COMMENT

Free Exercise Jurisprudence: A Comment on the Heightened Threshold and the Proposal of the "Burden Plus" Standard

I. INTRODUCTION

. . . one nation, under God, indivisible,
with liberty and justice for all.

As the concluding lines of the Pledge of Allegiance indicate, "[we] are a religious people whose institutions presuppose a Supreme Being."[1] Indeed, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."[2]

The charter protection of religious freedom is the religion clause of the first amendment, which provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[3] As the text itself indicates, there are two threshold aspects to the free exercise clause: the requirement that "religion" be implicated and the requirement that the exercise of that religion be "prohibited."

These threshold requirements to the invocation of the free exercise clause have been the subject of two recent United States Supreme Court decisions. In *Frazee v. Illinois Department of Employment Security*,[4] the Court upheld a free exercise claim, refusing to raise the religion aspect of the threshold. However, in *Lyng v. Northwest Indian Cemetery Protective Association*,[5] the Court rejected a free exercise claim by heightening the prohibit threshold requirement that must be shown to invoke the free exercise clause.

This Comment will focus on the *Lyng* case and the larger context of the narrowing scope of the protection given by the free exercise clause. More importantly, this Comment will propose and discuss a new threshold standard to be used by both the bench and the bar to examine future free exercise claims. This new standard is proposed in response to what has been called the "inadequacies of current doctrine" in free exercise jurisprudence.[6] Section II of this Comment will examine the background of the free exercise clause and will offer a brief discussion of the balancing test used once constitutional protection is invoked. Section III will explore the major case law interpretation of the threshold requirement of the clause, with a special emphasis on the interpretation of the key word "prohibit." Section IV will discuss both the *Lyng* and *Frazee* cases and provide a critical analysis of the resultant current threshold standard. Section V will propose the "Burden Plus" standard as a

1. Zorach v. Clauson, 343 U.S. 306, 313 (1951).
2. Abington School Dist. v. Schempp, 374 U.S. 203, 213 (1962).
3. U.S. CONST. amend. I.
4. 109 S. Ct. 1514 (1989).
5. 108 S. Ct. 1319 (1988).
6. McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 2 (1989).

workable analytical framework that can be used to determine the propriety of invoking the free exercise clause in future cases.[7] In addition, Section V will apply the Burden Plus standard to demonstrate that it is a superior analytical framework. Further, some substantial advantages of the standard will be discussed and some potential criticisms will be rebutted.

II. BACKGROUND

A. *Constitutional Text*

The constitutional manifestation of religious liberty, set forth in the first amendment, reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[8] This "religion clause" of the first amendment has two distinct parts: the "establishment clause" and the "free exercise clause." The religion clause is applicable to the states through the fourteenth amendment.[9]

In examining the significance to be attached to the religion clause, it is useful to examine the context in which it was proposed and ratified. The Framers of the Constitution sought "to protect American liberty by establishing a limited federal government that [would] be permitted to act only where it had an explicit mandate to act."[10] However, the limited nature of the new government was not seen as a sufficient guarantee of the religious and civil liberties of the people.[11] James Madison, a principal architect of the Constitution, proposed to Congress a set of constitutional amendments aimed at insuring protection of religious liberty, among other things.[12]

As a general proposition, the first amendment sought to prevent any federal interference with religion. The Supreme Court has noted that the purpose of the religion clause "was to state an objective, not to write a statute."[13] Thus, the courts

---

7. The proposal of such new free exercise standards is currently in vogue among legal scholars. Noted free exercise commentator Professor Ira C. Lupu proposes a new standard in his recent article, Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989). Professor Lupu's fascinating article critiques the prevailing judicial definitions of "burden" and proposes what he calls a "common law" approach: "[w]herever religious activity is met by intentional government action analogous to that which, if committed by a private party, would be actionable under general principles of law, a legally cognizable burden on religion is present." *Id.* at 966. With all due deference, the Burden Plus standard proposed in this Comment has two main advantages over Professor Lupu's standard. First, the Burden Plus standard reconciles existing precedent. Second, while Professor Lupu's standard is centered on oftentimes amorphous common law concepts, the Burden Plus standard is centered on the concrete "Plus" concept. *See infra* text accompanying notes 124–65.

Another standard has been proposed in McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989). Again, the problem with such an economic approach is the difficulty of quantifying the costs and benefits involved in a free exercise claim. In contrast, the Burden Plus standard does not depend on attempted quantification, but rather on the existence of recognized legal rights or entitlements. *See infra* text accompanying notes 124–65.

8. U.S. CONST. amend. I.

9. Cantwell v. Connecticut, 310 U.S. 296 (1940).

10. G. MILLER, RELIGIOUS LIBERTY IN AMERICA 74 (1976).

11. *Id.*

12. *See generally* T. CURRY, THE FIRST FREEDOMS 193–222 (1986) [hereinafter CURRY].

13. Walz v. Tax Commissioner, 397 U.S. 664, 668 (1969).

were "left with the task of developing rules and principles to realize the goal of the religion clauses without freezing them into an overly rigid mold."[14]

The provision for "free exercise" can be accurately viewed as the most progressive part of the amendment. One commentator has noted, "the government was obliged under this phrase to avoid actions that would interfere with the practice of faith in areas under its jurisdiction; that is, it was a guarantee of the liberty to practice one's faith."[15] It is with this notion that the free exercise clause comes in conflict, and creates a tension, with the establishment clause.

Government action arguably prohibited by the establishment clause may in some cases be compelled by the free exercise clause. Constitutional law scholar Professor Laurence Tribe has described the free exercise clause as carving a "zone of permissible accommodation" out of the establishment clause.[16] This phenomenon was most recently demonstrated in *Hobbie v. Unemployment Appeals Commission of Florida*[17] in which the Supreme Court, following solid precedent,[18] held that the award of unemployment compensation benefits to Mrs. Hobbie after she was discharged for refusing to work on her Sabbath day was not in violation of the establishment clause, but was in fact *required* by the free exercise clause.

Fundamentally, then, the text of the free exercise clause should be seen as protecting freedom of belief by preventing any government interference with respect to religious beliefs. Indeed, the Supreme Court has recently stated, "[o]ur cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute."[19] The absolute protection with respect to belief should be seen as extending to protect against any indirect interference with belief that may result from subtle discriminatory activity.[20]

Although religious beliefs are protected absolutely by the free exercise clause, religious activities are not. As the Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Association*[21] noted, "[t]he crucial word in the constitutional text is 'prohibit.'"[22] Under free exercise clause jurisprudence, if a claimant shows religious sincerity and the requisite burden resulting from a prohibition of a religious activity, the threshold is met and the court will undertake a balancing test to determine if the government interest manifested by its action is important enough to justify the resulting intrusion on the claimant's religious activity. Therefore, before the interpretation of the threshold is examined, it is appropriate to offer a brief discussion of the balancing test used once the constitutional threshold is met.

---

14. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2 (2nd ed. 1988) [hereinafter TRIBE].

15. MILLER, *supra* note 10, at 76.

16. TRIBE, *supra* note 14, at § 14-4.

17. 480 U.S. 136 (1987).

18. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981).

19. Bowen v. Roy, 476 U.S. 693, 699 (1986).

20. *See infra* text accompanying note 113.

