Incidental Burdens on First Amendment Freedoms

Charles F. Capps

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The Supreme Court is currently reconsidering the question when, if ever, the Free Exercise Clause requires exemptions to neutral laws of general applicability. This Essay proposes an answer that is based on the idea—which this Essay labels the "Principle of Consistency"—that the First Amendment requires comparable levels of protection for speech and religious exercise. Other scholars applying the Principle of Consistency have discussed the implications of United States v. O'Brien*, which prescribed intermediate scrutiny for incidental burdens on speech, for the problem of exemptions under the Free Exercise Clause. But no one has discussed the implications of two lines of cases in which the Court has applied strict scrutiny to incidental burdens on speech—*NAACP v. Alabama ex rel. Patterson *and its progeny, and* Roberts v. U.S. Jaycees *and its progeny—for the problem of exemptions under the Free Exercise Clause. This Essay argues that, together with* O'Brien*, these lines of cases support a regime in which incidental burdens on religious exercise trigger intermediate scrutiny, unless they take the form of (1) government allocations of doctrinal authority or spiritual responsibilities in religious institutions (the "ministerial exception") or (2) pressures on a person to violate her religious conscience (the "conscience exception"), in which case they trigger strict scrutiny.*

INTRODUCTION

The question when, if ever, the Free Exercise Clause requires exemptions to neutral laws of general applicability has proven one of the most difficult problems in First Amendment jurisprudence. The Supreme Court endorsed one answer to the question in *Sherbert v. Verner*, holding that incidental burdens on religious exercise generally trigger strict scrutiny.[1] But

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1 Sherbert v. Verner, 374 U.S. 398, 403 (1963).

this answer never really stuck.[2] After years of wrangling, the Court abandoned *Sherbert* and tried a different answer in *Employment Division v. Smith*, holding that incidental burdens on religious exercise trigger at most rational-basis scrutiny.[3] But this answer would not stick, either.[4] The Court has already qualified *Smith* when adjudicating religious institutions' right to select their own ministers.[5] This term, it heard a case in which the petitioners asked it to overrule *Smith* altogether.[6]

The justices of the Supreme Court are not the only ones who have been unable to agree about exemptions under the Free Exercise Clause. After *Smith*, Congress intervened in favor of exemptions to federal laws,[7] but not all state legislatures followed suit.[8] Scholars, meanwhile, have weighed in with radically diverse proposals, ranging from the view that religious exemptions are almost never permitted by the Establishment Clause, let alone required by the Free Exercise Clause,[9] to the view that religious exemptions are almost

2 Justice Rehnquist, for example, persistently dissented from decisions applying *Sherbert*. *See* Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 722 (1981) (Rehnquist, J., dissenting) ("*Sherbert* . . . reads the Free Exercise Clause more broadly than is warranted."); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987) (Rehnquist, C.J., dissenting) ("I adhere to the views I stated in dissent in *Thomas* . . . .").

3 Emp. Div. v. Smith, 494 U.S. 872, 878–82 (1990).

4 *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial . . . ."); City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting) ("I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims."); *id.* at 565 (Souter, J., dissenting) ("I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) ("I have doubts about whether the *Smith* rule merits adherence."); *id.* at 578 (Blackmun, J., concurring in the judgment) ("I continue to believe that *Smith* was wrongly decided . . . .").

5 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC., 565 U.S. 171, 189–90 (2012).

6 *See* Questions Presented, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123).

7 *See* Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb. The Supreme Court held RFRA unconstitutional as applied to the states in *Boerne*, 521 U.S. at 529–36.

8 For a list of which states have enacted RFRA-like legislation and which have not, see *State Religious Freedom Restoration Acts*, NAT'L CONF. STATE LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

9 *See, e.g.*, Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 493 (1996) ("[T]he Court in *Smith* . . . should have gone so far as to prohibit the legislature from granting special privileges to religious objectors alone absent a compelling governmental interest.").

always required by the Free Exercise Clause,[10] with a great host of views in between.[11]

A rare point of widespread (even if not universal) agreement in the debate is that the First Amendment prescribes comparable levels of protection for speech and religious exercise; hence, courts should be consistent in how they treat incidental burdens on speech and incidental burdens on religious exercise.[12] Call this the "Principle of Consistency." Of course, there is disagreement about what the Principle of Consistency implies regarding how courts should treat incidental burdens on religious exercise.[13] But on the Principle of Consistency itself, there is relative (even if not absolute) consensus. As the Court stated in *Prince v. Massachusetts*, it is

10 *See, e.g.*, Jesse H. Choper, *Some Difficulties in Assuring Equality and Avoiding Endorsement*, 54 VILL. L. REV. 613, 613 (2009) (defending a "Free Exercise Clause requirement . . . of exemptions from generally applicable regulations unless there is a compelling state interest").

11 *See, e.g.*, Nicholas J. Nelson, Note, *A Textual Approach to Harmonizing* Sherbert *and* Smith *on Free Exercise Accommodations*, 83 NOTRE DAME L. REV. 801, 828–43 (2008) (proposing a "first-in-time" rule that requires an exemption if and only if the burdened religious practice predated the burdening law).

12 *See, e.g.*, David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 248 (1997) ("[T]he Court should have a similar standard for generally applicable laws under both the Free Exercise and Free Speech Clauses of the First Amendment . . . ."); Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith*: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 58 (2001) ("[I]n both religion cases and expression cases, the Court should apply the same standard of review whenever an individual claims an exemption from a neutral, generally applicable law."); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 121 (2000) (characterizing the Court's differential treatment of "incidental burdens on religious practices" and "incidental burdens on expression" as "perverse"); Daniel J. Hay, Note, *Baptizing* O'Brien*: Towards Intermediate Protection of Religiously Motivated Expressive Conduct*, 68 VAND. L. REV. 177, 180 (2015) (characterizing the "tests the Court has applied to challenges to generally applicable laws that indirectly burden First Amendment rights" as "needlessly divergent"); Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENT. 147, 154 (1987) (encouraging the Court to "put[] free exercise and free speech cases on the same plane"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1486–88 (1990) (arguing that the original meanings of "abridging" in the Free Speech Clause and "prohibiting" in the Free Exercise Clause are synonymous); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1344 (1995) (arguing that the Court should generalize its approach to incidental burdens "in the free speech context" to the entire First Amendment).

