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Public Policy Against Religion: Doubting Thomas

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In free exercise cases, the Supreme Court has adopted a least restrictive alternative test in an attempt to maximize protection for religiously motivated practices. Because the least restrictive alternative test only considers the importance of the governmental interest and the availability of alternative means to accomplish those interests, thereby ignoring the importance of the burdened religious activity to the individual and the degree of burden on religious activity, all religious interests are treated equally when asserted against a governmental interest. Under such an inflexible and brittle test, the Supreme Court has recently denied religious claims which had previously been recognized. The author argues that only a test which considers all aspects of a religious claim affords permanent and maximum protection of religious interests.

I. INTRODUCTION

A constitutional liberty is the right of an individual to be exempt from a statute that penalizes, burdens, or disadvantages certain conduct or beliefs. It is immaterial if the statute specifically addresses the conduct or belief, in which case the statute is invalid on its face, or is of general application, in which case the statute is invalid as applied. In either case, in passing on a constitutional challenge, the Court must *evaluate* the individual's

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assertion that he should not be subject to the statute, *evaluate* the government's interest in enforcing the statute, and somehow *resolve* the conflict. The very nature of such an evaluation by the Court suggests a process that is sensitive, discriminating, and fact-oriented. The Court is called upon to assess the relative importance of the government's application of the statute to the particular claimant, the availability of alternative, less burdensome means to effectuate the same ends, the degree of the burden on the claimant's interest, and the importance of that individual interest.

When the asserted constitutional liberty interest is founded upon the free exercise clause of the first amendment, the individual claims that he is different from others because of his religion and thus entitled to an exemption that others with different religious beliefs cannot assert. In such cases, the balancing test described above is likely to invite two criticisms. First, evaluation of both the degree of the burden and the importance of the individual interest places the Court in the unseemly position of deciding what actually constitutes a religion and its necessary practices. Secondly, as a criticism applicable to "balancing" in general, the Court appears to make policy decisions and to substitute its views for those of the legislature and drafters of the Constitution in a fact-oriented opinion decided without regard to any general principles and with relatively little precedential value.

For whatever reason, the Supreme Court has moved completely away from anything resembling a balancing approach in free exercise cases. In what appeared to be an attempt to maximize protection for religiously motivated practices, the Court in *Thomas v. Review Board*[1] finally settled on the least restrictive alternative approach for *all* types of burdens[2] challenged under the free exercise clause. In *Thomas,* the Court awarded relief to an individual whose pursuit of a religious practice made him ineligible for a public benefit. The Court felt constrained to follow an earlier case where, as in *Thomas,* the burden was the denial of unemployment compensation.[3]

This least restrictive alternative test purports to focus on only the former two elements of the balancing test; the relative importance of the governmental interest and the availability of alternative means to accomplish those governmental ends, including an

1. 450 U.S. 707 (1981) [hereinafter cited as *Thomas*].

2. *See infra* notes 65-67 and accompanying text.

3. Sherbert v. Verner, 374 U.S. 398 (1963) (violation of free exercise clause by denial of unemployment benefits to one who was fired because her religious beliefs would not permit her to work on Saturdays) [hereinafter cited as *Sherbert*]. See *infra* notes 17-22 and accompanying text for discussion of *Sherbert.*

exemption for the claimant from the general regulation. Two cases decided subsequent to *Thomas,* however, denied a religious claim which had been previously recognized by the Court[4] and suggest that the apparent arrival of a new settled approach which maximizes protection of religious interests was illusory. This new unsettledness is especially curious in light of the fact that all of the opinions were written by Chief Justice Burger.

This article will suggest that the certainty promised by *Thomas* does not exist, because it *cannot* exist. The same test cannot be applied to both specific prohibitions of religious practices and the indirect financial burdens upon members of particular religious groups. The two situations are completely distinguishable. The *Thomas* approach refuses to weigh or balance the religious claim advanced, thereby *reducing* all religious claims to a lowest common denominator when measured against an asserted secular purpose. The Court's approach further treats claims of religious privilege and claims of personal autonomy equally, thus jeopardizing our religious diversity. Additionally, the Court seems unable to assess the importance of the governmental interest asserted.

II. FORMER APPROACHES TO EVALUATING RELIGIOUS CLAIMS

Religion was of great importance during Revolutionary times.[5] The protection of the free exercise of religion and the prevention

4. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) [hereinafter cited as *Bob Jones Univ.*]; United States v. Lee, 455 U.S. 252 (1982) [hereinafter cited as *Lee*].

Bob Jones Univ. involved the right of parents to send their children to a religious school in satisfaction of compulsory attendance laws, one of the first rights ever recognized by the Court in this area. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (Oregon law requiring the education of children in public schools violated the parents' liberty interest in directing the upbringing and education of their children). Intervening cases had left the right unimpaired. Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory attendance laws beyond eighth grade violated free exercise clause); Lemon v. Kurtzman, 403 U.S. 602 (1971) (state aid to religious primary and secondary schools violated establishment clause). However, in *Bob Jones Univ.,* the Court, purporting to apply a least restrictive alternative test, upheld a burden on the right to choose a religious education—the loss of favorable tax treatment.

In *Lee,* the Court, again using a least restrictive alternative test, rejected the claim of individuals of the Amish faith for an exemption from the social security system, despite an earlier decision in Yoder v. Wisconsin, 406 U.S. 205 (1972), which allowed Amish parents to withdraw their children from public schools after the eighth grade.

