The Substantial Burden Test's Impact on the Free Exercise of Minority Religions

Eloise Henderson Bouzari*

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1]

I. Introduction

After the Revolution, American society was not very regulated; few laws touched on religious liberties.[2] Eventually more laws were passed that affected the free exercise of religion. The earliest of these laws were directed against the Mormons, while later laws targeted the Jehovah's Witnesses.[3] When, in *Cantwell v. Connecticut*,[4] the Fourteenth Amendment extended the coverage of the First Amendment to the states, cases testing these laws began to make their way into the courts. In the early days of the history of free exercise jurisprudence, a balancing test began to emerge and to be refined.

In 1963, in the landmark case of *Sherbert v. Verner*,[5] the Supreme Court set out what came to be the standard test for claims of violation of the free exercise clause, balancing the interests of a plaintiff bringing a free exercise claim against the interests of the government in passing the law at issue. *Sherbert*'s test required that for a law to be held constitutional, any incidental burden on the free exercise of religion must be justified by a compelling state interest.[6] The next important free exercise case came nine years later with *Wisconsin v. Yoder*,[7] which employed a test similar to that set out in *Sherbert*. *Yoder*, however, added the requirement that the religious beliefs at issue be "legitimate."[8] The balancing tests in *Sherbert* and *Yoder* have come to be called the substantial burden test.[9] Although there were the usual minor

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* Associate, McKenna & Cuneo, L.L.P. (Denver, Colorado). M.A. 1987, The University of Texas; J.D. 1995, The University of Texas School of Law.

1. U.S. CONST. amend. I.
2. Douglas Laycock, *The Religious Freedom Restoration Act*, B.Y.U. L. REV. 221, 222 (1993).
3. *Id.* at 223.
4. 310 U.S. 296 (1940). The facts of *Cantwell* are discussed at length in Part II, *infra*.
5. 374 U.S. 398 (1963).
6. *Id.* at 403.
7. 406 U.S. 205 (1972).
8. *Id.* at 214-15. This distinction will be discussed at length in Part II, *infra*.
9. The test is also known as the compelling interest test, and some scholars use the term interchangeably.

variations in the test that controversial cases bring, from 1963 to 1990 free exercise jurisprudence essentially followed the substantial burden test set out in *Sherbert* and *Yoder*.[10]

In 1990, however, *Employment Division v. Smith*[11] effectively neutralized the substantial burden test. The Supreme Court announced in *Smith* that *Sherbert* should be limited to its facts, i.e., unemployment benefits cases, and should not apply to generally neutral laws not targeted at a certain religious sect.[12] The Court in *Smith* held that the substantial burden test did not apply to "generally applicable criminal law[s],"[13] but only to laws that were "specifically directed at [the plaintiff's] religious practice."[14] The new rule declared in *Smith* sent off a firestorm in both the academic and judicial world. By 1994 more than fifty scholarly articles had been written about the case,[15] the overwhelming number of which were critical.

The impact of *Smith* was apparently short-lived, however, as Congress took the matter out of the courts altogether. As the general public became aware of the *Smith* decision, "one of the broadest coalitions in recent political history, including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations"[16] pressured Congress to repair the damage to religious liberty caused by the Supreme Court's decision. Congress responded with equal enthusiasm. The Senate bill to neutralize *Smith* was sponsored by Senators Edward Kennedy and Orrin Hatch, and had 55 co-sponsors.[17] The legislation had equal support in the House and passed by unanimous vote.[18]

The Religious Freedom Restoration Act of 1993 ("RFRA"),[19] citing *Sherbert, Yoder,* and *Smith* by name, mandates that courts apply the substantial burden test set out in *Sherbert* and *Yoder*. The Act provides that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least

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10. *See infra* Part III.

11. 494 U.S. 872 (1990) (refusing to grant members of the Native American Church a religious exemption to the laws banning use of peyote). The facts of *Smith* will be discussed further in Part IV, *infra*.

12. *Id.* at 883.

13. *Id.* at 884.

14. *Id.* at 878.

15. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 212 (1994).

16. *Id.* at 210. Professor Laycock points out that "[t]he deleterious effects of *Smith* were not merely hypothetical." *Id.* at 214. "[M]any lower court judges took *Smith* as a signal that the Free Exercise Clause had been generally repealed, that whatever clever argument a church lawyer might make about *Smith*'s exceptions, the operative rule was that free exercise claims should be rejected." *Id.* at 216.

17. Michelle L. Stuart, Note, *The Religious Freedom Restoration Act of 1993: Restoring Religious Freedom After the Destruction of the Free Exercise Clause*, 20 U. DAYTON L. REV. 383, 423 n.200 (1994).

