationship between the equality and no-inquiry principles that I had begun to develop in a previous writing. *See* Marshall, *Equality*, *supra* note 17, at 198-202.

27. *See infra* text accompanying notes 130-34.

28. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981) [hereinafter Thomas v. Review Bd.].

29. *See infra* Part IV. This Article does not address criminal law doctrines such as the "deific decree" defense in which the courts treat religious beliefs as a form of psychotic delusion because those doctrines

II. A FREE EXERCISE OVERVIEW

A. Free Exercise and the Road to Smith

The Court's first free exercise case, *Reynolds v. United States*, employed what in modern parlance might be termed as "minimal" or "rational basis scrutiny"[30] in upholding a criminal anti-polygamy law against First Amendment challenge.[31] After concluding that the anti-polygamy law was "within the legislative power of Congress," the Court quickly dismissed the free exercise claim without any inquiry as to the effects of the law on the religious believer.[32] To the Court, excepting religious believers from the criminal prohibitions:

> would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . [To hold otherwise] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[33]

Reynolds was the law for over eighty years until the Court's decision in *Sherbert v. Verner*.[34] In *Sherbert*, in reviewing a claim by a Seventh-day Adventist that she had been improperly denied employment benefits because her unavailability to work on Saturdays was based upon her religious belief, the Court heightened its measure of review in cases involving free exercise challenges.[35] According to *Sherbert*, any government infringement on free exercise rights must be supported by a compelling state interest.[36]

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cannot be understood as providing religious exemptions from the criminal law. The deific decree defense applies when "a party performs a criminal act, knowing it is morally and legally wrong, but believing, because of a mental defect, that the act is ordained by God." State v. Crenshaw, 659 P.2d 488, 494 (Wash. 1983) (citing People v. Schmidt, 110 N.E. 945, 950 (N.Y. 1915)). The defense might then apply, for example, in a case in which a mother killed her child believing that God had spoken to her and commanded the act. *See id*. In such a case, "[a]lthough the woman knows that the law and society condemn the act, it would be unrealistic to hold her responsible for the crime, since her free will has been subsumed by her belief in the deific decree." *Id.* (citing *Schmidt*, 110 N.E. at 949-50). In these cases, then, the defendant is not excused from the application of the criminal law because she is religious; she is excused because she is considered to be lacking the necessary mental capacity for conviction. *See* Grant H. Morris & Ansar Haroun, "*God Told Me to Kill": Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 997-1018 (2001). For scholarly examinations of the deific decree doctrine, see, for example, *id.* and Christopher Hawthorne, "*Deific Decree": The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1908-09 (2000).

30. Minimal basis scrutiny requires only that the measure in question be supported by a rational government interest. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (applying the rational basis test to a substantive due process challenge); *see also* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (applying the rational basis test to an equal protection claim).

31. *See* Reynolds v. United States, 98, U.S. 145, 165 (1878).

32. *Id.* at 166, 168. To be sure, the *Reynolds* Court did spend some time emphasizing the strength underlying the state's interest in outlawing polygamy. *See id.* at 164-66.

33. *Id.* at 166-67.

34. Sherbert v. Verner, 374 U.S. 398 (1963).

35. *See id.* at 409. In an earlier case, the Court had indicated that heightened scrutiny should be used when evaluating a free exercise challenge, but because the Court sustained the challenged law in that case

Sherbert's compelling interest test, however, was never rigorously applied, and the Court, in a wide range of decisions—many of which did not involve particularly strong countervailing state interests—routinely turned back free exercise claims.[37] The Court, for example, denied a free exercise challenge to the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act.[38] It held that there was no free exercise right to be exempted from the government's use of social security number registration requirements in food stamp and welfare programs.[39] The Court rejected free exercise claims in all cases arising from prisons and the military, contending that special deference to authority was required in these contexts.[40] It refused all claims asking for free exercise exemptions from tax laws.[41] And, in a very far-reaching decision, the Court ruled that the Free Exercise Clause was inapplicable to a claim brought by Native Americans seeking to prevent the government from developing certain lands that were government-owned but sacred to Native American religious heritage.[42] As the *Lyng* Court explained, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[43]

At the same time, the Court vindicated free exercise interests in only five cases between when *Sherbert* was decided in 1963 and the *Smith* decision was

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(a Sunday closing measure) against the free exercise attack, the reference to heightened scrutiny was dicta. *See* Braunfield v. Brown, 366 U.S. 599, 607 (1961).