5. *See* A. STOKES, CHURCH AND STATE IN THE UNITED STATES *passim* (1950).

of a federally established church were given high priority.[6] Given the widespread and diverse religious practices, a significant volume of litigation involving free exercise might have been expected to reach the Supreme Court of the United States. That so few cases have reached the Court may be attributable to the sensitivity of legislatures and law enforcement officials to such concerns. However, the Supreme Court, in those few cases that have reached it, has not tread so lightly.

Where particular conduct or activity is singled out for sanctions or burdens for non-secular (religiously discriminatory) reasons, the regulation should be *per se* invalid. The free exercise clause means nothing if it is not a prohibition against disparate treatment or special burdens on personal practices solely because they are religious.

However, where the regulation is cast in secular terms, the problem has been intractable.[7] Originally, the Court attempted to draw a distinction between belief and action.[8] No distinction, however, was drawn between actions that were part of a worship service and those conducted in everyday life but dictated by religious belief. The consequence of such an approach was to protect the *belief* absolutely, but the *practice* not at all.[9] The individual was subject to regulation without reference to the motive for his action. Until *Bob Jones University v. United States*[10] in 1983, there were no Supreme Court cases contributing to *modern* doctrinal development where the sanctioned or burdened activity was itself dictated by religious belief, as opposed to the sanctioning of conduct which indirectly burdened other religiously motivated

6. *See* U.S. CONST. AMEND. I; *see also* ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION *passim* (2d ed. Philadelphia 1836) (1st ed. Philadelphia 1830).

7. *Cf.* Epperson v. Arkansas, 393 U.S. 97 (1968) (curricular design of public school invalid where evolution *not* taught).

8. *See* Reynolds v. United States, 98 U.S. 145 (1878) (religious claim by members of the Church of Jesus Christ of the Latter-Day Saints [Mormons] was not permitted as a defense to federal prosecution for the practice of polygamy in United States territories no matter how important a religious exercise).

9. *See* Kurland, *Of Church and State and the Supreme Court,* 29 U. CHI. L. REV. 1 (1961). There is an added irony in that contemporary first amendment doctrine protects beliefs quite independently of any religious claim. The free exercise clause is thus superfluous under an approach that relies on a belief/action dichotomy. *See* Wooley v. Maynard, 430 U.S. 705 (1977) ("Live Free or Die" slogan on New Hampshire auto license plates may be taped over); Elfbrandt v. Russell, 384 U.S. 11 (1966) (public employment may not be conditioned on beliefs); Torasco v. Watkins, 367 U.S. 488 (1961) (public office may not be conditioned on beliefs); Board of Educ. v. Barnette, 319 U.S. 624 (1943) (free speech considerations compel that objecting student be excused from compulsory flag salute exercises in public schools).

10. 103 S. Ct. 2017 (1983).

conduct.[11]

Modern Supreme Court doctrine has concerned itself with the indirect burden case. In such a case, the prohibition or burdening of a particular kind of conduct or religious practice, which, although not religiously dictated, is nonetheless indirectly burdened by the governmental statute. The burden is usually of a financial nature, either through the withholding of a benefit or the imposition of a sanction.[12] The belief/action test was abandoned and a new balancing approach[13] manifested itself clearly in the *Sunday Closing Law Cases.*[14] In those cases, Orthodox Jewish merchants claimed that because their religious beliefs prevented them from working on Saturday, the statute preventing them from operating their retail establishments on Sunday seriously impaired their ability to earn a livelihood. They did not claim, however, that their religious beliefs dictated that their stores be open on Sunday.

The plurality opinion stated that regulations advancing secular goals that indirectly burdened religious observances were valid unless alternative means would not impose such a burden.[15] It was not clear to the plurality that such alternatives existed, given the increased difficulties of enforcement and the possible increase of commercial noise that granting an exemption might create.[16]

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11. The Court had refused to hear argument or write an opinion when presented with the opportunity in cases where the conduct was allegedly part of a worship service. *See* Town v. State *ex rel.* Reno, 377 So. 2d 648 (Fla. 1979), *appeal dismissed and cert. denied,* 449 U.S. 803 (1980) (state has compelling interest in restricting use of marijuana which overrides free exercise interests of persons claiming use as part of religious ceremony); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom.* Bunn v. North Carolina, 336 U.S. 942 (1949) (conviction under an ordinance prohibiting "handling" of poisonous reptiles upheld against religious exercise claim).

12. *E.g.,* Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing law made it more difficult for Orthodox Jew who would not work on Saturday to earn a livelihood).

13. A balancing test involves consideration of the importance of the religious practice. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I, The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381 (1967); Weiss, *Privilege, Posture and Protection "Religion" in the Law,* 73 YALE L.J. 593 (1964).

14. Braunfeld v. Brown, 366 U.S. 599 (1961). In a companion case, Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961), the statute challenged was titled "Observance of the Lord's Day Act." The Court upheld the statute holding that the legislators' motive was irrelevant. *Id.* at 630. *Contra* Epperson v. Arkansas, 393 U.S. 97 (1968) (curricular design of public school invalid where evolution *not* taught).

15. 366 U.S. at 607.

16. The deference to legislative convenience was in part caused by the desire

The scope of review, while an improvement over the belief/action test, was still too relaxed to guarantee serious protection against indirect burdens to religious interests.