18. Laycock & Thomas, *supra* note 15, at 210.

19. 42 U.S.C. §§ 2000bb to bb-4 (Supp. 1995) [hereinafter RFRA].

restrictive means of furthering that compelling governmental interest."[20] Specifically nullifying *Smith*, RFRA clearly states that the substantial burden test must be applied "even if the burden results from a rule of general applicability."[21] The legislative history of RFRA indicates that "substantially" was added to the legislation as an amendment.[22] The significance of this language will be discussed in Part II, *infra*. At this point in the discussion, however, it is interesting to note that the use of "substantial burden," which appears twice in section 2000bb and twice in section 2000bb-1, was deliberate.

A legislative mandate that the judiciary apply a specific legal doctrine arguably approaches the limits of constitutional interference with the separation of powers. However, Congress has broad powers to create federal courts and to make rules regulating the judiciary[23]--whether RFRA is constitutional is beyond the scope of this article.[24] Professor Douglas Laycock, however, a proponent of the legislation and one of its drafters, expresses no doubt that Congress was acting within the scope of its powers when it enacted the legislation.[25] But Laycock nonetheless remains concerned about the viability of RFRA. He recently wrote, "I worry that the same judges who brought us *Smith* will construe RFRA in a narrow, hostile, and ineffective way. I do not worry that it is unconstitutional."[26]

Although the courts long ago decided that the First Amendment's prohibition against interference with religious freedom is not absolute,[27] the substantial burden test can serve as a fair way to determine whether any government infringement of religious liberties is justified. But as Professor Laycock has noted, the same test of constitutionality can be implemented in an unjust manner just as easily.[28] From the beginning of government interference with the exercise of religion, laws have been directed against practitioners of minority religions. Consequently, judges should be particularly sensitive to fairly applying the substantial burden test in cases where the religious practice at issue is unfamiliar to the court.

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20. *Id.* § 2000bb-1(b).

21. *Id.* § 2000bb-1(a).

22. Honorable Arlin M. Adams, *Recent Decisions by the United States Supreme Court Concerning the Jurisprudence of Religious Freedom*, 62 U. CIN. L. REV. 1581, 1594 n.103 (1994).

23. *See* Flores v. City of Boerne, 73 F.3d 1352, 1361-2 (5th Cir.) (holding that RFRA does not violate separation of powers), *cert. granted*, 117 S. Ct. 293 (1996).

24. *See id.* at 1364-65 (reversing district court order holding RFRA facially unconstitutional).

25. Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 169-70 (1995) [hereinafter Laycock, *RFRA, Congress, and the Ratchet*].

26. *Id.*

27. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 162 (1878).

28. Laycock, *RFRA, Congress, and the Ratchet*, *supra* note 25, at 150-52.

This Article will make some observations on how the courts should construe the language of the substantial burden test in light of RFRA's mandate that the language in *Sherbert* and *Yoder* be implemented as the standard free exercise balancing test. Part II will explore the roots of the substantial burden test by looking at early free exercise cases, culminating in further analysis of *Sherbert* and *Yoder*. Part III will discuss several free exercise cases decided after *Sherbert* and *Yoder*, in an attempt to understand how the Court has dealt with various sensitive issues inherent in substantial burden analysis. Finally, Part IV will explore how implementation of the substantial burden test can serve to exacerbate the Court's historic treatment of non-mainstream religions as suspect and less deserving of protection from governmental infringement than mainstream religions, and will offer recommendations on how this problem can be avoided.

II. The Early Free Exercise Cases

A. Cantwell *and* Jones

Although the Supreme Court in *Sherbert* announced what later came to be known as the substantial burden test with little reliance on prior authority, the kernels of the test appeared in earlier free exercise cases. The first free exercise cases did not employ a balancing test at all, however, and often rejected free exercise claims with little fanfare.[29]

The first important free exercise case was *Cantwell v. Connecticut*.[30] *Cantwell* is most often cited for bringing the states under the reach of the First Amendment via the Fourteenth Amendment's due process clause.[31] But *Cantwell* is important to this discussion for another reason; it contains much of the language that later appeared in the substantial burden test. Cantwell, a member of the Jehovah's Witnesses sect, was arrested for selling religious publications without a permit, in violation of Connecticut law.[32] The Supreme Court held that the law requiring a permit for religious solicitation was an unconstitutional infringement of the plaintiff's First Amendment rights, because the law gave the secretary of the public welfare council the discretion to determine whether the petitioner's "cause is a religious one or is a bona fide