36. *See Sherbert*, 374 U.S. at 406-09.

37. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413-37 (1992) (examining how courts had applied the compelling interest test prior to *Smith*); *see also* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (noting that the test may have been strict in theory, but not in fact). Even Michael McConnell, perhaps the compelling interest test's most ardent defender, described the pre-*Smith* Court's application of the compelling interest test as a "misnomer" because the test had been so leniently applied. *See* McConnell, *supra* note 5, at 1127.

38. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 306 (1985) (rejecting a claim by a religious institution that it did not have to comply with the FLSA because the receipt of wages conflicted with its workers' religious beliefs).

39. *See* Bowen v. Roy, 476 U.S. 693, 707 (1986) (rejecting a free exercise claim against the government's use of a social security number in reference to their child because using a number in this manner violated their religious beliefs).

40. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (finding prison restrictions on attending religious services did not violate the Free Exercise Clause); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (upholding a military uniform requirement that prohibited the wearing of religious head covering against a free exercise challenge).

41. *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1990) (holding no free exercise right to exemption from state sales tax on religious organization's sale of religious literature); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that denial of tax-exempt status to religiously affiliated university that discriminates on the basis of race did not violate Free Exercise Clause); United States v. Lee, 455 U.S. 252, 261 (1982) (denying Amish employer an exemption from social security tax).

42. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 476 (1988). The special significance of *Lyng* to the development of free exercise jurisprudence is discussed in Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 945 (1989).

43. *Lyng*, 485 U.S. at 448 (quoting *Bowen*, 476 U.S. at 699).

announced in 1990, and even that figure is inflated.[44] Four of those cases, including *Sherbert*, addressed essentially the same question: Could the State deny benefits to unemployment compensation applicants who claimed they were not available for work because of religious reasons?[45] In each of these cases, the Court ruled that a religious claimant could not be forced to choose between the receipt of government benefits and the precepts of her religion.[46] The only other case upholding a free exercise challenge was the Court's iconic decision in *Wisconsin v. Yoder*, holding that the Amish were entitled to constitutional exemption from compulsory-education laws,[47] a decision that appeared to be as much about the uniqueness of Amish life as it was about religion.[48]

B. Employment Division v. Smith

Against this background, the Court decided *Employment Division v. Smith*.[49] The *Smith* litigation arose when two counselors at a private drug rehabilitation organization, Alfred Smith and Galen Black, were terminated from their jobs "because they ingested peyote for sacramental purposes at a ceremony of the Native American Church."[50] They subsequently applied for unemployment compensation, but the Oregon Employment Division denied their request on the basis of its determination that they had been fired for employee-related "misconduct."[51] Smith and Black appealed, claiming that the denial of benefits violated their rights under the Free Exercise Clause.[52]

The case went twice to the United States Supreme Court.[53] The first time the Court remanded the case to the Oregon Supreme Court in order to determine whether Smith's and Beck's use of peyote for sacramental purposes violated the state's criminal law.[54] After the Oregon Supreme Court ruled that

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44. *See, e.g.*, Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam) (affirming, by an equally divided Court, a lower court decision that a Jehovah's Witness was entitled to a free exercise exemption from a law requiring that she have her picture on her driver's license).

45. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 832 (1989); Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 137 (1987); Thomas v. Review Bd., 450 U.S. 707, 709 (1981).

46. *See Frazee*, 489 U.S. at 832; *Hobbie*, 480 U.S. at 146; *Thomas*, 450 U.S. at 717-18; Sherbert v. Verner, 374 U.S. 398, 410 (1963).

47. Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972).

48. *See, e.g.*, Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 388 (1986) ("The Supreme Court ruling in *Yoder* was firmly anchored to the special situation presented by the Amish faith.").

49. *See* Emp't Div. v. Smith, 494 U.S. 872, 880 (1990).

50. *Id.* at 874.

51. *Id.*

52. *Id.*

53. *Id.* at 875-76.

