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Old Wine, Old Bottles, and Not Very New Corks: On State RFRAs and Free Exercise Jurisprudence

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OLD WINE, OLD BOTTLES, AND NOT VERY NEW CORKS: ON STATE RFRAS AND FREE EXERCISE JURISPRUDENCE

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I. INTRODUCTION

State actors can engage in nullification in many ways. While a paradigmatic example involves a public official interfering in some way in the recognition or enforcement of individual rights arising under federal law, other examples include a state legislature's disapproving of a court's interpretation of federal law and then enacting more protective legislation. Several states have passed state Religious Freedom Restoration Acts (RFRAs) after the United States Supreme Court offered a narrow interpretation of free exercise guarantees in *Employment Division, Department of Human Resources of Oregon v. Smith*[1] and struck down the Federal Religious Freedom Restoration Act as applied to the states in *City of Boerne v. Flores*.[2]

Smith was controversial and likely understated the protections afforded under free exercise guarantees.[3] Nonetheless, the Court had not been consistent with respect to its recognition of the strength of free exercise guarantees in the case law preceding *Smith*,[4] and a (legislative) rejection of a particular decision like *Smith* does not establish how the guarantees should be construed. Even a legislature's rejecting *Smith* and endorsing certain decisions like *Sherbert v. Verner*[5] or *Wisconsin v. Yoder*[6] does much less work than might be thought, because the Court allegedly applied the protections recognized in those decisions when affording little protection in other contexts.[7] It thus should not

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1. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

2. City of Boerne v. Flores, 521 U.S. 507 (1997).

3. *Cf.* Douglas Laycock, Essay, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 885–86 (1994) ("[T]he state should not burden a religious practice without a compelling reason. That was the rule that prevailed in the Supreme Court from *Sherbert v. Verner* in 1963 until just before the *Smith* case in 1990.").

4. *See infra* Part II.D.

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

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

7. *See infra* notes 77–98 and accompanying text (discussing *Braunfeld* in which the Court claimed to be applying the test later used in *Sherbert* while not providing much free exercise protection) and *infra* notes Part II.D and accompanying text (discussing *Lee* in which the Court

be surprising that courts interpreting the state RFRAs, which often involve implementing or following the pre-*Smith* jurisprudence, have been less protective than might have been hoped.

Part II of this article addresses the developing free exercise jurisprudence, noting some of the mixed signals that the Court has sent with respect to the breadth and depth of those guarantees. Part III addresses some of the state responses to *Smith*'s narrow reading of free exercise guarantees and offers some suggestions about why the state RFRAs have not resulted in the kind of robust protection of free exercise guarantees that might initially have been expected. The article concludes that the state RFRA cases illustrate some of the complexities of attempting to implement a respectful free exercise jurisprudence and some of the dangers that can arise especially for those with minority religious views or practices.

II. THE CHANGING FREE EXERCISE JURISPRUDENCE

In a series of cases, the United States Supreme Court has addressed the breadth and depth of free exercise guarantees.[8] Rather than offer a clear picture of those guarantees, however, the Court has instead sent mixed messages about how heavy a burden the state must bear when seeking to limit religious practices.[9] Precisely because the free exercise opinions not only adopted differing approaches but also made implausible distinctions when attempting to reconcile the cases previously decided, the jurisprudence prior to *Smith* was open to such different interpretations that those loudly proclaiming their wish to return to the pre-*Smith* jurisprudence did not thereby provide much guidance with respect to what they thought free exercise guarantees protected.

A. The Application of Free Exercise Guarantees

In *Cantwell v. Connecticut*, the United States Supreme Court held that the free exercise guarantees afforded by the First Amendment[10] to the United States Constitution were incorporated by the Fourteenth Amendment against the states.[11] Because those guarantees also limited the degree to which states

claimed to be applying the test used in *Yoder* and *Sherbert* but not providing robust free exercise protection).

8. *See infra* Part II.A–D.

9. *See infra* notes 77–120 and accompanying text (discussing *Braunfeld* and *Sherbert* in which the Court allegedly used the same test but came up with such different holdings that the opinions do not seem capable of being reconciled in a plausible way).

10. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

11. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

could limit religious practices, the Court then had a variety of opportunities to spell out which burdens states could and could not place on free exercise.

The *Cantwell* Court explained that the religious freedoms protected by the First Amendment are quite robust: "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."[12] Further, the Constitution protects not only an individual's right to believe, but also an individual's right to act in accord with conscience.[13] That said, the freedom to believe and the freedom to act in accord with religious belief are not given the same degree of protection. "[T]he Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[14] Yet, announcing that religious conduct may be regulated to protect society does not provide much guidance—the protection of society encompasses a wide range of threats, from grave dangers to minor inconveniences, and more must be said before that can be a helpful standard.

B. The Accuracy of Religious Beliefs

Even before one discusses what the state must show to justify its limitations on religious exercise, a prior question involves which kinds of beliefs or activities count as religious for First Amendment purposes. In *United States v. Ballard*,[15] the Court addressed the degree to which the state could second-guess the tenets of a particular religion.

Edna and Donald Ballard were convicted of fraud.[16] They claimed to have supernatural powers enabling them to cure the sick.[17] Individuals would send them "money, property, and other things of value,"[18] hoping that the detrimental effects of severe or terminal illness might be avoided. The Ballards

12. *Id*.

13. *Id.* ("it safeguards the free exercise of the chosen form of religion").

14. *Id*. at 303–04.

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

16. *Id.* at 79 ("Respondents were indicted and convicted for using, and conspiring to use, the mails to defraud. § 215 Criminal Code, 18 U.S.C. § 338, 18 U.S.C.A. § 338; § 37 Criminal Code, 18 U.S.C. § 88, 18 U.S.C.A. § 88.").

17. *See id.* at 80 ("Edna W. Ballard and Donald Ballard had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments.").

18. *See id*.

allegedly knew that they had no power to cure the sick,[19] although they argued that they could not be punished for their religious beliefs.[20]

The trial court told the jury that its task was not to assess the truth of the defendants' beliefs,[21] but only to consider whether the defendants believed what they preached.[22] Further, defendants' counsel did not object to the court's direction to the jury that the sincerity of belief was the focus of the inquiry.[23]

The *Ballard* Court explained that "[f]reedom of thought . . . embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."[24] It thus did not matter that "[t]he religious views espoused by respondents might seem incredible, if not preposterous, to most people."[25] The Court cautioned that if the Constitution were to permit those beliefs to be set "before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect."[26] For that reason, "the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents."[27] Thus, the Constitution does not permit the state to determine the accuracy of religious beliefs.

C. Which Beliefs Are Religious?

Suppose that an individual has deeply held and well-considered beliefs that play a central role in her life, even if those beliefs are not part of an organized set of beliefs including some notion of a supreme being. Would those beliefs count as religious for free exercise purposes?

19. *Id.* ("Each of the representations enumerated in the indictment was followed by the charge that respondents 'well knew' it was false.").

20. *Id.* at 80–81 ("There was a demurrer and a motion to quash each of which asserted among other things that the indictment attacked the religious beliefs of respondents and sought to restrict the free exercise of their religion in violation of the Constitution of the United States.").

21. *Ballard*, 322 U.S. at 81 ("[I]t is immaterial what these defendants preached or wrote or taught in their classes. They are not going to be permitted to speculate on the actuality of the happening of those incidents.").

22. *Id.* ("The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted.").

23. *Id.* at 82 ("[C]ounsel for the defense acquiesced in this treatment of the matter, made no objection to it during the trial, and indeed treated it without protest as the law of the case throughout the proceedings prior to the verdict.").

24. *Id.* at 86.

25. *Id.* at 87.

26. *Id.*

27. *Ballard*, 322 U.S. at 88. *See also* United States v. Seeger, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.").