13 *Compare, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 886 (1990) (defending the majority's rule on the ground that it brings the Court's free-speech and free-exercise doctrines into alignment), *with id.* at 901–02 (O'Connor, J., concurring in the judgment) (attacking the majority's rule on the ground that it knocks the Court's free-speech and free-exercise doctrines out of alignment).

"doubt[ful] that any of the great liberties insured by the [First Amendment] can be given higher place than the others."[14]

This Essay argues that the Principle of Consistency is the key to an attractive but so-far overlooked solution to the problem of exemptions under the Free Exercise Clause. According to this solution, incidental burdens on religious exercise should trigger intermediate scrutiny, with two exceptions: (1) government allocations of doctrinal authority or spiritual responsibilities in religious institutions (the "ministerial exception") and (2) government pressures to violate religious conscience (the "conscience exception") should each trigger strict scrutiny. Part I argues that the Principle of Consistency supports subjecting most incidental burdens on religious exercise to intermediate scrutiny. Part II argues that the Principle of Consistency supports subjecting incidental burdens on religious exercise that fall within the ministerial and conscience exceptions to strict scrutiny.

I. INTERMEDIATE SCRUTINY FOR MOST INCIDENTAL BURDENS ON RELIGIOUS EXERCISE

The Court articulated the test that it ordinarily applies to incidental burdens on speech in *United States v. O'Brien*.[15] Under this test, the Free Speech Clause permits an incidental burden on speech if and only if the law furthers a "substantial governmental interest" in a way that restricts speech no more "than is essential to the furtherance of that interest."[16] The *O'Brien* test is sometimes called "intermediate scrutiny."[17] It is more stringent than mere rational-basis scrutiny: it requires a "substantial" interest rather than a merely legitimate interest, and it requires narrow tailoring. But it is less stringent than strict scrutiny: it requires only a "substantial" interest rather than a "compelling" interest, and the Court has held that its narrow-tailoring requirement, though articulated in way that echoes the narrow-tailoring requirement of strict scrutiny, is in fact more deferential.[18]

In conjunction with the Principle of Consistency, *O'Brien* implies that the Court should, in general, apply intermediate scrutiny to incidental burdens on religious exercise. That is, the Court should generally treat incidental burdens on religious exercise as permissible under the Free Exercise Clause

14 Prince v. Massachusetts, 321 U.S. 158, 164 (1944); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2266–67, 2267 n.2 (2020) (Thomas, J., concurring) (criticizing Establishment Clause standing doctrine on the grounds that it results in weaker protections of religious exercise than of speech).

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

16 *Id.* at 377.

17 *See, e.g.*, Freeman, *supra* note 12, at 24. Although the term "intermediate scrutiny" is sometimes used to characterize other tests as well, this Essay uses it exclusively to refer to the *O'Brien* test.

18 *See, e.g.*, United States v. Albertini, 472 U.S. 675, 689 (1985) ("[A]n incidental burden on speech is . . . permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.").

if and only if they are narrowly tailored to further a substantial government interest.

Some scholars[19] have argued that the test that the Court should transpose onto incidental burdens on religious exercise is the test for time-place-manner restrictions on speech articulated in *Clark v. Community for Creative Nonviolence*.[20] Under this test, restrictions on the time, place, or manner (but not the content) of speech are permitted if and only if "they are narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication."[21]

To the extent that the test from *Clark* differs from the test from *O'Brien*,[22] the Principle of Consistency does not support transposing the test from *Clark* onto incidental burdens on religious exercise. An incidental burden is one that results from the application of a neutral law. A law is nonneutral with respect to speech (or religion) if and only if it was designed to regulate speech (or religion) as such.[23] But time-place-manner restrictions on speech are laws that are designed to regulate speech as such: they prohibit speaking during certain times and/or in certain places and/or in certain ways—for example, at midnight in a residential neighborhood with a bullhorn. So, time-place-manner restrictions impose direct rather than incidental burdens on speech.[24] True, because they are content neutral, they receive more deferential treatment than restrictions that are content based. But they are nonetheless direct burdens on speech; the distinction between direct and incidental burdens should not be conflated with the distinction between content-neutral and content-based restrictions. Therefore, although the Principle of Consistency may support transposing the test from *Clark* onto a subcategory of *direct* burdens on religious exercise that is analogous to the category of time-place-manner restrictions on speech, it does not support transposing the test from *Clark* onto the category of *incidental* burdens on religious exercise.

II. STRICT SCRUTINY FOR THE MINISTERIAL AND CONSCIENCE EXCEPTIONS

Although the Court's free-speech jurisprudence in conjunction with the Principle of Consistency implies that *most* incidental burdens on religious

19 *E.g.*, McCoy, *supra* note 12, at 1355–73.

20 Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

21 *Id.* at 293.

22 According to the Court, the two tests are "little, if any, different." *Id.* at 298.

23 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."). Although the paradigm example of such a law is one that on its face restricts speech or religion, a law may be designed to regulate speech or religion even if it is drafted to conceal this design by being facially neutral. *See, e.g.*, *id.* at 534 (explaining that "[o]fficial action that targets religious conduct for distinctive treatment" remains nonneutral even if "masked" in facially neutral terms).

24 *See* Hay, *supra* note 12, at 199 ("[W]hen the government regulates the time, place, or manner of speech, it is unmistakably targeting speech.").

exercise should trigger intermediate scrutiny, it does not imply that *all* incidental burdens on religious exercise should trigger intermediate scrutiny. The Court has subjected incidental burdens on speech to strict scrutiny in two contexts. Section A reviews the cases in which the Court has subjected incidental burdens on speech to strict scrutiny and extracts the principle that most plausibly explains them. Section B transposes that principle onto the Free Exercise Clause, where it requires strict scrutiny for incidental burdens on religious exercise that fall within the ministerial and conscience exceptions.

