NOTES

Baptizing *O'Brien*: Towards Intermediate Protection of Religiously Motivated Expressive Conduct

I. INTRODUCTION

Despite the relative prominence of religious expression in society[1] and its elevated status in constitutional law,[2] the Supreme Court has struggled to articulate a consistent standard of review for neutral, generally applicable laws that indirectly burden religious expression. Since the late nineteenth century, the Court has vacillated between a highly deferential belief-action dichotomy[3] and a more searching (albeit selectively applied) compelling interest test.[4] Currently, the Court embraces a hybrid categorical–rational basis standard[5] that relies in part upon a highly criticized[6] assumption that the political process will be solicitous of minority religious practice. This retreat to rational basis has subordinated religious belief to political opinion by more rigorously protecting the latter. What's more, the current state of law has declawed the Free Exercise Clause, offering protection only in the "rare" case of a "law actually aimed at suppressing religious exercise."[7]

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1. *See, e.g.*, *Religion*, GALLUP, http://www.gallup.com/poll/1690/religion.aspx, *archived at* http://perma.cc/3L9W-JABQ (last visited Jan. 9, 2015) (reporting that seventy-eight percent of Americans responded that religion was "very important" or "fairly important").

2. U.S. CONST. amend. I.

3. *E.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); Reynolds v. United States, 98 U.S. 145 (1878).

4. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

5. *See* Emp't Div. v. Smith, 494 U.S. 872, 886–87 & n.3 (1990) ("[G]enerally applicable, religion-neutral laws that . . . burden[ ] a particular religious practice need not be justified by a compelling governmental interest . . . .").

6. *See, e.g.*, *id.* at 902 (O'Connor, J., concurring) ("The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups . . . ."); *cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . .").

7. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564 (1993) (Souter, J., concurring).

To clarify free exercise law and restore the constitutionally protected status of religious worship, the Court does not need to articulate a new standard of review or even venture outside its First Amendment canon. In free speech cases, the Court has already recognized that speech and conduct are often intertwined into "expressive conduct."[8] When generally applicable laws place an indirect burden on expressive conduct, the Court applies the *O'Brien* test, a carefully structured form of intermediate review.[9] While imperfect,[10] *O'Brien* balances the importance of uniform regulation of conduct against the undue suppression of opinions or ideas.

No such middle ground exists in the free exercise context, resulting in a bizarre asymmetry. Currently, when the government indirectly burdens religious conduct, it must assert only a rational basis for doing so. Thus, religious conduct receives constitutional protection only when the government acts in an irrational manner or in a way that directly limits religious expression. But acts of worship and the observance of sacraments are means through which religious persons outwardly express deeply held convictions. In other words, many forms of religious conduct can be deemed a subset of expressive conduct. When a general law places an incidental burden on expressive conduct, it should not matter whether the font of expression is political opinion or religious conviction. This inconsistency has no basis in the text or history of the First Amendment,[11] which is equally resolute in its protection of speech and religion.[12] In addition to being of questionable pedigree, the Court's current jurisprudence fails to recognize that "speech" and "religion" are often nothing more than labels; expressive conduct protected under the Free Speech Clause can be functionally indistinguishable from expressed belief left unprotected by the Free Exercise Clause.

Recognizing this incongruity is by no means novel; indeed, it would be more revolutionary to argue that the Court has been consistent in its approach to or application of First Amendment protections. Other commentators have ably argued for a unified theory

8. *See infra* Part III.B.

9. United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

10. *See, e.g.*, David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 506 (1988) (arguing *O'Brien* "demonstrate[s] an eroding judicial commitment to free speech values"); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1204 (1996) ("Given that the *O'Brien* test asks so little in principle, it should not be surprising that it means so little in practice.").

11. *See infra* text accompanying notes 235, 268–89.

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

of First Amendment jurisprudence[13] and even specifically advocated for intermediate scrutiny of religious exemptions to generally applicable laws.[14] My contention is narrower. I submit that religiously motivated acts of worship and sacrament *are* expressive conduct, not just "conceptually or structurally"[15] but substantively. By applying intermediate scrutiny to laws that indirectly burden expressive conduct but a rational basis standard to laws that burden expressed belief, the Court has done exactly what it claims to be avoiding: it has subordinated religious belief to political and philosophical opinion, preferencing speakers over believers. In Parts II and III, this Note lays out the contemporaneously developed yet needlessly divergent tests the Court has applied to challenges to generally applicable laws that indirectly burden First Amendment rights. Part IV analyzes the effect this has had on First Amendment law, namely that it has subordinated faith to opinion and circumscribed free exercise protection. Part V offers both short- and long-term solutions to achieve parity between religious and nonreligious claimants.

II. A DOCTRINE IN DISARRAY: RELIGIOUS EXEMPTIONS FROM GENERALLY APPLICABLE LAWS

In free exercise law, there are two relatively easy types of cases: direct regulation of religious belief, which is per se invalid,[16] and direct regulation of religious conduct, which must survive "the most rigorous of scrutiny."[17] Today, however, it would be "nearly unthinkable" for a legislature to pass a law that facially discriminates

13. *See generally, e.g.*, 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 (2001); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335 (1995). *But see* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (advocating a rational basis approach in free speech cases too).

14. *See, e.g.*, David A. Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 253 (1997) ("The obvious candidate for a test to evaluate neutral, generally applicable laws is *O'Brien*"); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 115 (1991) (noting the Court in *Smith* "ignor[ed] the intermediate scrutiny that applies in analogous free speech cases").

15. McCoy, *supra* note 13, at 1365.

16. *E.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878).

17. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). The *Lukumi* Court applied what could be deemed strict*est* scrutiny, amplifying the traditional strict scrutiny framework to require not just a "compelling interest" but a state interest "of the highest order." *Id.* (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

against a particular religious belief or practice.[18] Moreover, barring a real-life Thinkpol,[19] it is unclear how the government *could* regulate belief. Thus, the bulk of contemporary free exercise cases challenge laws that indirectly burden religious expression, either by requiring what a particular religion proscribes[20] or by prohibiting what a particular religion commands.[21] In this area, the Court's jurisprudence has been a history of extremes.

Section A analyzes the Court's first encounter with the Free Exercise Clause, where a unanimous Court held that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions."[22] This belief-action dichotomy was the dominant test for almost a century.[23] Section B describes the Court's seminal decision in *Sherbert v. Verner*, where the Court required a compelling government interest to sustain any state action that incidentally burdened religious conduct.[24] The *Sherbert* test, however, proved unworkable in practice. As Section C chronicles, the Court interpreted around *Sherbert* in several ways between 1963 and 1990. The death knell for *Sherbert* finally arrived in *Employment Division v. Smith*, where a narrowly divided Court rejected strict scrutiny except where the purported burden fit within one of a few narrow categories.[25] Section D describes the Court's retreat to rational basis in *Smith*.

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18. McCoy, *supra* note 13, at 1350; *see also Lukumi*, 508 U.S. at 564 (Souter, J., concurring) (noting it is "rare" to find "a law actually aimed at suppressing religious exercise").

19. GEORGE ORWELL, 1984, at 19 (Signet Classics 1977) (1949) ("The Thought Police would get him just the same. He had committed—would still have committed, even if he had never set pen to paper—the essential crime that contained all others in itself. Thoughtcrime, they called it."); *see infra* note 29.

20. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (addressing a religious objection by a closely held, for-profit company to an HHS regulation requiring employee-sponsored health insurance to cover most forms of contraception).

21. *E.g.*, Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418 (2006) (challenging a federal drug regulation that prohibited hoasca, a hallucinogenic tea ingested sacramentally by members of the União do Vegetal church). Both *Hobby Lobby* and *O Centro* involved statutory claims under the more protective Religious Freedom Restoration Act ("RFRA"), as opposed to constitutional claims under the Free Exercise Clause. The Court, however, has limited RFRA's scope to include only certain actions of the federal government. For a discussion of RFRA and how it has been circumscribed, see *infra* text accompanying notes 110–14.

22. Reynolds v. United States, 98 U.S. 145, 164 (1878).

23. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("[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.").

24. 374 U.S. 398 (1963). While the Court claimed that this ruling was consistent with its past holdings, *id.* at 408–09, it is seemingly impossible to rectify these precedents. *See id.* at 417 (Stewart, J., concurring) ("I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown*."); *see also infra* note 51.

25. Emp't Div. v. Smith, 494 U.S. 872 (1990).

Finally, Section E briefly surveys the response to *Smith* in public, judicial, and scholarly opinion.

A. Absolute Belief and Rational Action: The Reynolds *Belief-Action Distinction*

The Supreme Court did not hear its first free exercise case until 1878,[26] when George Reynolds, a leader in the Mormon Church, was convicted under the Morrill Anti-Bigamy Act,[27] a federal law that prohibited polygamy in the territories. The Court unanimously rejected Reynolds's argument that polygamy was his religious duty and that the Free Exercise Clause therefore enjoined his prosecution under the Morrill Act.[28] The Court held, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[29]

For the next eighty-five years, the Court would, for the most part, hew closely to this belief-action dichotomy by treating belief as untouchable[30] but action as fully regulable.[31] Beginning in the 1940s, however, the Court began recognizing exemptions from generally applicable laws for claimants who proved that the law burdened their religious exercise *and some other interest of constitutional dimension*. In *Cantwell v. Connecticut*, for example, a door-to-door evangelist was convicted of violating a state law that prohibited soliciting money for a religious or charitable organization without a license.[32] While Cantwell could have been convicted under a rigid application of the *Reynolds* belief-action test, the Court described Cantwell's actions in

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26. *Reynolds*, 98 U.S. at 145.

27. Ch. 126, 12 Stat. 501 (1862).

28. *Reynolds*, 98 U.S. at 160–67. Reynolds argued the judge should have instructed the jury that, if his marriages were "in pursuance of and in conformity with . . . a religious duty, that the verdict must be 'not guilty.' " *Id.* at 161–62.

29. *Id.* at 164. Barry Lynn points out how truly limited the *Reynolds* Court's articulation of the Free Exercise Clause was: "[R]eligious belief could not be circumscribed by federal action (*as if it could, regardless of the position on the subject taken by the Court*), but . . . actions based on such religious belief could be regulated." Barry W. Lynn, *The Sad State of Free Exercise in the Courts, in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 70, 70 (Eugene W. Hickok, Jr. ed., 1991) (emphasis added).

30. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (invalidating a Maryland law requiring all holders of public office to declare their belief in God under both the Free Exercise Clause and Article VI).

31. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603–04 (1961) (refusing to grant an exemption from a Sunday closing law to Saturday sabbatarians).

32. 310 U.S. 296, 301–02 (1940). Specifically, Cantwell was a Jehovah's Witness who went door-to-door playing a phonograph that attacked organized religion. After playing his record, Cantwell would ask for contributions for the publication of evangelical pamphlets. *Id.*

terms of speech rather than worship: "[W]e find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell . . . conceived to be true religion."[33] The conviction, the Court held, was inimical to First Amendment values—both speech and religion.[34] Thus, *Cantwell* posed a hybrid religion-speech claim, and the Court imported free speech principles to protect Cantwell's proselytization. Absent the viable speech claim, it is likely the Court would have upheld the ordinance.

A similar issue arose in the flag-salute cases of the early 1940s. In *Minersville School District v. Gobitis*,[35] a Jehovah's Witness challenged the school district's policy of requiring all students to participate in the Pledge of Allegiance. The Pledge, Gobitis asserted, violated his belief that God and the Bible are man's ultimate authority.[36] Relying on the state's interest in national unity and patriotism, the Court rejected this claim, holding, "Conscientious scruples have not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[37] Just three years later, however, the Court reconsidered this exact question in *West Virginia State Board of Education v. Barnette*.[38] In an opinion released on Flag Day, the Court expressly overruled its earlier holding in *Gobitis*. Rather than focusing on Barnette's religious claims, the Court focused on the free speech implications of requiring any student to profess an oath of fidelity to any symbol.[39] "If there is any fixed star in our constitutional constellation," Justice Jackson wrote, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[40] As in *Cantwell*, while the genesis of Barnette's objection was religious, the source of his exemption was free speech.[41]

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33. *Id.* at 310.

34. *Id.* at 307 ("[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license . . . is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.").

35. 310 U.S. 586 (1940).

36. *Id.* at 591–92 & n.1.

37. *Id.* at 594.

38. 319 U.S. 624 (1943).

39. *Id.* at 638.

40. *Id.* at 642.

41. A third case often cited in this line is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), where the Court held that Oregon could not require children to attend a public school. *See* Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (listing *Pierce* as a hybrid rights case that depended on both religious and parental rights). On closer inspection, however, *Pierce* appears to rest entirely on "the liberty of parents and guardians to direct the upbringing and education of children."

