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Toward a RFRA That Works

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I. INTRODUCTION

The history of the Supreme Court's First Amendment jurisprudence regarding the proper standard of protection for the free exercise of religion is complicated. In determining how the First Amendment speaks to situations in which generally applicable health, welfare, and safety laws incidentally or accidentally burden certain individuals' religious practices, the Court has vacillated between different standards and different extremes, overruling itself several times. Early on, the Court held that, provided the government did not interfere deliberately with religion for religious reasons, an inadvertent interference with religious practice raised no Free

Exercise Clause problem,[1] "no matter how trivial the state's nonreligious objectives, and no matter how many alternative approaches were available to the state to pursue its objectives with less impact on religion."[2]

That doctrine soon was overruled,[3] and a series of cases from the 1960s through the '80s, known as the *Sherbert*[4] line, or the *Sherbert-Yoder*[5] line, established that even generally applicable health, welfare, and safety regulations could be struck down if their burden on religious practice, however accidental, did not meet certain constitutional requirements. The *Sherbert* line of cases boldly asserted that for a law of general applicability to bind religious objectors, the state must demonstrate a "compelling state interest."[6]

Yet, the rhetoric of the *Sherbert* line notwithstanding, rather than employing a "compelling state interest" test or "strict scrutiny"—both names for the most demanding standard of judicial review—the Court in fact was applying an intermediate and more refined level of scrutiny. The Court balanced the state's regulatory interest against the burden imposed on the religious adherent's practices, accounting for (albeit subconsciously or implicitly) the availability of alternative means for both parties. As a result, later cases in the *Sherbert* line declined even to employ the language of "compelling state interest" or "strict scrutiny."[7] As the *Sherbert* line progressed, the Court moved ever closer to the recognition that the appropriate approach to accidental interference cases was a simple balancing test.

But the earlier cases' invocation of the compelling interest test, despite the fact that another standard was in fact being applied, resulted in the *Sherbert* line ultimately being overruled in the case of

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1. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

2. Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1346 (1995).

3. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

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

5. Wisconsin v. Yoder, 406 U.S. 205 (1972).

6. *Sherbert*, 374 U.S. at 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."); *see also Yoder*, 406 U.S. at 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

7. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988) ("Respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to . . . engage in timber harvesting in the Chimney Rock area. We disagree."); Bowen v. Roy, 476 U.S. 693, 707 (1986) ("The test applied in cases like *Wisconsin v. Yoder* is not appropriate in this setting." (internal citation omitted)).

Employment Division v. Smith.[8] The *Smith* Court, taking *Sherbert* at its word, found that the compelling interest test was an impermissibly strict constitutional bar for the state to meet should any law incidentally burden an individual's religious practice.[9] Ignoring the fact that the *Sherbert* line had not in fact applied a true strict scrutiny standard, and mischaracterizing cases in which the religious objector had prevailed to avoid explicitly overruling prior cases, the Court held that accidental interferences with religion posed no Free Exercise problem and that the state was not required to meet strict scrutiny, or any level of scrutiny for that matter.[10]

Frustrated with *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA")[11] to overrule the Supreme Court and reinstate what it apparently thought was the "compelling interest" test as set forth in *Sherbert* and *Yoder*.[12] In *City of Boerne v. Flores*, however, the Supreme Court struck down RFRA as it applied to state laws, marking a severe setback for RFRA in terms of reinstating pre-*Smith* law.[13] But because the Court based its decision to strike down the law upon principles of federalism,[14] *Boerne* left open the possibility that RFRA remained constitutional as applied to federal laws. That possibility was recently affirmed in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, which sustained a RFRA defense against the federal Controlled Substances Act.[15] Likewise, a substantial number of states have attempted to counteract *Smith* by enacting their own "mini-RFRAs," many of these modeled after the federal RFRA.

Still, enormous unanswered definitional ambiguities exist with respect to RFRA. For example, how does one interpret a statute that purports to reinstate a "compelling interest" test as embodied in cases

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8. 494 U.S. 872 (1990).

9. *Id.* at 888.

10. *Id.* at 878 ("It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

11. The Religious Freedom Restoration Act is commonly referred to as RFRA ("riff-ra").

12. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4 (2000)).

13. 521 U.S. 507 (1997).

14. *Id.* at 536.

15. 546 U.S. 418 (2006). Prior to this case, several Courts of Appeals had already affirmed RFRA's continued validity with respect to federal law. *See, e.g.*, O'Bryan v. Bureau of Prisons, 349 F.3d 399, 400-01 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1220-22 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 958-60 (10th Cir. 2001); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 858-63 (8th Cir. 1998). It was not, however, until *O Centra Espirita* that the Supreme Court had occasion to finally answer the question.

that do not actually set forth a compelling interest test? Or, how does one interpret a statute that attempts to overrule a case that itself overruled previous case law by mischaracterizing it and setting up a straw man?

This Note attempts to answer these questions. More precisely, this Note advances the argument that a true compelling interest test is inappropriately extreme for accidental interference cases, that the Court had arrived at a more reasonable intermediate balancing test in the *Sherbert* line of cases,[16] and that, for all of the linguistic inaccuracies in both that line of cases and RFRA, RFRA codified the intermediate balancing approach of the *Sherbert* line. This Note further argues that the compelling governmental interest test is so extreme and untenable that it only invites a backlash of the kind seen in *Smith*. This backlash aims not to lower the constitutional bar for accidental interference to a more reasonable balancing approach, but to deny that the government need demonstrate any particularly strong regulatory interest to justify such burdens. The ironic result is that religious claimants ultimately stand to gain the most protection for their religious liberty by pushing for an interpretation of RFRA that would require a lower standard of protection, not a higher one. Hence, religious interest groups would be wise to steer RFRA's interpretation in both the federal arena and in the states' mini-RFRAs, toward the refined, reasonable, and nuanced approach of *Sherbert* and its progeny. Such an interpretation is not merely advantageous to religious claimants, but also finds ample support in the text of the statute, as this Note will demonstrate.

Part II of this Note details the history of the Court's free exercise jurisprudence. It shows how the Court came to a workable solution to the problem of accidental interference in the *Sherbert* line of cases, how and why that line of cases was overruled in *Smith*, and how Congress responded by enacting RFRA. Part III provides several arguments for an interpretation of RFRA that is more consistent with the methodology actually employed in the *Sherbert* line, as opposed to a strict scrutiny standard, and examines the Court's adherence to such an interpretation in *O Centra Espirita*, its first encounter with RFRA since the statute's partial demise in *Boerne*. Finally, Part IV emphasizes the importance of a moderate interpretation of RFRA in securing lasting protection for religious interests.

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16. This observation has been made already by several commentators. *See, e.g.*, Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENT. 147 (1987); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 69 MINN. L. REV. 545 (1983); McCoy, *supra* note 2; G. Michael McCrossin, Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149 (1980).

II. HISTORY

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ."[17] In free exercise jurisprudence, deliberate interference with religious beliefs or practices has not posed much of a problem. Statutes that deliberately attempt to suppress religious belief or practice are almost never enacted,[18] and those that are enacted are unequivocally struck down as unconstitutional.[19] On the other hand, the Court has struggled mightily to resolve the problem of what might be called "accidental interference." Accidental interference occurs when the government, whether federal, state, or local, enacts a law of general applicability that, although meant to advance a secular purpose, incidentally burdens an individual's or group's religious practice.[20] In this area of the law, as one commentator notes, "the Court has adopted one fundamental doctrinal construct, promptly overruled that construct, adopted a nearly opposite principle, and then years later resurrected the original principle."[21] This Part traces the history of the Court's approach to the problem and identifies important patterns therein.

A. Resolving Accidental Interference Before Smith

This Note is concerned primarily with three periods or events in the history of free exercise jurisprudence: (1) the *Sherbert v. Verner* era, (2) the *Employment Division v. Smith* decision overruling

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17. U.S. CONST. amend. I (emphasis added).

18. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 577 (1993) (Blackmun, J., concurring) (recognizing that occasions on which the government explicitly targets religion are rare); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 3 (1994).

19. *See City of Hialeah*, 508 U.S. 520 (invalidating a city ordinance prohibiting the ritual slaughter of animals on the grounds that the ordinance, while facially neutral, was a deliberate attempt to target practitioners of the Santeria faith); McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating a Tennessee provision that prohibited clergy from being legislators or constitutional convention delegates); Torcaso v. Watkins, 367 U.S. 488 (1961) (striking down a Maryland law requiring that all holders of public office declare their belief in the existence of God, using the Free Exercise Clause rather than the Establishment Clause).

20. A common alternative formulation of the problem is to ask whether and to what degree the Constitution requires "exemptions" from generally applicable regulatory schemes. *See, e.g.*, William P. Marshall, *The Case against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

21. McCoy, *supra* note 2, at 1335.

Sherbert, and (3) the congressional response to *Smith*: RFRA. Nevertheless, a brief overview of *Sherbert*'s predecessors may be helpful for putting *Sherbert* into historical context.

1. Cases before *Sherbert*

The Court first attempted to resolve problems of interference with religious exercise using the now-defunct "belief-action" dichotomy.[22] In *Reynolds v. United States*, decided in 1878, the Court upheld application of a federal law proscribing bigamy against the free exercise defense of a Mormon who claimed that polygamy was his religious duty.[23] The Court reasoned that while Congress was deprived of all legislative power over religious *beliefs*, it remained free to reach *actions* that were in violation of social duties or subversive of good order.[24] To allow otherwise, the Court stated, would be "to permit every citizen to become a law unto himself."[25]

While such a distinction between the realms of thought and action provided a workable standard that was certainly elegant in its simplicity and logically defensible, it suffered from one critical shortcoming. It did not prohibit the government from *deliberately* interfering with religion, provided its regulations pertained solely to religious conduct and not to religious belief.[26] Therefore, the Court abandoned the belief-action distinction in favor of the more nuanced "deliberate-inadvertent" distinction in *Minersville School District v. Gobitis*.[27] *Gobitis* held that deliberate state interference with religion was per se unconstitutional, whereas inadvertent interference with religion in pursuit of a secular state objective raised no free exercise problem.[28] This standard seemed to preserve the result in *Reynolds*—the state could not plausibly intrude upon religious belief for an allegedly secular purpose—but it also served to protect the religious adherent from any state effort to undermine his or her devotion through the prohibition of religious conduct that could not be explained on grounds other than underlying religious animus. Yet, the deliberate-inadvertent distinction itself suffered from a defect.