54. Emp't Div., Dep't of Human Res. of Or. v. Smith, 485 U.S. 660, 673-74 (1988).

it was so proscribed,[55] the case returned again, and the Supreme Court framed the issue before it as follows:

> This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.[56]

The actual issue decided by the Court in *Smith*, however, may be stated more simply: Does the Free Exercise Clause allow for religious claimants to be exempted from neutral laws of general applicability?[57] The Court's landmark decision ruled that it did not.[58]

One of the more notable aspects of *Smith* was its treatment of precedent. Although the decision abandoned *Sherbert*'s compelling interest test, the Court did not acknowledge that it was changing the standard, and it did not overrule any previous cases.[59] It claimed *Yoder* was not based solely on the Free Exercise Clause but was an example of a "hybrid" right that combined free exercise interests with another constitutionally protected right.[60] It distinguished *Sherbert* and the other unemployment cases on the grounds that those cases involved statutes that required the State to make "individual assessments" for possible exemptions, and because these statutes did not include religion as an eligible factor for exemption, the free exercise concerns were triggered.[61] As the Court explained, the unemployment compensation cases stand only 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."[62]

Smith did rely, however, on *Ballard*.[63] In response to the argument that free exercise exemptions could be limited to situations in which the religious conduct is central to the adherent's belief, the Court responded that such an inquiry into centrality would run afoul of the principle "that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[64]

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55. Smith v. Emp't Div., Dep't of Human Res. of Or., 763 P.2d 146, 148 (Or. 1988).

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

57. *See id.*

58. *See id.* at 879. As Michael McConnell noted, this issue was actually not before the Court. *See* McConnell, *supra* note 5, at 1112-13. He explains: "The most important thing to know about the briefs in *Smith* is what they did not contain: neither of the parties asked the Court to reconsider its free exercise doctrine. The State expressly conceded the compelling interest test in its brief and the parties did not discuss the doctrinal issue at oral argument." *Id.* at 1113.

59. *See* McConnell, *supra* note 5, at 1120-24.

60. *See Smith*, 494 U.S. at 881.

61. *See id.* at 884.

62. *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

63. *See id.* at 887 (citing United States v. Ballard, 332 U.S. 78, 85-87 (1944)).

64. *Id.*

The ruling in *Smith* was unexpected in the sense that the issue of whether the compelling interest test applied was not formally before the Court.[65] But it was not particularly surprising in result. As some commentators have noted and as the cases discussed in the previous section demonstrated, the handwriting was on the wall by the time *Smith* was decided that the Court had already effectively abandoned the compelling interest test.[66] The Court had ruled against free exercise cases in too many contexts for the *Sherbert* test to still be considered viable.[67]

Looking at these pre-*Smith* cases in retrospect, however, it may be that the death knell for *Sherbert* was more determined by a case in which the Court upheld the free exercise claim than the decisions in which it rejected the constitutional challenge.[68] That case, *Thomas v. Review Board*, is the subject of the next section.[69]

III. *THOMAS V. REVIEW BOARD*

Thomas v. Review Board was one of the Court's decisions upholding a free exercise challenge to a denial of unemployment compensation benefits to a religious believer who asserted that he was unable to work because of his religious beliefs.[70] The facts of the case, however, are particularly helpful in explaining the road to *Smith*.[71] In *Thomas*, the free exercise claimant, Eddie C. Thomas, had been working in the roll-foundry section of a manufacturing plant that was primarily engaged in the production of weapons.[72] When the roll foundry closed, Thomas was transferred to a line manufacturing gun turrets.[73] Apparently realizing for the first time that his employer was in the arms business, Thomas asked another Jehovah's Witness who worked with him at the plant whether the tenets of the Witnesses forbade working on armaments.[74] His co-worker indicated that they did not.[75] Thomas decided, however, that he could not work in the factory in good conscience and requested that he be laid

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65. *See* McConnell, *supra* note 5, at 1112-14.

66. *See* Ryan, *supra* note 37, at 1409.

67. *See supra* Part II.A.

68. *See* Thomas v. Review Bd., 450 U.S. 707, 720 (1981).

69. One post-*Smith* free exercise case is worth noting. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down ordinances prohibiting animal sacrifice on grounds that those prohibitions were not neutral laws of general applicability. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993).

70. *See Thomas*, 450 U.S. at 719-20.

71. *See* Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 391 N.E.2d 1127, 1128-29 (Ind. 1979), *rev'd*, 450 U.S. 707 (1981).

72. *Id.* at 1128.

73. *Id.*

74. *Id.*

75. *Id.* Thomas also apparently reached out to other members of the congregation to determine whether the Jehovah's Witness religion prohibited working in armaments factories, but the record was silent as to whether he was eventually advised. *See id.* at 1129.

off.[76] The request was denied, and Thomas eventually quit.[77] He then sought unemployment compensation, claiming that he was unavailable for work because working on armaments violated his religious principles.[78]

Thomas then had a hearing before the state's unemployment insurance referee on his benefits request.[79] During the hearing, Thomas struggled to articulate why he considered his objections to working in an armaments factory to be based on his religious beliefs, and the hearing officer, perhaps understandably, did not ask probing follow-up questions.[80] The hearing officer

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76. *Id.*

77. *Id.*

78. *Id.* at 1128.