21. 108 S. Ct. 1319 (1988).

22. *Id.* at 1326.

B. *Balancing Test*[23]

The "modern" free exercise clause standard originated in *Sherbert v. Verner*[24] when the Court extended protection beyond mere belief. Sherbert was a Seventh Day Adventist who was fired for refusing to work on Saturdays, her religion's day of rest. When she failed to make herself available for other work on Saturdays, the State of South Carolina denied her unemployment compensation benefits. The Supreme Court held that such a denial violated Sherbert's right to the free exercise of her religion.[25] The Court stated that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship."[26]

The existence of the burden itself, however, was not enough to provide free exercise clause protection for religious activity. Rather, the Court went on to "consider whether some compelling state interest . . . justifies the substantial infringement of [Sherbert's] First Amendment right."[27] The *Sherbert* Court imposed a "strict scrutiny"[28] balancing test and found the denial of benefits to be unconstitutional when no "compelling interest" was advanced as a justification.[29]

Nonetheless, the holding in *Sherbert* left unanswered the question whether a statutory scheme which applied equally to everyone, not subject to such charges of facial discrimination, violated the free exercise clause. In *Wisconsin v. Yoder*[30] the Court considered such a nondiscriminatory statute: Wisconsin's requirement that all children attend school until they reach the age of sixteen. Because of a sincerely held religious tenet,[31] the Amish respondents objected to compulsory formal education beyond the eighth grade. The Court found that such a requirement burdened the

---

23. The following discussion is by no means meant to be comprehensive, since the focus of this Comment is on the threshold to the invocation of the free exercise clause. For recent commentary on the standard of review in free exercise cases, see Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943 (1986) and Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147 (1987).

24. 374 U.S. 398 (1963). "Modern" in the sense that while today it is taken for granted that the free exercise clause protects certain religious activity, *Sherbert* was the first case in which activity was protected. For example, in Reynolds v. United States, 98 U.S. 145 (1878), the Court stated, "[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.* at 166. The Court went on to hold that a conviction for polygamy was not a prohibition of the free exercise of the Mormon religion. Another example is Prince v. Massachusetts, 321 U.S. 158 (1944), in which the action of offering religious books for sale was not given free exercise clause protection when offered by a minor in contravention of the state child labor law.

25. *Sherbert*, 374 U.S. at 403.

26. *Id.* at 404.

27. *Id.* at 406.

28. This phrase was developed in the context of the Supreme Court's Equal Protection analysis. Under "strict scrutiny," the government is required to demonstrate that its action is the least restrictive means of advancing a compelling state interest. The Court explicitly recognized in Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987), that "strict scrutiny" is used to examine alleged infringements on free exercise rights: "such infringements must be subjected to strict scrutiny and [can] be justified only by proof by the State of a compelling interest." *Id.* at 141; *see infra* text accompanying note 46. *See also* TRIBE, *supra* note 14, at § 14-13.

29. Specifically, the interest advanced by the state was "a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work." *Sherbert*, 374 U.S. at 407.

30. 406 U.S. 205 (1972).

31. ". . . a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." *Id.* at 210.

respondents' right to the free exercise of their religion, stating, "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause . . . ."[32] The *Yoder* Court stated the balancing test in the following seminal language: "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[33] Although still considered "strict scrutiny," this test arguably held the state to a standard higher than the "compelling interest" standard of *Sherbert*.[34] The Court in *Yoder* found that requiring two more years of compulsory education was not "of the highest order" and thus required the state to create an exemption for the Amish people.

The exact language used to describe the balancing test in *Yoder* was used six years later in *McDaniel v. Paty*.[35] There, the Court struck down Tennessee's ban on clergy serving in the state legislature as violative of the free exercise clause when the state failed to show that the anti-establishment interests promoted by the statute were of the "highest order."[36]

Thomas v. Review Board of the Indiana Employment Security Division[37] involved the denial of unemployment benefits to Thomas, who refused, after a change in the nature of his employer's operation, to work in contravention of his religious beliefs in a munitions operation. The Court cited the *Yoder* language and went on to describe the balancing test in this manner: "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[38] As in *Sherbert*, the Court found the state interest insufficient to justify denial of unemployment benefits.[39]

The free exercise balance, however, has not always weighed in favor of the claimant. In *United States v. Lee*[40] the Amish respondent Lee "failed to withhold social security taxes from his employees or to pay the employer's share of such taxes because he believed that payment of the taxes and receipt of the benefits would violate the Amish faith."[41] The Court applied a balancing test that was arguably even

---

32. *Id.* at 214.

33. *Id.* at 215.

34. *Id. See supra* text accompanying note 27.

35. 435 U.S. 618, 628 (1978).

36. Tennessee asserts that its interest in preventing the establishment of a state religion is consistent with the Establishment Clause and thus [is] of the highest order. . . . Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed.

Id.

37. 450 U.S. 707 (1981).

38. *Id.* at 718. Of course this is the classic strict scrutiny language, *see supra* note 28.

39. The purposes urged to sustain the disqualifying provisions of the Indiana unemployment compensation scheme are two-fold: (1) to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for "personal" reasons; and (2) to avoid a detailed probing by employers into job applicants' religious beliefs. These are by no means unimportant considerations. When the focus of the inquiry is properly narrowed, however, we must conclude that the interests advanced by the State do not justify the burden placed on free exercise of religion.

Id. at 718–19 (footnote omitted).

40. 455 U.S. 252 (1982).

41. *Id.*

stricter than the *Yoder* test, stating, "[t]he state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an *overriding* governmental interest."[42] Nevertheless, the Court found that the governmental interest in administration of the social security system outweighed the free exercise claim,[43] especially in light of the fact that "Congress already has granted the Amish a limited exemption from social security taxes."[44]

The most recent exposition of the balancing test is in *Hobbie v. Unemployment Appeals Commission of Florida*.[45] The facts were similar to those in *Sherbert* in that Hobbie was denied unemployment benefits for her refusal, because of religious beliefs, to work on Saturdays. Relying on both *Sherbert* and *Thomas*, the Court reversed the denial and stated that "such infringements must be subjected to strict scrutiny and [can] be justified only by proof by the State of a compelling interest."[46] In so doing, the Court rejected the Appeals Commission's argument that the proper balancing test was a less rigorous one. The Commission claimed that "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[47]

This less rigorous test comes from a[48] chink in the strict scrutiny armor worn by a free exercise claimant, the 1986 Supreme Court decision in *Bowen v. Roy*.[49] There, the Court held that the requirement of federal benefit programs that state agencies use social security numbers in administration of the programs did not violate the free exercise clause. Roy had objected, based upon a religious tenet, to use of such a number. The Court stated, "[n]ever to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development. . . ."[50] The Court went on to apply the aforementioned "minimal scrutiny" reasonableness standard,

---

42. *Id.* at 257 (emphasis added).

43. "Thus, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high . . . . To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *Id.* at 258–59.

44. *Id.* at 262. *See* 26 U.S.C. § 1402(g).

45. 480 U.S. 136 (1987). The Supreme Court made no mention of the balancing test in the most recent free exercise clause case, Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514 (1989). Rather, Frazee's free exercise claim for unemployment benefits was upheld on the authority of *Sherbert*, *Thomas*, and *Hobbie* once the Court held that the religion threshold was met by the mere showing of sincerity. *See infra* text accompanying notes 64–67.