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

23. 98 U.S. 145 (1878).

24. *Id.* at 164.

25. *Id.* at 167.

26. McCoy, *supra* note 2, at 1345 ("It is apparent that the legislature could regulate religious conduct, such as worship services, for no reason other than the legislature's religious preference in the choice of acceptable conduct.").

27. 310 U.S. 586 (1940).

28. McCoy, *supra* note 2, at 1346.

Provided that burdens placed on religious conduct by generally applicable laws were truly accidental, such inadvertence was sufficient to withstand attack on free exercise grounds "no matter how trivial the state's nonreligious objectives, and no matter how many alternative approaches were available to the state to pursue its objectives with less impact on religion."[29]

Recognizing the shortcomings of this approach, the Court overruled *Gobitis* only three years later in *West Virginia State Board of Education v. Barnette* and suggested that even inadvertent legislative interferences with religion must withstand *some* constitutional scrutiny under the Free Exercise Clause.[30] What level of constitutional scrutiny such legislation must meet, however, was not specified until 1963, when the Court decided the seminal case of *Sherbert v. Verner*.[31] *Sherbert* not only addressed the issue head-on, but also established the language, and hence the standard to be employed, in accidental interference cases. For this reason, although it had its genesis in *Barnette*, this period of free exercise jurisprudence is commonly associated with *Sherbert* and the cases following it.

2. *Sherbert*, *Yoder*, and the Introduction of the "Compelling State Interest" Test

In *Sherbert v. Verner*, the Court held unconstitutional South Carolina's denial of unemployment compensation to a Seventh-Day Adventist on account of her refusal to accept jobs that would require her to work on Saturdays.[32] The Court reasoned that the applicant's ineligibility to receive benefits derived solely from the practice of her religion, and that this ineligibility put pressure on her to forgo the practice of her religion in order to receive such benefits. The Court concluded that the governmental imposition of such a choice imposed the same kind of free exercise burden as would a fine against her for worshiping on Saturday.[33]

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29. *Id.*

30. 319 U.S. 624, 639 (1943) (stating that, under due process, while a State may regulate a public utility merely upon a "rational basis," when those restrictions concern First Amendment guarantees, they are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect).

31. 374 U.S. 398 (1963).

32. *Id.* at 399-402.

33. *Id.* at 404. In so holding, the Court was adhering to a doctrine commonly known as the "unconstitutional conditions doctrine." The doctrine basically provides that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. While simply stated, the doctrine is anything but straightforward in practice, and courts and commentators have never fully and

In so holding, however, the Court faced a potential charge of inconsistency, as its decision seemed at tension with the case of *Braunfeld v. Brown*, decided only two years prior. In *Braunfeld*, the Court dismissed objections by Jewish business owners to a mandatory Sunday closing law.[34] The appellants argued that because their religion required them to remain closed on Saturdays as well, they faced unfair competition from non-Jewish businesses, which could remain open an additional day per week.[35] The Court nevertheless upheld the statute, reasoning that the state had an interest in maintaining a uniform "day of rest" throughout the city— an interest that would otherwise be thwarted by allowing an exemption for religious purposes.[36]

Although the burden on free exercise in *Sherbert* seemed similar to that in *Braunfeld*, the *Sherbert* Court distinguished *Braunfeld* on the ground that the government had there prevailed by demonstrating a sufficiently strong state interest.[37] Setting forth the proper standard under which such burdens on religious liberty were to be evaluated, the Court stated,

> We must next consider whether some *compelling state interest* enforced in the eligibility provisions of the . . . statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[38]

The term "compelling state interest" is, of course, a reference to the "compelling interest test," or "strict scrutiny" standard, of judicial review.[39] When a court evaluates a law under strict scrutiny, the government must satisfy two prongs. First, it must demonstrate that

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satisfactorily articulated when and how the doctrine should apply. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

34. 366 U.S. 599, 599-601, 609 (1961).

35. *Id.* at 601.

36. *Id.* at 608 ("[T]o permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity.").

37. *Sherbert*, 374 U.S. at 408 ("[T]he statute [in *Braunfeld*] was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers.").

38. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945) (emphasis added)) (internal citation omitted).

39. The following discussion of strict scrutiny relies heavily on Adam Winkler's *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

the law advances a "compelling" governmental purpose.[40] This inquiry refers to the "societal importance of the government's reasons for enacting the challenged law."[41] Second, the government must demonstrate that the law is "narrowly tailored,"[42] or is the "least restrictive means,"[43] to achieve that interest. In other words, the law must be neither over- nor underinclusive.

As a form of heightened scrutiny—in contrast to the openly deferential "rational basis" standard—strict scrutiny is generally thought to have its genesis in the 1938 case of *United States v. Carolene Products*, which suggested in its famous "footnote 4," that laws appearing to be within specific constitutional prohibitions or discriminating against "discrete and insular minorities" might properly be subject to a "more searching judicial inquiry."[44] Consistent with this formulation, strict scrutiny found its paradigm application in cases of racial classification and discrimination.[45] Over time, it was extended to cover invasions of so-called "fundamental rights,"[46]

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40. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))).

41. Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 219 (Stephen E. Gottlied ed., 1993).

42. *Grutter*, 539 U.S. at 530.

43. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).

44. 304 U.S. 114, 152 n.4 (1938).

45. *See* Berg, *supra* note 18, at 32 (" 'Strict scrutiny' has mostly been applied in cases of government discrimination, whether between people of different races (under the Fourteenth Amendment) or between the content of ideas (under the Free Speech Clause)."); Winkler, *supra* note 39 ("The motive theory of strict scrutiny has its most profound impact in equality cases . . . .").

46. There are actually two ways in which the Court has found that the burdening of "fundamental rights" may occur. The first, under the doctrine of "substantive due process," is when a law directly burdens a particular "fundamental" right for everyone who may possess the right. *Compare* Eisenstadt v. Baird, 405 U.S. 438 (1972) (interpreting *Griswold v. Connecticut*, 381 U.S. 479 (1965), as classifying an individual's decision whether to bear or beget a child as "fundamental," and therefore subjecting restrictions on contraceptives to strict scrutiny), *with* Michael H. v. Gerald D., 491 U. S. 110 (1989) (declining to recognize as "fundamental" the visitation rights of a biological father to a child born of an adulterous affair, and therefore subjecting restrictions thereof to the lenient rational basis standard of review). Second, under Equal Protection jurisprudence, an otherwise non-suspect classification may be subjected to strict scrutiny if the classification concerns the exercise of a "fundamental" right. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978) ("Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required."); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (subjecting the selective distribution of the franchise to strict scrutiny).

content-based restrictions on free speech,[47] and, in *Sherbert*, incidental burdens on the free exercise of religion.

Strict scrutiny generally is the most demanding standard of judicial review that a federal court will apply. Thus, the Supreme Court has often referred to it as "the most exacting scrutiny"[48] or as "the most stringent level of review."[49] The late Gerald Gunther's famous characterization of strict scrutiny as "strict in theory, fatal in fact"[50] has become one of the most famous statements in constitutional law,[51] having been quoted approvingly even by the Court itself.[52]

As Professor Adam Winkler describes it,

> Under this approach, the court weighs the costs of a law in terms of its impact on individual rights against the law's benefits to society as a whole. But this is a weighted balancing, with a *heavy thumb on the scale* in favor of the individual rights claimant, and the government is unlikely to win absent especially pressing circumstances.[53]

Outside the free exercise context, the Court[54] has deemed only a few governmental interests "compelling." These include remedying the past effects of governmental discrimination;[55] preventing sex discrimination;[56] enhancing student body diversity in the higher education setting;[57] preserving the integrity of the state election process;[58] shielding minors from the influence of sexually explicit, although short of obscene, literature;[59] ensuring that "criminals do not

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47. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

48. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

49. Fullilove v. Klutznick, 448 U.S. 448, 496 (1980).

50. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

51. Kathleen M. Sullivan, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002).

52. *See* Bernal v. Fainter, 467 U.S. 216, 220 n.6 (1984); *Fullilove*, 448 U.S. at 519 (1980) (Marshall, J., concurring). *But see* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (again protesting Gunther's characterization); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " (quoting *Fullilove*, 448 U.S. at 519)).

53. Winkler, *supra* note 39, at 803 (emphasis added) (internal citations omitted).

54. The following list enumerates only those interests that the Supreme Court has deemed "compelling," leaving out the significant number of additional "compelling interests" that lower courts have recognized.

55. *See* City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 480 (1986) (plurality opinion).

56. *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

57. *See Grutter*, 539 U.S. at 307.

58. *See* Burson v. Freeman, 504 U.S. 191, 199 (1992); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 231 (1989).

59. *See* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989); New York v. Ferber, 458 U.S. 747, 756-57 (1982); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968).

profit from their crimes";[60] and preventing vote-buying.[61] Given the apparent magnitude of the foregoing interests, it is not surprising that the Court has deemed these interests "compelling," while excluding lesser interests, such as administrative efficiency.[62]

The Court's decision in *Sherbert* to expand the application of strict scrutiny to restrictions on free exercise was not surprising. After all, by 1963, strict scrutiny had well been in play in evaluating free speech and freedom of association restrictions.[63] What was surprising, however, was that, unlike the Court's free speech jurisprudence, *Sherbert* extended strict scrutiny to *accidental* interferences with free exercise. Prior free speech cases had distinguished between deliberate and accidental interferences with speech.

Schneider v. New Jersey (Town of Irvington)[64] and *Kovacs v. Cooper*[65] provide early examples of the distinction in the speech context. In *Schneider*, several communities forbade the distribution of leaflets, arguing that such flat bans were necessary to prevent littering.[66] The prevention of littering, of course, constituted a non-speech interest. The state was not deliberately attempting to curb the speech of those who would distribute leaflets, and thus the interference with speech was merely accidental, in the form of a "time, place, or manner" restriction.[67] Nonetheless, the Court held that the communities could accomplish their interests in a less restrictive manner by simply punishing those who actually threw paper on the streets, and therefore struck down the law.[68]

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60. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991).

61. *See* McConnell v. FEC, 540 U.S. 93, 119 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990); Buckley v. Valeo, 424 U.S. 1, 24-28 (1976).

62. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989); Carey v. Population Servs. Int'l, 431 U.S. 678, 691 (1977); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 102 n.9 (1972); *see also* McCoy, *supra* note 2, at 1348 n.44 ("[I]t is axiomatic that financial concerns never rise to the level of a 'compelling interest.' ").

63. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 127 (1959); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958); *see also* Stephen A. Siegel, The Origin of the Compelling State Interest Test and Strict Scrutiny (Aug. 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=934795 (arguing that, despite common opinion, the compelling state interest test had its genesis not in Equal Protection claims, but in First Amendment cases of the 1950s and early 1960s).

64. 308 U.S. 147 (1939).

65. 336 U.S. 77 (1949).

66. 308 U.S. at 153-59.

67. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

68. *Schneider*, 308 U.S. at 162.

In *Kovacs*, the Court came out the other way. *Kovacs* concerned a ban on the use of sound trucks (loud speakers on vehicles) upon public streets.[69] Once again, the interference with speech was incidental; the state was not trying to censor any messages that might be amplified from the loud speaker, but was concerned merely with preventing loud sounds.[70] The Court upheld the ordinance, reasoning that the state had a valid interest in the protection of tranquility and freedom from nuisance.[71] Moreover, the Court reasoned that those prohibited from disseminating their ideas by sound trucks had alternative avenues of expression.[72] Thus, just as *Schneider* considered the towns' alternative means of accomplishing their interests, *Kovacs* took into account the speakers' alternative means of advancing their message.

Subsequent cases, such as *United States v. O'Brien*[73] and *Clark v. Community for Creative Non-Violence*,[74] further developed this framework for resolving instances of accidental interference with speech. As a result, a nuanced form of balancing emerged in which courts balanced (1) the state's interests, (2) in light of the state's viable alternatives to accomplish its interests, against (3) the speaker's interests in the expression of his message, (4) in light of available alternative avenues for advancing his ideas.[75]

Thus, in free speech jurisprudence, the line was clearly drawn: deliberate restrictions on speech were subject to strict scrutiny; accidental restrictions on speech were subject only to an intermediate balancing of the interests at stake. This dichotomy seems reasonable; not only do deliberate interferences with speech seem less compatible with guarantees of free speech, but the application of strict scrutiny to cases of accidental interferences with speech would produce absurd results.

Consider the following hypothetical. Suppose a state law prohibits public nudity. While the state may be concerned solely with public aesthetics, a non-speech interest, such a ban might interfere inadvertently with a nudist's means of expressing herself, a speech

69. 336 U.S. at 78-79.

70. *Id.* at 82-83.

71. *Id.* at 83.

72. *Id.* at 88-89 ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when *easy means of publicity are open*. . . . There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." (emphasis added)).

73. 391 U.S. 367 (1968).

74. 468 U.S. 288 (1984).

75. *See* McCoy, *supra* note 2, at 1361-62 (setting forth this four-factor method of balancing).

interest. Employing a balancing standard, a court would evaluate the state's strong, but certainly not compelling, interest in public aesthetics against the nudist's interest in expressing herself, accounting for both parties' alternatives. Applying strict scrutiny, however, almost certainly would result in the nudist prevailing, as a state interest in aesthetics would hardly be sufficiently compelling to justify, say, a racial classification scheme, or the burdening of a "fundamental right."

For this reason, the Court's invocation of strict scrutiny in *Sherbert* seems incorrect. The Court was not wrong to require a state exemption for an applicant's religiously based refusal to work on Saturdays. Rather, it was the Court's invocation of the highly exacting "compelling interest" standard of protection, where a lesser standard of protection would have sufficed to reach a similar outcome, that raises serious concerns. If one assumes that interests deemed "compelling" in one area of the law may be deemed similarly "compelling" in other areas, it is significant that *Sherbert* distinguished the contrary holding in *Braunfeld* on the ground that the government had justified burdens on free exercise by demonstrating a "compelling state interest." For it would be absurd to classify *Braunfeld*'s interest in a uniform day of rest as "compelling" under classic strict scrutiny. Once again, imagine such a justification being proffered for a state-imposed racial classification scheme or the burdening of a "fundamental right." Because a mere interest in uniformity could not overcome abridgements of these constitutional rights, such a decision would represent a remarkable diminishment in protection.

On the other hand, assuming a parallelism between the Court's free speech and free exercise jurisprudence, the *Clark-O'Brien* balancing calculus could have informed the Court's judgment, its choice of language notwithstanding. Such an assumption would have been justifiable from the facts of *Sherbert*. While the burden on the petitioner was substantial—her religion expressly forbade her from working on "the Sabbath"—the state's interest in denying compensation to applicants willing to work every day but Saturday was minimal, as evidenced by the state's Sunday exemption.[76] Hence, *Sherbert*'s "compelling state interest" language may have meant no more than that the state must demonstrate an interest that is simply substantial *enough* to outweigh the burden imposed on religious practice. In other words, perhaps the Court was engaging in the

76. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

balancing inherent in strict scrutiny, only without any thumb on the scale.

Yet, nine years later, in the case of *Wisconsin v. Yoder*, the Court continued in its use of superlative language. In *Yoder*, the Court struck down the fine and conviction of an Amish man who refused, on religious grounds, to send his fifteen-year-old daughter to school after she had completed the eighth grade, in violation of Wisconsin's requirement of school attendance until age sixteen.[77] The Court held that such a regulation unduly burdened the religious practices of the Amish, and struck down the fine and conviction as unconstitutional under the Free Exercise Clause.[78] In so holding, the *Yoder* Court relied on *Sherbert* for the proposition that the State's interest in compulsory education laws must be balanced against the religious interests of the Amish.[79] However, in articulating the standard supposedly set forth in *Sherbert*, the *Yoder* Court boldly stated, "The essence of all that has been said and written [concerning accidental interferences with religion] is that only those interests of the *highest order* and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[80] If there remained any question as to what standard of scrutiny the Court intended to apply in accidental interference cases, *Yoder* effectively answered it. The Court's reference to state interests "of the highest order" described a requisite strength of the governmental interest on par with the compelling interest standard employed in other areas of constitutional law. And the Court's use of the phrase "not otherwise served" seemed to encapsulate the means-fit requirement that the law be narrowly tailored.

Yet, if strict scrutiny were the standard to be applied, it is again difficult to understand how the state's interest in a uniform day of rest in *Braunfeld* was an interest "of the highest order." Moreover, as in *Sherbert*, the *Yoder* Court did not need to employ strict scrutiny to reach its result. While the burden on the religious practices of the Amish was substantial—compulsory secular indoctrination in public schools that contradicted the Amish community's religious teachings[81]—the state's regulatory interest in an additional year of education for a near-adult was trivial at best.[82] Thus, the *Yoder* Court simply could have found that the state's interest was not sufficiently

77. 406 U.S. 205, 207-08 (1972).
78. *Id.* at 234.
79. *Id.* at 215.
80. *Id.* (emphasis added).
81. *Id.* at 210-11.
82. *See id.* at 222.

substantial (in contrast to a "compelling" requirement) to outweigh the consequent burden on religious practice. But despite the fact that both *Sherbert* and *Yoder* could have reached the same outcomes under a less onerous intermediate scrutiny standard or a balancing test, both cases were taken at their word as adopting the compelling governmental interest test as the standard for resolving accidental interference claims.

3. *Sherbert*'s Progeny—Refining the Standard

After *Sherbert* and *Yoder*, claims for constitutionally mandated religious exemptions from laws of general applicability continued to succeed in cases involving state unemployment compensation.[83] Claimants outside of this context did not fare as well. Although the next Supreme Court cases to apply the *Sherbert-Yoder* rule outside of the unemployment context—*United States v. Lee*[84] and *Bob Jones University v. United States*[85]—followed suit in purporting to employ strict scrutiny in cases of accidental interference, they too cast doubt on the requirement of a true compelling governmental interest test.

In *United States v. Lee*, the Court rejected the free exercise claim of an Amish employer who refused to pay the required share of his employees' social security taxes.[86] Noting that "the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system," the Court recognized a conflict between the Amish faith and the federal obligation. Yet, the Court did not articulate clearly the appropriate standard of review for such a case. Citing *Sherbert*, it stated, "The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an *overriding governmental interest*." Nonetheless, the Court upheld the imposition of the tax under that standard, reasoning that it would be difficult to accommodate the social security system if it allowed "myriad exceptions flowing from a

83. *See* Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829, 829 (1989) (further extending *Sherbert* to protect an applicant whose religious motive for refusing to work on Sunday derived solely from his basic Christian beliefs, despite his lack of affiliation with any particular sect or church); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 136-37 (1987) (extending *Sherbert* to the case of an employee whose religious beliefs had changed in the course of his employment); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 707 (1981) (striking down the denial of unemployment benefits to a Jehovah's Witness on account of his voluntarily quitting his job in a munitions factory, because he had resigned due to religious objections to war).

84. 455 U.S. 252 (1982).

85. 461 U.S. 574 (1983).

86. For relevant facts of the case, see 455 U.S. at 254-60.

wide variety of beliefs." It reasoned that such a policy would allow similar objections to the imposition of taxes by those who object on religious grounds to activities, such as war, that the government may fund with those taxes.

What standard of review was the Court applying? Although the language chosen—"essential to accomplish an overriding interest"—is not entirely clear, the requirement that the interest be "overriding" intimates the necessity of a particularly strong governmental interest, and the requirement of essentiality seems to foreclose other, less restrictive means of accomplishing that interest. This, coupled with the Court's subsequent citations to *Yoder* and *Sherbert*, strongly suggests that the Court was in fact invoking the demanding strict scrutiny standard.

But even the compelling interest test was not necessary to reach the same result. While it is true that the state's regulatory interest in uniform taxation was high,[87] the alleged burden on the petitioner's religion was decidedly minimal. While the Amish may believe in providing for the elderly, the petitioner here was in no way prohibited from providing for his elderly by imposition of the social security tax. Rather, his complaint seems to have been that the money he provided in the form of a tax to the government would be distributed to non-Amish elderly, and that this government-provided subsistence might in some cases cause the relatives of those non-Amish elderly recipients to neglect to provide for *their* elderly. Such a convoluted articulation of the causal connection illustrates how attenuated it was. If the government's requirement burdened the Amish man's religion, it was one of the slightest burdens conceivable. Hence, the Court did not need to bring out the heavy machinery of strict scrutiny to uphold the imposition of the tax; it merely needed to demonstrate that the state's regulatory interest outweighed the accidental interference with the petitioner's religion, hardly a difficult task.