Despite these victories, prior to 1963, religious adherents were unsuccessful when their claims rested solely on the Free Exercise Clause. In *Braunfeld v. Brown*,[42] for example, Orthodox Jewish business owners challenged a law requiring most retailers to close on Sundays. The petitioners argued that this law unduly burdened their free exercise of religion because they already observed Saturdays as their Sabbath; closing on Sundays as well, they worried, would prevent them from turning a profit.[43] The law "put [the appellant] to a choice between his business and his religion."[44] The Court, however, relied on the *Reynolds* belief-action distinction to reject the petitioner's claim, holding, "[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties . . . even when the actions are demanded by one's religion."[45] Because a state has the power to declare a uniform day of rest, accommodating minority religious practices would frustrate the very purpose of the legislation.[46]

B. Sherbert*,* Yoder*, and the Compelling State Interest Test*

Just two years after *Braunfeld*, the Court took a dramatic step in its free exercise jurisprudence. Adell Sherbert was a textile worker in Beaumont, South Carolina, and a Seventh-Day Adventist who observed Saturday as a mandatory day of rest and worship. The textile mill where Sherbert worked expanded its workweek from five days to six, requiring Sherbert to work on Saturdays. Sherbert's refusal to work on Saturdays led to her termination.[47] While Sherbert was offered other jobs from other companies, each required her to work on Saturdays as well.[48] Unable to keep her job or obtain new

Pierce, 268 U.S. at 534–35 (citation omitted). The First Amendment is not cited once in the Court's analysis, and one of the schools challenging the ordinance, a private military academy, had no religious claim to raise. *Id.* at 532–33; *cf.* Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the First Amendment one week after the Court ruled in *Pierce*). If free exercise was integral to the Court's decision, then one would have expected the parochial school to win but the military academy to lose. A better reading of *Pierce*, it would seem, views the First Amendment argument as an ex post rationale that supplements, rather than explains, the decision. *Cf.* Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) (noting that "had [*Pierce*] been decided in recent times, [the case] may well have been grounded upon First Amendment principles").

42. 366 U.S. 599 (1961).

43. *Id.* at 601.

44. *Id.* at 611 (Brennan, J., dissenting in part).

45. *Id.* at 603–04 (majority opinion).

46. *Id.* at 608 (noting the state's interest in a uniform day of rest).

47. Sherbert v. Verner, 374 U.S. 398, 399 & n.1 (1963).

48. *Id.* at 399–401.

employment, Sherbert applied for state unemployment benefits. Her claim was denied, however, because she "failed, without good cause . . . to accept available suitable work when offered."[49] The state Employment Security Commission found that religious scruples did not constitute "good cause" and ruled Sherbert ineligible to collect unemployment benefits.[50]

Under *Reynolds* and *Braunfeld*, it appeared that the state had no obligation to accommodate Sherbert's religious practice. Writing for the Court, however, Justice Brennan refocused the Court's analysis on the type of conduct proscribed and not whether the claimant could attach her religious objection to another constitutional guarantee. Brennan distinguished Sherbert's claim from past denials of religious exemptions, noting the "conduct or actions so regulated [in past cases] have invariably posed some substantial threat to public safety, peace or order."[51] Because Sherbert's refusal to work on Saturdays "constitute[d] no conduct . . . of a kind within the reach of state legislation," the Court employed a more exacting analysis.[52] The commission could deny Sherbert benefits, the Court held, only if its decision placed no burden on her religious exercise or if any such burden was "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' "[53]

Reviving a line of analysis from his *Braunfeld* dissent, Justice Brennan noted that a burden exists whenever a law forces an individual to choose between her religion and some significant economic interest.[54] When a law places such a burden on religious exercise, even indirectly and without criminal sanction, the government must justify the action with a compelling state interest.[55] "[I]n this highly sensitive constitutional area," the Court held, "only the gravest abuses, endangering paramount interest, give occasion for

49. *Id.*

50. *Id.*

51. *Id.* at 403. This seems tenuous at best, as it immediately follows a citation to *Braunfeld*, which did not involve any such "substantial threat." While Brennan maintains *Sherbert* is consistent with *Braunfeld*, *id.* at 408–09, other Justices were unpersuaded. *See id.* at 417–18 (Stewart, J., concurring) ("[I]t is clear to me that in order to reach this conclusion the court must explicitly reject the reasoning of *Braunfeld v. Brown*."); *id.* at 421 (Harlan, J., dissenting) ("[T]he decision necessarily overrules *Braunfeld* . . . .").

52. *Id.* at 403 (majority opinion).

53. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

54. *Id.* at 404; *see also supra* text accompanying note 44.

55. *Sherbert*, 374 U.S. at 403. While the opinion does not use the phrase "strict scrutiny," it later adds to the "compelling state interest" prong a requirement that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407.

permissible limitation."[56] The state was unable to meet this heavy burden, alleging only the potential for false claims that might ultimately "dilute the unemployment compensation fund [and] hinder the scheduling by employers of necessary Saturday work."[57] The Court rejected these purported interests on procedural grounds.[58] For at least the next twenty-five years, the Court continued to apply strict scrutiny in cases where a claimant's religious convictions excluded him from unemployment compensation.[59]

The Court reaffirmed *Sherbert* nine years later in *Wisconsin v. Yoder*.[60] Three members of the Old Order Amish from New Glarus, Wisconsin, refused to enroll their fourteen- and fifteen-year-old children in the local high school. This violated the state's compulsory education law, which required children to attend school through their sixteenth birthday.[61] While the Amish do not object to primary schooling through the eighth grade,[62] they view high school as inimical to their way of life and antithetical to their religious convictions.[63] Instead, the Amish train their own to be productive members of Amish society.[64]

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56. *Id.* at 406 (internal citation and quotation marks omitted).

57. *Id.* at 407.

58. *Id.* (noting that South Carolina failed to assert these interests before the state supreme court). Even if it could reach the question, the Court found nothing in the record to support the state's fear that insincere claimants would become a drain on the state's coffers. *Id.* The Court further stressed that more vocationally debilitating beliefs would be less likely to obtain an exemption. *Id.* at 409–10.

59. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989) (holding *Sherbert* applied to an applicant who did not belong to a formal religion); Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 143–44 (1987) (extending *Sherbert* to employee whose beliefs changed over course of employment); Thomas v. Review Bd., 450 U.S. 707, 707 (1981) (reversing denial of benefits to a claimant who quit his job at a munitions factory due to religious pacifism).

60. 406 U.S. 205, 236 (1972).

61. *Id.* at 207.

62. *Id.* at 212:

> The Amish do not object to elementary education . . . because they agree 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.

63. *Id.* at 210–11 ("[The Amish] view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs.").

64. *Id.* at 222–24; *see also* CATHARINE COOKSON, REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE 30 (2001) ("An educational expert witness opined that this combination [of formal and vocational education] was an 'ideal' system of learning, 'superior' to that of ordinary high school.").

At the outset, Chief Justice Burger distinguished the Amish from analogous nonreligious claimants: had the Amish, like Thoreau,[65] rooted their actions in the "evaluation and rejection of the contemporary social values . . . their claims would not . . . rise to the demands of the Religion Clauses."[66] The Court rejected the state's reliance on a *Reynolds*-like belief-action distinction.[67] Instead, the Court applied *Sherbert* and found the state's purported interests (preparing children for democracy[68] and enabling them to be self-reliant members of society[69]) lacking as applied to these defendants. Given these two seminal cases, it seemed that the central analysis to future religious exemption cases would be whether the government had asserted a compelling interest.

C. Interpreting Around Strict Scrutiny

While *Sherbert* and *Yoder* remained law between 1963 and 1990, the compelling interest standard was frequently criticized by academics and inconsistently applied by courts.[70] After *Yoder*, the Court heard a series of religious exemption cases. Outside of the unemployment context,[71] however, "the person seeking the exemption never won."[72] Instead, the Court tended to distinguish *Sherbert* and *Yoder* in one of three ways: recognizing a compelling interest in

65. *See* HENRY DAVID THOREAU, WALDEN 85 (Beacon Press ed. 2004) (1854) ("I wanted to . . . live so sturdily and Spartan-like as to put to rout all that was not life, to cut a broad swath and shave close, to drive life into a corner, and reduce it to its lowest terms . . . .").

66. *Yoder*, 406. U.S. at 215–16.

67. *Id.* at 220 (noting that "belief and action cannot be neatly confined in logic-tight compartments").

68. *Id.* at 221–22 (agreeing that "some degree of education" was necessary to prepare children for democracy but doubting the marginal one-to-two years at stake would further that interest).

69. *Id.* at 222 (noting the Amish are "a highly successful social unit within our society").

70. *See, e.g.*, Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENT. 147, 147 (1987) (noting that, prior to *Smith*, the Court "simply look[ed] for and f[ou]nd[ ] a way out"). Even when the Court purported to apply strict scrutiny, its analysis evinced a retreat from the robust test applied in *Sherbert* and *Yoder*.

71. *See supra* note 59 (citing cases applying strict scrutiny to a claimant whose religious convictions excluded him from unemployment compensation).

72. FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 32–33 (2007). Professor Tushnet has adduced a more troubling trend in religious exemption cases: "[P]ut bluntly, the pattern is that sometimes Christians win but non-Christians never do." Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 381. Lower courts, however, have been at least marginally more willing to grant religious exemptions based on the Free Exercise Clause. *See* RAVITCH, *supra*, at 201 n.189 (detailing a number of cases in which lower courts granted religious exemptions).

uniformity, refusing to apply *Sherbert* in certain settings, or holding the challenged action did not burden religious conduct.

First, the Court in several cases held that the government had a compelling interest in promoting uniformity. In a case that arguably followed from *Yoder*, a member of the Old Order Amish challenged an assessment for unpaid Social Security taxes, again relying on Amish communalism.[73] Relying on *Sherbert* and *Yoder*, the district court invalidated the assessment.[74] The Supreme Court reversed, identifying three compelling interests for mandatory, universal participation in Social Security: financial stability,[75] administrative convenience,[76] and general taxation.[77] This distinction follows the line Justice Brennan drew between *Sherbert* and *Braunfeld*: the Sunday closing law in *Braunfeld* was permissible because Pennsylvania had a "strong state interest in providing one *uniform* day of rest for all workers."[78]

Second, the *Sherbert*-era Court also denied claims for religious exemptions in certain settings where the state's interest is at its apex. The military is the clearest example of such special settings. In *Goldman v. Weinberger*, the Air Force disciplined an Orthodox Jewish psychologist for wearing his yarmulke in violation of uniform dress regulations.[79] The Court held that *Sherbert* did not govern, noting instead that "[o]ur review of military regulations . . . is far more deferential than constitutional review of similar laws . . . designed for

73. United States v. Lee, 455 U.S. 252, 254–55 (1982) ("[The Amish] believe it sinful not to provide for their own elderly . . . and therefore are religiously opposed to the national social security system.").

74. *Id.* at 255 (citing Lee v. United States, 497 F. Supp. 180 (W.D. Pa. 1980)).

75. *Id.* at 258 ("[M]andatory participation is indispensable to the . . . social security system.").

76. *Id.* at 259–60 ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

77. *Id.* at 260 ("There is no principled way . . . to distinguish between general taxes and . . . the Social Security Act.").

78. Sherbert v. Verner, 374 U.S. 398, 408 (1963) (emphasis added); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding government's "fundamental, overriding interest in eradicating racial discrimination in education" outweighed a private university's religiously motivated ban on interracial dating); *cf.* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (pre-*Sherbert* case denying religious exemption from child labor laws).

79. 475 U.S. 503, 504 (1986).

civilian society."[80] The Court has recognized a similar special-settings exception for prison regulations.[81]

Third, the Court sometimes interpreted around *Sherbert* by holding that a law placed no burden on free exercise or that the burden was insufficient to warrant heightened scrutiny. In *Bowen v. Roy*, for example, Native American parents challenged the federal government's practice of assigning Social Security numbers, claiming the practice would "rob the spirit" of their daughter, Little Bird of the Snow.[82] Writing for the Court, Chief Justice Burger rejected the respondents' claim, asserting that the First Amendment has never been interpreted "to require the Government itself to behave in ways that the individual believes will further his or her spiritual development."[83] The Free Exercise Clause protects individuals from compulsion; it cannot coopt the government into the role of concelebrant.[84] Two years later, relying on *Bowen*, the Court rejected a claim that building a highway through and logging in a sacred Native American forest violated the Free Exercise Clause.[85] Finding that the burden on religious exercise was not "heavy enough" to trigger strict scrutiny under *Sherbert*, the Court denied the exemption and noted "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[86] Finally, just three months before *Smith*, the Court held that a generally applicable sales tax "imposes no constitutionally significant burden on . . . religious practices or beliefs."[87]

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80. *Id.* at 507 (reasoning the military does not need to "encourage debate or tolerate protest" but rather strives to "foster instinctive obedience, unity, commitment, and esprit de corps").

81. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987) (holding prison officials do not have to accommodate Muslim inmates' religious services). As this Note was going to press, the Court was considering *Holt v. Hobbs*, a challenge by a Muslim inmate to a prison facial hair regulation. *See* 509 F. App'x 561 (8th Cir. 2013) (per curiam), *cert. granted*, 134 S. Ct. 1490 (2014). However the Court decides, *Holt* is inapposite here because the regulation is challenged under the Religious Land Use and Institutionalized Persons Act, not the Free Exercise Clause.

82. 476 U.S. 693, 696 (1986).

83. *Id.* at 700. In a separate part of their claim, the respondents challenged a requirement for parents to furnish a child's Social Security Number to receive AFDC benefits. While the Court did not reach this question due to an insufficient record, *see id.* at 714 (Blackmun, J., concurring), the various opinions in the case suggest that a separate majority would have voted to uphold the respondents' AFDC claim. *See id.* at 716–17, 721 (Stevens, J., concurring); *id.* at 731 (O'Connor, Brennan, & Marshall, JJ., concurring); *id.* at 733 (White, J., dissenting).

84. *Id.* at 700.

85. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988).

86. *Id.* at 452.

87. Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 392 (1990).

D. Employment Division v. Smith *and the Retreat to Rational Basis*

The years between *Yoder* and *Smith* demonstrate the difficulty of heightened protection for religious conduct in a pluralistic society. Overaccommodation of religious exemptions from generally applicable laws proved impossible to administer,[88] and a robust application of *Sherbert* would render government unable to function.[89] By 1990, the Court had effectively cabined the compelling interest test to cases factually indistinguishable from *Sherbert* and *Yoder*.[90]

In *Employment Division v. Smith*, the long-anticipated reexamination of *Sherbert* finally arrived.[91] The respondents, two members of the Native American Church, were employees at a private drug rehabilitation center. As a condition of their employment, the respondents were required to abstain from using illicit drugs; as part of their religion, they were required to ingest peyote during sacramental ceremonies.[92] These two requirements eventually collided, and the respondents were fired from their jobs after they each failed a drug test.[93] Because possession of peyote violated state law, the state employment commission deemed the respondents to have been dismissed for "work-related misconduct," and therefore ineligible for unemployment benefits.[94] Under *Sherbert* and subsequent unemployment compensation cases,[95] the respondents presented a strong case for a religious exemption.[96] Reversing course without reversing *Sherbert* or *Yoder*, Justice Scalia wrote for a six-

88. *See, e.g.*, Bogen, *supra* note 14, at 248 ("The Court cannot practically require the highest standard to justify minimal impacts on speech or religion.").

89. *See Lyng*, 485 U.S. at 452 ("[G]overnment simply could not operate if it were required to fulfill every citizen's religious needs and desires.").

90. See COOKSON, *supra* note 64, at 33 (describing the application of *Sherbert*-*Yoder* as "exceptionally minimalist").

91. 494 U.S. 872, 879 (1990) ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

92. *Id.* at 874.

93. *Id.*

94. *Id.* at 874–75 (internal quotation marks omitted).

95. *See supra* note 59 (listing a series of post-*Sherbert* unemployment-compensation cases where the Court required a religious exemption from facially neutral eligibility requirements).

96. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, . . . a burden upon religion exists."); *see also* RAVITCH, *supra* note 72, at 33 ("Given this precedent, most people believed that the battle lines in *Smith* would be drawn over whether the state had an adequate compelling governmental interest.").

justice majority that *Sherbert* does not apply to generally applicable, religion-neutral laws that indirectly burden religious exercise.[97]

The majority reasoned that *Sherbert*'s compelling-interest standard applies only in certain types of cases: unemployment claims and "hybrid situation[s]."[98] While the Court had "purported to apply" a pure *Sherbert* test in other contexts,[99] it had never employed *Sherbert* to *invalidate* a government action that did not involve unemployment benefits.[100] This suggested a narrow reading of *Sherbert*.[101] Cases like *Yoder* and *Cantwell*, meanwhile, represented another narrow category meriting strict scrutiny: hybrid claims.[102] In hybrid cases, the Court had recognized exceptions "not [based on] the Free Exercise Clause alone but the Free Exercise Clause in conjunction with other constitutional protections."[103] Thus *Cantwell* was a free speech–free exercise claim,[104] while *Yoder* was a religion-specific instance of parental rights.[105] Because the *Smith* respondents relied solely on the Free Exercise Clause, they did not pose such a hybrid claim.[106]

Even assuming *Sherbert* and *Yoder* were not narrower than once believed, the Court introduced another wrinkle: unlike *Sherbert* and its progeny, the law in *Smith* involved a criminal prohibition.[107] The *Sherbert* test, the Court held, is "inapplicable to an across-the-board criminal prohibition on a particular form of conduct."[108] The

97. *Smith*, 494 U.S. at 883.

98. *Id.* at 878–84.

99. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257–58 (1982) (citing the *Sherbert* test and holding that social security taxes do not "interfere[ ] with the free exercise of the Amish").

100. *See Smith*, 494 U.S. at 883. The Court's claim that *Sherbert* had been cabined to the unemployment compensation context is debatable. See, for example, Professor McConnell's criticism of *Smith*'s use of history and precedent, *infra* text accompanying notes 116–23.

101. *Smith*, 494 U.S. at 883.

102. *See id.* at 881–82. For a discussion of some of the most commonly cited hybrid cases, see *supra* notes 32–41 and accompanying text.

103. *Smith*, 494 U.S. at 881 & n.1 ("[These] cases have specifically adverted to the non-free-exercise principle involved.").

104. *Id.* at 881 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

105. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)). The Court hinted that the Free Association Clause might also support a hybrid claim. *See id.* at 882.

106. *Id.* at 882.

107. *Id.* at 884–85. Two years earlier, the Court had remanded to the Oregon Supreme Court to determine if sacramental peyote use was prohibited by Oregon's controlled substance act. Emp't Div. v. Smith, 485 U.S. 660, 673–74 (1988). The state court found in the affirmative. Smith v. Emp't Div., 763 P.2d 146, 148 (1988).

108. *Smith*, 494 U.S. at 873. The majority's reliance on this factor is somewhat confusing, since the respondents were not seeking immunity from (nor does it appear that they were ever threatened with) prosecution; rather, they were invoking their religious beliefs as cause excusing what would otherwise be "work-related misconduct."

Court returned to its reasoning in *Reynolds*, worrying a decision to the contrary would permit every man "to become a law unto himself."[109]

E. Reaction to Smith

The Court's decision in *Smith* was—and remains—highly controversial. Shortly after the decision, Congress overwhelmingly passed the Religious Freedom Restoration Act of 1993 ("RFRA").[110] RFRA restored the *Sherbert-Yoder* standard for any substantial burdens placed on religious exercise "even if the burden results from a rule of general applicability."[111] But this reversion was short-lived. In *City of Boerne v. Flores*, the Court held that Congress had overstepped its Section Five enforcement powers[112] RFRA, as applied to state and local governments, did not enforce constitutional rights but rather rewrote states' constitutional obligations to their citizens.[113] The Court later held that RFRA was valid as applied to the federal government—even if Congress could not enforce its obligations against state and local governments, it could create a statutory protection against burdensome federal law.[114]

The legal academy has been largely critical of *Smith*.[115] Professor Michael McConnell, an erstwhile Tenth Circuit judge, has

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109. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

110. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2012)); *see also* Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99, 113–15 (1990) (describing Congress's early efforts to undo *Smith*). RFRA passed the House by a voice vote and the Senate by a vote of 97–3. *See Bill Summary & Status 103rd Congress (1993–1994) H.R.1308*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d103:HR1308:, *archived at* http://perma.cc/C8PJ-KL2Y (last visited Nov. 2, 2014).

111. 42 U.S.C. § 2000bb-1.

112. Congress purported to pass RFRA under its "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5; *see* S. REP. NO. 103-111, at 13–14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903 (discussing the constitutional authority to enact RFRA); H.R. REP. NO. 103-88, at 9 (1993) (same).

113. 521 U.S. 507, 519 (1997) (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)); *see also id.* at 520 (requiring "congruence and proportionality" between the constitutional injury threatened and the preventative means adopted).

114. *See* Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418, 424 & n.1 (2006) (describing RFRA as "a statutory rule comparable to the constitutional rule rejected in *Smith*").

115. *See, e.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 581 (2003) ("*Smith* has the rather unusual distinction of being one case that is almost universally despised . . . by both liberals and conservatives.").

It would be a mistake, however, to say that the academy is uniformly critical of *Smith*. Richard Duncan, for example, suggests that the evils of *Smith* have been greatly overstated and notes that "free exercise is alive and well in the wake of *Smith*." Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability*

been one of the most forceful critics of *Smith*.[116] McConnell argues that *Smith* misstates history[117] and precedent,[118] and that earlier cases flatly contradict the opinion's use of absolutes:

> The *Smith* opinion states baldly: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." In *Wisconsin v Yoder,* however, the Court had stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[119]

McConnell also rejects the hybrid rights claims purportedly exemplified by *Yoder*.[120] "[T]he opinion in *Yoder*," he points out, "expressly stated that parents do *not* have the right to violate the compulsory education laws for nonreligious reasons."[121] Even accepting the hybrid rights description, however, McConnell notes that the petitioners' ingestion of peyote could be described as a hybrid speech-religion activity:

> Why isn't *Smith* itself a "hybrid" case? Whatever else it might accomplish, the performance of a sacred ritual like the ingestion of peyote communicates, in a rather dramatic way, the participants' faith in the tenets of the Native American Church. Smith and Black could have made a colorable claim under the Free Speech Clause that the prohibition of peyote use interfered with their ability to communicate this message. If burning a flag is speech because it communicates a political belief, ingestion of peyote is no less. And even if Smith and Black would lose on a straight free speech claim, following the logic of *Smith*'s explanation of *Yoder,* why shouldn't their claim prevail as a "hybrid" with their free exercise claim?[122]

Requirement, 3 U. PA. J. CONST. L. 850, 851 (2001). Likewise, Ronald Krotoszynski calls *Smith* out for overdue praise, arguing "*Smith* better advances equality among religious sects than did *Sherbert* and *Yoder*." Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1199 (2008). However, these scholars remain in the minority.

116. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter *Free Exercise Revisionism*]; Michael W. McConnell, *Religion and Its Relation to Limited Government*, 33 HARV. J.L. & PUB. POL'Y 943 (2010); Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 B.Y.U. L. REV. 611; Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

117. *See Free Exercise Revisionism*, *supra* note 116, at 1117–18 (noting early state and colonial practices exempting religious objectors from generally applicable laws).

118. *See id.* at 1120 (describing the *Smith* Court's application of precedent as "troubling, bordering on the shocking").

119. *Id.* (citations omitted).

120. *Id.* at 1121–22.

121. *Id.* at 1121 (citing Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972)).

122. *Id.* at 1122.

Given these inconsistencies, McConnell concludes that the hybrid rights distinction "was not intended to be taken seriously."[123]

Professor Douglas Laycock, a leading First Amendment scholar and litigator, has been equally strong in his condemnation of *Smith*.[124] A few weeks after the *Smith* decision, Laycock wrote, "[C]hurches and believers are [now] fully subject to the tax and regulatory burdens of the modern welfare state."[125] Providing his own solution to the problem, Laycock opined, "I think the text and the purposes of the Free Exercise Clause require that government leave religion as free as can be managed."[126] Rather than making exemptions routine, the *Smith* Court has made them "exceptional at best; it may think exemptions should not exist."[127]

Other scholars have focused on the disarray *Smith* has engendered in lower courts. Steven Aden and Lee Strang argue the "hybrid rights claims" distinction fails to offer a rule with predictive or descriptive value.[128] One circuit has explicitly rejected the hybrid rights justification altogether,[129] while most others have been unsympathetic to hybrid claims.[130] Daniel Crane observed that some state-court judges "continue to apply the pre-*Smith* compelling interest test," though it is rare that such cases produce a religious exemption.[131]

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123. *Id.*; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hileah, 508 U.S. 520, 567 (1991) (Souter, J., concurring) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . ."); Kent Greenawalt, Quo Vadis*: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 335 (describing the hybrid rights theory as "a make-weight to 'explain' *Yoder*").