79. *Id.*

80. *See id.* at 1131-32; *infra* text accompanying note 85 (discussing the concerns raised by government investigations into the nature of religious beliefs). The ambiguity as to the basis of Thomas's beliefs is apparent in the portions of the hearing excerpted from the Indiana Supreme Court's opinion:

> Q. Okay, because at that point you realized the entire plant was an armaments production.
> A. The entire . . . that's correct.
> Q. Engaged in armament production. All right.
> A. That's correct.
> Q. Which is against your religion beliefs, right?
> A. That's true.
> Q. To contribute to the armament production of the world.
> A. That's correct.
> Q. Is that correct?
> A. That's correct.
> Q. All right. Now, at the time you were working at the roll foundry you didn't realize that, right?
> A. That . . .
> Q. That it was part of an armaments procedure?
> A. No, I did not.
> This exchange indicates the entire plant, including the roll foundry, was part of an armaments procedure. Nevertheless, the claimant stated that he would have returned to the roll foundry to work. In an attempt to clarify claimant's position the referee asked:
> Q. Mr. Thomas, let me ask you this, getting . . . at the (inaudible) your convictions a little bit . . .
> A. Certainly.
> Q. What if you were working for United States Steel or Inland Steel who produced steel, the raw product necessary for the production of any kind of a tank . . .
> A. Mm-hum.
> Q. And you found that that steel was being shipped to whoever . . .
> A. Yes, for . . . for . . .
> Q. . . . strictly for armaments purpose.
> A. Yeah, I understand, strictly for armaments. Then I could continue to . . . to work for U.S. Steel or whatever steel maker or raw products or the . . . whatever producer it might be. I could still scripturally, you know, cause see the work for the . . . for the company . . . because it would . . . it would . . . it would . . . I would not be a direct party to whoever they shipped it to, you see, would not be . . . would not be chargeable in . . . according to my conscience to me, you know. But . . . .
> Q. Okay, is it the social atmosphere that makes a tank or is it the people? I don't know. What's the difference whether you work for the steel producer that produces the steel or the coal company that produces the coal or the . . .
> A. There . . . there you are.
> Q. Or the . . . the company . . . the chemical company that produces the saltpetre.
> A. Or the actual . . . or what have you, you know, would . . . the . . . the company that. . . .
> Q. You . . . your . . . your expression is then that you . . . finally you have to make a choice.
> A. Yeah, you have . . . .

subsequently ruled that Thomas left work for religious reasons, and on that basis, the Indiana appellate court held that Thomas was entitled to unemployment compensation under *Sherbert*.[81]

The case was appealed to the Indiana Supreme Court, which based upon its reading of the record, reversed, concluding that Thomas left work for personal reasons.[82] The Court reasoned that:

> [A person] who voluntarily quits work for personal reasons and personal beliefs which can somehow be described as religious beliefs, must be allowed benefits while other employees who voluntarily quit work for valid personal reasons or beliefs which are not "religious" are denied benefits, would violate the Establishment Clause of the First Amendment.[83]

The United States Supreme Court reversed again.[84] First, in response to the state court, it indicated that the fact that the Free Exercise Clause protected religious but not nonreligious objectors to armaments employment was not problematic.[85] As the Court stated, "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[86] Second, it held that Thomas's beliefs should be construed as religious.[87] Responding at length to the Indiana court's characterization of Thomas's beliefs as personal, the Court stated:

> In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to "working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I]

> Q. And then when it comes to actually producing the tank itself, hammering it out; that you will not do that.
>
> A. That's right, that's right. When I . . . when I'm daily faced with the knowledge that these are tanks . . . that these are tanks and . . . these was a couple other occurrences that really imprinted on my mind exactly where I was working, durin' those three or four weeks that I was working in . . . within armaments. There was what they call it a bomb scare on two different occasions where we had to evacuate the work area. So . . .
>
> Q. Go ahead.
>
> A. I really could not, you know, conscientiously continue to to work with armaments. It would be against all of the . . . the . . . religious principles that . . . that I have come to learn and appreciate except up to that . . . up to this point.

Thomas, 391 N.E.2d at 1131-32 (internal quotations omitted).