In *Bob Jones*, the Court upheld the denial of tax-exempt status to two small religious colleges that prohibited interracial dating among students, a policy that allegedly accorded with the religious beliefs of the institutions.[88] Finding that the government had a sufficiently "compelling" interest in "eradicating racial discrimination

87. *Id.* at 258-59 ("[T]he Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.").

88. 461 U.S. 574, 579-81 (1983).

in education," the Court sustained the withdrawal of tax-exempt status against the universities' free exercise objections.[89]

Whatever the degree of the burden on religious practice imposed by the IRS policy at issue, the Court's automatic acceptance of the government's interest in eradicating racism in private education as "compelling" raises certain interpretive problems. Although, the Court has recognized the eradication of racism as a compelling interest, it has done so only in the context of *governmental* discrimination.[90] The Court has declined to recognize a governmental interest in remedying *private* discrimination as "compelling," and has struck down affirmative action policies that employ racial classifications and content-based speech restrictions under strict scrutiny for that reason.[91] Its promotion to "compelling" status solely in the area of free exercise therefore is confusing.[92] As one commentator notes, "If we are to take the compelling interest test seriously in this context, it is quite surprising that the Court found a compelling governmental interest in the dating policies of a small religious college."[93] Perhaps the only explanation is that, once again, the Court was not employing traditional strict scrutiny.

Such doubts only continued when, in the late 1980s, the Court decided four more accidental interference cases—*Goldman v. Weinberger*,[94] *O'Lone v. Estate of Shabazz*,[95] *Bowen v. Roy*,[96] and *Lyng v. Northwest Indian Cemetery Protective Ass'n*[97]—all of which expressly declined to invoke strict scrutiny. In *Goldman*, an Air Force psychologist was disciplined for wearing a yarmulke, in violation of

89. *Id.* at 603-04.

90. *See* City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 492-93 (1989).

91. *See id.* at 499 (striking down a municipal requirement that private contractors on city projects subcontract at least thirty percent of the dollar amount of the contract to one or more minority businesses when there was no evidence that the city had ever participated in the alleged private discrimination in subcontracting); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768-70 (2007) (Thomas, J., concurring); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 200-02 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377, 389-90 (1992) (holding content-based restrictions on private racist speech unconstitutional on the grounds of impermissible viewpoint discrimination).

92. Without going into detailed analysis, neither does it seem that the government played a role in encouraging the private discrimination, under the current "state action" doctrine. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (requiring that there be a "sufficiently close nexus between the State and the challenged action of the regulated entity [before] the action of the latter may be fairly treated as that of the State itself"); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972) (same).

93. McCoy, *supra* note 2, at 1371.

94. 475 U.S. 503 (1986).

95. 482 U.S. 342 (1987).

96. 476 U.S. 693 (1986).

97. 485 U.S. 439 (1988).

the military's uniform dress regulations barring the wearing of headgear indoors.[98] The petitioner sought an exemption, arguing that the case should be analyzed "under the standard enunciated in *Sherbert* [and *Yoder*]." Instead, deeming the military a separate, "specialized society," the Court applied a "far more deferential" standard of review. It reasoned that greater deference was appropriate in the military context because, to accomplish its mission, the military must foster "instinctive obedience, unity, commitment, and *esprit de corps*." The military asserted that standardized uniforms encouraged "the subordination of personal preferences and identities in favor of the overall group mission." Under this openly deferential standard of review, the Court found the government interest sufficient to justify the burden on the petitioner's religious practice. In *Shabazz*, the Court similarly deferred to prison policies that prevented a Muslim inmate from attending a midday service.[99] Moreover, it expressly rejected the view that prison officials have the burden of disproving available alternatives.[100]

Thus, *Goldman* and *Shabazz*, both in the *Sherbert* line of cases, and both purporting adherence to *Sherbert*, expressly declined to employ the compelling governmental interest test. Both decisions were predicated on the peculiar characteristics of the environments. That is, the Court carved out special, formalistic categories meriting a more lenient standard of review. But no such formalism was required. The fact that the military needed to foster "instinctive obedience," or the subordination of personal preferences in favor of the group, was merely another way of saying that the government's regulatory interest in the military context was particularly high. The same could be said of the prison context, in which the state has a very strong regulatory interest in maintaining strict schedules for inmates, in light of the inherent danger attending prisoner mobility. Viewing the governmental interests in this manner, it once again becomes apparent that both decisions could have reflected the same result had the Court employed a simple balancing test of the type employed *O'Brien* and *Clark* in the free speech context.[101]

Roy and *Lyng*, on the other hand, declined to employ strict scrutiny for an entirely different reason. Rather than recognize special *sui generis* categories for the governmental interests at stake, the Court seemed to create the additional rule that burdens resulting from

98. For the relevant facts of this case, see 475 U.S. at 505-10.

99. 482 U.S. at 344-45.

100. *Id.* at 350 (citing Turner v. Safley, 482 U.S. 78, 90-91 (1987)).

101. *See supra* text accompanying note 75.

the government's choice in regulating its own procedures or property would not be subject to the *Sherbert-Yoder* test. In *Roy*, the petitioners objected to the requirement that welfare recipients be assigned and identified by a social security number, arguing that the assignment of a number to their two-year-old daughter, "Little Bird of Snow," would "rob the spirit" of their child, thus violating their religious beliefs.[102] Although certainly a case of accidental interference, the Court expressly declined to subject the interference to the test employed in *Yoder*.[103] Two considerations animated the Court's reasoning. First, it stated,

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. . . . Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.[104]

Second, it contrasted the nature of the interference at issue—the denial of benefits—with the nature of the interference in cases such as *Yoder* and *Lee*, in which the state had compelled religious objectors to engage in conduct that they found objectionable.[105]

Likewise, in *Lyng*, the Court declined to require the National Forest Service to put forth a compelling justification for its decision to build a road through and harvest timber from a national forest used by Native American tribes as a sacred religious site.[106] Citing *Roy*, the Court again emphasized that the petitioner's objection to the government's proposed actions would be to dictate the government's internal procedures—in this case, how to use its own land.[107] Like the *Roy* Court, it also distinguished between governmental programs that may simply make it more difficult to practice a particular religion and those that directly coerce individuals to violate their religious beliefs.[108]

Both *Roy* and *Lyng* relied on these two factors to avoid requiring the government to satisfy strict scrutiny. But once again, it was not necessary to create a special class of situations in which the

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102. 476 U.S. 693, 695-96 (1986).

103. *Id.* at 707.

104. *Id.* at 699-700.

105. *Id.* at 703. Of course, such a distinction brought into question the result reached in cases such as *Sherbert* and *Thomas v. Review Board*. Although the Court continued to affirm these decisions, it devoted little discussion to distinguishing them from the case at bar. *See id.* at 706-07.

106. 485 U.S. 439, 442-43 (1998).

107. *Id.* at 453.

108. *Id.* at 450-51.

Sherbert test would not apply. Rather, these factors could have been relevant considerations in ultimately finding the burden on religious claimant to be altogether minimal, and thus identical results could have been reached under the intermediate balancing standard discussed above.

Perhaps at this point, the Court's continued invocation of the compelling interest test would not be troubling if one believed that the Court nevertheless reached the proper result in each case.[109] But the intermediate and reasonable standard that had emerged from these cases lasted only a few years before ultimately meeting its demise in the seismic shift that was *Smith*.

B. Employment Division v. Smith

In 1990, in *Employment Division v. Smith*, the Court once again faced an accidental interference case in which it was asked to apply strict scrutiny to the alleged burden on religious practice.[110] Yet, rather than recognize the implicit standard that governed the previous cases, *Smith* rejected the *Sherbert* test and reinstated what one commentator has called the "constitutionally insensitive doctrine of *Gobitis*."[111]

In *Smith*, two members of the Native American Church were fired from their jobs at a drug rehabilitation clinic after ingesting peyote at a religious ceremony.[112] Oregon denied the fired individuals unemployment compensation, concluding that their dismissal for illegal drug use constituted work-related "misconduct."[113] Although technically the challenge was to the denial of unemployment compensation, and thus should have been governed by the result in *Sherbert* and *Thomas*, the Court, per Justice Scalia, instead chose to address the case under the broader issue of the extent to which the state could criminally ban the use of peyote in light of its ceremonial use in the Native American religion.[114] The Court declined to subject

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109. In this regard, the author differs from Thomas Berg, who views the progression of the *Sherbert* line as one in which the Court was continually watering down its protection for accidental interferences. *See* Berg, *supra* note 18, at 3, 9-11. I, on the other hand, believe that each case in the *Sherbert* line was, in fact, subjected to the same standard and reached the correct result, interpreting the failure rate of religious claimants in the latter cases to be indicative more of a weak case for constitutionally compelled exemptions than a weakening standard of protection.

110. 494 U.S. 872 (1990).

111. McCoy, *supra* note 2, at 1346.

112. 494 U.S. at 874.

113. *Id.*

114. *See id.* at 876.

the criminal ban to strict scrutiny and upheld the Oregon law as constitutional. Moreover, the Court proclaimed that it "[has] never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[115]

To reconcile such an assertion with prior case law, the Court engaged in a series of clever, albeit disingenuous, distinctions. Citing *Sherbert*, it stated, "We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."[116] The Court distinguished *Yoder* on the ground that it belonged to a class of cases involving "hybrid situation[s]," in which the free exercise challenge was coupled with another constitutional protection, such as freedom of speech[117] or, as in *Yoder*, the right of parents to direct the education of their children.[118] Cases such as *Lee*, which directly invoked *Sherbert*'s "compelling interest" language, were distinguished on the ground that while the Court had "sometimes purported to apply the *Sherbert* test in contexts other than [unemployment compensation], [it has] always found the test satisfied."[119] Finally, the Court cited *Goldman*,

115. *Id.* at 878-79.

116. *Id.* at 883 (citing Hernandez v. Comm'r, 490 U.S. 699 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963)).

117. *Id.* at 881 (citing Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940)).