While not speaking directly to that point,[28] the Court did address whether an individual had to believe in God in order to be considered a conscientious objector in *Seeger v. United States*[29] and *Welsh v. United States*,[30] and those decisions have been interpreted to establish the robustness of free exercise guarantees.[31] However, a subsequent decision involving conscientious objectors undercut such an interpretation.[32]

Daniel Seeger refused to submit to induction, claiming to be a conscientious objector.[33] While stating that his refusal to participate in war in any form was based on religious beliefs, he preferred to leave open whether he believed in God[34] and instead based his beliefs on his reading the works of various thinkers.[35] His views were found to be sincere,[36] and the reason for his denial of conscientious objector status in the district court was that his beliefs were not tied to a belief in a supreme being.[37]

The *Seeger* Court interpreted Congress's linking the exemption to a supreme being as Congress's "merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views."[38] The Court further explained that "under this construction, the test of belief 'in a relation to a Supreme

28. *But cf.* Terri Jane Lavi, Note, *Free Exercise Challenges to Public School Curricula: Are States Creating "Enclaves of Totalitarianism" through Compulsory Reading Requirements?*, 57 GEO. WASH. L. REV. 301, 321–22 (1988) (discussing "the expansive definition of religion the Court adopted in *Seeger* and *Welch*").

29. Seeger v. United States, 380 U.S. 163 (1965).

30. Welsh v. United States, 398 U.S. 333 (1970).

31. *Cf.* Steven D. Collier, *Beyond Seeger/Welsh: Redefining Religion under the Constitution*, 31 EMORY L.J. 973, 982 (1982) ("Commentators generally have agreed that the *Seeger*/*Welsh* definition is the constitutional definition of religion, at least for purposes of the Free Exercise Clause.").

32. *See infra* notes 56–72 and accompanying text (discussing *Gillette v. United States*).

33. *Seeger*, 380 U.S. at 166 ("He first claimed exemption as a conscientious objector in 1957 after successive annual renewals of his student classification."). *See also id.* at 164–65 ("These cases involve claims of conscientious objectors under § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456(j) (1958 ed.), which exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form.").

34. *Id.* at 166 ("[H]e declared that he was conscientiously opposed to participation in war in any form by reason of his 'religious' belief; that he preferred to leave the question as to his belief in a Supreme Being open, 'rather than answer 'yes' or 'no'.'").

35. *Id.* ("He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity.").

36. *Id.* at 166–67 ("His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields.").

37. *Id.* at 167 ("Seeger's claim, however, was denied solely because it was not based upon a 'belief in a relation to a Supreme Being' as required by § 6(j) of the Act.").

38. *Seeger*, 380 U.S. at 165–66.

Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[39] Because Seeger's opposition to war operated the same way within his belief system as it would in a system closely linked to a belief in a supreme being, Seeger had to be awarded conscientious objector status.[40]

Elliot Welsh II was convicted of refusing to be drafted into the army.[41] He challenged that conviction because he claimed to be a conscientious objector.[42] While Welsh "held deep conscientious scruples against taking part in wars where people were killed,"[43] he denied that those beliefs were religious[44] except in the ethical sense of that word.[45]

One of the questions at hand was whether Welsh's beliefs were appropriately characterized as "essentially political, sociological, or philosophical views or a merely personal moral code,"[46] especially because Welsh admitted that his views were based in part on his perceptions of world events.[47] But the Court rejected that the exclusion from the exemption should apply "to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy."[48] The Court instead interpreted the exclusion to apply to "those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon

39. *Id.*

40. *See id.* at 187 ("It may be that Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term 'Supreme Being.' But as we have said Congress did not intend that to be the test. We therefore affirm the judgment in No. 50.").

41. Welsh v. United States, 398 U.S. 333, 335 (1970) ("The petitioner, Elliott Ashton Welsh II, was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. § 462(a), and was on June 1, 1966, sentenced to imprisonment for three years.").

42. *Id.* ("One of petitioner's defenses to the prosecution was that § 6(j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was 'by reason of religious training and belief . . . conscientiously opposed to participation in war in any form.'").

43. *Id*. at 337.

44. *Id.* at 341 ("Welsh was far more insistent and explicit than Seeger in denying that his views were religious.").

45. *Id.* ("Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were 'certainly religious in the ethical sense of the word.'").

46. *Id*. at 342.

47. *Welsh*, 398 U.S. at 342 ("Welsh's conscientious objection to war was undeniably based in part on his perception of world politics.").

48. *Id.*

considerations of policy, pragmatism, or expediency."[49] Believing "[t]he controlling facts in this case . . . strikingly similar to those in *Seeger*,"[50] the *Welsh* Court found that Welsh should also be classified as a conscientious objector.[51]

Justice Harlan concurred in the result, which he believed was constitutionally required.[52] Justice White in his dissent suggested that conscientious objector status might be required as a matter of free exercise,[53] although he did not believe that nonreligionists would also have to be afforded an exemption.[54]

Together, *Welsh* and *Seeger* might seem to suggest robust free exercise protection.[55] Yet, *Gillette v. United States*[56] undermines such an interpretation.

Guy Gillette and Louis Negre were each convicted of refusing to serve their country in war,[57] although each had claimed to have conscientious

49. *Id.* at 342–43.

50. *Id.* at 335.

51. *Id.* at 343–44 ("[W]e think Welsh was clearly entitled to a conscientious objector exemption. Section 6(j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.").

52. *Id.* at 344–45 (Harlan, J., concurring) ("I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether § 6(j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. For reasons later appearing I believe it does, and on that basis I concur in the judgment reversing this conviction.").

53. *Cf. Welsh*, 398 U.S. at 369–70 (White, J., dissenting) ("Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect."). S*ee also id.* at 373 (White, J., dissenting) ("[F]ree exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion.").

54. *Id.* at 370 (White, J., dissenting) ("Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include nonreligious believers as well.").

55. *But see* Matthew D. Krueger, Note, *Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause*, 89 MINN. L. REV. 1179, 1191 (2005) ("While the broad *Seeger/Welsh* view of 'religion' has the virtue of tolerance—ensuring that claimants holding untraditional or unusual beliefs are not neglected—this view tends to diminish the freedom afforded to claimants. This is because legislatures and courts are unlikely to offer both strong protections from general laws and wide accessibility to those protections.").

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

57. *See id.* at 439 ("[P]etitioner Gillette was convicted of willful failure to report for induction into the armed forces."). *See id.* at 440 ("[P]etitioner Negre, after induction into the Army, completion of basic training, and receipt of orders for Vietnam duty commenced proceedings looking to his discharge as a conscientious objector to war.").

objections to serving in the Vietnam War.[58] Sincerity of belief was not at issue.[59] Further, recognizing that "these petitioners' beliefs concerning war are 'religious' in nature,"[60] the Court did not base its decision on the exclusion related to "essentially political, sociological, or philosophical views, or a merely personal moral code."[61] Nonetheless, the Court suggested that Congress did not intend to offer conscientious objector status to those objecting to a particular war rather than to war in general.[62]

Yet, such a distinction raises other difficulties because some faith traditions object to war as a general matter and other traditions only object to unjust wars, and Congress seemed to be respecting free exercise concerns for certain traditions but not others.[63] The Court noted that the challenged section "on its face, simply does not discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning war."[64] Because that was so, the Court interpreted the petitioners' contention to be that "the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions,"[65] a contention that could not "simply be brushed aside."[66] However, because differentiating between objections to all wars and to a particular war "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions,"[67] and because "valid neutral reasons

58. *Id.* at 439 ("In support of his unsuccessful request for classification as a conscientious objector, this petitioner had stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as 'unjust.'"). *Id.* at 440–41 ("Negre, a devout Catholic, believes that it is his duty as a faithful Catholic to discriminate between 'just' and 'unjust' wars, and to forswear participation in the latter. His assessment of the Vietnam conflict as an unjust war became clear in his mind after completion of infantry training, and Negre is now firmly of the view that any personal involvement in that war would contravene his conscience and 'all that I had been taught in my religious training.'").