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29. *See, e.g.*, Stansbury v. Marks, 2 U.S. (2 Dall.) 213 (1793); Vidal v. City of Philadelphia, 43 U.S. 127 (1844); Permoli v. City of New Orleans, 44 U.S. 589 (1845); Reynolds v. United States, 98 U.S. 145 (1878); Pence v. Langdon, 99 U.S. 578 (1878); Gibbs & Sterrett Mfg. v. Brucker, 111 U.S. 597 (1884); Soon Hing v. Crowley, 113 U.S. 703 (1885); Murphy v. Ramsey, 114 U.S. 15 (1885); Holy Trinity Church v. United States, 143 U.S. 457 (1892); Arver v. United States, 245 U.S. 366 (1918).

30. 310 U.S. 296 (1939).

31. *Id.* at 303.

32. *Id.* at 300.

object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity."[33] The Court saw this discretionary element as constituting "censorship of religion,"[34] and noted that the Connecticut statute was not "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."[35] While the *Sherbert* Court cited *Cantwell* for other propositions, it did not give the *Cantwell* Court credit for setting out the germs of the substantial burden test.

Elements of the substantial burden test also slipped into a 1942 opinion, two years after *Cantwell* was decided. *Jones v. Opelika*[36] was a five-to-four decision remarkable for the Court's division in an era of much less discord than that seen in more recent Courts. In *Jones,* the Supreme Court was again faced with a free exercise claim brought by a member of the Jehovah's Witnesses, who had been arrested for selling religious literature without a permit as required under Alabama law.[37] Citing a predecessor to *Cantwell, Lovell v. Griffin*,[38] Justice Reed wrote that the facts at bar were distinguishable from prior laws that had been held unconstitutional.[39] He reasoned that the discretionary element involved in the licensing procedure in *Jones* involved discretionary revocation of existing permits, as opposed to discretionary denial of petitions for future permits.[40] Basing its decision more on technicality than on doctrine, the Court held that the possibility of revocation was "much too contingent for us now to declare the licensing provisions to be invalid."[41]

Jones is important to this discussion because it was the first Supreme Court case to address the relative importance of the religious practice to the plaintiff's religion. Justice Reed wrote that it was dispositive that the plaintiff's sales had more of a commercial character than a religious one,[42] a fact vehemently contested by Chief Justice Stone in dissent.[43] Justice Reed wrote that "[w]hen proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing."[44]

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33. *Id.* at 302.
34. *Id.* at 305.
35. *Id.* at 311.
36. 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943).
37. 316 U.S. at 586.
38. 303 U.S. 444 (1938).
39. *Jones*, 316 U.S. at 599-600.
40. *Id.*
41. *Id.* at 600.
42. *Id.* at 597-8.
43. *Id.* at 608 (Stone, J., dissenting).
44. *Id.* at 597.

Judicial evaluation of the importance of a religious practice to the plaintiff's religion is hazardous and is even less objective than the routinely difficult judgment calls the courts make in their attempts at fair resolution of less personal disputes. Furthermore, insensitivity to an unfamiliar belief system can lead judges to misinterpret the facts of a free exercise claim. In *Jones*, for example, the categorization of the plaintiff's actions as a commercially motivated rather than a spiritually motivated practice directly conflicted with the district court's finding of fact that such proselytizing is an integral part of Jehovah's Witnesses doctrine.[45] Both judicial evaluation of the importance of a given religious practice to a plaintiff's religion and the judicial tendency to misinterpret the facts when the case involves an unfamiliar belief system will be discussed in further detail, *infra*.

The *Jones* decision was short-lived. The next year, in a per curiam opinion, the decision was vacated after reargument.[46] Justice Douglas elaborated on the Court's change of position in *Jones* in an opinion issued on a consolidated case, *Murdock v. Pennsylvania*.[47] Clearly rejecting the holding in *Jones*, the Court held that "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."[48]

Although *Murdock* has no substantial burden language, there is a doctrinal aspect of *Murdock* that is germane to this discussion. The last paragraph of the majority opinion states eloquently that "[t]he judgment in *Jones v. Opelika* has this day been vacated. Freed from that controlling precedent, we can *restore* to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith though distribution of literature."[49] This language is an interesting foreshadowing of the restoration of religious freedom that RFRA attempted in the wake of *Smith*.

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45. *Id.* at 587-88.

46. *Jones*, 319 U.S. 103 (1943).