124. *See, e.g.*, Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994) (criticizing the majority's approach in *Smith*); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (exploring the theoretical and practical implications of *Smith*) [hereinafter *The Remnants of Free Exercise*]; Laycock, *supra* note 110 (publishing an unfiled amicus brief in support of a petition to rehear *Smith*).

125. DOUGLAS LAYCOCK, *Watering Down the Free Exercise Clause*, *in* 2 RELIGIOUS LIBERTY 66, 67 (2011). Laycock argues that *Smith* was based on four misconceptions: neutrality, belief and practice, religion, and the judicial role. *The Remnants of Free Exercise*, *supra* note 124, at 10–38.

126. *The Remnants of Free Exercise, supra* note 124, at 68.

127. *Id.*

128. Aden & Strang, *supra* note 115, at 605.

129. *See id.* at 587 (citing Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993)).

130. *See id.* at 588 ("The First, Second, Third, Eighth, Ninth, and Tenth Circuits have all faced cases where the courts ruled that the claim accompanying the free exercise claim lacked merit and dismissed the hybrid claim . . . .").

131. Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 269 (1998).

III. A VISION OF (RELATIVE) CLARITY: INCIDENTAL BURDENS ON EXPRESSIVE CONDUCT

While developing and then dismantling the compelling interest test, the Court simultaneously heard challenges to generally applicable laws based on the First Amendment's free speech guarantee. Seemingly unaware of the conceptual overlap between these cases, the Court has more ably and consistently articulated the standard of review for free speech challenges to generally applicable laws than it has for free exercise challenges. Section A surveys the two-track approach the Court takes in free speech cases, paying close attention to the distinction between content-based and content-neutral regulations. Section B then looks at the Court's long history of finding that "speech" does not require the utterance of a syllable or penning of a letter, but can be communicated through conduct. Finally, Section C looks at the *O'Brien* test, an intermediate standard of review through which the Court balances the state's need for general regulations of health, safety, and order against the individual's right to free expression.

A. Two-Tier Approach in Free Speech Cases

When the Court reviews a purported burden on free speech, it employs a two-tier analysis.[132] The Court subjects content-based regulations[133] to heightened scrutiny: if the speech is not categorically excluded from First Amendment protection, then the regulation must withstand strict scrutiny.[134] However, for content-neutral regulations, the Court applies one of two intermediate standards of review.[135]

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132. This taxonomy is borrowed, with slight modification, from Day, *supra* note 10, at 492 ("A commonly accepted starting point in free speech analysis is the observation that the Court has adopted a 'two-track' system: 'content-based' and 'content-neutral.' ").

133. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 (1994) ("Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' " (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

134. *See, e.g.*, Cohen v. California, 403 U.S. 15, 18–22 (1971) (applying strict scrutiny after finding the defendant's actions were not within any exempted category).

135. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (establishing a four-part test for government actions that indirectly burden speech). *But see* Texas v. Johnson, 491 U.S. 397, 410 (1989) (holding that *O'Brien* is inapplicable where the regulation is related to the suppression of speech).

1. Tier One: Content-Based Regulation of Speech

Content-based restrictions strike at the core of First Amendment values[136] and are presumptively invalid.[137] To overcome this presumption, the government must fit the regulation within an unprotected[138] category of speech, successfully argue that the Court should recognize a new category, or meet strict scrutiny.[139]

The most straightforward way for the government to regulate speech on the basis of its content is to fit the type of speech within a preexisting category of unprotected speech. In *Chaplinsky v. New Hampshire*, the Court recognized that, at common law, some categories of speech were outside even the most robust understanding of free speech; these categories remain beyond full First Amendment protection.[140]

Because these categories are a product of the common law, they are not "static."[141] Creative state solicitors general could thus conceivably convince the Court to recognize a new category of unprotected speech. This is the most difficult option, however—the Court has not recognized a new *Chaplinsky* category since 1982[142] and has since suggested that it will take the extraordinary step of creating a categorical exemption only when the speech poses cognizable harm.[143]

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136. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

137. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

138. While these categories are often described as "unprotected," the Court has cautioned that these forms of speech are simply *less* protected and can only be regulated consistent with First Amendment values. *Id.* at 383–84 ("[T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* [but are not] vehicles for content discrimination . . . .").

139. *Turner*, 512 U.S. at 642; *see also* McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014) (noting that a content-based regulation "must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest" (citation omitted)).

140. 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."). Recently, the Court identified nine such categorical exemptions to First Amendment protection: imminent incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting a "grave and imminent threat" that is within the government's power to prevent. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

141. Day, *supra* note 10, at 494.

142. *See* New York v. Ferber, 458 U.S. 747, 763 (1982) (upholding state ban on the sale of child pornography).

143. *See, e.g.*, *Alvarez*, 132 S. Ct. at 2545 (noting that past prohibitions on false statements all involved "legally cognizable harm associated with a false statement"). *Compare* Stanley v. Georgia, 394 U.S. 557, 559 (1969) (holding that the state may not prohibit the private possession

These narrow alternatives excepted, most content-based regulations of speech will be upheld only if they survive strict scrutiny, the "most exacting scrutiny" applied to government regulations.[144] To withstand strict scrutiny, a statute or regulation must "(1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest."[145] While this standard was once described as "strict in theory, but fatal in fact,"[146] courts occasionally, though infrequently, find a content-based regulation to be constitutionally permissible.[147]

2. Tier Two: Content-Neutral Regulation of Speech

The government can also burden speech through content-neutral means in two ways: time-place-manner regulations or incidental regulations of expressive conduct. The Court applies two potentially overlapping but analytically distinguishable tests for these modes of regulation.

The time-place-manner doctrine provides the government a way to regulate "manner[s] of expression [that are] incompatible with the normal activity of a particular place at a particular time."[148] The current articulation of the time-place-manner test comes from *Ward v. Rock Against Racism*, a challenge to New York City's regulation of the

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or viewing of obscene materials), *with* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding states may prohibit the private possession or viewing of child pornography because "[t]he pornography's continued existence causes the child victims continuing harm").

144. *Turner*, 512 U.S. at 642.

145. ACLU v. Mukasey, 534 F.3d 181, 190 (3d Cir. 2008) (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

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

147. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 193–95 (1992) (upholding a Tennessee statute prohibiting electioneering within one hundred feet of a polling place based on the compelling government interest in preventing voter intimidation and election fraud).

148. *See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). This doctrine originated in *Cox v. New Hampshire*, where the Court held that a city may require parades and marches to acquire permits "in order to assure the safety and convenience of the people in the use of public highways." 312 U.S. 569, 574 (1941). In its early history, the doctrine was limited to instances where the speech "intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). However, the Court gradually relaxed this requirement. *E.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (upholding anticamping ordinance as applied to demonstrators who wanted to sleep on the National Mall and in Lafayette Park to call attention to homelessness).

use of sound systems in Central Park.[149] Responding to noise complaints about concerts in an amphitheater in the park, the City began requiring performers to use city-owned sound equipment operated by an independent sound technician.[150] Rock Against Racism, whose annual concerts were a driving force behind the new regulation, argued that the regulation burdened their speech. The Court granted certiorari to "clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech,"[151] holding that time-place-manner restrictions must be (1) content neutral, (2) narrowly tailored regulations that (3) serve a significant government interest and (4) preserve "ample alternative channels for communication."[152] Because the regulation applied to all performances, was narrowly tailored to eliminating a public nuisance, and limited only the volume (as opposed to the medium or content) of the respondents' speech, the Court upheld the regulation.[153]

The second category of content-neutral regulation, discussed in depth below,[154] involves "governmental regulations that are directed towards nonspeech behavior, but that have an adverse impact on protected speech."[155] In such cases, the Court currently applies the *O'Brien* test, which states that the regulation must: (1) be within the power of the government; (2) further "an important or substantial government interest"; (3) be unrelated to the suppression of speech; and (4) be "no greater than is essential" to further that interest.[156]

Some scholars, relying on dicta in *Clark v. Community for Creative Non-Violence*, argue "the *O'Brien* analysis was subsumed in the . . . time, place, or manner formulation."[157] While it is true that there is significant overlap between *O'Brien* and *Ward*, the two tests serve different constitutional ends.[158] The time-place-manner doctrine asks whether a regulation that purports to focus on the "physical form

149. 491 U.S. 781, 784 (1989).

150. *Id.* at 786–87.

151. *Id.* at 789.

152. *Id.* at 791 (quoting *Clark*, 468 U.S. 288, 293 (1984)). The Court emphasized that the narrow tailoring requirement is not a least-restrictive-alternative prong, meaning the *Ward* test is not a strict scrutiny standard. *Id.* at 798–99.

153. *Id.* at 791–803.

154. *See infra* Part III.C.

155. *See* Day, *supra* note 10, at 499. This generally protects expressive conduct, but scholars have considered its application to other categories. *See, e.g.*, J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1008 n.36 (1976) (discussing and rejecting application of *O'Brien* to campaign finance laws).

156. United States v. O'Brien, 391 U.S. 367, 377 (1968).

157. *See, e.g.*, McCoy, *supra* note 13, at 1359 (citing *Clark*, 468 U.S. at 293).

158. Day, *supra* note 10, at 495.

of protected speech [is] actually directed towards the content of the speech"; the *O'Brien* test, meanwhile, evinces a "concern for the overreaching effect of governmental restrictions that have an adverse impact on protected expression."[159] These unique policy goals are evident in two regards. First, when the government regulates the time, place, or manner of speech, it is unmistakably targeting speech. The *O'Brien* test, however, governs only when the challenged regulation has an indirect or incidental relation to speech.[160] Similarly, the *O'Brien* test does not require that the government "leave open ample alternative channels for communication of the information";[161] on this score, the test requires only that the regulation be "unrelated to the suppression of free expression."[162] Because the *O'Brien* test does not require "ample alternative channels for communication," the inadvertent but complete suppression of speech might be acceptable. In the case that gives the *O'Brien* test its name, for example, the Court upheld O'Brien's conviction for publically burning his draft card as an act of protest.[163] The result was that O'Brien could not make this particular statement at any time, in any place, or in any manner, meaning the law likely would have failed a traditional time-place-manner analysis.[164]

Furthermore, the Court has continued to apply *O'Brien* even after *Clark*.[165] For example, in *Barnes v. Glen Theatre, Inc.*, decided six years after *Clark*, the proprietors of two strip clubs challenged an Indiana ban on fully nude live dancing.[166] Applying *O'Brien*, the Court upheld the ban, even though doing so left the club operators with no alternative means of communicating their message—a result incompatible with the time-place-manner analysis.[167] Thus, while

159. *Id.* at 495–96.

160. *See* Spence v. Washington, 418 U.S. 405, 415 n.8 (1974) (per curiam) (holding *O'Brien* inapplicable when the asserted interest is "directly related to expression in the context of [the] activity"); *see also* Day, *supra* note 10, at 496 ("[A time-place-manner] regulation is established for the purpose of abridging protected expression, [while] an incidental regulation is a nonpurposeful abridgment.").

161. *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

162. United States v. O'Brien, 391 U.S. 367, 377 (1968).

163. *Id.* at 382.

164. While O'Brien technically could have used a different medium to protest the draft, in his case, "the medium [was] the message." Dorf, *supra* note 10, at 1215 n.184.

165. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–68 (1991) (plurality opinion); *see also id.* at 582 (Souter, J., concurring) ("I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in [*O'Brien*] . . . .").

166. *Id.* at 562–63 (plurality opinion).

167. *Id.* at 563; *see also* Texas v. Johnson, 491 U.S. 397, 410 (1989) (holding that a flag-burning law was related to the suppression of speech, and therefore subject to strict scrutiny

there is overlap between the time-place-manner doctrine and the *O'Brien* test, the two tests retain independent analytical value.[168]

B. "Speech . . . Brigaded with Action"[169]: Regulation of Expressive Conduct

Burning a flag.[170] Forming a peace symbol.[171] Wearing a black armband.[172] Nude dancing.[173] Often, speech goes beyond talking or writing to include conduct inextricably linked to an underlying communicative intent. Such forms of communication are alternatively referred to as "symbolic speech" and "expressive conduct."