118. *Id.* (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972)). It seems quite unlikely that Justice Scalia actually meant to recognize such a category of "hybrid rights," in the sense that a claim for religious interference coupled with a second speech or parental interference would receive constitutional protection, even if the second claim could not stand on its own. Rather, such a classification appears only instrumental in allowing the Court to distinguish prior cases such as *Yoder* without overruling them. *See* Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 417-18 (1999). Moreover, the fact that Justice Scalia has argued (unsuccessfully) that accidental interference with speech should also pose no constitutional problem, *see* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 578-79 (1991) (Scalia, J., concurring), casts doubt on the sincerity of his desire to protect accidental interference with religion simply because it is combined with speech. *See also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) (questioning the tenability of the hybrid rights distinction drawn in *Smith*); Kissinger v. Bd. of Trustees, 5 F.3d 177 (6th Cir. 1993). *But see* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *reh'g granted and opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999).

119. 494 U.S. at 883. Justice O'Connor, in her concurrence, rightfully objected to this kind reasoning, stating that "it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us." *Id.* at 897 (O'Connor, J., concurring).

Shabazz, *Roy*, and *Lyng* for the proposition that recently it had abstained from applying the *Sherbert* test at all.[120]

Having distinguished almost the entire *Sherbert* line, the Court went on to unequivocally reject the compelling governmental interest test as the standard by which accidental interferences with religion were to be resolved. Citing *Gobitis*, the Court stated, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[121] In fact, Justice Scalia pointed out that the compelling governmental interest test supposedly set forth in the *Sherbert* line was "not remotely comparable" to the standard employed elsewhere, and that "watering it down here would subvert its rigor in the other fields where it is applied."[122] Thus, the Court concluded that inadvertent state interference with religion raised no free exercise problem, no matter how serious the inadvertent interference and no matter how trivial the state's nonreligious regulatory objective.[123]

Although the decision dealt a blow to religious protection, the Court's conclusion is understandable. Unlike *Goldman* and *Shabazz*, the Court here could not find a discrete category, like the military or prison contexts, in which to shield the state from the supposed strict scrutiny requirement. Nor, as in *Roy* and *Lyng*, was the burden on free exercise so trivial that the Court could excuse applying the *Sherbert* test because of the indirect nature of the burden or the government's right to use its property as it saw fit. Rather, in *Smith*, the burden was substantial and undeniable. Religious practitioners were *directly* prohibited from engaging in a ceremonial practice[124] and laid no claim to a right to dictate the government's internal procedures or use of its property. The regulatory interest necessary to outweigh such a burden would indeed have to be significant under the implicit or subconscious balancing test applied in the *Sherbert* line. Perhaps it would even need to be "of the highest order," and thus equivalent to a truly "compelling" interest. Yet, the Court arguably feared giving credence to a true compelling interest test, for as one commentator put it,

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120. *Id.* at 883-84 (majority opinion).

121. *Id.* at 879 (citing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

122. *Id.* at 885-86, 888.

123. McCoy, *supra* note 2, at 1349-50.

124. *See* Bowen v. Roy, 476 U.S. 693, 703 (1986) (distinguishing the welfare applicants' objection to the assignment of a social security number from cases such as *Lee* and *Yoder* on the grounds that "in no sense does [the interference at hand] affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons" (internal citations omitted)).

> Under *Sherbert*, if the compelling interest test were taken seriously, generally applicable health and welfare regulations would be unconstitutional as applied. This would be the case whenever such regulations impacted religion, no matter how sound the state interest (short of *compelling*), no matter how insignificant the impact on religion, . . . and regardless of whether alternative practices were available . . . that would serve [the] religious purposes almost as well as the regulated practice.[125]

As Justice Scalia noted, such a standard indeed might allow "every citizen to become a law unto himself."[126] Thus, if the Court attempted to discern whether the state's interest in regulating peyote met a high enough standard to outweigh the significant burden on religious interests—whether it found that standard met or not—it might be seen as endorsing a true compelling governmental interest test. Such a result might set that high standard as precedent, even in cases involving only trivial interference with free exercise. The Court reacted to such a dilemma by abandoning the *Sherbert* doctrine altogether.

The Court found itself, as one commentator put it, "between the Scylla of no First Amendment protection against inadvertent interference and the Charybdis of the paralyzing 'compelling interest' test applied to every generally applicable health, welfare, and safety regulation that happens to interfere with some particular individual's off-beat way of expressing herself."[127] Yet, rather than attempt to "construct a middle course"[128] between these two doctrinal extremes by following the practice (and not the language) of *Sherbert* and its progeny, the Court returned to the Scylla of its former precedents.[129] After *Smith*, the state did not have to assert any particularly substantial interest to accidentally burden religious conduct, no matter how great the burden. *Sherbert* was overruled, and the "compelling interest" test, whatever it meant, was no more.

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125. McCoy, *supra* note 2, at 1348.

126. 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

127. McCoy, *supra* note 2, at 1363.

128. *Id.*

129. Actually, Justice Scalia did briefly consider a middle ground, rejecting respondents' proposal to "requir[e] a 'compelling state interest' only when the conduct prohibited is 'central' to the individual's religion." *Id.* at 886. Scalia asserted that it was not the place of judges to determine the "centrality" of religious beliefs. *Id.* at 887. Analyzing this proposition, itself, could consume an entire article and, indeed, has been the subject of much debate. Not wishing, however, to weigh into this debate, I briefly note that, whatever the merit of this objection, RFRA now expressly *requires* judges to evaluate the substantiality of the burden on religious conduct. *See infra* text accompanying notes 157-166. Whether deeming a burden "substantial" requires judges to determine whether a particular practice is "central" to the claimant's religion, as Justice Scalia contended, *see Smith*, 494 U.S. at 886-87, or the extent of the burden can be assessed without such an inquiry, as Justice O'Connor argued, *see id.* at 906-07, is therefore now only a secondary matter.

C. Getting Past Smith

1. The Religious Freedom Restoration Act

Not surprisingly, *Smith* drew immediate criticism. Fifty prominent law professors petitioned the Court for a rehearing of the case, [130] but the Court denied their request.[131] Congress immediately began efforts to overturn *Smith*.[132] More than fifty organizations, many of them traditionally at political odds with each other, joined in an "unprecedented" joint effort to work for RFRA's passage.[133] RFRA passed the House on a unanimous voice vote, the Senate followed with only three votes against passage, and President Clinton signed it into law shortly thereafter.[134]

As its name suggests, the Religious Freedom Restoration Act was an attempt to restore the *Sherbert* test for laws inadvertently burdening the free exercise of religion.[135] A strikingly brief statute, the first part sets forth Congress's findings, two of which merit discussion here. First, the statute explicitly references the *Smith* decision: "[I]n *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[136] Second, the findings explicitly reference and endorse the compelling interest test: "[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[137] The statute then sets forth the purposes of the Act:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[138]

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130. John Gatliff, City of Boerne v. Flores *Wrecks RFRA: Searching for Nuggets Among the Rubble*, 23 AM. INDIAN L. REV. 285, 298 (1998).

131. 496 U.S. 913 (1990) (mem.).

132. Gatliff, *supra* note 130, at 298.

133. *Id.*; *see also* Berg, *supra* note 18, at 12-17 (describing the dynamics of the different members of the RFRA coalition, and the process by which they eventually brought RFRA to law).

134. Galiff, *supra* note 130, at 298.

135. 42 U.S.C. § 2000bb(b)(1) (2000).

136. *Id.* § 2000bb(a)(4).

137. *Id.* § 2000bb(a)(5).

138. *Id.* § 2000bb(b) (citations omitted).

Finally, the statute sets forth its substantive protection:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[139]

RFRA thus attempted to overrule the Supreme Court's interpretation in *Smith* and to restore the "compelling interest test" as that test was "set forth" in *Sherbert* and *Yoder*. Yet, the simple text of the statute fails to resolve serious questions about its meaning. On the one hand, the statute's requirement that a government action be the "least restrictive means of furthering [a] compelling governmental interest" suggests a true compelling governmental interest test, on par with the test applied in the Court's equal protection jurisprudence. On the other hand, the Act expressly states that its purpose is to "restore" the "compelling interest test *as set forth in Sherbert v. Verner* and *Wisconsin v. Yoder*."[140] Yet, as detailed above, *Sherbert* and *Yoder* did not set forth a true "compelling interest test," but rather an intermediate form of scrutiny in which the state's regulatory interests were merely balanced against the burdens imposed on religious practice. Hence, it is unclear which "compelling interest test" was codified in RFRA—a true compelling governmental interest test, or a watered down compelling governmental interest test? The test suggested by the language of the *Sherbert* line, or the test actually applied in the *Sherbert* line?

2. RFRA Partially Struck Down: *City of Boerne*

Unfortunately, before courts could address these questions, RFRA was partially struck down in the case of *City of Boerne v. Flores*.[141] In *Boerne*, the city denied a Catholic Church a permit to renovate its building because a renovation would run afoul of a local ordinance preserving historic buildings.[142] The church challenged the denial under RFRA.[143] While not settling the issue of whether the city's actions did in fact violate RFRA—and thus addressing the scope of RFRA's "compelling interest" test—the Court, in a 6-3 decision, held that RFRA exceeded Congress's power under Section 5 of the

139. *Id.* § 2000bb-1(b).

140. *Id.* § 2000bb(b)(1) (emphasis added) (citations omitted).

141. 521 U.S. 507 (1997).

142. *Id.* at 511-12.

143. *Id.* at 512.

Fourteenth Amendment, insofar as it attempted to regulate state conduct.[144]

The *Boerne* holding, however, was limited to the issue of Congress's power to apply RFRA to the states. The question remained whether RFRA retained brio in the federal arena. Although still an affront to the Supreme Court's constitutional interpretation in *Smith*, RFRA did not face a serious challenge at the federal level because Congress retained power over the passage of its own laws. Thus, unless the Court were truly irascible concerning congressional overruling, it seemed likely that RFRA remained in effect in the federal arena. This question ultimately was answered affirmatively in recent case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, in which the Court struck down a federal law that incidentally burdened an obscure religion's ceremonial use of a hallucinogen.[145]

Moreover, the gap in protection from state interferences with religion left by *Boerne* has been filled in two ways. First, a number of states have passed their own Religious Freedom Restoration Acts.[146] Most of these mini-RFRAs copy the test from the federal RFRA verbatim.[147] Second, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[148] Under RLUIPA's land use provision, state and local governments may not substantially burden the religious exercise of a person (a) in any program that

144. *Id.* at 536.

145. 546 U.S. 418, 439 (2006).