47. 319 U.S. 105 (1943). Justice Douglas and Justice Murphy had joined Justice Black's dissent to the first *Jones* opinion. 316 U.S. at 623 (Black, J., dissenting). The three dissenters in *Jones* announced that they had reconsidered their vote with the majority in another Jehovah's Witness case, Minersville School District v. Gobitis, 310 U.S. 586 (1940). *Gobitis* held that a law mandating that Jehovah's Witness school children participate in flag saluting was constitutional. *Id.* at 598-600. *Gobitis* was later overruled in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Touching on a subject to be discussed in Part IV, *infra*, Justice Black wrote in his dissent in *Jones* that "[c]ertainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be." *Jones*, 316 U.S. at 624 (Black, J., dissenting).

48. *Murdock*, 319 U.S. at 111.

49. *Id.* at 117 (emphasis added).

B. Sherbert *and* Yoder

In *Sherbert*, a case decided twenty years after *Murdock,* the plaintiff was denied unemployment benefits after being fired when she refused to work on Saturday in violation of her Seventh-Day Adventist beliefs.[50] Justice Brennan set out what was to become the substantial burden test:

> If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.[51]

Justice Brennan's test involves two steps: First, the court must determine whether there is any burden at all on the plaintiff's religious freedom. If there is none, then the door is shut and the plaintiff loses. If, however, there is an infringement of the plaintiff's exercise of her religion, the court proceeds with the second step. The second inquiry is whether the burden on free exercise that was determined by step one is outweighed by a compelling governmental interest.

The next case, *Yoder,* involved a free exercise claim brought by plaintiffs who were members of the Amish community. The plaintiffs appealed their conviction under Wisconsin's mandatory education laws requiring them to send their children to school through age sixteen. The plaintiffs argued that their beliefs prevented them from complying with this law, because the Amish community emphasized cooperative farming and homemaking skills rather than the intellectualism and competitiveness promoted in the public schools.[52] Furthermore, while conceding that basic reading and writing skills were necessary for Bible study, remaining a part of the public school environment past the eighth grade conflicted with the Amish belief that entanglement with the outside world was detrimental to Amish community unity and its chosen separateness from modern life.[53]

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50. *Sherbert*, 374 U.S. at 399.
51. *Id.* at 403-4 (citations omitted).
52. *Yoder*, 406 U.S. at 210.
53. *Id.* at 211-12.

The *Yoder* Court held that the Wisconsin law as applied to the plaintiffs was unconstitutional. Although the Court did not cite *Sherbert*'s substantial burden language, it employed a balancing test similar to that of its predecessor. Chief Justice Burger wrote that

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a *legitimate* religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. . . . [O]nly those interests of the highest order . . . can overbalance *legitimate* claims to the free exercise of religion.[54]

It is interesting to note the differences between these two tests which are so often paired together. Judges, especially United States Supreme Court justices, are keenly aware that they are setting precedent for future decision-making. Their role consists of analyzing a legal problem and then setting out their reasoning process in as precise terms as possible so that future decision-makers can follow the same logic path. Key words in doctrinal tests must be chosen even more carefully. While *Sherbert* defined the parameters of free exercise analysis in terms of the government's intent in burdening religious freedom (balancing is in order even if the burden is "incidental"[55]), *Yoder*'s test focuses on the "quality of the claims"[56] of the plaintiff (the petitioner must prove that a "legitimate"[57] religious belief has been infringed). *Yoder*'s test puts the onus on the courts to decide what is or is not a legitimate belief.

This key difference between the language of *Sherbert* and *Yoder* could be dispositive in post-RFRA free exercise jurisprudence, depending first on how the courts interpret "legitimate," and secondly on how much emphasis the courts choose to give that part of the *Yoder* test. "Legitimate" is open to two interpretations. On the one hand, "legitimate" could be interpreted to mean sincerely held, as when a plaintiff claims that legitimately held religious beliefs are being infringed upon. Alternatively, "legitimate" could be interpreted to mean "acceptable."[58] For example, the Supreme Court in 1878

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54. *Id.* at 214-15.
55. *Sherbert*, 374 U.S. at 403.
56. *Id.* at 215.
57. *Yoder*, 406 U.S. at 215.
58. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985) defines "legitimate" as "conforming to

held in *Reynolds v. United States*[59] that the plaintiff's "odious" religious belief in the practice of polygamy was not worthy of First Amendment protection, citing in part the common law tenet that polygamy was an offense against society.[60] Both sincerity analysis and acceptability analysis are possible routes that a court relying on the "legitimacy" language of *Yoder* could take. Because of their inclination to lead a court into the realm of ethnocentrism, it will be argued below that each of these analyses is inappropriate for the judiciary to undertake.