59. *Id.* at 440 ("Gillette's defense to the criminal charge [was] rejected, not because of doubt about the sincerity or the religious character of petitioner's objection to military service but because his objection ran to a particular war. . . . [N]o question is raised as to the sincerity or the religious quality of [Negre's] views.").

60. *Id.* at 447.

61. *Id.*

62. *Gillette*, 401 U.S. at 447 ("[W]e hold that Congress intended to exempt persons who oppose participating in all war—'participation in war in any form'—and that persons who object solely to participation in a particular war are not within the purview of the exempting section, even though the latter objection may have such roots in a claimant's conscience and personality that it is 'religious' in character.").

63. *Id.* at 448–49, 451–52.

64. *Id.* at 450.

65. *Id.* at 451–52.

66. *Id.* at 452.

67. *Id.*

exist for limiting the exemption to objectors to all war, . . . the section therefore cannot be said to reflect a religious preference."[68] The Court mentioned the nation's religious diversity,[69] suggesting that permitting objections to a war to serve as a basis for conscientious objection would create an even greater potential for indeterminacy and unfairness.[70]

The Court expressly addressed the petitioners' free exercise claim, suggesting that the government's "incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned."[71] For example, the Court noted the concern "of the National Advisory Commission on Selective Service . . . that exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict."[72] Thus, the Court accepted that according conscientious objector status to those with religious objections to particular wars might have too severe an impact on the conduct of the war.

Perhaps *Gillette* can be explained by talking about the difficulty in distinguishing between those with sincere religious objections to the war and those with merely political objections to it.[73] Yet, the Court accepted that political or moral objections to war as a general matter that were firmly held could be the basis of conscientious objector status in *Welsh*,[74] so the Court should presumably be taken at its word that it believed a different decision

68. *Gillette*, 401 U.S. at 454.

69. *Id.* at 457 ("Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions.").

70. *See id.* at 458 ("While the danger of erratic decision making unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory."); *See also id.* (discussing "the interest in fairness").

71. *Id.* at 462.

72. *Id.* at 459–60.

73. *Cf.* Charles J. Reid, Jr., *John T. Noonan, Jr., on the Catholic Conscience and War: Negre v. Larsen*, 76 NOTRE DAME L. REV. 881, 954 (2001) ("The difficulties in distinguishing between religious dissenters to a particular war and those dissenting on political grounds, the [*Gillette*] Court suggested, 'are considerable.'"); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1295–96 (1994) ("[W]e might think it unreasonable for secular objectors to build moral identities around distinctions that they themselves recognize as matters inviting political resolution. This argument carries less weight with respect to religious objectors, since the state may no more pass upon the reasonableness of religious distinctions among just and unjust wars than it may pass upon the reasonableness of religious beliefs about wearing yarmulkes or eating beef on Friday. Those who accept this line of reasoning might endorse *Gillette* while rejecting *Negre*.").

74. *See supra* notes 37–50 and accompanying text (discussing *Welsh*).

might seriously impair the war effort.[75] In any event, *Gillette* does not represent a particularly robust protection of religious liberty.[76]

D. The Robustness of Free Exercise Guarantees

While claiming to be applying the same guarantees, the Court seems to vary the strength of the protections afforded under the Free Exercise Clause in different cases. In *Braunfeld v. Brown*,[77] the Court discussed whether Sunday closing laws could be applied to Philadelphia retail merchants who, because of sincere religious belief, had to close their establishments on a day other than Sunday. "Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday."[78] They "had previously kept their places of business open on Sunday, [and] . . . each of [the] appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday."[79] The appellants claimed that forcing them to be closed on Sunday as well "will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment."[80] Enforcement of the law "will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath."[81]

The *Braunfeld* Court explained that while free exercise guarantees are robust and the "freedom to hold religious beliefs and opinions is absolute,"[82] it is nonetheless true that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[83] Because "the statute at bar does not make unlawful any religious practices of appellants"[84] but instead merely "operates so as to make

75. Arlin M. Adams & Sarah Barringer Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317, 339 (1988) (noting that "one of the most compelling state interests is that of government in protecting its citizens and borders through military conscription").

76. *See* Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1206 (2013) (suggesting that *Gillette* represents a less robust protection of religious liberty).

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

78. *Id.* at 601.

79. *Id.*

80. *Id.*

81. *Id.* at 602.

82. *Id.* at 603.

83. *Braunfeld*, 366 U.S. at 603 (citing Cantwell v. Connecticut, 310 U.S. 296, 303–04, 306 (1940)).

84. *Id.* at 605.

the practice of their religious beliefs more expensive,"[85] the law at issue was less burdensome than some that had been upheld in the past.[86] Further, the Sunday closing law did not disadvantage "all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday."[87] For those disadvantaged, the Court reasoned that the forced choice was not between practicing one's religion and facing criminal penalty,[88] but merely between choosing one kind of work versus another.[89]

The *Braunfeld* Court justified its approach by noting that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference."[90] Such diversity creates practical difficulties, and "it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."[91] A different analysis would be required if the legislation were targeting religion.[92]

The Court offered a standard by which to determine whether the state was justified in burdening free exercise: "[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[93] Yet, it was not clear that the Sunday closing law passed muster even in light of the suggested standard, because the state might have accomplished its goals by requiring a day of rest but not

85. *Id.*

86. *See id.* (citing Reynolds v. United States, 98 U.S. 145 (1878) and Prince v. Massachusetts, 321 U.S. 158 (1944)).

87. *Id.*

88. *Id.* at 605 ("And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution.").

89. *Braunfeld*, 366 U.S. at 605–06 ("Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.").

90. *Id.* at 606.

91. *Id.* at 606–07.

92. *Id.* at 607 ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.")

93. *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 304–05 (1940)).

mandating that it be Sunday.[94] Indeed, several states had adopted such an approach,[95] although the Court did not believe such a solution required[96] because there would be added compliance costs were such an approach implemented.[97] In addition, such an approach might afford those open on Sunday with an economic advantage.[98]

Two years after *Braunfeld*'s tepid enforcement of free exercise guarantees,[99] the Court decided *Sherbert v. Verner*.[100] The case involved a free exercise challenge by Adell Sherbert, who was denied unemployment compensation after having been fired because she, as a Seventh Day Adventist, could not work on Saturdays without violating her religious convictions.[101]

Sherbert could not find other employment that did not require her to work on Saturdays.[102] The South Carolina Employment Security Commission rejected that her faith-based refusal to accept such employment qualified as "good cause" justifying her not accepting such a job offer.[103] For that reason, her claim for unemployment compensation was denied.[104] She unsuccessfully

94. *Id.* at 608 ("They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday.").

95. *Braunfeld*, 366 U.S. at 608 ("A number of states provide such an exemption, and this may well be the wiser solution to the problem.").

96. *Cf. id.* ("But our concern is not with the wisdom of legislation but with its constitutional limitation.").

97. *Id.* ("[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. . . . [E]nforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.").

98. *Id.* at 608–09 ("To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against.").

99. Donald Falk, *Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 ECOLOGY L.Q. 515, 564 (1989) (describing *Braunfeld*'s free exercise protection as "weak").

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

101. *Id.* at 399 ("Appellant, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith.").

102. *Id.* at 399–400 ("[S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work.").

103. *Id.* at 401 ("The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered . . . by the employment office or the employer . . .'").