146. As Professor Eugene Volokh reported in his First Amendment casebook, the current status of state RFRAs as of 2005 was as follows: twelve states (AZ, CT, FL, ID, IL, MO, NM, OK, PA, RI, SC, and TX) have enacted RFRAs by legislation; twelve states (AK, IN, MA, ME, MI, MN, MT, NC, OH, VT, WA, and WI) have interpreted their state constitutions to require strict scrutiny for accidental interferences with religion; one state (AL) has implemented a RFRA by state constitutional amendment; four states (MD, JN, OR, and TN) have rejected strict scrutiny for accidental interferences with religion under their state constitutions, and have not legislatively enacted a RFRA; courts in four states (CA, HI, NY, and UT) have noted explicitly the uncertain legal status of compelled religious exemptions but have thus far declined to resolve it; and the remaining states (AR, CO, DE, GA, IA, KS, KY, LA, MS, ND, NE, NH, NV, SD, VA, WV, and WY) have neither had a judicial decision on the subject, nor enacted a state RFRA. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES, PROBLEMS, CASES AND POLICY ARGUMENTS (2d ed. 2005).

147. *See, e.g.*, FLA. STAT. ANN. §§ 761.01-.05 (LexisNexis 2008); 775 ILL. COMP. STAT. ANN. 35/1-30 (LexisNexis 2008); TEX. CIV. PRAC. & REM. § 110.003 (Vernon 2008). Interestingly enough, it was the Texas city of Boerne that challenged the federal RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and was successful in invalidating it as to the states. Also interesting is the fact that Marci A. Hamilton, counsel for the city of Boerne, has now become a major critic of constitutional and statutory exemptions for religious objectors. *See generally* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005); *see also infra* Part IV.

148. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc-2000cc-5 (2000)).

receives federal financial assistance, (b) if the burden would affect either foreign or interstate commerce, or (c) if the burden results from zoning or other land use regulations.[149] RLUIPA's institutionalized-persons provision sets forth protections for institutionalized persons in much the same manner.[150] Like RFRA, both RLUIPA provisions require that the state or local government demonstrate that a religious burden furthers of a compelling governmental interest and is the least restrictive means of furthering that governmental interest.[151] Thus, because of the state RFRAs' and RLUIPA's similarity to the federal RFRA in terms of their incorporation of a seeming compelling governmental interest standard, the following analysis of RFRA should also apply to their interpretation.

III. ARGUING FOR A MODERATE INTERPRETATION OF RFRA

RFRA lends itself to two possible interpretations: a true compelling governmental interest test or a moderate balancing test. Because the latter provides the more sensible framework for resolving accidental interference disputes, and because such a standard will, perhaps counterintuitively, better protect religious interests, this Note will offer arguments that support the moderate interpretation.[152]

A. Defining "Compelling"

RFRA's invocation of the "compelling interest test" seems, at first, to settle the matter of the proper standard of review. The term

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149. *Id.* § 2000cc.

150. *Id.* § 2000cc-1. This section, of course, would dictate the opposite result in cases such as *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), provided that the prison received federal funds. *See supra* Part II.A.3.

151. 42 U.S.C. §§ 2000cc, 2000cc-1. In *Cutter v. Wilkinson*, the Supreme Court upheld the institutionalized-persons provision of RLUIPA as constitutional under Congress's Spending Power, also sustaining its compatibility with the Establishment Clause. 544 U.S. 709, 716, 725-26 (2005). Although numerous lower courts similarly have upheld the constitutionality of RLUIPA's land use provision, *see, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1239 (11th Cir. 2004); Mayweathers v. Newland, 314 F.3d 1062, 1066 (9th Cir. 2002), the Supreme Court has not yet ruled on the provision.

152. Many of the interpretive techniques and arguments set forth in this section resemble those employed by Thomas Berg in his article, *What Hath Congress Wrought: An Interpretive Guide to the Religious Freedom Restoration Act*, *supra* note 18. There is a crucial difference, however: Professor Berg thinks that the Court had become increasingly unreceptive to religious claimants in the latter cases along the *Sherbert* line and, therefore, believes RFRA would do little to restore religious freedom if it did no more than reinstate the holdings of these pre-*Smith* cases. I, by contrast, largely agree with the results reached in these cases and argues that RFRA will, in fact, best protect religious freedom if it does reinstate the implicit intermediate balancing standard applied therein.

"compelling interest," used throughout constitutional law as the first prong of strict scrutiny, refers to a governmental interest of exceeding importance that, when advanced by a law that is narrowly tailored to advance that interest, is sufficient to justify the abridgement of any constitutional liberty interest. Thus, it seems clear that the standard set forth in RFRA is the Court's classic strict scrutiny test. But this interpretation fails to give comparable literal effect to the phrase "as set forth in *Sherbert* . . . and *Yoder*."[153] Whatever the meaning of "compelling interest" in other areas of constitutional law, RFRA requires the term to find its definition in specific free exercise cases.

In both *Sherbert* and *Yoder*, the definition of "compelling interest" is rather benign. For instance, in *Sherbert*, the Court distinguished the invalidated employment compensation policy at issue from the mandatory Sunday closing law upheld earlier in *Braunfeld* because, there, the state succeeded in demonstrating a "compelling state interest."[154] *Sherbert* therefore would recognize a governmental interest in a "uniform day of rest" as "compelling" and RFRA, by incorporating *Sherbert*, would do so as well. Because such an interest would not qualify as "compelling" in other areas of law, such as equal protection or free speech,[155] it stands to reason that RFRA does not subject accidental interferences with free exercise to the classic strict scrutiny standard of constitutional law. Instead, a lower standard apparently governs.

B. The Problem of Sherbert*'s Progeny*

An appropriate rejoinder to the previous argument is that, ignoring the state's victory in *Braunfeld*, the religious claimants in both *Sherbert* and *Yoder* succeeded in obtaining constitutionally compelled exemptions for their religious conduct. While *Sherbert*'s approval of *Braunfeld* does not square with a true compelling governmental interest test, the result in *Sherbert* does. If we assume that *Sherbert*'s discussion of *Braunfeld* was merely dicta, allowing the Court to side-step overruling a two-year old decision, and we limit our purview to *Sherbert* and *Yoder*, both of which would have reached the same result under strict scrutiny, we eliminate the apparent tension between those cases and the traditional formulation of strict scrutiny.

Perhaps such an interpretation would aid in interpreting the phrase "prior Federal court rulings" in the following statement of

153. 42 U.S.C. § 2000bb-1(b)(1).

154. 374 U.S. 398, 403, 408 (1963).

155. *See supra* text accompanying notes 54-62.

congressional findings: "[T]he compelling interest test as set forth in *prior Federal court rulings* is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[156] If "prior Federal court rulings" refers to the *general* body of federal constitutional law, as opposed to federal rulings concerning only free exercise, then RFRA indeed instructs courts to look to the compelling interest test as applied throughout constitutional law.

But removing *Braunfeld* from the picture raises a bigger question: Does RFRA only reinstate *Sherbert* and *Yoder*, or does it codify *all* pre-*Smith* cases in the *Sherbert* line? Setting aside other unemployment compensation cases similar to *Sherbert*,[157] remember that the only cases in the *Sherbert* line in which religious claimants actually succeeded in their request for constitutionally compelled exemptions were *Sherbert* itself and *Yoder*. In all other cases—*Braunfeld*,[158] *Lee*, *Bob Jones University*, *Goldman*, *Shabazz*, *Roy*, and *Lyng*—the government ultimately prevailed on an interest that would not be considered sufficiently "compelling" to justify the abridgement of other constitutional rights.[159]

If RFRA mandates application of strict scrutiny to cases involving incidental burdens on religious exercise, then RFRA would not only protect the result in *Sherbert* and *Yoder*, but arguably reverse the result in each of these cases, because the government would not have been able to satisfy strict scrutiny. The Amish would be exempted from paying their share of their employees' social security taxes, Bob Jones University could reinstate its racial dating restrictions and still maintain its tax exempt status, and the government would be prohibited from assigning a social security number to "Little Bird of Snow."[160]

On the other hand, if RFRA preserves the result in these cases, then it can be certain that RFRA does not institute strict scrutiny for all case involving accidental interference with religious practice If that is the case, then we are left with the conclusion either that the phrase "prior Federal court rulings" refers to *Sherbert*'s progeny or that we

156. 42 U.S.C. § 2000bb(a)(5) (emphasis added).

157. *See supra* note 83 and accompanying text.

158. Of course, it is not entirely clear whether *Braunfeld*, having preceded *Sherbert*, is officially considered part of the *Sherbert* line. Regardless, its inclusion is not essential to establish the argument advanced, since several other cases in the *Sherbert* line also resulted in the denial of the religious objectors' claims.

159. *See supra* Part II.A.3.

160. It should be noted, however, that these results assume, *arguendo*, that under RFRA the burdens upon the claimant's religious exercise would be found to be "substantial[]," an additional argument against strict scrutiny, which I address *infra* Part III.C.

simply must accept the tension between applications of the compelling interest test in different areas of constitutional law.

In addition, according to RFRA, these "prior Federal court rulings" are to provide guidance as to "*striking sensible balances* between religious liberty and competing prior governmental interests." But if strict scrutiny is to be applied, then RFRA's language concerning "striking sensible balances" remains euphemistic and without effect. A true compelling governmental interest test is less about striking balances than it is about granting exceedingly strong protection for the liberty interest at stake. As Professor Winkler described, strict scrutiny becomes an act of balancing only after the liberty interest has been sufficiently weighted such that there is a strong "thumb on the scale."[161] Moreover the word "sensible" implies that the balancing of interests should be a nuanced process. Such a nuanced approach seems far more akin to the four-factor balancing test that emerged in the *Sherbert* line,[162] under which both sides' interests were carefully evaluated in a kind of "close scrutiny,"[163] than of the strict scrutiny standard, which first establishes a presumption of unconstitutionality before entertaining the government's proffered interests.[164]

C. RFRA's Substantive Provisions

The substantive provisions of RFRA provide the biggest textual obstacle to interpreting RFRA as setting forth an intermediate scrutiny standard. RFRA provides that the

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a

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161. Winkler, *supra* note 39, at 803.

162. *See supra* text accompanying notes 73-75, 101.