46. 480 U.S. at 141.

47. *Id.*

48. I say "a" chink, meaning "one," because two other recently decided cases also invoke a less rigorous review of the infringement upon free exercise. However, both cases were decided in "special contexts": in Goldman v. Weinberger, 475 U.S. 503 (1986), no balancing test was applied but rather the Court gave great deference to a military regulation that prohibited the claimant from wearing a yarmulke while in uniform; meanwhile in O'Lone v. Shabazz, 482 U.S. 342 (1987), the Court applied a "reasonableness" test and upheld a prison regulation that prevented the claimants from attending a weekly Muslim religious service. *See generally* Dienes, *When The First Amendment Is Not Preferred: The Military and Other "Special Contexts"*, 56 U. CIN. L. REV. 779 (1988).

49. 476 U.S. 693 (1986). It should be noted that the use of this less rigorous balancing test, although it appeared in Chief Justice Burger's majority opinion, was concurred with by only Justices Rehnquist and Powell. *Id.* at 695, 701–12. Justice O'Connor dissented sharply to this proposition, stating, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." *Id.* at 727 (O'Connor, J., concurring in part and dissenting in part).

50. *Id.* at 699 (emphasis in original).

which easily weighed in favor of the government. In effect, internal government procedures were exalted to the level of constitutional significance, as the Court stated, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[51]

As previously mentioned, however, the Court rejected the invitation to use the less rigorous *Roy* standard in the *Hobbie* case, stating, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."[52] This seemingly limits the use of the less rigorous test to the facts of *Roy*.[53]

To summarize, if the free exercise threshold is met, a court will undertake a strict scrutiny balancing test to determine whether the infringement on the free exercise of religion is justified. That is to say, a court will require the state to show that its action is the least restrictive means of accomplishing a compelling state interest. Professor Tribe has described this as "[t]he [r]equirement that the [s]tate [s]how that [o]nly [u]niform [e]nforcement [c]an [a]chieve an [u]nusually [i]mportant [e]nd."[54] Of course, if an exemption is the superior resolution, it is required.[55]

III. An Examination of What Types of Government Actions Have Constituted a "Prohibition"

A. *Introduction*

Recall that the text of the free exercise clause provides two threshold requirements to invocation of the free exercise clause. First, "religion" must be implicated. Second, the challenged action must "prohibit" the free exercise of that religion. For ease of discussion, these threshold requirements will be referred to as the religion threshold and the prohibit threshold, respectively.

B. *Modern Era Interpretation of "Religion"*

In "modern" free exercise jurisprudence, that is, since *Sherbert v. Verner* in 1963,[56] the Court has avoided attempting to define "religion." Indeed, in *Sherbert* the Court recognized "the prohibition against judicial inquiry into the truth or falsity

---

51. *Id.*

52. *Hobbie*, 480 U.S. at 141. Actually, as mentioned in *supra* note 49, this language comes from Justice O'Connor's opinion concurring in part and dissenting in part in *Roy*.

53. However, as the reader will learn from section IV of this Article, the majority opinion in *Lyng* relied heavily upon the reasoning in *Roy* (although in *Lyng* a balancing test was never applied since the Court found that the threshold requirement of "prohibition" was not met).

54. Tribe, *supra* note 14, at § 14-13.

55. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). *See also* McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1 (1989).

56. 374 U.S. 398 (1963). As used in the remainder of this Comment, "modern era" refers to the period after the Supreme Court's decision in *Sherbert*. *Sherbert* was the dawn of the modern era because in *Sherbert*, the Court extended free exercise protection beyond mere belief for the first time. *See supra* text accompanying notes 23–29.

of religious beliefs."[57] In *Wisconsin v. Yoder*[58] the Court stated that "a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question,"[59] although it did go on to distinguish religion from philosophy.[60] In *Thomas v. Review Board*[61] the Court stated the broadest "non-definition:" "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[62] Unique to *Thomas* was the fact that the claimant was admittedly "struggling" with his beliefs; nevertheless, the Court held that "[c]ourts should not undertake to dissect religious beliefs because . . . [the] beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[63]

It was against this backdrop that the Supreme Court expressly addressed the issue of the requirement of the religion threshold in *Frazee v. Illinois Department of Employment Security*.[64] *Frazee* was similar to *Sherbert*, *Thomas*, and *Hobbie* in that it involved the denial of unemployment benefits because of a refusal to work on the Sabbath. However, the *Frazee* case was distinct in that Frazee, unlike Sherbert, Thomas or Hobbie, "was not a member of an established religious sect or church, nor did he claim that his refusal to work resulted from a 'tenet, belief or teaching of an established religious body.' "[65] But the Supreme Court refused to use this distinction to distinguish *Frazee* from *Sherbert*, *Thomas*, and *Hobbie*. In reversing the denial of unemployment benefits, the *Frazee* Court stated, "we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection."[66]

In line with the judicial reluctance to dissect religious beliefs, *Frazee* established that the requirement with respect to the religion threshold is satisfied if the claimant can show that the religious belief at issue is sincerely held. So, with "religion" not subject to judicial inquiry, this leaves "prohibit" as "the crucial word in the constitutional text."[67]

---

57. *Id.* at 407.

58. 406 U.S. 205 (1972).

59. *Id.* at 215.

60. [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id. at 215–16.

61. 450 U.S. 707 (1981).

62. *Id.* at 714.

63. *Id.* at 715.

64. 109 S. Ct. 1514 (1989).

65. *Id.* at 1516.

66. *Id.* at 1517 (footnote omitted).

67. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1326 (1988).

C. *Modern Era Interpretation of "Prohibit"*

The seminal modern interpretation of "prohibit" occurred, not surprisingly, in *Sherbert v. Verner*:[68] "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[69] This established the principle that there must be affirmative government action in order for a prohibition to exist. In *Sherbert* itself, as well as in *Thomas v. Review Board*,[70] *Hobbie v. Unemployment Appeals Commission*,[71] and *Frazee v. Department of Employment*,[72] the Court held the affirmative denial of unemployment benefits to be sufficient to "prohibit" the free exercise of religion. The language in *Sherbert*, mentioned previously in the discussion of the balancing test,[73] that "government imposition . . . puts the same kind of burden upon . . . religion as would a fine imposed against [Sherbert] for her Saturday worship,"[74] was directly relied upon in *Thomas*[75] and *Hobbie*.[76] Thus, "prohibit" is defined in terms of burden.

In *Hobbie*, the Court explicitly stated, "the salient inquiry under the Free Exercise Clause is the burden involved."[77] This general language represented a relaxation of the burden standard announced in *Yoder*: that state action "gravely endanger if not destroy the free exercise of respondents' religious beliefs."[78]

Between *Yoder* and *Hobbie* the Court had stated in *United States v. Lee*[79] that "not all burdens . . . are unconstitutional."[80] This merely suggests, however, that the strict scrutiny balancing test will be undertaken once a burden is shown; it does not require some minimal quantum of burden be shown. The Court's refusal to require that some specific quantum of burden be shown is consistent with its refusal to "dissect religious beliefs," for as *Thomas* demonstrates, a burden to one believer may be trivial to another believer of the same faith.[81]

---

68. 374 U.S. 398 (1963). Recall that *Sherbert* established the "modern" free exercise standard. *See supra* text accompanying notes 23–29.