104. *See id.* at 399–400.

challenged that denial in the state courts.[105] The South Carolina Supreme Court held that "appellant's ineligibility infringed no constitutional liberties because such a construction of the statute 'places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.'"[106]

When reviewing the South Carolina Supreme Court decision, the United States Supreme Court began its analysis by asking whether Sherbert's "disqualification as a beneficiary . . . [infringed upon] her constitutional rights of free exercise."[107] The Court explained that it did,[108] because "the pressure upon her to forego that [religious] practice is unmistakable."[109] Basically, she was put in the position of having "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[110] The Court analogized the choice she faced to one involving a government-imposed penalty: "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[111]

Yet, it would seem that the government had required the same kind of forced choice in *Braunfeld*.[112] The *Sherbert* Court distinguished the two cases:

> [T]he state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served 'to make the practice of (the Orthodox Jewish merchants') religious beliefs more expensive.'[113] But the statute 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. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions

105. *See id.* at 401.

106. *Sherbert*, 374 U.S. at 401 (citing Union Naval Stores Co. v. United States, 240 U.S. 286, 303–04 (1916) and Sherbert v. Verner, 125 S.E.2d 737, 746 (S.C. 1962)).

107. *Id.* at 403.

108. *Id.* (In determining whether Sherbert's disqualification infringed upon her rights, the United States Supreme Court found "it is clear that it does.").

109. *Id.* at 404.

110. *Id.*

111. *Id.*

112. *See* Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961) ("[T]he alternatives open to appellants and others similarly situated-retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor-may well result in some financial sacrifice in order to observe their religious beliefs.").

113. *Id.* at 605.

> for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.[114]

Thus, the *Sherbert* Court suggests that the law at issue in *Braunfeld* was narrowly drawn to promote compelling state interests, whereas the denial of unemployment benefits in *Sherbert* did not. Yet, such a characterization of the state interests implicated in *Braunfeld* is not plausible.[115] For example, when the *Braunfeld* Court noted that some states required a day of rest without requiring that everyone rest on Sunday,[116] the Court offered an example of such a statute[117] without describing the experiences of those states. But no evidence was presented suggesting that those states incurred great difficulty when affording such flexibility,[118] which undercuts the claim that the state's interest in Sunday closing laws was compelling.[119] But that makes *Sherbert* and *Braunfeld* difficult to reconcile, as some of the justices pointed out.[120]

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114. *Sherbert*, 374 U.S. at 408–09.

115. *See* Steven M. Rosato, *Saving Oklahoma's "Save Our State" Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 SETON HALL L. REV. 659, 672 (2014) ("*Sherbert v. Verner* . . . seems in direct conflict with the holding in *Braunfeld*.").

116. *See Braunfeld*, 366 U.S. at 608.

117. *See id.* at 608 n.5 (citing IND. STAT. ANN. § 10-4301).

118. *See id.* at 614–15 (Brennan, J., concurring and dissenting) ("It is also true that a majority—21 of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's.").

119. *See id.* at 613–614 (Brennan, J., concurring and dissenting) ("What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? . . . It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday."); McGowan v. Maryland, 366 U.S. 420, 561 (1961) (Douglas, J., dissenting) ("If the 'free exercise' of religion were subject to reasonable regulations, as it is under some constitutions, or if all laws 'respecting the establishment of religion' were not proscribed, I could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with anyone's free exercise of religion and took no step toward a burdensome establishment of any religion. But that is not the premise from which we start."); Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2530 (1996) (describing the *Braunfeld* Court as "applying rational basis review").

120. *See* Sherbert v. Verner, 374 U.S. 417 (1963) (Stewart, J., concurring in the result) ("I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown.*"); *id*. at 421

The line of cases including *Braunfeld*, *Sherbert*, and the conscientious objector cases[121] makes it somewhat difficult to tell how heavily free exercise concerns are weighed, or even whether one standard is being used that can explain all of these cases. The lack of clarity is exacerbated in *Wisconsin v. Yoder*,[122] because of how the Court treats the distinction between a philosophical or merely personal moral code on the one hand and religious views on the other.

Yoder involved a Wisconsin law requiring children to attend school until their sixteenth birthday.[123] Jonas Yoder, Wallace Miller, and Adin Yutzy were Amish who declined to send their fourteen- or fifteen-year-old children to public school beyond the eighth grade,[124] because they believed that sending their children to high school not only violated their religious convictions[125] but would "endanger their own salvation and that of their children."[126] The sincerity of belief was not at issue.[127]

The respondents believed that high school inculcated the wrong values by "emphasiz[ing] intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students."[128] In contrast, "Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."[129] While the Amish believed that "their children must have basic skills in the 'three R's' in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs,"[130] they did not want their children to attend high school. Doing so would take the

(Harlan, J., dissenting) ("[D]espite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, 366 U.S. 599, which held that it did not offend the 'Free Exercise' Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday.").

121. *See supra* notes 25–72 and accompanying text (discussing the conscientious objector cases).

122. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).

123. *Id.* at 207 ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16.").

124. *Id.* ("[R]espondents declined to send their children, ages 14 and 15, to public school after they complete the eighth grade.").

125. *Id.* at 209 ("[R]espondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life.").

126. *Id.*

127. *Id.* ("The State stipulated that respondents' religious beliefs were sincere.").

128. *Yoder*, 406 U.S. at 211.

129. *Id.*

130. *Id.* at 212.

children "away from their community, physically and emotionally, during the crucial and formative adolescent period of life [d]uring [which] . . . the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife."[131]

The *Yoder* Court explained that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[132] But such a robust standard has to be cabined in some way and the Court suggested that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[133]

Determining which beliefs are religious and which are not "present[s] a most delicate question."[134] The Court offered an example. "[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis."[135] Because "Thoreau's choice was philosophical and personal rather than religious, . . . such belief does not rise to the demands of the Religion Clauses."[136] Yet, the Court's discussion of Thoreau was confusing, because his values were deeply held,[137] and the Court had suggested in the conscientious objector cases that deeply held beliefs and values might be treated as religious.[138]

What criteria are used to determine whether particular beliefs are "not merely a matter of personal preference?"[139] The Court noted that "the traditional way of life of the Amish is . . . of deep religious conviction, shared by an organized group, and intimately related to daily living."[140] It was not clear whether any of these factors was necessary or sufficient to trigger free

131. *Id.* at 211.

132. *Id.* at 215.

133. *Id.*

134. *Yoder*, 406 U.S. at 215.

135. *Id.* at 216.

136. *Id.*

137. *See* Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 56 (2001) (suggesting that Thoreau's values were "deeply held").

138. *See supra* notes 25–51 and accompanying text (discussing *Seeger* and *Welsh*).

139. *Yoder*, 406 U.S. at 216.

140. *Id.*

exercise protection, although the Court was obviously satisfied that a belief meeting all of these criteria was protected by the applicable guarantees.[141]

Accepting that the Amish beliefs and values were religious in nature, the Court next addressed whether the action at issue in the case (the Amish keeping their children out of school) was protected by free exercise guarantees. While acknowledging that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers," citing both *Braunfeld* and *Gillette*,[142] the Court rejected that "religiously grounded conduct is always outside the protection of the Free Exercise Clause."[143] Noting that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability," citing *Sherbert*,[144] the Court explained that "[w]here fundamental claims of religious freedom are at stake"[145] the Court must "searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption."[146] Rejecting the state's claim that "upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings,"[147] the Court held that "the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16."[148]

The *Yoder* Court seemed to strike a blow for tolerance and diversity when suggesting that "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[149] Perhaps as a way of showing that Congress also believed that the Amish deserved to be exempted from some of the requirements of generally applicable laws, the Court noted that "Congress itself recognized their self-

141. *See* Destyn D. Stallings, Comment, *A Tough Pill to Swallow: Whether the Patient Protection and Affordable Care Act Obligates Catholic Organizations to Cover Their Employees' Prescription Contraceptives*, 48 TULSA L. REV. 117, 127 (2012) (noting that "the belief satisfied all three criteria").