A. Special Categories of Incidental Burdens on Speech

This Section attempts to uncover the principle behind the two lines of cases in which the Court has applied strict scrutiny to incidental burdens on speech. Subsection 1 reviews the two lines of cases. Subsection 2 works backward to the principle that explains them. This principle, Subsection 3 concludes, is that "neutrally definable" categories of serious threats to the central purposes of the Free Speech Clause trigger strict scrutiny, where a category is "neutrally definable" if and only if a court need not draw conclusions about matters that the First Amendment places beyond its authority in order to determine what falls within the category. Following the Court, this Essay assumes that the First Amendment places it beyond the authority of courts to determine whether a party's political, moral, or religious convictions are true.[25]

1. Exceptions to the Rule that Incidental Burdens on Speech Trigger Intermediate Scrutiny

Supreme Court caselaw contains two exceptions to the general rule that incidental burdens on speech trigger intermediate scrutiny. Subsubsection (a) discusses the first exception, which comprises cases involving compelled disclosure of membership in dissident expressive associations. Subsubsection (b) discusses the second exception, which comprises cases involving interference with expressive associations' leadership.

25 *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86 (1944) (holding that "the First Amendment precludes" a jury from evaluating "the truth or verity of [a person's] religious doctrines or beliefs"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

a. The Court Reserves Strict Scrutiny for Compelled Disclosure of Membership in Dissident Expressive Associations

The caselaw on compelled disclosure of membership in expressive associations begins with *NAACP v. Alabama* ex rel. *Patterson*, in which the Court held that a state-court order requiring the NAACP to disclose its membership violated NAACP members' First Amendment rights.[26] The Court recognized that "Alabama . . . ha[d] taken no direct action . . . to restrict the right of [NAACP] members to associate freely."[27] Nonetheless, the Court insisted, "abridgment of" rights of "speech, press, or association" may "follow from varied forms of governmental action," including governmental action that "appear[s] to be totally unrelated to protected liberties."[28] The Court observed that the NAACP had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[29] Thus, compelled membership disclosure would effectively freeze would-be members' right to associate for expressive purposes.[30] The Court held that only a "compelling" state interest could justify such a severe, albeit incidental, burden on speech.[31] Finding Alabama's interest in the disclosure less than compelling, the Court concluded that the First Amendment precluded Alabama from enforcing the order.[32]

Two years later, in *Bates v. City of Little Rock*, the Court held that a local ordinance requiring membership disclosure was unconstitutional as applied to the NAACP.[33] Citing *Patterson*, the Court emphasized that the freedoms protected by the First Amendment "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[34] Because compelling the NAACP to disclose its membership would constitute such a "significant interference with the

26 NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 451, 466 (1958).

27 *Id.* at 461.

28 *Id.*

29 *Id.* at 462.

30 *Id.* at 462–63.

31 *Id.* at 463. One could argue that the state-court order at issue imposed a direct burden on speech because compelled disclosure of membership constitutes compelled speech. But the Court has not generally treated required disclosures to the government as unconstitutionally compelled speech. *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 800 (1988) (proposing, to avoid a compelled-speech problem, that a state "publish the detailed financial disclosure forms it requires professional fundraisers to file" instead of requiring the fundraisers to communicate the information to prospective donors). At any rate, the Court's stated reason for subjecting the order to heightened scrutiny was the effect that enforcing the order would have on would-be NAACP members' right to associate, not the fact that the order compelled speech by the NAACP to the government.

32 *Patterson*, 357 U.S. at 464–66.

33 Bates v. City of Little Rock, 361 U.S. 516, 517, 527 (1960).

34 *Id.* at 523.

freedom of association of [the NAACP's] members," the Court required the government to "show[] a subordinating interest which is compelling" and "reasonably related" to the enforcement of the ordinance.[35] Determining that the government had failed to meet this standard, the Court concluded that the First Amendment entitled the NAACP to an exemption from the ordinance.[36]

In *Brown v. Socialist Workers '74 Campaign Committee*, it was the Socialist Workers Party that sought an exemption from a compelled-disclosure law.[37] The Court did not retreat from *Patterson* and *Bates* or confine them to the unique circumstances surrounding racial desegregation in the South. Instead, the Court applied the test that it had articulated in *Buckley v. Valeo*[38] for when a political party is sufficiently "dissident" to qualify for an exemption from a generally applicable disclosure law.[39] The Court went so far as to declare that "[t]he First Amendment prohibits a State from compelling disclosures" from such a party.[40] Although compelling the disclosures would be permissible if there were a "substantial relation between the information sought" and a "compelling state interest,"[41] the "government's interests in compelling disclosures are diminished in the case of minor parties."[42]

The line of cases from *Patterson* to *Brown* marks an exception to the general rule that incidental burdens on speech trigger intermediate scrutiny. According to this line of cases, compelling a dissident expressive association to disclose its membership triggers strict scrutiny. It is true that the Court did not use the term "strict scrutiny" in *Patterson*, and it did not employ the language of "least restrictive means" that is familiar from modern formulations of the strict-scrutiny test. But it is important to remember that

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35 *Id.* at 523–25.

36 *Id.* at 525–27.

37 Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 88 (1982).

38 Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

39 *See Brown*, 459 U.S. at 88 (explaining that the party must be "minor," and there must be "a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassment, or reprisals'" (quoting *Buckley*, 424 U.S. at 74)).

40 *Id.* at 101.

41 *Id.* at 92 (citing Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 546 (1963)).

42 *Id.* (citing *Buckley*, 424 U.S. at 70) (internal quotation marks omitted). Unfortunately, the Court was not entirely clear about whether compelled disclosures like those at issue in *Brown* always require a compelling government interest or, as *Patterson* and *Bates* suggest, they require a compelling government interest only as applied to dissident political parties. For an argument that the Court treated the Socialist Workers Party's dissident status as "trigger[ing] a more demanding standard of review" rather than merely causing the statute as applied to fail the standard of review applicable to all political parties, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 62–63 (1987) [hereinafter Stone, *Content-Neutral*]. Since *Brown*, the Court has made clear that disclosure requirements in the electoral context are subject to "exacting scrutiny," which requires a "sufficiently important" government interest rather than a compelling government interest, and reiterated that "as-applied challenges would be available" to dissident groups. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010).

the use of "strict scrutiny" as a term of art and the modern formulation of the test that it stands for had not yet come into judicial parlance in 1958, when the Court decided *Patterson*. The Court's insistence of a tight nexus to a "compelling" state interest is as close to modern formulations of the strict-scrutiny test that one could expect in an opinion from 1958. Indeed, there is evidence that the concept of strict scrutiny emerged from a body of First Amendment cases that included, *inter alia*, *Patterson*.[43] It is no surprise, then, that scholars writing in retrospect characterize these cases as applying strict scrutiny.[44]

b. The Court Reserves Strict Scrutiny for Government Interference in Expressive Associations' Leadership

Patterson and its progeny are not the only line of cases in which the Court has applied strict scrutiny to incidental burdens on speech. In a second line of cases, the Court has applied strict scrutiny to government interference in expressive associations' leadership.