However, even if a court chooses to ignore the "legitimacy" language of *Yoder*, a third trap exists in substantial burden analysis that could result in unfair evaluation of a claim that the practice of a non-mainstream religion is being unconstitutionally burdened. What I refer to as "centrality analysis" can arise from implementation of the *Sherbert* test without looking to the "legitimate" language in *Yoder*. Centrality analysis goes as follows: In weighing the interests of the government in furthering a compelling government interest against the rights of a plaintiff's free exercise claims, the courts must determine which interest is most significant. In other words, is the government's interest in enacting and enforcing the law more compelling than the plaintiff's interest in observing the religious practice at issue? One obvious way to measure the plaintiff's interest in the religious practice is to gauge its centrality to the plaintiff's faith. It stands to reason that interference with a religious practice that is central to the plaintiff's belief would weigh more heavily against the government's interest than a practice that is only of marginal importance to the practice of the religion. *Jones* turned on just this analysis; the Court held that Jones' religious freedom was not substantially burdened because the canvassing was more commercial than spiritual, and thus was not central to the free exercise of his religion.[61] The problem with centrality analysis is the same as that encountered with sincerity and acceptability analysis. Inquiry into such a personal domain is not a proper role for the judiciary, and can lead to misinterpretation of the plaintiff's case when the belief system at issue differs significantly from that of the court.

Detailed analysis of *Sherbert* and *Yoder* is not purely academic. RFRA declares that

> [t]he purposes of this chapter are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S.

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recognized principles or accepted rules and standards."

59. 98 U.S 145 (1878).

60. *Id.* at 164.

61. 316 U.S. 584, 598.

> 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[62]

The language of the tests set out in these two cases now has even more significance than it did before *Smith*. The courts can either iron out the conflict between the language in *Sherbert* and *Yoder*, or they can rely on one case more than the other. For example, plaintiffs that a court finds in some way unsympathetic may see their claims evaluated using any of the above-mentioned analytical traps possible under the substantial burden test: sincerity, acceptability, or centrality analysis. On the other hand, judges could choose to evaluate more sympathetic claims under a less culturally sensitive test. In this sense the test can predetermine the outcome.

The next step in this discussion is to examine how courts after *Sherbert* and *Yoder,* but before *Smith*, manipulated the *Sherbert-Yoder* test. The navigation of the Court between the two variations of the substantial burden test is an excellent way to predict how courts will decide free exercise cases after RFRA, since RFRA did little more than restore *Sherbert* and *Yoder* to their place as the controlling precedents they were before *Smith*.

III. The Descendants of *Sherbert* and *Yoder*

The 1980s saw the Court busy with a heavy docket of important free exercise claims. While both *Sherbert* and *Yoder* were relied on as controlling precedent, free exercise jurisprudence took interesting twists and turns, with much dissension along the way. A sampling of these free exercise cases will be addressed in this Part, in an effort to sort out how the substantial burden test can best be implemented in order to fairly evaluate claims brought by practitioners of minority religions.

A. Thomas

Thomas v. Review Board [63] was a case brought under facts very close to those of *Sherbert*. *Thomas* is often cited along with *Sherbert* and *Yoder* as being a model application of the substantial burden test.[64] For this reason, as

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62. RFRA, *supra* note 19, § 2000bb(b).
63. 450 U.S. 707 (1981).
64. *See, e.g., Smith*, 494 U.S. at 895 (O'Connor, J., concurring); Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

well as for the reason that the opinion delves into all three areas of analysis discussed in Part II, *supra*, *Thomas* will be discussed at length.

The Court in *Thomas* held that the plaintiff's First Amendment rights had been violated by Indiana's denial of unemployment benefits. The plaintiff had been fired from his manufacturing job when he refused on religious grounds to be transferred to a division that made armaments following the closure of the division where he had previously worked.[65]

The plaintiff lost in state court because of a finding that his belief in the impropriety of working with munitions was not a central tenet of his faith. Holding that Thomas' decision to refuse to be transferred was based on a "personal philosophical choice rather than a religious choice," the Indiana Supreme Court held that Thomas' case did "not rise to the level of a first amendment claim."[66] The court seemingly was swayed by the fact that another member of Thomas' sect had no qualms about working in the munitions plant but rather found the work "scripturally acceptable."[67] The United States Supreme Court disagreed with the state court's centrality inquiry and held that the lower court's comparison of Thomas' interpretation of Jehovah's Witness doctrine against his co-worker's was inappropriate.[68] Chief Justice Burger wrote that