142. *Yoder*, 406 U.S. at 220 (citing Gillette v. United States, 401 U.S. 437 (1971) and Braunfeld v. Brown, 366 U.S. 599 (1961)).

143. *Id.* at 219–20.

144. *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

145. *Id.* at 221

146. *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

147. *Id.* at 224.

148. *Yoder*, 406 U.S. at 234.

149. *Id.* at 224.

sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes."[150]

Yoder raises a number of issues including how to differentiate between a religious way of life and mere personal preferences. For example, how should religiously based beliefs be handled if they appear idiosyncratic or at least not generally held by those professing that faith? *Thomas v. Review Board of Indiana Employment Security Division*[151] seemed to provide a partial answer.

At issue in *Thomas* was whether Eddie Thomas was entitled to receive unemployment benefits after he quit his job rather than produce armaments in violation of conscience.[152] He applied for unemployment benefits, explaining why he had quit.[153] Although a friend of the same faith tradition had advised him that the work to which he had been assigned was not "unscriptural,"[154] Thomas disagreed.[155]

Thomas was denied unemployment benefits.[156] When explaining why that denial did not offend free exercise guarantees, the Indiana Supreme Court explained that "the belief was more 'personal philosophical choice' than religious belief,"[157] although the Indiana court also suggested that "a termination motivated by religion is not for 'good cause' objectively related to the work."[158]

The *Thomas* Court explained that while "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause,"[159] a separate question involves which beliefs are thereby protected. "The determination of what is a 'religious'

150. *Id.* at 222.

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

152. *Id.* at 709 ("Thomas terminated his employment in the Blaw-Knox Foundry & Machinery Co. when he was transferred from the roll foundry to a department that produced turrets for military tanks. He claimed his religious beliefs prevented him from participating in the production of war materials.").

153. *Id.* at 710–11 ("Thomas applied for unemployment compensation benefits under the Indiana Employment Security Act. At an administrative hearing where he was not represented by counsel, he testified that he believed that contributing to the production of arms violated his religion.").

154. *Id.* at 711.

155. *Id.* ("Thomas was not able to 'rest with' this view, however. He concluded that his friend's view was based upon a less strict reading of Witnesses' principles than his own.").

156. *Id.* at 712 ("The Review Board adopted the referee's findings and conclusions, and affirmed the denial of benefits.").

157. *Thomas*, 450 U.S. at 713; *See also* Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 391 N.E.2d 1127, 1131 (Ind. 1979) ("A personal philosophical choice rather than a religious choice, does not rise to the level of a first amendment claim of religious expression.") (citing Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972)).

158. *Thomas*, 450 U.S. at 713; *See also Thomas*, 391 N.E.2d at 1131 ("The disqualifying statute imposes only an indirect burden, if any, on claimant's free exercise of his religion. It makes no religious practice unlawful.").

159. *Thomas*, 450 U.S. at 713.

belief or practice is more often than not a difficult and delicate task."[160] Nonetheless, when attempting to ascertain whether a particular practice was religious, certain modes of inquiry are not permissible. For example, "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[161] In explaining why the Indiana Supreme Court had relied too much on the testimony of Thomas's friend that the work at issue was permissible, the *Thomas* Court noted that "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."[162]

Acknowledging that "an asserted claim [might be] so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause,"[163] the Court nonetheless explained that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[164] After all, "[c]ourts are not arbiters of scriptural interpretation."[165] Because "[o]n this record, it is clear that Thomas terminated his employment for religious reasons,"[166] the state had a heavy burden insofar as it was going to justify the benefit denial. The Court explained that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[167] In this case, "the employee was put to a choice between fidelity to religious belief or cessation of work,"[168] and "the interests advanced by the State do not justify the burden placed on free exercise of religion."[169]

A year after supporting free exercise guarantees in *Thomas*, the Court seemed to undermine those very guarantees in *United States v. Lee*,[170] where the Court examined whether an Amish employer refusing to pay into social

160. *Id.* at 714.
161. *Id.*
162. *Id.* at 715.
163. *Id.*
164. *Id.* at 716.
165. *Thomas*, 450 U.S. at 716.
166. *Id.*
167. *Id.*
168. *Id.* at 717.
169. *Id.* at 719. *See also* Hobbie v. Unemployment Appeals Com'n of Fla., 480 U.S. 136, 146 (1987) (striking down Florida's refusal to award unemployment benefits to an individual who was unemployed due to her refusal to work on her Sabbath); Frazee v. Ill. Dep't. of Emp't Sec., 489 U.S. 829, 834 (1989) (striking down Illinois's refusal to award unemployment benefits to an individual who refused to work on Sunday as a matter of religious conviction).
170. United States v. Edwin D. Lee, 455 U.S. 252, 254 (1982).

security could be punished without thereby violating constitutional guarantees. The Court first determined that Lee was not exempt under the applicable statue, construing the "exemption . . . [as] available only to self-employed individuals and . . . not . . . to employers or employees."[171] But that meant that Lee would only be successful if free exercise guarantees required that he be exempted.[172]

The conflict arose because the "Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system."[173] The sincerity of that belief was not challenged,[174] although the government had contended that "payment of social security taxes will not threaten the integrity of the Amish religious belief or observance."[175] But the state cannot be an arbiter of what a particular religion requires,[176] and the Court accepted as accurate that "payment and receipt of social security benefits is forbidden by the Amish faith."[177]

In discussing the states' implicated interests, the Court noted that "[t]he social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees."[178] Because the "social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans,"[179] the Court reasoned that "the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high."[180] But that speaks to the government maintenance of the system as a general matter, and the important determination was "whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest."[181]

The Court reasoned that the issues in *Lee* were quite different from those presented in *Yoder*, because "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a

171. *Id.* at 256.

172. *Id.* ("Thus any exemption from payment of the employer's share of social security taxes must come from a constitutionally required exemption.").

173. *Id.* at 257.

174. *Id.* ("the Government does not challenge the sincerity of this belief").

175. *Id.*

176. *See Lee*, 455 U.S. at 257 ("It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'" (citing Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981))).

177. *Id.*

178. *Id.* at 258.

179. *Id.*

180. *Id.* at 258–59.

181. *Id.* at 259.

wide variety of religious beliefs."[182] Further, "[t]here is no principled way . . . for purposes of this case to distinguish between general taxes and those imposed under the Social Security Act."[183] But that meant that if Lee were exempted then if "a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax."[184] The Court then explained that because the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief"[185] and "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[186] The tax system would itself be undermined were the Court to recognize a right to a religious exemption in this case, so Lee's challenge on constitutional grounds was rejected.

In what has been described as a decision representing the virtual abandonment of free exercise protection,[187] the Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, which addressed "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[188] Alfred Smith and Galen Black were fired from their employment with a private drug rehabilitation organization because they used peyote as part of a religious ritual.[189] They were denied unemployment compensation because their firing had been for cause.[190]

182. *Lee*, 455 U.S. at 259–60.

183. *Id.* at 260.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231 (1991) (discussing "the virtual abandonment of the Free Exercise Clause in the . . . case of *Employment Division, Department of Human Resources v. Smith*").

188. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

189. *Id.* ("Respondents Alfred Smith and Galen Black . . . were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members.").

190. *Id.* ("When respondents applied to petitioner Employment Division . . . for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related 'misconduct.'").