The second line of cases starts with *Roberts v. United States Jaycees*, which involved the application of a Minnesota public-accommodations statute that prohibited discrimination on the basis of sex to the Jaycees, an expressive association that admitted only men as voting members.[45] The Court held that the First Amendment permits government "interfere[nce] with the internal organization or affairs" of such a group if and only if it furthers "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[46] The Court expressed skepticism that "admission of women as full voting members [would] impede" the Jaycees' expressive aims.[47] However, it held that any "incidental abridgment of the Jaycees' protected speech" was at any rate "no greater than is necessary" to further the government's "compelling interest" in preventing discrimination against women.[48] Therefore, the Court upheld the statute as applied.[49]

The Court's analysis in *Board of Directors of Rotary International v. Rotary Club* was similar.[50] The Court upheld the application of a California nondiscrimination statute to the Rotary Club, which refused membership to women. Although it doubted that "admitting women . . . [would] affect in any significant way" the expressive purposes of the Rotary Club, the Court

43 *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 371–75, 391 (2006).

44 *See, e.g.*, Stone, *Content-Neutral*, *supra* note 42, at 50, 50 n.13, 53 (characterizing *Brown* as applying strict scrutiny).

45 Roberts v. U.S. Jaycees, 468 U.S. 609, 612–15 (1984).

46 *Id.* at 623.

47 *Id.* at 627.

48 *Id.* at 628.

49 *Id.* at 628–29.

50 Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

concluded that any "infringement on [the] Rotary [Club's] members' right of expressive association" was at any rate "justified because it serves the State's compelling interest in eliminating discrimination against women."[51]

In *Boy Scouts of America v. Dale*, the Court confronted a case in which the application of a nondiscrimination statute did significantly affect an organization's expressive aims.[52] At issue in *Dale* was the application of a New Jersey public-accommodations law that prohibited discrimination on the basis of sexual orientation to the Boy Scouts, which had revoked a scoutmaster's membership after he came out as gay.[53] The Court noted that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[54] It then reasoned that having a gay man in a position of leadership would significantly affect the Boy Scouts' ability to advocate its opposition to homosexuality.[55] Declining to follow *Roberts* by finding that the infringement on the Boy Scouts' "freedom of expressive association" was justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms," the Court held the statute unconstitutional as applied.[56]

The rule that emerges from *Roberts*, *Rotary International*, and *Dale* is that incidental burdens on speech that take the form of interference with expressive associations' leadership trigger strict scrutiny.[57] Hence, these cases

51 *Id.* at 548–49.

52 Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000).

53 *Id.* at 645.

54 *Id.* at 648.

55 *Id.* at 653–56.

56 *Id.* at 648, 656–61 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). Confusingly, the Court in *Dale* referred to the burden imposed by the nondiscrimination statute on First Amendment rights as "direct[]" rather than incidental. *Id.* at 659. Whatever the Court meant by this statement, the burden on expression was straightforwardly incidental in the sense that it resulted from the application of a law that was not designed to regulate expression as such. *See* Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 298 (2009) [hereinafter Stone, *Free Speech*] (characterizing the burden in *Dale* as incidental).

57 In *Christian Legal Society v. Martinez*, 561 U.S. 661, 678–83 (2010), the Court qualified the rule from *Roberts* and its progeny, holding that this rule does not apply in a "limited public forum," that is, public property that the government has opened for "use by certain groups" or "discussion of certain subjects." *Id.* at 679, 679 n.11. Like content-based, direct restrictions on speech, the incidental burdens on speech at issue in *Roberts* and its progeny ordinarily trigger strict scrutiny but, in the context of a limited public forum, are consistent with the First Amendment if they are viewpoint neutral and reasonable in light of the forum's purposes. *See id.* at 679. Arguably, *Martinez* in conjunction with the Principle of Consistency implies that the free-exercise regime that this Essay proposes must be qualified to allow for deferential scrutiny of restrictions on religious exercise in limited public or analogous fora, even if those restrictions fall within the ministerial and/or conscience exceptions.

mark a second exception to the general rule that incidental burdens on speech trigger intermediate scrutiny.

2. Working Backward to the Principle that Explains the Exceptions

Why does the Court reserve strict scrutiny for compelled disclosures of membership in dissident expressive associations and interference with expressive associations' leadership if it subjects other incidental burdens on speech to intermediate scrutiny? This Subsection lays the groundwork for an answer. Subsubsection (a) argues that a central purpose of the Free Speech Clause is to promote knowledge. Subsubsection (b) argues that compelled disclosures of membership in dissident expressive associations constitute a neutrally definable category of serious threats to knowledge. Subsubsection (c) argues that government actions that interfere with expressive associations' leadership also constitute a neutrally definable category of serious threats to knowledge. The hypothesis that emerges is that the Court reserves strict scrutiny for neutrally definable categories of serious threats to the central purposes of the Free Speech Clause.

a. A Central Purpose of the Free Speech Clause is to Promote Knowledge

The idea that a central purpose of the Free Speech Clause is to promote knowledge follows from the dominant theory of the Free Speech Clause, the "marketplace-of-ideas" theory. According to the marketplace-of-ideas theory, over the long run the truth is most likely to emerge if the government permits open debate in which citizens exchange ideas in a "free market."[58] The Free Speech Clause is designed to establish a free market in ideas, thereby promoting long-run progress in knowledge.[59]

The marketplace-of-ideas theory finds support in Founding-era views of the freedom of speech. In his celebrated concurrence in *Whitney v. California*, Justice Brandeis declared that the Founders understood that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[60] Justice Brandeis was right. The Founders were familiar with the idea that freedom of speech facilitates the discovery of truth. According to Enlightenment thinker Claude Adrien Helvétius, "[i]t is . . . to the liberty of the press, that physics owes its improvements. Had this liberty never subsisted, how many errors, consecrated by time, would be cited as incontestable axioms! What is here

58 *See* Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 1–8 (1996) (summarizing the marketplace-of-ideas theory).