> [i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[69]

But even while Chief Justice Burger rejected centrality analysis, he applied sincerity analysis instead. He disagreed with the state court's finding that Thomas' beliefs were not sincerely held because Thomas admitted that he "was 'struggling' with his beliefs and that he was not able to 'articulate' his

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65. *Thomas*, 450 U.S. at 709-11.
66. *Id.* at 713.
67. *Id.* at 715.
68. In his dissent, then- Associate Justice Rehnquist agreed with the result reached by the Indiana Supreme Court, and apparently with its reasoning as well. He wrote that "[b]ecause Thomas left his job for a personal reason, the State of Indiana should not be prohibited from disqualifying him from receiving benefits." *Id.* at 723 n.1.
69. *Id.* at 715-16.

belief precisely."[70] While the Chief Justice reached a different result than the state court, he found the lower court's method of analysis to be proper. The *Thomas* Court held that "[t]he narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an *honest* conviction that such work was forbidden by his religion."[71] To his credit, Chief Justice Burger unequivocally rejected acceptability analysis. Citing both *Sherbert* and *Yoder*, he stated that

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. *Sherbert v. Verner*, *supra*; *Wisconsin v. Yoder* . . . . The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.[72]

B. Other Recent Cases

1. Sincerity analysis.—Contrary to its position in *Thomas*, the Court stated unequivocally in 1987 in *Hobbie v. Unemployment Appeals Commission of Florida*[73] that sincerity analysis was an improper inquiry for the judiciary. Like Sherbert, Hobbie sought unemployment benefits after being discharged from her job following her refusal to work on Saturday in violation of her Seventh-Day Adventist beliefs. The government argued that the Court should distinguish *Sherbert* on the grounds that Hobbie converted to the Seventh-Day Adventist Church during her employment, while Sherbert was a member of that sect when she was hired.[74] The Court refused to make such a distinction. Citing the 1944 case of *United States v. Ballard*,[75] the Court held that the timing of Hobbie's conversion was immaterial, since such inquiry would lead to analysis of the reasons for Hobbie's conversion and the sincerity of her

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70. *Id.* at 715.
71. *Id.* at 716 (emphasis added).
72. *Id.* at 713-14.
73. 480 U.S. 136, 143-4 (1987).
74. *Id.*
75. 322 U.S. 78 (1944).

beliefs.[76] Courts in the post-RFRA era should look to *Hobbie* rather than *Thomas* on this issue. Sincerity analysis will take the courts into territory where they are better not led.

2. *Acceptability analysis*.—The ethnocentric inquiry into the acceptability of polygamy in *Reynolds* seems to be of a past and less open-minded era of jurisprudence. None of the cases after *Yoder* have delved into the realm of acceptability analysis that *Yoder*'s "legitimate belief" language seems to encourage. In fact, two cases in particular, *United States v. Lee*[77] and *Goldman v. Weinberger*,[78] expressly warn of the dangers of such inquiry. Insensitive analysis like that seen in *Reynolds* goes beyond being politically incorrect; it is unworthy of the judiciary and should not be repeated.

3. *Centrality analysis*.—The Court stated in *Hernandez v. Commissioner*[79] that centrality analysis is not a valid measure of whether a plaintiff should prevail under the substantial burden test. The plaintiffs in *Hernandez* argued that the law at issue placed a "heavy burden on the central practice" of their religion.[80] But the Court refused to factor centrality into the substantial burden equation. Citing *Thomas*, the *Hernandez* Court held that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[81] While the plaintiffs in *Hernandez* urged the Court to consider centrality analysis in its application of the substantial burden test, future free exercise plaintiffs are better off that the Court did not. Although there is no recent free exercise case in which centrality analysis played a key role in a majority opinion, it is important to remember now-Chief Justice Rehnquist's position in *Thomas*.[82] Because of the Chief Justice's stature on the current court, centrality analysis remains a potential method of inquiry under the substantial burden test.

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76. *Hobbie*, 480 U.S. at 144 n.9.

77. 455 U.S. 252 (1982) (refusing to grant an Amish small business operator exemption from paying social security taxes even though he argued that support of government benefits programs was "sinful").

78. 475 U.S. 503 (1986) (refusing to grant Jewish plaintiff exemption to military dress code so that he could wear a yarmulke with his Air Force uniform).

79. 490 U.S. 680 (1989) (refusing to grant plaintiffs a tax deduction for expenses incurred in Scientology training, finding such practice a quid pro quo benefit and not a charitable contribution).

80. *Id.* at 698.

81. *Id.* at 699.