Oregon criminalized the use of peyote even for religious purposes,[191] and the respondents argued that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons."[192] The *Smith* Court denied that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,"[193] interpreting the prevailing jurisprudence to be that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . [only if] the Free Exercise Clause in conjunction with other constitutional protections"[194] is implicated. For example, it read *Cantwell* as involving freedom of religion and freedom of speech[195] and *Yoder* as freedom of religion plus the parents' freedom to direct the education of their children.[196] The Court contrasted those cases with "[t]he present case [which] does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[197]

While *Sherbert* and *Thomas* might seem to suggest a different rule, the Court claimed that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."[198] That *Smith* was also an unemployment compensation case did not faze the Court[199]—this case was distinguishable because the others did not "require exemptions from a generally applicable criminal law."[200]

The *Smith* Court then discussed why it did not believe strict scrutiny appropriate in this kind of free exercise case, noting that the "'compelling government interest' requirement seems benign, because it is familiar from other fields."[201] But its use in the free exercise context "would produce . . . a private right to ignore generally applicable laws . . . [which would be] a constitutional anomaly."[202] The Court also worried about the breadth of the

191. *Id.* at 876 ("Oregon does prohibit the religious use of peyote.").

192. *Id.* at 878.

193. *Id.* at 878–79.

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

195. *Id.*

196. *Id.*

197. *Id.* at 882.

198. *Id.* at 883.

199. *Id.* at 891 (O'Connor, J., concurring) ("We held, however, in Employment Div., Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660 (1988) (*Smith I*), that whether a State may, consistent with federal law, deny unemployment compensation benefits to persons for their religious use of peyote depends on whether the State, as a matter of state law, has criminalized the underlying conduct. See *id.* at 670–72.")

200. *Smith*, 494 U.S. at 884.

201. *Id.* at 885–86.

202. *Id.* at 886.

protections that might thereby be accorded, noting that free exercise protections could not be limited to religious beliefs of central importance. "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."[203] The Court reasoned that "[i]f the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded,"[204] and warned that such an application would result in striking down a variety of laws.[205]

Congress reacted to *Smith*[206] by passing the Religious Freedom Restoration Act (RFRA),[207] which was intended to require both state and federal governments to meet a very difficult test in order to justify their burdening free exercise rights.[208] This difficult test would be triggered even when the government was not targeting religious practice but, instead, was burdening that practice as a result of a "rule of general applicability."[209] Congress specifically referred to the test used in *Sherbert* and *Yoder*, requiring that it be used to evaluate whether government burdening of free exercise was permissible.[210]

The constitutionality of that act was tested in *City of Boerne v. Flores*.[211] At issue was a denial of a building permit to a church wishing to expand its facilities in the city of Boerne, Texas.[212] The denial was challenged as a violation of RFRA.[213] The Court held that RFRA was unconstitutional, at least

203. *Id.* at 886–87.

204. *Id.* at 888.

205. *Id.* ("[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test.").

206. City of Boerne v. Flores, 521 U.S. 507, 512–13 (1997) ("Congress enacted RFRA in direct response to the Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).").

207. 42 U.S.C. § 2000bb *et seq.* (2012).

208. *See Flores*, 521 U.S. at 507 ("RFRA prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.' 42 U.S.C. § 2000bb–1. RFRA's mandate applies to any branch of Federal or State Government.").

209. *Id*.

210. *See* Burwell v. Hobby Lobby Stores, Inc., 134 U.S. 2751, 2784–85 (2014).

211. *Flores*, 521 U.S. at 507.

212. *Id.* at 511 ("A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993.").

213. *Id.* at 512 ("The Archbishop relied upon RFRA as one basis for relief from the refusal to issue the permit.").

as applied to the states.[214] That caused the state legislatures to react by enacting their own state versions of RFRA in an effort to afford more protection to the free exercise of religion.

III. STATE RELIGIOUS FREEDOM RESTORATION ACTS

In response to the *Smith* Court's narrow reading of free exercise guarantees and the *Flores* Court's striking down RFRA as applied to the states, various state legislatures passed state religious freedom restoration acts.[215] While the acts vary in language,[216] they are all designed to correct *Smith*'s alleged undermining of free exercise protections.[217] Yet, the state RFRAs have proven to be less protective than might originally have been thought,[218] and it is helpful to consider a few of the state cases litigated under the state RFRAs to understand why that is so.

A. Freeman

Florida has had substantial litigation[219] under its state RFRA,[220] and it may be helpful to understand how that statute has been interpreted. Consider

214. *See id*. at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

215. *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 820 n.165 (2014) ("In response to *Smith* and *City of Boerne*, a number of post-*Smith* state legislative acts or constitutional amendments provided increased protections for religious freedom.").

216. *See* Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 478–79 (2010) (discussing some of the differences among the state RFRAs).

217. *See id.* at 466 ("*Smith*, as everyone knows, dramatically narrowed the scope of the Free Exercise Clause.").

218. *Id.* at 467 ("In most jurisdictions, plaintiffs have not won a single state RFRA case litigated to judgment. To be sure, some states have seen significant state RFRA litigation and there have been some very important victories. But in many states, state RFRAs seem to exist almost entirely on the books.").

219. *Id.* at 481 ("Florida passed its RFRA early; it has seen substantial litigation. Yet of all the claims asserted over the years, only a single state Florida RFRA claim litigated to judgment has won.").

220. *See* FLA. STAT. ANN. § 761.03

> 1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
> (a) Is in furtherance of a compelling governmental interest; and
> (b) Is the least restrictive means of furthering that compelling governmental interest.
> (2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Freeman v. Department of Highway Safety and Motor Vehicles,[221] which involved a challenge to a denial of a driver's license because Sultaana Lakiana Myke Freeman "refused to have her picture taken without her veil."[222] Freeman was permitted to wear her veil when she was photographed for her Illinois driver's license,[223] but Florida law requires a "'fullface' photograph of the license holder."[224] She was informed that she could not get a license unless she were willing to have a photograph taken without a veil,[225] which she testified was simply not an option.[226]

An expert for the state testified that "where the Department had accommodated the belief by having a female photographer and no males present, a Muslim woman could have her license photograph taken."[227] An expert for Freeman testified that "Muslim women must veil themselves and that . . . the doctrine of necessity, found in Islamic law, [could not be] applied to [permit] removing the veil to take a driver's license photograph."[228]

While accepting that Freeman's beliefs were sincere,[229] the Florida appellate court rejected that a substantial burden had been placed on Freeman's religious exercise.[230] Because there had been testimony that it was "[c]onsistent with Islamic law [for] women . . . [to be] required to unveil for medical needs and for certain photo ID cards,"[231] and because "the Department's existing procedure would accommodate Freeman's veiling beliefs by using a female photographer with no other person present,"[232] this meant that "[h]er veiling practice is 'merely inconvenienc[ed]' by the photograph requirement [and that] . . . she failed to demonstrate a substantial burden."[233] While the *Freeman* court "recognize[d] the tension created as a result of choosing between following the dictates of one's religion and the mandates of secular law,"[234] it reasoned that "as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed,"[235] citing *Braunfeld* in support.[236]

221. Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. App. 2006).
222. *Id.* at 50.
223. *See id.* at 51.
224. *Id.*
225. *See id.* at 52.
226. *Id.*
227. *Freeman*, 924 So. 2d at 52.
228. *Id.*
229. *See id.* at 54.
230. *Id.* ("[T]here is no substantial burden on Freeman's exercise of religion.").
231. *Id.* at 56.
232. *Id.*
233. *Freeman*, 924 So. 2d at 57.
234. *Id.*
235. *Id.*
236. *Id.*

The *Freeman* court readily admitted that the "protection afforded to the free exercise of religiously motivated activity under the FRFRA [Florida Religious Freedom Restoration Act] is broader than that afforded by the decisions of the United States Supreme Court."[237] However, it rejected that the substantial burden test under the Florida act had been met[238] and thus had no need to determine whether the state could meet its "heavy dual burden of demonstrating a compelling interest and that the regulation is the least restrictive means to meet that interest."[239]

If *Thomas* is any guide,[240] then the mere fact that others of the faith may have different views about what the religion permits and prohibits does not undermine an individual's claim that a restriction imposes a substantial burden on her free exercise rights.[241] That said, at least two points might be made.