69. *Id.* at 412 (Douglas, J., concurring).

70. 450 U.S. 707 (1981).

71. 480 U.S. 136 (1987).

72. 109 S. Ct. 1514 (1989).

73. *See supra* text accompanying note 26.

74. *Sherbert*, 374 U.S. at 404.

75. *See Thomas*, 450 U.S. at 716–17.

76. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140 (1987).

77. *Id.* at 144.

78. Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).

79. 455 U.S. 252 (1982).

80. *Id.* at 257.

81. Recall that in *Thomas* the claimant quit his job because of a religious conviction against war that prevented him from working on and with munitions. There was a question whether this same conviction was held by Thomas' fellow believers. Addressing this, the Court stated:

> The Indiana Court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.

Thomas, 450 U.S. at 715.

Similarly, *Frazee* established that one need not "be responding to the commands of a particular religious organization" in order to claim the protection of the free exercise clause, as long as that religious belief is sincerely held. Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514, 1517 (1989).

The modern test for prohibition thus appears to be the *Hobbie* articulation that "the salient inquiry under the Free Exercise Clause is the burden involved."[82] The Court seems to be saying that the claimant need only show the existence of a burden. Unless the case arises in a special context,[83] the strict scrutiny balancing test will be applied to determine if free exercise rights have been violated without inquiry into the degree of the burden.

Bowen v. Roy[84] illustrates, however, that another aspect must be considered. Drawing on the Court's statement in *Sherbert* that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government,"[85] the *Roy* Court stated:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.[86]

This casts a degree of uncertainty upon the *Hobbie* burden standard, which merely requires the existence of a burden, when actions of the federal government itself are at issue. This uncertainty was apparently resolved in *Lyng*, a discussion of which appears in the following section.

D. *Summary*

The words "religion" and "prohibit" represent the two threshold requirements to the invocation of the free exercise clause. *Frazee* established that the religion threshold is met simply by showing that the belief is of a religious nature and is sincerely held. The prohibit threshold, notwithstanding the uncertainty cast by the *Roy* opinion when federal government action is at issue, is met by demonstrating that a burden has been placed upon the free exercise of religion. However, the *Lyng* decision, discussed in the next section, raised the prohibit threshold significantly, at least when federal government action is at issue, and at most in all cases.

IV. *Lyng* and the Resultant Threshold Standard

A. Lyng v. Northwest Indian Cemetery Protective Association[87]

1. *Facts and Lower Court Dispositions*

Seven nonprofit associations, four Native Americans, and two Sierra Club members sought to prevent implementation of the United States Forest Service's

---

82. *Hobbie*, 480 U.S. at 144. *See supra* text accompanying note 77.

83. *See supra* note 48 for a discussion of the two recent free exercise clause cases decided within "special contexts": *Goldman* in the military context and *O'Lone* in the prison context.

84. 476 U. S. 693 (1986). *See supra* text accompanying notes 49–51.

85. Sherbert v. Verner, 374 U.S. 398, 412 (1963).

86. *Roy*, 476 U.S. at 699 (emphasis in original).

87. 108 S. Ct. 1319 (1988).

plans to permit timber harvesting and road construction in the Chimney Rock section of the Six Rivers National Forest. This area is known as "high country" and used by Native Americans for site-specific religious purposes. The plaintiffs claimed that the construction and harvesting plans violated rights protected by the free exercise clause of the first amendment. Following exhaustion of administrative remedies, a suit was filed in the Federal District Court for the Northern District of California.

The District Court held that the proposed plans did violate the Native Americans' rights protected by the free exercise clause.[88] The court first found that the two threshold requirements were met. With respect to the religion threshold, "[t]he Indian plaintiffs' claim that the high country is sacred is both sincerely held and 'rooted in religious belief;' "[89] and, with respect to the prohibit threshold, "[t]he evidence establishes that . . . implementation of the . . . [plans] would seriously impair the Indian plaintiffs' use of the high country for religious practices."[90]

With the threshold passed, the District Court then applied the strict scrutiny balancing test: "[o]nce a burden on the free exercise of religion is established, 'only those interests of the highest order' can uphold the challenged government action."[91] Based upon explicit findings of fact, the District Court found that the balance weighed in favor of the Native Americans. The court stated that "construction of the [road] would not materially serve several of the claimed governmental interests"[92] and that "[t]he remaining interests defendants offer in support of construction of the [road] fall far short of constituting the 'paramount interests' necessary to justify infringement of plaintiffs' freedom of religion."[93] The court also held that "harvesting timber from the [high country] would not serve any compelling interest."[94] It appeared that the District Court had undertaken the proper free exercise inquiry.

On appeal, the Ninth Circuit Court of Appeals affirmed in part and vacated in part.[95] On rehearing, the Court of Appeals affirmed in relevant part.[96] The court undertook a de novo review of the Native Americans' first amendment claim[97] and again found that the balance weighed in favor of the Native Americans. In

88. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586 (N.D. Cal. 1983).

89. *Id.* at 594.

90. *Id.*

91. *Id.* at 595, using, of course, the familiar language from *Yoder*; *see supra* notes 30–34 and accompanying text. Note that the requirement that the state interest be of the "highest order" is a higher standard than the usual strict scrutiny requirement of a "compelling" state interest.

92. *Id.* The road contemplated was a six mile paved segment through Chimney Rock that would allow completion of a 75 mile road linking two California towns, Gasquet and Orleans (the G-O road). *Id.* at 589–90.

93. *Id.* at 596 (citing Sherbert v. Verner, 374 U.S. 398, 406).

94. *Id.*

95. Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985), *aff'd in relevant part on rehearing*, 795 F.2d 688 (9th Cir. 1986), *rev'd* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

96. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986), *rev'd* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). For discussion of the Ninth Circuit's decision in *Northwest Indian*, see Comment, *Constitutional Law-* Northwest Indian Cemetery Protective Association v. Peterson*: Indian Religious Sites Prevail Over Public Land Development*, 62 NOTRE DAME L. REV. 125 (1986) and Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771 (1987).

97. *Northwest Indian*, 795 F.2d at 691 n.3.

distinguishing the case from the then recently decided case of *Bowen v. Roy*,[98] the Court of Appeals stated: "the fact that the proposed government operations would virtually destroy the plaintiff Indians' ability to practice their religion differentiates this case from *Bowen v. Roy*."[99] The Supreme Court, however, took quite a different view of the matter.

2. *United States Supreme Court Holding*

By a vote of five to three, the Supreme Court reversed and remanded the case.[100] Justice O'Connor's majority opinion explicitly rejected the Court of Appeals' reasoning: "Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the Indians' ability to practice their religion' . . . the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[101]

The majority opinion relied heavily upon *Bowen v. Roy*:[102] "[t]he building of a road or the harvesting of timber . . . cannot be meaningfully distinguished from the use of a Social Security number in *Roy*."[103] The opinion declined respondents' requests to distinguish the case from *Roy* on the ground that the infringement on religious liberty here was "significantly greater"[104] or on the ground that while in *Roy* the government's conduct of its own internal affairs "did not interfere with his ability to practice his religion," here the government conduct would "physically [destroy] the . . . conditions . . . without which the [religious] practices cannot be conducted."[105] Instead, the Court concluded:

> These efforts to distinguish *Roy* are unavailing. This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy* . . . and accordingly cannot weigh the adverse effects on the [Native Americans]. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.[106]

The weakness of this conclusion is clear, based upon the discussion in section III of this Comment. While it is true that the Court will not delve into the veracity of religious beliefs,[107] this relates only to the threshold aspect of religion. Once the religion threshold is met by a mere showing of sincerity,[108] and the prohibit threshold

---

98. 476 U.S. 693 (1986). *See supra* notes 49–53 and accompanying text.