163. Berg, *supra* note 18, at 20 ("[I]t is possible to read the 'compelling interest' standard of *Sherbert* and *Yoder* in a 'moderate' rather than an 'absolute' fashion, as instituting a case-by-case 'close scrutiny' of government actions that harm religion but without setting up a virtual per se rule against such effects.") (citing William Bentley Ball, *Accountability: A View from the Trial Courtroom*, 60 GEO. WASH. L. REV. 809, 812 (1992), for the proposition that the *Sherbert*/*Yoder* approach was highly "fact intensive").

164. *Compare* Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 178-79 ("The crucial consequence of subjecting a governmental [racial] classification to 'strict scrutiny' is that the classification then becomes *presumptively unconstitutional*, and the burden falls on the government to establish an extremely persuasive justification for use of that classification (a burden which is essentially never met)." (emphasis added)), *with* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 64 (1993) (denying that the *Sherbert*/*Yoder* standard, despite its language, creates an initial presumption of unconstitutionality).

> compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[165]

That courts will uphold these actions only if they further a "compelling governmental interest" and are the "least restrictive means" of furthering that interest sounds like the classic strict scrutiny standard.[166] Yet, this bar for government action is applicable only in instances in which the government "*substantially* burden[s] a person's exercise of religion." The substantiality requirement immediately sets free exercise jurisprudence apart from other areas of the law in which the Court has applied strict scrutiny. For instance, once a court identifies a racial classification it is irrelevant whether the classification is a minor one,[167] or one made for benign purposes.[168] The racial classification is the trigger; once found, strict scrutiny applies. Similarly, content-based restrictions on speech, while sometimes surviving strict scrutiny, are not immune from the strict scrutiny inquiry simply because they restrict speech for only a short time or in only a single location.[169] In contrast, under RFRA, while requiring the government to put forth an interest deemed "compelling" places a thumb on the scale in favor of the religious claimant,[170] requiring the claimant to prove that the burden is "substantial[]" places an additional thumb on the opposite side of the scale for the government, restoring a more genuine balance. So, when we compare the standards under which the pre-*Smith* cases operated and under which RFRA should operate according to its statutory language, we see that the standards are identical in all but one respect:

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165. 42 U.S.C. § 2000bb-1(b) (2000).

166. *See supra* notes 55-62.

167. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2746-47, 2751, 2753 (2007) (subjecting to strict scrutiny a school district's policy to base its placement of students in part on the students' race, despite the fact that race became a determinative factor in the decision only after several other considerations, which were often sufficient, failed to determine the placement decision).

168. *See, e.g.*, City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 490, 493 (1989) (subjecting to strict scrutiny a city's race-based remedial system despite its allegedly benign or compensatory purpose).

169. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 193-94, 198 (1992) (subjecting to strict scrutiny a Tennessee law that prohibited political campaigning within only one hundred feet of a polling place and only on election day).

170. *See supra* Part II.A.2.

Table 1A—Balancing Calculus Before RFRA

		Governmental Interest	
		Compelling	Not Compelling
Burden	Substantial	Balancing Required	Adherent Prevails
	Not Substantial	Government Prevails	Balancing Required

Table 1B—Balancing Standard After RFRA

		Governmental Interest	
		Compelling	Not Compelling
Burden	Substantial	Balancing Required	Adherent Prevails
	Not Substantial	RFRA Inapplicable: Government Prevails	***Government Prevails**

Thus, at least in theory, RFRA deviates from the pre-*Smith* balancing standard only in cases where both the religious burden and the governmental interest are weak. In such cases, because the religious adherent is left without statutory protection, the government should prevail. However, considering cases such as *Lyng*, *Lee*, and *Roy*, all of which involved (arguably) only minor burdens on free exercise that were overcome by governmental interests short of compelling, perhaps RFRA codifies pre-*Smith* law even in this fourth category after all.

Of course, the main objection to this categorical comparison might be that it is accurate only insofar as it is divided into these four discrete categories. If, as this Note has argued, *Sherbert* and its progeny implemented a true balancing test, then theoretically a situation in which the government created a burden on religious practice just shy of "substantial" and in which it attempted to justify that burden by a truly trivial public interest, would result in a court finding in favor of the religious claimant. Yet, because RFRA protections kick in only for religious burdens rising to the level of "substantial," a court would have to reach the opposite result under RFRA and find for the government. This argument suffers from two defects. First, it fails to account for the subjective nature of judging. The threshold question of whether the claimant has suffered a

"substantial" burden will be animated and implicitly informed by examining the extent of the government's proffered interest. Perhaps a judge or jury would be more likely to consider a burden "substantial" if the government interest seemed minimal. For this reason, it is not surprising that in both pre-RFRA and post-RFRA cases in the lower courts, the major battleground often has been the threshold question of burden, rather than the balancing that is supposed to take place thereafter. Courts evaluating the alleged burden have not refrained from analyzing the strength of the government's interest, even though such an inquiry technically should be irrelevant until a burden is found.[171] Second, the "least restrictive means" requirement and any alternative avenues of religious practice for the claimant (to the degree that they will be considered in assessing the substantiality of the alleged burden) should allow for sufficient fluidity between the categories. This would result in a more flexible ultimate inquiry on par with that employed in the pre-*Smith* case law.[172]

These three considerations—the requirement that the compelling interest test find its definition in *Sherbert* and *Yoder*; the potential incorporation of *Sherbert*'s progeny, which watered down the standard for demonstrating a compelling interest; and RFRA's requirement that the burden on religious conduct be "substantial"—support an interpretation of RFRA consistent with a moderate balancing standard, not a classic strict scrutiny analysis.

D. O Centro Espirita*: A Post-*Boerne *RFRA Case*

Having argued that the *Sherbert* line sets forth an intermediate balancing test, and having demonstrated that RFRA is susceptible to an interpretation consistent with such intermediate scrutiny, this Note will examine the Supreme Court's first post-*Boerne* encounter with RFRA, *Gonzales v. O Centro Espirita Beneficente*

171. The pre-RFRA (and pre-*Smith*) case of *Mozert v. Hawkins County Board of Education* provides a good example. Plaintiff public school students and their parents argued that being required to read and discuss materials that ran contrary to their beliefs violated the students' right to free exercise. 827 F.2d 1058, 1060-61 (6th Cir. 1987). Although the court analyzed the alleged burden as a threshold question to be answered before First Amendment guarantees would kick in, *id.* at 1063, the court's extensive discussion of the arguments for and against the presence of a burden also delved into the strength of the government's interest in "teaching fundamental values essential to a democratic society." *Id.* at 1068-69 (internal quotation marks omitted).

172. *See supra* text accompanying notes 73-75, 101 (setting forth the nuanced four-factor balancing test that the Court uses in cases involving accidental interference with free speech, in which alternatives available to the government and alternatives available to the claimant are factors two and four, respectively).

Uniao do Vegetal, to determine whether the Court has moved in this direction.

O Centro Espirita involved the practices of a religious sect called the O Centro Espirita Beneficente Uniao do Vegetal (UDV).[173] Central to the UDV's faith is the practice of receiving communion through *hoasca*, a sacramental tea containing the hallucinogenic substance DMT.[174] DMT is listed in Schedule I of the Controlled Substances Act[175] and thus is illegal in the United States. In 1999, United States Customs Inspectors intercepted a shipment of *hoasca* to the American UDV and threatened prosecution.[176] The UDV sought declaratory and injunctive relief, alleging that the Controlled Substances Act, as applied to the UDV's sacramental use of *hoasca*, violated RFRA.[177] The UDV also sought a preliminary injunction allowing it to continue its use of *hoasca* pending trial on the merits.[178] At a hearing on the UDV's preliminary injunction motion, the government conceded that the challenged application would substantially burden a sincere exercise of religion.[179] However, the government argued that it had satisfied RFRA by demonstrating "a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban" could be made to accommodate the UDV's religious practice.[180]

The Court unanimously affirmed the lower courts' judgment granting UDV's preliminary injunction and rejected the government's invocation of the Controlled Substances Act as a compelling interest.[181] The Court stated,

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.[182]

Thus, the government could not simply rely on the assertion that Schedule I of the Controlled Substances Act by definition could admit of no exceptions, an assertion the Court also noted was

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173. 546 U.S. 418, 423 (2006).

174. *Id.* at 425.

175. 21 U.S.C. § 812(c) sched. I(c) (2000).

176. 546 U.S. at 425.

177. *Id.* at 425-26.

178. *Id.* at 426.

179. *Id.*

180. *Id.* at 423.

181. *Id.* Justice Alito took no part in the consideration or decision of the case. *Id.* at 439.

182. *Id.* at 430-31 (citation omitted).

contradicted by the fact that an exception already had been made for peyote—also a Schedule I substance—for religious use.[183]

Although the term "strict scrutiny," like the term "compelling interest," was not without its misuses in the *Sherbert* line,[184] the Court's use of the latter term throughout its opinion is significant. In two of the four instances in which the Court used the term "strict scrutiny," it did so in citations to cases from other areas of constitutional law in which there is virtually no dispute as to its meaning. First, in addressing the proper standard of review for religious exemption claims under RFRA, the Court cited *Adarand Constructors, Inc. v. Pena*, an equal protection case, for the proposition that "strict scrutiny *does* take 'relevant differences' into account."[185] Second, in discrediting the government's argument that uniform enforcement of the Controlled Substances Act remains a "compelling interest" in the abstract, the Court cited *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, a *deliberate* free exercise interference case, and *Florida Star v. B.J. F.*, a content-based speech restriction case. The Court noted that these cases stand for the proposition that in "strict scrutiny jurisprudence . . . 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.' "[186] Significantly, the Court drew from three different areas of the law in which strict scrutiny is applied with its normal rigor. This reliance goes a long way in advancing the argument that RFRA transformed the supposedly "strict scrutiny" standard in free exercise cases from a level it had characterized as "not remotely comparable" to that employed elsewhere[187] to a level on par with the rest of constitutional law.

Also significant is the fact that the Court took a step in the opposite direction by seemingly recognizing other cases in the *Sherbert* line as consistent with the compelling interest test. The government contested the Court's rejection of uniformity as a compelling interest by citing *Lee* and *Braunfeld*, both of which had relied on an interest in the uniform application of laws to reject claims for religious

183. *Id.* at 433. As the Court noted, while there had been a regulatory exemption for peyote use by the Native American Church for the past 35 years, it was not until 1994 that Congress extended the exemption to members of all recognized tribes. *Id.*; *see also infra* note 193 and accompanying text.

184. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (citing *Sherbert* for the proposition that accidental interferences with religion "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest").

185. *O Centro Espirita*, 546 U.S. at 431-32 (quoting *Adarand*, 515 U.S. 200, 228 (1995)).

186. *O Centro Espirita*, 546 U.S. at 433 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. 520, 547 (1993), and *Florida Star*, 491 U.S. 524, 541-42 (1989)).

187. Employment Div. v. Smith, 494 U.S. 872, 885-86 (1990).

exemptions.[188] In *Lee*, the Court found a state interest in not allowing "myriad exceptions flowing from a wide variety of beliefs" sufficient to justify the burden of imposing social security taxes upon religiously objecting employers.[189] Yet, as explained above, such an interest could not survive classic application of strict scrutiny because "it is axiomatic that financial concerns never rise to the level of a 'compelling interest.' "[190] Nor, as also demonstrated above, could a state interest in a "uniform day of rest."[191] If RFRA brings strict scrutiny in free exercise cases in line with the rest of constitutional law, these cases should provide no authority regarding what interests may be "compelling." Yet, rather than dismiss them accordingly, the Court implicitly affirmed their validity, stating that "[t]hese cases show that the Government *can* demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[192] The Court held that nevertheless, the government had not demonstrated a similar danger for the exemption at issue.

Thus, by incorporating other cases in the *Sherbert* line, cases in which a watered down compelling governmental interest standard was used, the Court demonstrated either that it views RFRA as codifying the intermediate standard set forth in this Note or that it remains conflicted about the proper standard of review. Suffice it to say that *O Centro Espirita*, far from resolving the ultimate issue, keeps the debate alive, and thus continues to provide religious claimants with an opportunity to steer RFRA's interpretation in an advantageous manner.

V. THE IMPORTANCE OF THIS ANALYSIS: LESSONS FOR THE FUTURE

While this Note's analysis concerning the standard of review set forth in free exercise case law and RFRA may seem to split hairs, a firm grasp of this issue is crucial to the ability of RFRA's supporters to accomplish their goals. *Smith* easily could have come out the same way without overruling *Sherbert*. Employing a simple balancing test, the Court could have concluded that the state's regulatory interest in preventing the health and diversion risks attending an exception for

188. *O Centro Espirita*, 546 U.S. at 435.

189. United States v. Lee, 455 U.S. 252, 259-60 (1982).

190. McCoy, *supra* note 2, at 1348 n.44.

191. *See supra* text accompanying notes 154-155.

192. *O Centro Espirita*, 546 U.S. at 435 (emphasis added).

the use of peyote outweighed the burden imposed on Native Americans in being denied unemployment compensation. Yet, it would also have been reasonable for the Court to have sided with the Native American interests at stake. If to forbid peyote use was indeed a substantial burden on the free exercise of Native American Religion, then perhaps the government's interest in uniform regulation should not have been enough. That such an argument had merit was demonstrated four years later, when Congress provided explicit statutory authorization for peyote use in the American Indian Religious Freedom Act.[193]

Respondents could have used this intermediate balancing argument to persuade the Court to decide in their favor. Instead, both respondents and their amici—religious organizations such as the American Jewish Congress and the Council on Religious Freedom—argued for a true compelling governmental interest test, seizing upon every piece of language in the *Sherbert* line that lent support to such a standard.[194] This demanding standard faced opposition from the *Smith* Court: "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation."[195] The Court therefore concluded that the state need assert no particularly substantial interest to burden religion. In many ways, respondents and their amici, by asking for too much, may have effectively shot themselves in the foot.

Likewise, attacks on RFRA capitalize on the seeming strict scrutiny standard to (quite convincingly) hypothesize absurd and alarming results that would follow from taking such a standard seriously. Professor Marci A. Hamilton, who successfully argued against RFRA in *City of Boerne v. Flores*,[196] provides several such carefully crafted hypothetical scenarios in her article, *How Much*

193. 42 U.S.C. § 1996a (1994).

194. *See, e.g.*, Brief of American Jewish Congress as Amicus Curiae Supporting Respondents at 23-27, Employment Div. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126849 ("[G]overnment cannot rely on theoretical interests when its laws infringe on an individual's most basic right to religious liberty. 'Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms . . . .' " (quoting Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part)).

195. Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

196. *See supra* Part II.C.2.

Protection Does Religion Need?[197] For example, criticizing the bill that would eventually become RLUIPA,[198] she writes,

> How would the [standard] apply when a religious believer beats (poisons, refuses medical treatment for or refuses to feed) his wife and children as part of his religion, and the family ends up at a shelter or county hospital that receives federal tax dollars? If the believer, in line with his religious beliefs, demands them back, the courts would have to determine which arrangement is the least restrictive means of serving the government's interest in the wife's and children's safety. It would be less restrictive to post a policeman in the house than to keep the family away from the believer, even though the societal cost would be immense.[199]

Perhaps arguments like this were persuasive to former California governor Pete Wilson, who ultimately vetoed California's proposed RFRA, commenting,

> Unfortunately, this bill would go further than the compelling interest test utilized by the courts before Employment Division v. Smith and would create a means to challenge facially neutral laws by prisoners, criminal defendants, and others.[200]

> Poorly drafted, it sets standards for assessing the validity of laws which would have untold consequences not contemplated by its supporters: It would engender litigation by prisoners and criminal defendants alike, who claim that the laws which protect and preserve order burden their religious beliefs. It would open up the prospect of invalidating laws ranging from the payment of taxes to compulsory vaccination laws, to drug laws, to land use laws, to laws against racial discrimination.[201]

> [Under] the bill, criminal defendants could raise religious objections to drug laws, seek to justify domestic violence based on a purported religious belief that wives should be submissive to their husbands, and could seek to resurrect the diminished capacity defense for defendants who are under the influence of drugs when they commit crimes. In each case, the State would have to show that these criminal laws are the "least restrictive means" of furthering its compelling interests in these laws. While no one can predict the outcome of these challenges, we can predict that law enforcement will be thwarted, delayed, and consumed in litigation.[202]

While such attacks are certainly hyperbolic—after fifteen years of RFRA in federal law and the enactment of at least twelve state RFRAs,[203] no such parade of horribles has occurred—they are no doubt theoretically consistent with a true compelling interest test. Thus, by

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197. Marci A. Hamilton, *How Much Protection Does Religion Need?*, 115 CHRISTIAN CENTURY 686 (1998). Actually, Professor Hamilton goes further by characterizing RFRA as requiring what she calls "superstrict scrutiny." *Id.* at 686.

198. As noted above, because the standard of review imposed in RLUIPA is identical to that of RFRA, *see supra* text accompanying note 151, Professor Hamilton's criticisms apply equally to RFRA.

199. Hamilton, *supra* note 197, at 687.

200. Governor Pete Wilson, Veto Message—Assembly Bill No. 1617 (Sept. 28, 1998), 1997-98 CAL. ASSEMBLY J. (REGULAR SESSION) 9647, 9478 (Recess Journal No. 26, Oct. 1, 1998).

201. *Id.* at 9647.

202. *Id.* at 9649.

203. *See supra* note 146.

insisting on a true compelling interest test, religious claimants risk inviting precisely this kind of reactionary response. Of course, if the fate of the California RFRA or the result in *Smith* provides guidance, the likely result of a successful backlash would not be a slight easing of the standard of protection, but an elimination of any standard whatsoever. Hence, by asking for too much, religious claimants risk losing it all.

Instead, religious claimants should seek the middle ground of a reasonable balancing test between the state's regulatory interest and the degree of burden on free exercise, the test that emerged in the *Sherbert* line of cases. Religious claimants should seek this middle ground in two ways. First, in arguing RFRA and RLUIPA cases, they should advance an interpretation of "compelling interest" as that test was "set forth" in *Sherbert*, *Yoder*, and its progeny—that is, not a true compelling governmental interest test, but an intermediate balancing test. This approach will decrease hostility to what otherwise might prove an extreme interpretation and application of RFRA and will minimize the likelihood of RFRA's repeal through the political process. Second, they should enact mini-RFRAs that expressly and unequivocally adopt a balancing test like the one described in this Note. It would be best to eschew reference to *Sherbert*, *Yoder*, or any other cases in that line and not to employ the term "compelling interest." Rather, the statute could accomplish this purpose by stating that all state laws incidentally burdening the free exercise of religion should be subject to intermediate scrutiny in which the state's regulatory interest is to be weighed against the burden on the citizen's religious practice, accounting for possible alternative avenues on both sides. As in RFRA, the statute should provide that any defendant may raise this requirement as a defense in a criminal or civil proceeding.[204]

VI. CONCLUSION

From the 1960s through the '80s, the Supreme Court refined a sensible and workable test for resolving the question of accidental regulatory interference with religion. Through *Sherbert v. Verner* and its progeny, the Court arrived at an intermediate form of scrutiny in which, some of its language notwithstanding, the state's regulatory interests were weighed against the alleged burdens on the petitioner's religious practices while accounting for feasible alternatives for both sides. Unfortunately, that finely wrought balance was destroyed in *Employment Division v. Smith*, in which the Court held that the state

204. *See* 42 U.S.C. § 2000bb-1(c) (2000).

need demonstrate no particularly compelling interest should a facially neutral uniform law incidentally burden religion. This dismantling of the *Sherbert* doctrine was the unfortunate result of *Sherbert*'s hyperbolic rhetoric of the "compelling governmental interest" test, an extreme and seldom met standard. Congress responded by enacting the Religious Freedom Restoration Act, which attempted to restore the pre-*Smith* understanding of accidental interference. Although RFRA was struck down as unconstitutional as applied to the states in *City of Boerne v. Flores*, RFRA continues to have force with respect to federal laws. RFRA's text admits of two possible interpretations, one being a true form of strict scrutiny, as that test is applied in other areas of constitutional law, and the other being the balancing test actually applied in the *Sherbert* line of cases. Because a true compelling governmental interest test is so extreme that it invites a backlash akin to *Smith*, religious claimants should take advantage of the current definitional ambiguity in RFRA to steer its interpretation toward the balancing test applied in *Sherbert* and away from a true compelling governmental interest test. Such an interpretation of RFRA is not only the optimum approach to accidental interference jurisprudence, but it also is the approach most likely to enjoy continued acceptance in the law, and therefore the most likely to provide the best protection for religious interests in the long run.

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