First, whether federal constitutional guarantees are violated by the Florida requirement that those receiving a Florida driver's license be photographed without a veil is not the focus of this discussion—such a determination might depend on whether this is a neutral, generally applicable law and on whether there are very important interests justifying such a law. Second, a separate question is whether the Florida court's interpretation of what constitutes a substantial burden for purposes of the statute was itself too restrictive—it may be that the Florida Supreme Court's "narrow definition of substantial burden" was not meant to be this narrow.[242] In any event, the interpretation of the Florida Religious Freedom Restoration Act offered in *Freeman* is clearly not as robust as might have been expected under the *Sherbert-Thomas* line of cases.[243]

B. Christian Romany Church Ministries

At issue in *Christian Romany Church Ministries, Inc. v. Broward County* was whether the county would be permitted to condemn and remove a church through use of its eminent domain power.[244] While the county's doing so

237. *Id.* at 55 (citing Warner v. City of Boca Raton, 887 So. 2d 1023, 1032 (Fla. 2004)).

238. *Id.* at 54.

239. *Freeman*, 924 So. 2d at 56.

240. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981).

241. Lund, *supra* note 216, at 488 ("The court essentially says that because other Muslim women in other countries remove the veil for photographs, Freeman should consider herself free to do so as well. But . . . [i]ndividuals have a right to religious accommodation even on matters where they differ from their co-religionists.").

242. *See Freeman*, 924 So. 2d at 56 ("The narrow definition of substantial burden adopted by the supreme court tempers the act's strict scrutiny requirement. A plaintiff must meet a high standard to show a substantial burden on religious freedom.").

243. *See* Sherbert v. Verner, 374 U.S. 398 (1963); *See Thomas*, 450 U.S. at 707.

244. Christian Romany Church Ministries, Inc. v. Broward Cnty., 980 So. 2d 1164, 1165 (Fla. Dist. Ct. App. 2008).

served a public purpose,[245] the church nonetheless claimed that its condemnation would violate Florida's Religious Freedom Restoration Act[246] because the church had nowhere else to go.[247]

Condemnation and destruction of the church might result in the congregation's being unable to hold worship services, which would seem to be a paradigmatic example of burdening free exercise.[248] Yet, the court rejected that the challenged action would impose such a burden for purposes of the state's Religious Freedom Protection Act, because condemnation could not be construed as either compelling or forbidding religious conduct.[249] Because there was "nothing about this location that is unique or integral to the conduct of the religion,"[250] the court held that "the condemnation does not substantially burden the exercise of religion."[251]

Perhaps the Florida appellate court is correct that condemnation does not qualify as imposing a substantial burden on religion for purposes of the state RFRA. Absent some evidence of "bad faith or gross abuse of discretion,"[252] it may be that state law did not prevent the church from being forced to move. But it can hardly be thought that Florida's Religious Freedom Restoration Act provides robust protection if a church can be condemned (for an admittedly legitimate purpose) even when that condemnation and destruction would make it impossible for the congregation to worship.[253]

C. Cordingley

At issue in *Idaho v. Cordingley*[254] was whether Cordingley's possession of marijuana and drug paraphernalia was protected under the Idaho Free Exercise

245. *Id.* ("[T]he church does not dispute that the taking would serve a public purpose.").

246. *Id.* ("[The church] asserts that the county has failed to show a reasonable necessity for the taking and is in violation of the Florida Religious Freedom Restoration Act (FRFRA).").

247. *Id.* at 1166 ("The pastor testified that he did not know where they will go if the church is taken, and he has no other place for holding religious education.").

248. *See id*. at 1168 ("[The] church's insistence that a specific church building for holding worship services is fundamental to religious exercise.").

249. *Id.* ("Our supreme court expressly rejected any definition of substantial burden other than that compelling conduct or that forbidding conduct. By no stretch does an otherwise valid condemnation fall within these limits.").

250. *Christian Romany Church*, 980 So. 2d at 1168.

251. *Id.*

252. *Id.* at 1167.

253. *Cf.* Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 981 (9th Cir. 2006) ("We find that the County imposed a substantial burden on Appellee Guru Nanak Sikh Society of Yuba City's . . . religious exercise under RLUIPA because the stated reasons and history behind the denial at issue, and a previous denial of Guru Nanak's application to build a temple on a parcel of land zoned 'residential,' to a significantly great extent lessened the possibility of Guru Nanak constructing a temple in the future.").

254. Idaho v. Cordingley, 302 P.3d 730 (Idaho Ct. App. 2013).

of Religion Protected Act (FERPA).[255] Cordingley had founded the "Church of Cognitive Therapy (COCT), established specifically for the use of marijuana as a 'sacrament,'"[256] and he argued that his religious exercise was substantially burdened by Idaho law.

The Idaho appellate court explained that the "legislative history of the FERPA makes it clear that in adopting the statute, the Idaho legislature intended to adopt the 'compelling interest test' contained in its federal counterpart, the Religious Freedom Restoration Act (RFRA), which the United States Supreme Court held in *City of Boerne v. Flores* . . . was invalid as it applied to states."[257] The plaintiff had to show that he was engaging in a religious exercise and that the challenged state law substantially burdened that exercise.[258]

At issue was not whether Cordingley's beliefs were sincere or even whether the Idaho law substantially burdened the activity associated with those beliefs.[259] Instead, the issue was whether the beliefs at issue were "religious" for purposes of the Idaho statute when Cordingley had admitted that "the Church of Cognitive Therapy is not so much a religion as it is a companion to religion."[260] As such, it provided a way for people to "become spiritual or enlightened, but it [did] not have a comprehensive belief system with the trappings of a religion."[261]

When analyzing whether the burdened practices qualified as religious, the court cited to *Ballard* and *Thomas*, but also cited *Yoder*'s attempt to distinguish between the religious and the merely personal and philosophical.[262] The Idaho court denied that it was trying to be extremely restrictive with respect to what constituted a religion, instead suggesting that should there be "any doubt about

255. *Id.* at 731 ("Levon Fred Cordingley appeals from the district court's intermediate appellate decision affirming the magistrate's denial of his motion to dismiss the possession of marijuana and paraphernalia charges against him on the basis his right to religious freedom under the Idaho Free Exercise of Religion Protected Act (FERPA).").

256. *Id.* at 732.

257. *Id.* at 733.

258. *See id.* ("To establish a prima facie RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion.' Second, the government action must 'substantially burden' the plaintiff's exercise of religion.") (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008) (internal citations omitted)).

259. *Id.* at 734 ("[I]t was undisputed that Cordingley's beliefs were both sincerely held and substantially burdened by the applicable controlled substances statutes.").

260. *Cordingley*, 302 P.3d at 734 (citing the district court opinion).

261. *Id.* (citing the district court opinion).

262. *Id.* at 736.

whether a particular set of beliefs constitutes a religion, the court will err on the side of freedom and find the beliefs are a religion."[263]

To determine whether the beliefs at issue constituted religious beliefs, the court used a multifactor test. "Under this test, to help determine whether a particular set of beliefs qualifies as 'religious' under the RFRA or its state equivalent, a court examines the extent to which a party's asserted 'religion' (1) addresses 'deeper and more imponderable questions' of the meaning of life, man's role in the universe, moral issues of right and wrong, and other 'ultimate concerns'; (2) contains an 'element of comprehensiveness'; and (3) the 'formal, external, or surface signs that may be analogized to accepted religions.'"[264]

The court found that the church met the relevant criteria to some extent.[265] However, because some of the factors were not met and because "COCT is singularly focused on the use of marijuana to a degree that has consistently been found not to be indicative of statutorily recognized religious practice,"[266] the Idaho appellate court found that the practices at issue were not religious and thus did not qualify for enhanced protection under the Idaho statute.