A dramatic new direction was announced in *Sherbert v. Verner,*[17] the first of the unemployment compensation cases. The indirect financial burden in *Sherbert* was the withholding of a public benefit. The state had determined that a Jehovah's Witness who would not work on Saturday was not "available for work" as required by the state's unemployment compensation statute and thus not eligible for unemployment compensation. The Supreme Court characterized this particular burden as "less direct" than that involved in the *Sunday Closing Law Cases.*[18] Rather than being deferential to the state's choice of means, the Court cast the burden on the state to demonstrate that there were no alternative means that would not infringe upon the asserted rights[19]—a burden which is next to impossible to meet.[20]

Whether the Court had finally settled on a new approach remained uncertain, however, because its least restrictive alternative language was unnecessary to the decision. The unemployment compensation scheme provided a possible exemption for Sunday worshipers;[21] therefore, the case could have been decided on grounds of religious discrimination. Furthermore, the exemption for Sunday worshipers suggested that the state's interest in its rigid view of the meaning of the requirement "available for work" was something less than compelling.[22]

The potential universality of the technique announced in *Sherbert* was put in question nine years later in *Wisconsin v. Yoder,*[23] a case which came closer to the more direct burden of the *Sunday Closing Law Cases.*[24] In *Yoder,* the Court affirmed the reversal of

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to avoid a state-conducted inquiry into the sincerity of religious beliefs. *Id.* at 609. In contrast, the dissent took a more non-evaluative, burden-shifting approach: "We are not told that those States [which grant exemptions] are significantly noisier, or that their police are significantly more burdened. . . ." *Id.* at 614-15 (Brennan, J., dissenting).

17. 374 U.S. 398 (1963). The opinion was written by Justice Brennan, the dissenter in Braunfeld v. Brown, 366 U.S. 597, 610 (1961); *see supra* note 16.

18. 374 U.S. at 408.

19. *Id.* at 407.

20. *See* Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection,* 48 MO. L. REV. 587, 617-19 (1983).

21. 374 U.S. at 406.

22. *See id.* at 403. Justice Brennan borrowed this idea from the free speech case of NAACP v. Button, 371 U.S. 415, 438 (1963). This "less than compelling" evaluation did not appear in his Sunday Closing Law Cases dissent. *See* Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (Brennan, J., dissenting).

23. 406 U.S. 205 (1972).

24. Braunfeld v. Brown, 366 U.S. 599 (1961). For discussion of *Braunfeld,* see *supra* notes 13-16 and accompanying text.

convictions of Amish parents who had refused to comply with the law subjecting their children to compulsory education beyond the eighth grade. The opinion by Chief Justice Burger adopted a balancing approach, although one not as deferential to the state as that in the *Sunday Closing Law Cases.*[25] The approach, however, was not a full-fledged balancing test. The state's interest in one or two years of schooling beyond the eighth grade[26] was not strongly defended in terms of content and received no support from the Court. Furthermore, there was no discussion of how the state might pursue its interest in the further education of students apart from mandating full-time attendance at school.

The uncertainty over the appropriate test to be employed in various factual situations became apparent in *McDaniel v. Paty,*[27] a case involving the disqualification of clergy from serving as state legislators. The eight Justices involved in the decision, although agreeing that the facial discrimination was itself invalid, could not produce a majority opinion as to why. The major disagreement was over the effect of *Torasco v. Watkins,*[28] which struck down a requirement that all Maryland public office holders take an oath declaring their belief in God. In the plurality opinion, Chief Justice Burger held that *Torasco* was a "belief" case and thus not applicable to the instant "status" case.[29] Instead, he relied on *Sherbert* to place the burden of justification on the state. " '[T]o condition the availability of benefits [including access to the ballot] upon the appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties.' "[30] Neither the state's nor the American experience provided any support for the state's assertion that clergy would be less faithful to their oaths of office or less careful of anti-establishment interests than their unordained

25. 406 U.S. at 214. Justice Brennan joined Justice White's concurring opinion, *id.* at 237, which also expressly used a balancing test. Coupled with the fact that the Chief Justice was not on the Court when *Sherbert* was decided, this decision cast further doubt on the universality of the least restrictive alternative approach.

26. WIS. STAT. § 118.15(1)(a) (West 1969) set school age requirements of 7 to 16 years but not grade level requirements. The statute was subsequently revised to comply with *Yoder. See* WIS. STAT. § 118.15 (West Supp. 1983).

27. 435 U.S. 618 (1978).

28. 367 U.S. 488 (1961).

29. 435 U.S. at 626-27.

30. *Id.* at 626 (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

counterparts.[31]

Justice Brennan, in his concurring opinion, however, thought the facial discrimination was in itself enough to invalidate the statute under *Torasco.*[32] Noting that the statute was neither implemented by religiously neutral means nor in furtherance of an avowedly secular purpose, Justice Brennan concluded that not only was the balancing test of *Yoder* inapplicable, but the *consideration* of *any* less restrictive means under *Sherbert* was also inappropriate.[33] Justice Brennan further stated that the interest in preventing those more intensely involved in religion from injecting sectarian goals and policies into the lawmaking process itself raised establishment clause questions.[34]

III. The Adoption of the Least Restrictive Alternative Test

As late as 1980, writers asserted that the free exercise cases should be examined under a balancing test.[35] Regardless of whether this was a fair characterization of the preceding cases, that assertion would not live out the 1980 term during which *Thomas*[36] was decided.