81. *Id.* at 1132.
82. *See id.* at 1134.
83. *Id.*
84. *See* Thomas v. Review Bd., 450 U.S. 707, 720 (1981).
85. *Id.* at 713-14.
86. *Id.* at 713.
87. *Id.* at 715-16.

> would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience . . . ." The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.
>
> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[88]

The *Thomas* Court's reasoning is not unsound. As the Court noted, the Free Exercise Clause refers only to religion, and if one interprets the Clause as mandating the creation of constitutionally compelled exemptions to neutral laws, it arguably makes textual sense that those exemptions should be limited to religious adherents.[89] Additionally, the Court is right that simply because a person is "struggling" to identify the nature and scope of their religious beliefs does not mean that the individual's belief are not religious and not entitled to free exercise protections.[90] The Court is also correct in noting that the fact that a belief may not comport with a formal tenet of an adherent's religion does not

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88. *Id.* (alteration in original) (citations omitted) (quoting *Thomas*, 391 N.E.2d at 1131).

89. *Id.* at 713; *see* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."). The key issue, of course, is whether the text requires the creation of constitutionally compelled exemptions, a contention that I have disputed elsewhere. *See* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 358-60 (1989-1990). For detailed historical discussions of the exemption issue, see generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing that the historical evidence supports exemptions); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that the historical evidence does not support exemptions).

90. *Cf.* United States v. Seeger, 380 U.S. 163, 187 (1965) (recognizing beliefs expressed outside the "usual understanding" of a religion are still religious beliefs).

mean that the individual does not hold that religious belief.[91] It just means that religion can be a matter that is highly individualistic and highly impressionistic.[92] In fact, a contrary ruling on this issue would have raised a more serious constitutional concern because such a holding would effectively privilege some types of religious beliefs—those tied to formal religious doctrine—over other types of religious beliefs—those that are individualistic. Government preference among religious beliefs, however, strikes at the heart of the First Amendment's anti-establishment mandate.[93]

Thomas's implications for free exercise jurisprudence, however, are significant. First, *Thomas* graphically illustrates the harm to the equality principle created by free exercise exemptions.[94] Eddie Thomas is entitled to exemption because his objection to working in an armaments factory is based upon his religion.[95] A secular pacifist or conscientious objector, on the other hand, would receive no exemption no matter how deep, heartfelt, or well-defined her convictions.[96]

Second, the Court's adoption of a highly individualistic approach to religion, when considered in light of the no-inquiry principle, raises serious issues as to whether the compelling interest test can ever be coherently applied. The *Thomas* Court's deference to an individual's self-characterization of the religiosity of her beliefs is so broad that it means that there is virtually an unlimited number of claims for exemption that can be asserted on free exercise grounds.[97] It also means the state fact-finders would be charged with the troublesome burden of having to investigate and ascertain the basis of an adherent's inchoate beliefs, such as the one offered by Eddie Thomas.[98] But having courts adjudicate these claims requires either (1) that courts reflexively defer to the free exercise assertion, thereby losing their "ability to reject claims of relatively minor or even questionable religious significance"[99] or (2) that

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91. *Cf. id*. at 184 ("[O]ne deals with the beliefs of different individuals who will articulate them in a multitude of ways.").

93. *Cf.* Gail Merel, *The Protection of Individual Choice: A Consistent Understanding Under the Frist Amendment*, 45 U. CHI. L. REV. 805, 815 (1978) ("[T]he central value underlying both the establishment and free exercise provisions is the protection of individual choice in matters of religion . . . ." (emphasis omitted)).

93. *Cf.* Larson v. Valente, 456 U.S. 228, 246 (1982) (stating that the Establishment Clause prohibits sect preferences). *But see* Gillette v. United States, 401 U.S. 437, 461-63 (1971) (holding that the United States may permissibly grant conscientious objector status to believers whose religious tenets demand opposition to participation in all wars but not to believers whose religious tenets demand opposition only to participation in "unjust" wars).

94. *See Thomas*, 450 U.S. at 713-14.

95. *Id.* at 716.

96. *See* Marshall, *In Defense of* Smith, *supra* note 17, at 319-23.

97. *See, e.g.*, State v. Hodges, 695 S.W.2d 171 (Tenn. 1985) (addressing a free exercise claimant who asserted that his religious beliefs required him to dress like a chicken when going to court).

98. *See Thomas*, 450 U.S. at 709-11.

99. Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 86 (1997).

courts actually investigate the legitimacy of free exercise claims, thereby endangering the values inherent in the no-inquiry principle.[100]

Consider, for the moment, the implications of this latter course for the *Thomas* case itself. In *Thomas*, as we have seen, the testimony as to the basis of Eddie Thomas's claim for exemption was not particularly clear as evidenced, not only by the transcript, but by the fact the Indiana and United States Supreme Courts were able to come to two different, yet plausible, interpretations of the record.[101] Most likely this ambiguity was created in part by the hearing officer's apparent reluctance to closely question Thomas about his religious beliefs.[102] But should the state hearing officer have acted more aggressively? Should he have inquired about the theological sources of a claimant's religious assertions? Should he have asked Thomas if he believed his Jehovah's Witness co-worker was violating scripture by not refusing to work in the armaments factory? Would that have been relevant to determining the nature of Thomas's beliefs? Most importantly, how could this questioning have been maintained without the process taking on the disconcerting aspects of religious inquisition? And even if the questioning was appropriately conducted, how can a fact-finder decide the nature of a person's inchoate belief without risking a high probability of error?[103]

The remaining alternative, of course, was to reject the continued maintenance of constitutionally compelled exemption—the path the Court eventually followed in *Smith*.[104] And in this respect it is notable that Justice Stevens, who concurred in *Thomas*, expressed reservations about the compelling interest test on exactly these grounds in less than a year after the *Thomas* decision.[105] As Justice Stevens explained:

> In my opinion, the principal reason for adopting a strong presumption against such [free exercise exemption] claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims.[106]

Justice Stevens later joined the *Smith* majority in abandoning the compelling interest test.[107]

In the end, *Thomas* may have served to weaken the case for the constitutionally compelled free exercise exemption simply by the power of

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100. *See infra* notes 117-22 and accompanying text.

101. *See supra* notes 70-80, 88 and accompanying text.

102. *See supra* note 80 and accompanying text (presenting excerpts from Thomas's hearing transcript).

103. Marjorie Heins, "*Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153, 167 (1981).

104. *See* Emp't Div. v. Smith, 494 U.S. 872, 885-90 (1990).

105. United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring).

106. *Id.* at 263 n.2 (1982). Justice Stevens's *Lee* opinion related the no-inquiry principle to Establishment Clause concerns. *See id.* at 261-63.

107. *Smith*, 494 U.S. at 873.

negative example. It showed the unfairness created when secular objectors are denied exemptions from neutral laws while those individuals presenting exactly the same objection under a religious guise are found entitled to relief, no matter how unformed or unexplained the religious basis is for the claim. And it demonstrated the difficulties, if not the impossibility, of civil tribunals being able to sort through the question of whether a claimant was in fact presenting a religious objection or was instead relying on a nonreligious personal or philosophical belief.

IV. *UNITED STATES V. BALLARD* AND THE NO-INQUIRY PRINCIPLE

Perhaps no case underscores the intractability of the issues raised by the religion clauses more than *United States v. Ballard*.[108] *Ballard* involved the federal mail fraud prosecution and conviction of certain leaders of the so-called "I Am" movement.[109] The specific allegations against the group included the following:

> [T]hat Guy W. Ballard, now deceased, alias Saint Germain, Jesus, George Washington, and Godfre Ray King, had been selected and thereby designated by the alleged "ascertained masters," Saint Germain, as a divine messenger; and that the words of "ascended masters" and the words of the alleged divine entity, Saint Germain, would be transmitted to mankind through the medium of the said Guy W. Ballard;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard, and Donald Ballard, by reason of their alleged high spiritual attainments and righteous conduct, had been selected as divine messengers through which the words of the alleged "ascended masters," including the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the "I Am" movement;
>
> that Guy W. Ballard, during his lifetime, and Edna W. Ballard and Donald Ballard had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did falsely represent to persons intended to be defrauded that the three designated persons had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases; and did further represent that the three designated persons had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments[.][110]

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108. United States v. Ballard, 322 U.S. 78 (1944).

109. *See id.* at 79-80. The "I Am" movement continues to exist. *See* THE SAINT GERMAIN FOUND., http://www.saintgermainfoundation.org (last visited Oct. 10, 2011).

110. *Ballard*, 322 U.S. at 79-80.