99. *Northwest Indian*, 795 F.2d at 693 (emphasis added).

100. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988). Justice O'Connor authored the majority opinion, Justice Brennan filed a dissenting opinion in which Justices Marshall and Blackmun joined, and Justice Kennedy took no part in the consideration or decision of the case.

101. *Id.* at 1326–27 (quoting *Northwest Indian*, 795 F.2d at 693).

102. 476 U.S. 693 (1986).

103. *Lyng*, 108 S. Ct. at 1325.

104. *Id.*

105. *Id.* Two other grounds on which to distinguish *Roy* suggested by the Native Americans were that "government practice in *Roy* was 'purely mechanical' whereas this case involves 'a case-by-case substantive determination as to how a particular unit of land will be managed'" as well as that "the government action is not at some physically removed location where it places a restriction on what a practitioner may do." *Id.*

106. *Id.*

107. *See supra* text accompanying notes 56–67.

108. *See supra* text accompanying note 66.

is also met,[109] then under heretofore normal free exercise praxis the Court applies a balancing test. The balancing test weighing the adverse effects is applied *regardless* of the fact that there was no inquiry into the truth of the underlying religious beliefs.

However, no balancing test was applied in *Lyng*. Rather, the Court held that the Native Americans' free exercise claim failed because the prohibit threshold was not met. The Court did find that the religion threshold was met,[110] but such a finding was effectively useless since both threshold requirements must be met to support a free exercise claim.[111]

In the beginning of the portion of its opinion that discussed the applicable law, the *Lyng* Court frankly stated: "Respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the [high country] area. We disagree."[112]

Thus, the uncertainty in the burden threshold created by *Roy* was confirmed in *Lyng*, at least with respect to actions of the federal government:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment . . . . This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.[113]

B. *The Resultant Current Threshold Standard*

There is no question that the decision in *Lyng* substantially heightened the prohibit threshold required to bring a free exercise claim. To the majority, it was a legitimate extension of *Sherbert v. Verner*:[114] "the crucial word in the constitutional text is prohibit: for the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[115] To the dissent, it was an unduly narrow interpretation of "prohibit": "[t]he constitutional guarantee we interpret today, however, draws no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that *frustrates* or *inhibits* religious practice."[116] It is somewhat amazing that government action that will "virtually destroy the Indians' ability to practice their religion"[117] could be held *not* to prohibit the free exercise thereof.[118]

---

109. *See supra* text accompanying notes 68–86.
110. "It is undisputed that the Indian respondents' beliefs are sincere . . . ." *Lyng*, 108 S. Ct. at 1324.
111. *See supra* text accompanying notes 56–86.
112. *Lyng*, 108 S. Ct. at 1324.
113. *Id.* at 1326.
114. 374 U.S. 398 (1963). *See supra* text accompanying notes 68–76.
115. *Lyng*, 108 S. Ct. at 1326 (internal quotation marks omitted).
116. *Id.* at 1330 (Brennan, J., dissenting) (emphasis in original).
117. *Id.* at 1326 (quoting Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693).
118. It also seems difficult to reconcile Justice O'Connor's position in *Lyng*, significantly raising the threshold

Nonetheless, the threshold standard that results from *Lyng* requires that something more than frustration or inhibition of religious practices be shown in order for the threshold requirement of prohibition to be met. The resulting test probably does not go as far as requiring that there be coercive compulsion of affirmative conduct inconsistent with religious belief as the dissent suggests,[119] but that is beside the main point that a new "bite" has been put in the threshold that had been previously met by simply showing sincerity and the existence of a burden.

It should be noted that the *Lyng* Court made no attempt to raise the religion threshold beyond the minimal showing of sincerity. Indeed, subsequent to *Lyng*, in *Frazee v. Department of Employment*,[120] the Court explicitly refused to heighten the religion threshold. In *Frazee*, the Court confirmed that the religion threshold is met by the minimal showing of sincerity.[121]

An argument can be made that the higher threshold standard established in *Lyng* is limited to cases involving action by the federal government that impinges on religious liberty. Further, it can be argued that *Lyng* was wrongly decided, that the majority's interpretation of "prohibit" was unnecessarily and improperly narrow. Still, in light of the fact that "[we] are a religious people,"[122] and as a result of *Lyng*, there is a need for a clear analytical threshold standard that reconciles existing precedent within the Supreme Court's current free exercise jurisprudence. Such a standard, the "Burden Plus" standard, is proposed in the following section. Indeed, as another commentator has recently noted, "[t]he concept of burden is thus emerging as crucial in free exercise law."[123]

V. The "Burden Plus" Standard Proposed and Discussed

A. *Introduction*

Recall that the prohibit threshold of the free exercise clause has been defined in terms of "burden."[124] The Burden Plus standard is proposed for use to determine whether the prohibit threshold to the invocation of the free exercise clause is met, in light of the substantial heightening of the threshold by the Supreme Court's decision in *Lyng v. Northwest Indian Cemetary Protective Association*.[125] Simply stated, under the Burden Plus standard, the prohibit threshold to the invocation of the free exercise clause is met if there is some "plus" factor in addition to governmental interference with religion. As to the propriety of such a standard, it should be noted

---

requirement for free exercise protection, with her position in *Roy*, in which she vigorously dissented to the lessening of the strict scrutiny balancing test traditionally applied after the free exercise threshold has been met.

119. *Lyng*, 108 S. Ct. at 1330 (Brennan, J., dissenting).

120. 109 S. Ct. 1514 (1989).

121. *See supra* text accompanying notes 64–67.

122. *See supra* text accompanying note 1.

123. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 935 (1989).

124. *See supra* text accompanying notes 68–86.

125. 485 U.S. 439 (1988). *See supra* text accompanying notes 100–113.

that the notion of a "plus" standard has been used previously in first amendment jurisprudence.[126]

The concept comes from a procedural due process case decided by the Supreme Court, *Paul v. Davis*.[127] In *Paul*, the Court held that the liberty interest protected by the due process clause in the fourteenth amendment[128] did not include Davis' own interest in his "reputation alone, apart from some more tangible interests."[129] Thus, a "reputation plus" standard was announced, meaning that the damage to reputation must be accompanied by another deprivation in order to invoke the due process safeguards.[130]

It follows, then, that under the Burden Plus standard, in order to meet the prohibit threshold the claimant must show a burden on religious activity[131] plus deprivation of some recognized right or entitlement. The question raised, of course, is what are the parameters of "some recognized right or entitlement."