59 *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 595 (2011).

60 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

said of physics is applicable to morality and politics."[61] The Founders agreed and treated the discovery of truth as a justification for freedom of speech and the press. According to Thomas Jefferson, the "most effectual" way to open "avenues to truth" is by guaranteeing "the freedom of the press."[62] This is because "truth is great and will prevail, if left to herself"; "free argument and debate" are "her natural weapons."[63]

The marketplace-of-ideas theory finds additional support in Supreme Court caselaw. On multiple occasions, the Supreme Court has endorsed the marketplace-of-ideas theory as presented in Brandeis's concurrence in *Whitney* and Justice Holmes' earlier dissent in *Abrams v. United States*.[64] In *United States v. Alvarez*, for example, a plurality of the Court stated:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. . . . The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[65]

In another case, the Court quoted both Brandeis and Holmes, writing that "[f]reedom of speech is 'indispensable to the discovery and spread of political truth,' . . . and 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'"[66] These cases confirm that the Supreme Court recognizes the promotion of knowledge as a central purpose of the Free Speech Clause.

b. Compelled Disclosures of Membership in Dissident Expressive Associations Constitute a Neutrally Definable Category of Serious Threats to Knowledge

Government actions that compel a dissident expressive association to disclose its membership constitute a category of serious threats to knowledge. Forcing dissident expressive associations to reveal their membership threatens the progress of knowledge because it risks not just dampening but altogether silencing certain viewpoints. The combination of having a small membership to begin with and suffering a high rate of loss due to "fears of

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61 2 CLAUDE ADRIEN HELVÉTIUS, A TREATISE ON MAN; HIS INTELLECTUAL FACULTIES AND HIS EDUCATION 328 (W. Hooper trans., 1810).

62 Letter from Thomas Jefferson to Judge John Tyler (June 28, 1804), *in* JEFFERSON'S LETTERS 222, 222 (Willson Whitman ed., 1940).

63 An Act for Establishing Religious Freedom (1786), *reprinted in* VA. CODE ANN. § 57-1.

64 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

65 United States v. Alvarez, 567 U.S. 709, 727–28 (2012) (plurality) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

66 Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 (1980) (first quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); and then quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

reprisal"[67] would mean that most dissident movements would be "cripple[d]"[68] and many would not "survive"[69] at all. Were the viewpoints espoused by dissident expressive associations merely dampened, then the threat to the progress of knowledge would be significant but tolerable: in the event that the dissident viewpoints were true, it might take longer for them to prevail. But the threat is much more serious if the viewpoints are not just dampened but silenced: it is difficult for the truth to prevail if it has not even a small platform but no platform at all. As Professors Geoffrey R. Stone and William P. Marshall put it, "in the disclosure context, there is a risk that particular ideas or viewpoints may be driven completely from the 'marketplace of ideas.'"[70] Government actions that compel a dissident expressive association to disclose its membership thus constitute a category of serious threats to knowledge. And this category is neutrally definable: a court need not take a position on the merits of an expressive association's views to assess whether the association is sufficiently ostracized to count as dissident.[71]

c. Government Actions that Interfere with Expressive Associations' Leadership Constitute a Neutrally Definable Category of Serious Threats to Knowledge

Government actions that interfere with expressive associations' leadership constitute another category of serious threats to knowledge. Such actions also risk driving certain views from the marketplace of ideas. The leaders of an expressive association control its message. Thus, if the government requires expressive associations to admit people of a certain type into its leadership, then expressive associations will partially or completely lose the ability to advocate viewpoints that people of that type disproportionately—or uniformly, if the type is defined by viewpoint—oppose. For example, suppose that a state passes a public accommodations law that prohibits discrimination on the basis of a person's status as a vegan, a vegetarian, or neither. Application of this law to a nonprofit that operates a vegan gift shop and promotes veganism as the only morally permissible dietary regime might devastate its ability to advocate its viewpoint. It would no longer be able to exclude from its leadership people who, say, are vegetarians for health reasons and consider the nonprofit's popular gift shop to be the most effective vehicle for popularizing low-meat diets. Government actions that interfere with expressive associations' leadership thus constitute a category of serious threats to knowledge. And this category is neutrally

67 Buckley v. Valeo, 424 U.S. 1, 71 (1976) (per curiam).

68 Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98 (1982).

69 *Buckley*, 424 U.S. at 71.

70 Geoffrey R. Stone & William P. Marshall, Brown v. Socialist Workers: *Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 610 (1983) (citing *Brown*, 459 U.S. at 93).

71 *See Brown*, 459 U.S. at 88 (applying a neutral test for when a political party counts as sufficiently dissident).

definable: a court need not take a position on the merits of the views that an expressive association advances to assess whether a given position in the association's organizational chart counts as a position of leadership or influence.

3. The Principle Behind the Exceptions

The considerations of Subsection 2 suggest an explanation for the two exceptions identified in Subsection 1 to the general rule that incidental burdens on speech trigger intermediate scrutiny. The principle behind these exceptions appears to be that neutrally definable categories of serious threats to the central purposes of the Free Speech Clause trigger strict scrutiny.

This Essay is not the first to advance such a hypothesis. Stone and Marshall argue that the best explanation for *Patterson*, *Bates*, and *Brown* is the Court's "concern with the extraordinarily severe effects that . . . disclosure requirements may have on" dissident expressive associations, namely, the "risk that [their] ideas or viewpoints may be driven completely from the 'marketplace of ideas.'"[72] This Essay reaches a similar conclusion and extends it to *Roberts*, *Rotary International*, and *Dale*.[73]

The hypothesis is attractive not only because it fits the data of the Court's decisions but also because it coheres with the Court's overall approach to the Free Speech Clause. The same principle that underlies the Court's application of strict scrutiny to content-based restrictions on speech—a commitment to the advance of knowledge through the marketplace of ideas—also supports applying strict scrutiny to categories of incidental burdens on speech that pose especially serious threats to knowledge by impoverishing the marketplace of ideas.