In *Thomas,* the Chief Justice applied Justice Brennan's *Sherbert*[37] language. However, unlike *Sherbert,* the facts of *Thomas* did not present the option of deciding the case on religious discrimination grounds or on the basis of a weak governmental interest.[38] Petitioner, a Jehovah's Witness, was transferred from his job when the rolling foundry where he had worked was closed.[39] Subsequent to the closing of the foundry, the only position remaining open for petitioner with the employer was in a department that fabricated turrets for military tanks[40] from the sheet steel that may have been produced in the rolling foundry in which

31. *Id.* at 629.

32. *Id.* at 632 (Brennan, J., concurring).

33. *Id.* at 634-35.

34. *Id.* at 636. The same argument is raised in situations where religious *exemptions* are granted by statute. For instance, it has been argued that had the unemployment compensation statute in *Sherbert* been written by the legislature to provide for special benefits for Sabbatarians (which Justice Brennan held the free exercise clause mandated) the establishment clause would be violated. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. Pitt. L. Rev. 673, 690-92 (1980).

35. Choper, *supra* note 34, at 674; Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities,* 90 Yale L.J. 350, 355 (1980).

36. Thomas v. Board of Review, 450 U.S. 707 (1981).

37. Sherbert v. Verner, 374 U.S. 398 (1963); *see supra* notes 17-22 and accompanying text.

38. *See supra* notes 21-22 and accompanying text.

39. 450 U.S. at 710.

40. *Id.*

petitioner had previously worked.[41]

Claiming his religious principles, which were not compelled by the creed,[42] prevented him from working *directly* on weapons, he asked for a transfer. When none was forthcoming, he quit and filed for unemployment compensation.[43] The state denied his claim stating that "good cause" for terminating employment must be "job related and objective in character"[44] in order to comply with the requirements for obtaining unemployment compensation benefits. The court below held that any indirect burden on a free exercise right was justified because of the state's interest in the integrity of its unemployment compensation fund.[45]

Chief Justice Burger first concluded that the petitioner's reasons for refusing employment were religious rather than personal.[46] Therefore, because a religious belief was burdened by the denial of benefits,[47] the Court held that the state was obliged to show that it had chosen the "least restrictive" means of achieving some compelling state interest.[48] In dismissing the state's asserted interest in avoiding unemployment, protecting against the burden on the unemployment compensation fund if persons were permitted to leave jobs for personal reasons, and avoiding detailed probing by employers into job applicants' religious beliefs,[49] the Court found no evidence that individuals in petitioner's position would create any significant problem.[50]

The balancing test appeared to be gone. It had been replaced by a universal test that was next to impossible for a state to meet.[51] Although reaction to the case has been limited,[52] at least

41. *Id.* at 711.

42. Evidence was introduced below that the belief was personal. *Id.* at 715.

43. *Id.* at 710.

44. *Id.* at 712-13.

45. *Id.* at 713. The Court also asserted that awarding such benefits would violate the establishment clause, *id.*, a claim rejected in *Sherbert.*

46. The fact that he was "struggling" with his beliefs or that they were not shared by other members of his faith was not fatal. 450 U.S. at 715.

47. *Id.* at 716-17. According to the Court, the state's forcing the choice between following the precepts of one's religion or forfeiting a benefit is the same kind of burden as imposing a fine for Saturday worship. *Id.* at 717 (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

48. 450 U.S. at 718.

49. *Id.* at 718-19.

50. *Id.* at 719. The implication is that the more widespread a religious practice is the less *constitutional* protection is available.

51. An impossible test is an unworkable one. The experience of the same test in equal protection is described in Seeburger, *supra* note 20.

one commentator has criticized the decision both because of its factual analysis and its doctrine.[53] However, it is the least restrictive alternative test finally adopted in *Thomas* that is the focus of this article, rather than its particular result or holding.

As is witnessed by the two free exercise cases decided since *Thomas,*[54] this technique, much more than a balancing test,[55] lends itself to insensitivity of religious concerns. The test recognizes no distinctions in the degrees, directness, or types of burdens and is insensitive to differences in governmental policy. The most incidental inconvenience suffered by an individual in pursuit of a unique, arguably religious personal conviction, when burdened by even a critical government interest, is treated in the exact manner as a widely shared traditional religious practice when burdened by a relatively minor governmental interest. Government policy is trivialized and personal predilection exalted. Sooner or later religious interests must receive short shrift under such a test. It has been sooner rather than later.[56]

IV. Critique of the Least Restrictive Alternative Test

Any challenge to state activity on free exercise grounds elicits at least three possible inquiries: (1) when is the exercise or belief "religious"?; (2) what constitutes a "burden"?; and (3) how does the court identify a "compelling" state interest?[57]

The first question, when is the belief or exercise "religious," presents long standing problems not unique to the least restric-

52. It was noted in only six law reviews: Note, *Thomas v. Review Board: How Far is the Supreme Court Willing to Go?,* 10 Ohio N.U. L. Rev. 193 (1983); Note, *Constitutional Law: The Religion Clauses—A Free Rein to Free Exercise?,* 11 Stetson L. Rev. 386 (1982); Note, *Religious Discrimination in the Workplace: A Comparison of Thomas v. Review Board and Title VII Cases,* 33 Syracuse L. Rev. 843 (1982); Note, *Unemployment Benefits and the Religion Clauses: A Recurring Conflict,* 36 U. Miami L. Rev. 585 (1982); 22 Santa Clara L. Rev. 235 (1982); 59 U. Det. J. Urb. L. 217 (1982). The case was generally praised for its protection of religious interests.