The seminal cases dealing with such parameters in the procedural due process context are the "tenure cases:" *Board of Regents v. Roth*[132] and *Perry v. Sindermann*.[133] In *Roth*, the Supreme Court found no due process-protected interest in a nontenured assistant professor's claim that he deserved a hearing before a state university declined to renew his contract. The Court reasoned that "to have a property interest [such that procedural due process is required] . . . a person clearly must have more than an abstract need or desire for it;" property interests "are created and . . . defined by existing rules and understandings that stem from an independent source such as state law . . . ."[134]

---

126. To deal with the freedom of speech implications of labor picketing, the Supreme Court developed a "speech plus" standard in order to allow the states some degree of regulatory power over picketing. Professor Tribe offers this clear and succinct discussion:

> In *Thornhill v. Alabama* [310 U.S. 88 (1940)] the Court declared that peaceful picketing to publicize the fact of a labor dispute was constitutionally protected free speech. In a series of cases culminating some 17 years later in *Teamsters Local 695 v. Vogt* [354 U.S. 284 (1957)], the Court upheld state laws which banned peaceful labor picketing for illegal purposes. To distinguish these cases from *Thornhill*, Justice Frankfurter said that picketing is 'speech plus' and that a state could regulate the 'plus' [*See Vogt*, 354 U.S. at 289–293].

Tribe, *supra* note 14, at § 12-7 (footnotes omitted).

The speech plus standard was explicitly recognized in *United States v. O'Brien*, 391 U.S. 367 (1968), where Chief Justice Warren stated, in the opinion of the Court, "[t]his 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." *Id.* at 376. (The *O'Brien* Court held that the first amendment did not protect the burning of draft cards because of the sufficiently important governmental interest in regulating the nonspeech element). The notion of a "plus" standard is also used in antitrust analysis, in the context of price fixing among competitors. There, it is held that evidence of parallel price changes by competitors is not enough, by itself, to establish the existence of an illegal price fixing conspiracy. Rather, something in addition to the mere parallelism must be shown to establish an antitrust violation. A leading commentator in the field has stated: "the other factors that serve to transform parallelism into conspiracy (or that allow a jury to do so) are often characterized as 'plus factors.'" P. AREEDA & L. KAPLOW, ANTITRUST ANALYSIS 306–14 (4th ed. 1988).

127. 424 U.S. 693, *reh'g denied*, 425 U.S. 895 (1976).

128. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV § 1.

129. *Paul*, 424 U.S. at 701.

130. *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 88 (1976). *See also* TRIBE, *supra* note 14, at § 10–11.

131. *See supra* text accompanying notes 68–86.

132. 408 U.S. 564 (1972).

133. 408 U.S. 593 (1972).

134. *Roth*, 408 U.S. at 577.

Somewhat of an expansion of the *Roth* notion occurred in *Perry*. The case involved a similar denial of due process claim brought by a professor at a state junior college who was not rehired. The *Perry* Court held that the professor, previously employed by the junior college for four years, might be able to show "the existence of rules and understandings, promulgated and fostered by state officials that . . . justify his legitimate claim of entitlement to continued employment absent sufficient cause."[135]

Although not with perfect clarity, *Roth* and *Perry* establish the boundaries of "some recognized right of entitlement" in the procedural due process context and by analogy can be used in the Burden Plus analysis. Included within the boundaries of the "plus" concept should be other rights explicitly recognized by the Supreme Court.[136]

B. *Discussion*

The following discussion will demonstrate that the Burden Plus standard reconciles existing precedent in a manner that provides concrete analysis for the heretofore amorphous notion of prohibit. In addition, the Burden Plus standard will be applied to two fact patterns, one real and one hypothetical, to demonstrate further that it provides a clear analytical framework. Finally, the advantages of the Burden Plus standard will be discussed and some potential criticisms will be rebutted.

1. *Reconciliation of Existing Precedent*

With respect to the cases where the free exercise threshold has been met, recall that *Sherbert v. Verner*,[137] *Thomas v. Review Board*,[138] *Hobbie v. Appeals Commission*,[139] and *Frazee v. Department of Employment*[140] all involved denial of unemployment benefits to a claimant who refused to work because of a sincere religious objection. Applying the Burden Plus analysis, the burden is the imposed choice between religious conduct and monetary compensation, the "fine imposed" notion.[141] The "plus" is the Supreme Court's holding in *Goldberg v. Kelly*:[142] "benefits are a matter of statutory entitlement for persons qualified to receive them."[143] Thus, in all four cases there is a burden and a "plus" such that the prohibit

---

135. *Perry*, 408 U.S. at 602–03 (internal quotation marks omitted).

136. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) ("[welfare] benefits are a matter of statutory entitlement for persons qualified to receive them"); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) ("liberty of parents and guardians to direct the upbringing and education of children under their control"); Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 647 (1981) ("oral and written dissemination of . . . religious views and doctrines is protected by the First Amendment").

137. 374 U.S. 398 (1963). *See supra* text accompanying notes 24–29.

138. 450 U.S. 707 (1981). *See supra* text accompanying notes 37–39.

139. 480 U.S. 136 (1987). *See supra* text accompanying notes 45–47.

140. 109 S. Ct. 1514 (1989). *See supra* text accompanying notes 64–67.

141. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert*, 374 U.S. at 404. *See supra* text accompanying note 26.

142. 397 U.S. 254 (1970).

143. *Id.* at 262.

threshold is met, as was found by the Court in each case. Combined with the minimal religious sincerity requirement, explicitly reaffirmed in *Frazee*, the two aspects of the free exercise threshold are met, thereby allowing the Court to undertake a balancing test.

In *Wisconsin v. Yoder*[144] the burden was that the compulsory education statute required contravention of the Amish tenet that "salvation requires life in a church community separate and apart from the world and worldly influence,"[145] upon pain of criminal sanctions. The "plus" was the Supreme Court's holding in *Pierce v. Society of Sisters*[146] that there exists a "liberty of parents and guardians to direct the upbringing and education of children under their control."[147] Again, the Court held that the prohibit threshold was met, and the threshold is met under the Burden Plus standard.

In *McDaniel v. Paty*[148] the Court found the free exercise balance to weigh in favor of the claimant and struck down Tennessee's prohibition on clergy serving in the legislature. Under the Burden Plus analysis, the burden was the fact that the state was "punishing a religious profession with the privation of a civil right"[149] and the "plus" was the state statutory right "of its adult citizens generally to seek and hold office as legislators . . . ."[150] Again, the Burden Plus analysis provides the same result reached by the Court.

Finally, in *United States v. Lee*[151] the Burden Plus analysis is slightly attenuated, but still provides the proper result. Recall there that after the Court found that the threshold was passed, the balancing test was applied and found to weigh in favor of administration of the Social Security System against the Amish claimant's religious objection. The burden was the contravention of the Amish tenet of providing for their own. The "plus" was the perceived inclusion within a Social Security statutory exemption.[152] However, the Court found Lee and his employees were not within the express provisions of the exemption.[153] Arguably, then, the prohibit threshold was not met and the balancing test should not have been applied. However, when one recalls that in the pre-*Roy* era the required burden showing was very minimal,[154] the Court's action is justified and the Burden Plus analysis consistent.

Now, with respect to *Bowen v. Roy*[155] and *Lyng v. Northwest Indian Cemetary Protective Association*,[156] the two cases where the threshold was not met, the Burden Plus analysis also squares with the Court's outcome.

---

144. 406 U.S. 205 (1972). *See supra* text accompanying notes 30–34.