The Court indicated a willingness to recognize First Amendment–protected conduct as early as 1931.[174] In *Stromberg v. California*, a counselor at a Communist summer camp was convicted of violating the state's Red Flag Law, which prohibited any person from "display[ing] a red flag, banner or badge . . . as a sign, symbol or emblem of opposition to organized government."[175] While ultimately holding the law void for vagueness, the Court seemed willing to accept that Stromberg had "spoken" despite not writing a word or uttering a syllable.[176] Three decades later, the Court noted in a Civil Rights Era sit-in case that the First Amendment is "not confined to verbal expression," but rather "embrace[s] appropriate types of action."[177]

The Court announced its modern test for symbolic speech in *Spence v. Washington*.[178] Spence, who taped a peace symbol to a United States flag as a form of protest, was convicted under a Washington statute prohibiting the "improper" display of the flag.[179] While Spence neither wrote nor talked, the Court nonetheless found

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rather than *O'Brien*); Arcara v. Cloud Books, Inc., 478 U.S. 697, 704–05 (1986) (holding a city health code placed too indirect of a burden on speech to trigger *O'Brien*).

168. *See infra* Part V.B.2.

169. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

170. *Johnson*, 491 U.S. 397.

171. Spence v. Washington, 418 U.S. 405 (1974) (per curiam); *cf.* Sole v. Wyner, 551 U.S. 74, 83 n.4 (2007) (expressing no opinion on a § 1983 plaintiff's claim that the First Amendment protects nude performance art).

172. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

173. *E.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562–63 (1991).

174. *See* Stromberg v. California, 283 U.S. 359, 361, 369–70 (1931).

175. *Id.* at 361–62.

176. *Id.* at 369–70.

177. Brown v. Louisiana, 383 U.S. 131, 142 (1966) (reversing convictions following a peaceful library sit-in).

178. 418 U.S. 405, 410–11 (1974) (per curiam).

179. *Id.* at 405–07.

that he spoke, delineating a two-part test for expressive conduct: (1) Was there "[a]n intent to convey a particularized message"? (2) If so, was it likely "that the message would be understood by those who viewed it"?[180] The Court continues to apply this test to expressive conduct and symbolic speech claims.[181]

C. The O'Brien *Test*

In *United States v. O'Brien*,[182] the Court articulated its standard of review for neutral laws that indirectly burden speech.[183] In 1966, David O'Brien, a nineteen-year-old, draft-eligible man, burned his draft card on the steps of a courthouse in front of a large crowd, including several FBI agents.[184] O'Brien was later convicted of violating the Military Training and Service Act ("MTSA"), which prohibited defacing, destroying, or otherwise changing a draft card.[185] The First Circuit reversed, holding that "his actions constituted symbolic speech protected by the First Amendment."[186]

Accepting without analyzing the lower court's finding that O'Brien was convicted for speech,[187] the Court reversed the decision and reinstated the conviction. First, the Court found that the MTSA was a content-neutral regulation.[188] Next, the Court noted that expressive conduct occupies some intermediate level of importance in free speech jurisprudence—by necessity its protection cannot be coterminous with that of pure speech, but neither is it unprotected.[189]

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180. *Id.* at 410–11.

181. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989) (applying *Spence* in a flag-burning case).

182. 391 U.S. 367 (1968).

183. *See* Donald A. Fishman, United States v. O'Brien, *in* FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVE ON LANDMARK SUPREME COURT DECISIONS 130, 140–41 (Richard A. Parker ed., 2003) (noting that *O'Brien* remains controlling precedent in expressive conduct cases).

184. *O'Brien*, 391 U.S. at 369; *see also id.* ("[O'Brien] stated he had burned his registration certificate because of his beliefs, knowing that he was violating federal law.").

185. *Id.* at 370. Prior to the amendment, the MTSA only required registrants to carry their certificates at all times.

186. Fishman, *supra* note 182, at 131.

187. *See O'Brien*, 391 U.S. at 376 (proceeding "on the assumption" that the Free Speech Clause applies).

188. *See id.* at 375 ("[The MTSA] deals with conduct having no connection with speech.").

189. *See id.* at 376 ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

For this intermediate interest, the Court articulated an intermediate test:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction . . . is no greater than is essential to the furtherance of that interest.[190]

The Court held the MTSA met each element and was therefore valid facially and as applied.[191]

In later cases, the Court further clarified the *O'Brien* test. In *Texas v. Johnson*, for example, the Court implied that the third prong—whether the regulation is unrelated to the suppression of speech—is analytically prior to the others.[192] It is only if the regulation is unrelated to the suppression of speech that intermediate scrutiny applies; otherwise, the regulation must withstand strict scrutiny.[193] Also, in *Ward*, the Court clarified that the "no greater than . . . essential" prong is not a least-restrictive-alternative analysis.[194] It is enough that the challenged regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[195] Additionally, the Court has refused to overly attenuate the burden requirement.[196] In *Arcara*, local authorities closed an adult bookstore that condoned the solicitation of

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190. *Id.* at 377.

191. *Id.* at 382.

192. 491 U.S. 397, 403 (1989). Technically, the first prong—within the government's constitutional powers—is a threshold question. However, if the government is acting ultra vires, the Court is unlikely to reach the First Amendment challenge. *See* Dorf, *supra* note 10, at 1202 & n.111 ("Prong one is not properly part of First Amendment law because *all* regulation must be within the government's constitutional powers.").

193. *See id.* ("If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* . . . controls.").

194. *See* 491 U.S. 781, 798 (1989); *cf.* Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (holding, one week after *Ward*, that the "necessary" prong of the commercial speech test requires only a " 'fit' between the legislature's ends and the means chosen to accomplish those ends" (internal citations omitted)). While *Ward* concerns a time-place-manner regulation, the Court often makes comparisons across the two standards' overlapping elements.

195. *Ward*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)); *see also* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484–85 (1975) (describing *O'Brien* as "requir[ing] only that there be no less restrictive alternative capable of serving the state's interest as efficiently" (footnote omitted)).

196. *See* Arcara v. Cloud Book Stores, Inc., 478 U.S. 697, 705–06 (1986) ("The severity of this burden is dubious at best, . . . since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."); *see also* Cowen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (holding the First Amendment does not shield a newspaper from civil liability for breach of contract).

prostitution on the premises.[197] Reversing the New York Court of Appeals, the Supreme Court held that the purported burden was too indirect to trigger intermediate scrutiny.[198] As in other First Amendment cases, the burden of persuasion shifts to the government once the challenger has made a prima facie free speech claim.[199]

In summary, the Court continues to apply *O'Brien* notwithstanding some analytical overlap with the time-place-manner doctrine.[200] To claim an *O'Brien* exemption, the party challenging the general law must show that the law placed an indirect (but not too indirect[201]) burden on expressive conduct. The focus then shifts from the speaker's message to the government's justification.[202] The Court will first determine whether the regulation is related to the suppression of speech.[203] If the regulation is directed at speech, strict scrutiny applies; if it is not, the Court applies the remaining elements of *O'Brien*: whether the regulation is within the government's constitutional powers, furthers an important government interest, and is no more extensive than necessary.[204] While the latter two elements resemble strict scrutiny, the Court requires neither a compelling interest[205] nor a least-restrictive-alternative analysis.[206]

197. *Arcara*, 478 U.S. at 699–700.

198. *Id.* at 706–07 ("[T]he First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books."). The Court further concluded that *O'Brien* applies only in two situations: "where it was conduct with a significant expressive element that drew the legal remedy, . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." *Id.* (internal footnote and citations omitted).

199. *See* Healy v. James, 408 U.S. 169, 184 (1972) (noting "the burden was upon the [state] to justify its decision" (citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968))). *But see* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 108 (1988) ("[T]he Court starts from the presumption that [laws that indirectly burden free speech] raise no [F]irst [A]mendment issue." (citing Associated Press v. NLRB, 301 U.S. 103 (1937))).

200. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

201. *See Arcara*, 478 U.S. at 706–07.

202. *See* Fishman, *supra* note 182, at 141–42 ("The test does not examine the defendant's mode of expression or even the intended message.").

203. Texas v. Johnson, 491 U.S. 397, 403 (1989).

204. *Id.*

205. United States v. O'Brien, 391 U.S. 367, 377 (1968) (requiring only an "important or substantial" interest).

206. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (noting that *O'Brien* is not a least-restrictive-alternative analysis).

IV. EXEMPTIONS FROM GENERALLY APPLICABLE LAW UNDER *O'BRIEN* AND *SMITH*.

The current state of First Amendment jurisprudence poses an odd asymmetry when it comes to generally applicable laws that indirectly burden First Amendment rights. Section A begins by posing a hypothetical that will be helpful in discussing the problems with and solution to the *O'Brien-Smith* conundrum. Section B then surveys the scholarly literature noting the glaring inconsistency between *O'Brien* and *Smith*. Section C shows that this inconsistency has relegated religion to second-class status in the First Amendment canon, violating the neutrality principle. Finally, Section D makes the case that *Smith* has weakened the Free Exercise Clause and robbed it of any value independent of the Establishment Clause.

A. Free Exercise and Free Speech on Fire

Imagine two neighbors: Francis and Henry. On the last Friday of November, both Francis and Henry independently decide to burn all of their worldly possessions in the parking lot of the Hamilton Township Mall. Hamilton, beset by summer forest fires in recent years, had enacted the Forest Fire Prevention Act of 2012 ("FFPA"), which requires a permit for all uncontained outdoor fires. The district attorney charges both Francis and Henry with violating the FFPA.

At trial, both men claim protection under the First Amendment. Francis, who has recently embraced theological asceticism, claims that he burned his belongings as an act of worship that would purify his soul, purge corrupting influences, and make him more like his deity. Henry, meanwhile, has been reading transcendentalist authors, leading him to realize that he is a slave to the accoutrements he once called conveniences. To make a point, Henry chose to burn everything he owned at a mall on Black Friday—the church of consumerism on its holiest day.

Both displays were outward manifestations of inward convictions that are at the core of the First Amendment. Thus, were we to erect a legal regime tabula rasa, we would, at a minimum, expect the law to treat both men the same. Moreover, when we interpose the text of the First Amendment[207] and the words of the Supreme Court,[208] we might even expect a thumb on the scale in favor of religious expressive conduct. The opposite is in fact true.

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207. *See infra* text accompanying note 235.

208. *See supra* notes 65–66 and accompanying text.

Francis would have no First Amendment–based defense. Under *Smith*, a religious adherent can claim an exemption from a law only by proving that the law is not generally applicable, not neutral towards religion, or directly burdensome on religious exercise.[209] The FFPA is applicable to all would-be fire starters, neutral towards religion,[210] and only indirectly burdens worship. Moreover, the *Smith* Court held that the First Amendment offers no protection to the religious from generally applicable criminal prohibitions.[211]

Henry, however, would have a colorable First Amendment defense. As a threshold matter, Henry has "spoken" without uttering a word. Because the FFPA prohibits fires regardless of their message (or lack thereof), a court would apply a tier-two, content-neutral standard of review. Moreover, this is not a regulation of the time, place, or manner of Henry's speech but a complete prohibition. Therefore, *O'Brien* applies, and the ordinance satisfies the first three prongs: a fire-prevention ordinance is within the powers of local government in furtherance of an important interest unrelated to speech (to wit, safety). Thus, Henry's claim hinges on whether the regulation is "no greater than essential." Henry could argue there is no risk of a forest fire in the middle of a paved parking lot in late November. While the FFPA might be necessary in densely wooded areas or during the dry summer months, application of the law year-round and town-wide is overly restrictive and provides no marginal benefit to the government's purported interest in preventing forest fires.[212]

While it is far from certain that Henry would win, he stands a fighting chance, where Francis's claim would be summarily rejected. Thus, when *O'Brien* and *Smith* are compared side-by-side on analogous facts, the unmistakable conclusion is that the current state of jurisprudence accords greater protection to philosophically

209. In practice, this really comes down to neutrality. If a law is not neutral, it cannot be generally applicable. And while a nongeneral, nonneutral law might place *no* burden on religion, any burden would be necessarily direct.

210. Assume for present purposes that the town council did not harbor an intent to hinder religious fires. Had the FFPA been passed, for example, after a religious sect began performing burnt offerings in Hamilton, this might be a different case. *Cf.* Church of the Lukumi Babalu, Inc. Aye v. City of Hileah, 508 U.S. 520, 534 (1991) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

211. Emp't Div. v. Smith, 494 U.S. 872, 884–85 (1990).

212. It is true that Henry could probably be convicted under other laws—for example, trespass if he had been asked to leave or arson if he had damaged another's property. However, the Court has emphasized that it is not enough that the defendant is guilty of *something*; if the challenged prohibition is unconstitutional, that part of the conviction fails. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 379–80 & n.1 (1992) (noting the other laws petitioner could have been convicted under).

motivated conduct than it does to religiously motivated conduct.[213] This is at odds with the Court's own words.[214]

B. Scholarly Treatment

Unsurprisingly, scholars have noticed this apparent inconsistency between the *O'Brien* test and the treatment under *Smith* of similar laws that indirectly burden religious exercise. A few years after *Smith*, Thomas McCoy called for a "coherent" approach to the First Amendment's guarantees of free speech, free exercise, and nonestablishment.[215] For McCoy, the unifying theme is "inadvertence,"[216] and he argues inadvertent conflicts with the Free Speech Clause or the Religion Clauses pose "precisely the same jurisprudential question."[217] This fact has eluded the Court.[218] McCoy suggests that the Court apply the time-place-manner doctrine to inadvertent burdens on religious exercise and endorsements of religious practices.[219] While McCoy succinctly diagnoses the problem, his remedy, as discussed below,[220] proves unworkable in free exercise cases because it would require courts to assess the centrality of a specific act of worship to an individual's faith.