82. *See supra* note 68.

IV. Evaluation by a Majoritarian Judiciary of the Government's Burden on Minority Religions

If centrality, sincerity, or acceptability analysis does become a part of the standard post-RFRA substantial burden test, this subjective inquiry could exacerbate the danger that judges—who overwhelmingly come from mainstream religious backgrounds—will make erroneous and even unfair determinations that the religious practice at issue is in fact not central to the plaintiff's faith, not sincerely held, or not acceptable behavior, and thus does not meet the substantial burden test.

Although the inflammatory language of *Reynolds* seems antiquated today,[83] it was a key case relied on by *Smith* in 1990.[84] *Reynolds* is a potent example of the insensitive language found in early free exercise opinions. As discussed in Part II, *supra*, the more recent *Yoder* opinion spoke of evaluating the legitimacy of religious beliefs, the presumption being that some beliefs would in fact not be found to be legitimate. The danger is that religious beliefs too distant from those that the judge holds personally would be found not to be legitimate, which in effect is exactly what the *Reynolds* Court held. Had the *Reynolds* Court had one or more justices with a less hostile view toward polygamy, say a Mormon or Moslem justice, the decision might have come out the other way. However, a rare Jewish or Catholic justice aside, the Supreme Court has not been known for its religious diversity.

Furthermore, assumptions that are facially less offensive than the acceptability analysis employed in *Reynolds* have sneaked in the back door of free exercise jurisprudence. A court's insensitive review of the record as it relates to the petitioner's belief system—whether actually addressed in the opinion or not—can contribute to ethnocentric holdings just as readily as the three methods of analysis discussed in Parts II and III, *supra*. Comparison of the facts of *Smith* with *Yoder* illustrates this point.[85] The *Smith* case dealt with a Native American Church member's denial of unemployment benefits after he was dismissed for employee misconduct following his admission of sacramental peyote use. *Yoder*, on the other hand, was brought by plaintiffs with a much more innocuous request than permission to use illegal drugs; they merely wanted to shelter their children from the evils of the material world.

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83. In addition to labeling the plaintiff's religious practice "odious," the *Reynolds* Court called polygamy an "offence against society" and an act that "fetters the people in stationary despotism." The Court warned that the practice had the potential to cause the breakdown of American society and the rise of anarchy. *Reynolds*, 98 U.S. at 164-7.

84. 494 U.S. at 879.

85. *See also* the discussion of *Jones* in Part II, *supra*, for an additional instance of misinterpretation of the record by a court unfamiliar with the plaintiff's belief system.

Both Justice Scalia's majority opinion and Justice O'Connor's concurring opinion in *Smith* pointed to the government's interest in fighting drug trafficking as being a crucial factor in the resolution of the plaintiff's claims.[86] But since the majority opinion did not apply a balancing test at all, Justice Scalia's comments on the importance of the government's stance against drugs must be taken as dicta.

Justice O'Connor, on the other hand, remained loyal to the substantial burden test in writing that the compelling interest of preventing the abuse and trafficking of illegal drugs outweighed Smith's free exercise right to an exception to the ban on peyote use. Justice O'Connor's analysis turned on the fact that since peyote was listed as a controlled substance, the government had an automatic compelling interest in preventing any use of the drug. With much less than her usual attention to the facts of the case, Justice O'Connor simply stated, "I would conclude that uniform application of Oregon's criminal prohibition is 'essential to accomplish' its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance."[87]

Justice Blackmun, who dissented, raised key points that Justice O'Connor failed to mention. He called attention to evidence that he felt Justice O'Connor should have put on the scales as the two competing interests were weighed, noting that "[t]he State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic."[88] Justice Blackmun pointed out that twenty-three states currently had statutory exemptions to their controlled substance laws for sacramental peyote use, as did the federal government.[89] Furthermore, the petitioners were not arrested for their peyote use, but were in court on a civil rights claim.[90] In fact, Justice Blackmun noted that the State of Oregon had pursued only one criminal prosecution for peyote use since the law was passed, and that case dated back to 1975.[91] More pointedly, he stressed the fact that because of the side effects associated with peyote use (the taste is so unpleasant that it causes vomiting and other unpleasant reactions), the drug does not lend itself either to abuse or to trafficking.[92] Therefore, Justice Blackmun believed that the government's interest in stemming drug trafficking and drug abuse was not furthered by the law at all, and actually was irrelevant to the plaintiffs' case.