145. *Id.* at 210.

146. 268 U.S. 510 (1925).

147. *Id.* at 534–35.

148. 435 U.S. 618 (1978). *See supra* text accompanying notes 35–36.

149. *Id.* at 626 (quoting 5 WRITINGS OF JAMES MADISON 288 (G. Hunt ed. 1904)).

150. *Id. See* TENN. CONST. ART. 2, §§ 9, 25, 26; TENN. CODE ANN. §§ 8-1801, 8-1803 (Supp. 1977).

151. 455 U.S. 252 (1982). *See supra* text accompanying notes 40–44.

152. 26 U.S.C. § 1402(g).

153. *Lee*, 455 U.S. at 256. ("The exemption provided by § 1402(g) is available only to self-employed individuals and does not apply to employers or employees." Mr. Lee was not self-employed.)

154. *See supra* text accompanying notes 68–86.

155. 476 U.S. 693 (1986).

156. 108 S. Ct. 1319 (1988).

Roy involved the denial of government benefits because of the claimant's refusal, based on a religious objection, to use a Social Security number. A majority of the Court concurred in Chief Justice Burger's statement that, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[157] Thus, the Court implicitly held that internal government affairs do not burden religion in the free exercise sense and therefore the threshold was not passed and no balancing test was applied. One will recall that Burger's opinion went on to apply the "minimal scrutiny" balancing test discussed previously in section II of this Comment.[158] But, as mentioned earlier, this part of his opinion was not joined by a majority of the Court and drew a sharp dissent from Justice O'Connor.[159]

The same result, failure to meet the threshold, is obtained under the Burden Plus analysis. The burden was the same as in *Sherbert*, *Thomas*, *Hobbie*, and *Frazee*: religious conduct versus monetary compensation.[160] But, there was no "plus": the *Goldberg* holding gives a right to benefits to those "persons *qualified* to receive them."[161] Thus, use of a Social Security number is a qualifier to the receipt of benefits.[162] Hence, there is no "plus" and the claimant fails to meet the threshold under the Burden Plus analysis as well.

Finally, the Burden Plus standard provides the proper result in *Lyng*. There, the Court held that road construction and timber harvesting in an area used by Native Americans for site-specific religious purposes did not prohibit the free exercise thereof.[163] The threshold was not met, therefore a balancing test was not applied.

The Burden Plus analysis produces an identical result. The burden was the "virtual destruction" of the Native Americans' ability to practice their religion.[164] However, there was no "plus." The "plus" could have been the Native Americans' property rights in the high country land. But as Justice O'Connor pointed out, "[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[165] Therefore, the threshold is not met under the Burden Plus analysis either.

2. *Application to a Contemporary Case*

While squaring with the Court's result, the Burden Plus standard provides a superior analytical framework for a recently decided California Supreme Court case. The case presented the unusual situation of assertion of the free exercise clause as a

157. *Roy*, 476 U.S. at 699.

158. *See supra* text accompanying notes 49–53.

159. *See supra* note 49 and accompanying text.

160. *See supra* text accompanying notes 49–51.

161. Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (emphasis added). *See supra* text accompanying notes 141–42.

162. In Roy's case, it was Aid to Families with Dependent Children. 42 U.S.C. § 602(a)(25) provides in relevant part: "as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the state agency his social security account number." *See Roy*, 476 U.S. at 698.

163. *See supra* text accompanying notes 100–13.

164. *Lyng*, 108 S. Ct. at 1326. *See supra* text accompanying note 99.

165. *Id.* at 1327 (emphasis in original).

defense. Invoking the balancing test, the court found the balance to weigh against the free exercise claimant.

Molko v. Holy Spirit Association[166] was based on the similar, but separate, experiences of David Molko and Tracy Leal. Both unwittingly became "members" of the Reverend Sun Myung Moon's Unification Church. Both had become involved with the group only after group members had repeatedly denied any religious affiliation. After each had spent several months with the group, the religious orientation was revealed, but each stayed to undergo "advanced training." Upon completion of their training, both were sent out in public to "witness." While witnessing, each was abducted by "deprogrammers" hired by their parents; shortly after abduction, both renounced any association with the Unification Church. The two then brought suit in state court against the Church alleging willful misrepresentation, reliance upon which resulted in both emotional and financial damages.

In defense, the Church claimed that the state-law tort action impermissibly burdened rights protected by the free exercise clause. In analyzing the free exercise claim, Justice Stanley Mosk found that the religion aspect of the threshold was met, stating, "Molko and Leal do not contest the sincerity of . . . the Church's beliefs . . . ."[167] He impliedly found that the prohibit aspect of the threshold had been met, stating, "[g]overnment action burdening religious conduct is subject to a balancing test . . . ."[168]

Mosk found the burden on free exercise to be "marginal"[169] and then went on to "consider whether a compelling state interest"[170] justified the burden. He found two such interests: the state's interest in protecting safety, peace, and order, and the state's interest in protecting the family institution.[171] Mosk completed application of the strict scrutiny balancing test by stating, "we perceive no less restrictive alternative available . . . ,"[172] and concluded that "the federal . . . Constitution [does not bar] Molko and Leal from bringing traditional fraud actions against the Church . . . ."[173]

The Burden Plus standard provides the same result, but adds substantial clarity to Justice Mosk's threshold analysis. The burden is tort liability. The "plus" is the United States Supreme Court's recognition in *Heffron v. International Society for Krishna Consciousness*[174] that "oral and written dissemination of . . . religious views

166. 46 Cal. 3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46 (1988). *See also* Reidinger, *Puncturing the Faith Defense*, ABA JOURNAL, Feb. 1989, at 89–90.

167. *Molko*, 46 Cal. 3d at 1115, 252 Cal. Rptr. at 134, 762 P.2d at 58 (emphasis omitted).

168. *Id.* at 1113, 252 Cal. Rptr. at 132, 762 P.2d at 56.

169. *Id.* at 1117, 252 Cal. Rptr. 136, 762 P.2d at 60. Justice Mosk stated:

> Yet these burdens, while real, are not substantial. Being subject to liability for fraud does not in any way or degree prevent or inhibit Church members from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading Reverend Moon's message among the population. It certainly does not, like the educational requirement in *Yoder*, compel Church members to perform acts "at odds with fundamental tenets of their religious beliefs."

Id. (citation omitted).

170. *Id.* Note the use of the strict scrutiny balancing test.

171. *Id.* at 1118, 252 Cal. Rptr. at 136, 762 P.2d at 60.

172. *Id.*

173. *Id.* at 1119, 252 Cal. Rptr. at 137, 762 P.2d at 61.

174. 452 U.S. 640 (1980).

and doctrines is protected by the First Amendment."[175] Thus, the prohibit threshold is met and the strict scrutiny balancing test is properly applied.

This application demonstrates a major advantage of the Burden Plus standard: establishment with clarity that there is a threshold requirement to invocation of free exercise protection and clarification of how that threshold is met.

3. *Hypothetical Application*

Suppose that in light of the recent controversies surrounding the alleged improprieties of several television evangelists, a state legislature passes a law prohibiting television broadcasts by all such persons. Suppose too that the court hearing the "televangelists'" challenge holds that the enactment is a valid "time, place and manner" regulation (because of the existence of other venues such as live performances and radio broadcasts) such that the televangelists are left to rely upon a free exercise claim. Should the strict scrutiny balancing test be applied? Given the statute's substantial infringement on religion, most would intuitively say "yes." Under the Burden Plus analysis, the response is also "yes."