53. Professor Garvey delivers a convincing attack on two fronts. First, the failure to pay compensation does not burden the free exercise of religion and second, to treat it as a restriction on liberty at all is to do violence to the notions of equality underlying the establishment clause. Garvey, *Freedom and Equality in the Religion Clauses*, 1982 Sup. Ct. Rev. 193. On the latter point, see also Choper, *supra* note 34.

54. *Bob Jones Univ.,* 103 S. Ct. 2017 (1983); *Lee,* 455 U.S. 252 (1982).

55. *Contra* Note, *supra* note 35, at 355-62.

56. The least restrictive alternative principle might be likened to cutting the Gordian knot. It presents a quick resolution to the problem at hand at the expense of having no useful rope left over.

57. Implicit in the statement of this test is the notion that a non-compelling state interest pursued by the least restrictive means which nonetheless burdens religion is *per se* invalid.

tive alternative test. The belief/action distinction avoided them.[58] The balancing test struggled with them.[59] It is clear, however, that a "personal philosophical choice" not "rooted in religion" is not protected by the free exercise clause.[60] The claimant must in fact hold to the belief or no interest is invaded.[61] The belief, however, need not be shared.[62]

Notwithstanding these considerations, government determinations, through the courts or otherwise, of what is and what is not a religion for purposes of free exercise protection in and of itself raises serious questions under the establishment clause.[63] Under any test, however, a sincerely held belief inducing action that foregoes a benefit is likely to be treated sympathetically.[64] In any event, no religious claim has ever been rejected by the Supreme Court on the grounds that it did not involve "religion."

The second inquiry, what is an unconstitutional burden, is also effectively abandoned as a factor by the least restrictive alternative test. Deferential treatment based on the kind of burden, let

58. *See* Reynolds v. United States, 98 U.S. 145 (1878). For discussion of *Reynolds,* see *supra* note 8.

59. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); *see also supra* notes 23-26 and accompanying text. Notwithstanding the state's concession or the finding below on this point, the Court made its own determination, which in that particular case happily was not remotely problematic. For a fuller discussion on the development from *Braunfeld* through *Sherbert* to *Yoder,* see Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause,* 1973 DUKE L.J. 1217, 1220-30 (1973).

60. Thomas v. Review Board, 450 U.S. 707, 713 (1981). Such beliefs are, however, protected against compulsory expression of ideas. *See* cases cited, *supra* note 9.

61. The fact that the claimant is "struggling" with the belief or having some difficulty articulating it is not fatal to the claim. 450 U.S. at 715.

62. "[I]t 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." *Id.* at 716. *See also* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment,* 45 U. CHI. L. REV. 805 (1978). It is not to be read that tenets of the faith must be shared or based on scripture, although "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause. . . ." *Thomas,* 450 U.S. at 715.

63. *See generally,* Choper, *supra* note 34; Garvey, *supra* note 53; *see also* Justice Harlan's dissenting opinion in *Sherbert,* 374 U.S. at 418, and concurring opinion in Welsh v. United States, 398 U.S. 333, 344 (1970) (reaching constitutional issue on statutory grant of exemption from combatant military service for persons conscientiously opposed to war because of religious training and beliefs and stating that Congress cannot draw the line between religious, theistic or non-theistic, and secular beliefs).

64. *E.g., Thomas,* 450 U.S. at 707; *Sherbert,* 374 U.S. at 398.

alone its degree, is foreclosed. Three types of possible burdens exist: burdens or prohibitions on an activity designated as a religious exercise, such as the act of worship;[65] burdens or prohibitions on acts outside the worship service deemed compelled or banned by the faith;[66] and individual desires to perform a prohibited or burdened act, whether or not compelled by religious belief, in order to facilitate religious practices, when such an act would make the individual unavailable for a particular benefit.[67] The only possible latitude available in this inquiry is the Court's statement in *Thomas,* made without discussion or apparent consideration, that the benefit withheld (the burden) must be "important."[68]

In determining the third inquiry, the importance of a governmental interest in religion cases, the Court's performance heretofore has been erratic at best.[69] For example, the government's interest in protecting children from harmful influences can prevent a girl under 18 from selling literature in a public place as her religion demands,[70] but it cannot compel her attendance at a public school[71] or at any school past the eighth grade.[72] The government, in its desire not to subsidize personal choices, may withhold educational,[73] but not unemployment benefits.[74] Assuming an important interest can be identified with some objectivity, the least restrictive alternative test contemplates granting individual exemptions. Where the interest is in saving money, the government must show that extending the benefit would cost more

65. The Eucharist in some Christian sects compels minors to drink alcoholic beverages. *See* Town v. State *ex rel.* Reno, 377 So. 2d 648 (Fla. 1979), *appeal dismissed and cert. denied,* 449 U.S. 803 (1980); *see also supra* note 11.

66. *E.g.,* Reynolds v. United States, 98 U.S. 145 (1878). For discussion of *Reynolds,* see *supra* note 8.

67. *E.g., Thomas,* 450 U.S. at 707.

68. *Id.* at 717. This may suggest that the distinctions made between Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (hearing required prior to garnishment of wages because of their importance) and Mathews v. Eldridge, 424 U.S. 319 (1976) (no hearing for termination of social security disability payments required) will be observed. *See also* Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing required prior to termination of welfare benefits). The difficulty is that the "importance" does not refer to any adjudicative fact or any attribute of the claimant, but rather it seems to be a legislative fact. Thus in *Sniadach,* the claimant whose "important" wages were garnished could have been the owner of the company who received only a nominal wage, but lived on profits and investments.