The question before the Court was whether the truth of those representations concerning the defendants' religious beliefs should have been submitted to the jury.[111] The Court ruled that they could not.[112] As the Court powerfully explained, allowing the government to evaluate the validity of religious claims would cut at the heart of religious freedom guarantees:

> [The First Amendment] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[113]

Although calling the Ballards' teachings "nothing but humbug, untainted by any trace of truth," Justice Jackson's dissent went even further than the majority in limiting the scope of the state's inquiry.[114] Responding to the implication in the majority's opinion that suggests that a court could convict the defendants for fraud if it could be shown that the defendants were not sincere in their representations,[115] Justice Jackson argued that he could "not see how we can separate an issue as to what is believed from considerations as to what is

111. *See id.* at 80.
112. *Id.* at 86.
113. *Id.* at 86-87.
114. *Id.* at 92-93 (Jackson, J., dissenting).
115. *See id.* at 83-84 (majority opinion) (approving the trial court's jury instruction that the jury could convict if it found that the defendants did not act in good faith).

believable."[116] To Jackson, submitting the sincerity issue to the courts would then raise the same concerns as allowing courts to measure the veracity of the defendants' assertions because the two inquiries were inextricable.[117] Jackson's solution, therefore, was that any fraud committed in the name of religion would have to go unpunished on grounds that "[p]rosecutions of this character easily could degenerate into religious persecution."[118] He, therefore, would have dismissed the indictment against the Ballards entirely.[119]

Without doubt, the concerns raised by the majority opinion and Jackson's dissent in *Ballard* are compelling. Governments can, and have, persecuted unpopular religions by attacking the validity of their faiths.[120] And even when the government acts in good faith, inquiries into the validity of religious belief are troublesome because the government has no business or competency that would allow it to condemn a religious belief as "false."[121] Moreover, having the government decide such issues is problematic because, by doing so, the government places its imprimatur on particular religious visions, thereby raising anti-establishment concerns.[122] Furthermore, as we have seen in our previous discussion of the *Thomas* litigation, the process of investigating the nature of a religious belief is also problematic and unseemly because it requires asking the believer to explain or justify her belief.[123] *Ballard*'s general notion that the government should not evaluate the truth of religious claims, then, would seem uncontestable.[124]

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116. *Id.* at 92 (Jackson, J., dissenting).

117. *See id.* at 92-93.

118. *Id.* at 95.

119. *Id*. The Ballards' convictions were eventually overturned, although on different grounds. Ballard v. United States, 329 U.S. 187, 195-96 (1946). After remand to the court of appeals, the case returned to the Supreme Court where the convictions were reversed because women had been improperly excluded from the jury. *Id.*

120. For specific accounts of anti-religious animus in the United States, see, for example, ANTI-SEMITISM IN AMERICA, *in* 6 AM. JEWISH HISTORY 1 (Jeffrey S. Gurock ed., 1998) (discussing anti-Semitism); TERRYL L. GIVENS, THE LATTER-DAY SAINT EXPERIENCE IN AMERICA 59-89 (2004) (discussing anti-Mormonism); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193-251 (2002) (discussing anti-Catholicism). Anti-Catholic bias apparently led to passage of the Oregon provision forbidding parents to send their children to private school that was struck down in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925). More recently, bias against a minority religion led to the enactment of laws prohibiting animal sacrifice that were struck down in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993).

121. *See supra* notes 116-17; and accompanying text. *But see* Jorge O. Elorza, *Secularism and the Constitution: Can Government Be Too Secular?*, 72 U. PITT. L. REV. 53, 111 (2010) (arguing that the Court can determine such matters as whether the Ballards healed the sick); Jared A. Goldstein, *Is There a* "*Religious Question*" *Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 501 (2005) (arguing that courts are competent to resolve some religious questions).

122. *See, e.g.*, United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 812 (2009); Marshall, *In Defense of* Smith, *supra* note 17, at 310-11.

123. *See supra* notes 97-100 and accompanying text.

124. To be sure, *Ballard* has not escaped all criticism. *See, e.g.*, John T. Noonan, Jr., *How Sincere Do You Have to be to be Religious?*, 1988 U. ILL. L. REV. 713, 720-24. Judge Noonan, consistent with Justice Jackson's dissent, has argued that the *Ballard* decision did not go far enough because it still allows the state to

V. CONCLUSION: RECONCILING *SMITH AND BALLARD*

Even if *Ballard* is soundly-based, the question remains whether the decision is consistent with *Smith*.[125] *Ballard* does, after all, offer a defense to the criminal law that is religion-specific.[126] The restriction on the proof of fraud announced in *Ballard* does not apply in cases in which the alleged fraud has no religious component.[127] The effect of *Ballard*, then, is that religious fraud defendants are treated differently, and more favorably, than defendants accused of fraud not involving religious assertions.[128] Does this non-neutral treatment of religious and nonreligious defendants run afoul of *Smith*?