Sincerity is conceded, meeting the religion aspect of the threshold. The Burden Plus standard is used to analyze the prohibit aspect. The burden is obvious: "virtual destruction" of the respective religions[176] since the television audience provides a substantial part, if not the entirety, of a televangelist's congregation. The "plus" would be the previously mentioned recognition in *Heffron*[177] that "oral and written dissemination of . . . religious views and doctrines is protected by the First Amendment."[178]

Hence, the Burden Plus analysis allows the court, consistent with Supreme Court precedent, to apply the strict scrutiny balancing test in a manner that provides a clear analysis, in a situation where most would agree that such a strict judicial examination should be undertaken.

4. *Advantages*

The Burden Plus standard reconciles existing free exercise clause precedents and in that sense provides a superior analytical framework for resolution of future claims. In addition, it provides a concrete standard by which the existence of the heretofore amorphous "burden" can be established.

The Burden Plus standard provides for certainty in an area of the law left uncertain by the recent Supreme Court decisions in *Roy* and *Lyng*. It allows a court to determine, with certainty and consistent with existing precedent, whether or not to apply the strict scrutiny balancing test.

The Burden Plus standard provides clarity in the analysis of free exercise claims.

---

175. *Id.* at 647.

176. Recall that "virtual destruction" was used by the Court of Appeals to describe the result of the government action in *Lyng*. *See supra* text accompanying note 99.

177. 452 U.S. 640 (1980). *See supra* text accompanying notes 174–75.

178. *Id.* at 647.

It makes clear that there is in fact a threshold requirement to the invocation of the free exercise balancing test. And, of course, it makes clear how that threshold is met.

Further, the Burden Plus standard is consistent with the notion that there is a "dynamic tension" between the free exercise clause and the establishment clause.[179] A finding in favor of a free exercise claimant may tend toward an impermissible "establishment" of that religion. However, by requiring an additional right or entitlement, the Burden Plus standard allows a court to use the free exercise clause to "carve" a "permissible zone of accommodation" out of the establishment clause.[180]

Perhaps the most impressive advantage of the Burden Plus standard is the fact that it is consistent with the intent of the Framers of the Constitution. After all, in addition to allowing for the free exercise of religion, the first amendment also prohibits the government from promoting the establishment of religion. The Framers realized that there must be a line where accommodation stops. The location of that line is where the accommodation tends towards establishment.[181] James Madison, in a statement that had the support of Federalists and Anti-Federalists alike, said that the federal government had not the "shadow of a right . . . to intermeddle with religion."[182] Madison, along with Thomas Jefferson was "as much concerned with freedom *from* religion as with freedom *of* religion . . . ."[183] Even Patrick Henry, a staunch supporter of religious liberty, "called for a ban on the establishment of one sect in preference of others."[184] The Burden Plus standard requires the claimant to have an additional right or entitlement insuring that if the court finds in favor of the claimant, it can be seen as upholding the right or entitlement as much as the free exercise of religion. A decision resting on two such aspects will have less of a tendency to be viewed as a decision that promotes establishment than would a decision based solely on the religious aspect.

5. *Rebuttal of Potential Criticisms*

One may contend that there is an "absolute" right to invoke free exercise clause protection upon showing that there is a burden on the free exercise of religion. There are two responses to this contention. First, it is simply not true in light of the *Lyng* decision, in which it was conceded that a burden existed but the Court rejected the invocation of free exercise clause protection. Second, there can be no "absolute" right because the free exercise clause, as discussed earlier, is co-existent with the establishment clause. Burdens upon religious claimants have been upheld where the

179. *See supra* text accompanying notes 16–18.

180. Recall that this is Professor Tribe's description of the conflict between the free exercise clause and the establishment clause. *See supra* note 16 and accompanying text.

181. *See generally* CURRY, *supra* note 12.

182. CURRY, *supra* note 12, at 208.

183. P. KAUPER, RELIGION AND THE CONSTITUTION 48 (1964).

184. CURRY, *supra* note 12, at 213.

relief of such a burden would be seen as promoting impermissible establishment interests.[185]

A second criticism may be that there really is not a threshold requirement to the invocation of free exercise clause protection. Although the Supreme Court has never explicitly stated that there is a threshold requirement, a close reading of the free exercise cases will reveal that a threshold analysis has been undertaken in each case. The Burden Plus standard clarifies that, indeed, a threshold exists, and makes clear how the threshold is met.

A third criticism may be that an explicit threshold analysis in addition to the balancing analysis is simply a waste of time. However, use of an analytical standard that promotes both clarity and certainty, as discussed earlier, can hardly be viewed as a waste. Further, a logical analysis is not a waste of time when the rights implicated are so important that they were included in the *first* amendment to the Constitution.

Finally, the critic may question the propriety of a "plus" standard. As discussed at the beginning of this section proposing the Burden Plus standard, a "plus" standard has been previously used in the first amendment context. The notion of a "plus" standard is also used both in the procedural due process and antitrust contexts. Further, the cases establishing the boundaries of a right or entitlement in the due process context[186] can be used by analogy in the free exercise context to establish the proper parameters of the "plus." In addition, the "plus" insures that when a free exercise claim is upheld, it is unlikely to tend toward impermissible establishment interests.

VI. Conclusion

The current doctrine with respect to the burden aspect of the free exercise clause is truly a "gray area."[187] It is not asserted that the Burden Plus standard has any talismanic properties. However, this Comment's application of the standard demonstrates the analytical clarity and certainty that the Burden Plus standard provides. These and several other substantial advantages have been advanced, and several legitimate criticisms have been rebutted.

It is ironic that in this year of the bicentennial anniversary of the ratification of the Bill of Rights, the protection afforded by the religion clause of the first amendment has been pared down. The free exercise claimant who previously put on the armor of a "strict scrutiny" balancing test against governmental impingement on religious activity by merely showing a sincere belief and a burden on the activity,

185. *See, e.g.*, Estate of Thorton v. Caldor, Inc., 472 U.S. 703 (1985) (Connecticut statute requiring all employers to give any employee the day off on that employee's Sabbath struck down as violative of the establishment clause).

186. Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972). For a discussion of the development of the interests protected by due process safeguards, see Tribe, *supra* note 14, §§ 10-9, 10-10, 10-11.

187. *Fletch* (MCA Video 1985). Gray because in light of *Lyng*, it is unclear what constitutes a "prohibition" for the purposes of invoking the protection of the free exercise clause. *Lyng* establishes that "frustration" or "inhibition" does not constitute a prohibition, but leaves open the question of what does constitute a prohibition. Under the Burden Plus standard there is a prohibition (allowing the claimant to don the armor of strict scrutiny) if the claimant can show interference with religious activites or beliefs and the existence of an appropriate plus factor.

now faces a considerably higher threshold in attempting to don the knight's garb to do battle with those attempting to infringe on religious rights. This Comment has proposed and discussed the Burden Plus standard as a superior analytical framework to determine when the free exercise threshold is met and as a way to ensure "liberty and justice for all."

Thomas E. Geyer