David Bogen also argues in favor of intermediate scrutiny for generally applicable laws that indirectly burden religious exercise.[221] Noting the problems with both extremes, Bogen argues that an intermediate standard of review "assures both the government's

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213. Professor Leiter poses a similar hypothetical with an opposite outcome. BRIAN LEITER, WHY TOLERATE RELIGION 1–3 (2013). This hypothetical is distinguishable, however, because Professor Leiter's book discusses the broader philosophic underpinnings of religious tolerance, not its particular treatment under the U.S. Constitution. In fact, the case Professor Leiter relies upon is a Canadian case that permitted a religious exemption under the Canadian Charter of Rights and Freedoms. *See* Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6 (Can.). His hypothetical, therefore, is inapposite in considering the treatment of religious conduct under the First Amendment.

214. Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

215. *See generally* McCoy, *supra* note 13 ("[T]he Supreme Court has yet to develop a coherent and consistent approach to the application of [the Free Exercise Clause and the Establishment Clause].").

216. *Id.* at 1342–43.

217. McCoy, *supra* note 13, at 1343.

218. *Id.*

219. *Id.* at 1364–83; *see also id.* at 1344 ("[T]he conceptual methodology developed by the Court for dealing with inadvertence in the free speech context is the only sensible approach to the inadvertence problem in [the free exercise and establishment contexts].").

220. *See infra* Part V.B.2 (arguing that McCoy's argument overlooks subtle differences between the two tests).

221. *See* Bogen, *supra* note 14, at 253 ("The obvious candidate for a test to evaluate neutral, generally applicable laws is *O'Brien*.").

ability to accomplish its legitimate functions and the protection of speech and religion from unnecessary regulation."[222] Unlike McCoy, but like this Note, Bogen concludes that the *O'Brien* test is the "obvious candidate for a test to evaluate neutral, generally applicable laws" because the test "permits the government to accomplish any significant legitimate objective . . . [but] decreases the likelihood that a law with an impermissible purpose will survive strict scrutiny."[223] Writing in 1997, Bogen opined the Court would soon "make its free speech decisions consistent with its free exercise jurisprudence."[224] But no such consistency has emerged. Also, for Bogen, the appeal of *O'Brien* is its convenience as a happy medium between two unworkable extremes.[225] Yet, he fails to address at any length the substantive analogy between expressive and religious conduct.

Brian Freeman believes that a unified standard for First Amendment–based exemptions from generally applicable laws is necessary to maintain neutrality between religious and secular expression.[226] The current approach, Freeman argues, is hopelessly "muddled" as the court vacillates between "the polar extremes of rational basis scrutiny and strict scrutiny."[227] *Sherbert* and *Yoder* privileged religion over nonreligion; *Smith* does the opposite. Thus, intermediate review, supplemented with a hard look at legislative purpose, promotes neutrality between religious and political expression.[228]

Not all commentators believe intermediate scrutiny is necessary or appropriate. Professor Day, for example, argues that *O'Brien* is "toothless" and "the Court for the most part treats incidental burdens as largely irrelevant for constitutional purposes."[229] Similarly, Professor Stone has argued the Court's standard of review

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222. *Id.* at 205. Bogen also argues that, while *Smith* rejects strict scrutiny, it does not require rational basis. *See id.* at 206, 212–13 ("The rejection of the 'compelling governmental interest' test does not necessarily foreclose the application of a lesser standard . . . ."). This seems unlikely given Justice Scalia's criticism elsewhere of intermediate scrutiny, *see* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring) ("[W]e should avoid wherever possible . . . a method of analysis that requires judicial assessment of the 'importance' of government interests . . . ."), but it nonetheless underscores the fallacy of viewing standard of review as a binary question.

223. *Id.* at 253–55.

224. *Id.* at 204.

225. *Id.* at 253–54 (describing *O'Brien* as an "obvious candidate" and "the best alternative" to competing approaches).

226. Freeman, *supra* note 13, at 11 (calling for a harmonized treatment of "religious, ethical, philosophical, moral, or political" expression).

227. *Id.* at 81.

228. *Id.* at 57.

229. Dorf, *supra* note 10, at 1180, 1204.

under *O'Brien* is less robust than its elements would suggest.[230] Notably, *Smith*'s author himself, Justice Scalia, has recognized the inconsistency between *Smith* and *O'Brien* and advocated for consistency—but in the other direction. In *Barnes*, the Court applied *O'Brien* and rejected a First Amendment challenge to Indiana's ban on completely nude live dancing.[231] Concurring in judgment, Justice Scalia returned to the formalistic analysis he employed in *Smith*. "[A] general law regulating conduct and not specifically directed at expression," Scalia wrote, "is not subject to First Amendment scrutiny at all."[232] Comparing the Court's opinion in *Smith* with its *O'Brien* analysis in *Barnes*, Scalia suggested a similar approach to the similar challenges: "In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed."[233]

Despite these degrees of difference, commentators generally agree that the jurisprudence regarding generally applicable laws that indirectly burden First Amendment rights is a mess and has been for at least two decades. Their proposed solutions each seek to resolve the cognitive dissonance between how the Court speaks about First Amendment rights and the way it actually protects those rights.

C. Relegating Religion to Opinion

As the hypothetical above demonstrates, the law currently accords more protection for nonreligious conduct than for religious conduct. While a normative debate persists as to whether religion deserves special treatment,[234] this question lies beyond the scope of this Note. For present purposes, a tautology will suffice: religion in the United States is constitutionally significant because the Constitution says so.[235]

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230. Stone, *supra* note 199, at 50–52.

231. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–68 (1991).

232. *Id.* at 572 (Scalia, J., concurring); *see also id.* at 579 ("There is even greater reason to apply this approach to the regulation of expressive conduct. Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression.").

233. *Id.* at 579.

234. *See generally, e.g.*, LEITER, *supra* note 213 (arguing that religious exemptions to generally applicable laws should be granted only when doing so would not "shift burdens or risks onto others"); John Finnis, *Does Free Exercise of Religion Deserve Constitutional Mention?*, 54 AM. J. JURIS. 41 (2009) (outlining the normative justifications both for and against constitutional protection of religion).

235. Notably, the drafters of the First Amendment included the Free Exercise Clause but removed a similar clause protecting conscience. *See* Lee v. Weisman, 505 U.S. 577, 612–13 (1992)

In the past, the Court has recognized that religion is different from, and its protection elevated over, opinion. As noted above, *Yoder* distinguished the Amish respondents' convictions from Thoreau's philosophical separatism, extending protection to only the former.[236] A general writ to obey only the laws that accord with one's opinions would create a state where every man is a "law unto himself."[237] It would be impossible to raise an army if draftees could refuse to fight in an unjust war,[238] or fund the government if taxpayers could credit a pro rata share of programs with which they disagree.[239] Religion, however, plays a gatekeeping role that makes claims for exemption less numerous, more easily verifiable, and more broadly shared.[240]

Thus, as *Yoder* recognized, the Constitution arguably allows for greater protection of religious exercise than it does expressive conduct. At a minimum, the text of the Constitution would seem to require parity. However, as the story of Francis and Henry demonstrates, the Court has flipped this on its head and subordinated religious expression to expressive conduct. This regime violates the core First Amendment value of neutrality, which requires not just neutrality between sects but neutrality between religion and nonreligion.[241] By offering less protection under *Smith* than under *O'Brien*, the Court penalizes the religious actor vis-à-vis the nonreligious actor.

D. What's Left of the Free Exercise Clause?

After *Smith*, generally applicable laws that indirectly burden religious conduct must bear only a rational relationship to a valid

(Souter, J., concurring) (describing the excision of a proposed clause protecting "the rights of conscience" from the First Amendment prior to the adoption of the Bill of Rights). While it is unclear why the conscience clause was excised, the drafting history makes clear that the First Congress was more concerned with religious objection than conscientious objection. *See* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1481 (18th ed. 2013) ("It is unclear why the first Congress deleted the final phrase . . . .").

236. Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

237. *See* Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

238. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 461 (1971) (denying draft exemptions to individuals with conscientious objections to particular wars, as opposed to war in general).

239. *See, e.g.*, United States v. Lee, 455 U.S. 252, 259–61 (1982) (refusing to exempt the Amish from Social Security taxes because "there is no principled way . . . to distinguish between general taxes and . . . Social Security [taxes]").

240. *See supra* note 232.

241. *E.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

state interest to survive a challenge under the Free Exercise Clause.[242] What, then, is the role of the Free Exercise Clause in the *Smith* era? Setting aside unemployment claims, the Free Exercise Clause only has independent force in challenging nonneutral or nongeneral laws that directly burden religious exercise.[243] But, given the American tradition of religious pluralism, it would be highly unlikely for a legislature to directly regulate religious exercise.[244] Moreover, a law that is not neutral concerning religion—a law that burdens or benefits religious exercise—would likely already be invalid under the Establishment Clause.[245] The current state of law has led Professor Greenawalt to wonder "whether anything that is not redundant remains" of the Free Exercise Clause.[246] Similarly, Professor McCoy argues that the current state of law "read[s] the Free Exercise Clause as essentially meaningless surplusage in the contemporary context."[247]

By itself, the fact that a constitutional provision has outlived its usefulness is not dispositive. The Third Amendment, for example, is all-but-invisible in constitutional law;[248] no one would seriously argue that this calls for the Court to reexamine its (nonexistent) Third Amendment cases. But the political process has produced an equilibrium regarding forced quartering that has not developed for religious liberty. With so many live disputes, the Free Exercise Clause must be more than a constitutional hall monitor. In the wake of

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242. *See Smith*, 494 U.S. at 886 n.3 ("[G]enerally applicable, religion-neutral laws that . . . burden[ ] a particular religious practice need not be justified by a compelling governmental interest . . . ."). As mentioned above, the Religious Freedom Restoration Act, an attempted repeal of *Smith*, has been narrowed to create a statutory right against certain types of federal laws and regulation. *See supra* text accompanying notes 110–14. This Section discusses only the scope of *constitutional* free exercise protection, which RFRA failed to expand.

243. This also sets aside hybrid rights, since such claims stand or fall on the strength of the accompanying right. *See, e.g.*, Church of the Lukumi Babalu, Inc. Aye v. City of Hialeah, 508 U.S. 520, 567 (1991) (Souter, J., concurring) ("[I]f a hybrid claim is one in which a litigant would actually obtain an exemption . . . under another constitutional provision, then there would have been no reason . . . to have mentioned the Free Exercise Clause at all.").

244. *See id.* at 564 (noting that *Lukumi* "provided a rare example of a law actually aimed at suppressing religious exercise").

245. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (noting that a government action violates the Establishment Clause when its "actual purpose is to endorse or disapprove of religion" or the action "in fact conveys a message of endorsement or disapproval").

246. Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 156–57 (2004) (emphasis omitted).

247. McCoy, *supra* note 13, at 1350.

248. *See* Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 140 (1993) ("The Supreme Court has never given [the Third Amendment] more than a passing reference . . . ."). According to Westlaw, only fifty-one published federal opinions through 2014 had cited the Third Amendment.

Smith, it is unclear what role the Free Exercise Clause is to play besides an added layer of protection against laws that would likely be defeated by the Establishment Clause and our culture of constitutionalism.

V. GENERATING CONSISTENCY AND ARGUING ALTERNATIVELY

The Court could immediately and dramatically clarify its free exercise jurisprudence by applying the *O'Brien* test for expressive nonreligious conduct to religious acts of worship or sacrament. Absent such a specific determination, religious claimants may nonetheless seek intermediate protection by recasting their expressed belief as expressive conduct. This Note proposes two solutions. Section A recommends a short-term litigation strategy based on the assertion that acts of worship and the observance of sacrament are substantively indistinguishable from expressive conduct. So long as the Supreme Court applies rational basis to free exercise claims, creative advocates should plead free exercise and expressive conduct claims in the alternative in an effort to obtain the heightened protection of free speech law. Section B concludes that such a patchwork approach to the First Amendment is unsatisfactory and that, in the long run, the Court should adopt an intermediate standard—specifically the *O'Brien* test—to claims for religious exemptions from generally applicable laws.