Yet, it is difficult to reconcile this approach with the approach taken in *Ballard*, where the beliefs of the "I Am movement"[267] were not examined with respect to whether they incorporated "ultimate ideas" or constituted a "moral or ethical belief structure" or even whether the "comprehensiveness of beliefs" entitled the group to be designated as religious. The *Ballard* Court noted that "[r]eligious experiences which are as real as life to some may be incomprehensible to others,"[268] and that the fact that certain experiences are "beyond the ken of mortals does not mean that they can be made suspect before the law."[269] Further, a set of beliefs that is described by the adherents as a "companion to religion"[270] would seem to be religious even if not providing many desired metaphysical answers, precisely because it was to be understood in light of other beliefs or belief systems.

That said, it was fair for the *Cordingley* court to point out that the United States Supreme Court has not always espoused deference to the claim that particular views are religious.[271] The *Yoder* Court suggested that it is

263. *Id.* (citing United States v. Meyers, 906 F. Supp. 1494, 1499 (D. Wyo. 1995)).

264. *Id.* (Adams, J., concurring) (citing Malnak v. Yogi, 592 F.2d 197, 208–09 (3d Cir. 1979)).

265. *Id.* at 744 ("to some degree the COCT is comprised of a structure containing some of the 'accoutrements of religion'").

266. *Cordingley*, 302 P.3d at 745.

267. *See* United States v. Ballard, 322 U.S. 78, 79 (1944).

268. *Id.* at 86.

269. *Id.* at 87.

270. *Cordingley*, 154 P.3d at 734.

271. *See id.* at 736 (discussing Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972)).

permissible to distinguish between the religious and the philosophical,[272] although the Court provided no guidance about how to perform that task beyond saying that Thoreau's views were not religious.[273] The failure to say more was regrettable, if only because many of such analyses will be subject to one of the dangers mentioned by the *Ballard* Court—permitting the trier-of-fact to decide whether a particular set of beliefs is religious or, perhaps, sufficiently profound or comprehensive opens the door to a potentially unsympathetic trier-of-fact subjecting a set of avowedly religious beliefs to very critical examination.[274] While *Yoder* might have been trying to protect the diversity of religious belief,[275] it has been used to exclude belief systems from qualifying as religious.

IV. CONCLUSION

Several states passed their own versions of religious freedom restoration acts in response to the *Smith* Court's narrow construction of free exercise guarantees.[276] While those statutes clearly rejected *Smith* and attempted to restore substantial protection of certain religious practices, they did not provide sufficient clarity with respect either to which beliefs would count as religious or to what would constitute a substantial burden of religious practice.[277] Reinstating strict scrutiny of limitations on free exercise does not as a practical matter yield great protection if it is very difficult to qualify as a religion or very difficult to establish that a particular restriction imposes a substantial burden on religious practice.[278]

The state courts' application of their respective state RFRAs has not resulted in robust protection of free exercise. That may be due in part to the uneven protection of free exercise in the pre-*Smith* jurisprudence and in part to the failure of the respective legislatures to provide more guidance to the courts.[279] Other factors likely playing a role are that courts may fear both that according robust protection on the basis of a state RFRA will create the

272. *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

273. *Id.*

274. *Cf. Ballard*, 322 U.S. at 87 ("The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.").

275. *See Yoder*, 406 U.S. at 220–21.

276. Steven D. Collier, *Beyond Seeger/Welsh: Redefining Religion under the Constitution*, 31 EMORY L.J. 973, 1010–11 (1982).

277. James W. Wright Jr., *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L.R., 425, 426, 429 (2010).

278. *Id.* at 430–31.

279. *Id.* at 435.

potential for a large number of religious exemption claims,[280] and that the sincerity requirement will not do enough to keep out the "non-meritorious" claims. Further, whether consciously or unconsciously, triers-of-fact (and legislators) may be less willing to credit minority religious beliefs and practices either with respect to whether they really are religious beliefs or with respect to whether neutral state laws really substantially burden those beliefs,[281] so it should be unsurprising that state RFRAs have not provided robust free exercise protection of minority religious practices.[282]

Several cases involving state RFRAs have involved individuals who sought exemptions from state laws prohibiting the use of controlled substances.[283] It may be that in individual cases those challenging their convictions were not engaging in sincere religious exercise.[284] Nonetheless, there is no small irony in a court focusing on the sacramental use of drugs as a reason to *deny* religious exercise even when some other indicia of religion are met,[285] given that the case sparking the various state RFRAs involved sacramental use of proscribed drugs.[286] So, too, there is no small irony in a state finding no violation of the state RFRA when condemnation of a church

280. *Cf.* Evan J. Bergeron, Comment, *Organized RFRAFF: A Recommendation to the Louisiana Legislature on the Best Way to Accomplish a State Religious Freedom Restoration Act*, 12 LOY. J. PUB. INT. L. 133, 164 (2010) ("Whether the drafters and supporters of House Bill 340 were simply ignorant of the ramifications of protecting mere expression or whether they made a conscious and calculated attempt to open the floodgates for religious preferential treatment is unclear.").

281. *Cf.* Frank S. Ravitch, *The Unbearable Lightness of Free Exercise under Smith: Exemptions, Dasein, and the More Nuanced Approach of the Japanese Supreme Court*, 44 TEX. TECH L. REV. 259, 269 (2011) ("The dominant or majority religious community will generally be protected because its beliefs will be understood, and perhaps empathized with, but for religious minorities, quite the opposite might be true."); Molly A. Gerratt, Note, *Closing A Loophole: Headley v. Church of Scientology International as an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes*, 85 S. CAL. L. REV. 141, 188 (2011) ("[I]t is less likely that lawmakers will take counter-majoritarian free exercise claims into consideration when legislating or that judges will take those claims seriously when judging their sincerity.").

282. *Cf.* Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343, 357 (2007) (discussing "legislators who may be trusted not to exaggerate the needs of minority religions over the welfare of the general populace").

283. State v. White, 271 P.3d 1217, 1219 (Idaho Ct. App. 2011); Rudd v. State, No. 54221, 2010 WL 3503516, at *1 (Nev. July 15, 2010); State v. Hardesty, 214 P.3d 1004, 1005 (Ariz. 2009).

284. *See Rudd*, 2010 WL 3503516, at *3 ("At the hearing on the motion, the district court found that Rudd failed to present evidence and establish that his use of marijuana was religious and noted that Rudd even denied during his testimony that its use was part of his religious practice.").

285. *See* Idaho v. Cordingley, 302 P.3d 730, 745 (Idaho Ct. App 2013) ("[T]he COCT is singularly focused on the use of marijuana to a degree that has consistently been found not to be indicative of statutorily recognized religious practice.").

286. *See* Emp't Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

was at issue—*Flores*, which involved a church seeking a zoning variance, resulted in the Court invalidating the Federal Religious Freedom Restoration Act's application to the states, [287] and also sparked the state RFRAs.

The United States Supreme Court has long been sending mixed messages about free exercise, sometimes suggesting that religious belief is immune from second-guessing and sometimes suggesting not only that religious practices can be prevented or punished but also that the state burden justifying such limitations is not very great. The Court has also sent mixed signals about whether or how religious beliefs can be distinguished from other kinds of beliefs. Because the Court has offered so many mixed signals for decades, it is unsurprising the state legislatures' repudiating one decision and praising a few others has not resulted in robust protection of free exercise at the state level. Nor are we likely to see a major change in the future whereby minority religious practices will be afforded more protection. Instead, on both the state and federal level, we are likely to continue to see uneven and unprincipled protection of free exercise, which should satisfy no one.

287. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) ("A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 . . . 42 U.S.C. § 2000bb *et seq.* The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.").