Certainly there is at least some tension between the two cases. The no-inquiry principle may not provide an actual "exemption" for religious actors from fraud laws, as one author notes,[129] but it does allow the religious actor to potentially escape liability simply because he claims he is acting pursuant to his religious convictions.

Of course, the fact that there may be some inconsistency in religion clause doctrine is nothing new.[130] But in this case I believe it is justified. The *Smith* concern is that allowing only religious objectors to gain constitutional exemption from neutral laws creates a preference for religious over parallel secular claims, a preference that I and others have argued is not constitutionally

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inquire into religious sincerity. *See id*. Judge Noonan acknowledges his approach would allow "pseudo-religionists . . . [to] obtain money by false pretenses." *Id.* at 724.

Others, in contrast, contend that the decision goes too far in protecting religious actors from fraud prosecutions. *See, e.g.*, Elorza, *supra* note 121, at 110-11. Samuel Levine, in turn, argues that the over-enforcement of the *Ballard* rule is ultimately unhelpful to religions because, in keeping the courts out of evaluating religious claims, it leads to results like *Smith* that minimize judicial ability to protect religious freedom. *See* Levine, *supra* note 99, at 118-19; *see also* Kent Greenawalt, *Hands Off: When and About What*, 84 NOTRE DAME L. REV. 913, 916 (2009) (arguing that sometimes religion should be treated specially by law). And, numerous commentators have argued that *Ballard* overstates the point because some inquiry into the legitimacy of religious claims is necessary for the courts to decide constitutional and statutory issues. *E.g.*, Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 852 (2009). Of course, the fact that courts may at times have to decide religion-validity issues does not mean that *Ballard* or *Smith* is wrong in suggesting that those efforts should be minimized. *See* Goldstein, *supra* note 121, at 501.

125. A quick, if not compelling answer to this question is the fact that *Smith* cited *Ballard* favorably, indicating that at least the Court majority did not believe the cases were in conflict. *See* Emp't Div. v. Smith, 494 U.S. 872, 877-87 (1990). This included citing the case for the proposition that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* at 887.

126. *See* United States v. Ballard*,* 332 U.S. 78, 86-88 (1994).

127. *See generally id.* (noting that courts cannot determine the truth or falsity of any religious beliefs).

128. *See supra* notes 23-27 and accompanying text.

129. *See* Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 690-92 (1993). As Masoudi points out, the relief required by *Ballard* is not actually an exemption from a neutral law. *See id.* at 692. The claim is not that religious actors should be exempt from anti-fraud requirements on account of their religious beliefs. *See id.* Rather, it is that the state cannot inquire into the validity of a religious assertion when trying to prove fraud. *See id.*

130. *See* Kent Greenawalt, *Quo Vadis*: *The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup. Ct. Rev. 323, 323 (characterizing religion clause doctrine as in "total disarray").

justified.[131] The no-inquiry restriction imposed in *Ballard*, in contrast, although obviously concerned with protecting religious belief, is also based upon two independent concerns regarding government behavior.[132] The first is fear of government prosecution of unpopular religious beliefs, a concern well founded in history.[133] The second is the concern that the government is not competent to decide religious issues, another theme that is deeply grounded in religious jurisprudence.[134] The applicability of these concerns serves to distinguish the differential treatment of religion allowed in *Ballard* from the disparate treatment denied in *Smith*. The focus of the equality principle in *Smith* is on the believer. The focus of the no-inquiry principle in *Ballard* is on the state.

Finally, the consistency between the two cases is established again by referring to the litigation in *Thomas*. *Thomas*'s facts, involving an ambiguous and inchoate belief by a conscientious objector to armaments work, graphically demonstrated the arbitrariness and unfairness in distinguishing between religious and nonreligious claims. Imagining the inquiry that would have been necessary in order for the state fact-finder to determine whether Thomas's belief was religious or nonreligious, in turn, illustrates the substantial harms to religion clause concerns that state investigations into religious beliefs entail. The *Thomas* litigation, in short, provides a powerfully pragmatic argument as to how, in the words of this panel's description, both *Ballard* and *Smith* "got it right."

131. *See supra* notes 15-19 and accompanying text.

132. *See supra* Part IV.

133. *See supra* notes 113-16 and accompanying text.

134. *See* Watson v. Jones, 80 U.S. (1 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").