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86. *Smith*, 494 U.S. at 885; 494 U.S. at 905-6 (O'Connor, J., concurring).
87. *Id.* at 905 (O'Connor, J., concurring) (citation omitted).
88. *Id.* at 910-11 (Blackmun, J., dissenting).
89. *Id.* at 912 n.5 (Blackmun, J., dissenting).
90. *Id.* at 909 n.2, 911 (Blackmun, J., dissenting).
91. *Id.* at 911 n.3 (Blackmun, J., dissenting).
92. *Id.* at 914 n.7 (Blackmun, J., dissenting).

Contrasting Justice O'Connor's implementation of the substantial burden test in *Smith* with a similar judicial task in *Yoder* serves to clarify the point. Although the admittedly compelling government interest at stake in *Yoder* was mandatory school attendance, the Court held that the interests of the Amish plaintiffs in keeping their children out of school after the eighth grade was of a higher magnitude. Chief Justice Burger went to great lengths to paint the Amish as a model minority, emphasizing statistical evidence offered at trial that no one in the Amish community had ever been arrested or gone on welfare, for example.[93] Had the plaintiffs been more threatening to mainstream thinking than the idyllic Amish were, one wonders whether the decision would have come out differently, buttressed by the Court's railing against the high dropout rate in general and the importance of education in creating a productive society.[94]

An understanding of the sacramental significance of peyote is surely difficult for those outside the Native American Church to conceive. It is for that reason, however, that free exercise claims merit particular judicial sensitivity to the threat that ethnocentrism may cloud a court's review of the facts in such a case. Plaintiffs bringing free exercise claims almost invariably are practitioners of minority religions. In analysis of these cases, the dearth of claims brought by Methodists and Presbyterians is immediately apparent. And as has been stressed previously, the opposite is true of the judiciary; it is representative of the majority, not of the minority.

There are two ways that the courts can deal with the tension between a majoritarian judiciary and plaintiffs claiming that their right to practice a minority religion has been infringed. The first measure to combat ethnocentric judicial thinking is to reject wholesale the "legitimate" language in *Yoder,* and to stay away from the three analytical traps that the substantial burden test can give rise to: centrality, acceptability, and sincerity analyses. Furthermore, as the previous comparison of *Smith* and *Yoder* demonstrated in Part IV, *supra*, cultural insensitivity can occur in even more subtle ways. The second measure that courts can take to check any unintentional forays into ethnocentricity is to proceed through the record slowly, making sure not to dismiss a claim too quickly without fully exploring the facts of the case. By this measure, both interests can be fairly put on the scales before the balancing test is performed.

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93. Justice Douglas' partially dissenting opinion in *Yoder* points out that this idyllic picture is less than accurate. *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting in part).

94. To the contrary, Chief Justice Burger dismissed the government's argument that Yoder's position promoted "ignorance." *Yoder*, 406 U.S. at 222.

V. Conclusion

No precautionary measure aimed at avoiding unintended ethnocentric decisions in free exercise cases will address the threat to RFRA that Professor Laycock warned of, outright hostility. This Article has sought to address unintentional insensitivity to difference. But unfortunately, judicial hostility to the free exercise of religion remains a threat to religious freedom as well. A quotation from *Smith* illustrates the point. In response to Justice O'Connor's claim that he was setting out a parade of horribles to exaggerate the consequences of preserving the substantial burden test, Justice Scalia stated that "[i]t is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[95] In light of this language from a powerful member of the current Court, it is hard to dismiss Professor Laycock's fears as unwarranted. However, it is my hope that in light of RFRA's clear mandate, the substantial burden test will be implemented with fairness and tolerance, and that both insensitivity and hostility toward differences in belief will be minimal.

Certainly RFRA is admirable for its potential to undo the damage of a wrongly decided case. Furthermore, there are drawbacks with any balancing test, and the courts can always manipulate precedent to get the desired result, as *Smith* itself demonstrates. But the religious freedom set out in the First Amendment is a precious right designed to protect the minority from the majority, and this right must be preserved as a right in practice as well as in theory. The makeup of the Court has not changed significantly since *Smith* was decided, and Professor Laycock's fears that RFRA will be used to reach unfair results are not unfounded.

This Article has sought to achieve three goals: first, to foster awareness of the inherent conflict when majoritarian judges are given the task of evaluating a free exercise claim brought by practitioners of a minority religion; second, to point out the dangers in certain analytical turns that the substantial burden test can take; and third, to show that even if the substantial burden test is not applied in a way that can lead to unfair analysis of a religious freedom claim, ethnocentrism can lead to quick dismissal without thoughtful analysis of the facts of the case.

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95. 494 U.S. at 889 n.5.