A. Short-Term: Recast Religious Expression as Expressive Conduct

Most acts of worship serve a dual sacramental-communicative purpose. Primarily, acts of worship are symbols of personal devotion, fidelity, or virtue. But many religions are based on claims of universal truth, and thus behaviors adopted by an adherent implicitly encourage others to behave likewise. This truth claim is both didactic (instructing fellow adherents how to act) and evangelical (demonstrating to nonadherents the acts of a well-ordered life). A coherent First Amendment jurisprudence would treat communicative religious conduct the same as it treats communicative political conduct.[249]

249. *See* Gordon, *supra* note 14, at 107 ("Why shouldn't religious practices that are performed for religiously symbolic . . . reasons enjoy at least the same level of constitutional protection as other expressive conduct . . . ?")

Consider the case of Fifth Avenue Presbyterian Church ("FAPC") in Manhattan.[250] Located along New York's premier shopping locale and just four blocks from Central Park, FAPC allowed homeless persons to sleep on its steps and on a small strip of property between the church's wall and the public sidewalk.[251] The church viewed its outdoor space "as a sanctuary for the service-resistant homeless who prefer not to sleep in shelters."[252] In 2001, New York City ordered FAPC to discontinue the practice because, it alleged, FAPC was creating a public nuisance, violating several city codes about the use of sidewalks, and unlawfully maintaining a shelter.[253] FAPC sued under § 1983 (among other federal and state causes of action), alleging that the City had violated three First Amendment guarantees: free exercise, free speech, and free association.[254] On brief before the Second Circuit, FAPC emphasized that this practice had a dual role: it discharged their moral obligations to the less fortunate while simultaneously preaching a message of charity to passersby.[255] FAPC ultimately obtained a permanent injunction on both free speech and free exercise grounds, allowing it to continue providing overnight shelter to homeless persons.[256] In entering the injunction, the district court observed, "[B]y allowing such activity, the Church engaged in expressive conduct by communicating a highly particularized, easily understood, *religious and political message* regarding how homeless persons should be treated by society."[257]

The Fifth Avenue Presbyterian case is probably more exemplary than it is exceptional. Indeed, many—perhaps most—acts of worship could be said to have an evangelical purpose. Beyond making claims to truth and the well-ordered life, religious worship is often intended to tell a story. The first question of the Passover Sedar is, "Why is this night different from all other nights?" and the elements of the Sedar proceed to tell the story of the Jews' Exodus from Egypt. Likewise, the Eucharist commemorates the actualizing

250. Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002).

251. *Id.* at 572. Persons who chose to sleep on church property were "given a list of rules, which includes instructions to clean up after themselves and a prohibition on begging, loud music, disruptive behavior, and foul language." *Id.*

252. *Id.*

253. *Id.* at 572–73.

254. Brief of Plaintiffs-Appellees-Cross-Appellants at 2, *Fifth Ave. Presbyterian*, 293 F.3d 570 (Nos. 02-7073, 02-7153).

255. *Id.* at 28 (arguing the practice "is designed not only to serve the spiritual needs of the homeless and those who minister to them, but also to evangelize passersby").

256. Fifth Ave. Presbyterian Church v. City of New York, No. 01-Civ.-11493(LMM), 2004 WL 2471406 (S.D.N.Y. Oct. 29, 2004).

257. *Id.* at *10.

event of Christianity, with the Apostle Paul writing, "For as often as you eat this bread and drink this cup, you *proclaim* the Lord's death till He comes."[258] The hajj reenacts Allah's protection of Hagar and Ishmael, as well as Mohammed's pilgrimage from Medina to Mecca.[259] Each of these ceremonies is integral to telling the story of faith and is often a means of passing the faith down to future generations.

Once the prevalence of expressed belief is recognized, it becomes hard to justify the disparate treatment. Consider *Spence*, where the Court held the defendant was constitutionally entitled to hang an American flag with a duct-taped peace sign outside of his home as a war protest.[260] But what if, instead of a peace sign, Spence was an Orthodox Jew and had affixed to his door a mezuzah, a small decorative box containing the Shema.[261] The Torah commands the mezuzah not only as a matter of devotion but also as a means of communicating God's commandments to others.[262] The message "The Lord is God and He is one" is every bit as communicative as "Make love, not war." However, when these messages are reduced to symbolic form—either in an altered flag or a decorative box—the standards shift, with the protest flag receiving greater protection than the mezuzah.[263] Likewise, many religions also prescribe or proscribe certain forms of dress as a means of professing holiness, purity, or set-apartness.[264] In *Tinker*, the Court held that wearing black armbands in violation of a school dress code was protected symbolic speech.[265] Yet under *Smith*, wearing a yarmulke or a tilaka to profess religious

258. 1 *Corinthians* 11:26 (emphasis added).

259. *See* F.E. PETERS, THE HAJJ 3–58 (1994) (describing the origins of the hajj).

260. Spence v. Washington, 418 U.S. 405, 414–15 (1974) (per curiam).

261. The Shema is a Jewish prayer beginning with the admonition, "Hear, O Israel, the Lord is our God, the Lord is One." MEIR LEVIN, WITH ALL YOUR HEART: THE SHEMA IN JEWISH WORSHIP, PRACTICE, AND LIFE 11 (2002).

262. *Deuteronomy* 6:5–9.

263. *Spence* is somewhat inapposite because the Court noted in dicta that the law was related to the suppression of speech. 418 U.S. at 413–14 n.8. Nonetheless, had Spence's display been punished by a law that was content neutral, it would have nonetheless been protected by at least intermediate scrutiny. *But cf.* Bloch v. Forschholz, 587 F.3d 771, 783 (7th Cir. 2009) (en banc) (suggesting in dicta that a religion-neutral law that indirectly prohibited mezzuzahs would likely survive under *Smith*).

264. The Amish, for example, wear unadorned garb to symbolize their integration with Amish culture and separation from worldly culture. *See* DONALD B. KRAYBILL, THE RIDDLE OF AMISH CULTURE 57–70 (2001) ("In Amish society, dress signals group membership and submission to the moral order."). Similarly, Buddhist monks wear plain robes to demonstrate "ascetic humility," separateness from the material world, and "commitment to the teachings of the Buddha." LYNNE HUME, THE RELIGIOUS LIFE OF DRESS 104–08 (2013).

265. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

devotion receives minimal protection against generally applicable laws.

So long as the Court continues to apply greater deference to general laws that indirectly burden religious exercise, First Amendment advocates should argue that their clients' acts of worship have a secondary communicative, evangelical, or didactic purpose. For example, in the hypothetical presented in Section IV.A, whether inspired by religious or secular text, both Francis and Henry are asserting that simplicity is part of the well-ordered life. And returning to the examples discussed above, a (religion-neutral) government ban on candles, wine, or travel to Saudi Arabia would place an indirect burden on celebrating Chanukkah, observing the Eucharist, or completing the hajj, respectively. Even if litigants could not identify some truth claim contained in these practices, they could still seek an *O'Brien* exemption on the basis that these acts communicate stories central to their faiths. Thus, the space between *O'Brien* and *Smith* creates an opportunity for creative advocates to recast their clients' religious conduct as expressive conduct, triggering an intermediate standard for a claim that would otherwise receive only minimal scrutiny.

Such an approach would also be consistent with *Smith*'s recognition of hybrid rights claims.[266] In a hybrid claim, the party seeking the exemption attaches her free exercise claim to another, more protected constitutional right. While this is often described as holding that hybrid claims trigger strict scrutiny, a more precise interpretation is that hybrid claims trigger *whichever standard of review is the highest*. Theoretically, that higher standard of review need not be strict scrutiny; an *O'Brien* claim could be the weightier half of a free exercise hybrid rights claim. Thus, this approach could be described as a *Smith* hybrid rights argument, with the resulting standard of review being intermediate scrutiny.

B. Long-Term: Towards an Intermediate Standard

In the long run, recasting religious conduct as expressive conduct only adds nuance and complexity to an area of law already overburdened by distinctions without differences. Ultimately, the Court must articulate a consistent standard of review for generally applicable laws that indirectly burden First Amendment rights. This Section makes the case that *O'Brien* offers the proper standard of review.

266. Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

1. Why Intermediate Scrutiny?

Merely recognizing an inconsistency between *Smith* and *O'Brien* does not establish that intermediate scrutiny is the proper standard of review. One could argue, as Justice Scalia has, that *Smith* and *O'Brien* are inconsistent but that *rational basis* review should govern all claims for First Amendment–based exemptions from generally applicable laws.[267] However, constitutional history does not mandate such an approach, and a universal rational basis standard would do little to resolve the flaws in the current approach.

First, exemptions from generally applicable laws that indirectly burden religious exercise are consonant—or at least not at odds—with the Framers' understanding of religious liberty. Justices Scalia and O'Connor extensively sparred over this question of original intent in *City of Boerne*.[268] Justice O'Connor believed that the Framers were more accommodating of religious practice than the *Smith* majority gave them credit for.[269] To support this claim, Justice O'Connor drew from colonial charters, early state constitutions, and the practices of state governments in the late eighteenth century.[270] Justice O'Connor also cited the Northwest Ordinance's guarantee that "[n]o person . . . shall ever be molested on account of his mode of worship or religious sentiments."[271] Based on these early practices, Justice O'Connor concluded, "[A]round the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice."[272]

Justice Scalia, defending his opinion in *Smith*, disagreed.[273] Scalia argued that the material cited by Justice O'Connor "either has little to say about the issue or is in fact more consistent with *Smith*."[274] The state analogues to the Free Exercise Clause were "a virtual restatement of *Smith*: Religious exercise shall be permitted so long as it does not violate general laws governing conduct."[275] Ultimately, Scalia concludes, the dissent's weakness is in what it fails

267. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring) ("[A]s a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.").

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

269. *See id.* at 549 (O'Connor, J., concurring) ("The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause.").

270. *See id.* at 550–52.

271. *Id.* at 554.

272. *Id.*

273. *Id.* at 537 (Scalia, J., concurring).

274. *Id.*

275. *Id.* at 539 (emphasis omitted).

to—and cannot—identify: "a . . . case refusing to enforce a generally applicable statute because of its failure to make accommodation."[276] Unconvinced by the dissent's argument, Justice Scalia continued to rely on the historical and precedential analysis employed in *Smith*.[277]

Professor McConnell argues that the actual answer is somewhere in the middle and that the historical record does not present a neat case one way or the other. [278] In support of *Smith* is the influence of John Locke on the Framers.[279] For Locke, one way to quell the tension between church and state was to prevent "religious and governmental leaders [from] intermeddl[ing] in the others' province."[280] This belief manifested itself in two relevant ways: "advocacy of legislative supremacy with respect to conflicts between public power and individual conscience and . . . rejection of religious exemptions."[281] In addition to Lockean theory, proponents of *Smith* also find support in the writings of Thomas Jefferson, William Penn, and the highest courts of at least two states.[282]

But there is also significant historical support on the other side of the ledger, evidence McConnell finds more compelling.[283] For example, eight state constitutions at the Founding included "language that appears to be an early equivalent of the 'compelling interest' test."[284] McConnell believes it is unlikely the Framers, who modeled the Free Exercise Clause after equivalent state provisions, would have taken such a narrow approach when the states were generally willing to accommodate religious exercise.[285] This approach had deep roots in

276. Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

277. *Id.* at 542–43.

278. *See* McConnell, *Free Exercise Revisionism*, *supra* note 116, at 1119 ("At *most,* the Court could have said that there are two constitutional traditions, both with impressive pedigrees, and that persons of common sense and good will have come down on both sides of the question.").

279. *Id.* at 1117–18; *see also* Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430–35 (1990).

280. McConnell, *supra* note 279, at 1432; *see also* JOHN LOCKE, A LETTER CONCERNING TOLERATION 33 (James H. Tully ed., 1983) (1689) ("No Peace and Security . . . can ever be established or preserved amongst Men, so long as this Opinion prevails, That Dominion is founded in Grace, and that Religion is to be propagated by force of Arms." (emphasis omitted)).

281. *Id.* at 1433.

282. *See Free Exercise Revisionism*, *supra* note 116, at 1117 (noting that several founding fathers, as well as the supreme courts of Pennsylvania and South Carolina, rejected religious exemptions).

283. *See id.* ("On the other hand, the history would have revealed other evidence—more substantial, in my judgment—in favor of the broader exemptions position.").

284. *Id.* at 1117–18.