69. For a discussion of the identification of important governmental objectives under an equal protection analysis, see Seeburger, *supra* note 20, at 609-10.

70. Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

71. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

73. Johnson v. Robison, 415 U.S. 361 (1974) (conscientious objectors performing alternative service excluded from veterans' educational benefits).

74. Sherbert v. Verner, 374 U.S. 398, 403-06 (1963).

than *ad hoc* determinations of eligibility.[75]

The danger is clear. A test with only one possible variable, the "importance" of a governmental interest, is a brittle one. When the Court is confronted with an interest which it presumes can be furthered through no less restrictive alternative means, that interest, almost by definition, must prevail. Religious interests of great dignity then *must be ignored.* This result was reached in each of the last two terms when interests essentially the same as those previously protected under earlier tests by the Court were asserted and rejected.

V. APPLICATION OF *THOMAS*

One year after *Thomas,*[76] *United States v. Lee*[77] denied "precisely the same religious interests"[78] that had prevailed in *Yoder v. Wisconsin.*[79] In *Lee,* an Amish employer resisted both the Social Security taxes imposed on himself and the withholding of his Amish employee's Social Security contributions on the grounds that such taxes burdened the scriptural requirement: " '[b]ut if any provide not . . . for those of his own house he hath denied the faith, and is worse than an infidel.' "[80] The Chief Justice's opinion for the Court acknowledged the existence of a burden on religion in this case. The Amish religion believes that it is sinful not to provide for their own elderly or needy, and prohibits the acceptance of benefits from and the contributions to the social security system.[81] Chief Justice Burger noted that there was no challenge

75. *See* Mathews v. Lucas, 427 U.S. 495 (1976) (differential treatment of legitimate and illegitimate offspring under Social Security Act); Frontiero v. Richardson, 411 U.S. 677 (1973) (differential treatment of male and female members of armed forces); *see also Thomas,* 450 U.S. at 719:

> There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment. . . . Nor is there any reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries [into religious beliefs].

Id. The Court did not consider the impact of this rule on the choice of other employees. This impact, for Dean Choper, is critical as an establishment clause matter. *See* Choper, *supra* note 34, at 690-96.

76. 450 U.S. 707.

77. 455 U.S. 252 (1982).

78. *Id.* at 263 n.3 (Stevens, J., concurring).

79. 406 U.S. 205 (1972), *see supra* notes 23-26 and accompanying text.

80. 455 U.S. at 255 n.3 (quoting from 1 Timothy 5:8).

81. *Id.*

to the sincerity of the belief and that there was no judicial role in determining whether the religionists' interpretation of the Amish faith was the proper one.[82] This forced the conclusion that "compulsory participation in the social security system interferes with their free exercise rights."[83] Thus, under the *Thomas* least restrictive alternative test, the only question remaining was whether the compulsory participation was "essential to accomplish an overriding governmental interest."[84]

At this point, instead of expressly placing the burden on the government to "justify an inroad on religious liberty,"[85] the Chief Justice implicitly engaged in the very deferential approach of the *Sunday Closing Law Cases.*[86] However, this deference was only to the importance of mandatory participation and the administrative difficulties in granting exemptions[87] and did not consider the *degree* of the burden on the Amish. The opinion quotes from the Senate report to the effect that voluntary coverage would undermine the soundness of the system.[88] The report, however, was not Congress' final word on the subject inasmuch as it provided for exactly the exemption sought by *Lee,* but limited it to the self-employed.[89] In *Lee,* therefore, the Chief Justice was willing to *suppose* a harm to the social security system. In *Thomas,* however, he presumed the *absence* of any harm to the Indiana Unemployment Compensation system by placing the burden of

82. *Id.* at 257 ("'[c]ourts are not arbiters of scriptural interpretation.'" (quoting *Thomas,* 450 U.S. at 716)).

83. 455 U.S. at 257. Obviously, like the Jewish merchants in *Braunfeld,* or the Jehovah's Witnesses in *Sherbert* and *Thomas,* the pursuit of the dictates of their religions forces them to forego certain financial benefits.

84. 455 U.S. at 257-58.

85. *Thomas,* 450 U.S. at 718.

86. Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961). For a discussion of these cases, see *supra* notes 14-16 and accompanying text.

87. The performance of the Court on this *Thomas* least restrictive alternative test is at best pathetic. Justice Stevens says simply, "[t]hus, if we confine the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case, the constitutional standard as formulated by the Court has not been met." *Lee,* 455 U.S. at 262 (Stevens, J., concurring). He concurred, however, because he rejected the *Thomas* test. *Id.* at 263. "In my opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability." *Id.* at 262.

88. *Id.* at 258.