B. Special Categories of Incidental Burdens on Religious Exercise

This Section unpacks the implications of Section A for the Court's free-exercise jurisprudence. Whereas Section A started with the Court's exceptions to the rule from *O'Brien* and worked backward to the principle that explains them, this Section starts with that principle, transposed onto the Free Exercise Clause, and works forward to the exceptions that it implies. Subsection 1 begins with the principle that the Court should reserve strict scrutiny for neutrally definable categories of serious threats to central purposes of the Free Exercise Clause. Subsection 2 works forward from this principle to the exceptions that it implies. Subsection 3 concludes by identifying these exceptions as the ministerial exception and the conscience exception.

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72 Stone & Marshall, *supra* note 70, at 610–11 (citing *Brown*, 459 U.S. at 93).

73 *Cf.* Stone, *Free Speech*, *supra* note 56, at 298 (citing *Dale* as "illustrat[ive]" of the "few instances" in which "the Court has held incidental effects [on speech] unconstitutional as applied when the incidental effect of the law was seen by the Court as particularly severe").

1. The Principle Behind the Exceptions

Subsection A.3 concluded that the principle that explains the two exceptions to the *O'Brien* rule is that incidental burdens on speech that fall within neutrally definable categories of serious threats to the central purposes of the Free Speech Clause trigger strict scrutiny. In conjunction with the Principle of Consistency, this principle implies that incidental burdens on religious exercise that fall within neutrally definable categories of serious threats to the central purposes of the Free Exercise Clause should trigger strict scrutiny, too.

2. Working Forward to the Exceptions that the Principle Implies

This Subsection lays the groundwork for specifying the categories of incidental burdens on religious exercise that the principle identified in Subsection 1 implies should trigger strict scrutiny. Subsubsection (a) identifies promoting religious knowledge and its practice as a central purpose of the Free Exercise Clause. Subsubsection (b) identifies protecting religious integrity as another central purpose of the Free Exercise Clause. Subsubsection (c) explains why government allocations of doctrinal authority or spiritual responsibilities in religious institutions constitute a neutrally definable category of serious threats to religious knowledge and its practice. Subsubsection (d) explains why government pressures on individuals to violate their religious conscience constitute a neutrally definable category of serious threats to religious integrity.

a. A Central Purpose of the Free Exercise Clause is to Promote Religious Knowledge and its Practice

Insofar as it protects freedom of opinion in matters of religion, the Free Exercise Clause promotes a special case of the value that the Free Speech Clause promotes, namely, knowledge about specifically religious matters (for example, the existence or nonexistence of a God or gods). No doubt such knowledge is valuable in itself. But it is also instrumental to another value. To the extent that religion is concerned with, *inter alia*, ultimate questions about how to live, religious knowledge is "practical." Its practice or "exercise" in a life well lived is itself valuable. This Subsubsection argues that the proposition that a central purpose of the Free Exercise Clause is to promote not only religious knowledge but also its practice finds support in Founding-era views on the freedom of religion as well as Supreme Court caselaw.

Consider first Founding-era views about the freedom of religion. The Founders and those who influenced them considered the promotion of religious knowledge and its practice to be a central justification for religious liberty. "Reason and free inquiry are the only effectual agents against error,"

declared Thomas Jefferson.[74] "Give a loose to them, they will support the true religion by bringing every false one to their tribunal."[75] And once religious truth is known, it can be practiced, which is itself valuable. Thus, Timothy Dwight concluded in 1794, "religious instruction . . . makes good men and good men must be good citizens."[76]

These ideas found expression in the Virginia Statute for Establishing Religious Freedom of 1786. The bill included a lengthy explanatory preface that announced its guarantee of the freedom "to frequent or support any religious worship, place or ministry" and "to profess, and by argument to maintain, their opinions in matters of religion."[77] According to the preface, the guarantees of religious freedom were warranted in light of "the impious presumption of legislators and rulers . . . [who,] setting up their own opinions . . . [and] endeavoring to impose them on others, have established and maintained false religions over the greatest part of the world, and through all time," whereas "truth is great and will prevail, if left to herself."[78] The preface also noted that the marketplace of religious ideas created by a guarantee of religious liberty would promote sound religious practice. It pointed out that the liberty of each to contribute "to the particular pastor[,] whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness" will furnish "an additional incitement to earnest and unremitting labors, for the instruction of mankind."[79]

Perhaps no one articulated the power of religious liberty as a means to religious knowledge and its practice more clearly than the representatives of the Presbyterian Church in Virginia:

> We are fully persuaded of the happy influence of Christianity upon the morals of men; but we have never known it, in the history of its progress, so effectual for this purpose, as when left to its native excellence and evidence to recommend it, . . . free from the intrusive hand of the civil magistrate.[80]

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74 THOMAS JEFFERSON, NOTES ON VIRGINIA (1782), *reprinted in* 2 THE WRITINGS OF THOMAS JEFFERSON 1, 221 (Albert Ellery Bergh ed., definitive ed. 1907).

75 *Id.*; *see also* Letter from Thomas Jefferson to Dr. Benjamin Waterhouse (June 26, 1822), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 383, 385 (Albert Ellery Bergh ed., definitive ed. 1907) (arguing that "free inquiry and belief" will lead to the practice of the true religion).

76 JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 62 (1998).

77 An Act for Establishing Religious Freedom (1786), *reprinted in* VA. CODE ANN. § 57-1.

78 *Id.*

79 *Id.*

80 Memorial of the Presbytery of Hanover to the General Assembly of Virginia, *reprinted in* 1 AMERICAN STATE PAPERS ON FREEDOM IN RELIGION 80, 81 (William Addison Blakely ed., 3d rev. ed. 1943).