285. *See id.* ("These provisions were the likely model for the federal free exercise guarantee . . . .").

colonial charters and practices.[286] While these were legislative and not judicial exemptions, this was a time before judicial review, and thus exemptions could only come from the legislature.[287] Finally, James Madison, who (unlike Jefferson) was involved in drafting the First Amendment, "advocated free exercise exemptions . . . and proposed language for the Virginia free exercise clause that was even more protective than the . . . provisos of most states."[288] Accordingly, there is sufficient support to discount the *Smith* Court's conclusion that the allowance for religious exemptions "contradicts both constitutional tradition and common sense."[289]

Additionally, exporting *Smith* to the free speech context would magnify the problems in *Smith*. There would remain, under such an approach, the inscrutable legacy of unemployment claims and the jurisprudential "make-weight" of hybrid rights claims.[290] Such an approach would also create some hard choices in free speech cases by obviating not only *O'Brien* but also the time-place-manner doctrine. Would the government be able to prohibit protest marches by passing sidewalk ordinances or prohibit political billboards through zoning laws? The Court would likely have to fashion another category of hybrid rights or categorical exemptions, but this would exacerbate a key flaw of *Smith*.[291]

A final reason that intermediate scrutiny is the proper approach is something of a Goldilocks solution: whereas *Yoder* was too much and *Smith* too little, *O'Brien* is just right. The *Smith* opinion was the culmination of several decades of case law proving that the *Sherbert-Yoder* test was undesirable in practice.[292] However, proving that strict scrutiny failed does not necessitate removing the acts from heightened scrutiny altogether.[293] As McCoy writes, "The problem with the *Sherbert* approach was that the Court seemed to have substituted one extreme . . . for the earlier extreme."[294] If the compelling interest test failed and the rational basis approach is failing,[295] process of elimination supports some standard of review in

286. *See id.* at 1118–19 ("The practice of the colonies and early states bore this out.").

287. *See id.* (noting that legislatures had the responsibility for "upholding constitutional norms").

288. *Id.* at 1119.

289. *Id.* (quoting Emp't Div. v. Smith, 494 U.S. 872, 885 (1990)).

290. Greenawalt, *supra* note 123, at 335.

291. *See supra* notes 118, 128–31 and accompanying text.

292. *See supra* Part II.C.

293. *See supra* note 222.

294. McCoy, *supra* note 13, at 1348.

295. *See supra* Part II.E.

the middle. An intermediate approach offers a third way that protects religious conduct without hamstringing government actors. Such an approach would be solicitous of religious convictions—particularly minority religious convictions that might escape the eye of the legislature—but deferential to the state's exercise of police powers.

2. Why *O'Brien*?

Once intermediate scrutiny is identified as the proper standard of review, the next task is determining which version of intermediate scrutiny works best in the free exercise context. From content-neutral free speech claims, there are two candidates: the time-place-manner doctrine and the *O'Brien* test.

Professor McCoy has advocated importing the time-place-manner test.[296] Again, a time-place-manner restriction must be (1) content neutral, (2) narrowly tailored, (3) and in furtherance of a significant government interest while also (4) leaving "ample alternative channels for communication."[297] McCoy doubts whether *O'Brien* remains a stand-alone constitutional test.[298] In *Clark*, the Court noted that the *O'Brien* test is "little, if any, different from the standard applied to time, place, or manner restrictions."[299] From this, McCoy concludes "the *O'Brien* analysis was subsumed into the more broadly applicable time, place, or manner formulation."[300] This goes too far. While the time-place-manner and *O'Brien* tests are similar and many cases would come out the same way under either test, there remain subtle differences in the elements, which lead to starkly different outcomes.[301] Thus, the *Clark* Court hedged, not committing itself to explicitly consolidating the two approaches but instead recognizing only the potential for overlap.[302] Moreover, in cases

296. McCoy, *supra* note 13, at 1364–73.

297. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

298. McCoy, *supra* note 13, at 1359.

299. *Clark*, 468 U.S. at 298.

300. McCoy, *supra* note 13, at 1359.

301. The *O'Brien* facts, for example, would fail the time-place-manner doctrine since the regulation left no alternative channels by which O'Brien could make his statement. *See supra* notes 158–64. Cases like *Ward*, meanwhile, would fail under the *O'Brien* test because the regulations were designed to suppress speech.

302. In a footnote, the Court cautioned reading too much into this, noting that it had muddled *O'Brien* and the time-place-manner doctrine. *See Clark*, 468 U.S. at 298 n.8 ("[O]nly recently, . . . the Court framed [an] issue under *O'Brien* and then based a crucial part of its analysis on the time, place, or manner cases." (citation omitted)).

following *Clark*, the Court has continued to apply the *O'Brien* test.[303] Thus, notwithstanding the Court's dicta in *Clark*, the *O'Brien* test remains "controlling precedent in symbolic speech controversies."[304]

The time-place-manner doctrine is a poor fit in free exercise law because it asks whether the regulation "leave[s] open ample alternative channels for communication."[305] McCoy writes that this would translate to "an assessment of the importance to the individual of the restriction on his or her religiously motivated conduct and the availability of alternative courses of conduct that would serve the individual's religious purposes nearly as well as the prohibited conduct."[306] However, such an analysis is both improper and inapplicable in the free exercise context. It is improper because it asks courts to wade into matters of centrality—in other words, it forces judges to ask, "Can one be a faithful X while doing (or despite not doing) Y?"[307] It is also inapplicable because, whereas the political actor can usually make her point in other ways, acts of worship are undertaken in compliance with divine prescriptions that usually do not allow for alternative means of completion.[308] Thus, as Professor Dorf notes, the "concept of an alternative means of expression has no obvious free exercise analogue."[309]

In addition to being inappropriate and inapplicable, this analysis is unnecessary. *O'Brien* remains good law and avoids the issue of centrality entirely. The *O'Brien* test focuses on the government's asserted interest in and justification for the regulation.[310] The Court can still rely on the *Ballard* rule[311] to screen out charlatans. But the Court need not wade into intractable matters of church doctrine and individual devotion. In the free exercise context, the *O'Brien* test would limit courts to a proper judicial

303. *See supra* text accompanying notes 165–68.

304. Fishman, *supra* note 183, at 141.

305. *Clark*, 468 U.S. at 293.

306. McCoy, *supra* note 13, at 1369.

307. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . ."); *see also* United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) (noting an "overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims").

308. Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 27 (1992) ("A person who acts from religious conscience feels he has no alternative; a person expressing an idea wants to do so effectively, but probably does not ordinarily feel some inner compulsion to use a particular means.").

309. Dorf, *supra* note 10, at 1215.

310. Fishman, *supra* note 183, at 142.

311. *See* United States v. Ballard, 322 U.S. 78, 85–86 (1944) (holding that courts may consider the sincerity, but not the substantive truth or relative importance, of religious claims).

function within their institutional competency and, therefore, is preferable to the time-place-manner approach.

3. The Baptized *O'Brien* Test

In practice, very little of the *O'Brien* test would change once exported to the free exercise context. The Court should retire the "within the constitutional power of the Government" prong because, as noted above,[312] this is not a First Amendment inquiry. The remaining three prongs of *O'Brien*, however, would function similarly. As a threshold question, the reviewing court would first ask whether the asserted state interest is unrelated to religion. If not, strict scrutiny governs; if so, the court would apply the remaining prongs of *O'Brien* by evaluating whether the regulation furthers an important government interest in a manner no greater than essential to achieve that interest.

The Court should resist the urge to delve too deeply into subjective legislative intent. In *O'Brien*, Chief Justice Warren warned about the unreliability of legislative intent[313] and the subterfuge such an inquiry would invite.[314] Regardless of the merits of legislative intent more generally, Chief Justice Warren stressed the need to "eschew guesswork" when the Court is asked to "void a statute that is . . . constitutional on its face."[315] This proviso notwithstanding, the Court has occasionally been more willing to rely on legislative history in religion cases than it was in *O'Brien*.[316] This impulse should be resisted. Reducing the complexity of the legislative process to the opinion of a single member of a multimember body undermines the rule of law and invites ends-motivated analysis.[317] Instead, courts should focus on the text of the law and the broader context surrounding its passage.[318]

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312. *See supra* note 192.

313. *See* United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . . .").

314. *See id.* (refusing to invalidate a statute that would be valid had a "legislator made a 'wiser' speech about it").

315. *Id.*

316. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56–60 (1985) (concluding that a school moment-of-silence law was unconstitutional because a state senator called the law "an 'effort to return voluntary prayer' to the public schools").

317. *See* Edwards v. Aguillard, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."); *supra* note 313.

318. Church of the Lukumi Babaulu Aye v. City of Hileah, 508 U.S. 520, 534 (1993):

This problematic inquiry has proven unnecessary to protect religion from discriminatory legislation. In *Lukumi*, the Court unanimously invalidated a local regulation on animal slaughter designed to suppress Santería, a West African religion that performs animal sacrifice.[319] While Justice Kennedy's majority opinion includes a discussion of legislative intent,[320] that section commanded just two votes.[321] Without divining legislative intent, the Court had no problem finding that the text and effect of the statute impermissibly targeted the practice of Santería.[322] Because legislative history is unnecessary to protect against subtle discrimination, the Court should avoid the pitfalls of discerning "the" intent of a multimember deliberative body.

A baptized version of *O'Brien* likely would not have changed the outcome in *Smith*.[323] Initially, the Court would have held that the law was unrelated to religious expression. The Court would then have analyzed the strength of Oregon's asserted interest in prohibiting the possession of peyote and balanced it against the severity of the prohibition. Few would gainsay the importance of the state's interest in a uniform criminal prohibition of narcotics.[324] Moreover, since *O'Brien* does not require a least-restrictive-alternative analysis, the Court would have found the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[325] Thus, it is likely that the respondents in *Smith* would still have been denied an exemption under a free exercise version of the *O'Brien* test.

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

(quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

319. *Id.* at 542.

320. *Id.* at 540–42.

321. *See* Stormans, Inc. v. Selecky, 571 F.3d 960, 981 (9th Cir. 2009) (Clifton, J., concurring) (noting the use of legislative intent in *Lukumi* was "nonprecedential").

322. *Lukumi*, 508 U.S. at 534–36.

323. Instead, the analysis might have followed Justice O'Connor's concurring opinion, in which she found that the peyote ban withstood even the compelling government interest standard. *See* Emp't Div. v. Smith, 494 U.S. 872, 903–05 (1990) (O'Connor, J., concurring) (stating that departing from *Sherbert* is "unnecessary" because the state "has a compelling interest in prohibiting the possession of peyote").

324. While the *Smith* dissenters wrote that the state's purported interest was not compelling, *id.* at 909–11 (Brennan, J., dissenting), in an *O'Brien* analysis, the interest only has to be "important or substantial."

325. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

In fact, moving from *Smith* to *O'Brien* in the free exercise context would result in only a slight doctrinal shift. *O'Brien* lacks the teeth of a compelling interest standard and has just slightly more bite than rational basis. The difference in outcome would likely be most pronounced in cases like those involving Francis and Henry, where secular and religious conduct differs only in subjective motivation. More fundamentally, this new test would advance neutrality by treating similarly situated litigants similarly. It would also have an effect in cases where the government's purported interest is less established than it was in *Smith*, where the state's interest in curtailing drug possession was both clear and absolute. The case law following *Smith* is sparse, however, so it is hard to predict how great the shift would be.

VI. CONCLUSION

For over two and a half decades, *O'Brien* and *Smith* have survived in an awkward coexistence. The result has been a confused, inconsistent, and underdeveloped body of case law that underprotects expressed belief while privileging nonreligious expressive conduct. Harmonizing these tests under a single standard would produce a more manageable, truly neutral approach to conscious-based objections to neutral laws of general applicability.

Standards of review say something about what society believes is worthy or in need of protection. The dangers of majoritarian suppression of both speech and religious practice are similarly grave. Because both speech and religion are equally in need of protection from the vicissitudes of democratic society, a difference in the level of protection can only be explained by differing societal values attached to each class of activity. This, however, cannot be—or should not be—the case. But when one compares *O'Brien* and *Smith* side by side, it is clear that First Amendment jurisprudence currently preferences expressive conduct over religious conduct, at least with regards to indirect burdens posed by generally applicable laws.

A coherent theory for generally applicable laws that indirectly burden First Amendment–protected conduct is more administrable than the current patchwork regime, which lower courts have struggled to consistently apply.[326] The Court currently underprotects religious expression and unnecessarily distinguishes between religiously and politically motivated conduct. By recognizing that religious conduct *is* expressive conduct and according the same protection to each, the

326. *See supra* notes 128–31.

Court could clarify its free exercise jurisprudence, standardize its First Amendment analysis of generally applicable laws, and restore the elevated status of religious exercise in American constitutional order.

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