89. *See* 26 U.S.C. § 1402(g) (1976). One could conclude that the government's interest is not that critical. *See supra* notes 21-22 and accompanying text. The opinion simply asserts that, "[s]elf-employed persons in a religious community having its own 'welfare' system are distinguishable from the generality of wage earners employed by others." *Lee,* 455 U.S. at 261. It does not tell us why this *factual* distinction is *legally* significant.

justification on the state.[90]

Most recently, in *Bob Jones University v. United States,*[91] the same deference to the importance of policy choices, without consideration of the impact on religion, characterized the Court's application of the *Thomas* least restrictive alternative test. Through Chief Justice Burger, the Court upheld a burden on religious schools and the individual's choice of a religious education for one's children. Again, a religious interest previously protected through a different test counted little in the constitutional analysis under the "liberal" test.[92]

Two schools were involved. The first, Bob Jones University, is a religious and educational institution dedicated to the teaching and propagation of "fundamentalist Christian religious beliefs."[93] It requires its teachers to be devout Christians and to teach all courses "according to the Bible."[94] Entering students are screened according to their religious beliefs and their private conduct is strictly regulated, including prohibitions on interracial dating and marriage which the sponsors of the University "genuinely believe" is forbidden by the Bible.[95] The second, Goldsboro Christian Schools, offers classes from kindergarten through high school in satisfaction of state compulsory education requirements. Its Biblical view that cultural or biological mixing of the races is a violation of God's command leads it to maintain a racially discriminatory admissions policy.[96]

The Internal Revenue Service (I.R.S.) determined that institutions which practice racial discrimination were not entitled to certain tax benefits.[97] After concluding that the I.R.S. correctly interpreted the statutes, the Court turned to the constitutional issue—whether that tax policy could be applied to schools that advance a sincerely held religious belief as a reason for engaging in

90. 455 U.S. 252, 256-58 (1982).

91. 103 S. Ct. 2017 (1983).

92. *Id.* at 2035. *But see* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

93. 103 S. Ct. at 2022.

94. *Id.*

95. *Id.*

96. *Id.* at 2023-24.

97. In particular, such institutions were no longer deemed eligible for an exemption from unemployment taxes under 26 U.S.C. § 501(c)(3) (1976) and contributions to them were not deemed deductible as charitable contributions under 26 U.S.C. § 170(a) (1976).

a particular practice, here racial discrimination, that is burdened by statute.

The entire constitutional analysis is contained in a single four-sentence paragraph with which no member of the Court took issue. Consistent with practice under the least restrictive alternative test, the Court assumed that the sincerely held beliefs were religious.[98] The second prong needed no elaborate discussion in finding a burden since "[d]enial of tax benefits will inevitably have a *substantial* impact on the operation of private religious schools. . . ."[99] Thus, the critical third prong was approached—whether the compelling government interest could not be accommodated through less restrictive means.

The first of the four sentences states, "[t]he governmental interest at stake here is compelling."[100] The Court attempts to bolster this assertion by adding the second sentence: "As discussed [above],[101] the Government has a fundamental overriding interest in eradicating racial discrimination in education[102]—discrimination that prevailed, with official approval, for the first 165 years

98. 103 S. Ct. at 2034 & n.28; *see also supra* notes 58-64 and accompanying text.

99. 103 S. Ct. at 2035 (emphasis added); *see supra* notes 65-68 and accompanying text. The Court did observe that the denial "will not *prevent* those schools from observing their religious tenets." 103 S. Ct. at 2035 (emphasis added). However, this is true of any indirect burden case, financial or otherwise.

100. 103 S. Ct. at 2035. As noted previously, the question of whether a governmental interest is "important" has been problematic and without apparent judicial standards. *See supra* notes 69-75 and accompanying text. It might be argued that the Court should be more inclined to defer to the judgment of Congress, a co-equal branch, when the issue involves a federal statute rather than a state statute. With regard to this point in benign discrimination cases, see Seeburger, *A Heuristic Argument Against Preferential Admissions,* 39 U. PITT. L. REV. 285, 299-304 (1977); *accord* Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality opinion upholding requirement that 10 percent of funds under Public Works Employment Act of 1977 be set aside for minority contractors). That argument, however, is at its weakest here since the first amendment, by its express terms, is a limit only on Congress.

101. The focus of the discussion was whether the I.R.S. correctly interpreted the statutes giving tax benefits.

102. 103 S. Ct. at 2035 (footnote added). The Court added a footnote making two points. *Id.* at n.29. First, the subject matter of the regulation was schools, not churches. This point would be clearer if the relevant issue under the *Thomas* test was the degree of burden rather than the importance of the governmental interest. It is further obscured by the second point in the footnote, a reference to Norwood v. Harrison, 413 U.S. 455 (1973), which had invalidated the state distribution of textbooks to racially discriminatory schools. The Bob Jones University situation, however, involved a *private* action and was not within the reach of the fourteenth amendment. *Norwood,* which did not address private discrimination, is relevant only if the denial of the tax exemption is *constitutionally compelled.* The federal government has expressed this in 42 U.S.C. § 1981 (1976). *See* Runyon v. McCrary, 427 U.S. 160 (1976) (right to *contract* without private racial discrimination includes right to enroll in private schools); Title VII, 42 U.S.C. § 2000e-2 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment in private schools reachable through the commerce clause); and Title IX, 20 U.S.C. §§ 1681-86 (1982) (prohibit-

of this Nation's history."[103] The next sentence, dealing with the actual application of the *Thomas* test,[104] seems terribly out of place. "That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[105]

It is only the fourth and last sentence that, given the lack of controversy over the sincerity of the belief, its religious nature, the fact of a burden, and the existence of an important governmental interest, purports to dispose of the constitutional question. That sentence in its entirety reads: "The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, see *United States v. Lee;* and no 'less restrictive means,' see *Thomas v. Review Board;* are available to achieve the governmental interest."[106]

This statement can be self-evident (and thus require no elaboration) only where the religious practice *itself* is prohibited by the governmental regulation, as opposed to being indirectly burdened or made financially more difficult to observe. The former was the case here. The government's policy is to eradicate segregation in (private)[107] education.[108] Thus, the government policy *always*

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ing programmatic discrimination where federal funds are received through the spending power).