On this view, religious liberty promotes religious knowledge and its practice in good "morals" by permitting the true religion's "native excellence and evidence to recommend it."[81]

Next, consider Supreme Court caselaw. In *Everson v. Board of Education*, the Court stated that "the provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as" the Virginia Statute for Establishing Religious Freedom.[82] The Court reiterated this view in *McGowan v. Maryland*.[83] After quoting the Virginia statute at length, the Court declared: "In this bill breathed the full amplitude of the spirit which inspired the First Amendment, and this Court has looked to the bill, and to the Virginia history which surrounded its enactment, as a gloss on the signification of the Amendment."[84]

The Court also acknowledged the importance of religious knowledge and its practice in *Wisconsin v. Yoder*.[85] Explaining its decision that the Free Exercise Clause entitled the Amish to an exemption from compulsory education laws, the Court wrote:

> We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong."[86]

The Court's point was that the Free Exercise Clause bars the government from acting on the tempting but dangerous assumption that minority ways of life are nonsense. The purpose of doing so is to prevent the suppression of minority ways of life that, like the monastic practices of those who "preserved" the values of "the civilization of the Western World," will eventually be proven "right" in some important respect.[87]

b. A Central Purpose of the Free Exercise Clause is to Protect Religious Integrity

The Free Exercise Clause has another central purpose: to protect religious integrity, that is, the practice of acting in accordance with one's sincere religious convictions. The proposition that protecting religious integrity is a central purpose of the Free Exercise Clause also finds support in Founding-era views on the freedom of religion as well as Supreme Court caselaw.

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81 *Id.*
82 Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947).
83 McGowan v. Maryland, 366 U.S. 420 (1961).
84 *Id.* at 493–94.
85 Wisconsin v. Yoder, 406 U.S. 205 (1972).
86 *Id.* at 223–24.
87 *Id.*

Consider first Founding-era views of the freedom of religion. It is a staple of ethics that a person is morally obligated to follow her conscience. Even if her conscience is wrong, such that there is a sense in which she would be acting immorally if she follows it, there is another sense in which she would be acting immorally if she does not follow it.[88] To pressure a person to act against her conscience is therefore to pressure her to act morally impermissibly. And to pressure someone to act morally impermissibly is itself at least *pro tanto* morally impermissible. Thus, one has a right, even if only a defeasible right, not to be pressured to act against one's conscience, including one's conscience insofar as it is informed by one's religion.[89] The Founders understood this. Roger Williams memorably characterized forcing a person to convert against her conscience as raping the person's soul.[90] James Madison wrote that "it is the right of every man to exercise [religion] as [his conscience] may dictate," because "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[91] Explaining why it granted an exemption from military conscription

88 *See, e.g.*, ST. THOMAS AQUINAS, The "SUMMA THEOLOGICA" pt. I-II, q. 19, art. 5, at 240 (Fathers of the English Dominican Province trans., 2d ed. 1927) ("[W]hen the will is at variance with erring reason, it is against conscience. But every such will is evil . . . ."). As a normative matter, these considerations support protecting secular conscience no less than religious conscience. Whether, as a legal matter, the Free Exercise Clause is best interpreted as in fact protecting secular conscience is a question that this Essay does not attempt to answer.

89 Some integrity-based arguments for religious liberty take a different form. This Essay argues that pressuring a person to violate her religious conscience is at least *pro tanto* morally impermissible because violating one's religious conscience is morally impermissible, and pressuring a person to do what is morally impermissible is itself at least *pro tanto* morally impermissible. Others argue that harmony between one's conduct and one's convictions is a basic good, and the state should promote rather than impede its subjects' enjoyment of basic goods. *See, e.g.*, Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism: Empowering All, Encumbering None*, *in* JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 108, 124–38 (2017); Paul Bou-Habib, *A Theory of Religious Accommodation*, 23 J. APPLIED PHIL. 109, 117–21 (2006). Although this Essay makes only the former argument, the two arguments are compatible, and the latter also supports the idea that protecting religious integrity is a central purpose of the Free Exercise Clause.

90 ROGER WILLIAMS, THE BLOUDY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE (n.p. 1664), *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 1, 182 (Samuel L. Caldwell ed., Wipf & Stock Publishers 2007) (1963) (referring to "violat[ing]" or "forc[ing]" a person's "Conscience" as "Soule or Spirituall Rape"); *see also* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 168–69 (2008) (endorsing Williams' idea that "conscience," understood as "the faculty with which each person searches for the ultimate meaning of life[,] . . . is worthy of respect whether the person is using it well or badly").

91 James Madison, Memorial and Remonstrance against Religious Assessments, *in* 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 183, 184 (Gaillard Hunt ed., 1901); *cf* Declaration of Rights as Finally Adopted XVI (June 12, 1776), *reprinted in* KATE MASON ROWLAND, 1 THE LIFE AND CORRESPONDENCE OF GEORGE MASON, 1725–1792 438, 441 (Russell & Russell 1964) (1892) ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience.").

to "people who from Religious Principles, cannot bear Arms in any case," the Continental Congress wrote that it "intend[s] no Violence to their Consciencies."[92]

It is unsurprising, then, that concern for religious integrity appears to have provided at least part of the motivation for the Free Exercise Clause. Daniel Carroll encouraged the adoption of what would become the Free Exercise Clause on the ground that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."[93] One of the earliest free-exercise cases was *People v. Phillips*, in which a state court cited the Free Exercise Clause in refusing to compel a Catholic priest to testify in violation of the seal of Confession.[94] The court observed that compelling the testimony would force the priest to act "in violation of his conscience."[95] Whether the priest's conscience was correct did not matter. Indeed, the court noted that it "differ[ed] from the witness" in "religious creed."[96] But it concluded that the guarantee of "free exercise of . . . religion" in the "constitution of this country" prevents the government from inflicting "torture to [persons'] consciences" regardless whether their consciences are correct.[97]

Next, consider Supreme Court caselaw. The Supreme Court has indicated that it too considers protecting religious integrity to be a central purpose of the Free Exercise Clause. In one of its first free-exercise cases, it stated that the Free Exercise Clause "was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience."[98] Similarly, in *McGowan*, the Court stated that, "[i]n assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience."[99] In support of this proposition, the Court cited a proposed amendment to the Constitution offered by the Virginia Convention, which affirmed a universal right "to the free exercise of religion, according to the dictates of conscience."[100]

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92 1 U.S. GOV'T PRINTING OFFICE, CONSCIENTIOUS OBJECTION 33–34 (1950) (quoting Resolution of the Continental Congress (July 18, 1775)).

93 MARY VIRGINIA GEIGER, DANIEL CARROLL: A FRAMER OF THE CONSTITUTION 164 (1943).

94 *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 200, 209 (1955) (reporting the case). The case was decided in 1813 but not included in a reporter.

95 *Id.* at 200.

96 *Id.* at 209.

97 *Id.*

98 Davis v. Beason, 133 U.S. 333, 342 (1890).

99 McGowan v. Maryland, 366 U.S. 420, 464 (1961).

100 *Id.* at 464 n.2.

c. Government Allocations of Doctrinal Authority or Spiritual Responsibilities in Religious Institutions Constitute a Neutrally Definable Category of Serious Threats to Religious Knowledge and its Practice

Government allocations of doctrinal authority or spiritual responsibilities in religious institutions constitute a neutrally definable category of serious threats to the first of the Free Exercise Clause's central purposes: the promotion of religious knowledge and its practice.

Government control over who holds doctrinal authority in religious institutions is a special case of, and thus poses the same type of threat to knowledge as, government control over who occupies positions of leadership of expressive associations generally. Government control over a religious institution's doctrinal authorities entails government control over a religious institution's doctrine. It is unlikely that government officials will exercise this control in a way that facilitates the emergence of religious truth over the long run.

A threat to the attainment of religious knowledge is also, of course, a threat to the practice of religious knowledge. If one does not know what the ideal way of life is, then it is difficult to achieve it. Therefore, government control over who holds doctrinal authority in religious institutions is a threat to the practice of religious knowledge as well as a threat to religious knowledge itself.

Government allocation of spiritual responsibilities within a religious institution is also a threat to the practice of religious knowledge. Many religious institutions purport not just to impart knowledge about how to live but also to provide the means—in many cases, the *exclusive* means—by which to put this knowledge into practice. If the government allocates spiritual responsibilities within a religious institution, then it risks doing so in a way that compromises the institution's ability to provide the means to put its instruction into practice.

Finally, the category of government actions that allocate doctrinal authority or spiritual responsibilities in a religious institution is neutrally definable. To determine whether the government is allocating doctrinal authority or spiritual responsibilities in a religious institution, a court does need a basic understanding of how the religious institution is organized and what spiritual roles it contains. But the court need not draw any conclusions about whether the institution's religious doctrines are true.

d. Government Pressures to Violate Religious Conscience Constitute a Neutrally Definable Category of Serious Threats to Religious Integrity

Government pressures to violate religious conscience constitute a neutrally definable category of serious threats to the other central purpose of the Free Exercise Clause: protecting religious integrity. Such pressures

directly threaten religious integrity. And the category of such pressures is neutrally definable. To determine whether the government is pressuring a person to violate her religious conscience, a court need not evaluate the truth of the person's religious beliefs. The court simply needs to determine whether the government is pressuring the person to do something that she sincerely believes on religious grounds is morally impermissible. For it is the obstacle to doing whatever a person *sincerely believes* her religion renders morally obligatory, not the obstacle to doing what is *in fact* morally obligatory, that is the serious threat to religious integrity.[101]

It is worth noting that the category of government pressures to violate religious conscience is narrower than it might seem, for two reasons. First, it excludes government pressures to do otherwise than as one's religious convictions merely encourage. For example, an ordinance that prohibits hunting would not contradict any *moral demand* of a religion that ascribes spiritual benefits to, but does not require, hunting. Second, many religious prescriptions are *pro tanto* rather than absolute and yield to countervailing legal rules. For example, the command of Genesis 1:28 to "be fruitful and multiply" could be understood to require married couples to have more than one child when circumstances make it reasonably feasible to do so, with a government one-child policy qualifying as a circumstance that makes it not reasonably feasible. On this interpretation of Genesis 1:28, a government one-child policy would not pressure anyone to violate its command.

3. Exceptions to the Rule that Incidental Burdens on Religious Exercise Should Trigger Intermediate Scrutiny

The considerations of Subsection 2 suggest that the principle identified in Subsection 1—that neutrally identifiable, serious threats to the central purposes of the Free Exercise Clause should trigger strict scrutiny—implies a pair of exceptions to the general rule that incidental burdens on religious exercise should trigger intermediate scrutiny. Notwithstanding this general rule, incidental burdens that take the form of (1) government allocations of doctrinal authority or spiritual responsibilities in religious institutions or (2) government pressures to violate religious conscience should trigger strict scrutiny.

CONCLUSION

The Court's decision to reconsider *Smith* opens the door for the Court to bring its First Amendment jurisprudence into alignment. The principle that the First Amendment requires consistent treatment of incidental burdens on speech and incidental burdens on religious exercise is intuitive and widely accepted. Application of this principle in light of the Court's free-speech

101 For a response to concerns about courts adjudicating religious sincerity, see Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017).

jurisprudence—including not only *O'Brien* but also *Patterson*, *Roberts*, and their progeny—implies a regime in which incidental burdens on religious exercise trigger intermediate scrutiny, unless they involve (1) government allocations of doctrinal authority or spiritual responsibilities in religious institutions or (2) government pressures to violate religious conscience, in which case they trigger strict scrutiny. The Court has already moved partway toward this regime by holding that the Free Exercise Clause, in conjunction with the Establishment Clause, prohibits the government from interfering with religious institutions' selections of their own ministers.[102] When the appropriate cases arise, the Court should consider completing the process of aligning its First Amendment jurisprudence by prescribing strict scrutiny for incidental burdens on religious exercise that fall within the conscience exception and intermediate scrutiny for other incidental burdens on religious exercise.

102 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189–90 (2012). Note that this Essay's suggestion that the Free Exercise Clause by itself prohibits government interference with a religious institution's ministerial appointments unless such interference is the least restrictive means of furthering a compelling government interest is compatible with the claim that the Religion Clauses in conjunction prohibit government interference with a religious institution's ministerial appointments altogether.