103. 103 S. Ct. at 2035.

104. "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas,* 450 U.S. at 718.

105. 103 S. Ct. at 2035. As with the footnote to the prior sentence, *see supra* note 102, this seems to have relevance only to a balancing test which would take into account the degree of the burden. *See supra* notes 13-16 and accompanying text. Under such a test, Bob Jones University and the Goldsboro Christian Schools might be treated differently. *See infra* quote from Tilton v. Richardson, 403 U.S. 672 (1972), note 108.

106. 103 S. Ct. at 2035 (citations and footnote omitted). The Court added a footnote rejecting Bob Jones University's establishment clause claim that denial of the exemption favors religions that do not require racial discrimination over those that do. *Id.* at n.30.

107. *See supra* note 102.

108. It is difficult to see the practices of Bob Jones University and the Goldsboro Christian Schools as interfering with that policy in the same way. Bob Jones University does not involve compulsory education at the primary and secondary levels. *Contra* Tilton v. Richardson, 403 U.S. 672, 685-86 (1972). Chief Justice Burger, in a plurality opinion, upholding state aid to church-related colleges against an establishment clause challenge stated: "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherence to a particular faith by having control of their total education at an

prevails against a religious claim when the practice is *directly* burdened. The application of the *Thomas* test to the direct burden case is no less mindless than the belief/action distinction[109] and produces the same result—no special protection for religious practices.[110]

VI. The Benefits of Balancing

Unless there is some evaluation of the degree of the burden and the importance of the practice, weighed against the strength of the government's claim, the free exercise clause will have meaning only where there is an indirect and often trivial burden. The free exercise clause will receive only minimal recognition where a practice is directly prohibited. While the least restrictive alternative test might have value in the case of an indirect burden, it is inappropriate when examining direct burdens. The same standard of review does not work for both the case where an individual's religious beliefs cause him to forego a public benefit coupled with a strong government policy for the denial, and the case where a religious practice is prohibited by a general regulation accompanied by a relatively weak governmental policy. Eventually, any religious claim will fall against the government's interest where there is no *express* consideration of the importance of the interest or the degree of the burden.

Different results which are more protective of religious interests might have been obtained if the *Thomas* least restrictive alternative test had not been used exclusively. The availability of alternative means, such as an exemption, could be an important and often determinative component of such a test. Although such a balancing test would not cast the burden on the government, the consideration of alternative means in conjunction with the relative importance of the interest asserted could hardly be less critical of governmental interests than was the case in *Lee*[111] or *Bob Jones University.*[112] Additionally, such a test would be sensitive to the *degree of the burden* and the *importance of the religious practice,* which the *Thomas* test ignores.

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early age.' . . . [C]ollege students are less susceptible to religious indoctrination." *Id.* (citations and footnotes omitted). Additionally, Bob Jones University did not prevent blacks from enrolling; rather it prevented all students from interracial dating and marriage. The Court correctly pointed out that the states may not prevent miscegenation. The Court, however, failed to attempt to identify a federal policy in favor of it, as it did with desegregated education. 103 S. Ct. at 2017.

109. *See* Reynolds v. United States, 98 U.S. 145 (1878). For discussion of *Reynolds,* see *supra* note 8.

110. *See supra* notes 8-9 and accompanying text.

111. 455 U.S. 252 (1982).

112. 103 S. Ct. at 2017.

In *Bob Jones University,* the two schools could have been treated differently. The availability of alternative means is clear. The I.R.S. routinely deals with tax exemptions involving charitable institutions. Since the case involved *private* institutions, the governmental interest in desegregation, while nonetheless substantial, is not as strong as the Court would have the reader believe. Similarly, the importance to religion on controlling education is not the same in the primary and secondary schools as at the college level. Similarly, the governmental interest is not the same when dealing with schools subject to compulsory education laws compared with an undergraduate schools' interracial dating policy. Clearly, the burden on the religious interest of the Goldsboro Christian Schools was significantly greater, whereas the governmental interest in Bob Jones University was less demanding.

By the same token, *Lee* and *Thomas* are difficult to reconcile. In *Lee,* the government had already provided a similar exemption for religious reasons to other members of the Amish faith. On the other hand, no previously existing exemptions were present in *Thomas.* Therefore, the governmental interest and the availability of alternative means are quite different in the two cases. Similarly, the importance and degree of burdens are different. *Lee* involved a tax on a recognized group. *Thomas* involved the withholding of a benefit to an idiosyncratic individual. If there are to be different results in these cases, *each should have been decided the other way.*

VII. CONCLUSION

Protection of religious interests requires the abandonment of a universal or exclusive *Thomas* test. When the Court concludes that there is no less restrictive alternative available, it should not thereupon automatically uphold the burden on the practice. Rather, the Court should proceed to do something more difficult—to carefully identify and evaluate all the relevant competing interests. Such an approach, a balancing test, has room for some sensitivity, judgment, and intelligence.[113]

113. *See* Freund, *A Picture of Law as Creation*, HARV. LAW SCHOOL BULL., Summer 1976, at 6:

> In a larger sense all law resembles art, for the mission of each is to impose a measure of order on this disorder of experience without stifling the underlying diversity, spontaneity and disarray. New vistas open in art as in

law. In neither will the craftsman succeed unless he sees that proportion and balance are both virtues when held in a proper tension. The new vistas give a false light unless there are cross-lights. There are, I am afraid, no absolutes in law or art except intelligence.

Id.